In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOSEPH SEFERINO CORDOVA,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S152737

Contra Costa County Superior Court Case No. 040292-5
The Honorable Peter L. Spinetta, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GLENN R. PRUDEN
Supervising Deputy Attorney General
DONNA M. PROVENZANO
Deputy Attorney General
J. MICHAEL CHAMBERLAIN
Deputy Attorney General
State Bar No. 185620
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5892
Fax: (415) 703-1234
Email: Michael.Chamberlain@doj.ca.gov
Attorneys for Respondent

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STATEMENT OF THE CASE

In an information filed March 2, 2004, the Contra Costa County District Attorney charged appellant with murder (Pen. Code, § 187). (2 CT 459.) The information further alleged special circumstances of murder in the course of committing rape (Pen. Code, § 190.2, subd. (a)(17)(C)) and murder in the course of committing a lewd and lascivious act upon a child under age 14 (Pen. Code, § 190.2, subd. (a)(17)(E)). (2 CT 459.) The People filed concurrent notice of their intent to seek the death penalty. (2 CT 457.)

Jury selection began on December 12, 2006. (9 RT 2052.) On January 26, 2007, the jury convicted appellant of first degree murder and returned true findings on both special circumstance allegations. (18 RT 4319, 4323-4324.)

Presentation of arguments and evidence in the penalty phase began on February 5, 2007. (19 RT 4478.) On February 16, 2007, the jury returned a death verdict. (8 CT 2149; 22 RT 5292.)

On May 11, 2007, the trial court denied appellant's motions for a new trial, to set aside the death verdict, and to dismiss the case for due process violations.[1] (8 CT 2243; 22 RT 5322.) The trial court then pronounced a sentence of death. (8 CT 2243, 2251-2253; 22 RT 5337-5339.)

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[1] The defense motions are reprinted in volume 8 of the Clerk's Transcript at pages 2187-2211, 2167-2186, and 2153-2166, respectively. The People's responses appear in the same volume at pages 2212-2225, 2226-2230, and 2231-2234, respectively.

STATEMENT OF FACTS

A. Guilt Phase Prosecution Evidence

1979: The crime

In August 1979, eight-year-old Cannie Bullock lived in a one-bedroom house on Dover Street in San Pablo with her mother Linda Bullock[2] and a woman named Debbie Fisher. (13 RT 2940-2941, 2943, 2970.) Their house was a small building situated in the backyard area of a main residence. (14 RT 3156.)

Cannie's mother was inattentive at best, leaving Cannie "hungry for attention," according to Ms. Fisher. (13 RT 2941.) Men frequently visited Linda Bullock at the house. (13 RT 2952, 2957, 2976.) Some of them would have sex with Linda[3] in her back bedroom. (13 RT 2976-2977.) They often spoke with Cannie before going into Linda's bedroom. (13 RT 2952.) One of these men was appellant. (13 RT 2953-2954, 2964; 14 RT 3313.) Fisher saw him in the house a "couple times," and many years later appellant acknowledged spending the night with Linda in 1979 and seeing Cannie the next morning. (8 CT 2273, 2266-2267; 13 RT 2953.)

Cannie was never in the bedroom while her mother engaged in sex, and Linda Bullock did not have sex with a man the night Cannie was murdered, or the night before. (13 RT 2977, 2992, 3004.)

On Friday August 24, 1979, Linda Bullock and Fisher left Cannie home alone while they went out to a local bar that night. (13 RT 2942, 2944, 2959, 2971.) Cannie was watching television on a fold-out sofa bed in the front room when the women departed sometime between 9:00 and

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[2] Her name had become Linda Baum at the time of trial. (13 RT 2970.)

[3] Respondent refers to Linda Bullock by her first name to avoid confusion. No disrespect is intended.

11:30 p.m. (13 RT 2942, 2944, 2950, 2971, 2973, 3013; 14 RT 3107.) Cannie had taken a bath or a shower, and was in her bathrobe ready for bed. (13 RT 2942, 2972; 14 RT 3107-3108; 18 RT 4081, 4083.) Linda and Fisher locked the door when they left; Linda told Cannie not to open the door to strangers. (13 RT 2944-2945, 2973; 14 RT 3107, 3111.) The porch light was on, the garden gate latched. (14 RT 3107.) Linda did not see her daughter alive again. (13 RT 3004.)

After the two women spent time together at a neighborhood bar called Oscar's, Fisher left Linda and went elsewhere. (13 RT 2945, 2961.) Linda arrived home to Dover Street first, around 2:45 or 3:00 a.m. (13 RT 2974, 3014; 14 RT 3108.) The gate was unlatched, the porch light off, and the door to the house stood open. (13 RT 2975; 14 RT 3019.) There was no indication of forced entry. (14 RT 3113-3114.) Cannie was gone. (13 RT 2975-2976.) The sheets and mattress of Cannie's sofa bed were in disarray, and her bathrobe lay on the floor of the living room. (13 RT 2975, 3014-3015; 14 RT 3109.) Cannie's blood was on the robe in such volume that it had soaked though the lower portion. (13 RT 2946, 2975, 3014; 14 RT 3109, 3159-3160; 16 RT 3650, 3674-3675.) Other than the robe, there were no significant blood stains inside the cottage. This indicated that Cannie had not walked around with bleeding injuries. (14 RT 3160.)

When Fisher came in sometime later, she found Linda "screaming that she couldn't find her baby." (13 RT 2945.) After looking for Cannie and asking after her with neighbors, Fisher called the police from their landlady's house. (13 RT 2946-2947, 2962.)

San Pablo police officers responded, arriving at approximately 3:30 a.m. the morning of August 25. (13 RT 3012, 3022.) A brief search revealed Cannie's dead body under a bedspread in the weed-choked backyard of the house. (13 RT 3015-3016.) Cannie was naked, with legs splayed and one hand positioned near her genitals. (13 RT 3038; People's

exhibit No. 30.)[4] It appeared that her body had been dragged to that location. (14 RT 3103.) There was extensive and visible bruising on Cannie's neck and throat, and some blood near her vagina. (13 RT 3043; 14 RT 3101, 3102, 3103; People's exhibit No. 30.)

Cannie had been violently raped. (14 RT 3103-3104, 3251.) Her vaginal tissues were torn, bruised, and hemorrhaging. (14 RT 3103-3104, 3251-3253; 17 RT 3870.) When Cannie's body was turned facedown on the examination table at the morgue, a "large amount" of blood drained from inside her vagina and pooled below her crotch. (13 RT 3044, 3077-3078; 14 RT 3104-3105.)

Cannie had been manually strangled to death. (14 RT 3103-3104, 3246-3254.) Manual strangulation generally requires "several minutes" of constant pressure until the victim dies. (14 RT 3251.)

1979: Autopsy and evidence collection

Dr. George Bolduc performed the autopsy of Cannie's body later in the morning the day she was found murdered. (13 RT 3039; 14 RT 3245.) At the time, Dr. Bolduc was a medical resident in a pathology program, and this case represented his first autopsy involving sexual assault. (14 RT 3241, 3260.) Since 1981, Dr. Bolduc had performed "over 3,000" autopsies. (14 RT 3243-3244.) He conceded on cross-examination that he had created a false entry on a resume used to apply for a pathologist job, and was later terminated from employment as a result. (14 RT 3288.) At

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[4] Descriptions of the victim's appearance when she was found are based on photographs authenticated by witnesses and introduced as evidence. Prior to oral argument in this case respondent intends to designate People's exhibit No. 30 for transmission to this Court. It is a photograph that permits recitation of certain facts herein. (See, e.g., p. 67, *post*.)

the time of trial Dr. Bolduc was not permitted to work homicide cases in San Joaquin or Stanislaus counties. (14 RT 3289.)

San Pablo Detectives Bentley and Bennett attended the autopsy. (13 RT 3060; 14 RT 3100, 3259.) Charles Bennett was the lead investigator into Cannie's murder. (14 RT 3092.) At the time of trial, he was retired after serving as the Chief of Police for the City of Richmond. (14 RT 3091.) During the autopsy Dr. Bolduc collected exterior and interior vaginal swabs, rectal swabs, and vaginal smears. (13 RT 3042-3043, 3044, 3045-3046, 3064-3065; 14 RT 3165, 3172.) This evidence included a "deep vaginal" sample, collected directly from inside Cannie's vagina after her body had been cut open during the autopsy. (13 RT 3045-3046, 3057.) Dr. Bolduc also collected reference samples of Cannie's blood. (13 RT 3049-3050; 14 RT 3165.) Detective Bentley took possession of these biological samples, sealed and labeled them. (13 RT 3045-3048, 3054-3058, 3061-3066.) He turned them over to Richard Schorr of the Contra Costa County Sheriff's Crime laboratory at 1:30 the same afternoon.[5] (13 RT 3050-3051, 3056-3058, 3075-3076; 14 RT 3151, 3160, 3165, 3188.)

Initial forensic testing, in 1979, indicated the presence of semen on the vaginal swab, deep vaginal swab, and rectal swab collected from Cannie's body. (14 RT 3170-3171; 16 RT 3671.) DNA testing did not yet exist. (14 RT 3173.) The various evidence items were stored in a manner designed to prevent cross-contamination with each other and contamination with foreign biological evidence. (14 RT 3175-3176.) No physical evidence—e.g., sheets or bedding—was collected from Linda Bullock's back bedroom. (14 RT 3158-3159.)

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[5] For at least one evidence item collected during the autopsy—a sample of heart blood—Mr. Schorr labeled the packaging himself. (13 RT 3075-3076.)

Debbie Fisher found a Sagittarius zodiac pendant and a Sears sewing machine manual on the coffee table in the Bullock house that had not been there when she and Linda Bullock left Cannie. (14 RT 3113; 18 RT 4072.) She turned them over to police. (14 RT 3113.)

Fewer than two months after Cannie's murder, appellant moved to Canada. (17 RT 3822.) Appellant's name never came up during the initial investigation. (13 RT 3059.) The investigation stalled and went cold for 17 years.

1996-1999: Additional analysis of biological evidence

In April 1996, Detective Mark Harrison of the San Pablo Police Department reopened the Cannie Bullock murder case in light of the development of DNA testing technology. (15 RT 3331.) "It appeared," he stated, "that this case would be one of those cases . . . perfect for DNA testing . . . ." (15 RT 3332.) He retrieved biological evidence in the case from storage and delivered it to the Contra Costa County Sheriff's Crime Laboratory. (14 RT 3176-3177; 15 RT 3334-3337, 3485-3486.) Following further screening for presence of sperm, in April 1996, the Contra Costa County lab forwarded three vaginal swabs, one deep vaginal swab, and a reference sample of Cannie's blood to Cellmark Diagnostics Laboratory (Cellmark) in Maryland, for DNA testing. (14 RT 3178-3179, 3181-3182; 15 RT 3429-3430, 3499.) At the time, Contra Costa County did not offer DNA testing as a forensic science service. (16 RT 3590, 3592.)

Cellmark's microscopic examination of this evidence, as well as the Contra Costa County and Forensic Science Associates laboratories' later examination of vaginal and rectal swabs collected from Cannie's body, revealed a large quantity of sperm cells present and in intact physical condition. These characteristics were consistent with fresh ejaculate directly into Cannie's vagina, consistent with sample collection within hours, and consistent with Cannie never standing up and becoming mobile

again after being raped. (15 RT 3445-3446, 3460-3461, 3471; 16 RT 3622, 3653-3657, 3664, 3785-3787.)

The sperm present in Cannie's body, as well as the absence of any female DNA other than Cannie's, did not support a theory that sperm from her mother's bedding—left after her mother or some other female had engaged in sexual intercourse there—was transferred to Cannie's vagina by contact with the bedding. (16 RT 3659-3662, 3786-3787.) The biological evidence was also inconsistent with a theory that the man who raped Cannie had inadvertently transferred another man's sperm into Cannie's body during that act. (16 RT 3662-3664.)

Cellmark took cuttings from the various vaginal swabs and performed DQ-Alpha and Polymarker PCR[6] DNA tests on them in 1996. (15 RT 3434, 3436, 3440, 3447-3448, 3458, 3462.) The testing revealed the presence of two discrete DNA contributors with distinct profiles, representing the sperm and nonsperm components of the mixture. (15 RT 3450.) Only those two DNA profiles were present on the vaginal swabs, with each being clearly attributable to one person. (15 RT 3470.)

The remaining portions of the swabs were kept isolated from each other, returned to their tubes, and in 1999 sent back to the Contra Costa County Sheriff's lab along with DNA extracts produced from the evidence samples during Cellmark's testing. (15 RT 3432, 3434-3436, 3440, 3474; 16 RT 3596-3599.) The case remained unsolved.

2001-2002: The cold hit

In early 2002, at the request of investigators, the Contra Costa County laboratory conducted DNA testing on the DNA extracts that had been returned by Cellmark several years before. (16 RT 3601-3602, 3606, 3636.) Those extracts had been generated when Cellmark processed

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[6] Polymerase Chain Reaction. (16 RT 3616.)

portions of the four vaginal swabs collected from Cannie Bullock, and then isolated the product into sperm and nonsperm fractions. (16 RT 3636-3637.) The Contra Costa County laboratory, which by that time offered DNA testing services, developed a DNA profile for the nonsperm fraction Cellmark extract. (16 RT 3637.) It matched the profile of a known reference sample of Cannie's blood. (16 RT 3638.) A profile was also developed for the sperm fraction, attributable to the unknown perpetrator. (16 RT 3637.) The laboratory uploaded that sperm profile into CODIS[7] to be searched against state and national DNA databases. (16 RT 3637, 3641.)

CODIS reported back a potential match, identified through the National DNA Index System (NDIS), to a known DNA profile that had been uploaded by the Colorado Bureau of Investigation. (16 RT 3639, 3678.) The profile was appellant's. (16 RT 3639.) In 2002, the Contra Costa County lab notified the San Pablo Police Department that Joseph Cordova had been identified as a suspect. (14 RT 3311-3312; 16 RT 3639.) The case was reopened. (14 RT 3312.)

Establishing appellant's ties to San Pablo, and to Linda and Cannie Bullock

On July 18, 2002, San Pablo Detective Mike Von Millanich traveled to Colorado and interviewed appellant, who at the time was incarcerated in prison there. (14 RT 3313; 16 RT 3576.) Appellant recalled that he lived in San Pablo in 1979 until October of that year, when he moved to Canada. (8 CT 2272, 2273 [interview transcript accompanying videotape].) He told Detective Von Millanich that he remembered Linda Bullock, Cannie Bullock, and Debbie Fisher. (8 CT 2273.) The following exchange ensued:

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[7] Combined DNA Index System. (16 RT 3634.)

Det. Von Millanich: Well, we've got a problem. The problem is you've been identified through your DNA, your seminal fluid was found in her daughter.

Mr. Cordova: In her daughter?

Det. Von Millanich: Uh-huh.

Mr. Cordova: I don't know how that can be.

(8 CT 2273-2274.) Appellant then recounted how he met Linda Bullock in a bar on a Friday night, spent the night with her at her house, then woke up and went to work on Saturday morning. (8 CT 2274.) He remembered the Bullock house: "She [Linda] lived behind another house or something." (8 CT 2274.) He gave a stumbling explanation of how he heard about Cannie's murder, while including specifics such as days of the week and the name of the bar he patronized the night of the murder:

Det. Von Millanich: Okay. Well, the problem is – you remember when her daughter was killed?

Mr. Cordova: Yeah.

Det. Von Millanich: The problem is –

Mr. Cordova: I heard about it Saturday night.

Det. Von Millanich: Huh?

Mr. Cordova: I heard about it Saturday night. I was down at Cleo's [bar][8] that night.

Det. Von Millanich: You were down at Cleo's that night of the murder?

Mr. Cordova: Yeah.

Det. Von Millanich: Who were you with?

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[8] In 1979, Debbie Fisher told Detective Bennett that she went to Cleo's the night Cannie was killed, after leaving Linda Bullock behind at another bar. (14 RT 3112.)

Mr. Cordova: Myself.

Det. Von Millanich: Okay.

Mr. Cordova: I just come back from El Sobrante and I went down to Cleo's. They still put on that –

Det. Von Millanich: What did you hear happened?

Mr. Cordova: I didn't hear nothing till the next, well, the next day, Sunday. Sunday night I went down to the bar.

Det. Von Millanich: Okay. And what did you hear?

Mr. Cordova: I just heard, they said she died. Somebody killed her or something.

Det. Von Millanich: She was raped and strangled, and your DNA is in her.

Mr. Cordova: I don't know.

(8 CT 2275-2276.)

On July 24, 2002, John "Smokey" Kurtz also interviewed appellant. (14 RT 3291, 3292.) Kurtz was a criminal investigator for the office of the Colorado Inspector General. (14 RT 3291.) During their conversation, appellant again acknowledged that he met Linda Bullock at a bar one evening, after which he spent the remainder of the night with Linda at her house. (8 CT 2266-2267.) "Her daughter [Cannie] come [*sic*] out that morning when I was leaving. I went to work." (8 CT 2267.) When asked if he could offer an explanation for how his semen ended up inside Cannie, appellant initially responded, "No," but then quickly elaborated: "I imagine I left some [semen] on the sheets in the bed there, you know." (8 CT 2267.)

In the late 1970's Cynthia Born[9] "hung around the neighborhood where Linda [Bullock] lived," and at trial recognized appellant from the neighborhood. (14 RT 3298, 3330.) Ms. Born later married a man whose ex-wife was appellant's sister. (14 RT 3299-3300.) Ms. Born recognized the Sagittarius pendant recovered from the scene of Cannie's murder as one appellant wore "all the time" in the late 1970's. (14 RT 3299, 3302, 3309.) She testified that appellant and Linda Bullock went to bars and parties together during that time. (14 RT 3300, 3308.)

Vicki Cordova, appellant's sister-in-law, testified that she could not recall appellant wearing jewelry in the 1970's, however, and claimed that she told case detectives that she never saw the Sagittarius pendant. (14 RT 3206-3207, 3209.)

2002-2004: DNA match confirmed repeatedly

A reference blood sample was collected from appellant on July 17, 2002, while he was incarcerated in Colorado. (16 RT 3576-3577.) Detective Von Millanich brought the blood back to California, where it was delivered to the Contra Costa County laboratory. (14 RT 3315; 16 RT 3577, 3579.)

In late July and early August of 2002, the Contra Costa County lab conducted DNA testing on the known reference sample of appellant's blood. (16 RT 3641.) The resulting profile matched the sperm fraction profile generated from Cannie's vaginal swab evidence. (16 RT 3642.) It was a very rare DNA profile, expected to occur randomly in one out of 3.1 quintillion African-Americans, 670 quadrillion Caucasians, and 3.6

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[9] Ms. Born has a lengthy criminal record involving theft and forgery convictions, and was in custody on 12 pending felony counts at the time she testified in this trial. (3 CT 742; 14 RT 3304-3306; 15 RT 3481-3482.)

quintillion Hispanics.[10] (16 RT 3642.) In comparison, it is estimated that fewer than 100 billion people have ever lived on Earth. (16 RT 3642.) Given those statistics, and assuming that appellant does not have an identical twin, DNA expert David Stockwell opined that appellant was the source of the sperm in Cannie's body, "to a reasonable degree of scientific certainty." (16 RT 3644-3645.) At the time of trial, Stockwell was the technical lead for the Contra Costa County Sheriff's lab, "responsible for all of the output of my forensic biology section relating to DNA analysis." (16 RT 3580-3581.)

In October 2002, investigators asked the Contra Costa County lab to also test the vaginal smear collected during Cannie's autopsy. (16 RT 3606, 3611.) In early 2003, the Contra Costa County laboratory performed a new round of DNA testing, this time on the previously untested vaginal smear. (16 RT 3645-3646.) The sample was separated into sperm cell and nonsperm cell fractions, and DNA profiles attributable to each source were generated. (16 RT 3646-3647.) The profile for the nonsperm fraction matched Cannie's DNA profile. (16 RT 3646.) The single-source sperm fraction profile was identical to the profile previously developed from the sperm fraction Cellmark extract; in other words, it matched appellant. (16 RT 3647.)

In November 2002, the Contra Costa County lab sent one vaginal swab and the rectal swab to the private sector Forensic Science Associates (FSA) laboratory for additional DNA testing, along with reference samples for Cannie and appellant. (16 RT 3605-3607, 3609, 3717, 3721-3724, 3726.) Examination of the vaginal and rectal swabs revealed "a very large number of sperm" that had been diluted only by blood and Cannie's cellular

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[10] These statistics assume populations of individuals unrelated to the source of the target DNA profile. (16 RT 3643.)

material. (16 RT 3731, 3732, 3737, 3754.) This indicated deposit "straight out of the penis." (16 RT 3738.) Sperm and nonsperm fractions were developed from the vaginal swab. (16 RT 3735-3736.)

FSA analysts performed DNA testing on the vaginal swab, the rectal swab, a known reference sample of Cannie's blood, and, over a year later, a known reference sample from appellant.[11] (16 RT 3765, 3772-3774.) Using "state-of-the-art" technology, they developed full 15-locus DNA profiles for each item.[12] (16 RT 3766, 3772-3773.) The nonsperm fraction DNA profile for the vaginal swab matched Cannie's known profile. (16 RT 3768, 3777.) The sperm fraction profiles for the vaginal and rectal swabs were the same, indicating the same source. (16 RT 3776-3777.) That profile matched appellant's known DNA profile. (16 RT 3777, 3782.) It was a very rare profile, expected to occur randomly with a frequency of "1 out of 130 billion trillion"[13] in the Caucasian population, "1 out of a trillion trillion"[14] in the African American population, and "1 out of 13 billion trillion" in the "Mexican-American" population. (16 RT 3782, 3783, 3784.) This profile is so uncommon that it is "expected to be unique in the human population." (16 RT 3784.)

Then, between May and July 2004, the Contra Costa County laboratory performed still more DNA testing, this time on the deep vaginal swab collected from Cannie's body. (16 RT 3647.) Although Cellmark had previously removed much of the swab for testing several years before,

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[11] FSA reported its results of analysis of the vaginal and rectal swabs in January 2003. (16 RT 3774.) Approximately a year and a half later, it conducted testing on appellant's reference sample for comparison purposes. (16 RT 3774.)

[12] Plus a gender marker as a sixteenth data point. (16 RT 3766, 3771.)

[13] A billion trillions is also known as a "sextillion."

[14] A trillion trillion is also known as a "septillion."

some biological material remained, adhered to the stick in a condition amenable to analysis. (16 RT 3647-3648.) As with previous tests, nonsperm and sperm fractions were isolated from each other and processed, resulting in full DNA profiles. (16 RT 3648, 3649.) The nonsperm fraction profile matched Cannie, and the sperm fraction profile matched appellant. (16 RT 3648-3649.)

Appellant's prior child molests

Nina S. testified that appellant sexually molested her in 1992 in Lakeview, Colorado. (17 RT 3807-3808, 3810.) She was 12 years old at the time. (17 RT 3809.) Nina and her two-year-old brother were sleeping overnight at appellant's house; appellant lived there with his then-wife and had agreed to babysit the children overnight. (17 RT 3809.) Nina awoke in the middle of the night to find appellant "rubbing my chest and my butt." (17 RT 3810.) She demanded he stop. (17 RT 3810.) Appellant's response was to plead that she not "tell" because then he would "go to jail." (17 RT 3810.) For his conduct appellant was convicted in 1994, under Colorado state law, of attempting to sexually assault a child. (17 RT 3811-3812, 3910.)

In 1997, appellant sexually assaulted a 12-year-old boy named Curtis B. while the latter was sleeping in a house in Denver, Colorado. (17 RT 3913-3916.) Appellant crept into Curtis's room in the night, put his hand down the boy's underwear, and "rubbed" his "butt." (17 RT 3914.) Curtis jumped up and ran to tell his father, who filed a police report. (17 RT 3915.) Consequently, appellant was convicted in 1998, under Colorado law, of sexual assault on a child. (17 RT 3910-3911.)

Investigation and elimination of William Flores as a suspect

The morning Cannie's body was found, Detective Bentley contacted William Flores, who with his mother Mary Flores lived "a couple of doors down" from the Bullock house. (13 RT 3066, 3069-3070; 18 RT 4074.)

Flores had known Cannie as a neighbor. (13 RT 3069.) He expressed curiosity about the circumstances of her death, and said that he had been up watching television until 1:30 a.m. the night before. (13 RT 3069.) Flores made similar statements to Detective Bennett the next afternoon. (14 RT 3126-3127.) He went into more detail, stating that Cannie had been "'too friendly." (14 RT 3127.) Flores told Detective Bennett that he was home watching television the night of the murder. (14 RT 3128.) At some point, he recounted, he walked to his bedroom and then "'heard a voice come from his rear yard area state, "You shouldn't do that. You should leave her alone."'" (14 RT 3127.) Flores told Bennett that Flores's mother told him that she had heard from the Bullock's landlady that Cannie's body was discovered in the back yard area. (14 RT 3127-3128.) By the time Flores made this statement, a local newspaper had published a story recounting the location of Cannie's body. (14 RT 3147.)

Flores also told Detective Bennett that "'[he] believed whoever killed the victim did it because he felt sorry for her.'" (14 RT 3129.) According to Detective Bennett's transcription of Flores's statement, "'William further believed that the reason the victim had been moved to the rear yard was because he wanted the police to think it had happened outside. William stated it was too bad that whoever did it got away with it.'" (14 RT 3129.) When Mary Flores approached, William stopped speaking. (14 RT 3129.) Detective Bennett perceived Flores as "enjoying the limelight" of involvement in the investigation. (14 RT 3149.)

Detectives later recovered torn writings from Mr. Flores's trash can. (13 RT 3071-3072; 14 RT 3132.) They contained notes about Mr. Flores's aspirations and goals, which included acquiring vacuum and sewing machine repair skills. (13 RT 3072-3073; 14 RT 3132-3133, 3139-3141.) The notes also referenced goals involving cooking and painting professionally, and various means of social and financial self-improvement.

(14 RT 3139-3140.) There was mention in the writings of Flores's desire for female companionship and love despite his difficulty relating to "ladies." (14 RT 3143-3144.)

Flores permitted police to search his back yard and look through his house during the investigation, and initiated contact with police at least two times during the investigation to provide information. (13 RT 3080; 14 RT 3137.) He also voluntarily provided reference fingerprints to the police for comparison with latent prints collected from the Bullock house. No matches resulted from comparisons performed in 1979 and then again in 1996. (14 RT 3138; 15 RT 3349-3350.)

William Flores committed suicide in 1983. (15 RT 3338.) San Pablo police officers participated in an exhumation of his body in 1996 in order to retrieve DNA samples for comparison to biological evidence from Cannie's rape and murder. (15 RT 3338.) The police collected bones from Flores's body and submitted them to the Contra Costa County Sheriff's Crime Laboratory. (15 RT 3486.) That lab forwarded the sample remains—a portion of Flores's jaw bone and teeth—to Cellmark Laboratories in Maryland for DNA analysis. (15 RT 3342-3344, 3396, 3486, 3501, 3502.) Cellmark conducted DNA testing on the remains, developed a profile for Flores, and excluded him as the source of the sperm left in Cannie Bullock. (15 RT 3451-3453, 3455-3456.)

B. Guilt Phase Defense Evidence

The Sagittarius pendant

According to appellant's sister, Ms. Linda Gurule, appellant lived in the Richmond/San Pablo area in the 1970's. (17 RT 3814, 3818.) He moved to Canada in October 1979. (17 RT 3821, 3822.) Ms. Gurule saw appellant "from time to time" when he lived in the East Bay, and did not recall him wearing jewelry. (17 RT 3818.) She did not recognize the

Sagittarius pendant found at the crime scene. (17 RT 3819.) In 1979, appellant did not have a tattoo on his forehead. (17 RT 3818.)

Autopsy ambivalence

Following the autopsy in 1979, Dr. Bolduc told Detective Bennett that he could not tell whether the sexual assault on Cannie was pre- or postmortem. (17 RT 3863.)

A neighbor hears nothing

Mr. Angel Baure, who in 1979 lived in the vicinity of the murder scene, was awake until one or two o'clock in the morning the night Cannie was killed but heard nothing. (17 RT 3919.) That included not hearing responding police and other emergency personnel and vehicles. (17 RT 3920.)

Expert testimony

Mr. Keith Inman of the Forensic Analytical Sciences, Inc., laboratory, was hired by the defense to examine biological evidence in the case and consider whether sperm on the vaginal and rectal swabs collected from Cannie's body could be attributed to "any circumstances" other than her rape and murder at appellant's hands. (17 RT 3921, 3925.) In view of the physical evidence, those circumstances, according to Mr. Inman, would have had to include (1) the existence of semen ejaculated directly onto a surface without vaginal contact, (2) the semen remaining moist until coming in contact with—and somehow migrating up into—Cannie's vagina, and (3) nothing happening to remove or wash away the semen between that contact and the collection of evidence following Cannie's death. (17 RT 3927, 3951-3954.) Mr. Inman, however, agreed that Cannie's rape and murder had happened "virtually concurrently." (17 RT 3925.) He also conceded that the significant volume of semen collected from Cannie's body "is what we would expect from a neat [i.e., direct ejaculate] semen sample." (17 RT 3940.)

Theoretical plausibility aside, Mr. Inman examined blood stains on Cannie's bathrobe, bedspread, and polka dot sheet in order to determine whether semen was also present in the stains. (17 RT 3928, 3929.) He reasoned that "[i]f vaginal ejaculation took place then an expectation that we would have is that it would be a blood/semen mixture on those particular items." (17 RT 3928; see also 17 RT 3934.) Inman agreed, however, that he would expect blood but no semen on the robe if the robe was worn during the assault and then removed before ejaculation. (17 RT 3941-3942.) Mr. Inman located no semen on the bloody items. (17 RT 3930, 3933-3934.)

Mr. Inman also located a "very messy old [semen] stain" on a mattress[15] with what appeared to be a mixture of multiple donors to the sperm fraction and multiple donors to the nonsperm fraction. (17 RT 3932-3933.) There was no blood mixed in with the stain. (17 RT 3932, 3933, 3950.) Appellant was excluded as a potential donor. (17 RT 3933.) Mr. Inman found "nothing in that piece of evidence that relates it to this particular incident [Cannie's rape and murder] at all." (17 RT 3950.)

Mr. Inman performed DNA testing on the vaginal swabs and confirmed what previous testing had determined, namely, that the genetic types identified "were consistent with or characteristic of Cannie Bullock in the nonsperm fraction," while "the sperm fraction . . . types were similar to Mr. Cordova." (17 RT 3930.) Upon cross-examination, Mr. Inman clarified that by "consistent with" and "similar" he meant that the nonsperm fraction profile was a match to Cannie Bullock's known DNA profile and the sperm fraction DNA profile was a match to appellant's known DNA

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[15] Mr. Inman described the mattress as from "a bed that I think is in what has been called the living room . . . ." (17 RT 3929.)

profile, while. (17 RT 3945-3946.) Mr. Inman chose to use a nine-locus DNA test kit in his work. (17 RT 3948-3949.)

Mr. Inman did not perform testing on the rectal swab. (17 RT 3934.) He opined, however, that the semen collected on the rectal swab could be accounted for by either drainage from the vagina or transfer from "a pure semen stain unrelated to [Cannie's rape and murder]." (17 RT 3935.) In the latter scenario, Inman qualified, the semen would have to be "liquid" or "wet" when Cannie came into contact with it. (17 RT 3936.)

Mr. Brent Turvey testified as "an expert in the area of forensic sciences." (17 RT 3983, 3987.) He qualified his expertise, however, by noting that he is "not a criminalist by any stretch of the imagination," and also that he is not a DNA expert. (17 RT 4011, 4016.) Turvey cited "crime reconstruction" as a major component of the work he does. (17 RT 3988.) He conducts the majority of this work as an expert for criminal defendants. (17 RT 3986.) Turvey reviewed "thousands" of pages of material generated in the investigation of this case. (17 RT 3988.) He had not, however, read the trial testimony—produced in daily transcripts—of the prosecution DNA experts because he "didn't have the time." (17 RT 4003-4004, 4013, 4026.) He did read the testimony of defense expert Inman. (17 RT 4012.)

Mr. Turvey opined that Cannie's murder occurred inside her home before the killer moved her body outside. (17 RT 3989-3990.) Like Mr. Inman, Turvey proffered two theories to explain the DNA evidence: that appellant ejaculated on or in Cannie's body and, alternatively, that his DNA was transferred to her body from somewhere else. (17 RT 3991-3992.) Turvey characterized the secondary transfer theory as "very reasonable" based on the assumption that appellant ejaculated directly onto a surface which Cannie later "sat in" and then the sperm made its way up into her vagina and stayed there for some period of time—during which she moved

around and may have bathed—until she was killed by an unknown third party. (17 RT 3991-3992, 3994, 3999, 4015, 4018.) By "reasonable," Turvey explained that he viewed a theory of secondary transfer as a "possibility" that he does not "consider . . . farcical." (17 RT 3995.)

Turvey pointed to the various blood stains that did not include semen as evidence "consistent with a secondary transfer." (17 RT 3996.) He acknowledged, however, that the theory of secondary transfer is "very weak" under the assumption that appellant's semen was left in the Bullock house a week before Cannie was raped and killed.[16] (17 RT 4025.)

Turvey criticized the documentation of sample collection during the autopsy and the collection of biological evidence from the crime scene. (17 RT 3998-3999, 4028-4031.) He was unaware, however, that Detective Bentley testified that he personally observed Dr. Bolduc take the swabs from Cannie's body and took contemporaneous notes of his observations. (17 RT 4004.)

Finally, Turvey was "not willing to make [the] assumption" that Cannie's killer also raped her. (17 RT 4006, 4009.) "I'm not here to speak to that," he stated. (17 RT 4006.)

Third party culpability

In 1979, William Flores and his mother were neighbors of Linda and Cannie Bullock in San Pablo. (18 RT 4046, 4047, 4053.) Flores committed suicide in 1983. (18 RT 4046, 4053.) At the time, according to Flores's sister Linda Smith, their mother said there was no suicide note. (18 RT 4053.)

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[16] As noted, appellant told investigators that he spent a Friday night with Linda Bullock and then saw Cannie when he left for work the next morning. (8 CT 2274.) Cannie was killed on a Friday night. Thus appellant's night with Linda must have been a least a week earlier.

In April 1996, San Pablo Detective Mark Harrison spoke to Linda Smith in connection with the Cannie Bullock investigation. (18 RT 4071-4072.) According to Detective Harrison, Ms. Smith did not like her brother William Flores. (18 RT 4077-4078.) She reported to the detective that her mother had two sewing machines—a Singer and a Sears model—and that the sewing machine manual recovered at the crime scene appeared to be her mother's. (18 RT 4072, 4089.) Ms. Smith also told Harrington in 1996 that approximately one week after Cannie's murder Smith's mother told her that William Flores had come home the night of the murder with a bloody shirt, and that their mother had burned it in a backyard incinerator. (18 RT 4074.) Smith said that her mother told her that William Flores said he had been in a fight, was hit on the nose, and the blood on the shirt was his own. (18 RT 4075.) In notes about the interview, Detective Harrington wrote, "'Billy [Flores] got beat up, came home full of blood.'" (18 RT 4087.) There were also indications from Ms. Smith in her 1996 interview, however, that the incident involving William Flores's bloody shirt happened on a date that preceded Cannie's murder. (18 RT 4087.) Specifically, Detective Harrington had recorded that Linda Smith stated that her mother relayed that William Flores was "beat up" a "couple of weeks ago," while other notes indicated that the conversation between Linda and her mother occurred "about a week" after the murder. (18 RT 4087.)

Also in 1996, Ms. Smith identified the note recovered from William Flores's garbage in 1979 as composed by William given its appearance and content. (18 RT 4076.) Additionally, she told Detective Harrington that, years before Cannie's death—when Ms. Smith was nine years old—William Flores had asked if he could feel her vagina, but never touched her. (18 RT 4077, 4085.) She also stated that, after her brother's death in 1983, her mother described a suicide note left by William in which he wrote he

"'was sorry for what he did.'" (18 RT 4078, 4079.) Ms. Smith never saw a suicide note. (18 RT 4079, 4083.) Nor did the police ever find a suicide note, or any other evidence that one existed. (18 RT 4084.) In Detective Harrington's experience it is "very common" for suicide victims to leave notes apologizing for their suicide. (18 RT 4085.)

Ms. Smith herself testified that she had not been close with her mother and did not get along with her brother. (18 RT 4062, 4088.) Although Ms. Smith could not remember specifics of her 1996 conversation with Detective Harrington, she testified that any incriminating statements about her brother were "probably" made facetiously because she was a "mouthy person" and had become "irritated" at repeated questioning. (18 RT 4048-4050.) Ms. Smith had "medical problems" in 1996 as well. (18 RT 4052.) Ms. Smith noted that in 1979 her mother would not have broken rules by burning anything in the incinerator, the use of which was prohibited at the time. (18 RT 4050.) William Flores never tried to sexually assault Smith. (18 RT 4060.) Ms. Smith did not contact police during the original investigation of Cannie's murder. (14 RT 3138.)

Finally, Ms. Smith testified that her mother only owned Singer sewing machines, and always wrote the date in the manuals for the machines she owned. (18 RT 4052, 4067-4068.) She did not recognize the Sears sewing machine manual recovered from the Bullock house crime scene. (18 RT 4067.)

C. Penalty Phase Prosecution Evidence

Victim impact

Cannie's mother, Linda Baum, briefly described her life with Cannie and her life after Cannie's death. (19 RT 4496-4504.) Cannie was born in Mississippi, where she and her mother lived for two years before Linda broke up with Cannie's father and brought Cannie to California. (19 RT 4497.) Cannie would have been in third grade at the time appellant

murdered her. (19 RT 4498.) She enjoyed coloring and spelling. (19 RT 4497-4498.) Linda showed photographs of Cannie. (19 RT 4500-4502.) Linda, however, "didn't take care of [Cannie] like I should have." (19 RT 4499.) She could not remember if Cannie attended kindergarten. (19 RT 4501.)

Linda had no other children. (19 RT 4499.) The loss of Cannie led Linda to attempt suicide twice. (19 RT 4499.) Linda thinks of Cannie daily. (19 RT 4503.) And, relayed Linda, because Cannie's birthday was on December 23 "I didn't have no Christmases after her." (19 RT 4503.)

Cannie's uncle, Roy Bullock, recounted how Cannie's death drove her father, Glenn Bullock, to alcoholism. (19 RT 4555-4557.) In the 10 to 12 years after Cannie's murder Glenn Bullock "lost everything he had, his family, and all that." (19 RT 4557, 4558.) "[H]e about killed hi[m]self." (19 RT 4558.) Glenn continues to be unable to speak of Cannie. (19 RT 4557.)

Appellant's other criminal activity

In April 1977, appellant was apprehended by Contra Costa County Sheriff's deputies with an illegal and functional sawed-off shotgun. (19 RT 4506, 4513-4514, 4529, 4531.) He was subsequently convicted of that offense. (19 RT 4538.) A sawed-off shotgun is a "devastating close range weapon[]" with no use other than to injure or kill other people. (19 RT 4531, 4532, 4534.)

In 1970, appellant was convicted of felony forgery. (19 RT 4538.)

In 1982, appellant, who had been drinking, loaded and fired a rifle inside his apartment during an argument with his girlfriend. (19 RT 4547, 4549-4550.) He told police he wanted to "scare her." (19 RT 4550.)

In 1994, appellant was convicted of resisting arrest, misdemeanor "menacing," and assault against his then-wife Kelly Cordova. (19 RT 4539.)

D. Penalty Phase Defense Evidence

Character evidence

Appellant's brother Abe Cordova described their family childhood and environment. (20 RT 4572-4595.) Appellant was raised in rural southern Colorado, where his father worked as a coal miner and deputy sheriff. (20 RT 4572-4573.) He was the fourth of six Cordova siblings. (20 RT 4578-4579.) Appellant had a small town upbringing that involved hard work, parental discipline, hunting, fishing, religion, and sports. (20 RT 4579-4595.) The Cordova family was warm and supportive, and their parents instructed the children on distinguishing right from wrong. (20 RT 4609.) Abe[17] did not recall appellant behaving cruelly or in a "weird" manner, but did remember that he was a "jokester." (20 RT 4579-4580.) Appellant was not physically or sexually abused as a child, to Abe's knowledge. (20 RT 4612.) Abe agreed that appellant "had a kind of wholesome, uneventful childhood[.]" (20 RT 4612.)

Appellant married three times and fathered children with other women whom he did not marry. (20 RT 4611, 4632-4633.) Abe Cordova had infrequent and sporadic contact with appellant as an adult. (20 RT 4601-4606.) Abe interacted with appellant to some extent in California after appellant was discharged from the Navy, but, according to Abe, "I didn't know his personal life, what he was doing." (20 RT 4597, 4602.) He recounted how appellant had found $200 belonging to Abe among Abe's property and returned it instead of keeping it. (20 RT 4600.) He also remembered that appellant left for Canada in 1979 without saying goodbye. (20 RT 4597.) Abe did not see appellant again until 1981. (20 RT 4598.)

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[17] Mr. Cordova's first name is used to avoid confusion. No disrespect is intended.

Abe had a difficult time accepting that appellant could have raped and murdered Cannie. (20 RT 4601.)

Abe Cordova's wife—and appellant's sister-in-law—Vicki Cordova testified. (20 RT 4618.) She knew appellant during their childhood in Colorado until appellant moved away at age 15, then reestablished contact in the Bay Area following his discharge from the Navy. (20 RT 4619-4620, 4630-4631.) Although appellant had "changed" following his Navy service, he remained courteous and respectful to Vicki[18] and other family members. (20 RT 4621-4622, 4635.) Vicki could not believe that appellant committed the crimes for which he was convicted, calling it "[o]ut of character, totally." (20 RT 4628-4629.)

Appellant's son Phillip Cordova testified that he had sporadic contact with appellant while growing up in Richmond in the 1970's and 1980's. (20 RT 4639-4640.) It was a "total surprise" when appellant appeared at his graduation. (20 RT 4639.) Appellant never disciplined Phillip[19] in an "inappropriate way." (20 RT 4640.) Phillip did not want to see his father executed. (20 RT 4641.)

Appellant's younger sister Linda Gurule testified about growing up with appellant, describing him as a "nice, kind person." (20 RT 4644.) She spoke about the Cordova family's habits of religious worship. (20 RT 4652-4653.) She described appellant as a happy youngster who was negatively impacted by his military service in Vietnam. (20 RT 4645-4646.) At one point appellant lived in Ms. Gurule's home for a month with her two daughters, then ages 10 and 14. (20 RT 4647.) Ms. Gurule had no concern over appellant being alone with the girls. (20 RT 4647.) Ms.

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[18] Ms. Cordova's first name is used to avoid confusion. No disrespect is intended.

[19] Mr. Cordova's first name is used to avoid confusion. No disrespect is intended.

Gurule did not believe that appellant raped and murdered Cannie Bullock, and opined that his child molestation convictions in Colorado were "bogus." (20 RT 4648, 4653-4654, 4659, 4660.) Appellant's sister recalled socializing with appellant in bars in the 1970's, where he would play pool, dance, and drink beer in moderation. (20 RT 4649-4640.) She only saw him twice in the 1980's. (20 RT 4656.)

Tangie Hollis lived with appellant "for a few months" in 1979 or 1980. (20 RT 4666, 4671.) Ms. Hollis met appellant at a bar and took him home with her because "[h]e didn't have a place to stay, so why not?" (20 RT 4672.) During their cohabitation, Ms. Hollis and appellant were together every night. (20 RT 4674.) She drank heavily at the time, and recalled that appellant occasionally drank heavily as well. (20 RT 4666-4669.) They both used drugs. (20 RT 4675.) Appellant treated her in a "considerate" and nonviolent manner. (20 RT 4669, 4670.) But, when Ms. Hollis attempted to end the relationship, appellant would not leave immediately and she had to fire a gun near him to "scare him out." (20 RT 4669-4670.)

Kelly Cordova was appellant's wife at the time of trial. (20 RT 4690.) She had met him in 1988 after she was "abandoned . . . in a public place." (20 RT 4691.) At the time, Kelly[20] was a 22-year-old drug addict who weighed 87 pounds. (20 RT 4721.) Appellant was then 44 years old. (20 RT 4721.) They began living together the same day. (20 RT 4691.) They "frequently" smoked and sold marijuana together. (20 RT 4696, 4730-4731.) They had two sons. (20 RT 4692.) The Cordovas' parental rights were terminated, however, and the boys were made wards of the court and

[20] Ms. Cordova's first name is used to avoid confusion. No disrespect is intended.

had lived with relatives in Arizona since 1996. (20 RT 4692, 4718.) Kelly Cordova described appellant as a "good father." (20 RT 4695, 4719.)

Kelly Cordova recounted a domestic violence incident in or around 1993 in Colorado, during which she called 9-1-1 because appellant was acting "a little crazy," struck her on the face and head, and threatened her with a knife. (20 RT 4698, 4702-4703, 4724.) After the incident, Kelly's face was cut and bruised. (20 RT 4727.) She spoke of the resulting criminal charges, and how a prosecutor impeded the Cordovas' efforts to resolve the criminal case with a plea bargain. (20 RT 4701.) Appellant, while attending anger management classes, threatened to kill the case prosecutor. (20 RT 4728.) Consequently, appellant was rearrested with bail set at one million dollars. (20 RT 4702, 4729.) Ms. Cordova never again had physical contact with appellant. (20 RT 4732.)

Kelly Cordova also described the night in September 1992 when appellant sexually molested Nina S. (20 RT 4703-4706.) Kelly was in a different bedroom and did not witness the actual assault. (20 RT 4705-4706, 4730.) Kelly Cordova was not concerned about the safety of her own young boys after appellant pleaded guilty to molesting Curtis B. (20 RT 4717-4718.)

Kelly Cordova expressed her wish that the jury would not impose the death penalty because "[appellant is] a man, he has a lot to look forward to. I'm hoping that our children can get to know him and kind of pick up where they've left off." (20 RT 4710.) Appellant had had no physical contact with his sons since 1993. (20 RT 4718.)

Appellant's younger sister Sally Cordova testified that, when she was a young girl, appellant "always" played with her despite their nine-year age

difference. (20 RT 4733, 4734-4735.) When Sally[21] was older and appellant was out of the Navy, appellant lived with Sally and her children for a brief time. (20 RT 4736.) Sally had no concerns leaving the children in his care. (20 RT 4737.) Sally claimed to "know in [her] heart" that appellant did not rape and murder Cannie Bullock. (20 RT 4738.) She also believed he was "framed" for both child molest crimes in Colorado. (20 RT 4740.) Appellant told Sally that he did not commit the instant crimes. (20 RT 4744.)

Richard Cordero knew appellant from high school, and eventually became his brother-in-law when appellant married his sister. (20 RT 4745-4746, 4747.) Mr. Cordero described appellant as a typical teenager in both his behavior and relationships with females. (20 RT 4749.) Mr. Cordero lost contact with appellant after 1969. (20 RT 4751.) Mr. Cordero expressed ambivalence about whether appellant should receive the death penalty. (20 RT 4749-4750.)

Miles Malmgren knew appellant from the mid-1980's to the early 1990's. (20 RT 4753.) During that time they lived together as roommates in Colorado for three years. (20 RT 4753.) Mr. Malmgren subsequently lived with appellant and Kelly Cordova and their infant son for approximately a year. (20 RT 4757-4758.) Mr. Malmgren observed appellant being "a good dad, good husband" during the latter time frame. (20 RT 4758.) Malmgren and appellant enjoyed fishing and bowling together. (20 RT 4759.) Malmgren described appellant as "[a] good brother." (20 RT 4759.) He did not believe that appellant raped and murdered Cannie Bullock. (20 RT 4765.) Mr. Malmgren discussed his and appellant's experiences in Vietnam in general terms. (20 RT 4754-4755.)

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[21] Ms. Cordova's first name is used to avoid confusion. No disrespect is intended.

Ms. Lupe Snasel knew appellant in Richmond, California when they were both teenagers, and married him in 1968. (21 RT 5039-5040.) Shortly thereafter, Ms. Snasel became pregnant with appellant's son. She filed for divorce and appellant was reassigned to a Navy posting in the Philippines. (21 RT 5043-5044.) Ms. Snasel and appellant had lived together for a total of four months. (21 RT 5056.) Appellant returned home for his son's birth, and had periodic contact with the boy for several years thereafter. (21 RT 5046-5047.) Ms. Snasel asserted that she "still love[s]" appellant. (21 RT 5050.) "Joe has a heart," she maintained. (21 RT 5052.)

Appellant's tesitmony

Appellant testified. (20 RT 4775.) He was not angry at the jury's verdict. (20 RT 4776.) "But to tell you the truth," he continued, "I did not commit this crime. I look you in the eye and say I did not commit this crime." (20 RT 4776, 4849.) His conviction was a "mistake." (20 RT 4799.) He was of the same opinion regarding his prior child molest convictions. (20 RT 4799-4800, 4802.)

Appellant maintained that he was not a sex offender, and twice refused to participate in sex offender treatment while in prison in Colorado despite the consequence of additional incarceration. (20 RT 4806.) Appellant conceded that he was "willing to lie to get something that's to [his] advantage." (20 RT 4814-4815.) He described his "moral parameters" as, "If you can do it, get away with it, why not do it" (20 RT 4818) and "if you want something, you take it" (20 RT 4842). He reported how he was disciplined by jail and prison authorities for multiple violations during his incarceration in Colorado. (20 RT 4834-4837.) Appellant enjoys sex and agreed that he is "not very discriminating" in his choice of sexual partners. (20 RT 4820.)

Appellant was largely indifferent on the matter of penalty, expressing the belief that he would die in prison either way in view of his failing health. (20 RT 4776-4777, 4848-4849.) He opined that being put to death would be both a "curse" and a "blessing." (20 RT 4789.) Appellant favored housing on death row, however, as a "safer" alternative because it would preclude violent altercations with other inmates. (20 RT 4778-4779, 4787.) Specifically, appellant anticipated having to kill other inmates in self-defense if permitted to interact with them. (20 RT 4778, 4838.)

Appellant discussed his eight years of service in the Navy, which included deployment to Vietnam. (20 RT 4790-4797.) For the first four years of his service he was an "airman," and then became a "clerk typist" for the last four years. (20 RT 4809.) Appellant's Vietnam experience included five months on river patrol boats. (20 RT 4792.) He was not wounded, but "it was scary down there." (20 RT 4793-4794.) The experience did not render him unstable, however, and his only regret about serving in the Navy was that he "didn't kill more Gooks." (20 RT 4794, 4814.) Appellant had wanted to remain in the Navy as a career, and agreed that there was nothing about his experience in the military that caused him to become a child molester or a rapist. (20 RT 4814.) But, in 1970, upon posting to San Diego, appellant decided to steal money from "a lot of new ensigns coming out of the academy" because they were "bugging him" and were "a pain in the ass." (20 RT 4796, 4809-4810.) He was convicted of forgery, placed on probation, and dishonorably discharged from the Navy. (20 RT 4797.)

Appellant discussed his drug use, drug sales, and possession of weapons during the 1970's and 1980's. (20 RT 4818-4820.) He also discussed his relationships with women. He was married to his first wife for one year, and they divorced after appellant accused her of conceiving their child with another man. (20 RT 4821.) He married and lived with his

second wife for six months before they divorced. He accused her of sleeping with a brother-in-law. (20 RT 4822-4823.) He fathered a child with a 16-year-old girl in the Philippines; he never saw the child, knew her name, or provided financial support. (20 RT 4823.) He fathered a child with a woman whom he dated for several months in 1984. (20 RT 4823.) He never met the child and did not know her name. (20 RT 4824.) He fathered a daughter with a woman he dated for several months in 1965. (20 RT 4824.) He last saw that child when she was two years old, and had provided no support. (20 RT 4824-4825.) He fathered a son with a woman he dated "off and on" in the mid-1970's. (20 RT 4825.) He last saw that child in person when the boy was approximately two years old, and had provided no support. (20 RT 4825.)

Appellant recalled threatening a girlfriend with a loaded gun, and hitting his wife Kelly on the head during a domestic fight. (20 RT 4829.) He denied telling Lori Clapp—the anger management therapy facilitator in Colorado—that he wanted to kill the prosecutor in the criminal case resulting from the domestic violence offense. (20 RT 4831.)

Expert testimony about state prison system

James Esten was a retired career employee of the California Department of Corrections. (21 RT 4963.) He has extensive familiarity with, and knowledge of, the state prison system and its institutions. (21 RT 4964-4967.) He described prison architecture, security mechanisms, and housing options for different prisoner classifications and in different institutions, and described prison life. (21 RT 4973-4995.) Mr. Esten discussed how, in a general prison population, appellant would likely be vilified by fellow prison inmates in view of his rape and murder of a young child, which in turn could cause appellant to be killed in prison. (21 RT 4995-4996, 5000-5001, 5010.) In prison, child molesters are known as "chesters," and may be intentionally cut by other inmates with a razor blade

in a particular pattern which then scars and permanently marks them as such. (21 RT 5008-5009.) Appellant's Hispanic surname and medical issues (diabetes, hepatitis C) also increased risk to his personal safety were he not housed on death row. (21 RT 5014.) But, Mr. Esten was not aware of any child murderers who actually had been killed in prison. (21 RT 5016.)

Mr. Esten acknowledged how appellant had been imprisoned in Colorado for over a decade on child molest convictions, how he had refused to admit his culpability for those crimes, and how he had chosen not to attend a sex offender treatment program. (21 RT 4998-4999.) Mr. Esten reviewed appellant's record of behavior and disciplinary sanctions while in prison in Colorado and in local custody in California. (21 RT 5001-5006.) He opined that appellant's behavior had been "above average," with no indication of aggressive or predatory tendencies. (21 RT 5006.) Mr. Esten labeled as "bluster" appellant's predictions that, in a general prison population, he would kill others to defend himself.[22] (21 RT 5008.) However, Mr. Esten described San Quentin's "death row" as providing enhanced protection against violence between inmates due to heightened security measures. (21 RT 5011-5012, 5028.) Thus, appellant would present less of a future danger if housed on death row than if housed in a setting for prisoners serving life without parole sentences. (21 RT 5029.) Mr. Esten noted that only 14 out of 658 condemned inmates have been executed since 1978. (21 RT 5012.)

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[22] In prison vernacular, noted Mr. Esten, appellant has "a bulldog's mouth and a Pekinese ass." (21 RT 5008.)

ARGUMENT: GUILT PHASE

I. THE CHRONOLOGY OF THIS CASE WAS ATTRIBUTABLE TO THE DEVELOPMENTAL STATUS OF DNA IDENTIFICATION TECHNOLOGY, AND DID NOT INFRINGE UPON APPELLANT'S STATE OR FEDERAL CONSTITUTIONAL RIGHTS

Cannie Bullock was murdered in August 1979. On December 3, 2002, the Contra Costa County District Attorney filed a complaint charging appellant with the crime. (2 CT 381-382.) Appellant claims that the 23-year span between those events violated his federal (Fifth and Fourteenth Amendments) and state constitutional due process protections.[23] (AOB 39.) Specifically, he argues that the police preformed a cursory and incomplete investigation, and were negligent in failing to identify him as the perpetrator shortly after the crime because physical evidence indicated that the culprit was a man known to Cannie's mother Linda Bullock, as was appellant at the time. (AOB 53-55.) Moreover, he argues, the preaccusation delay caused prejudice because "memories were effectively extinguished and evidence and possible witnesses disappeared." (AOB 55-56.)

Appellant references a number of people whom he claims "could well have played a direct role in the investigation of this case and could have led to the development of a suspect around the time of the killing," including neighbors of Cannie and Linda Bullock, people with information about William Flores, and Linda's social contacts. (AOB 57-59.) He further suggests that the passage of time precluded testimony from witnesses about his Vietnam "experience and character," and notes the loss of educational,

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[23] Preaccusation delay, which is asserted here, does not implicate state and federal speedy trial rights. The latter attach only after arrest or charging. (*People v. Abel* (2012) 53 Cal.4th 891, 908.) Appellant does not claim a violation of his right to a speedy trial.

military, and medical records that could have been beneficial in the penalty phase. (AOB 59.) He proposes that there may have been other guilt or penalty-mitigating events in the intervening 23 years that appellant or others could not remember, including his own inability "to recall his whereabouts at the exact time of the crime." (AOB 61.)

Appellant's argument fails. No prejudice accrued as the result of the investigation's chronology. The investigative delay, pending development of DNA testing technology, was justified.

A. Trial Court Litigation

Appellant brought a pretrial motion to dismiss on grounds that preaccusation delay had violated his federal and state rights to due process. (5 CT 1103-1223.) The People filed a responsive pleading (5 CT 1309-1328), and the trial court entertained evidence and argument from the parties (6 RT 1406-1423, 1457-1462, 1473-1481; 7 RT 1522-1524).

The thrust of appellant's argument to the trial court was that the initial police investigation ineffectual. The defense argued that investigators made "minimal efforts to contact and identify a suspect" during the initial investigation of Cannie's murder, and failed to discover that appellant knew Cannie's mother and had spent the night at her house at some point before the murder. (6 RT 1407-1408.)

Appellant did not contend that DNA-based identification could have or should have occurred earlier than it did.

1. Witness testimony

Appellant offered pretrial witness testimony on the issue. Richard Bentley, a retired San Pablo Police Department detective who investigated Cannie's murder in 1979, testified, as did Charles Bennett, a retired San Pablo police officer who was the original lead detective. (6 RT 1424; 7 RT 1493-1494.) They described the initial phase of the investigation. After the

murder police canvassed the neighborhood, knocking on doors and speaking to neighbors in hopes of locating witnesses. (6 RT 1437, 1438-1439, 1442.) Detective Bentley spoke to various people in the course of that effort, including Nancy Bellinger, Mary Flores, William Flores, Leopoldo Gonzalez, Telesforo Paz, Rhonda Baker, and Jenny Bracsandolo. (6 RT 1443.) Investigators submitted physical samples from a subject named Rudy Sandoval to the crime lab for comparison to crime scene evidence. (6 RT 1444.) The police created a photo lineup that included Rudy Sandoval and showed it to Linda Bullock. (7 RT 1502.) William Flores was scrutinized as a potential suspect. (6 RT 1444.)

Investigators interviewed Linda Bullock and Debbie Fisher in addition to "all of the neighbors." (7 RT 1493-1495, 1503, 1510, 1515.) The police attempted to generate lists of Linda's friends and acquaintances, people who had been to the house, and men that Linda had brought home. (6 RT 1431, 1441; 7 RT 1515.) Linda was interviewed "on more than one occasion" within days of the murder. (6 RT 1431.) She appeared to be under the influence of drugs or alcohol when she gave statements to the police and answered questions, and may well have been unable to convey information to the police. (7 RT 1498-1499, 1501, 1515; 14 RT 3115-3116, 3119.) Linda was again "quite apparently under the influence of something" when she came to the police station two or three days after the murder to provide elimination fingerprints. (6 RT 1434.) Linda later testified that she was a heavy user of drugs and alcohol at the time in her life when Cannie was killed. (13 RT 2971, 2979, 2990-2991.)

Investigators developed a theory that the killer had been known to Cannie, and also believed that Cannie's mother was withholding information because of her ties to the Hells Angels gang, fear of police, and continuous drug and alcohol intoxication. (7 RT 1499-1501, 1514-1515.)

Specific efforts were undertaken to discover Linda's "known associates." (7 RT 1514, 1515.)

Detective Bennett interviewed "Bobby," who gave Linda a ride to the bar the night Cannie was killed. (7 RT 1507.) Another officer interviewed the bartender. (7 RT 1516.) Detective Bennett characterized the investigation as involving, generally, people "in the drug world" who "are fearful of becoming witnesses or associated as witnesses or police contact, specifically with Hell's Angels." (7 RT 1518.) Linda "went into hiding" and avoided police contact shortly after Cannie's murder. (7 RT 1511.) Investigators conducted DMV checks and spoke to Linda's family and acquaintances in an attempt to locate her. (7 RT 1511.)

Through it all, appellant's name never came up. (6 RT 1437; 7 RT 1514, 1518; 14 RT 3114.) Linda testified that she neither recalled Joseph Cordova nor mentioned his name to investigators in either 1979 or 2002. (13 RT 2977-2978.)

In December 1979, Detective Bennett was reassigned to patrol. (7 RT 1511-1512.) He explained that in late 1979 "San Pablo was going through a lot of internal turmoil, and a lot of people were leaving the police department. In fact, when I had left in July, there was somewhere in the neighborhood of 60 percent of the police department had left to go elsewhere." (7 RT 1512.) Detective Bennett continued: "During that time they were having problems assigning people, that's why I was reassigned to patrol because of manpower shortages, and I don't believe anybody took my place at that point until they contracted out detective investigative services with the county sheriff's office at that time." (7 RT 1512.)

2. Other relevant facts and events

In arguing the issue to the trial court, the defense acknowledged that in 1979 case investigators submitted physical evidence from the crime for forensic analysis, and laboratory staff examined "many items, [and]

determined the presence of sperm on different swabs and slides." (6 RT 1458; see 14 RT 3170-3171.) ABO blood typing could not be done on the source of the semen, however, given the nature of the mixed samples collected. (14 RT 3173.) DNA testing did not exist in 1979. (14 RT 3173.)

Cellmark Laboratories performed the initial DNA analysis of the crime scene evidence in 1996 using "DQ-Alpha" and "PM" (Polymarker) STR (short tandem repeat) test kits. (2 RT 312; 15 RT 3393-3394.) In 1996, DNA testing was limited to RFLP (restriction fragment length polymorphism) and early PCR (polymerase chain reaction) test kits. (15 RT 3436-3439.) RFLP required a relatively large sample of DNA with intact molecules that had not significantly degraded over time. (15 RT 3436-3437.) More modern DNA typing technology, by contrast, requires very little sample to produce results. (16 RT 3685.) The PCR kits available in 1996—DQ-Alpha and Polymarker—were limited in their utility, and were used primarily to exclude sources rather than identify suspects based on matches. (15 RT 3438-3439; 16 RT 3775.) Dr. Edward Blake, one of the People's DNA experts, described the Polymarker genes as less genetically discriminating than subsequent STR genes, rendering the former a "much more modest genetic typing system." (16 RT 3775.) Likewise, the DQ-Alpha typing system could discriminate between individuals but was an inferior method for genetic-based identification. (16 RT 3775-3776.)

In early 2002, at the request of case investigators, the Contra Costa County laboratory conducted DNA testing on the DNA extracts that had been returned by Cellmark, and developed a 13-locus STR DNA profile for the sperm cell fraction of the sample. (2 RT 312, 316; 16 RT 3601-3602,

3606, 3625, 3636.) In March 2002 the Contra Costa County lab uploaded that profile into the Combined DNA Index System (CODIS)[24] for state and national database search purposes. (2 RT 312-317.) The State of Colorado previously uploaded appellant's DNA profile into the National DNA Index System (NDIS), on March 26, 2001. (6 RT 1409.)

In May 2002, the Colorado Bureau of Investigation reported a high stringency match at all 13 loci in the National DNA Index System.[25] (2 RT 315-320.) The Colorado laboratory then conducted confirmation testing of its offender reference sample for appellant to verify the validity of the match. (2 RT 321.) At the conclusion of this second round of testing, on May 23, 2002, the Colorado Bureau of Investigation issued a report to California authorities identifying appellant as the subject of the database hit. (2 RT 321-322.) This was the point at which time appellant's name was first introduced into the investigation. (6 RT 1409.)

The database match, however, represented only an investigative lead providing probable cause to seize a new known reference DNA sample from appellant. (2 RT 322, 326, 339.) Thus, investigators prepared a warrant and seized a blood sample from appellant in July 2002. (2 RT 323; 16 RT 3576-3577.) The Contra Costa County lab received the known sample promptly, also in July 2002. (16 RT 3640.) It conducted DNA testing on that sample in July and August 2002, generated a new STR profile, and compared it against the crime scene evidence profile. (2 RT 323; 16 RT 3641.) They matched. (16 RT 3642.)

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[24] While this portion of the transcript refers to the acronym "CDIS," the proper terminology is "CODIS." (See *People v. Robinson* (2010) 47 Cal.4th 1104, 1127.)

[25] "High stringency" means that there is an exact match to every available allele in the crime scene evidence profile. (2 RT 318.)

On December 3, 2002, the Contra Costa County District Attorney filed a complaint charging appellant with Cannie's murder. (2 CT 381-382.)

3. Trial court findings and ruling

The trial court denied the preaccusation delay motion to dismiss. (7 RT 1526.) It found that appellant had not demonstrated law enforcement negligence in the conduct of the initial investigation. (7 RT 1524.) Appellant, observed the court, "has made no showing whatsoever that the failure to learn about Mr. Cordova until that time was the product of negligence . . . . Quite the contrary. What we've heard . . . is that they did inquire about the acquaintances and visitors to the household, and Mr. Cordova's name didn't come up in that connection." (6 RT 1472.) The police identified at least two "prime suspects," noted the court, both of whom were eventually eliminated by DNA evidence implicating appellant. (7 RT 1525.)

Further, observed the trial court, even if there had been negligence "it's pure speculation that had [the investigation] been done differently, it would have . . . led to the discovery of Mr. Cordova, or even if it led to the discovery of Mr. Cordova, that it would have led to the production of information sufficient to charge him with the crime." (7 RT 1524-1525; see also 6 RT 1410, 1417-1418 [reiterating "pure speculation" theme].) Thus, the trial court made a second finding that appellant failed to show prejudice, i.e., that any police negligence made a difference in the chronology of the accusations against him. (7 RT 1525.)

Throughout hearings on this issue, the trial court emphasized that the proof against appellant originated with the DNA cold hit: "The fact of the matter is in this case nothing has been suggested that there was evidence to

charge him until 2002, and it wasn't possible to get that evidence at least until 2001. So I mean this is clearly a *Nelson*[26] case. In fact, this is—the circumstances here are, if anything, more favorable to the prosecution than the circumstances in *Nelson*." (6 RT 1474; see also 6 RT 1481 [trial court observing that "there was no case against Mr. Cordova until the DNA match. That wasn't possible until 2001, 2002"]; 7 RT 1525 [trial court observing that "[t]he fact of the matter is that the evidence to charge Mr. Cordova . . . was not available until . . . 2001, and only really learned in 2002, and earlier than that it's just pure speculation with respect to what would have happened if certain other things were done"].)

B. Applicable Law and Standard of Review

Preaccusation delay that is both unjustified and prejudicial may infringe upon a defendant's state and federal due process protections. (*Nelson*, *supra*, 43 Cal.4th 1242, 1250.) "[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence." (*People v. Martinez* (2000) 22 Cal.4th 750, 767.)

A violation of due process under the United States Constitution must involve government delay that "was undertaken to gain a tactical advantage over the defendant." (*People v. Catlin* (2001) 26 Cal.4th 81,107 (*Catlin*); see *United States v. Lovasco* (1977) 431 U.S. 783, 795.) California due process protections, in turn, may be infringed upon where government negligence—or intentional inaction—results in a time lapse before charging. (*Nelson*, *supra*, 43 Cal.4th at p. 1255.) Because California's protections in this regard are broader than their federal counterparts,

[26] In reference to *People v. Nelson* (2008) 43 Cal.4th 1242 (*Nelson*).

application of California law will answer the federal challenge as well. (*Id.* at p. 1251.)

Either way, however, "[a] defendant seeking relief for undue delay in filing charges must first demonstrate resulting prejudice, such as by showing the loss of a material witness or other missing evidence, or fading memory caused by the lapse of time." (*People v. Abel*, *supra*, 53 Cal.4th at p. 908.) Prejudice will not be presumed. (*Id.* at pp. 908-909.) Prejudice must be "actual," and is not demonstrated where a defendant relies upon mere "possibilities." (*United States v. Marion* (1971) 404 U.S. 307, 324-236; see also *People v. Belton* (1992) 6 Cal.App.4th 1425, 1433 ["California authority stresses that prejudice will not be presumed and that the defendant bears the burden of proving actual prejudice"], citing *People v. Archerd* (1970) 3 Cal.3d 615, 640.) A showing of prejudice cannot be speculative. (*Id.* at p. 326.) A showing of prejudice by the defendant is particularly important in a murder case, the prosecution of which is not bound by a statute of limitations. (*Nelson*, *supra*, 43 Cal.4th at p. 1250 ["'[T]he statute of limitations is usually considered the primary guarantee against bringing overly stale criminal charges,' and there 'is no statute of limitations on murder'"].)

Even if prejudice is established, "[t]he prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay." (*Catlin*, *supra*, 26 Cal.4th at p. 107; see also *People v. Abel*, *supra*, 53 Cal.4th at p. 909.) If prejudice is not established, the trial court may deny the defense motion without inquiry into the cause of the delay. (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 249.)

The calculus performed by trial courts is thus one of cause and effect. At one end of the spectrum, "[p]urposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would

suffice to tip the scales towards finding a due process violation." (*Nelson*, *supra*, 43 Cal.4th at p. 1256.) "[M]erely negligent" delay, on the other hand, requires "a greater showing of prejudice . . . to establish a due process violation." (*Ibid.*) At the other end of the spectrum, "[t]he justification for the delay is strong when there is 'investigative delay, nothing else.' [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 431.)

A trial court's ruling on a motion to dismiss based on preaccusation delay is reviewed for abuse of discretion, and any factual findings are given deference if supported by substantial evidence. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 431.) Substantial evidence is "evidence which is reasonable, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Both prejudice and the cause of the delay are questions of fact. (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911-912.) Consequently, as the Court observed, whether a delay in filing charges violates due process is a question of fact generally "won or lost at the trial level," and not subject to reweighing on appeal. (*People v. Hill* (1984) 37 Cal.3d 491, 499.)

C. Appellant Demonstrated Neither Prejudice Nor Unjustified Delay

The trial court did not abuse its discretion in denying appellant's motion to dismiss for due process violations premised on preaccusation delay. As the trial court found, his assertions of prejudice amounted to "pure speculation," and nothing indicated that the police were negligent in failing to identify appellant as the killer in 1979, long before DNA technology was available.

1. Absence of prejudice

Substantial evidence supports the trial court's finding that the delay did not prejudice appellant. Appellant sets forth his argument on that subject at pages 56 to 61 of his opening brief. The very formulation of his

premise is self-defeating, however. He bases his claim on "the loss of witnesses who *potentially* could have shed light on the case and who, if properly interviewed in 1979, *might* have caused a suspect to be identified, or served to suggest that someone other than appellant committed the crime. (AOB 56, italics added.) Appellant even states candidly that he "cannot specifically state what any of these possible witnesses would have said . . . ." (AOB 61.) But, defendants seeking dismissal on grounds of preaccusation delay must demonstrate actual prejudice; it is insufficient to speculate about "potentially" relevant evidence or evidence that "might" have been relevant. (*People v. Abel*, *supra*, 53 Cal.4th at p. 909.) A showing of prejudice cannot be based on speculation about what a witness could have or would have said. Instead, a defendant must actually show that a witness actually could have or would have provided favorable evidence. (*Ibid.*) Appellant's argument is thus facially deficient.

Specifically, listing people who "could have provided [unspecified] information," as appellant does, is far removed from the kind of lost evidence that is actually memorialized and would actually have aided the defense had trial occurred sooner. For example, in *People v. Mirenda* (2009) 174 Cal.App.4th 1313, a largely unjustified preaccusation delay of more than 25 years resulted in the death of the only independent eyewitness to the killing, who originally told police that the victim was moving toward the defendant before being shot and killed. (*Id.* at pp. 1318, 1321, 1331-1332.) This evidence would have substantiated a self-defense or heat of passion manslaughter theory had the witness been available at trial. (*Id.* at pp. 1331-1332.) The trial court did not err in dismissing the case on due process grounds. (*Id.* at p. 1333.)

In contrast, appellant made no showing that any of the people cited as potential defense witnesses would have cooperated and offered helpful evidence. First, appellant cites "[r]elevant witnesses who have died or

otherwise became unavailable because of the delay . . . ." (AOB 56.) He names "Rose Azevedo," "Charles Greener," and "Michael Hunt" as neighbors who, were they alive at the time of trial, "could have provided information that could have established a reasonable doubt as to guilt by substantiating appellant's version of what occurred." (AOB 57.) The record belies this claim. According to defense counsel's offer of proof at trial, Ms. Azevedo was the Bullock's landlord. She was contacted by police after the murder and stated that she went to bed at 8:30 or 9:00 the night of the murder, and slept until awakened by detectives. (14 RT 3120-3121.) Contrary to appellant's assertion, there is no indication that Ms. Azevedo "could have provided information" favorable to appellant.

According to defense pretrial filings, Charles Greener was a neighbor of the Bullock's who was interviewed by police, and said that the night of the murder "he heard a man knock on Bullock's door and call out her name . . . ." (5 CT 1203.) Far from being favorable to appellant, Mr. Greener appears to have had information consistent with the prosecution's theory that Cannie opened the door in response to appellant because he was known to her, thus explaining the absence of evidence of forced entry into the cottage.

Finally, appellant claims that Mr. Hunt reportedly saw "a suspicious vehicle near the Bullock house the night of the murder." (AOB 57; see also 5 CT 1203.) This information is so vague as to be meaningless. There is no evidence of whether Cannie's killer arrived by car, or that appellant did or did not drive to the house that evening, or why Mr. Hunt believed the car to be "suspicious" in the first instance. (See generally *Catlin*, *supra*, 26 Cal.4th at p. 107 [explaining that it is not the loss of any witness with causes prejudice, but rather the loss of "'material witnesses'"].)

Second, appellant cites several people whom he claims could have provided incriminating character information about William Flores that

would have enhanced the third party culpability defense presented at trial. (AOB 57; see 5 CT 1205-1208 [defense investigator's declaration describing missing witnesses].) As a threshold matter, the argument fails because the jury heard extensive testimony about Flores. Jurors learned that Flores was long considered a prime suspect in Cannie's death, to the extent that investigators went to the extreme measure of exhuming his remains years later and submitting samples for DNA testing. (15 RT 3338, 3342-3344, 3396, 3486, 3501, 3502.) Appellant was able to elicit a great deal of information concerning Flores's proximity to the crime, his strange comments to police after Cannie's murder, the story about his bloody shirt the night of the killing, his suicide and cryptic suicide note, and his erratically expressed desire for female love and companionship. (See pp. 14-16, 20-22, *ante*.) Flores's sister, Linda Smith, was a defense witness, as was Detective Harrington, who interviewed Ms. Smith in 1996. The bloody shirt evidence received at trial originated with statements from Mary Flores (18 RT 4074-4075), making her absence largely inconsequential. Appellant's third party culpability defense was well developed despite the passage of time.

Knowing more about him would only have deepened the jury's understanding that Cannie and Linda had a peculiar neighbor, but it would not have altered the quality or quantity of guilt implicating appellant. For example, more evidence about Flores would not have advanced the defense theory that appellant was Linda's innocent sexual partner one or more weeks earlier who deposited his sperm directly onto a surface where it remained in a wet state for some period of days until it transferred onto Cannie and made its way deep into her vagina in significant quantities and remained there until her death without draining out through gravity's pull or being washed away in a bath or shower. That theory, aside from being patently absurd, was debunked by multiple expert witnesses for the

prosecution. (15 RT 3445-3446, 3461, 3471; 16 RT 3622, 3653-3657, 3659-3662, 3662-3664, 3785-3787.) Ultimately, the germane point in this inquiry is that Flores was excluded as the source of sperm in Cannie's body.

And, appellant's claim that medical staff who treated Flores following his suicide attempt—Rosemary Hearst, Marcelle Martin, Dr. W.A. Rohlfing, and Dr. Thomas Smith (AOB 57-58)—"could have provided information" about why Flores committed that act is, as the trial court phrased it, "pure speculation." (See CT 1208-1209.) Appellant also cites the possibility that medical records relating to treatment of William Flores following his self-immolation could have included documentation of his reasons for killing himself (AOB 57-58), but nothing suggests that any such information ever existed or, if it did, that it would have been available had appellant been identified as the perpetrator more quickly. (See *People v. Abel*, *supra*, 53 Cal.4th at p. 910 [defendant's claim of prejudice failed where he could not show that missing records would have been available had trial occurred sooner].)

Third, appellant points to Linda's 1979 social contacts, many of whom were unavailable at trial, as missing evidence that could have been beneficial to his defense. (AOB 58-59.) There are no grounds, however, for finding that any of these people would have been helpful material witnesses had appellant been charged sooner. In fact, both case detectives discussed how investigators attempted to compile lists of Linda's known associates, but encountered uncooperative attitudes from the Hells Angels "drug world" those people occupied. In pretrial pleadings, appellant was unable to even provide last names for many of the individuals he now claims "could well have played a direct role in the investigation of this case and could have led to the development of a suspect around the time of the killing." (AOB 59.) Nor does appellant explain how witnesses to "a

disturbance at the Bullock house two weeks before the murder" would actually have provided relevant testimony. In short, he again defaults to mere speculation.

Fourth, appellant mentions Vietnam-era witnesses who could have spoken to his "experience and character." (AOB 59.) He does not name these "witnesses," does not provide offers of proof detailing evidence they could have provided, and does not explain why they were unavailable at trial. This is not actual prejudice. The jury heard, in any event, detail from appellant himself about his military service, which ended in a forgery conviction and dishonorable discharge.

Fifth, appellant generically references "educational, military, and medical records were destroyed, records that could well have provided mitigating evidence for the penalty phase." (AOB 59.) He does not specify what records he means, and provides no detail about their contents or relevance. Once more, he speculates.

Sixth, appellant cites as indicators of prejudice his own faulty memory of his whereabouts in 1979 as well as events in the 23 years between Cannie's murder and the inception of this case that "would have had an impact on the penalty phase . . . ." (AOB 59-61.) Yet the record indicates otherwise. The jury heard recordings of appellant's 2002 statements to investigators in this case, in which he, with surprising alacrity, purported to possess acute recall of the events of the days surrounding Cannie's murder. (8 CT 2266-2267, 2273-2276.) Appellant recounted in detail how he knew Linda, Cannie, and Debbie Fisher, and that he had picked up Linda at a bar on a different Friday night, spent the night at her house, and left for work Saturday morning. (8 CT 2267, 2273-2275.) He "remembered" specifics down to where he had come from the night of the murder ("El Sobrante"), the day of the week he first met Linda ("Friday"), the time of day he saw Linda the next evening ("2:00 o'clock"), and the name of the bar where he

was the night after Cannie was killed ("Cleo's"). (8 CT 2267, 2273-2275.) Contrary to his contention, appellant demonstrated great precision in his recollection of events from 23 years earlier.

Finally, the fact that the passage of time allowed the prosecution to generate DNA evidence identifying appellant as Cannie's rapist and killer does not constitute prejudice for due process purposes. (*In re Chuong D.* (2006) 135 Cal.App.4th 1303, 1311.) To the contrary, it demonstrates that any evidence lost or forgotten by the time of trial was inconsequential in light of overwhelming DNA evidence that appellant raped and killed Cannie. Of the hundreds of thousands of criminal offenders routinely searched in the National DNA Index System in 2001 who could have matched the perpetrator's DNA profile,[27] the name produced was a man imprisoned in Colorado who actually knew Cannie in 1979 and had sex with Cannie's mother in Cannie's house in 1979. Appellant's premise—that more thorough investigation may have identified a different perpetrator—is demonstrably false in view of the fact that DNA testing revealed significant quantities of appellant's sperm inside Cannie's body. No amount of additional police interviews in 1979 would have altered that fact or made it less true. As the trial court found, "even if there was negligence [in the investigation], certainly it's not been shown that it would have made any difference in this case."

2. Delay justified

Even if some minimal prejudice accrued as the result of delay, the prosecution bore little if any burden of justification. Nevertheless, there

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[27] As of December 2001 there were 829,775 convicted offender profiles in the national database. (Report No. 02-20, Office of the U.S. Inspector General (May 2002) <http://www.justice.gov/oig/reports/OJP/a0220/intro.htm> (as of April 21, 2014).)

was significant and substantial evidence presented to the trial court supporting its finding that the delay was neither intentional nor negligent. Instead it was, as *Nelson* phrased it, "investigative delay." (*Nelson*, *supra*, 43 Cal.4th at p. 1256.) As such there was strong justification for the time lapse that far outweighed any de minimus prejudice to appellant.

On this point *Nelson* controls; its facts closely parallel those here. The delay in both cases was investigative delay tethered to the unavailability of sufficiently discriminating DNA typing technology for the two decades following the crime. As the United States Supreme Court recognized, "[m]odern DNA testing can provide powerful new evidence unlike anything known before." (*District Attorney's Office v. Osborne* (2009) 557 U.S. 52, 62.)

In *Nelson*, the 1976 crime was solved in 2002 with a DNA database match. In the present case, the 1979 crime was solved in 2002 with a DNA database match. *Nelson* reasoned that, despite having "some basis to suspect" the defendant as the perpetrator in 1976, the 26-year delay was "investigative" in nature, and thus strongly justified. The Court explained:

> [T]he justification for the delay was strong. The delay was investigative delay, nothing else. The police may have had some basis to suspect defendant of the crime shortly after it was committed in 1976. But law enforcement agencies did not fully solve this case until 2002, when a comparison of defendant's DNA with the crime scene evidence resulted in a match, i.e., until the cold hit showed that the evidence came from defendant. Only at that point did the prosecution believe it had sufficient evidence to charge defendant. A court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges. "The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. . . . Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. . . . Investigative delay is fundamentally

> unlike delay undertaken by the government solely to gain tactical advantage over an accused because investigative delay is not so one-sided. A prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt." [Citations.]

(*Nelson*, *supra*, 43 Cal.4th at p. 1256.) The reasoning set forth in *Nelson* applies with equal force here.

If anything, the instant case presents an even more compelling narrative of justification than did *Nelson*. Here, there was no evidence implicating appellant in 1979, as opposed to "some basis" in *Nelson*. (See also *People v. Cowan*, *supra*, 50 Cal.4th at pp. 434-435 [no negligence in delay despite some evidence implicating the defendant from the outset, because fingerprint match tying defendant to the crime scene did not occur until ten years later].) The record is clear that appellant's name never arose in connection with the case, despite investigators' efforts to interview neighbors and generate lists of people with whom Linda Bullock interacted. It is telling that even after appellant was identified through DNA in 2002, Linda could not remember him. As in *Nelson*, were it not for DNA, this case would have gone unsolved. Appellant's protestations to the contrary are precisely what this Court condemned as "Monday morning quarterbacking." (*People v. Cowan*, *supra*, 50 Cal.4th at p. 436.)

In addition to the absence of DNA technology in 1979, the police were hampered by Linda's drug and alcohol intoxication and attempts to evade contact with investigators. What assistance she attempted to provide, moreover, was misplaced. For example, despite not knowing who killed her daughter Linda told police in 1979 that "John" committed the crime. (13 RT 2987-2988.) According to Linda, John "was a black guy that I knew." (13 RT 2988.) Appellant calls the investigation "indefensible" (AOB 59) and cites the "John" information (AOB 54), yet fails to explain

how further efforts to locate "John" would have contributed evidence sufficient to charge appellant with the crime. Further, Linda and her acquaintances were part of a Hells Angels drug culture that discouraged cooperation with law enforcement.

In addition, and as an overarching context for the initial investigation, police resources were in short supply in San Pablo in 1979. Detective Bennett described how late 1979 was characterized by turmoil and workforce shortages in the San Pablo Police Department, so much so that he was reassigned to patrol. When Detective Bennett left the department in December 1979, "somewhere in the neighborhood of 60 percent of the police department had left to go elsewhere." (7 RT 1512.) This Court has made clear that delay caused by scarcity of law enforcement resources is justified: "A court may not find negligence by second-guessing how the state allocates its resources or how law enforcement agencies could have investigated a given case. '. . . Thus, the difficulty in allocating scarce prosecutorial resources (as opposed to clearly intentional or negligent conduct) [is] a valid justification for delay . . . .'" (*Nelson*, *supra*, 43 Cal.4th at pp. 1256–1257.) That conclusion squarely applies here.

Finally, as in *Nelson*, law enforcement responded promptly and aggressively once DNA technology became available. They exhumed William Flores's remains and submitted samples, along with crime scene evidence from 1979, for DNA testing as early as 1996. (15 RT 3338.) At the time, in fact, the Contra Costa County crime laboratory was not even doing DNA analysis, so investigators took the aggressive approach of sending the evidence to a private lab nearly 3,000 miles away. (15 RT 3342-3344.) DNA methods evolved further, of course, permitting a new round of testing in 2002 as a predicate to the database match that soon followed. (16 RT 3601-3602, 3606, 3636-3637.) Law enforcement pursued their investigation of Cannie's murder with vigor, using new tools

as they became available. Ultimately, as this Court opined in *People v. Cowan*, "[t]he prosecution was justified in waiting until it had evidence connecting defendant to the crime scene before arresting him and charging him with murder." (50 Cal.4th at p. 435; see also *Nelson*, *supra*, 43 Cal.4th at p. 1257 ["'The delay was the result of insufficient evidence to identify defendant as a suspect and the limits of forensic technology. [Citations.] When the forensic technology became available to identify defendant as a suspect and to establish his guilt, the prosecution proceeded with promptness'"].)

A perfect investigation is unrealistic, and not required by due process. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 436.) But the original investigation into Cannie's death was more than adequate, particularly in view of the fact that it would require technology not available for another 20 years to tie appellant to the crime. "[I]t is important to remember that prosecutors are under no obligation to file charges as soon as probable cause exists but before they are satisfied that guilt can be proved beyond a reasonable doubt or before the resources are reasonably available to mount an effective prosecution. Any other rule 'would subordinate the goal of orderly expedition to that of mere speed.' [Citation.]" (*People v. Boysen* (2007) 165 Cal.App.4th 761, 777.)

In sum, questions were asked, leads were pursued, and technology was utilized. The investigative delay was justified.

3. Any showing of prejudice did not outweigh the justification for the delay

Finally, as the foregoing discussion illustrates, substantial evidence supports a conclusion that, even if appellant was prejudiced by the passage of time, the trial court did not abuse its discretion in determining that the impact was inconsequential and the delay justified.

This conclusion is driven by the fact that the core evidence of appellant's guilt—DNA identification, appellant's prior sexual assaults of children, his presence in San Pablo in 1979, his flight to Canada shortly after the murder, his sexual encounter with Cannie's mother in the Bullock house, his admitted recollection of Cannie, and the content of his statements to police in 2002—were not dependent upon witness availability and ability to recall. (6 RT 1415-1416, 1475.) With its immutable evidence this case is unlike the facts presented in *People v. Hill*, *supra*, 37 Cal.3d 491, where "virtually the only evidence against defendant was the eyewitness testimony of the victims, and his only defense was mistaken identification." (*Id.* at p. 498.) Under those circumstances, faded recollection may well have prejudiced an otherwise robust defense. (*Ibid.*) Here, by contrast, there were no eyewitnesses to the crime, and compelling DNA evidence both proved appellant's guilt and disproved his theory that William Flores was the true perpetrator.

In sum, had DNA technology existed in 1979, appellant would not have been able to defend himself any more effectively than he was years later. The result would have been a guilty verdict decades earlier. As it was, investigators were forced to wait, permitting appellant to enjoy many additional years of freedom and unaccountability.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING, UNDER EVIDENCE CODE SECTION 1108, EVIDENCE OF APPELLANT'S TWO OTHER CHILD SEXUAL ASSAULTS

Appellant next contends that the trial court erred by admitting, pursuant to Evidence Code section 1108, evidence of his 1992 and 1997 child molestation offenses. (AOB 62-82.) The crux of his argument is that the two other crimes were sufficiently distinct in time and circumstance from Cannie's rape and murder to render them irrelevant to the instant case. (AOB 74-75, 80-82.) Secondarily, appellant argues that the prior sex

crimes were inadmissible under Evidence Code section 1101, subdivision (b), as well. (AOB 82-85.) Both arguments lack merit. The other crimes were highly probative as to appellant's propensity to sexually assault children in an opportunistic manner, when his victims were alone or otherwise vulnerable. Significant similarities between the other child molests and appellant's assault on Cannie in 1979 properly informed the trial court's discretionary decision to admit the evidence, and there was little—if any—attendant prejudice, potential for jury confusion, or undue consumption of time.

A. Factual Background

In an in limine motion the prosecution requested that the trial court permit, pursuant to Evidence Code sections 1108 and 1101, subdivision (b), evidence of two prior sexual assaults on children committed by appellant. (5 CT 1272-1281, 1298-1307; 8 RT 1759-1760.) One was the attempted sexual assault of a 12-year-old girl (Nina S.) in 1992, in Colorado, for which appellant was convicted in 1994. (8 RT 1759, 1760, 1828.) One was a sexual assault on a child in a position of trust, by a habitual sex offender, committed against a 12-year-old boy (Curtis B.) in 1997, for which appellant was convicted in 1998. (8 RT 1759-1760, 1762, 1769, 1828.)

Appellant opposed the request. (6 CT 1533-1592.) The defense contended that evidence of the prior convictions was irrelevant and needlessly prejudicial, while having no probative value on the question of identity, pursuant to Evidence Code section 352. (8 RT 1762, 1773-1778; 17 RT 3903.) In support of its position the defense pointed to the temporal remoteness and post-1979 timing of the proffered evidence, as well as the dissimilarity of the prior acts to the murder of Cannie Bullock. (8 RT 1774-1777.)

The trial court performed an Evidence Code section 352 assessment. (8 RT 1791, 1819.) It observed that the prior child molest evidence was "highly relevant" within the section 1108 framework, and of "significant probative value" on the question of the perpetrator's identity given appellant's propensity to sexually assault children. (8 RT 1787, 1765, 1786, 1789-1791, 1819; 17 RT 3904.) Moreover, the trial court found "very little" prejudice because the crimes in the 1990's involved only sexual touching, and not extreme and grotesque sexual violence as did the 1979 crime. (8 RT 1767.) "[W]hatever inflammatory value it has," concluded the trial court, "does not substantially outweigh its probative value . . . ." (8 RT 1787, 1819; 17 RT 3905.)

Accordingly, the trial court granted the People's motion to admit evidence of the Nina S. and Curtis B. sexual assault crimes as propensity evidence, pursuant to Evidence Code section 1108. (7 CT 1778; 8 RT 1792, 1817-1818; 17 RT 3903-3904.) The trial court noted that "the evidence would probably come in under [Evidence Code section] 1101(b) as well to show what I call motivation in this matter." (8 RT 1819.) The motive in this case, stated the court, would be sexual gratification. (8 RT 1819.) Nonetheless, the trial court indicated that it considered any apparent ruling on section 1101 grounds "relatively moot" in view of its decision to receive the evidence pursuant to section 1108. (8 RT 1820.)

At trial, Ms. Nina S. testified that appellant sexually molested her in 1992 in Lakeview, Colorado. (17 RT 3807-3808, 3810.) She was 12 years old at the time. (17 RT 3809.) Nina and her two-year-old brother were sleeping overnight at appellant's house; appellant lived there with his then-wife and had agreed to babysit the children overnight. (17 RT 3809.) Nina awoke in the middle of the night to find appellant "rubbing my chest and my butt." (17 RT 3810.) She demanded he stop. (17 RT 3810.) Appellant's response was to plead that she not "tell" because then he would

"go to jail." (17 RT 3810.) For his conduct appellant was convicted in 1994, under Colorado state law, of attempting to sexually assault a child. (17 RT 3811-3812, 3910.)

In 1997 appellant sexually assaulted a 12-year-old boy named Curtis B. while the latter was sleeping in a house in Denver, Colorado. (17 RT 3913-3916.) Appellant crept into Curtis's room in the night, put his hand down the boy's underwear, and "rubbed" his "butt." (17 RT 3914.) Curtis jumped up and ran to tell his father, who filed a police report. (17 RT 3915.) Consequently appellant was convicted in 1998, under Colorado law, of sexual assault on a child.[28] (17 RT 3910-3911.)

B. Pursuant to Evidence Code Section 1108, the Trial Court Properly Received Evidence of Appellant's Other Child Sex Crimes

1. Standard and applicable law

In *People v. Jones* (2012) 54 Cal.4th 1, this Court reiterated "well settled" rules controlling admissibility of evidence of other crimes, including sex offenses:

> Although evidence of prior criminal acts generally is inadmissible to show bad character, criminal disposition, or probability of guilt, such evidence may be admissible when relevant to prove some material fact other than the defendant's general disposition to commit such an act. (Evid. Code, § 1101, subd. (b).) "As Evidence Code section 1101, subdivision (b) recognizes, that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present crime. Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime

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[28] Appellant makes no claim, nor is there a meritorious claim to be made, that appellant's Colorado offenses were not each a "sexual offense" within the meaning of Evidence Code section 1108, subdivisions (a) and (d)(1). At a minimum, the Colorado acts represented violations of California Penal Code sections 243.4 and 288, subdivision (a).

> to prove the material fact, and the existence *vel non* of some other rule requiring exclusion." [Citation.] An exception to the general rule against admitting propensity evidence is Evidence Code section 1108, subdivision (a), which provides for the admissibility of evidence of other sexual offenses in the prosecution for a sexual offense, subject to Evidence Code section 352. "[T]he Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." [Citation.]

(*People v. Jones*, *supra*, 54 Cal.4th at p. 49.)

Section 1108 comports with federal due process protections given "the trial court's discretion to exclude propensity evidence under [Evidence Code] section 352." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*); see also *People v. Villatoro* (2012) 54 Cal.4th 1152, 1159-1164.) Evidence Code section 352 endows a trial court with discretion to "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.) In conducting a section 352 analysis for evidence of another sex crime proffered under section 1108,

> trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the

> defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.

(*Falsetta*, *supra*, 21 Cal.4th at p. 917.) Trial courts possess "broad discretion" in rendering decisions under section 352. (*People v. Wilson* (2008) 44 Cal.4th 758, 797.) A trial court's decision to receive propensity evidence pursuant to section 1108 is reviewed for an abuse of discretion. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1288.) An exercise of trial court discretion "will not be disturbed except on a showing 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. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

2. The trial court did not abuse its discretion

The trial court here exercised sound discretion in admitting the Nina S. and Curtis B. evidence. Its Evidence Code section 352 balancing analysis was apt. The two subsequent offenses were highly probative proof that appellant is sexually attracted to young children, and acts on his pedophilic impulses when presented the opportunity to do so without detection and when his victims are alone or otherwise vulnerable. Many similarities between the three sex crimes substantiate the significance of the 1992 and 1997 events, with little or no attendant prejudice or potential for jury confusion, or undue consumption of time.

Specifically, all three crimes were sexual in nature and involved child victims. Appellant knew Nina S., Curtis B., and Cannie before their respective assaults, and thus had access to them without resorting to forcible entry. (Compare *People v. Lewis*, *supra*, 46 Cal.4th at p. 1287 [describing same factor as key consideration].) Appellant sexually assaulted Nina S. and Curtis B. late at night, as with Cannie. Appellant assaulted Nina S. and Curtis B. while those children were in their bedclothes, as was Cannie. Appellant assaulted Nina S. and Curtis B. in

their beds, as he did with Cannie. Appellant assaulted all three children in moments of high vulnerability: Nina S. and Curtis B. while they were asleep, and Cannie while she was alone at home and had possibly been asleep shortly before. The four-year age difference between Cannie and appellant's subsequent victims qualifies as a point of similarity as well for admissibility purposes. (See *People v. Loy* (2011) 52 Cal.4th 46, 63 [noting difference of "only four years" between victim in charged offense and victim of section 1108 offense].) Similarities between charged and uncharged offenses enhance the probative value of the latter. (*People v. Balcom* (1994) 7 Cal.4th 414, 427.)

Appellant argues that Cannie's rape and murder were "planned" by a perpetrator who "waited until the adults that lived in the house were not home, gained illegal entrance, murdered Cannie and disappeared from the scene," and were thus significantly dissimilar to appellant's other sexual assaults on children. (AOB 74.) This is certainly not the only possible interpretation of trial evidence, nor is it the most likely chronology of events. It is far more probable that appellant showed up at the Bullock house hoping for another sexual encounter with Linda, found Cannie home alone in a bathrobe, took advantage of the unexpected opportunity to fulfill his predatory desires, and then killed his victim and only eyewitness. His opportunism with Cannie bore striking resemblance to his opportunism years later in Colorado, where he preyed upon Nina and Curtis upon finding them, like Cannie, in vulnerable circumstances.

These points were particularly relevant in light of appellant's defense that he did not rape and kill Cannie, but that his semen was somehow transferred into her vagina by contact sometime after he had sexual intercourse with Cannie's mother on an unspecified occasion. Appellant's propensity to sexually assault children certainly bore on the credibility of this proposed defense theory.

Finally, a relatively insignificant time was spent presenting the Evidence Code section 1108 evidence to the jury. Nina S.'s testimony was completed in four transcript pages (17 RT 3808-3811), while Curtis B's testimony took six pages, including cross-examination (17 RT 3911-3916).

There was little risk of undue prejudice as a counterbalance. "Evidence is prejudicial within the meaning of Evidence Code section 352 if it '"uniquely tends to evoke an emotional bias against a party as an individual"' [citation] or if it would cause the jury to '"'prejudg[e]' a person or cause on the basis of extraneous factors"' [citation]." (*People v. Cowan*, *supra*, 50 Cal.4th at p. 475.) As the trial court found, compared to the brutal rape and murder of eight-year-old Cannie, the sexual touching and rubbing of two 12-year-olds held little prejudicial potential and was unlikely to be inflammatory. (See *People v. Lewis*, *supra*, 46 Cal.4th at p. 1287; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070–1071.) Further, "the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual convictions and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses." (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) Such was the case here.

The fact that the Evidence Code section 1108 propensity evidence involved behavior that postdated the charged offense by 13 and 18 years, respectively, did not diminish its probative value in this case. There is no settled threshold beyond which Evidence Code section 1108 evidence must be considered overly remote. (See, e.g., *People v. Branch* (2001) 91 Cal.App.4th 274, 284-285 [holding that 30-year separation not overly remote, and discussing relevant case law].) Nor does evidence of character become less convincing if it involves activity that took place after the charged offense. In fact, permitting evidence of propensity under section

1108 only makes sense under the assumption that character traits are durable, if not fixed. If one assumes that character is transient and may change with the passage of time, then even acts committed before the charged crime would have little relevance. But, as Professor Wigmore observed, "a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because character is a more or less permanent quality and we may make inferences from it either forward or backward." (5 Wigmore, *Evidence* (Chadbourn rev. ed. 1974) § 1618, p. 595.) In this case, evidence of appellant's pedophilia was all the more probative because it was repeated over time, thus dispelling any suggestion that a particular act of sexual aggression towards a child was isolated or anomalous.

Several courts have cited Wigmore with approval on this point. In *People v. Medina* (2003) 114 Cal.App.4th 897, Wigmore's view contributed to a holding that the trial court properly admitted section 1108 propensity evidence based on a 2001 incident despite the charged crime occurring in 1993. (*Id.* at p. 903; see also *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448-449 [quoting same passage from Wigmore in holding that subsequent acts may be received under Evidence Code section 1103 to show a victim's character].) *Medina* also considered the plain language of Evidence Code section 1108, which merely references admission of "'*another* sexual offense'" without temporal limitation. (114 Cal.App.4th at p. 902, quoting Evid. Code, § 1108, subd. (a), italics in original.) Thus, the statutory language of section 1108 "strongly suggests that evidence of an uncharged sexual offense committed after the charged offense is within the scope" of the provision. (*Medina, supra*, 114 Cal.App.4th at p. 902.)

Appellant relies heavily upon *People v. Abilez* (2007) 41 Cal.4th 472 (*Abilez*) and *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*) as cases which make "clear that the two sexual assault cases should not have been

admitted by the trial court." (AOB 80.) Those two cases do not support his claim, however. *Abilez* first considered a trial court's decision, in a sodomy/murder case, to exclude a codefendant's prior sex crime pursuant to Evidence Code section 1101, subdivision (b). (*Abilez*, *supra*, 41 Cal.4th at p. 500.) This Court found no abuse of discretion. It noted that the prior incident—attempted statutory rape—took place more than 20 years earlier. (*Id.* at p. 501.) Then, considering whether the prior crime was admissible on the question of identity for purposes of section 1101, subdivision (b), the Court observed that an inference "that the person who attempted to have sex with a minor more than 20 years earlier was likely to be the person who sodomized and killed the 68-year-old victim" would be "weak" at best. (*Ibid.*) The remoteness and dissimilarity of the prior and charged crimes justified exclusion under section 1108 as well. (*Id.* at p. 502.)

In contrast, as discussed above, the section 1108 evidence in the present case was admissible in part because, unlike the discrepancy in *Abilez* between elderly and child victims, appellant consistently exhibited sexual attraction to young children over a span of time, thus demonstrating his pedophilic tendencies. *Abilez* provides an apt illustration of how sharply distinguishable facts may generate different trial court outcomes, and in so doing supports the judgment rendered below.

Nor does *Harris* advance appellant's cause. In that case, the defendant was convicted of multiple counts of rape, sexual battery, and oral copulation committed in 1995 against two women who were patients at a mental health treatment center where he worked as a nurse. (*Harris*, *supra*, 60 Cal.App.4th at pp. 730-732.) The trial court permitted the prosecution to introduce section 1108 evidence that in 1972 the defendant broke into a woman's home and committed a vicious, bloody, and apparently sexual, assault. (*Id.* at pp. 734-735.) The court of appeal reversed. It characterized the section 1108 evidence as "inflammatory *in the extreme*." (*Id.* at p. 738,

italics in original.) Unlike the charged case, which involved victims known to the defendant—and in one case a victim who was a former consensual sexual partner—but entailed no "unusual or shocking" aspects, the prior crime was a "violent and perverse attack on a stranger . . . ." (*Ibid.*) Moreover, the jury was presented with redacted facts that invited them to speculate about the full violent circumstances of the 1972 attack, and because the jury was told that the defendant had been convicted of burglary they may have suspected that he unjustly escaped punishment for the apparent rape and deserved harsher treatment accordingly. (*Id.* at pp. 738-739.) Thus in *Harris* the risk of confusion was high. In addition, the *Harris* court observed, the 23-year time lapse between events mitigated against admission of the prior act. (*Id.* at p. 739.)

Beyond its highly prejudicial nature, the prior act in *Harris* had no significant probative value either, according to the Court of Appeal. (60 Cal.App.4th at p. 741.) It had no bearing on the credibility of the victims at the underlying trial, and bore little similarity to the "breach of trust" sex crimes the defendant was charged with. In fact, noted the court, the prior offense was "totally dissimilar," and lacked "any meaningful similarity at all," to the charged crimes. (*Id.* at p. 740.) In sum, the *Harris* trial court abused its discretion in receiving the section 1108 evidence because it was "remote, inflammatory and nearly irrelevant and likely to confuse the jury and distract it from the consideration of the charged offenses." (*Id.* at p. 741.)

As with *Abilez*, *Harris* actually supports the trial court's action in the present case by setting a very high bar for trial court error. Unlike in *Harris*, there is no credible argument in this case that appellant's sexual molestation of two different 12-year-olds lacks "any meaning similarity" to his rape of an eight-year-old. As discussed, there is substantial and meaningful similarity between the crimes for purposes of demonstrating

appellant's deviant sexual attraction to young children and willingness to exploit vulnerable and isolated children to satisfy his urges. And, unlike the grossly prejudicial facts of the prior act at issue in *Harris*, the sexual touching of Nina S. and Curtis B. committed by appellant caused little if any prejudice when compared to his brutalization of Cannie. In this way the facts of *Harris* (prejudicial prior, more "routine" charged offenses) stand diametrically opposed to those in this case (more "routine" priors, extreme and grotesquely violent charged offense). A conclusion opposite to that reached in *Harris* follows accordingly.

The trial court did not abuse its discretion.

C. Any Error Was Harmless

Any error in admitting evidence of appellant's child molest offenses in the 1990's was harmless. In assessing the impact of erroneous admission of evidence under Evidence Code section 1108, the first issue is the applicable standard. Appellant contends that, whether the evidence was received under section 1101, subdivision (b), or under section 1108, his federal constitutional due process rights were violated and the harmless error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) should apply. (AOB 82, 86.) He is incorrect.

As a general matter, a defendant registering a trial objection pursuant to Evidence Code section 352 may make "a very narrow due process argument . . . that the asserted error . . . had the additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Here, however, appellant did not register a generic objection under Evidence Code section 352. Rather, he argued extensively and specifically that section 1108 propensity evidence should not be admitted in view of the factors to be considered under the attendant section 352 analysis. (Evid. Code, § 1108, subd. (a).) This Court has determined that Evidence Code section 1108 complies with constitutional due process

protections precisely because its mechanism includes a "careful weighing process" under Evidence Code section 352 as a condition precedent to admitting the propensity evidence. (*Falsetta*, *supra*, 21 Cal.4th at pp. 916-918, 920.)

Accordingly, constitutional due process is satisfied as long as the trial court actually conducts the "careful weighing process" prescribed by Evidence Code section 352, regardless of the outcome. (See *People v. Lewis*, *supra*, 46 Cal.4th at p. 1289 ["defendant [has] failed to convince us that section 352 is not an adequate safeguard against the admission of unduly prejudicial evidence"].) The record in this case demonstrates abundantly that the trial court conducted a careful weighing process under section 352 before admitting the evidence under section 1108. In so doing it carefully considered the factors set forth in *Falsetta*. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917.) A harmless error analysis is thus limited to a determination whether it is reasonably probable appellant would have obtained a more favorable result had that evidence not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see, e.g., *People v. Harris* (1998) 60 Cal.App.4th 727, 741 [applying *Watson* harmless error standard to Evidence Code section 1108 ruling]; accord *People v. Carter* (2005) 36 Cal.4th 1114, 1152 [error in failing to exclude evidence of uncharged misconduct does not require reversal "unless it is reasonably probable the outcome would have been more favorable to defendant had such evidence been excluded"]; *People v. Welch* (1999) 20 Cal.4th 701, 749-750 [*Watson* harmless error applies to decision to admit other crime evidence under Evidence Code section 1101]; *People v. Malone* (1988) 47 Cal.3d 1, 22 [same].) This conclusion is in keeping with the general rule that "[t]he 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1010, quoting *People v. Brown* (2003) 31 Cal.4th 518, 545.)

The section 1108 evidence related only to the special circumstance allegations, and thus would have had no impact on the underlying murder charge. (See 18 RT 4216 [instruction to jury on use of other crime evidence].) It is not reasonably probable that the jury would have delivered different findings on the special circumstance allegations had it not heard the Nina S. and Curtis B. evidence. Appellant's own argument is illuminating on this point—and ultimately self-defeating. He suggests that the section 1108 evidence "proved nothing about the propensity of appellant to commit a pre-planned violent rape and murder," and discusses how dissimilar the 1992 and 1997 offenses were to Cannie's rape and murder. (AOB 75, 74-75, 81, 85.) If this is so, then surely such insignificant evidence would not have tipped the scales of the trial against him. In any event, aside from the section 1108 evidence the proof of appellant's guilt was overwhelming, and based largely on empirical, unassailable, and redundant DNA identification evidence. The section 1108 information merely corroborated what the jury already knew about appellant based on what he did to Cannie; namely, that he is a child sex predator.

Any potential for undue prejudice was also dampened by the trial court's limiting instructions. (See *Falsetta*, *supra*, 21 Cal. 4th at p. 921; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) The jury was instructed that, even if believed, the other crime evidence is "simply one item for you to consider along with all other evidence in determining whether defendant's commission of the crimes referred to in the special circumstance allegations and the special circumstance allegations themselves have been proved beyond a reasonable doubt." (18 RT 4216-4217.) And, the trial court further instructed the jury that before the special circumstances could be considered, the jury must be persuaded beyond a reasonable doubt that appellant committed the murder itself. (18 RT 4217.)

Once the jury found appellant guilty of the murder, however, proof of the special circumstances would have been clear and compelling despite the other crime evidence. One need do no more than view a photo of the victim as she was found to know beyond a reasonable doubt that her killer also raped her. (See People's Exh. 30.) On appeal, appellate courts presume that jurors comprehended and followed the court's instructions, and considered the evidence for its limited evidentiary value alone. (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

D. Appellant Has Forfeited Any Claim of Error Related to Admission of Other Crime Evidence Under Evidence Code Section 1101, Subdivision (b)

Appellant argues in addition that "the trial court erred in using Evidence Code section 1101(b) as the means of admitting the 1992 and 1997 offenses . . . ." (AOB 86; see also AOB 82-86.) The trial court, however, expressly disclaimed reliance on that statutory provision in making its admissibility determination. Appellant did not press the trial court for a ruling, and is thus barred from now asserting error on appeal.

At trial, appellant opposed introduction of the evidence under section 1101, subdivision (b), as well as under section 1108. (8 RT 1822.) In finding appellant's other child sex crimes admissible, however, the trial court expressly relied upon Evidence Code section 1108 and expressly disclaimed reliance upon Evidence Code section 1101, subdivision (b). "I want to make clear," noted the court, "we were talking about 1108 . . . as opposed to 1101." (8 RT 1817-1818.) The trial court expressed some skepticism that the other crimes evidence would be admissible as proof of appellant's identity, pursuant to section 1101, subdivision (b), as the perpetrator. (8 RT 1818.)

The trial court further commented, however, that the evidence of other crimes "may also come in under 1101(b) insofar as [it] tend[s] to show

motivation, the sexual gratification component of lewd and lascivious conduct, for example . . . ." (8 RT 1818.) Specifically, "the evidence would probably come in under 1101(b) as well to show what I call motivation in this matter. . . . [O]ne of the things [the People] have to prove . . . is that what was done to the child was done for purposes of sexual gratification . . . ." (8 RT 1818.) It "seemed" to the trial court that the other crimes were sufficiently similar to the charged offense "to show intent or motive" within the meaning of section 1101, subdivision (b). (8 RT 1823.) To this end the trial court acknowledged "a very good point" by the People that evidence of motive would be particularly probative in response to any defense suggestion that Cannie's murderer may not have been the person whose semen was found in her body. (8 RT 1823.)

The trial court clarified, however, that it had not conducted a full section 1101, subdivision (b), analysis, and was not rendering a decision on that ground: Although "[t]here's probably not much of a debate about this in this particular case, . . . it may raise [Evidence Code] section 352 issues, which [are] no use in discussing . . . because of my ruling on 1108." (8 RT 1819; see also 1819 ["if we didn't have 1108 then we'd get in a full-blown extensive discussion about whether 352 considerations trumped any . . . 1101(b) considerations"], 1820 [trial court noting that applying section 352 to section 1101, subdivision (b), evidence is "all relatively moot in light of my . . . ruling with respect to 1108"], 1823 [trial court noting that a ruling under section 1101, subdivision (b), would necessitate "a real balancing thing . . . that is moot because of admission under 1108"].)

Appellant has forfeited his Evidence Code section 1101 claim on appeal because he did not insist that the trial court rule on that ground. "Failure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance. [Citation.]"

(*People v. Lewis* (2008) 43 Cal.4th 415, 481; see also *People v. Valdez* (2012) 55 Cal.4th 82, 143; *People v. Ramos* (1997) 15 Cal.4th 1133, 1171 [party seeking to preserve a claim for appeal must "secure an express ruling from the court"].)

E. Evidence of Appellant's Other Sex Crimes Would Have Been Properly Received Under Evidence Code Section 1101, Subdivision (b)

Finally, and alternatively, this Court is not precluded from assessing the admissibility of the other crimes evidence under the rubric of section 1101, subdivision (b), in view of the trial court's findings and reasoning on the section 1108 theory. An evidentiary ruling will be upheld by a reviewing court if it is correct on any theory, even one not relied upon by the trial court. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

In short, evidence of appellant's other crimes, demonstrating his sexual attraction to minors, was highly probative of his identity as Cannie's rapist and killer, as well as his intent and motive to sexually assault Cannie, and rebutted any suggestion that his sperm had been inadvertently transferred to Cannie's body by secondary contact. (See generally *People v. Foster* (2010) 50 Cal.4th 1301, 1329-1331 [discussing admissibility of evidence of prior conduct to prove defendant's intent and plan]; *People v. Kipp* (1998) 18 Cal.4th 349, 369-371 [discussing admissibility of prior sex crime evidence under section 1101, subdivision (b), to prove identity and intent].) Likewise, the Colorado crimes presented much milder and less inflammatory factual circumstances than did the charged capital crime, and thus carried no potential of undue prejudice or confusion for purposes of section 1101, subdivision (b). (See *People v. Kipp*, *supra*, 18 Cal.4th at p. 371; *People v. Foster*, *supra*, 50 Cal.4th at pp. 1331-1332.) The trial court's findings, including the similarity of the offenses and the absence of

prejudice, would have satisfied section 1101, subdivision (b), had that been the context for the discussion. No abuse of discretion would have resulted.

III. NONDISCLOSURE OF DNA LABORATORY CONTAMINATION EVENTS IN UNRELATED CASES DID NOT VIOLATE *BRADY V. MARYLAND* OR STATE DISCOVERY LAW

Appellant argues that the trial court erred in not compelling discovery of laboratory contamination records from unrelated casework performed by Forensic Science Associates (FSA), a private laboratory that conducted DNA testing at the prosecution's request. (AOB 86-119.) This alleged error, posits appellant, violated federal due process protections as set forth in *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), as well as state discovery law. (AOB 95-119.) His arguments lack merit. There is no indication that the records in question were favorable or material within the meaning of *Brady*, or that they were suppressed by the government. The trial court did not err in its ruling.

A. Factual Background

As discussed in the Statement of Facts (see pp. 12-13, *ante*), FSA analysts performed DNA testing on evidence swabs collected at Cannie's autopsy, as well as on a known reference samples for both Cannie and appellant. (16 RT 3765, 3772-3773.) FSA reported its results of analysis of the vaginal and rectal swabs in January 2003. (16 RT 3774.) Approximately a year and a half later, it conducted testing on appellant's reference sample for comparison purposes. (2 RT 359, 361-362; 16 RT 3774.) This temporal separation vitiated any concern about contaminating the evidence sample with the reference sample. (2 RT 363.) No contamination of DNA samples occurred in FSA's work in this case, and

appellant did not contest testimony from FSA employees on that point.[29] (7 RT 1581; 16 RT 3735.)

In addition, FSA maintained quality assurance procedures designed to detect contamination. They included running a "control blank" with each DNA sample extraction and amplification, and maintaining separate physical workspaces for examination, extraction, and amplification of biological evidence. (2 RT 343-344, 350; 7 RT 1575-1576, 1582-1583; 16 RT 3734-3735.)

Before trial, however, the defense sought discovery of "unintended DNA transfer" records from FSA—in other words, records of contamination in DNA casework unrelated to the instant case—and the corrective measures taken in response. (3 CT 760-787; 2 RT 219, 343.) The rationale provided to the trial court was that the presence of contamination in other cases could have affected the result in the present case even though no contamination was detected. (3 RT 729.) In other words, suggested appellant, the "history of contamination records" could reveal a "setup" conducive to reference samples and evidence samples from different cases contaminating each other. (3 RT 731.)

The trial court received pretrial testimony from an FSA analyst, Mr. Alan Keel, that preamplification contamination had never taken place at FSA. (7 RT 1538, 1599.) Dr. Edward Blake, the owner of FSA, testified

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[29] Nor does appellant claim on appeal that Penal Code section 1054, subdivision (f), compelled discovery of FSA contamination records. That provision provides for discovery of "[r]elevant written or recorded statements . . . including any reports or statements of experts made in conjunction with the case, including the results of . . . scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial." (Pen. Code, § 1054.1, subd. (f).) Appellant sought records created in *other cases* over a 20-year period, and thus not "made in conjunction with the case" as subdivision (f) requires.

that unintended transfer of DNA is "fairly rare" in the laboratory and, when it happens, is "only relevant to the investigation at hand." (2 RT 345-346.) Mr. Keel reiterated that unintended transfer in one case "has no bearing" on whether contamination occurred in a separate case. (7 RT 1599.) Dr. Blake stated that, in his 20 years of doing DNA analysis, he was unaware of any instance in which a laboratory reported DNA test results, after which a third party uncovered previously unidentified contamination that had escaped the laboratory's notice. (2 RT 359.)

FSA began performing DNA testing for clients in 1986. (2 RT 347.) The laboratory did not maintain a master log of contamination events. (2 RT 345.) Rather, it documented the presence of contamination, if any, in individual case reports. The laboratory facility includes an entire wall of five- to six-inch-thick binders, numbering 50 or more, containing its DNA casework history. (2 RT 221, 355, 357.) Culling out references to all contamination events would require case-by-case review of more than 1,000 reports going back 20 years. (2 RT 219-220, 236, 343-345, 347-349.) The task would take a knowledgeable person "many days, a week" to complete. (2 RT 350.) Out of all those reports, the owner of FSA estimated, "[m]aybe a dozen" involved an unintended DNA transfer event. (2 RT 357.)

The trial court made an initial finding that the requested material, given its mode of storage, was not reasonably accessible to the prosecution. (2 RT 224.) The trial court also observed that "the fact that there was contamination in other cases does not, without more, indicate that there would be contamination in this case." (2 RT 388.)

The People and FSA expressed related concerns that making the entire casework history of FSA available to the defense for inspection would implicate attorney-client privileges regarding FSA work done for the defense in other cases. (2 RT 220-221, 355-356.) Nonetheless, FSA

agreed that it would make its laboratory's entire casework history available to for inspection by the defense, if accompanied by the prosecutor and upon completion of a nondisclosure agreement. (2 RT 222.) The defense rejected that proposal. (2 RT 223.) FSA also agreed to make its files available for inspection by a court-appointed expert. (3 RT 547-548.) The defense participated in a discussion of that option, but did not pursue it. (3 RT 547-552.)

As a "backup" position, appellant requested unintended transfer records for a 60-day window around the three separate dates FSA performed testing in this case. (2 RT 385-386; 3 RT 521-522.) The People opposed that modified request on grounds that, even if contamination had occurred in other cases, such information would not be material within the meaning of *Brady*. (2 RT 396.) The trial court agreed:

> At this juncture, . . . I don't think sufficient showing has been made to show that these records contain exculpatory—potentially exculpatory information in this case. I am not going to order that the records themselves be produced, or that the People undertake an analysis of all of them, or that the defense be given access to them at this juncture without more. It is without prejudice, however, to a more specific showing as to materiality and/or—materiality of these records, or put another way, a more specific showing that creates a more plausible scenario of how these things could possibly produce—these reports could possibly produce exculpatory or potentially exculpatory information. So I leave it open to you to renew the request based on a more specific showing that could be made by way of—at least initially—by way of declaration or affidavit from your experts, or you, spelling out more clearly what kinds of things there could be in there and how they might—how they might constitute exculpatory or potentially exculpatory information in a concrete reality of this case.

(2 RT 396-397; see also 2 RT 229 [trial court characterizing the defense request as a "pure fishing expedition" because there was no basis for a belief that exculpatory material could or would be located in the unrelated

case files maintained by FSA], 399-400.) Moreover, stated the trial court, nothing in Penal Code section 1054.1 required disclosure of contamination records from a laboratory's unrelated case files. (3 RT 527-528.) Accordingly, the court denied the defense request to compel discovery. (2 RT 399.)

The trial court subsequently expanded upon its reasoning. The court found that the District Attorney had no authority to require a private laboratory to produce for inspection case files generated in work for other public and private clients, at least without the consent of the parties who commissioned those analyses, and potentially the consent of the subjects of those analyses. (4 RT 972-973.) The trial court also cited the "considerable" cost and labor involved in conducting the case file review. (4 RT 973.) The trial court concluded that FSA was not part of the "prosecutorial team" with respect to work it did for other clients, and that the files were not in the possession of, or readily accessible to, the District Attorney. (4 RT 973, 974.) The court denied appellant's discovery motion without prejudice, but suggested that the defense issue a subpoena duces tecum directly to FSA for the files in question. (4 RT 973-974.)

The defense elected not to seek FSA records by subpoena. It had the demonstrated ability to do so, however, having issued a subpoena duces tecum to a different company, Applied Biosystems, seeking data generated during its developmental validation of the Identifiler DNA testing kit. (5 RT 1101, 1103.) The trial court denied Applied Biosystems's motion to quash and required that it make the requested records available for inspection by the defense. (6 RT 1353.)

B. Federal and State Law Underlying Disclosure of Exculpatory Material

1. General principles

The trial court's denial of appellant's motion to compel discovery of unrelated FSA casework did not violate due process protections as set forth in *Brady*, *supra*, 373 U.S. 83, and did not infringe upon of statutory discovery rights codified in Penal Code section 1054.1.

To satisfy *Brady*, the prosecution in a criminal case must disclose exculpatory evidence favorable to the accused and material to either guilt or punishment. (*Brady*, *supra*, 373 U.S. at p. 87; see *People v. Salazar* (2005) 35 Cal.4th 1031, 1042.) This includes impeachment evidence. (*United States v. Bagley* (1985) 473 U.S. 667, 676.) The materiality factor is a significant limitation on the scope of the *Brady* obligation: "[T]he prosecutor will not have violated his constitutional duty of disclosure unless his [or her] omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108, disapproved on another ground in *United States v. Bagley*, *supra*, 473 U.S. at pp. 676-683.) Thus,

> strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

(*Strickler v. Greene* (1999) 527 U.S. 263, 281-282, fn. omitted; see also *United States v. Bagley*, *supra*, 473 U.S. at p. 678 [holding that, with either exculpatory or impeachment evidence that is suppressed by the People, "a constitutional error occurs, and the conviction must be reversed, only if the

evidence is material in the sense that its suppression undermines confidence in the outcome of the trial"]; accord *People v. Salazar*, *supra*, 35 Cal.4th at pp. 1042-1043 [describing *Brady* and its application].)

Outside of the limited disclosures required by the Due Process Clause as interpreted in *Brady*, the United States Constitution does not provide for substantive discovery in criminal matters. (*Gray v. Netherland* (1996) 518 U.S. 152, 168; *Weatherford v. Bursey* (1977) 429 U.S. 545, 559 ["There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"].)

State law, in turn, sets forth a detailed procedure for exchange of pretrial discovery. Penal Code section 1054.1 specifies items the prosecution must disclose to the defense, including "[a]ny exculpatory evidence." (Pen. Code, § 1054.1, subd. (e).) This mandate does not expand the prosecution's discovery obligations beyond what is required by federal due process. Specifically, this Court has "found 'no reason to assume the [pretrial discovery language of Penal Code section 1054.1] assigns the prosecutor a broader duty to discover and disclose evidence in the hands of other agencies than do *Brady* and its progeny.' [Citation.]." (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 905, bracketed text in original.) In fact, section 1054.1 is likely narrower than its federal constitutional counterpart: "[T]here is reason to think the electorate intended to use the term "exculpatory evidence" in its narrow sense and thus did not intend section 1054.1(e) to require the disclosure of impeachment evidence." (*Kennedy v. Superior Court* 2006) 145 Cal.App.4th 359, 377.)

2. Standards of review

This Court will "independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence. [Citation.]" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.) On appeal, the defendant

bears the burden of establishing all elements of a *Brady* violation. (*Strickler v. Greene*, *supra*, 527 U.S. at pp. 289, 291.)

For state law purposes, trial court rulings "on matters regarding discovery" are generally reviewed "under an abuse of discretion standard." (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Further, "'[t]he burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

C. The FSA Files Were Not Favorable to Appellant

"The first element of a *Brady* claim is that the evidence be favorable to the accused." (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1047.) "Evidence is 'favorable' if it hurts the prosecution or helps the defense." (*People v. Earp* (1999) 20 Cal.4th 826, 866; *In re Sassounian* (1995) 9 Cal.4th 535, 544.) The impeachment aspect of favorable evidence means that it could undermine a prosecution witness's credibility. (*People v. Webb* (1993) 6 Cal.4th 494, 518.) Appellant has not met the burden established by these authorities. Even if FSA's entire history of DNA casework files were considered readily accessible prosecution team documents, appellant has failed to demonstrate that they would have been exculpatory or impeaching.

As a threshold matter, nothing in the record indicates that any reported contamination took place in FSA casework occurring 60 days before or after the testing conducted here. Mr. Keel of FSA testified, in fact, that he knew of no such instances. (7 RT 1598.) This was in addition to testimony that unintended transfer was "rare," and had taken place perhaps 12 times in over a thousand cases at FSA. (2 RT 345, 357.) There can be no actionable discovery claim, whether pursuant to *Brady* or state

statutory authority, without a preliminary showing of a reasonable basis for believing the records even exist.

Even assuming the existence of contamination records in the relevant time frame, the general fact that contamination occurred on several instances over a two-decade period would have been, at best, a neutral factor to appellant's trial defense. From appellant's perspective such evidence could even be counterproductive—demonstrating the high standards of quality control exercised by FSA in view of the relatively few instances of transfer. A criminal defendant is "clearly" not entitled to discovery of neutral or unfavorable materials, "even under the broadest reading of section 1054.1(e) and *Brady* . . . ." (*Kennedy v. Superior Court, supra*, 145 Cal.App.4th at p. 371.)

Several other factors amply demonstrate that FSA contamination records would have been neither exculpatory nor useful for impeachment. First, uncontroverted evidence showed that autopsy swabs tested in the present case were not contaminated, and could not have been erroneously contaminated, with appellant's known DNA sample. The trial court heard testimony from both Dr. Blake and Mr. Keel that no contamination occurred during the testing in this case, and that robust quality control procedures were in place during the testing to detect unintended transfer were it to occur. (16 RT 3628-3629, 3733-3743, 3769-3769.) FSA witness testimony further established that FSA did not test appellant's known DNA sample for comparison purposes for over a year after the lab completed testing of the autopsy swabs. (16 RT 3774.) Moreover, testimony established that FSA performed testing on sperm cells that had been visually identified in the laboratory. (16 RT 3744-3749, 3753-3754.) Appellant's known reference sample consisted of his blood, not his sperm. (16 RT 3576.) Thus, DNA from appellant's reference sample could not have inadvertently infected the crime scene evidence; his DNA was present

at the crime scene because he committed the crime. Knowing how and why unintended transfer occurred in other cases would not have changed the fact that it simply, physically, and empirically did not happen here.

Second, four separate laboratories performed multiple rounds of DNA testing on multiple evidence items in this case over a span of eight years—from 1996 to 2004—including testing by an expert hired by the defense. (17 RT 3930.) The testing in some instances took place in laboratories thousands of miles apart, and utilized different test kits. Even within FSA, separate DNA testing was performed on a vaginal swab and a rectal swab, and different testing kits were used, including Identifiler, Profiler Plus, COFiler, DQ-Alpha, and Polymarker. (7 RT 1542-1543.) The results, however, uniformly indicated a match between appellant's DNA and the sperm deposited in Cannie's body. There is no plausible argument that contamination records involving unrelated casework performed in one of the several laboratories involved in this case would somehow have undermined or contradicted this cumulative and consistent body of proof.

Third, FSA witnesses testified that the autopsy swabs they tested contained a high volume of sperm cells, indicative of direct ejaculate from Cannie's rapist rather than secondary transfer through contact with a preexisting stain. (16 RT 3754 [a "[v]ery large amount" of sperm were present on the swabs], 3785 ["the fact of the matter is that the sperm levels are objectively very large, and that's the kind of result that you expect from a short post-coital interval"].) The presence of so much sperm independently defeats any supposition by appellant that the DNA present on the autopsy swabs could have been inadvertently contaminated—without detection by the control blanks during the extraction and amplification stages—by microscopic DNA transfer from another source within the laboratory.

Appellant's argument to the contrary, that FSA records would have been favorable, is without merit. He suggests that the evidence "was exculpatory to the extent that it might have revealed" laboratory errors in the unspecified past. (AOB 97.) This is pure speculation, however, and thus an inadequate basis for a claimed *Brady* violation because "'*Brady* . . . does not require the disclosure of information that is of mere speculative value' [Citation.]" (*People v. Williams* (2013) 58 Cal.4th 197, 259.)

Also grounded in unmitigated speculation is appellant's argument that FSA contamination records would have impacted the trial court's prong three hearing pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), to determine whether FSA followed correct scientific procedures in conducting testing with the Identifiler DNA test kit. (AOB 112.) There is no indication that any FSA contamination event even involved the Identifiler kit.

In sum, appellant has not carried his burden of demonstrating that the FSA files contained exculpatory or impeaching information.

D. The FSA Files Were Not Suppressed

"The second element of a *Brady* claim is that the evidence must have been 'suppressed' by the government." (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1048, citing *Strickler v. Greene*, *supra*, 527 U.S. at p. 282.) In this case, nothing was suppressed because the bulk of FSA's files were not in the possession of the prosecution team, and because the sought-after materials were equally available to the defense through alternative means. The trial court's findings on these points were correct, and appellant's argument to the contrary (AOB 98-100) is incorrect.

1. The FSA records were not possessed by, or readily available to, the prosecution

Generally speaking, the prosecution's duty to acquire exculpatory and impeachment evidence for disclosure to the defense is limited to materials

possessed by the "prosecution team;" i.e., those individuals and agencies who have participated in the case investigation or prosecution. (*Barnett v. Superior Court*, *supra*, 50 Cal.4th at pp. 904, 905; *In re Brown* (1998) 17 Cal.4th 873, 879–880; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 437 ["the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case"].) Ordinarily, a laboratory that performs scientific work for the prosecution is considered part of the prosecution team. (*In re Brown*, *supra*, 17 Cal.4th at p. 880.) Likewise, section 1054.1 limits the production of exculpatory evidence to "materials and information . . . in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies . . . ." (See *In re Littlefield* (1993) 5 Cal.4th 122, 135 ["California courts long have interpreted the prosecutorial obligation to disclose relevant materials in the possession of the prosecution to include information 'within the possession or control' of the prosecution"].)

State and federal law further define possession and control of information for discovery purposes, limiting those concepts to material "reasonably accessible" to the prosecution. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535; *In re Littlefield*, *supra*, 5 Cal.4th at p. 135 [also approving use of the phrase, "'readily available'"]; *People v. Memro* (1985) 38 Cal.3d 658, 677, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) Consequently, "the prosecution has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (*In re Littlefield*, *supra*, 5 Cal.4th at p. 135, italics in original; *People v. Morrison* (2004) 34 Cal.4th 698, 715 [even under the auspices of *Brady*, the prosecution has "no constitutional duty to conduct defendant's investigation for him"].)

FSA's status as a member of the prosecution team does not end the analysis here, however. Sometimes, an entity exists as both a member of the prosecution team and as a third party, a distinction informed by the nature of the information sought from that entity. In *People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, for example, the Imperial County District Attorney prosecuted the defendant for murdering his cellmate at Calipatria State Prison. (*Id.* at p. 1309.) The California Department of Corrections (CDC)[30] was "clearly . . . an investigatory agency in the case and part of the investigative team." (*Id.* at p. 1317.) Simultaneously, though, CDC maintained its status as an independent third party responsible for running the state prison system in all its aspects, and in this sense was not a part of the prosecution team. "Thus," resolved the court, "for our purposes, CDC has a hybrid status: part investigatory agency, and part third party." (*Ibid.*)

In *Barrett*, the related discovery issue arose when the defendant sought disclosure, under Penal Code section 1054.1, not only of CDC materials related to the murder investigation but also of materials maintained by CDC not specifically prepared or gathered in response to the homicide. (*Barrett*, *supra*, 80 Cal.App.4th at p. 1318.) These documents included administrative segregation unit incident logs from the four years preceding the killing, records of "assaults, weapons or weapon stock, and acts of violence between prison inmates and between inmates and guards" for four years preceding the killing, prison policy and procedure manuals, historical inmate statistics, and records involving unrelated "cell extractions, yard incidents and staff assaults . . . ." (*Id.* at pp. 1309-1310.) The Court of Appeal held that such material did not fall under the auspices of Penal Code section 1054.1: "Barrett cannot rely on the provisions of

[30] Now the California Department of Corrections and Rehabilitation.

[Penal Code] chapter 10 for discovery of materials from CDC that are strictly related to its operation of Calipatria State Prison, that is, materials CDC generated when it was not acting as part of the prosecution team. To the extent Barrett is seeking records that CDC maintains in the regular course of running Calipatria State Prison, Barrett is trying to obtain material from a third party." (*Id.* at p. 1318.)

So too has this Court recognized that a government agency or other entity may play a hybrid role as third party and member of the prosecution team; for example, a defendant seeking police department personnel file information by way of a "*Pitchess* motion"[31] is engaged in "essentially a third party discovery proceeding." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.) "'Thus, information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material." (*In re Steele* (2004) 32 Cal.4th 682, 697, quoting *Barrett, supra*, 80 Cal.App.4th at p. 1315.) Therefore, the "prosecution team" is defined by what it possesses, and an entity can maintain distinct classifications as prosecution team member and third party depending upon what materials are being sought as discovery. Information generated by an entity when it was not "acting on the government's behalf in the case" is possessed by a third party distinct from the prosecution team. (Accord *Kyles v. Whitley, supra*, 514 U.S. at p. 437; *Barnett v. Superior Court, supra*, 50 Cal.4th at p. 903; *In re Brown, supra*, 17 Cal.4th at pp. 879, 881.)

The trial court here correctly found that "Forensic Science Associates is part of the prosecution team, but only insofar and to the extent that it has done work in the instant case on behalf of the District Attorney's Office."

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[31] In reference to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

(4 RT 972.) There is no dispute that the FSA contamination records requested by appellant were unrelated to the testing performed by FSA in this case. Those records, therefore, were not possessed by the prosecution team and were instead under the exclusive control of FSA as a third party. Neither due process considerations nor statutory discovery rights required the prosecution to search for, collect, and disclose them. This is precisely analogous to CDC records unrelated to the investigation of the prison murder in *Barrett, supra*. Nothing was suppressed.

Alternatively, FSA contamination records were not readily available to the prosecution in a practical sense and thus not subject to disclosure, as the trial court found. They were contained within separate casework files representing months, if not years, of FSA DNA testing. Much of FSA's work during those times was likely performed on behalf of criminal defendants and thus protected by attorney work product, attorney-client, and Fifth Amendment self incrimination privileges. (2 RT 356; 16 RT 3763 [owner of FSA testifying that, at the time of trial, "the majority of the work that I do is for defense attorneys"]; see *People v. Combs* (2004) 34 Cal.4th 821, 864 [noting potential existence of various privileges attached to participation of expert witness in defense case].) The practical and legal obstacles to having the prosecution review months or even years of potentially privileged casework files generated by a private laboratory dictates that such drastic action was not required in this case. "When deciding the scope of the prosecution's duty to search files unrelated to the case, the courts consider such factors as whether a request has been made by the defense; the prosecution's ease of access to the information; and the likelihood of evidence favorable to the defense." (*J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1336, fn. 6.)

Finally, appellant's argument that FSA's maintenance of contamination records in individual case reports rather than a

"compendium" should not be a factor in determining the accessibility of those documents (AOB 113-114) is meaningless. The documents exist, and are maintained in a particular manner. That was the state of affairs presented for the trial court's consideration. In any case, appellant's related attempt to advance his argument by pointing to Dr. Blake's choice not to seek formal accreditation for his laboratory—a matter explained in detail by FSA employee Keel from the witness stand (7 RT 1567-1569)—rings hollow. Mr. Keel described how FSA's technical procedures conform to generally accepted methods, and are every bit as rigorous as procedures mandated by accrediting bodies. (7 RT 1596-1597.)

2. Appellant did not demonstrate that FSA records were otherwise unavailable to the defense

Alternatively, no suppression of evidence by the prosecution occurred because the materials were equally available to appellant. In California, a defendant's statutory right to receive exculpatory evidence extends only to that evidence both readily available to the prosecution and, significantly, not otherwise accessible to the defense. (*In re Littlefield*, *supra*, 5 Cal.4th at p. 135, citing *People v. Coyer* (1983) 142 Cal.App.3d 839, 843; see also *In re Pratt* (1999) 69 Cal.App.4th 1294, 1317.) Similarly, *Brady* error premised on suppressed evidence exists only with respect to "information which had been known to the prosecution but unknown to the defense." (*United States v. Agurs*, *supra*, 427 U.S. at p. 103.) This Court explained: "If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence." (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1049; see also *People v. Morrison*, *supra*, 34 Cal.4th at p. 715; compare *Strickler v. Greene*, *supra*, 527 U.S. at p.

283, fn. 23 [prosecution's "open file" policy may satisfy *Brady* obligation].)

Here, not only was appellant aware of the potential existence of the documents he sought, but he rejected or ignored several procedural alternatives available to him for obtaining the documents. He declined an offer from FSA to permit joint inspection of its files subject to a nondisclosure agreement, and failed to pursue the option of having a special master appointed by the trial court inspect the files. (2 RT 222, 223; 3 RT 547-548.) Appellant also chose not to pursue the documents by subpoena duces tecum despite the trial court's encouragement: "[I]f you want to seek these other files, unrelated to this case, you subpoena them from FSA." (4 RT 973-974.) This was a sound suggestion.

While California's statutory discovery procedures do not permit the defense to obtain material from third parties as discovery from the prosecution under Penal Code section 1054.1, a separate statutory mechanism permits parties to issue subpoenas duces tecum (SDT) to third parties in order to obtain desired information. (Pen. Code, §§ 1326, 1327; *Kling v. Superior Court* (2010) 50 Cal.4th 1068, 1074-1075, 1077 [describing criminal SDT procedure and requisite showing of good cause as alternative for obtaining third party records unavailable through Penal Code section 1054, et seq.].) Appellant could have issued an SDT directly to FSA. In fact, appellant's success in obtaining company records by subpoena from Applied Biosystems demonstrated that he understood the efficacy of proceeding in this manner.

A valid SDT must be accompanied by a showing of good cause, and must describe how the requested items are material to the case. (Civ. Code, § 1985, subd. (b).) Certainly this process would have been no more onerous than appellant's lengthy trial court effort to acquire the information by way of *Brady* or Penal Code section 1054.1, and it would have been the

procedurally appropriate vehicle for obtaining evidence from FSA as a third party. Conversely, a failed showing of good cause and materiality in support of an SDT would have indicated the analogous shortcoming in a *Brady* claim for the same material. Appellant's voluntary decision to forgo issuance of an SDT as a means of discovery cannot be viewed as a showing that the records were unavailable to him as a matter of law, or as a practical matter.

E. The FSA Files Were Not Material

"The third element of a *Brady* claim is that the suppressed evidence be material, 'for not every nondisclosure of favorable evidence denies due process.' [Citation.]" (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1049.) Evidence is material where there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley*, *supra*, 473 U.S. at p. 682.) Accordingly, a *Brady* violation occurs where the suppressed favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 435, fn. omitted.) Materiality must also be shown as a condition precedent to finding a violation of Penal Code section 1054.1, subdivision (e): "To prevail on a claim the prosecution violated this duty [to disclose "any exculpatory evidence" pursuant to Penal Code section 1054.1, subdivision (e)], defendants challenging a conviction would have to show materiality . . . ." (*Barnett v. Superior Court*, *supra*, 50 Cal.4th at p. 901.)

Appellant has not shown that the FSA files contained material information. There is no reasonable probability that information about the circumstances surrounding a handful of contamination events in 20 years of unrelated FSA casework would have resulted in a more favorable trial

outcome for appellant. (Cf. *Cooper v. State* (Tex.Ct.App. 2012) 373 S.W.3d 821, 830-831 [no *Brady* error where "several documented instances of contamination" in DNA analyst's work in other cases not disclosed to defense because no reasonable probability of more favorable trial outcome for defendant].)

As discussed, the DNA evidence implicating appellant was performed by multiple labs utilizing a variety of test kits over the course of eight years, with all results consistent with and corroborative of each other. It included DNA testing by an independent expert retained by appellant. (17 RT 3930, 3945-3946.) The FSA test results were thus not the exclusive DNA-based evidence of appellant's guilt, belying the materiality of FSA contamination records. (See *People v. Salazar*, *supra*, 35 Cal.4th at p. 1050 [generally, evidence is material if it is the only source of proof linking the defendant to the crime, and not material if it is corroborated by other evidence]; see also *In re Sassounian*, *supra*, 9 Cal.4th at p. 544 [the probability of a different result is "assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract"].) As the National Research Council noted in its seminal work on forensic DNA, "No amount of care and proficiency-testing can eliminate the possibility of error. However, duplicate tests, performed as independently as possible, can reduce the risk of error enormously." (Nat. Research Council, The Evaluation of Forensic DNA Evidence (1996) p. 88.)[32]

In addition to corroborating the validity of FSA test results, the redundancy of DNA evidence in this case supplied independent proof of

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[32] The Court has relied on this publication extensively. (See, e.g., *People v. Wilson* (2006) 38 Cal.4th 1237, 1243, fn. 1 [observing that "[w]e have treated that report as authoritative," and citing cases].)

appellant's identity as Cannie's rapist and killer. For example, FSA had no involvement in the initial database hit that identified appellant, out of all the offenders being searched in the National DNA Index System, as a suspect. The jury had compelling evidence that this match was no coincidence not only because of the genetic identification, but because by his own admission appellant—out of all offenders in the national search—actually knew Cannie and her mother in 1979, had been in the victim's house, and had a sexual encounter with her mother prior to the murder. He also had a propensity for sexually assaulting children, and fled the country shortly after the murder. Appellant was identified as the perpetrator, moreover, by independent DNA testing performed by the Contra Costa County laboratory after the cold hit.

Also as noted previously, this was not a case in which contamination would have been a viable or helpful issue for the defense to exploit. Mr. Keel of FSA testified that the evidentiary samples in this case exhibited "an overwhelming number of sperm" available for analysis. (7 RT 1593.) He characterized the sperm cell DNA as "high, robust data." (7 RT 1694.) He described rigorous quality controls designed to detect contamination and otherwise ensure the validity and reliability of results. (16 RT 3733-3743, 3769-3769.) There is no reasonable probability that contamination in unrelated FSA cases would have impeached the validity of the typing results achieved on the swabs from Cannie's autopsy, let alone a reasonable probability that the files would have facilitated a defense that resulted in a different verdict at the guilt or penalty stages.

In short, the proof of appellant's culpability would have been just as stark and compelling had FSA not participated in the case investigation at all, or if the jury had learned of isolated contamination incidents in unrelated FSA casework. There was no *Brady* violation, and the trial court

did not abuse its discretion in denying appellant's motion for discovery brought pursuant to Penal Code section 1054.1, subdivision (e).

IV. DR. WORD'S TESTIMONY DID NOT VIOLATE THE CONFRONTATION CLAUSE

Appellant argues that testimony from Dr. Charlotte Word of Cellmark Laboratory, in which she described DNA testing performed by a former colleague, violated his Sixth Amendment confrontation right. (AOB 120-126.) The argument lacks merit because Dr. Word provided independent expert opinions about the DNA testing conducted at Cellmark. As such Dr. Word was the "witness against" appellant within the meaning of the Sixth Amendment to the United States Constitution, and appellant had a full and fair opportunity to engage her in cross-examination. The analytical data and chain of custody information from the laboratory's file, relied upon by Dr. Word in forming her opinions, were not testimonial statements in view of recent decisional authority from this Court as well as the United States Supreme Court. In any event, given her role as the original reviewer of, and signatory to, the laboratory report, Dr. Word's testimony permissibly drew upon her own percipient experience and opinions rendered in the laboratory setting.

A. Factual Background

Dr. Charlotte Word testified for the prosecution as an expert in DNA analysis. (15 RT 3419, 3425.) In 1996 she worked as a senior manager for Cellmark Diagnostics Laboratory in Maryland. (15 RT 3420.) She described her position as being "one of the Ph.D.-level scientists who were responsible for reviewing the work that the analysts did in the laboratory and reviewing the results that they obtained, cosigning the reports that they generated stating the results and conclusions of the testing that was done in the laboratory." (15 RT 3420.) Dr. Word also helped develop Cellmark's laboratory procedures, and had served on a national DNA policy committee

formed by then United States Attorney General Janet Reno. (15 RT 3422, 3424.) She had testified as a DNA expert over 200 times, in California and other states. (15 RT 3425.)

In her capacity at Cellmark, Dr. Word reviewed the DNA casework conducted by her Cellmark colleague Paula Yates related to this case, and "cosigned the reports that outlined the results and conclusions that we obtained." (3d Supp. CT vol. 1, pp. 42-43; 15 RT 3393, 3426-3427, 3430, 3456.) At the time of trial, Ms. Yates was in Baghdad, Iraq. (15 RT 3431.) Dr. Word had worked "very closely" with Ms. Yates for 15 years and had reviewed "many, many, many of her cases . . . ." (15 RT 3420-3431.) Dr. Word described the chain of custody notations appearing in Cellmark's records for the physical evidence processed in this case. (15 RT 3430-3436, 3440-3441.) She explained that the Cellmark case file included "notes and documentation" of the testing in addition to the reports. (15 RT 3393.) Dr. Word had personally reviewed the file at the time of testing "in order to sign off on it." (15 RT 3393.)

Dr. Word testified that Cellmark performed RFLP as well as DQ-Alpha and Polymarker PCR analysis in this case on vaginal swabs from the autopsy. (15 RT 3439.) She described the laboratory's DNA testing procedures and protocols in detail. (15 RT 3394-3396, 3440-3443, 3448-3449, 3457, 3463-3464.) Cellmark followed methods generally accepted by the scientific community in conducting the tests. (15 RT 3394-3396, 3399-3401.) The PCR testing process for the kits then in use involved applying amplified DNA "onto a series of test strips" and then exposing the strips to "a series of chemical reactions" that may result in a color-based visual indication of DNA types. (15 RT 3448-3449.)

Dr. Word noted that the testing process generated data that were visually analyzed, recorded, and photographed "as a permanent record of those results." (15 RT 3449.) Those data could then be interpreted to

determine "whether a known individual's excluded or included as a possible source." (15 RT 3449.) Dr. Word described how she conducted an independent review of the data obtained in this case, based on photographs of the raw data and inspection of the analyst's handwritten notes:

> When we have analysts reading the results, they're on wet strips, and they need to be reviewed immediately because the color intensity can fade with time such as with exposure to light.
>
> So we have two analysts record the result. If they're very faint, we require a third person to record the result. And we also took Polaroid pictures, color pictures, of those dots.
>
> So in my review, I have the Polaroid picture taken as soon as the strips were developed, and then I also had the notes recording the types that the two analysts saw.
>
> THE COURT: So you'd be able to check whether two analysts looked at it, and you'd be able to check the photographs of the strips?
>
> THE WITNESS: That's correct.
>
> And in all situations, a handwritten result would correspond to the photographic result with the exception of the really, really faint dots that we kind of maybe had to look at it at the right angle, and those were dots that wouldn't be interpreted anyway.
>
> So all the interpretable data would be there in a photograph with the corresponding, supporting documentation for all the types that are reported and interpreted.
>
> [DEFENSE COUNSEL]:
>
> Q. So what you did, as I understand it, you looked at that test strips and verified the results that the operator came up with?
>
> A. That's correct.

(15 RT 3398-3399; see also 15 RT 3401 [Dr. Word confirming that she conducted "independent review of the photographic results"].)

In the course of her testimony, Dr. Word referred to the raw data and images generated in her laboratory. (15 RT 3444-3445, 3463-3467.) She authenticated the laboratory reports as business records. (15 RT 3428-3429; see Evid. Code, § 1271.)

Dr. Word relayed the resulting DNA profiles of the sperm and nonsperm fractions from the deep vaginal swab, based on the DQ-Alpha and Polymarker tests performed. (15 RT 3449-3550.) She opined that, because those profiles differed, the sperm and nonsperm components originated from different people. (15 RT 3450.) Only those two DNA profiles were present on the vaginal swabs, each clearly attributable to one person. (15 RT 3470.)

Ms. Yates also conducted DNA analysis of bone fragments from William Flores's exhumed body using the same testing technology. (15 RT 3451, 3452.) Dr. Word referred to Ms. Yates's notes in describing the testing process. (15 RT 3451-3452.) Dr. Word conveyed the observable alleles for the Flores sample, and then rendered an opinion based upon those data:

> Q. And what is the significance of that?
>
> A. It means that the person who this jawbone belonged to could not be the source of either the nonsperm cell fraction DNA or the sperm fraction DNA from the vaginal swabs.

(15 RT 3453.)

Cellmark's laboratory reports were neither marked as exhibits nor offered as evidence at trial.[33] While there was no mention of the summary report itself during Dr. Word's direct examination, defense counsel made

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[33] In one of his in limine motions, however, appellant attached a copy of Cellmark's 1996 report summarizing the DNA test results for the vaginal swabs. It is therefore part of the record before this Court. (3d Supp. CT vol. 1, pp. 42-43.)

specific reference to it on cross-examination and asked the witness to explain certain notations. (15 RT 3462.)

B. Appellant Has Forfeited His Claim

Appellant has forfeited his confrontation clause claim. He did not object to Dr. Word's testimony as it related to work performed by Ms. Yates at Cellmark.

A defendant may not complain for the first time on appeal that the admission of evidence violated the right to confrontation, or any other right under the federal Constitution. (Evid. Code, § 353; *People v. Boyette* (2002) 29 Cal.4th 381, 424 [due process, reliable penalty determination, and cruel and unusual punishment]; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [confrontation]; *People v. Zapien* (1993) 4 Cal.4th 929, 979-980 [confrontation]; *People v. Raley* (1992) 2 Cal.4th 870, 892 [confrontation and due process].)

Appellant was not, moreover, handicapped by an unforeseen change in Sixth Amendment law, as were the defendants in *People v. Pearson* (2013) 56 Cal.4th 393, 461-462 and *People v. Edwards* (2013) 57 Cal.4th 658, 704-705. Several years before Dr. Word's 2007 trial testimony (15 RT 3387), the United States Supreme Court decided *Crawford v. Washington* (2004) 541 U.S. 36, which reformulated the rules governing admissibility of statements from witnesses unavailable at trial. (*Id.* at pp. 59-60.) He was therefore on notice that "admission of testimonial statements of a witness who was not subject to cross-examination at trial violates a defendant's Sixth Amendment right of confrontation, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination." (*People v. Edwards*, *supra*, 57 Cal.4th at p. 705 [summarizing holding of *Crawford v. Washington*, *supra*, 541 U.S. at pages 59-60].) At the time of trial numerous published appellate decisions existed that would have informed a confrontation clause objection, as the Court

pointed out in *People v. Geier* (2007) 41 Cal.4th 555, 598-599 [citing cases from 2004 to 2006].) The fact that additional authority on the subject would be forthcoming from this Court and the United States Supreme Court does not mitigate appellant's obligation to object in 2007; the very existence of the questions subsequently addressed indicates that the applicability of the confrontation clause to expert witness testimony was a contentious subject at the time of trial. Appellant has no excuse now for not asserting the constitutional objection then.

C. No Violation of the Confrontation Clause Occurred

Even if considered on its merits, appellant's argument fails. No violation of appellant's Sixth Amendment confrontation right occurred in the course of Dr. Word's testimony.

1. Applicable law

The Sixth Amendment of the United States Constitution provides in part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." In *Crawford v. Washington*, *supra*, 541 U.S. 36, the United States Supreme Court abandoned prior law basing the right—or lack thereof—to confront an unavailable witness on the reliability of the statements at issue, and imposed a new standard tethering the right to confront witnesses to whether their out-of-court statements are "testimonial." (*Id.* at p. 68.) In three subsequent decisions the Supreme Court sought to clarify the application of *Crawford*'s confrontation clause jurisprudence to forensic science evidence and expert testimony. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705]; *Williams v. Illinois* (2012) 567 U.S. __, __ [132 S.Ct. 2221] (*Williams*).)

The most recent United States Supreme Court decision, *Williams*, also involved DNA testing performed by Cellmark Laboratory, occurring four

years after the testing at issue here. (*Williams*, *supra*, 132 S.Ct. at pp. 2228-2229.) And, as here, Cellmark's analysis took place before the crime was eventually solved with a DNA database "cold hit." (*Id.* at p. 2229.) But *Williams* presented an even closer question because in *Williams* no Cellmark employee even appeared at trial. Instead, a forensic DNA expert from the Illinois State Police laboratory relied on a DNA profile generated by Cellmark's examination of evidence in rendering her courtroom opinions about a DNA match. (*Id.* at p. 2230.) Nonetheless, five justices—a four-justice plurality and Justice Thomas concurring—concluded that admission of the expert witness's testimony did not violate the defendant's confrontation clause protections. (*Id.* at pp. 2228 (plur. opn. of Alito, J.), 2255 (conc. opn. of Thomas, J.).)

The plurality opined that "even if the report produced by Cellmark had been admitted as evidence, there would have been no Confrontation Clause violation." (*Williams*, *supra*, 132 S.Ct. at p. 2228.) Several reasons were cited: (1) "The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach," (2) "[t]he report was produced before any suspect was identified[]," (3) the report "was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose," and (4) the profile that Cellmark provided "was not inherently inculpatory." (*Ibid.*) In his concurring opinion, representing a fifth vote as to the result, Justice Thomas agreed that the Cellmark report was not testimonial "solely because Cellmark's statements lacked the requisite formality and solemnity to be considered testimonial for purposes of the Confrontation Clause." (*Id.* at p. 2255.)

Beyond its bottom-line holding that the contents of DNA testing reports are not necessarily testimonial statements within the meaning of *Crawford v. Washington, supra*, 541 U.S. 36, *Williams* presented a fractured amalgam of rationales which this Court subsequently interpreted in *People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*) and *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*).

In *Lopez*, the defendant was tried on charges of vehicular manslaughter. (55 Cal.4th at p. 573.) At trial, a criminalist with the San Diego County Sheriff's Crime Laboratory testified to the defendant's blood alcohol content based on a lab report generated by a nontestifying colleague. (*Id.* at p. 574.) The report was received into evidence. (*Ibid.*) In assessing the Sixth Amendment implications of this evidence, this Court explained that a two-part inquiry determines whether a challenged statement is testimonial: "First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity." (*Id.* at p. 581.) "Second, all nine high court justices [of the United States Supreme Court] agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be." (*Id.* at p. 582; see *People v. Holmes* (2012) 212 Cal.App.4th 431, 438 ["It is now settled in California that a statement is not testimonial unless both criteria are met"].)

Lopez then held that blood alcohol instrument data printouts, which comprised the majority of the report referenced and relied upon at trial by the expert witness, were neither formal nor solemn enough to qualify as testimonial statements for Sixth Amendment purposes. (*Lopez*, *supra*, 55 Cal.4th at pp. 582-583.) Those test results were not accompanied by statements of validity from the human operator, and in any event were the product of a machine not capable of being cross-examined. (*Id.* at p. 583.) Consequently, the trial witness was able to provide an "independent

opinion" about the defendant's blood alcohol content based on those data without violating confrontation clause protections. (*Id.* at pp. 574, 585.) Significantly, the Court noted that the trial witness had been able to render an opinion based on his "own 'separate abilities as a criminal analyst.'" (*Id.* at p. 574.)

Likewise, the page of the report which established a chain of custody for the blood sample lacked requisite formality. (*Lopez*, *supra*, 55 Cal.4th at p. 584.) That page's notations were labeled "FOR LAB USE ONLY," and as such were "nothing more than an informal record of data for internal purposes . . . ." (*Ibid.*) Nor was the chain of custody page signed, certified, or sworn by any lab analyst, further indicating preparation with less formality than testimonial statements must possess. (*Ibid.*)

Finally, even if the conclusion of the analyst who conducted the laboratory testing—recorded on the first page of the report—was a testimonial opinion, its admission along with the rest of the report was harmless beyond a reasonable doubt because the testifying criminalist offered his independent opinion regarding the defendant's sample based on raw data printed in other portions of the document. (*Lopez*, *supra*, 55 Cal.4th at p. 585.)

In respective concurring opinions, each joined by three other justices and representing additional majorities of the Court, Justice Werdegar and Justice Corrigan reached the same conclusion as the first majority by means of a "primary purpose" analysis. (*Lopez*, *supra*, 55 Cal.4th at pp. 585 (conc. opn. of Werdegar, J., joined by Cantil-Sakauye, C.J., Baxter, J., and Chin, J.), 587 (conc. opn. of Corrigan, J., joined by Baxter, J., Werdegar, J., and Chin, J.).) Specifically, tracking and foundational entries on the chain of custody logsheet were made for the routine conduct and administration of the laboratory's business, and not for the purpose of proving facts at a later trial. (*Id.* at p. 589; see also *id.* at p. 585 (conc. opn. of Werdegar, J.

[opining that "a laboratory assistant's logsheet notation recording the identification number assigned to defendant's blood sample . . . was not made with a primary purpose of creating evidence for trial but was, rather, made for the administration of the laboratory's own affairs"].)

The Court confronted a different set of facts in *Dungo*. There, a forensic pathologist provided independent opinion testimony about the cause and manner of the victim's death, based in part on objective facts taken from an autopsy report prepared by a non-testifying pathologist. (*Dungo*, *supra*, 55 Cal.4th at p. 612.) The Court held that the expert's testimony did not violate the confrontation clause because the statements in the autopsy report he relied upon—i.e., the "objective facts about the condition of [the victim's] body"—were not testimonial. (*Id.* at p. 621.) In so ruling the Court discussed both the formality and the primary purpose characteristics of autopsy report statements.

On the issue of formality, statements in the autopsy report "describing the pathologist's anatomical and physiological observations about the condition of the body" were mere recordation of objective facts by a pathologist, analogous to medical records written by a treating physician. As such, they did not possess the formality of testimonial statements. (*Dungo*, *supra*, 55 Cal.4th at p. 619; see also p. 624 (conc. opn. of Werdegar, J., joined by Cantil-Sakauye, C.J., Baxter, J., and Chin, J.) [agreeing that an autopsy is structured as a systematic medical examination governed by medical standards, rather than an interrogation].) Significantly, the trial witness "did not describe to the jury [the autopsy surgeon's] opinion about the cause of [the victim's] death; instead, he only gave his own independent opinion as a forensic pathologist." (*Id.* at p. 614; see also p. 618.)

On the issue of primary purpose, "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the

victim's] body; it was only one of several purposes." (*Dungo*, *supra*, 55 Cal.4th at p. 621, italics in original.) Other reasons for generating an autopsy report include statutory mandates requiring inquiry into certain deaths (some of which are unrelated to criminal activity), public health, public safety, use in wrongful death civil litigation, insurance coverage determinations, public awareness, and resolving questions for a deceased's family. (*Ibid.*; see also *id.* at pp. 625 (conc. opn. of Werdegar, J.) [describing nontestimonial primary purpose], 631 (conc. opn. of Chin, J., joined by Cantil-Sakauye, C.J., Baxter, J., and Werdegar, J.) [primary purpose of autopsy report was to "describe the condition of the body" and not to accuse the defendant or other "targeted individual"].) In short, "[t]he autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*Id.* at p. 625.)

Several published appellate decisions in California have applied these principles to DNA testing files created by forensic laboratories. The courts have concluded uniformly that data and related documentation contained in such files are not testimonial in nature, and may be considered by an expert witness as information predicate to an independent opinion, as was the case here. In *People v. Steppe* (2013) 213 Cal.App.4th 1116, the DNA technical reviewer of a nontestifying analyst's work rendered opinions based on raw data generated in the testing process. (*Id.* at pp. 1120-1121.) Drawing upon the Court's holding in *Lopez*, *supra*, the *Steppe* court analogized DNA data to the nontestimonial blood alcohol instrument printouts in *Lopez*, and noted the absence of authority to the contrary. (*Id.* at p. 1126.) Its conclusion that no confrontation error occurred was further influenced by the fact that the witness was the original technical reviewer of the lab work. "Thus, when the reviewer testified as to her conclusions, the jury necessarily knew that the . . . analyst had reached the same conclusions." (*Id.* at p. 1127.) Finally, the *Steppe* court agreed that DNA lab reports "lack

the degree of formality and solemnity to be considered testimonial for purposes of the confrontation clause." (*Ibid.*)

People v. Holmes, supra, 212 Cal.App.4th 431 likewise held that expert opinion testimony by supervising criminalists at Cellmark, based in part on DNA lab work performed by others, did not violate the confrontation clause. The courtroom witnesses

> referred to notes, DNA profiles, tables of results, typed summary sheets, and laboratory reports that were prepared by nontestifying analysts. None of these documents was executed under oath. None was admitted into evidence. Each was marked for identification and most were displayed during the testimony. Each of the experts reached his or her own conclusions based, at least in part, upon the data and profiles generated by other analysts.

(*Id.* at p. 434.) The *Holmes* court reasoned that these documents were not testimonial: "The forensic data and reports in this case lack 'formality.' They are unsworn, uncertified records of objective fact. Unsworn statements that 'merely record objective facts' are not sufficiently formal to be testimonial." (*Id.* at p. 438, citing *Dungo*, *supra*, 55 Cal.4th at p. 619.)

Finally, *People v. Barba* (2103) 215 Cal.App.4th 712—yet again involving Cellmark—undertook a lengthy analysis of the confrontation clause implications of an expert witness's trial testimony about a colleague's DNA testing, and concluded that the testimony was admissible. (*Id.* at p. 743.) The expert witness in *Barba*, like Dr. Word here, was the supervisor and technical reviewer of the DNA testing performed by her colleague. (*Id.* at p. 718.) The *Barba* court reasoned that majorities in both the United States Supreme Court and the California Supreme Court would conclude that the DNA reports at issue were not testimonial in nature. (*Id.* at p. 742.) It concluded that "[t]he primary purpose of the DNA reports was not testimonial" because they were "generated by a lab technician pursuant to standardized procedures" without regard to evidentiary

consequences, and because the in-court expert was the source of the "accusatory opinions" and subject to cross-examination. (*Ibid.*) As a practical matter, the *Barba* court agreed that "it makes no sense to exclude evidence of DNA reports if the technicians who conducted the tests do not testify. So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible." (*Id.* at p. 742.)

2. Analysis

Dr. Word's testimony was constitutionally permissible. One dispositive consideration is that Dr. Word actually cosigned the reports memorializing Cellmark's DNA test results, given her personal and independent participation in the case and conclusions drawn therefrom. (3d Supp. CT vol. 1, p. 43; 15 RT 3393, 3426-3427, 3430, 3456.) In other words, Dr. Word did not base her opinions on statements made by another that Dr. Word had to blindly trust and that consequently could not be explored and challenged through cross-examination. To the contrary, Dr. Word reached her own opinions based on first-hand knowledge and personal observations in the laboratory, which she then expressed and took responsibility for by cosigning the final reports. The statements in the reports were attributable to Dr. Word to the same degree as they were to Ms. Yates. Certainly there is no constitutional bar to Dr. Word conveying her own opinions, which were reached in the laboratory long before trial. (See *In re Ware* (Ala. 2014) __ So.3d __ [2014 Ala. Lexis 5, *19-*20] [no confrontation clause violation in light of testimony by Cellmark supervisor who reviewed DNA testing and cosigned report].) Defense counsel engaged in vigorous cross-examination of Dr. Word. No confrontation clause violation could have accrued under these circumstances.

Another, and equally dispositive, consideration is the applicability of *Williams v. Illinois*, *supra*. Regardless of its diverse legal underpinnings

Williams is factually analogous to this case to such a degree as to compel the same conclusion reached by a majority of the United States Supreme Court. Both cases involved DNA analysis by Cellmark that preceded a DNA database match identifying the perpetrator. Both cases involved expert testimony by someone other than the analyst who performed the physical testing. Both cases involved the expert describing DNA typing scientific methods and referring to chain of custody documentation. Both cases involved an independent expert opinion about a DNA profile match, and in neither case were the lab reports admitted into evidence. (*Williams*, *supra*, 132 S.Ct. at pp. 2229-2230; *id.* at p. 2246 (conc. opn. of Breyer, J.).)

If anything, any differences favored the claim of the *Williams* defendant. The trial witness in *Williams*, unlike Dr. Word, did not work at Cellmark, did not personally participate in the DNA testing, and "had not seen any of the calibrations or work that Cellmark had done in deducing a male DNA profile from the vaginal swabs." (*Id.* at p. 2230.) Nor did the expert in *Williams* "testify to anything that was done at the Cellmark lab . . . ." (*Id.* at p. 2225.) The fact that a majority of the Supreme Court determined, nonetheless, that no confrontation clause violation occurred in *Williams* dictates the same outcome here.

Moreover, the holdings and reasoning in *Lopez* and *Dungo* confirm that Dr. Word's expert testimony neither relied upon nor improperly conveyed testimonial statements within the meaning of *Crawford.* Four considerations support this conclusion.

First, as this Court held in *Lopez*, data output from instruments cannot be cross-examined and thus cannot implicate the Sixth Amendment confrontation right. (55 Cal.4th at p. 583.) In *Lopez* the data at issue were gas chromatograph readings, while here Dr. Word testified that she had reviewed the photographic record of the chemical reaction outputs that indicated genetic characteristics. Certainly photographs of a series of

colored dots on test strips floating in a liquid environment (15 RT 3448-3449) are not statements, nor can they be challenged by cross-examination. Independent expert opinion testimony based on consideration of such physical and instrument-driven evidence does not implicate the confrontation clause.

Second, neither the chain of custody information nor the analytical notes and documentation of testing maintained in Cellmark's case file were produced with the primary purpose characteristic of testimonial statements. They were routine documentation of laboratory work necessary to the "administration of the laboratory's own affairs" without any apparent regard to the evidentiary consequences in a future courtroom. (*Lopez*, *supra*, 55 Cal.4th at pp. 585 (conc. opn. of Werdegar, J.), 589 (conc. opn. of Corrigan, J.).) It can be faily assumed that Cellmark, as a business whose financial interest depended upon conducting accurate scientific testing for its clients, and which followed accepted scientific procedures, constructed all of its case files in a manner consistent with those strictures. The Cellmark employees who generated the documents relied upon by Dr. Word (including Dr. Word herself) were not "witnesses against" appellant for Sixth Amendment purposes. And, as Justice Corrigan observed, the "mere relevance" of notations in a business record for purposes of trial does not make them testimonial. (*Lopez*, *supra*, 55 Cal.4th at p. 589 (conc. opn. of Corrigan, J.).)

Third, DNA testing data contained in the Cellmark report were analogous to the objective observations and measurements this Court found nontestimonial in *Dungo*, and likewise lacked the primary purpose characteristic of testimonial statements. In *Dungo*, Justice Chin observed that "[t]he primary purpose of the portions of the [autopsy] report that [the witness] relied on was to describe the condition of the body. [Citations.] In describing the condition of the body, there was no prospect of fabrication or

incentive to produce anything other than a scientifically reliable report. The purpose of this part of the autopsy report is 'simply to perform [the pathologist's] task in accordance with accepted procedures.' [Citation.]" (*Dungo, supra*, 55 Cal.4th at p. 631 (conc. opn. of Chin, J.).) This reasoning applies with equal force to DNA testing.

As with autopsy report observations, DNA data, photographs, and related documentation are "routinely placed" into a lab report "whether or not a specific suspect exists. They are not statements with a primary purpose of accusing defendant, or anyone else, of criminal conduct." (*Dungo, supra*, 55 Cal.4th at p. 632 (conc. opn. of Chin, J.) For instance, Cellmark's testing of the William Flores remains was used to *exclude* Flores as a suspect in Cannie's death, making the underlying data and related statements *exculpatory* rather than accusatory, at least as to Flores. And, "[t]here was no prospect of fabrication or incentive to produce anything other than an accurate description" of the testing. (*Ibid.*) As one commentator noted, "[s]cientific data are the coin of the realm in science, and they are always treated with reverence." (Goodstein, *How Science Works*, in Reference Manual on Scientific Evidence, 3d ed. (Fed. Jud. Center 2011) at p. 43.) By extension, good science does not require that those who collect data be those who interpret it; indeed, "[t]rained experts commonly extrapolate from existing data." (*General Electric v. Joiner* (1997) 522 U.S. 136, 146.) Thus there is a teleological distinction between raw data and conclusions that may be drawn therefrom; whatever accusatory implications the latter may have, the former lack any. Scientific data cannot be imbued with a primary purpose indicative of testimonial statements. Data simply exist, regardless of what meaning an expert may later accord them.

Fourth, there is nothing in the record to indicate that the data, photographs, analyst's notes, or even final summary reports prepared by

Cellmark possessed the solemnity or formality typical of testimonial statements. Even the report itself, cosigned by Dr. Word, is not sworn, certified, signed under penalty of perjury, notarized, or otherwise formalized. It bears no likeness to an affidavit, custodial examination, prior testimony, deposition, or formal statement to a government officer, all of which were cited by the Supreme Court as examples of testimonial statements. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 51-52.) Nothing Dr. Word relied upon in formulating her opinions was sufficiently formal as to be testimonial.

D. Any error was harmless

Finally, even if Dr. Word's testimony was impermissibly grounded in testimonial hearsay, its introduction into evidence was harmless beyond a reasonable doubt. (See *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661 ["Violation of the Sixth Amendment's confrontation right requires reversal of the judgment against a criminal defendant unless the prosecution can show 'beyond a reasonable doubt' that the error was harmless"].) Cellmark's 1996 DNA testing in this case was followed several years later by multiple rounds of additional testing at the Contra Costa County Sheriff's laboratory and Forensic Science Associates laboratory, using far more discriminating technology, that confirmed appellant's identity as Cannie Bullock's rapist and killer. Had the jury never learned of Cellmark's work, it is beyond a reasonable doubt that the verdict would have been the same.

V. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY COMMENTING DURING ARGUMENT ON THE STATE OF EVIDENCE RELATED TO A THIRD PARTY

Appellant requests that the Court "reconsider its decision" in *People v. Lawley* (2002) 27 Cal.4th 102 (*Lawley*), and hold that the prosecutor here committed misconduct in closing argument when she argued that no

evidence linked William Flores to the sewing machine manual located in the Bullock house. (AOB 126-130.) The gravamen of appellant's claim is his allegation that the prosecutor argued a fact to the jury—that "no evidence connected Flores to the sewing machine manual"—knowing it to be untrue in view of the existence of an unauthenticated envelope addressed to a sewing machine repair correspondence school and purportedly among Mr. Flores's possessions, which the trial court ruled inadmissible. (AOB 129.)

Appellant's argument should be rejected. In *Lawley*, *supra*, 27 Cal.4th 102, this Court held that a prosecutor does not commit misconduct when he or she comments on the state of the evidence as defined by proper evidentiary rulings, despite knowledge of additional or even contradictory information excluded by the trial court. (*Id.* at p. 156.) *Lawley* need not even be invoked in this case, however, because the evidentiary value of the envelope would have been de minimus in any event, and the prosecutor could have offered the same commentary had it been admitted. In either case, no misconduct occurred, prejudicial or otherwise.

A. Factual Background

The People moved in limine to exclude evidence of third party culpability. (5 CT 1283-1287; 7 CT 1878-1975.) Conversely, appellant sought to introduce evidence that William Flores was the perpetrator. (6 CT 1612-1687; 7 CT 1797-1804.) The trial court entertained lengthy discussions on the issue. (8 RT 1889-1935; 9 RT 2007-2042.) It ultimately ruled that the defense would be permitted to introduce third party culpability evidence related to William Flores. (9 RT 2140.)

Consequently, during the prosecution's case in chief, defense counsel cross-examined Detective Bentley about items located in 1979 during a search of William Flores's yard. Among them was a torn note found in a garbage can. (13 RT 3072-3073.) The following testimony ensued:

Q. Do you recall if one of the items in the note was an indication or an entry about taking a correspondence course in sewing machine repair?

A. I don't know if sewing machine repair was specifically mentioned, but my recollection of the note was something about repairing small appliances or small machines and learning how to do that, yes.

(13 RT 3072-3073.) Later, under defense questioning, Detective Bennett provided additional detail about the writings from Flores's trash:

Q. In general, what was the nature of the document?

A. Overall, it appeared to be somewhat gibberish in the sense that it made no sense, but there were goals listed, just different items just randomly listed, and in some cases, it looked like they were trying to be defined.

Q. And as a goal, was one of the goals that was listed, quote, "Correspondence course, vacuum and sewing machines repair"?

A. Yes.

Q. And that was in the note that you discovered from Mr. Flores'—what appeared to be Mr. Flores' trash can; is that correct?

A. That's correct.

(14 RT 3132-3133; see also 14 RT 3139.)

Appellant elicited evidence that in April 1996, San Pablo Police Department Detective Mark Harrison spoke to Flores's sister, Linda Smith, in connection with the Cannie Bullock murder investigation. (18 RT 4071-4072.) According to Detective Harrison, Ms. Smith disliked her brother William Flores. (18 RT 4077-4078.) She reported to the detective that her mother had owned two sewing machines—a Singer and a Sears model—and that a sewing machine manual recovered in 1979 at the crime scene appeared to be her mother's. (18 RT 4072, 4089.)

Linda Smith testified as well. She recounted that she had not been close with her mother and did not get along with her brother. (18 RT 4062, 4088.) Although Ms. Smith could not remember specifics of her 1996 conversation with Detective Harrington, she asserted that any incriminating statements about her brother were "probably" made facetiously because she was a "mouthy person" and had become "irritated" at repeated police questioning. (18 RT 4048-4050.) Ms. Smith testified that her mother owned only Singer sewing machines, and always wrote the date in the manuals for the machines she owned. (18 RT 4052, 4067-4068.) She did not recognize the Sears sewing machine manual recovered from the Bullock house. (18 RT 4067, 4072.)

Defense counsel showed Ms. Smith defense exhibit No. O, described as "a photocopy of a face of an envelope" with the name "William Flores" in the "left hand corner." (18 RT 4060.) Ms. Smith did not recognize it and could not authenticate it. (18 RT 4060.) The defense subsequently elicited testimony from Detective Harrington that exhibit No. O was a "single paper" that he originally saw during the 1996 investigation. (18 RT 4076-4077.) Detective Harrington could not recall whether he ever showed it to Linda Smith, and did not state when, where, or under what circumstances the envelope was acquired by police. (18 RT 4077.)

Following this testimony, appellant sought to introduce exhibit No. O into evidence, with defense counsel representing that "[i]t appears to be addressed to a correspondence school for sewing machine repair." (18 RT 4102.) The prosecutor objected that there had been no foundation provided—only that Detective Harrington found the document in the case file—and that it had no relevance. (18 RT 4102, 4103.) The trial court sustained the People's objection, stating that "based upon what's in the record, I can't make any of those determinations. The objection's sustained." (18 RT 4103.)

During her initial closing argument, the prosecutor made one brief reference to the William Flores evidence: "Mr. Kotin told you at the beginning of this case in his opening statement that the killer left behind his calling card. And I agree with him, the killer did leave behind his calling card. And it wasn't a sewing machine manual that's never really been connected to this case . . . ." (18 RT 4256.)

Defense counsel, on the other hand, engaged in a lengthy and detailed exposition suggesting that William Flores was the real killer. (18 RT 4268-4275, 4277-4278.) He argued that Flores might have raped Cannie without leaving his DNA behind. (18 RT 4268.) He argued that Flores had the opportunity to assault and kill Cannie given his proximity as a neighbor, because he knew Cannie, and because he told investigators he was awake the night of the murder. (18 RT 4268, 4273-4274.) He argued that Flores had information "only the killer could know;" for example, that she was killed in the house and her body removed to the back yard. (18 RT 4268-4269, 4275.) He argued that Flores had once expressed sexual interest in his younger sister when they were both children. (18 RT 4271.) He argued that Flores had written about his inability to maintain relationships with women. (18 RT 4271.) He pointed out circumstantially incriminating details that Flores's mother had allegedly conveyed to his sister years after the murder, and also referenced a nonspecific apology in an alleged suicide note left by Flores. (18 RT 4273, 4276.) He argued that Flores had written notes about wanting to study sewing machine repair, and the killer left a sewing machine book in the Bullock house that could have been for the same kind of machine Flores's mother owned. (18 RT 4269-4272.) "What are the odds," stated defense counsel, "a man leaves a note about sewing machine repair and then what do we find in the house but a sewing machine manual? It's—if it's just a coincidence, it's an awful disturbing one. And

that fact alone should be enough to give you pause to find that there's reasonable doubt in this case." (18 RT 4270.)

In her rebuttal argument, the prosecutor responded to the theory that William Flores was the actual perpetrator. (18 RT 4285-4294.) As for the sewing machine manual in particular, she told the jury,

> we come to another category of red herrings and smoke and mirrors and that's Billy Flores. Billy Flores, poor pathetic man who was so troubled he ultimately killed himself and who the defense is now telling you that there was enough evidence to convict him. What's that evidence? Sewing machine manual. That evidence is useless. That evidence doesn't help connect him to the murder and the homicide in any way.
>
> Linda Smith made some statements way back in 1996, and she told Detective Harrison something about a sewing machine manual. Now she can't remember what she said, and now her testimony is different anyway. Now she's saying her mom never did own that kind of a sewing machine and that wouldn't have been her mom's manual because her mom would have put something in it.
>
> So what was her motive when she was talking to Detective Harrison in 1996? Remember, this was before Billy had been exhumed and his DNA had been discovered not to be in the body. At that time she hated her brother. She blamed her strained relationship with her mom because of him. And Harrison made it clear that she probably thought he did it. So she said, "Oh, yeah, that's the sewing machine manual." But can you really—can you really accept the truth of what she's saying either then or now?
>
> So what was the motive for this statement and were they even true? How do we know? The only evidence that you have that this sewing machine manual was connected to the Flores household really is Linda's contradictory statements. And even in 1996 she never really identified that actual manual. What she said was, "Well, that's the kind of sewing machine my mom has."
>
> Ah, but we have the note. Oh, I'm sorry. First of all, Debbie Fisher tells you she doesn't remember anything about

why she collected the sewing machine manual or the pendant now. She assumes it would have been doing something to help the police.

She also made statements to the police at the time, and what her statement was is, "We found these in the house on the coffee table." Well, you have photographs of the interior of the house. These were taken the night of the murder. These include pretty good photographs – [¶]

I'm sorry. These include pretty good photographs of the coffee table itself. Look at Number 12. Look at Number 13. That's the night the police were there taking pictures. There's no sewing machine manual on there.

Now, you don't see the pendant either. It's smaller. Could be there, maybe not. But look at the condition of the house overall. Does it really look like Debbie and Linda were that meticulous of housekeepers they would know every single item in their house and know when they got there and how they got there?

One thing we do know is it wasn't on the coffee table that night like she told the police the next day. Could have been mistaken. Maybe it ended up on the coffee table sometime between the murder and by the time that she took it to the police. We don't know. It's speculation. But again, how is it even connected to Mr. Flores?

And here's where we have the incriminating note. And I agree with counsel, I think you should read this note. This is just a pathetic cry for help. This is a very sad individual that if you look at this, it's two pages of ramblings, of desires, of goals, a lot of writing on there. And in this entire note there is one sentence talking about a goal to become a small appliance repairman, vacuum cleaners and sewing machines. So from that we're supposed to assume that this sewing machine manual is connected to the murder and is connected to Mr. Flores.

And why would a murderer bring a sewing machine manual to the house to commit murder? What possible explanation do you have for that? The reasonable explanation here? The sewing machine manual has nothing to do with the case. There

> isn't even evidence that it has anything to do with Mr. Flores, let alone with the murder.
>
> It's not like this sewing machine manual had blood on it. It's not like it had sperm on it. It's not like it had any kind of forensic evidence on it. It just happened to be an item that Debbie Fisher found that she didn't recognize, and that's all we know about it.

(18 RT 4285-4288.)

The prosecutor highlighted the reason why William Flores could not be a plausible third party perpetrator: "The fact that it . . . wasn't [Flores's] sperm inside the vaginal cavity of Cannie Bullock is pretty good evidence that he's not the killer. And not only that, there's no other DNA found. There is no other DNA found in Cannie's body. It's just one person." (18 RT 4293.)

The defense did not object to the prosecutor's argument, or ask for a curative admonition or instruction.

B. Appellant Has Forfeited His Claim

Appellant alleges that the prosecutor argued a fact to the jury—that "no evidence connected Mr. Flores to the sewing machine manual"—knowing it to be untrue in view of defense exhibit No. O, which had been excluded from evidence. (AOB 129.) Appellant, however, registered no timely and specific trial objection to the argument he now claims was misconduct, and also failed to request a curative admonishment to the jury from the trial court. Appellant did not act to preserve his claim, which is thus forfeited. (*People v. Lucero* (2000) 23 Cal.4th 692, 719; *People v. Cain* (1995) 10 Cal.4th 1, 48.)

Appellant is likely to assert in reply that an objection would have been futile in view of *Lawley*, thus obviating the need to register one. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821; AOB 129.) The record does not support that argument, however, because this case did not present a

Lawley situation. If appellant believed the prosecutor's trial argument to be unethical he should have raised an objection and sought an admonishment.

The Court held in *Lawley* that a prosecutor does not commit misconduct when he or she comments on the state of the evidence as defined by proper evidentiary rulings despite knowledge of additional and even contradictory information excluded by the trial court. (*Lawley*, *supra*, 27 Cal.4th at p. 156.) In *Lawley*, the prosecutor argued in closing that "nobody else in this case had a reason to kill [the victim]," notwithstanding information proffered by the defense but properly excluded by the trial court that a third party had been induced by the Aryan Brotherhood gang to kill the victim. (*Id.* at pp. 151-152, 156.)

In the present case, the prosecutor—in contrast to *Lawley*—did not deny the existence of any evidence that could potentially connect William Flores to the sewing machine manual. Instead, she acknowledged that (1) Linda Smith told Detective Harrington in 1996 that the manual from the Bullock house appeared to be her mother's, and (2) writings were found in Flores's backyard trash can in 1979 referencing his aspirations to learn sewing machine repair. (18 RT 4286, 4287.) The prosecutor did not hide or mislead the jury on any particular point, or represent that something did not exist when in fact it did. The state of the evidence included the fact that Flores was interested in a correspondence course involving sewing machine repair. (14 RT 3132-3133, 3139.) Therefore, although the prosecutor's comments were not misconduct as discussed below, *Lawley* is not necessarily controlling. If he believed aspects of the People's argument rose to the level of misconduct, appellant had an obligation to object and seek admonishment of the jury. He did not do so and has forfeited his claim.

C. The Prosecutor Did Not Err[34]

Appellant's claim fails on its merits regardless. The applicable standard is well-established: "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. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Here, the prosecutor's comments about the William Flores evidence were neither misconduct nor error under either federal or state standards. In addressing the defense theory of third party culpability the People did not unfairly capitalize on an erroneous evidentiary ruling, and did not mischaracterize evidence. (See *People v. Valdez* (2004) 32 Cal.4th 73, 133-134; *People v. Varona* (1983) 143 Cal.App.3d 566, 570.) In fact, appellant does not challenge the trial court's decision not to admit exhibit No. O in the first instance.

What the prosecutor did was permissibly comment on the state of the evidence by pointing out the negligible significance of the sewing machine manual, and Flores's interest in studying sewing machine repair, in view of the totality of evidence. "A prosecutor's 'argument may be vigorous as

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[34] Because there is no evidence the prosecutor intentionally or knowingly committed misconduct, appellant's claim should be characterized as one of prosecutorial "error" rather than "misconduct." (*People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1 ["We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error"]; see also ABA House of Delegates, Resolution 100B (August 9-10, 2010) [adopting resolution urging appellate courts to distinguish between prosecutorial "error" and "misconduct"].)

long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom.' [Citation.]" (*People v. Edwards*, *supra*, 57 Cal.4th at p. 736; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 726 ["A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence"]; *People v. Morales* (2001) 25 Cal.4th 34, 44 ["At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom"].)

The prosecutor readily acknowledged the sewing machine manual in her argument, while also noting Linda Smith's inconsistent testimony about whether it was for a brand owned by her (and William Flores's) mother. (18 RT 4285-4286.) The prosecutor invited the jury to inspect photos of the crime scene, none of which indicated the presence of a sewing machine manual. (18 RT 4286-4287.) Alternatively, the prosecutor continued, there was no evidence that the sewing machine manual was linked to either the murder or William Flores. (18 RT 4287-4288.) This was fair and reasonable commentary despite Flores's apparent goal of studying sewing machine repair, about which the jury knew and which the prosecutor herself referenced. (18 RT 4287.) A person's interest in studying sewing machine repair is not evidence that that person left a sewing machine manual at a neighbor's house, let alone after murdering the child who lived there. Defense exhibit No. O, an envelope of unknown origin discovered in a then 17-year-old police file, would have added nothing to the negligible quantum of evidence linking Flores to the sewing machine manual had it been admitted, and would not have required a different tact from the prosecutor in argument. The prosecutor's statement that no evidence tied the manual to Flores, "let alone [to] the murder" (18 RT 4288) could still have been permissibly made.

Finally, to the extent that *Lawley* does apply to the prosecutor's statement that no evidence tied Flores to the sewing machine manual, this Court held that comments such as those—on the state of the evidence as defined by proper evidentiary rulings—do not constitute misconduct.[35] (*Lawley*, *supra*, 27 Cal.4th at p. 156.)

No prosecutorial error occurred, and appellant's due process rights were preserved.

D. Any Error Was Harmless

Notwithstanding the discussion above, appellant has not met his burden of demonstrating prejudice as the result of any error that occurred. (See *People v. Williams* (1997) 16 Cal.4th 153, 255.)

"To be prejudicial, prosecutorial misconduct must bear a reasonable possibility of influencing the . . . verdict. [Citations.] In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019.) There was no such danger here. Because the jury heard evidence that Flores had expressed interest in learning sewing machine repair through a correspondence course, jurors could not have been unfairly deceived by the prosecutor's comment about the lack of evidence tying Flores to the manual found in the Bullock house. The fact that Flores had apparently addressed an envelope to a sewing machine repair correspondence course would merely have been consistent with what the jury already knew, and would not have provided any additional support to a defense argument that the manual in the Bullock house had been left there by Flores. There was no

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[35] There is no reason to reconsider *Lawley* in the context of this case, and appellant offers none.

reasonable possibility that the verdict would have been different in light of evidence in the case—prominently featuring DNA technology—identifying appellant as the perpetrator while exonerating Flores.

Finally, the trial court instructed jurors that statements by counsel were not evidence. (18 RT 4209.) Jurors are presumed to have complied with that admonition. (*People v. Hamilton* (2009) 45 Cal.4th 863, 957.)

VI. THE TRIAL COURT PROPERLY ADMITTED DNA TEST RESULTS ACHIEVED USING LONG-ACCEPTED AND WIDELY EMPLOYED DNA TESTING TECHNOLOGY

Appellant claims that the trial court erred in "refusing to grant" a hearing, pursuant to *People v. Kelly*, *supra*, 17 Cal.3d 24 (*Kelly*), on the general acceptance of the Identifiler DNA test kit. (AOB 130.) He asserts that his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution were violated as a result. (AOB 130, 136.)

The record does not support appellant's claim. The trial court did conduct a "first prong" *Kelly* hearing[36] regarding Identifiler, and ruled accordingly. Appellant concedes as much in his opening brief: "Before trial, defense counsel challenged the acceptance of the Identifiler technology and the admissibility of the results from that test under *People v. Kelly*, *supra*, 17 Cal.3d 24. The trial court took evidence at the hearing and denied the motion." (AOB 131.) And: "After hearing testimony and argument, the trial court ruled . . . that the Identifiler kit's methodology had gained acceptance by the relevant scientific community, hence, allowing trial testimony as to its use and results in the instant case." (AOB 133.)

Later in his argument, appellant appears to shift to a sufficiency of evidence rationale: "In the instant case, there was insufficient evidence to

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[36] The first prong of *Kelly*'s assessment of a new scientific technique inquires whether it has gained general acceptance in the relevant scientific community. (*Kelly*, *supra*, 17 Cal.3d at p. 30.)

allow the court to reach the conclusion that the use of the Identifiler kit had gained acceptance in the relevant scientific community." (AOB 135.) But he then reverts to the claim that no prong one *Kelly* hearing took place at all: "As such, the trial court erred in foregoing a first-prong *Kelly* hearing . . ." (AOB 135.) Appellant's theory of error is thus unclear. In an abundance of caution, however, respondent herein both describes the evidence presented at the prong one *Kelly* hearing, and discusses how the trial court's related admissibility decision was not an abuse of discretion.

A. Applicable Law

Kelly established a three-prong test that governs the admissibility of scientific evidence in California:

> Admissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) the reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]

(17 Cal.3d at pp. 30-32.) "Reliability," for *Kelly* admissibility purposes, means that a particular scientific technique "'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.'" (*Kelly*, *supra*, 17 Cal.3d at p. 30 (quoting *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014, italics omitted; see *People v. Venegas* (1998) 18 Cal.4th 47, 76.) *Kelly*'s first prong tests the "fundamental validity of a new scientific technology." (*People v. Cooper* (1991) 53 Cal.3d 771, 812-814; see *People v. Farmer* (1989) 47 Cal.3d 888, 913.)

"Whether a new scientific technique has gained general acceptance is a mixed question of law and fact. [Citation.] '[W]e review the trial court's determination with deference to any and all supportable findings of "historical" fact or credibility, and then decide as a matter of law, based on

those assumptions, whether there has been general acceptance.' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 447.) In resolving questions of general acceptance previously, this Court has surveyed relevant authorities that include national reports, legal commentary, scientific publications, and appellate court decisions in California and other state and federal jurisdictions, in addition to reviewing the trial court record. (See, e.g., *People v. Venegas*, *supra*, 18 Cal.4th at p. 89.) This process of considering secondary authorities is in keeping with *Kelly*'s paradigm of determining validity by considering the scope of the technique's use in the field, rather than conducting an original assessment of the science in the courtroom:

> *Kelly* does not demand that the court decide whether the procedure is reliable as a matter of scientific fact: the court merely determines from the professional literature and expert testimony whether or not the new scientific technique is accepted as reliable in the relevant scientific community and whether scientists significant either in number or expertise publicly oppose [a technique] as unreliable. . . . General acceptance under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community.

(*People v. Soto* (1999) 21 Cal.4th 512, 519, internal quotation marks and citations omitted.)

B. The Trial Court Held A Prong One *Kelly* Hearing

Contrary to appellant's premise that the trial court failed to conduct a *Kelly* prong one admissibility hearing about the Identifiler DNA test kit, such a hearing did occur. It was extensive, involving testimony from multiple witnesses over multiple days. The hearing began as an inquiry into whether Identifiler was a "new scientific technique" within the meaning of *Kelly*, but soon shifted into a full-blown prong one hearing. The trial court and parties acknowledged as much, and the court issued prong one findings accordingly.

1. Procedural summary

Before trial, appellant requested a "full three prong *Kelly* hearing to determine: that the collection, storage, testing methods and testing kits, used to perform the DNA tests are generally accepted as reliable within the scientific community, that the laboratories followed proper . . . procedures . . . , and that the statistical formulation used to report the results . . . are generally accepted . . . ." (3 CT 640.) The defense argued that short tandem repeat (STR) DNA testing performed by the Forensic Science Associates laboratory using the Identifiler[37] test kit was subject to a *Kelly* prong one hearing to determine general acceptance, to the extent that it employed genetic markers and associated protocols that had not previously been deemed fundamentally valid in published appellate decisions. (3 RT 462-463.)

The prosecution, citing *People v. Hill* (2001) 89 Cal.App.4th 48 (*Hill*), responded that a new prong one *Kelly* assessment is not required for individual DNA test kits as long as they continue to employ polymerase chain reaction (PCR) and STR technology previously determined to be generally accepted. (3 RT 465-466, 469-470.) By extension, argued the prosecution, Identifiler does not qualify as a new scientific technique subject to a prong one determination because it is based on PCR/STR methods. (3 RT 467-469, 689, 694, 696.) "Every single different variation of STR testing is not a new methodology," the prosecutor stated. (3 RT 696.) The defense responded that Identifiler "is a distinct technique that combines, basically, what was two tests [Profiler Plus and COfiler] into one." (3 RT 695.) The trial court decided to conduct a hearing to receive input from experts about whether the Identifiler test kit should be

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[37] The registered trademark name for Identifiler is the AmpFLSTR® Identifiler® PCR Amplification Kit. (4 RT 772; Applied Biosystems catalog, available at <http://www.lifetechnologies.com/order/catalog/product/4427368>.)

considered a new scientific technique that triggers a *Kelly* prong one inquiry. (3 RT 538, 540, 543.)

Testimony began on May 3, 2006, with DNA expert Marc Taylor testifying for the defense and DNA expert David Stockwell testifying for the People. (3 RT 570, 573-684.) Taylor owned an unaccredited private DNA laboratory in Southern California, and had testified primarily for the defense in criminal cases involving DNA. (3 RT 573, 580.) Stockwell was the DNA technical lead for the Contra Costa County Sheriff's Crime Laboratory. (2 RT 309-310.) Following their testimony, the trial court noted that both witnesses had gone beyond the "new technique" issue and had addressed the question of general acceptance. (3 RT 686.) At that point, the trial court provided both parties with "an opportunity to present any additional evidence . . . on whether utilization of the Identifiler kit for STR testing purposes is generally accepted in the scientific community." (3 RT 701-704.) The court "designated it as a first-prong *Kelly-Frye* issue."[38] (4 RT 737-738; see also 4 RT 1002 ["Is there any additional evidence that either of you wishes to present . . . on the issue of whether [Identifiler] is generally accepted in the relevant scientific community?"].) Appellant's trial counsel confirmed his understanding that further evidence would be taken to explore the general acceptance of Identifiler under *Kelly*. (4 RT 746.)

Accordingly, on June 5, 2006, Stockwell again testified. (4 RT 736, 748-850.) He was followed by Taylor, who took the stand for the second time on June 5, 2006, and then a third time on June 6. (4 RT 850-890, 995-

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[38] By way of contrast, the trial court subsequently conducted a lengthy *Kelly* prong three hearing on whether the proper procedures were used in the DNA testing conducted in this case. (7 RT 1538-1659; 15 RT 3387-3403.) It found that *Kelly*'s third prong requirements had been satisfied. (15 RT 3403.)

1001.) Appellant also called Dr. William Shields, who testified on June 5 and 6, 2006. (4 RT 892-965.) Dr. Shields was a biology professor at the State University of New York, Syracuse. (4 RT 892.) The following discussion summarizes evidence presented on the issue of Identifiler's admissibility under *Kelly*'s first prong.

2. Marc Taylor

Marc Taylor testified for the defense. (3 RT 573.) He owned an unaccredited private DNA laboratory in Southern California, and had testified primarily for the defense in criminal cases involving DNA. (3 RT 573, 580; 4 RT 852.) He explained that Identifiler, like Profiler Plus and COfiler, is an STR testing kit.[39] (3 RT 604.) It was developed by the Applied Biosystems company for the forensic science community, and was in use at the time by both forensic and research laboratories. (3 RT 600.) The Profiler Plus and COfiler kits had been developed by Applied Biosystems as well. (4 RT 826-827.) Taylor's laboratory used both the Profiler Plus and COfiler test kits, and he agreed that "the only major difference between the two" was the different sets of loci—i.e., genetic markers utilized for forensic identification purposes—they incorporate. (3 RT 577, 588-589.) Taylor described Identifiler as "using the same primer sequences [as COfiler and Profiler Plus] and [Applied Biosystems] combined them into a single reaction. In addition to that, they've added primers for two new genetic loci into this mix." (4 RT 854; see also 3 RT 593-594.) The characteristics of the additional Identifiler loci were well

[39] By the time this hearing took place, published appellate decisions had found both Profiler Plus and COfiler to be generally accepted in the relevant scientific community. (*People v. Smith* (2003) 107 Cal.App.4th 646, 671-672; *United States v. Ewell* (D. N.J. 2003) 252 F.Supp.2d 104, 111.)

known. (3 RT 598.) At the time of the hearing, Taylor's laboratory was considering use of Identifiler in its own casework.[40] (3 RT 592.)

Taylor conceded that "[t]here are very much similarities" [*sic*] between Identifiler and its predecessor STR kits. (4 RT 882.) Taylor attempted to articulate the differences between the COfiler and Profiler Plus STR kits and the Identifiler kit, while recognizing that the technology was fundamentally similar:

> A. I would say that a significant difference is the linkers that I have mentioned before. It's also—it is a difference, as I said, that we are dealing with different primers, and we're dealing with, then, a much more complex mixture. But that is a difference and stuff.
>
> Q. Essentially the methodology is the same?
>
> A. Certainly from the standpoint of the STRs being very similar loci with similar issues with regard to those loci and the amplification process. The question being with regard to amplification is how it been [*sic*] fully worked out, so we understand what the issues may be there with that system.

(3 RT 644.) Taylor expressed concern about "linker molecules" incorporated into the Identifiler kit that were not standard in predecessor kits. (3 RT 604.) He cited the inclusion of linkers in the Identifiler kit as the primary "issue" with Identifiler, but one based on a lack of understanding rather than critique of the actual reliability of that element. (4 RT 855-858, 865, 868, 882, 884-885, 888.)

As an aside, the People's expert, David Stockwell, described how Identifiler included a chemical modifier known as a "linker" to facilitate spatial discrimination between overlapping loci by "adding mass" and

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[40] As of October 2013, the website for Marc Taylor's laboratory confirms that it offers DNA testing using the Identifiler kit. (Technical Associates Inc. <http://www.tai-labs.com>.)

allowing more time for loci to be distinguished from each other. (4 RT 761, 823-825.) Dr. Shields, testifying for appellant, asserted that the linkers used in Identifiler were "based on chemistry that we understood" given previous experiences. (4 RT 892, 911-912.) Dr. Shields had not heard of any problems associated with the linker components to the kit. (4 RT 942.)

Taylor, however, questioned Identifiler's general acceptance by the scientific community given his view that there was a lack of understanding of certain elements of the testing kit. (3 RT 605; 4 RT 864-865.) At the same time, he characterized as "speculation" any criticism of Identifiler based on inclusion of linkers. (4 RT 871.) Taylor had offered similarly-themed testimony about COfiler and Profiler Plus when those kits were released.[41] (3 RT 605; 4 RT 873-875.) Ultimately, Taylor declined to give an opinion on the reliability of Identifiler. (4 RT 888.) He agreed, however, that "[i]t appears that [Applied Biosystems] have done a reasonable job at least getting [Identifiler] to work." (4 RT 854.) According to Taylor, some initial problems with the Identifiler had been "worked . . . out." (4 RT 999.) He testified that DNA profiles generated using the Identifiler kit are eligible for upload and searching in CODIS[42] databases because the kit had met prerequisite federal standards and had been the subject of national studies. (3 RT 641-642, 645.) He was unaware of any studies or publications disputing the fundamental validity of Identifiler testing, and could not identify any forensic testing laboratories that had chosen not to use Identifiler out of concern for its validity. (3 RT 644; 4 RT 865, 887, 890.)

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[41] See, e.g., *People v. Smith*, *supra*, 107 Cal.App.4th at p. 662.
[42] Combined DNA Index System.

3. Dr. William Shields

Dr. William Shields testified for the defense as well. (4 RT 892.) He was a biology professor at the State University of New York, Syracuse. (4 RT 892.) He did not use commercial DNA test kits in his academic laboratory, and was unfamiliar with the most current version of Identifiler. (4 RT 897, 939.) Dr. Shields declined to speak to current usage of Identifiler in forensic laboratories: "I can't answer you as to current usage in any laboratory, and I wouldn't choose to do so." (4 RT 919.)

Dr. Shields characterized Identifiler as a new technology because "the methods have changed, but the [PCR/STR] methodology remains the same . . . ." (4 RT 905.) He explained that he believed that any new DNA testing kit requiring validation by its manufacturer and the laboratories using it qualified as a new scientific technique. (4 RT 906.) But, Dr. Shields thereafter described an adjustment in testing kit materials that had taken place; although the manufacturer validated the improved kit Dr. Shields called the adjustment "a tweak rather than a change." (4 RT 907.) Dr. Shields had previously appeared in court to opine about similar "issues" with the Profiler Plus and COfiler kits.[43] (4 RT 938.)

4. David Stockwell

David Stockwell of the Contra Costa County Sheriff's Crime Laboratory testified that Identifiler had been released commercially in 2000 or 2001. (4 RT 768.) Stockwell described the nature and development of polymerase chain reaction and short tandem repeat technology, including the production of multi-locus kits such as Profiler Plus and COfiler. (4 RT 749-759, 762-763.) "[V]irtually every laboratory" uses STR testing systems, observed Stockwell. (3 RT 676.) He perceived no

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[43] See, e.g., *People v. Smith*, *supra*, 107 Cal.App.4th at p. 663.

methodological alterations in the lineage of STR testing kits that included Profiler, Profiler Plus, COfiler, and Identifiler. (4 RT 764-765, 767.) Stockwell characterized the evolution of STR testing as a "developmental process," and not the repeated creation of new and different techniques. (4 RT 756.)

Stockwell described Identifiler as "simply an addition to a long history of what has been taking place all along, the compartmentalization and consolidation for these testing kits to get more information from less sample." (4 RT 847.) Identifiler permits enhanced laboratory efficiency by effectively combining the two predecessor kits into one and also requiring less DNA, thus mitigating against consumption of evidence samples during testing. (4 RT 827.) Identifiler, like its predecessor testing kits, "utilize[s] the same test platform, the platform that was utilized for dye-chemistry-based STR testing in the past . . . ." (4 RT 847.) Stockwell perceived "no great difference in the characteristics of the Identifiler loci compared to those used by Profiler Plus or COfiler. (4 RT 848.)

Stockwell stated, moreover, that "virtually no difference" existed in the scientific methodology underlying the Identifiler, COfiler, and Profiler Plus kits. (3 RT 649.) While the nucleotide sequences developed for Identifiler are "the same" as those in its predecessor kits, Identifiler included additional loci and a "linker" designed "to spatially revolve the different loci as they come through the genetic analyzer." (3 RT 650.) The linker did not qualify as new technology, opined Stockwell. Rather, "[i]t is a supplement to a system in order to allow it to function the way we need it to function." (3 RT 650.) "[T]he methodology by which the technology is utilized in all other respects i[s] the same." (3 RT 650.) Stockwell testified that Identifiler did not represent a "novel methodology," but instead was an expansion of a tried and true testing platform using the same basic technology but requiring independent validation. (4 RT 846.)

Stockwell described the developmental validation of Identifiler by Applied Biosystems. (4 RT 772-774.) The validation complied with national guidelines set forth by the Scientific Working Group on DNA Analysis and Methods (SWGDAM) and the FBI's DNA Advisory Board. (4 RT 776-777, 793-795.) Stockwell recounted the basic function and characteristics common to any given STR test kit. (4 RT 756-760.) Specifically, any STR kit works by marking loci of interest with artificial DNA "primers" and amplifying those few regions into billions of copies that can be interpreted as particular patterns of repeating chemical base pair sequences. (4 RT 750, 751, 752, 754, 757.) Every STR kit performs this same essential function using the same basic technology:

> Q. So, the basic job of the test kit is to amplify and mark these genetic loci?
>
> A. Yes.
>
> Q. And COfiler, Profiler Plus and Identifiler, all do that basic job?
>
> A. Yes.
>
> Q. Do they all do it in the same basic way, the same basic method?
>
> A. They all utilize the polymerase chain reaction in exactly the same way to produce the results.

(4 RT 759-760.)

Stockwell opined that Identifiler was both a reliable testing method and generally accepted by the forensic science community. (3 RT 651; 4 RT 801.) The trial court inquired further:

> THE COURT: . . . You have this opinion [that Identifiler is] generally accept[ed] in the scientific community. What's that opinion based on?
>
> THE WITNESS: Primarily based on my knowledge of other laboratories systems that are utilizing this platform and my

knowledge of the manufacturer and its long lineage of these kits and how they have manufactured them and continue to manufacture them. There are a lot of steps that are involved. There's quality control. There is a resource available at Applied Biosystems that scientists, separate from publishing, can address problems directly to the manufacturer. If there were problems, the manufacturer has provided technological updates based on consumer input. So those are all mechanisms that I would say are available to the scientists. And to date, other than some issues having to do with what I've referred to as "artifacts," I'm unaware of anyone saying that this new platform, the Identifiler kit, does not meet the requirements of the forensic testing community.

THE COURT: You say that you're aware that other—of other users of it.

THE WITNESS: Yes.

THE COURT: Are these just local or national or what?

THE WITNESS: Oh, they include, for instance, the Department of Justice, State of

California. That is the largest laboratory system in the State of California. Many of the local laboratories. Orange County Sheriff, Los Angeles County Sheriff; they are utilizing this kit. Many are in the process of developing or at least doing the internal validation to put this kit online. There's a lot of reasons to do so. It allows us to be much more efficient in our operation, but that is why there's a big push to go from the Profiler Plus and CoFiler technology.

THE COURT: But can you tell me about its use outside of California?

THE WITNESS: Outside of California, there are laboratory systems. That's – the State of Colorado is utilizing it, the State of Florida, the State of Virginia in some locations. There are, for instance, the National Institute of Standards and Technology, NIST. They have utilized this kit rather extensively in comparison to other kits, showing both the good points and bad points as to why people would move to one particular platform or another. Other geneticists that utilize this, outside criminal

> forensic testing laboratories, utilize this kit. People who do work on mass disasters. Outside the country, in looking at mass deaths, perhaps genocides, things of that nature, laboratories are utilizing this kit for those purposes as well. It's widely distributed. It's world wide.

(3 RT 652-654.)

By 2006, Stockwell later reiterated, Identifiler was widely used in public and private sector laboratories nationally and internationally. (4 RT 768-771, 783, 788-790.) For example, a large private laboratory in Maryland, Orchid Cellmark, internally validated Identifiler and published its findings. (4 RT 780-781.) The FBI had likewise validated, approved, and adopted Identifiler for national use in conjunction with CODIS. (3 RT 647-648, 678; 4 RT 768, 769, 788-789, 795.) The California Department of Justice similarly implemented Identifiler testing as the standard for its state DNA database program. (4 RT 788.) Identifiler met international standards promulgated by agencies such as Interpol and the European Network of Forensic Science Institutes. (4 RT 791-792.) Stockwell was unaware of any publication disputing the validity of Identifiler. (4 RT 800.)

5. Documentary evidence

The People provided the trial court with a number of documents supporting Identifiler's general acceptance. They included the product's developmental validation conducted by Applied Biosystems (4 RT 772-774 [People's exhibit No. 1]), a validation study of Identifiler published in 2004 in the peer-reviewed Journal of Forensic Sciences (4 RT 779-780 [People's exhibit No. 3]), a validation study of Identifiler conducted by the Orchid Cellmark laboratory (4 RT 780-781 [People's exhibit No. 4]), an internal validation study of Identifiler conducted by the Federal Bureau of Investigation and published in the Forensic Science Communications journal (4 RT 781-782 [People's exhibit No. 5]), an internal validation study of Identifiler conducted by the Alabama Department of Forensic

Sciences (4 RT 782-783 [People's exhibit No. 6]), a 2001 presentation indicating the intent of the California Department of Justice to use Identifiler in its DNA data bank program (4 RT 787-788 [People's exhibit No. 8]), a 2002 press release from Applied Biosystems indicating that Identifiler had been adopted for use with the National DNA Index System (4 RT 788-789 [People's exhibit No. 9]), documentation that private-sector paternity testing laboratories utilize Identifiler in their work (4 RT 789-790 [People's exhibit Nos. 10, 11]), and a press release from Applied Biosystems indicating that Identifiler data are consistent with international standards set by Interpol and the European Network of Forensic Science Institutes (4 RT 792-793 [People's exhibit No. 12]). Each document was received into evidence. (4 RT 850.)

6. Other evidence

Although not as part of the pretrial prong one *Kelly* hearing, additional evidence was presented to the trial court bearing on Identifiler's general acceptance in the scientific community. During a pretrial evidentiary hearing on discovery issues the defense elicited testimony from another of its DNA experts, Dr. Christie Davis. (2 RT 270-274.) Dr. Davis had been working in the DNA field in the mid-1980's, starting her own forensic DNA consulting business in 2001. (2 RT 272.) She was familiar with the STR DNA testing conducted in this case using Applied Biosystems kits. (2 RT 274-275.) She considered it scientifically valid:

> Q. Is this a valid kind of testing if done properly?
>
> A. Certainly.
>
> Q. Okay. So you don't quarrel with the overall science involved here, do you?
>
> A. No.

(2 RT 278; see also 2 RT 398.)

Alan Keel of the Forensic Science Associates laboratory testified that Identifiler methods were "exactly the same" as those employed in connection with the Profiler Plus and COfiler kits "except for the commercial reagent kit and the software that's used to analyze the data once it comes off the instrument." (7 RT 1539-1540, 1545-1546.) During his trial testimony, Keel opined that the DNA testing techniques utilized in his laboratory are generally accepted in the scientific community. (16 RT 3719-3720.) Those techniques included the Identifiler test kit. (16 RT 3725.)

Finally, in the course of litigating Applied Biosystem's motion to quash appellant's subpoena for company records concerning Identifiler's development, a company scientist submitted a declaration to the trial court containing the following paragraph: "Many scientific articles have been published referencing the Identifiler kit. Pub Med listing references 58 publications pertaining to uses of the Identifiler Kit. These publications further contribute to the validation and general acceptance in the scientific community of Identifiler." (4 CT 991.) The list of publications was attached to the company's motion. (4 CT 1013-1021.)

7. Trial court's findings and ruling

On August 15, 2006, the trial court denied appellant's motion to exclude DNA evidence. (4 CT 1042.) It found that "the Identifiler Kit does not utilize a 'new' methodology within the contemplation of the law . . . and, even if it does, the methodology has met with widespread—indeed, nearly universal—acceptance among the relevant scientific community . . . ." (4 CT 1042.) The trial court explained its reasoning as follows:

> It's a major factor that [Identifiler] is being used by labs, scientists in labs, that is being used by our national lab, Department of Justice, FBI, Boston department [*sic*], according to the doctor who testified, all the other labs, private and public, that have been identified during the course of this testimony.

> Not one has been identified as having rejected the latest version of Identifiler, not one has. And there was even testimony by [Dr. Shields] that in several cases which he was involved in it was accepted by the courts.

(4 RT 1006.) The court characterized the defense witnesses' testimony as follows:

> [T]here are certain questions that Mr. Taylor and Dr. Shields have that keep them from endorsing this new kit a hundred percent unless and until they've had an opportunity to examine the data upon which the manufacturer has made its validation, but they aren't—they're not even—neither one of them has said that there are—there's bad science being used, that the methodologies employed are bad, that they're not—they have methodologies not accepted by scientists or rejected by scientists.

(4 RT 1008-1009; see also 5 RT 1032 [same].) The trial court continued, "I feel very strongly that we're not dealing with a new methodology. And to the extent that we are, it's clearly been accepted generally by the scientific community, notwithstanding these questions that still exist about certain validation points." (4 RT 1011; see also 5 RT 1030 [trial court finding that "Identifiler . . . has wide-spread acceptance among scientists" and "most labs seem to accept it"].)

In sum, the trial court held a thorough and extensive prong one *Kelly* hearing. Appellant's claim to the contrary misconstrues the record.

C. The Trial Court's Conclusion Was Correct As a Matter of Law

To the extent that appellant's argument is taken as an attack on the correctness of the trial court's ruling itself, his claim is likewise unavailing. The trial court's finding that Identifiler, as well as its animating PCR/STR technology, was generally accepted was amply supported by both trial witness testimony and documentation provided during the hearings

described above, and is further substantiated by extensive published appellate authority.

1. Identifiler is not a new scientific technique

The trial court need not have held a prong one *Kelly* hearing in the first instance. It is well-established that incrementally more advanced DNA test kits, such as Identifiler, using the same PCR/STR foundation, are variations on a theme and not new techniques triggering renewed scrutiny under *Kelly*: "Neither the use of PCR . . . nor STR technology to analyze mixed-source forensic samples is a new scientific technique. [Citation.] Nor are new kits as they come on the market." (*People v. Stevey* (2012) 209 Cal.App.4th 1400, 1411 [describing technology and citing cases]; see *People v. Jones* (2013) 57 Cal.4th 899, 937, fn. 13 [noting that "PCR has attained a consensus in the scientific community as a valid procedure"]; *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1149 ["PCR and STR methods of DNA analysis have been held to be generally accepted in the relevant scientific community for some time now"]; *Hill*, *supra*, 89 Cal.App.4th 48, 58 [Profiler Plus test kit based on PCR/STR technology, and not subject to new prong one *Kelly* assessment]; *People v. Henderson* (2003) 107 Cal.App.4th 769, 788-789 [PCR/STR and capillary electrophoresis technology generally accepted in scientific community]; *People v. Smith*, *supra*, 107 Cal.App.4th at p. 665 ["We agree with the Attorney General that the use of polymerase chain reaction and short tandem repeats technology to analyze a mixed-source forensic sample is neither a new or novel technique or methodology"]; *People v. Allen* (1999) 72 Cal.App.4th 1093, 1099-1100 [STR technology has achieved general acceptance in scientific community]; *Wilson v. Sirmons* (10th Cir. 2008) 536 F.3d 1064, 1102 ["Numerous federal and state courts as well as scientific investigators have found that PCR DNA analysis is reliable"]; *State v. Whittey* (N.H. 2003) 821 A.2d 1086, 1094 ["PCR-based STR DNA

testing is recognized and used in virtually every State and by the Federal Bureau of Investigation"]; *State v. Deloatch* (N.J. Super.Ct. 2002) 804 A.2d 604, 613 ["It would appear that every appellate court in the nation that has addressed the issue has accepted the scientific reliability of STR technology"].)

The Identifiler test kit is no exception; it too is merely a progressive application of accepted and widely used valid technology. In *People v. Stevey*, *supra*, 209 Cal.App.4th 1400, the defendant made a motion to exclude DNA test results generated using the Identifiler kit. (*Id.* at p. 1409.) On appeal, he argued that the trial court erroneously failed to hold a *Kelly* prong one hearing on interpretation of test results generated on Identifiler. (*Ibid.*) The Court of Appeal rejected his argument, noting that Stevey "overlooks something much more basic—*Kelly* only applies to new scientific techniques. We conclude the interpretation of the test results does not constitute a new scientific technique within the meaning of *Kelly* and did not require an evidentiary hearing." (*Id.* at pp. 1409-1410; see also *id.* at p. 1412 [discussing how varied applications of PCR/STR technology do not qualify as new or novel technology].) The court in *People v. Jackson* (2008) 163 Cal.App.4th 313 reached the same conclusion. It held that Identifiler was "new and improved version" of same methodology as previous PCR/STR kits, and thus Identifiler need not independently satisfy *Kelly*'s first prong. (*Id.* at pp. 323-325.)

The same conclusion is justified here. The record confirms that Identifiler is simply an improved usage of an existing accepted technology. David Stockwell testified that Identifiler was part of an unbroken lineage of PCR/STR testing kits that included Profiler Plus and COfiler. (4 RT 764-765, 767, 847.) There is "virtually no difference" in the underlying scientific methodology, Stockwell noted. (3 RT 649.) Identifiler is "simply an addition to a long history of what has been taking place all along, the

compartmentalization and consolidation for these testing kits to get more information from less sample." (4 RT 847.) All the kits use PCR "in exactly the same way." (4 RT 760.)

Defense witness Taylor agreed that Identifiler incorporated "the same primer sequences [as COfiler and Profiler Plus] and [Applied Biosystems] combined them into a single reaction. In addition to that, they've added primers for two new genetic loci into this mix." (4 RT 854.) When asked if the succession of testing kits culminating in Identifiler uses the same methodology, Taylor replied, "Certainly[,] from the standpoint of the STRs being very similar loci with similar issues with regard to those loci and the amplification process." (3 RT 644.) Defense witness Shields likewise testified that the PCR/STR methodology remained the same for the Identifiler kit. (4 RT 905.)

Appellant has not demonstrated that inclusion of "linker" molecules to enhance Identifiler data interpretation somehow transformed that PCR/STR test into a scientific technique fundamentally distinct from its predecessor PCR/STR kits, all of which the law has considered to be evolutionary stages of the same basic system. (See *People v. Jackson*, *supra*, 163 Cal.App.4th at p. 325 ["Defendant has not shown the use of non-nucleotide linkers makes the Identifiler test a materially distinct scientific technique. Rather, it appears Identifiler is a new and improved version of the same scientific procedure already generally accepted by the scientific community"].) To the contrary, witness Stockwell's testimony cut to the heart of the matter:

> Q. So, the basic job of the test kit is to amplify and mark these genetic loci?
>
> A. Yes.
>
> Q. And COfiler, Profiler Plus and Identifiler, all do that basic job?

A. Yes.

Q. Do they all do it in the same basic way, the same basic method?

A. They all utilize the polymerase chain reaction in exactly the same way to produce the results.

(4 RT 759-760.) No prong one hearing was necessary.

2. Identifiler is generally accepted for *Kelly* purposes

A first prong *Kelly* hearing, albeit unnecessary as discussed, certainly took place. It demonstrated convincingly that Identifiler is a generally accepted scientific technique.

The trial court received a substantial volume of evidence that Identifiler had actually earned general acceptance in the scientific community. The record includes uncontroverted evidence that Identifiler had been widely adopted for use by laboratories at the local, state, federal, and international levels. (3 RT 647-648, 652-654, 678; 4 RT 768-771, 780-781, 783, 788-7923, 795, 801.) Identifiler had been validated in numerous studies, conducted both by Applied Biosystems and laboratories considering its implementation. (4 RT 772-774, 779-783.) It had been the subject of published, peer-reviewed literature sanctioning its use.[44] (4 RT 779-780.) It was being used for both forensic science and paternity purposes. (4 RT 789-790.) It had been adopted by high-volume state and federal DNA database programs. (4 RT 787-789.) No trial witness was able to identify any publication disputing the fundamental validity of

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[44] See, e.g., Butler, *Genetics and Genomics of Core Short Tandem Repeat Loci Used in Human Identity Testing* (2006) 51:2 J. Forensic Sci. 253, 254 [describing development of successive STR testing kits and classifying Identifiler, released in July 2001, as a "commonly used" commercial STR kit], available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1556-4029.2006.00046.x/abstract>.)

Identifiler, or identify any laboratory that had declined to adopt Identifiler out of concern for its functionality.

Thus, the trial court's finding that "the methodology has met with widespread—indeed, nearly universal—acceptance among the relevant scientific community" (4 CT 1042) was more than adequately supported and is entitled to deference on review.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT APPELLANT WAS THE SOURCE OF SPERM RECOVERED FROM CANNIE'S BODY

Appellant claims that the trial court erred in permitting expert testimony from David Stockwell of the Contra Costa County Sheriff's Crime Laboratory that, based on matching DNA profiles, appellant was the source of sperm recovered from Cannie's body. (AOB 136-141.) He further claims that introduction of this "unreliable evidence" infringed upon his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 140, 141.) In constructing his argument, appellant relies on case authority discussing the "prosecutor's fallacy," in which the random match probability statistic used for estimating the rarity of a DNA profile is incorrectly asserted as the statistical probability that the defendant is not the source of crime scene DNA. (AOB 137-140.)

Appellant's argument fails. Neither the prosecutor nor her witness expressed the fallacious statement appellant suggests. Instead, the People's evidence included what is known as a source attribution statement. The prosecutor's fallacy involves logically flawed quantitation and is potentially misleading. Source attribution, on the other hand, is a permissible inference by an expert based on a match to an exceptionally rare DNA profile. Source attribution statements are admissible, and the trial court did not abuse its discretion in permitting such evidence here.

A. Factual Background

Before presentation of evidence from any DNA experts, the defense made a motion to preclude testimony identifying appellant as the source of sperm collected from Cannie Bullock's body. (15 RT 3403.) Asked the legal grounds for his objection defense counsel stated, "I suppose there is a *Kelly-Frye* aspect to it, but I would say lack of foundation and outside the scope of any expert's expertise." (15 RT 3412.) Defense counsel later clarified his position, asserting that while an expert can properly provide DNA rarity statistics, qualitative interpretation of the arithmetic is beyond an expert's purview. (16 RT 3563-3564.) The prosecutor responded that a source attribution statement was an acceptable component of an expert opinion, representing a logical extrapolation from statistics associated with a DNA profile match. (15 RT 3406-3409; 16 RT 3555-3557, 3560, 3565, 3567.)

Following arguments of counsel, the trial court ruled that the People's DNA experts would be permitted to render an opinion "within a reasonable degree of scientific certainty" as to the source of DNA collected from Cannie Bullock. (16 RT 3570-3571.)

In its opening statement, the defense conceded and acknowledged that appellant was the source of the sperm cells left in Cannie's body: "You're going to hear evidence that [appellant's] DNA profile was present on Cannie Bullock." (13 RT 2929; see also 13 RT 2937.)

In his testimony, Contra Costa County Sheriff's Crime Laboratory DNA analyst David Stockwell made clear that the evidentiary significance of a DNA profile match depends upon a statistical calculation of that profile's expected frequency in human populations:

> In this case I looked at 13 STR markers. That means that this person obviously could be the source of whatever the evidence sample was. But one could ask, "Well, could it be someone else in the population?" After all, you look at something like the

> ABO blood group system, I'm a type O. 50 percent of the population is type O. That's not very informative. So the idea is to provide some weight to how important this finding is based on a statistical analysis. How rare is this in the population or how frequent is this in the population?

(16 RT 3630-3631.) Stockwell went on to explain how rarity statistics are calculated. (16 RT 3631-3632.)

Stockwell described the Contra Costa County lab's DNA analysis of the sperm evidence from the vaginal swab extract in this case, and the analysis of a known reference sample of appellant's blood, which resulted in matching profiles. (16 RT 3637, 3641, 3642.) He provided the associated statistics, stating that the profile is expected to occur randomly in 1 in 3.1 quintillion African-Americans, 1 in 670 quadrillion Caucasians, and 1 in 3.6 quintillion Hispanics. (16 RT 3642.) Given those statistics, Stockwell opined that appellant was the source of the sperm in Cannie's body, "to a reasonable degree of scientific certainty." (16 RT 3644-3645.)

The defense elicited the same point in its cross-examination of Stockwell: "Q. And, again, to go over you what testified to this morning, there was blood [on the bathrobe] which you were able to identify as Cannie Bullock's blood; is that correct? A. For all intents and purposes, yes." (16 RT 3674-3675.)

Dr. Edward Blake of Forensic Science Associates also testified for the People about the probative DNA profile match and its significance. As did Stockwell, Dr. Blake described how the significance of a DNA profile match could be evaluated by reference to population frequency statistics calculated for a given DNA profile. (16 RT 3779-3782.) He explained that, when a DNA profile is so rare that it is expected to occur randomly only once—or fewer—times among all the people who have ever lived on the planet, "we're very close to achieving genetic uniqueness." (16 RT 3781.) Dr. Blake qualified the term "uniqueness" as a statistical

expectation of occurrence, as opposed to an empirical fact. (16 RT 3781.) Dr. Blake also noted that attributing the source of the crime scene DNA to appellant is an inference that can be made in view of the rarity statistics, but, unlike Stockwell, was more comfortable leaving it to the jury:

> Q. And in your opinion from a scientific standpoint or reasonable degree of certainty is he the source of the sperm found in the evidence samples in this case?
>
> A. Here's where I have a problem. I think that the role of the scientist here is to get you up to the point where you can make the logical leap, but the logical leap then needs to be made by jurors.
>
> Q. Okay.
>
> A. So the—I—the correct way for the scientist to express this information is that Joseph Cordova and the sperm source share the same genetic profile and that genetic profile is expected to be unique in the human population. The next step is a step for the jurors to take.

(16 RT 3784.) Dr. Blake did not state or imply that an inference that the defendant is the source is logically fallacious or otherwise scientifically impermissible.

Despite calling his own DNA expert as a defense witness, appellant elicited no testimony contesting the accuracy or validity of Stockwell's testimony attributing the sperm cells to appellant. (See generally 17 RT 3921-3939.)

During his closing argument, appellant's counsel conceded that his client was the source of DNA evidence collected from Cannie's body: "There's no question that Mr. Cordova's DNA was found." (18 RT 4260.)

B. The Trial Court Properly Admitted Mr. Stockwell's Source Attribution Statement

The trial court did not abuse its discretion in permitting David Stockwell to opine that appellant was the source of the sperm cells

recovered from Cannie's body. (See *People v. Castaneda* (2011) 51 Cal.4th 1292, 1336 [rulings on admissibility of expert witness testimony are reviewed for an abuse of discretion].)

1. A DNA expert may permissibly opine as to the source of a sample

The conclusion articulated by Stockwell—that appellant was the source of the sperm collected from Cannie's body—is a relevant logical inference based on a DNA match to a sufficiently rare profile. (*People v. Nelson*, *supra*, 43 Cal.4th at p. 1267 ["the question of how probable it is that the defendant . . . is the source of the crime scene DNA remains relevant"]; *People v. Soto* (1998) 21 Cal.4th 512, 523 [DNA testing and statistical description of a match contribute to proof "that the suspect was indeed the source of the sample"].) The possibility of reaching this conclusion is the driving force behind DNA testing as a forensic science discipline: it permits identification evidence of unparalleled accuracy. As the United States Supreme Court recognized, "[m]odern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980's, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty." (*District Attorney's Office v. Osborne* (2009) 557 U.S. 52, 62.)

Determining that a defendant is the source of unknown DNA, moreover, need not be left to the jury; it can be permissibly articulated by an expert from the witness stand. This Court and others have recognized that, when the odds of a coincidental DNA match to a target profile[45] are

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[45] This is known as the random match probability, which answers the question, "[W]hat is the probability that a person chosen at random from (continued...)

sufficiently low, "it might be appropriate for the expert to testify that, except for identical twins or maybe close relatives, '"it can be concluded to a reasonable scientific certainty that the evidence sample and the defendant sample came from the same person."' [Citations.]" (*People v. Nelson*, *supra*, 43 Cal.4th at p. 1262, fn. 1; accord *People v. Wilson* (2006) 38 Cal.4th 1237, 1248–1249 [observing that a sufficient rare frequency statistic is '"tantamount to saying his pattern is totally unique, and thus only he could have been the source of the crime scene bloodstains that did not match those of the victim'"].) The Court of Appeal in *People v. Cua* (2011) 191 Cal.App.4th 582 reached the same conclusion: "We know of no categorical prohibition, at least in this state, on source attribution—expression by an otherwise qualified expert of an opinion that the quantitative and qualitative correspondence between an evidentiary sample and a known sample from a defendant establishes identity to a reasonable scientific certainty. The reported cases and the scientific literature suggest otherwise." (*Id.* at pp. 600-601; see *People v. Robinson* (2010) 47 Cal.4th 1104, 1134 [discussing precision and exclusivity of DNA-based identification].)

A substantial body of additional authority—in California and beyond—is likewise in accord. (See *People v. Johnson*, *supra*, 139 Cal.App.4th at p. 1146, fn. 10 ['"'When the random match probability is sufficiently minuscule, the DNA profile may be deemed unique. In such circumstances, . . . the expert may inform the jury of the meaning of the match by identifying the person whose profile matched the profile of the DNA evidence as the source of that evidence'"]; *People v. Allen* (1999) 72

(...continued)
the relevant population would likewise have a DNA profile matching that of the evidentiary sample?" (*People v. Soto*, *supra*, 21 Cal.4th at p. 523.)

Cal.App.4th 1093, 1097 [expert concluded "'within a reasonable degree of scientific certainty'" that defendant was the source of the semen stain based on PCR test matching at a total of nine genetic markers]; *United States v. Garcia-Ortiz* (1st Cir. 2008) 528 F.3d 74, 83; *United States v. McCluskey* (D.N.M. 2013) 954 F.Supp.2d 1224, 1270; *United States v. Ewell* (D.N.J. 2003) 252 F.Supp.2d 104, 109; *Hopkins v. State* (Ind. 1991) 579 N.E.2d 1297, 1304 ["The trial court did not err in admitting evidence of forensic DNA test results identifying appellant as the source of semen found in the victim"]; *Young v. State* (Md.Ct.App. 2005) 879 A.2d 44, 56-57; *State v. Bloom* (Minn. 1994) 516 N.W.2d 159, 168 [allowing qualified expert to opine "to a reasonable scientific certainty" that the appellant is the source of DNA sample from crime]; *State v. Buckner* (Wash. 1997) 941 P.2d 667 ["there should be no bar to an expert giving his or her expert opinion that, based upon an exceedingly small probability of a defendant's DNA profile matching that of another in a random human population, the profile is unique"].)

In fact, an expert's conclusion drawn from a DNA comparison need not necessarily be accompanied by statistics to be admissible. (*People v. Her* (2013) 216 Cal.App.4th 977, 980-981; *People v. Cua*, *supra*, 191 Cal.App.4th at pp. 596, 597, 600; *People v. Johnson*, *supra*, 139 Cal.App.4th at p. 1146, fn. 10; *United States v. Davis* (D.Md. 2009) 602 F.Supp.2d 658, 684 ["there is no legal or scientific requirement that a source attribution statement (or opinion that a profile is 'unique') must be explained or accompanied by the presentation of the random match probability figure or other statistical calculation"]; *Young v. State*, *supra*, 879 A.2d at pp. 56-57.)

As these authorities comprehensively establish, the trial court did not abuse its discretion in allowing Stockwell's source attribution statement as a component of his expert testimony. Conversely, Dr. Blake's approach,

while commendably conservative, was not required by law. An expert may indeed express an inference—such as a source attribution statement—that coincide with core questions of fact in a case. It is a matter of settled law that "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805; see *People v. Vang* (2011) 52 Cal.4th 1038, 1048, 1049.)

Finally, of course, the expert rendering the source attribution opinion remains subject to cross-examination, and the jury may still decide what weight to accord the opinion. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1154 ["expert testimony has the advantage of being subject to cross-examination and rebuttal, thus allowing the jury to determine for itself the weight it should give to expert opinions, rather than binding the jury to accept certain experts' views"].) The trial court in this case took effective measures to remind the jury of its role in this regard. Following Stockwell's qualification as an expert, for example, the court reminded the jury, "As is the case with every expert, irrespective of who calls them, the weight, if any, to be given to the testimony of such expert is, of course, for you to determine." (16 RT 3584; see also 18 RT 4220-4221 [instructions on expert witness testimony].) Appellant additionally had the opportunity to contest the validity of Stockwell's source attribution statement through appellant's own DNA expert witness's testimony. Appellant elected not do so.

2. The testimony at issue did not involve the "prosecutor's fallacy"

Appellant's related assertion, that the trial court abused its discretion because Stockwell articulated the "prosecutor's fallacy" in the course of his testimony, is incorrect. As discussed, Stockwell testified to matches between appellant's DNA and DNA attributable to the sperm collected

from the victim's body. He provided associated random match probability statistics. He then extrapolated that appellant was the source of the sperm "to a reasonable degree of scientific certainty." This was not fallacious reasoning; it was merely evidence that appellant was the source of the DNA.

The "prosecutor's fallacy," on the other hand, occurs when an expert (or attorney) expressly equates DNA frequency statistics (i.e., the rarity of a profile in a population based on the probability of a random match) to the quantitative probability that the defendant is or is not the source of the DNA, or is or is not guilty. (See Kaye, *DNA Evidence: Probability, Population Genetics, and the Courts* (1993) 7 Harv. J.L. & Tech. 101, 158-159.) Doing so is not a permissible logical inference. The United States Supreme Court described this flawed reasoning in *McDaniel v. Brown* (2010) 558 U.S. 120:

> The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample. See Nat. Research Council, Comm. on DNA Forensic Science, The Evaluation of Forensic DNA Evidence 133 (1996) ("Let P equal the probability of a match, given the evidence genotype. The fallacy is to say that P is also the probability that the DNA at the crime scene came from someone other than the defendant"). In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy. It is further error to equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a .01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

(*Id.* at p. 128; accord *United States v. Chischilly* (1994) 30 F.3d 1144, 1156-1157 [also describing prosecutor's fallacy].) In other words, the random match probability may be *evidence* that a person is the source of DNA given the extreme rarity of a profile, but it cannot be used as a *statement* of the mathematical odds of that fact.[46] An inverted version of the prosecutor's fallacy, sometimes committed by the defense, improperly conflates the random match probability with the probability that a defendant is innocent. (See *Crews v. Johnson* (W.D.Va. 2010) 702 F.Supp.2d 618, 628, fn. 7.)

Mr. Stockwell did not employ fallacious reasoning or rhetoric in his testimony; he merely drew an inference "to a reasonable degree of scientific certainty." (16 RT 3644-3645.) He did not mathematically express a source probability, nor did he mathematically express the odds of guilt.

Expert testimony analogous to Stockwell's was discussed in *People v. Cua*, *supra*, 191 Cal.App.4th 582. There, DNA testing was done on several items. At trial, the analyst testified that defendant Cua could not be excluded as a contributor to a DNA mixture on two of the items, and provided related statistics. (*Id.* at pp. 589-590.) As to a third item tested—a bloodstain from the murder victims' car—the analyst testified that she developed a single-source 15-locus DNA profile that matched Cua. She "concluded that the stain 'belonged to Joseph Cua.'" (*Id.* at p. 596.) As

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[46] This is a significant distinction, if subtle. Indeed, the prosecutor's fallacy is expressed occasionally in published decisions without, apparently, the court or parties noticing. (See, e.g., *Jenson v. Maloff* (D.Md. 2007) 484 F.Supp.2d 404, 411 ["'The probability that someone other than appellant was the source of the blood was 1 in 8,200 among Caucasians and 1 in 170,000 among African- Americans'"]; *United States v. Mason* (C.M.A. 2004) 59 M.J. 416, 425 ["The expert witness interpreting the DNA evidence established at trial that the odds of an individual other than Appellant having been the source of the semen found in Mrs. P were an extremely small 1 in 240 billion"].)

appellant does in this case, Cua "contend[ed] that the testimony that the evidence sample 'belonged' to him was 'scientifically invalid' and it confused '"'random match probability'"' with '"'source probability'"'—what is sometimes referred to as the 'prosecutor's fallacy.'" (*Id.* at pp. 596-597.) The court rejected Cua's challenge, holding that the DNA expert "made no attempt to create . . . a misleading numerical characterization of the probability of Cua's guilt" based on a random match probability statistic. (*Id.* at p. 597.) Instead, continued the court, the analyst provided a source attribution statement admissible because the 15-locus match was "'tantamount to saying that defendant left the evidence at the crime scene.'" (*Id.* at p. 601, quoting *Nelson*, *supra*, 43 Cal.4th at p. 1247.)

Stockwell's testimony was valid and admissible. No abuse of discretion occurred in its admission.

C. Any Error Was Harmless

Any error was harmless beyond a reasonable doubt, thus satisfying either *Watson*, *supra*, 46 Cal.2d 818, 837, or *Chapman*, *supra*, 386 U.S. 18, 24. The jury heard testimony from both Stockwell and Dr. Blake concerning the extraordinarily small random match probabilities associated with the DNA profile match between appellant and the sperm cells recovered at the autopsy. It has long been recognized that the significance of a DNA profile match can be expressed by means of random match probability statistics. (See *People v. Venegas*, *supra*, 18 Cal.4th at p. 82 ["The evidentiary weight of the [DNA profile] match with the suspect is therefore inversely dependent upon the statistical probability of a similar match with the profile of a person drawn at random from the relevant population"].) Dr. Blake, in fact, noted that the rarity of the germane profile was such that it approached "uniqueness." The jury was thus able to independently arrive at the same qualitative inference made by Stockwell, namely, that appellant was the source of the DNA on and in Cannie's body.

Stockwell's source attribution opinion was thus inconsequential to the force of the DNA evidence and outcome of the case.

ARGUMENT: PENALTY PHASE

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY CONCERNING ITS ROLE IN THE PENALTY PHASE

Appellant argues that, during pretrial jury voir dire, the trial court provided "constitutionally defective" instruction about the nature of the penalty phase decision process. (AOB 141-146.) Specifically, he contends that aspects of the court's wording suggested a mandatory death judgment under some circumstances, without clarifying that each individual juror must undertake a weighing process before deciding the question of penalty. (AOB 146.) He takes issue with the following statements from the court:

> (1) "If the jury found [*sic*] that the circumstances in aggravation so substantially outweigh those in mitigation that it warrants the imposition of the death penalty, they will vote for the death penalty. If it finds that they do not, then they will vote for life without the possibility of parole." (10 RT 2201-2202 [addressing first panel of prospective jurors].)
>
> (2) "And if you find that the aggravating factors so substantially outweigh as to warrant mitigating factors as to warrant imposition of the death penalty [*sic*], then you should vote for the death penalty." (11 RT 2439-2440 [addressing second panel of prospective jurors].)
>
> (3) "If you find, and only if you find, that the aggravating factors so substantially outweigh the mitigating factors that in your mind it warrants the imposition of death, then you vote for death. And only if you find that the mitigating factors outweigh the aggravating factors that the life without the possibility of parole is warranted, then you should vote for that." (13 RT 2684 [addressing third panel of prospective jurors].)

(AOB 142-143.) Appellant's claim lacks merit, however. The quoted passages were not uttered by the court in isolation, but rather were

components of a careful, thorough, and legally accurate description of the penalty phase decision process. The trial court repeatedly emphasized that, should the trial proceed to the penalty phase, jurors would be called upon to make an individualized, normative decision based on what they considered to be appropriately valued aggravating and mitigating factors. It was made abundantly clear that the death penalty was never mandatory. There was no error.

A. Factual Background

Jury selection began on December 12, 2006, with the full group of 350 prospective jurors in attendance. (9 RT 2076.) Actual voir dire commenced on December 18, 2006, with an initial group of 30 prospective jurors. (10 RT 2175, 2177.) Additional groups of 30 jurors per day appeared on subsequent days. (10 RT 2175.)

1. December 18, 2006, jury selection

The trial court addressed the penalty phase with the first panel of potential jurors:

> But if we get to [the penalty phase], then you have a different type of decision to make. The decision then becomes as to whether the defendant should be put to death or sentenced to life without the possibility of parole. There are no other alternatives. It's one or the other that you'll be called upon to decide as being appropriate.
>
> Neither side really has any burden of proof with respect to the matter. The People don't have any burden of proof in that respect. Certainly, the defendant has no burden of proof in that respect.
>
> What the law envisions is that both sides will have an opportunity to present to you what are called evidence of aggravating factors and evidence of so-called mitigating factors.
>
> Mitigating factors can relate to any number of things, including things that pertain to the character of the evidence, the history, background of the defendant, circumstances of the case,

his history, any number of things. And I'll talk to you about those factors later on in greater detail.

The People can introduce evidence of aggravating factors. These are relatively limited in number as to what kind of things they can present to you in that regard, but it can be circumstances attendant to the commission of the crime. It could be any evidence that they may have about the criminal history of the defendant, certain kinds of criminal histories of the defendant and so forth. And we'll talk about those things in greater detail later.

But then what is envisioned is that the jury will weigh the circumstances in aggravation and the circumstances in mitigation. They will compare them and weigh them, weigh them, and ultimately make a decision as to whether the—as to whether or not the circumstances—or how the circumstances in aggravation compare to the circumstances in mitigation.

If the jury found that the circumstances in aggravation so substantially outweigh those in mitigation that it warrants the imposition of the death penalty, they will vote for the death penalty. If it finds that they do not, then they will vote for life without the possibility of parole.

This weighing process, it's not a mathematical counting. Let's see. The People came up with three factors in aggravation. Defendant has come up with one, two, three factors in mitigation. That's not how you do that. You can give each factor whatever weight you think it deserves.

So ultimately the weighing process is a qualitative—in fact, it's a moral decision that ultimately you make. A better word is normative decision. You will make a decision as to what you believe—what penalty should be imposed in light of the aggravating and mitigating circumstances, weighed against each other, attributing each of these factors whatever value, moral value, you think they deserve. And that's the nature of the decision that you're going to be called upon to make.

(10 RT 2200-2202.)

The trial court went on to emphasize that the only mandate would be to render an "appropriate" decision, and not to follow a formulaic mandate:

"But ultimately what is important is . . . can you do what the law requires you to do, which is to weigh the circumstances in aggravation and those in mitigation and then pick one or the other as you deem appropriate after hearing all the evidence." (10 RT 2204.) In describing California death penalty law, the court noted situations in which capital punishment "can be imposed" (10 RT 2215, 2216), but never stated or implied that any situation exists in which death "must" be the sentence.

In fact, stated the trial court, "even if it's one of those cases where the death penalty can be imposed, the law does not require that it be imposed in those cases." (10 RT 2216.) The trial court continued, "So, if you find the defendant guilty of first degree murder and find him guilty of committing such murder while engaged in a rape, you can consider the imposition of the death penalty, but you're not required to vote for the death penalty." (10 RT 2216-2217; accord 10 RT 2217 ["You can vote for death or life without the possibility of parole depending on what you feel is warranted after considering the circumstances in aggravation and in mitigation"], 2218 [trial court telling prospective juror in presence of all others, "But the law says [the death penalty] doesn't have to be imposed. You have to—all that means is you have to start considering the circumstances in aggravation and mitigation and weighing them"], 2229 [trial court asking prospective juror in presence of all others, "You understood what I talked about earlier that . . . the law may allow you to consider [the death penalty], that it doesn't require that it be imposed? You understand that?"], 2245 [trial court asking prospective juror in presence of all others, "do you understand that the law never requires the imposition of the death penalty, the law in California?" and the juror responding, "I do now"], 2245 [trial court asking prospective juror in the presence of all others, "And would you follow the law in that respect? Would you say 'okay, I realize that under California law death penalty is never mandatory neither is life without possibility of

parole mandatory, neither one of them is mandatory. What the law requires is that I consider and weigh and compare circumstances in aggravation with those in mitigation,' you understand that?"], 2280 [trial court telling prospective juror in presence of all others that, in penalty phase, can give factors in mitigation "whatever value you think they merit"], 2282 [trial court telling prospective juror in presence of all others, "it's never really mandatory that you decide who would be subject to the death penalty or not after consideration of all aggravating and mitigating factors"], 2312 [prosecutor stating during voir dire that "the law is never going to instruct you on what warrants a death penalty or not. The law will instruct you on what kind of cases can qualify, and then you make that decision"], 2365 [trial court during voir dire asking juror to "envision a possibility that there may be some circumstances brought to your attention that would maybe make you say, 'Oh, well, in this case probably death is not right. Maybe life without possibility of parole is better'"], 2367-2368 [trial court stating during voir dire, "you understand that each case death penalty's never mandatory, just for the jury to consider all the factors in aggravation and mitigation and then make a decision, but you can't . . . go in there with a notion that it's mandatory. You understand that?"], 2368 [trial court explaining during voir dire that imposition of the death penalty is "never required" and that "[t]he law is neutral with respect to the penalty"], 2372-2373 [trial court stating to prospective jurors that "[t]he law never requires, again I repeat it, it never makes the imposition of the death penalty mandatory. . . . The most that it will say is if you find certain things then you can consider whether to impose the death penalty, but that will be up to you to consider factors in aggravation and mitigation"].)

2. December 19, 2006, jury selection

On the second day of jury selection (11 RT 2416), the trial court explained the penalty phase decision to the next panel of potential jurors:

Where the jury finds first degree murder and finds the special circumstances to be true, the jury can decide whether to punish the person by death or life without the possibility of parole. The law does not require one or the other of these penalties, however. Under California law, the death penalty, for example, is never mandatory. Life without possibility of parole is never mandatory. The choice as to whether it will be death or life without the possibility of parole is up to the jury to decide after a consideration of what are called aggravating factors and mitigating factors.

[¶] . . . [¶]

The jury must consider all these, must consider the aggravating factors and the mitigating factors, compare them, weigh them and determine . . . whether the aggravating factors so substantially outweigh the mitigating factors as to warrant the death penalty.

And if you find that the aggravating factors so substantially outweigh as to warrant the mitigating factors as to warrant imposition of the death penalty, then you should vote for the death penalty. If . . . after you do this evaluation and you come to a different conclusion, then you can vote for life without the possibility of parole.

[¶] . . . [¶]

In the penalty phase, no one has the burden of proof. Anyone can bring forward any evidence relating to aggravating factors or mitigating factors. And then you prepare—weigh them and evaluate them, and your evaluation is just not a mathematical or quantitative weighing, a one, two, three aggravating factors and one, two, three mitigating factors. It's not an adding up.

It involves you making a moral or normative judgment. What should be. You ultimately make a value judgment of what should be the penalty in this matter. Okay. And that is going to depend very much on your own value system, okay, in terms of evaluating the evidence.

(11 RT 2438-2440.)

As on the first day of jury selection, the trial court continually emphasized that imposition of the death penalty was discretionary under all circumstances, and not mandatory under any circumstances. (11 RT 2442-2443 [trial court explaining that "the law as it is now does not require the imposition of either of these penalties in a given case, doesn't require that someone must be sentenced to death or must be sentenced to life without the possibility of parole in any case," and instead permits jurors to determine the sentence they deem "appropriate"], 2482 [trial court stating during voir dire of jurors, "You understand now, I've talked about it enough times that I'm sure you understand, the death penalty is never mandatory?"], 2482 [trial court telling prospective jurors that the death penalty "[c]an't automatically apply"], 2486 [trial court stating during voir dire, "Again, I've talked about this so many times now, but you appreciate that [the death penalty is] never mandatory?"], 2533 [trial court asking potential juror in open court, "[D]id you understand our rather lengthy discussion about these things that . . . [¶] . . . death penalty's never mandatory?"], 2537 [trial court inquiring of potential juror in open court, "you did seem to recognize what the law provides and that is [the death penalty is] never mandatory. [¶] And that whether it should be imposed or not depends upon your evaluation of evidence that's presented as to the aggravating and mitigating circumstances"], 2619 [trial court reminding juror in open court, "We've talked about this long enough that I think you understand [the death penalty is] never mandatory"].)

Also on the second day of jury selection, the trial court and counsel for both parties conferred in chambers about the proper way in which to describe the jury's penalty phase task. Appellant's attorney objected to any intimation that the law required the death penalty if aggravating factors outweighed mitigating factors. (11 RT 2554.) The court responded:

> Actually, the law expressly states that if the aggravating circumstances outweigh the – factors outweigh the mitigating factors, the [death] penalty is to be imposed, and vice versa. And there are several cases that have held to instruct the jury in accordance with that is okay.
>
> The clarification that's needed, and I've gone to pains to make sure that the jury has understood this, is it's not a mathematical or quantitative thing. It's a qualitative thing. So you have to find that the aggravating—before you can impose death, that the aggravating factors so outweigh the mitigating factors that you conclude that the imposition of the death penalty is warranted, and if you do find that, then the law provides that you vote for the death penalty. And that's what it is.

(11 RT 2555.) Counsel for appellant acknowledged that the trial court had "been pretty good consistently" in its descriptions of the jury's penalty phase task. (11 RT 2556.)

3. December 20, 2006, jury selection

On the third day of jury selection (12 RT 2661), the trial court explained the penalty phase decision process the final panel of prospective jurors:

> But I have to tell you, right now, under the state of the law in California, the death penalty is never mandatory nor is life without the possibility of parole. Neither of those sentences are ever mandatory in cases—in this type of a case, a so-called death penalty case.
>
> What the law says is that a jury can pick one punishment or the other, and no other punishment, by the way, just either death or life without the possibility of parole in cases where, for our purposes, are limited to first degree murders and special circumstance allegations are you found to be true. And in that type of a case, if the jury goes to the penal phase, they can pick either death or life without the possibility of parole after an examination, consideration, comparison and evaluation of any evidence that has been presented relating to aggravating factors at play or mitigating factors at play.

Aggravating factors include such things as—and I'll go into greater detail of this later. It would include things like the circumstances attendant to the crime. If you find them to be aggravating, you could consider those as an aggravating factor. If there's evidence that the defendant has engaged in the past in crimes of violence, that can be considered as an aggravating factor. And there are certain limited—limited other factors and matters that can be considered as aggravating factors.

The law says you can also consider mitigating factors. The circumstances attendant to a crime could also be mitigating factors for example. Okay. Or other—actually, just about anything relating to a defendant's character or his history can be—or his mental condition can be considered as mitigating factors.

The law says you look at these aggravating factors, and you weigh them against the mitigating factors or vice-versa, and then you determine, if you can, what the appropriate penalty should be in this case.

The process is not a weighing one, I should say, is not a mathematical one. It's not quantitative. You don't say, all right, one, two, three aggravating factors; one, two, three mitigating factors. And three to three or four. It's a qualitative one. You accord whatever weight and value to them as you think is important, according to your value system. Okay?

And then having done that—and by the way, in death penalty cases, you can look at them sympathetically, from defendant's perspective and view. Sympathy can come into play. You can't bring sympathy into play in the culpability phase. But sympathy can come into play in the evaluation phase because, ultimately, what you're going to be called upon to decide in the penalty phase is what we call normative – you'll be called upon to make a normative decision or a moral decision, a value judgment. We think the penalty—given the circumstances in aggravation and mitigation, what we think the penalty should be. That's why it's normative: This or that.

The law doesn't favor either one. The law does not favor life without the possibility of parole over death, or death over life without the possibility of parole. It's completely neutral.

It's up to you. It doesn't say one is more serious than the other. It doesn't say that. Neutral.

(12 RT 2681-2683.) The court continued: "If you find, and only if you find, that the aggravating factors so substantially outweigh the mitigating factors that in your mind it warrants the imposition of death, then you vote for death. And only if you find that the mitigating factors outweigh the aggravating factors that the life without the possibility of parole is warranted, then you should vote for that. Okay?" (12 RT 2684.)

The trial court reinforced these ideas in additional comments to the third jury pool. (12 RT 2692 ["As I explained, under California law, the imposition of the death penalty is never mandatory. Okay? You may feel that it should be always be applied in certain type of cases, but the fact of the matter is that the law does not make it mandatory. And just the opposite, the law says that you have to treat each case individually and consider the factors in aggravation and in mitigation in each case before making a decision"], 2739 ["So California law does not really provide for that you should impose the death penalty in any particular type case. It allows for the imposition of the death penalty in certain types of cases, just like it allows for the imposition of life without possibility of parole in certain types of cases, but it doesn't mandate either one of those penalties in any general type case"], 2799 ["In fact, you seem to appreciate . . . that the death penalty is not mandated in any particular type of case; that is to say, it's never automatic nor mandatory. You understand it's a case-to-case thing"], 2820-2821 ["[B]ut you, in fact, recognize what the law provides and that is that [the death penalty is] never mandatory; you have to look at the particular circumstances in each case"], 2830 ["In your case, you also are one of those individuals who said that you believe the death penalty should always be imposed in certain types of cases. And you've heard me

discuss and counsel discuss how that's never, in fact, required under California law"].)

The prosecutor emphasized the same point in her third day voir dire. (12 RT 2743 ["[T]he reason the law tells you that there's no such thing as a mandatory sentence is because it recognizes that every circumstance is different"], 2817 ["And you understand the state never says death is the appropriate punishment in any case. It's the jury that has to decide that"], 2817 "You're okay with the idea that there isn't a mandatory sentence in this case"].)

The jury was selected at the conclusion of the third day of jury selection. (12 RT 2699 [jurors], 2835 [alternates].)

4. Penalty phase instructions

Before counsel's penalty phase arguments, the trial court formally instructed the jury about how to make its decision. The court's instructions included the following:

> [The] role [of a jury in the penalty phase of a capital case] is not merely to determine facts, but ultimately to render an individualized, normative and moral determination in accordance with the law set forth in these instructions about the penalty appropriate for the defendant, that is, whether he should live in prison for the rest of his life or to be put to death.

(8 CT 2105; 22 RT 5164.)

> In arriving at your decision, you shall condition, take into account, weigh and be guided by the applicable factors in aggravation and mitigation upon which you have been instructed. The weighing of aggravating and mitigating factors does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various factors, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating factors with the totality of the

mitigating factors. To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life without the possibility of parole.

(8 CT 2122; 22 RT 5175; see CALJIC No. 8.88.)

With regard to factors in mitigation or aggravation, each juror must make his or her own individual assessment of the evidence and the weight to be given to such evidence.

(8 CT 2124; 22 RT 5176.)

While the existence of factors in aggravation and mitigation depend upon the evidence, their proper evaluation ultimately requires a normative or moral judgment as to which penalty—death or life without the possibility of parole—should be imposed.

(8 CT 2125; 22 RT 5176.)

If, in accordance with the instructions that I have just given to you, you consider that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

If, in accordance with the instructions I have given you, you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in state prison for a term of life without possibility of parole.

If, after a comparison of the aggravating and mitigating factors, you are unable to determine which penalty is warranted, you shall vote for neither.

(8 CT 2126; 22 RT 5176-5177.)

5. Penalty phase closing arguments

In her penalty phase closing argument, the prosecutor reminded the jury that the death penalty was not a default judgment, but rather the product of careful weighing of factors in aggravation and mitigation. (22 RT 5188-5189.) She stated that "[i]t's also important to remember that lack

of mitigation is not the same thing as . . . aggravation. You are going to go through a weighing process, but you can't turn lack of mitigation into aggravation." (22 RT 5189.) The prosecutor continued:

> Once you've decided what the aggravating and mitigating facts are—this is an individual decision that each of you will make — you will then individually assign normative or moral values to each fact found. You can decide how much weight to give each fact. What's important to you morally or normatively? What does this mean to you? And finally you weigh the facts. Now, that's not a mechanical weighing or calculating, as the Judge told you. You can find that one fact in aggravation, one fact alone, could outweigh seven mitigating facts. It depends on the value that you individually place on those factors.

(22 RT 5189.) She added:

> After you've gone through the decision-making process, you have to make a decision. And this is basically where you weigh everything, and you look at the results of your weighing is. If you find that the mitigating facts outweigh the aggravating, then your decision is to vote for life without the possibility of parole. And you assign your own value to those factors. You make your own normative decision. But once you've done that, once you've weighed it in your mind, if mitigating outweighs aggravating, then you vote for life without the possibility of parole. However, if the aggravating factors substantially outweigh the mitigating factors and you feel it warrants a sentence of death, then you vote for death. That's the decision.

(22 RT 5190.)

Defense counsel likewise emphasized that "[t]here is no automatic death penalty"—a theme he emphasized repeatedly in his presentation. (22 RT 5228, 5229.) "You may impose a sentence of death only if you are convinced that the aggravating circumstances so substantially outweigh the mitigating circumstances so as to warrant a sentence of death." (22 RT 5244.) "In making that moral normative choice that you make, you must call upon your own sense of morality to decide what it is that's appropriate." (22 RT 5264.)

B. Applicable Law and Standard of Review

Imposing the death penalty must be an "essentially normative determination" by jurors. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) It is an individualized, subjective decision on the appropriate penalty, informed by the aggravating and mitigating factors listed in Penal Code section 190.3. (*People v. Tate* (2010) 49 Cal.4th 635, 711; *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Brown* (1988) 46 Cal.3d 432, 448.) There are no circumstances under which a death verdict is mandated by law. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1066.) In conducting its review of alleged penalty phase instructional error related to these principles, the Court will consider whether there exists a "reasonable possibility the jury was misled about its sentencing responsibility and discretion . . . ." (*People v. Avena* (1996) 13 Cal.4th 394, 442.)

This variety of instructional error is known as "*Brown* error," in reference to *People v. Brown* (1985) 40 Cal.3d 512 (*Brown*), reversed on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538. (See *People v. Weaver* (2001) 26 Cal.4th 876, 984-985.) In *Brown*, this Court addressed the constitutionality of a penalty phase jury instruction based on language in Penal Code section 190.3 providing that the jury "'*shall* impose a sentence of death'" if, after hearing evidence and arguments, and after considering aggravating and mitigating circumstances, it "'concludes that the aggravating circumstances *outweigh* the mitigating circumstances . . . .'" (See *Brown*, *supra*, 40 Cal.3d at p. 538, quoting Pen. Code, § 190.3, italics added by Court.) The defendant in *Brown* argued that the "shall impose" language of the law, as reflected in the instruction, "impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors" and thus "strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty." (*Brown*, *supra*, 40 Cal.3d at p. 538; see *id.* at pp. 539-540

[discussing United States Supreme Court authority establishing that the Constitution requires capital case jurors be permitted to individually assess all constitutionally relevant evidence in determining the appropriate penalty].)

The Court concluded in *Brown*, however, that the "shall impose" language employed by California law did not "preclude juror consideration of any factors constitutionally relevant to imposition of the death penalty," did not "require[] jurors to render a death verdict on the basis of some arithmetical formula," and did not "force[jurors] to impose death on any basis other than their own judgment that such a verdict was appropriate under all the facts and circumstances of the individual case." (*Id.* at pp. 540, 541-544.) Thus, Penal Code section 190.3 "is not invalid on grounds that it withdraws constitutionally compelled sentencing discretion from the jury." (*Id.* at p. 544.)

As appellant notes, though, using "shall impose" language—or language of similar import—can be potentially misleading to capital case jurors absent clarifying instruction from the trial court. (AOB 144-145, citing *People v. Cooper* (1991) 53 Cal.3d 771, 845 and *Brown*, *supra*, 40 Cal.3d at pp. 542-545.) The danger is twofold: (1) that jurors may erroneously infer they can weigh competing factors by mechanically counting them or assigning arbitrary weights; and (2) that jurors may not understand that they are "not required to vote for the death penalty unless, as a result of the weighing process, the juror personally determines that death is the appropriate penalty under all the circumstances." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035, citing *Brown*, *supra*, 40 Cal.3d at pp. 541 & 544, fn. 17; *People v. Brasure*, *supra*, 42 Cal.4th at p. 1063; see also *People v. Avena*, *supra*, 13 Cal.4th at pp. 440-441 [jurors must be aware that they are "to undertake a normative decision to determine whether the death penalty [is] appropriate"].)

CALJIC No. 8.88 was drafted in order to remedy the concerns expressed in *Brown*, and sets forth the proper procedure for the jury to follow in determining penalty. (*People v. Streeter* (2012) 54 Cal.4th 205, 255, 258, 263; *People v. Jones*, *supra*, 54 Cal.4th at p. 74 & fn. 21; *People v. Perry* (2006) 38 Cal.4th 302, 320.) Its use at trial satisfies constitutional requirements attached to jurors' penalty phase decision process. (*People v. Perry*, *supra*, 38 Cal.4th at p. 320.) In addition to reviewing the formal instructions provided to juries, in both pre- and post-*Brown* cases this Court has considered other aspects of trial court records, including arguments of counsel and comments by the court to the jury, to determine whether the jury received adequate guidance about the nature and scope of its sentencing decision. (*Id.* at pp. 256-258; *People v. Brasure*, *supra*, 42 Cal.4th at p. 1062 [citing cases].)

Finally, appellant cites *Boyde v. California* (1990) 494 U.S. 370 (*Boyde*) as his primary authority. (AOB 141-142.) *Boyde*, like *Brown*, considered the constitutionality of California's penalty phase jury instruction informing jurors that "'[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.'" (*Id.* at p. 374.) The United States Supreme Court held that the "shall impose" wording of the instruction did not unconstitutionally prevent the jury from individually assessing mitigating evidence, and rejected petitioner's claim to the contrary. (*Id.* at p. 377.)

C. No *Brown* Error Occurred

Contrary to appellant's contention (AOB 146), the record in this case provides abundant support for the conclusion that jurors were not operating under the mistaken assumption that the death penalty could be mandatory

as a matter of law under given circumstances. The jury was told repeatedly and unambiguously that a vote for death must be an individual normative decision involving a careful and discretionary weighing of competing considerations, and under no circumstances did the law mandate the death penalty. The content of the trial court's communications to the jury on this topic was thoroughly responsive to the concerns articulated in *Brown*.

From the outset of the first day of jury voir dire, the trial court described how jurors would be called upon to "weigh" the circumstances in aggravation against those in mitigation, and only impose the death penalty if the former "so substantially outweigh" the latter. (10 RT 2201.) "[I]t's not a mathematical counting" of factors, explained the court; rather, jurors may assign a factor "whatever weight [they] think it deserves." (10 RT 2202.) The trial court characterized the "weighing process" as a "moral," or "normative[,] decision." (10 RT 2202.) Thus, from the beginning the trial court went to great lengths to comply with *Brown* and its progeny.

The trial court did not stop there, however. Again addressing the first panel of jurors, the court instructed that "the law does not require that [the death penalty] be imposed." (10 RT 2216.) Capital punishment is an option that jurors can choose if they "feel" it is "warranted" after "considering" and "weighing" the circumstances in aggravation and mitigation. (10 RT 2217, 2218.) The trial court reminded jurors numerous times in the course of conducting voir dire that "the law never requires the imposition of the death penalty . . . ." (10 RT 2245; accord 10 RT 2216, 2217, 2218, 2229, 2245, 2282, 2312, 2367-2368, 2372-2373.) Individual jurors in open court indicated their understanding of that concept. (10 RT 2229, 2245, 2369.)

This theme continued during the second day of jury selection, when the court reiterated that the law "does not require" the death penalty, which is "never mandatory." (11 RT 2438.) Again the trial court described how

jurors would "consider . . . compare . . . [and] weigh" aggravating and mitigating factors and decide "whether the aggravating factors so substantially outweigh the mitigating factors as to warrant the death penalty." (11 RT 2439.) This process does not involve a "mathematical or quantitative" approach: "It's not adding up." (11 RT 2440.) Instead, stated the court, jurors would be "making a moral or normative judgment" that would "depend very much on your own value system . . . ." (11 RT 2440.) As on the first day, during questioning of individual jurors the trial court went on to reinforce repeatedly that the death penalty is never automatic and never mandatory. (11 RT 2442-2443, 2482, 2486, 2533, 2537, 2619.) In fact, while conferring in chambers during the second day of jury selection appellant's attorney conceded that the judge had been "pretty good consistently" in describing the penalty phase decision process as a qualitative, not quantitative, weighing of factors. (11 RT 2556.)

The third day of jury selection proceeded similarly, with the trial court instructing that "the death penalty is never mandatory" and that the weighing process is "not . . . mathematical" and "not quantitative." (12 RT 2681, 2682.) Competing factors should not be counted, but rather "[y]ou accord whatever weight and value to them as you think is important, according to your value system." (12 RT 2682.) In choosing a penalty, jurors would "make a normative decision or a moral decision, a value judgment," explained the court. (12 RT 2683.) "The law doesn't favor either" penalty option; "[i]t's completely neutral." (12 RT 2683.) A vote for death should occur, stated the court, "only if you find[] that the aggravating factors so substantially outweigh the mitigating factors that in your mind it warrants the imposition of death . . . ." (12 RT 2684.) As on preceding days, the court went on to emphasize repeatedly that the death penalty is never a mandated outcome. (12 RT 2692, 2739, 2799, 2820-2821, 2830.)

Moreover, the trial court's instructions to the jury during the penalty phase itself included the essential core of CALJIC No. 8.88, which protects against *Brown* error. (8 CT 2122; 21 RT 4912 [discussion with counsel concerning use of CALJIC No. 8.88]; 22 RT 5175; see *People v. Streeter*, *supra*, 54 Cal.4th at p. 255; *People v. Perry*, *supra*, 38 Cal.4th at p. 320; *People v. Brown*, *supra*, 31 Cal.4th at p. 569.) The jurors were also reminded once more that they were charged with individually assessing factors in mitigation and aggravation, and assigning them whatever weight they deemed appropriate. (8 CT 2124; 22 RT 5176.) And, in its concluding instructions, the court emphasized yet again that jurors' evaluation of aggravating and mitigating factors would "ultimately require[] a normative or moral judgment as to which penalty—death or life without the possibility of parole—should be imposed." (8 CT 2125; 22 RT 5176.)

Finally, as described above, both parties in their respective closing arguments discussed how the jurors were obligated to view the evidence they had received through their individual moral frames of reference and assign weight accordingly. (22 RT 5189, 5264.) Defense counsel, for example, advised jurors that they "may choose the life penalty based on any single event which grabs at your heart with sufficient force." (22 RT 5245.)

The record thus demonstrates that no *Brown* error occurred in this case. Jurors, from voir dire on their first day in court to final penalty phase arguments months later, knew that the death penalty would not and could not be required by law under any circumstances. There was no reasonable possibility they were misled about their sentencing responsibility and discretion.

IX. THE TRIAL COURT PROPERLY PERMITTED THE JURY TO CONSIDER APPELLANT'S 1992 AND 1997 CHILD SEXUAL ASSAULTS IN MAKING ITS PENALTY DECISION

Appellant contends that the trial court erred in permitting the jury to consider his 1992 and 1997 child molestation offenses as aggravating "circumstances of the offense" during the penalty phase. (AOB 146-154.) He argues that these offenses did not qualify under factor (a) of Penal Code section 190.3, and instead constituted evidence of his "general bad character" that should have been excluded. (AOB 151-153.) Permitting the prosecutor to reference his two Colorado child molest offenses in her cross-examination of defense witnesses and closing argument, he concludes, was a prejudicial violation of his federal due process rights, and requires reversal of the death judgment. (AOB 153-154.)

Appellant is incorrect. The trial court did not abuse its discretion in determining that evidence of appellant's child molest crimes in the 1990's could be considered by the jury as circumstances of the underlying capital crime within the meaning of Penal Code section 190.3, factor (a). The events were relevant and highly probative of appellant's identity as Cannie's rapist and killer by demonstrating his propensity to sexually assault children. As such, they were circumstances of the offense.

References to appellant's child molest offenses were also properly admitted as character evidence that directly and proportionately rebutted defense evidence of appellant's good character, particularly his treatment of women and children. Finally, outright denials of culpability by both appellant and several penalty phase defense witnesses opened the door to cross-examination by the People about appellant's other child sex crimes.

A. Factual Background

Before penalty phase testimony began, appellant argued to the trial court that the jury should not be permitted to consider his Colorado sexual

assaults on Nina S. and Curtis B. as aggravating evidence. (19 RT 4373-4374.) The defense posited that the two crimes could not be presented to the jury as acts involving force or violence pursuant to Penal Code section 190.3, factor (b), and also should not be considered as circumstances of Cannie's rape and murder under section 190.3, factor (a), because they occurred years after the fact. (19 RT 4374-4376, 4380-4381.) The trial court agreed that the Colorado sex crimes were not activities that involved force or violence, and thus could not be presented as "factor (b)" evidence to the jury. (19 RT 4379.)

But, the trial court also ruled that those events could be considered by the jury in the penalty phase as circumstances of the instant capital crime, pursuant to Penal Code section 190.3, factor (a). (19 RT 4379-4380, 4382, 4384, 4456, 4457.) Evidence of the Colorado child molest offenses, stated the court, "relates logically to [Cannie's murder]" by showing its "true nature" as a murder committed in the course of rape and child molestation. (19 RT 4457, 4461-4462.) The trial court anticipated, moreover, that the jury would hear questioning related to the Colorado child molest offenses as rebuttal character evidence "since [defense counsel is] likely to present evidence of the good character of your client. So it seem[s] to me that either way a jury would hear this matter." (19 RT 4460.)

Several references to appellant's child molest offenses in Colorado occurred in the taking of penalty phase evidence. The first was during cross-examination of appellant's brother Abe Cordova. Abe testified extensively on direct examination about appellant's good character. He told the jury that appellant did not "get in trouble" or "do anything cruel" as a youth in their Colorado community. (20 RT 4579.) Rather, suggested Abe, appellant was a "jokester" and "pretty joyful all the time." (20 RT 4579, 4580.) Appellant was never "weird" toward any of his sisters, nor did he ever say anything that hinted of "anything weird" in his relationships

with them. (20 RT 4580.) Appellant was Catholic and attended church. (20 RT 4585, 4593.) Abe concluded by expressing his incredulity that someone with appellant's good character could have raped and killed a small girl: "Knowing my brother all these years I've known him, I'd say that couldn't have been my brother that done this. Knowing my brother the way I know him, that wasn't him that did this crime. It just doesn't put together. I just can't believe it." (20 RT 4601.)

On cross-examination, the prosecutor challenged Abe's perceptions by asking, "Now, the person you knew you said you don't understand how this could happen. Did the person you knew—did you find out that the first time he went to prison was for molesting a 12-year-old girl?" (20 RT 4607.) After Abe claimed not to have known about the molestation, the prosecutor followed up by asking, "Did you ever know about the fact that he was convicted of or pled guilty to molesting a 12-year-old boy in 1997 and went back to prison for that?" (20 RT 4607.)

Vicki Cordova, appellant's sister-in-law, testified that appellant had always treated her in a "very respectful" manner, "[l]ike a queen . . . ." (20 RT 4620, 4621.) She noted more generally that she had "never seen him mistreat any woman or be violent with any woman . . . ." (20 RT 4622.) Vicki described appellant as a "charmer" while around women—"he was like a magnet with the girls"—and opined that "he treated everyone, as far as I could tell, including my family, very well, very kind." (20 RT 4622.) "I've never seen him act as a jerk," she asserted. "All the time I've known him I've never seen that." (20 RT 4626.) She never saw him "drunk or stoned or acting badly." (20 RT 4627.) Like her husband, Vicki expressed disbelief that appellant committed the capital offense, calling it "[o]ut of character, totally." (20 RT 4628, 4629.)

In response to Vicki Cordova's testimony about appellant's character, the prosecutor inquired whether she "aware of the fact that he was

convicted, pled guilty, to molesting a 12-year-old girl?" (20 RT 4635.) The prosecutor also asked, "were you aware that at the time that he was -- the day that he molested the 12-year-old boy that he also sexually assaulted a 19-year-old girl, a sleeping woman, that he put his hands on her in a sexual manner while she was sleeping?" (20 RT 4635.) "I didn't know anything about that until this proceeding," Ms. Cordova replied. (20 RT 4635.) The prosecutor continued: "And that doesn't change your opinion as to him and his character for treating women well?" (20 RT 4635.)

Appellant's son Phillip Cordova testified about appellant as a father. Among his observations were that appellant never disciplined him "in any inappropriate way," and that that Phillip did not perceive appellant as a person who should be sentenced to death. (20 RT 4640, 4641.)

Appellant's sister Linda Gurule described appellant as "always a nice, kind person." (20 RT 4644.) She described how he was "always nice" to his young nieces, and how she "never" had the "slightest concern" about appellant being with the girls unsupervised. (20 RT 4647.) Ms. Gurule testified, "I don't believe that anything here that my brother did, had anything to do with this, and, therefore, I believe he's innocent of everything that they're charging him with." (20 RT 4653-4654.) In reply to the prosecutor's questions on cross-examination, Ms. Gurule also stated that she did not believe appellant molested Nina S. or Curtis B. (20 RT 4659-4660.)

The defense itself elicited testimony about the Nina S. molestation from Kelly Cordova, appellant's wife. (20 RT 4703-4707.) Kelly spoke of appellant's good character and treatment of children, while conceding knowledge of his Colorado convictions for child molestation:

Q. And I think you've told us he was good with the kids.

A. Yes.

Q. You see him playing with other children?

A. Other children enjoyed him.

Q. You're aware of what the charges are here I assume.

A. Yes.

Q. You've been made aware. And you're also aware, are you not, of his convictions in Colorado for molesting children?

A. Yes, I am.

Q. First of all—and you've told us about what you understand with respect to Nina. Knowing these things, that is the two Colorado events and the murder of this child in 1979, how do you reconcile that with your view of Joe?

A. I don't reconcile. I can't picture it taking place.

Q. Is the Joe you know capable of any of those things?

A. The Joe I know I can't picture him hurting anyone like that.

(20 RT 4709.) The prosecutor addressed those issues in cross-examination. (20 RT 4716-4718.)

Appellant's sister Sally Cordova provided additional character testimony, including descriptions of appellant's behavior with children. (20 RT 4736-4738.) On direct examination she acknowledged the Colorado molestation convictions. (20 RT 4737.) In response to the prosecutor's subsequent inquiries, Sally opined that appellant had not committed the Colorado offenses and instead had been "framed" for them, based on her opinion of his character. (20 RT 4740.)

Mr. Miles Malmgren provided additional character testimony on appellant's behalf. (20 RT 4752-4759.) On cross-examination, the prosecutor asked whether he was aware of appellant's Colorado child molest convictions and whether such knowledge would affect his opinion of appellant's character. (20 RT 4764-4765.)

Appellant took the witness stand and denied raping and killing Cannie. (20 RT 4776.) After he asserted that the entire case against him was "a mistake" (20 RT 4799), the prosecutor asked him whether his convictions for molesting Nina S. and Curtis B. were also mistakes. (20 RT 4799, 4802.) He responded that both convictions were mistakes on the part of the "[c]riminal justice system." (20 RT 4800, 4802-4804.) He denied being a child molester. (20 RT 4809.)

In conducting direct examination of appellant's former wife Lupe Snasel, defense counsel brought out that Snasel learned that appellant had been incarcerated in Colorado for "molesting children." (21 RT 5050.)

During discussions of penalty phase jury instructions, the subject of the child molest evidence arose once again, and the trial court responded that, given its previous ruling, the evidence "comes in with respect to the circumstances of the crime and also . . . as rebuttal to character. It can be considered by now." (21 RT 4862.)

Before closing arguments of counsel, the trial court instructed the jury that evidence of appellant's sexual assaults in Colorado may be considered as circumstances of the crime and the existence of special circumstances, "and also to negate any mitigating evidence if and to the extent that you find that it does so." (22 RT 5171.) The trial court made clear to the jury that the Colorado sex crimes were not among those "factor (b)" crimes involving force or violence that the jury could consider. (22 RT 5170-5171.)

The prosecutor made little mention of the Colorado sexual assaults in the course of closing argument. About Nina S., she said, "Well, [appellant] denies everything. Nothing. He's never done anything. He didn't molest Nina, no matter what Nina said he did, no matter . . . that he pled guilty, no matter . . . that he waived willingly and voluntarily all of his rights to a trial to plead guilty. Nope, he didn't do that." (22 RT 5211.) About Curtis B.,

she commented, "And 27 days after he got out of prison he didn't molest Curtis. Nope, he didn't do that. No matter that he pled guilty, no matter that Curtis said he did, doesn't matter, he didn't do it." (22 RT 5211.) Appellant's "denial," she concluded, "is inconsistent with the character that you have learned about, the character and the disposition of this man to molest children." (22 RT 5211.)

The defense focused on appellant's character in its closing argument, emphasizing family members' disbelief that the man they knew and had grown up with could have committed the crimes for which he was convicted. (22 RT 5249-5250, 5255.)

B. Appellant Has Forfeited His Claim

Insofar as the prosecutor referenced appellant's Colorado child molest offenses to impeach appellant's character witnesses to and rebut defense character evidence, and the jury's consideration of the evidence for that purpose, appellant has forfeited his claim of error. While appellant argued at trial that the Colorado child molest events could not be considered as circumstances of the capital crime under factor (a) of Penal Code section 190.3, he did not oppose use of the Colorado crimes to rebut his own good character evidence. (See *People v. Low* (2010) 49 Cal.4th 372, 393 [failure to raise particular theory at trial forfeits appellate claim based on those principles and authorities].) Appellant did not object when the prosecutor mentioned the Colorado crimes in cross-examination of defense witnesses. As noted above, in fact, defense counsel preemptively addressed the Colorado sex crimes with several defense witnesses on direct examination. Nor did appellant object to discussion of the Colorado crimes during the People's closing argument, or ask the trial court to admonish the jury or issue an additional or modified instruction limiting or precluding consideration of the Colorado evidence. Consequently, appellant has failed to preserve the issue for appeal. (*People v. Riel* (2000) 22 Cal.4th 1153,

1207 [failure to object to jury's consideration of nonstatutory aggravating factors during penalty phase forfeits claim]; *People v. Carter* (2003) 30 Cal.4th 1166, 1203-1204; *People v. Quartermain* (1997) 16 Cal.4th 600, 630.)

Regardless, if considered on its merits appellant's argument fails because the trial court correctly permitted the jury to consider the Colorado crimes, both as aggravating circumstances of the capital crime and as rebuttal character evidence.

C. The Colorado Molestations Qualified as Factor (a) Circumstances of the Capital Crime and Special Circumstances

The trial court correctly instructed that evidence of the Colorado offenses could be considered under Penal Code section 190.3, factor (a), as circumstances of the underlying capital crime and the attendant special circumstances.

Penal Code section 190.3 permits introduction of evidence "as to any matter related to aggravation," including "the nature and circumstances of the present offense . . . ." (Pen. Code, § 190.3.) Accordingly, the statute provides that jurors "shall take into account . . . if relevant," "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." (Pen. Code, § 190.3, factor (a); see *People v. Miranda* (1987) 44 Cal.3d 57, 106 ["We believe it proper for the jury to consider the facts and nature of the special circumstances in determining what punishment shall be imposed"].) The trial court's decision to permit consideration of evidence pursuant to factor (a) is reviewed for an abuse of discretion. (*People v. Eubanks* (2011) 53 Cal.4th 110, 148.) In fact, "[t]he trial court's discretion to *exclude* such evidence at

the penalty phase is more circumscribed than it is in the guilt phase." (*Id.* at pp. 146-147, italics added.)

This Court has "adopted an expansive reading" of the factor (a) language in Penal Code section 190.3. (*People v. Smith* (2005) 35 Cal.4th 334, 352.) Within the meaning of the statute, penalty phase evidence is permitted beyond the "immediate temporal and spatial circumstances of the crime" to also encompass "'[t]hat which surrounds materially, morally, or logically' the crime." (*People v. Edwards* (1991) 54 Cal.3d 787, 833; see also *People v. Tully* (2012) 54 Cal.4th 952, 1042.) Put differently, penalty phase evidence is properly admitted "to the extent that [it] gives rise to reasonable inferences concerning the circumstances of the crime and defendant's culpability." (*People v. Riggs* (2008) 44 Cal.4th 248, 321-322.) The "circumstances of the crime," for purposes of Penal Code section 190.3, factor (a), properly include all evidence introduced by the prosecution during the guilt phase of the trial that was relevant proof of the defendant's guilt. (*People v. Champion* (1995) 9 Cal.4th 879, 946-947, disapproved on another point in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 (conc. opn. of George, C. J., joined by a majority of the Court); cf. *People v. Ramirez* (2006) 39 Cal.4th 398, 474.) The circumstances of the crime are a "traditional subject for consideration by the sentence," and doing so does not offended federal constitutional principles. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976.)

Evidence of the defendant's mental state at the time of the capital crime, even if derived from facts independent of the physical commission of the homicide, may be considered by the jury under Penal Code section 190.3, factor (a). In *People v. Smith*, *supra*, 35 Cal.4th 334, for example, the People presented penalty phase testimony from a clinical psychologist who opined that the defendant's crime was characteristic of that committed by a "sexual sadist" who "derive[d] sexual pleasure from carrying out a

fantasy involving restraint and molestation of a child victim." (*Id.* at p. 350.) This Court held that such expert testimony fell under factor (a) of Penal Code section 190.3 because it "explained the significance of the methods used to commit the crime—the handcuffs and duct tape, the act of sodomy, the post mortem burning of the body. It also explained how evidence found in defendant's home and car showed that he premeditated the crime, and related to the manner in which it was committed." (*Id.* at p. 352.) Thus, evidence that explains a defendant's identity, motive, intent, or methods, may be considered in aggravation pursuant to section 190.3, factor (a). (See *People v. Ramos*, *supra*, 15 Cal.4th at p. 1170 [photographs fell under § 190.3, factor (a), as relevant to defendant's intent to kill]; *People v. Osband* (1996) 13 Cal.4th 622, 708 [jury may consider facts related to motive under § 190.3, factor (a)]); *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582 [guilt phase evidence of defendant's hatred of the victim's religion was admissible in penalty phase as a evidence of motive and thus a circumstance of the crime]; *People v. Edwards*, *supra*, 54 Cal.3d at p. 832 [evidence of massive but unsuccessful manhunt after the crime was admissible under § 190.3, factor (a), because it suggested defendant's "advance planning and . . . cool determination to avoid the consequences of his actions"].)

As this body of authority also demonstrates, evidence of events that took place before or after the capital crime itself is admissible. (See, e.g., *People v. Nicolaus*, *supra*, 54 Cal.3d at pp. 581-582; *People v. Edwards*, *supra*, 54 Cal.3d at p. 832.) In *People v. Quartermain*, *supra*, 16 Cal.4th 600, for example, the defendant used racial epithets during post-crime police interviews to refer to the victim and others of the victim's race. (*Id.* at p. 627.) The jury was properly permitted to consider these statements as aggravating circumstances during the penalty phase because they were relevant indicators of the defendant's racial animus toward the victim, and

thus evidenced his motive to commit premeditated murder. (*Id.* at pp. 628, 630.) Other case authority is in accord. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1051-1052 [evidence that the defendant terrorized his estranged wife and her family before committing the charged offenses "bore on motive and identity" and was admissible under § 190.3, factor (a), as circumstances of the crime]; *People v. Monterroso* (2004) 34 Cal.4th 743, 775, fn. 7 [noting that evidence of a prior petty theft may have qualified for admission under § 190.3, factor (a), to the extent that it could have supplied a motive for the capital crime]; cf. *People v. Navarette* (2003) 30 Cal.4th 458, 519 ["where the circumstances of the murders possibly suggested some sexual conduct or motivation (particularly in light of defendant's criminal history), the prosecutor could point out that fact despite the absence of specific sex-crime charges"].)

In view of this controlling law, sexual propensity evidence received during the guilt phase pursuant to Evidence Code section 1108 was certainly eligible for consideration among the circumstances of the crime during the penalty phase. For the reasons discussed in argument II.B.2., above, evidence of appellant's molestation of Nina S. and Curtis B. was relevant and highly probative of his identity as Cannie's rapist and killer. The Colorado events demonstrated his propensity to sexually assault children, particularly those known to him and to whom he had opportunistic access. Appellant's sexual predatory tendencies, as evidenced in the 1990's, were proof of his criminal motive and methods in 1979 and corroborated his identity as the perpetrator, particularly in view of the special circumstances alleged (and proved) in this case; namely, that appellant murdered Cannie while committing rape (Pen. Code, § 190.2, subd. (a)(17)(C)) and in the course of committing a lewd and lascivious act upon a child under age 14 (Pen. Code, § 190.2, subd. (a)(17)(E)). (2 CT 459.) The Colorado crimes, however, featured none of the grotesque sexual

violence inflicted on Cannie, and thus were not unduly prejudicial. The trial court did not abuse its discretion in finding that evidence to be admissible as circumstances of the crime for purposes of penalty determination.

D. The Colorado Molestations Qualified as Rebuttal Character Evidence

Appellant's claim lacks merit for a second reason. Namely, as a direct and proportionate response to defense witnesses' testimony about appellant's courteous and respectful treatment of women and children, and about how his character was inconsistent with raping and killing a young girl, the People properly addressed the Colorado child molest convictions though cross-examination and then argued the implication of the evidence in closing. (See *People v. Loker* (2008) 44 Cal.4th 691, 709 [penalty phase evidence of violent or antisocial character may be introduced, proportionally, to rebut defense evidence that a defendant is honest, socialized, and well-behaved].)

The enumerated factors set forth in Penal Code section 190.3 both define and circumscribe the prosecution's presentation of a penalty phase case for aggravation. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) But, once the defense presents evidence pursuant to factor (k), relevant prosecution evidence may be admitted in rebuttal.[47] (*Id.* at p. 776.) Reciprocal character evidence is a common manifestation of this rule. The Court summarized the law governing admission of such evidence in *People v. Valdez*, *supra*, 55 Cal.4th 82 (*Valdez*):

> Rebuttal evidence is relevant and admissible if it tends to disprove a fact of consequence on which the defendant has

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[47] Factor (k) provides that the jury shall consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Pen. Code, § 190.3, factor (k).)

> introduced evidence. [Citation.] The scope of proper rebuttal depends on "the breadth and generality of the direct evidence." [Citation.] "[E]vidence presented or argued as rebuttal must relate directly to a particular incident or character trait [the] defendant offers in his own behalf." [Citation.] When a defendant places his character at issue during the penalty phase of a capital trial, the prosecution may respond by introducing character evidence to undermine the defendant's claim that his good character weighs in favor of mercy and to present a more balanced picture of the defendant's personality. [Citation.]

(*Id.* at pp. 169-170; see *People v. Raley*, *supra*, 2 Cal.4th at p. 912.) A trial court's decision to permit rebuttal character evidence is reviewed for an abuse of discretion, and will not be overturned "absent palpable abuse . . . ." (*Id.* at p. 170.)

Here, the references to appellant's Colorado child molest offenses arose during both direct and cross-examination of defense witnesses. To the extent that the child molest convictions were referenced by the People, such evidence was directly responsive to defense witness testimony about appellant's good character. As set forth above, much of the defense case during the penalty phase involved friends and family of appellant attesting to his good character, including his courteous and respectful treatment of women and children, and his positive qualities as a husband and father. Defense witnesses Abe Cordova, Vicki Cordova, and Sally Cordova went so far as to express their disbelief that appellant could have raped and killed Cannie, in light of how they perceived his character. Appellant's multiple child molest convictions—including the fact that he pled guilty in both cases—belied those perceptions, and were thus relevant and probative topics to broach on cross-examination. "Often, when rebutting evidence of good character, a prosecutor will ask witnesses if they have heard about particular incidents involving the defendant." (*People v. Loker*, *supra*, 44 Cal.4th at p. 708; see *People v. Wagner* (1975) 13 Cal.3d 612, 619 ["When a defense witness, other than the defendant himself, has testified to the

reputation of the accused, the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness' testimony"].)

More generally, by continuing to deny that he raped and murdered Cannie during his penalty phase testimony, appellant placed his own credibility and character into issue. (Cf. *People v. Ing* (1967) 65 Cal.2d 603, 611 ["Where a defendant takes the stand and makes a general denial of the crime the permissible scope of cross-examination is very wide"].) His prior guilty pleas to child molestation became correspondingly probative. The prosecutor's closing argument made appropriate and limited use of that evidence to provide a more balanced perspective of appellant's personality. (22 RT 5211.)

The prosecutor made two points involving the Colorado child molest cases. Both were integral to painting "a more balanced picture of [appellant's] personality" for the jury. (*Valdez*, 55 Cal.4th at p. 170.) First, appellant's testimony that his Colorado convictions were "mistakes" indicated his tendency to deny responsibility and culpability for his crimes, which the jury could properly consider in evaluating his testimony that he was innocent of the capital crime in this case. Second, appellant's "disposition to molest children" was character evidence diametrically opposed to defense evidence of appellant's good treatment of women and children, and generally upstanding character.

Defense counsel's closing argument stressed appellant's good character and denials of culpability, further validating the appropriate and reciprocal nature of the prosecutor's use of the Colorado sex crime evidence. For example, defense counsel argued that "other evidence throughout the trial suggests that this one act, this one aberrant act in 1979 is so uncharacteristic of this individual, it's so inconsistent with all of the positive factors that he's had." (22 RT 5239.) He spoke of appellant as

"the man who is the jokester, the man who is light-hearted, happy-go-lucky, loving and caring," and reiterated family members' disbelief that appellant could have raped and killed Cannie. (22 RT 5248, 5249, 5250, 5251-5252, 5255.) Counsel quoted defense witness testimony asserting that appellant was a good father and a good husband. (22 RT 5254, 5255.) And, finally, defense counsel quoted appellant's own testimony professing his innocence: "'I look you in the eye, and I say I did not commit this crime.'" (22 RT 5257.) The prosecutor's limited and tailored use of the child molest evidence to challenge these defense portrayals of appellant's character was permissible and proper. The trial court did not abuse its discretion in permitting the People to reference to Colorado child molest crimes in cross-examination and argument.

E. Any Error Was Harmless

Any error in receiving testimony or argument about appellant's Colorado child molest offenses was harmless.

"State law error occurring during the penalty phase will be considered prejudicial when there is a reasonable possibility such an error affected a verdict. [Citations.] Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. [Citations.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.) To the extent that the Colorado sex crimes were inadmissible as factor (a) circumstances of the crime under Penal Code section 190.3, appellant experienced no prejudice because the child molest cases were properly utilized as rebuttal character evidence. And, as noted above, without regard to the merits of the latter claim appellant has forfeited it by failing to object on that ground at trial. (See *People v. Low*, *supra*, 49 Cal.4th at p. 393 [failure to raise particular theory at trial forfeits appellate claim based on those principles and authorities].) Conversely, to the extent that the child molest cases were

inadmissible as rebuttal character evidence in this case, appellant experienced no prejudice because the jury was permitted to consider those facts as factor (a) circumstances of the crime.

To the extent that the child molest offenses were inadmissible under either theory, there was no reasonable possibility that their consideration by the jury affected the death verdict. The impact of the child molest evidence on the jury was insignificant in view of the weight of other aggravating considerations. The People's primary case for the death penalty rested upon the horrific aggravating circumstances of the crime itself. The prosecutor told the jury, "Well, you know what, we didn't talk about factor (a), the circumstances of the crime and the special circumstances, but you know what, that's the whole case, and that's what I'm going to talk about now because that, ladies and gentlemen, is the case here." (22 RT 5217; see also 22 RT 5186-5187, 5217-5223 [People's argument concerning circumstances of the case].) The final comments offered by the prosecutor typified the argument's theme: "Every moral value society has tells us that any adult who could treat an 8-year-old girl this way, could horribly violate her trust, could brutally violate her body, could cruelly squeeze the life out of her and then callously dump her nude in the back yard to be eaten by the ants, that person doesn't deserve to live." (22 RT 5222-5223.)

The facts of the Colorado child molest offenses—which involved brief, nonviolent touching of the victims—paled in comparison to the heinous nature of the present crime. As such, they would not have tipped the balance between verdicts of death and life without parole. Similarly, any rebuttal of defense character evidence was collateral to the People's central focus on what appellant did to Cannie, and likely made no difference whatsoever.

Even if the question of appellant's character mattered to the jury, evidence of the Colorado threats was inconsequential in view of additional

and comprehensive evidence rebutting defense witnesses' favorable impressions of appellant's character. In particular, the prosecutor reminded the jury about appellant's abysmal performance as a father to his seven children—most of whom he ignored and abandoned (22 RT 5202-6303), how he battered his wife Kelly and then resisted arrest (22 RT 5203, 5205), his transient and shallow associations with women (22 RT 5204-5205), how Tangie Hollis had to threaten him with a gun to convince him to leave her (22 RT 5205), how he molested a 19-year-old woman while the latter was sleeping (22 RT 5205), his manipulative and dishonest recounting of his military service in Vietnam, including how he later lied to prison administrators about being shot in the head while in the military (22 RT 5207-5208), and his general immoral and dishonest character (22 RT 5211, 5214-5216). In short, appellant's child molestation crimes in the 1990's were two events out of an adult life characterized by deceit, violence, sexual predation, and general licentiousness. The jury was thus provided a balanced perspective on appellant's character even without considering the Colorado events. There is no reasonable possibility those events made a difference.[48]

X. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY TO DISREGARD TESTIMONY ABOUT THE POTENTIAL IMPACT OF APPELLANT'S EXECUTION ON HIS FAMILY

[48] Regardless, no error in the penalty phase could have prejudiced appellant because he expressed a preference for the death penalty during his own testimony. (20 RT 4778-4779, 4787.) Defense counsel confirmed in penalty phase discussions with the trial court that the death penalty would be a more favorable outcome for appellant: "The reality is Mr. Cordova's punishment is, in fact, less if he is given a death penalty. That's the conclusion that we come to." (21 RT 4946; see 21 RT 4961-4962 [defense stipulation to evidence implying that the death penalty "is . . . less—less—not as bad as a life sentence"].)

Appellant argues that this Court should "reconsider" its holding in *People v. Ochoa* (1998) 19 Cal.4th 353, 456 (*Ochoa*), and permit defense penalty phase evidence of the impact an execution would have on a defendant's family. (AOB 154-156.) By extension, he continues, the trial court's decision to instruct the jury not to consider such evidence in this case represented erroneous exclusion of relevant defense penalty phase evidence, thus violating his "right to a fair determination of penalty under the Eighth and Fourteenth Amendments to the United States Constitution." (AOB 158.)

Appellant's argument lacks merit; this Court has decided the issue. The trial court did not err in admonishing the jury not to consider the potential impact of appellant's execution on his family. Such evidence would have been irrelevant to the sentencing decision. Appellant's argument provides no justification for revisiting the Court's holding in *Ochoa*.

A. Factual Background

In discussions preceding penalty phase evidence, the defense indicated its intent to introduce testimony from members of appellant's family. (19 RT 4442, 4443, 450.) The stated purpose would be "to express their desires with respect to the death penalty and their relationship to Mr. Cordova." (19 RT 4442.) The prosecutor objected to any family member testimony addressing whether imposition of the death penalty would be appropriate. (8 CT 2068-2070; 19 RT 4442.) Defense counsel immediately qualified his offer of proof regarding family testimony: "Well, clearly," he represented, "they're not going to discuss issues relating to whether or not what impact it will have on them, that's not appropriate, that is whether it will impact their lives in some particular way." (19 RT 4442.) The trial court added that such testimony would be "irrelevant." (19 RT 4442.) Defense counsel agreed: "That's irrelevant. But to the

extent that they can express their love for Mr. Cordova and their desire that he not be put to death, a plea for mercy, there's adequate authority for that. That's just an extension of Mr. Cordova's character I guess is the theory under which that comes in." (19 RT 4442-4443.)

Appellant's sister-in-law Vicki Cordova testified. (20 RT 4618.) She knew appellant during their childhood in Colorado until appellant moved away at age 15, then reestablished contact in the Bay Area following appellant's discharge from the Navy. (20 RT 4619-4620, 4630-4631.) Although he had "changed" following his Navy service, Vicki testified, appellant remained courteous and respectful in demeanor. (20 RT 4621-4622.) Vicki could not believe that appellant committed the crimes for which he was convicted, calling it "[o]ut of character, totally." (20 RT 4628-4629.) The following exchange then took place:

> Q. Even accepting it as real, would you then think that putting him to death is an appropriate conclusion?
>
> A. No.
>
> Q. Why not?
>
> A. Because he has a family who care [*sic*] about him and that's—that would be devastating for the family.
>
> [THE PROSECUTOR]: I'm going to object and ask that that be stricken, your Honor.
>
> THE COURT: That will be disregarded, ladies and gentlemen. The impact on defendant's family of the penalty that's imposed is not relevant. You'll disregard that.

(20 RT 4629.) Defense counsel ended his direct examination at that point.

Before closing arguments of counsel, the trial court instructed the jury as follows: "Sympathy for the family of the defendant, as opposed to defendant himself, is not a matter you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should

be disregarded unless and to the extent it illuminates some positive quality of the defendant's background or character." (22 RT 5174; see CALJIC No. 8.85, factor (k).) Defense counsel had previously assented to this instruction. (21 RT 5121-5122.)

B. Appellant Has Forfeited His Claim

Appellant has forfeited his claim on appeal. Not only did he not object to the trial court's admonishment of the jury not to consider the impact of the penalty on his family, but defense counsel had previously agreed on the record that "clearly" such evidence is "not appropriate." (19 RT 4442.) Defense counsel, noting correctly that "the law is that the family's feelings can reflect on the defendant's character," also accepted the jury instruction given on the issue. (21 RT 5121.) Accordingly, appellant "forfeited his claims because he did not ask the trial court to modify this standard instruction to accommodate his concerns." (*People v. Duenas* (2012) 55 Cal.4th 1, 27; see also *People v. Arias* (1996) 13 Cal.4th 92, 171.)

C. The Trial Court Properly Admonished and Instructed the Jury

Appellant's argument fails on its merits regardless. The Court, in *People v. Ramos* (2004) 34 Cal.4th 494, explained how the concept of relevance informs trial court decisions to admit mitigating penalty phase evidence:

> The Eighth and Fourteenth Amendments require the jury in a capital case to hear any relevant mitigating evidence that the defendant offers, including "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" [Citation.] In turn, the court does have the authority to exclude, as irrelevant, evidence that does not bear on the defendant's character, record, or circumstances of the offense. [Citation.] "[T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of

> relevance as the term is understood generally." [Citation.] Indeed, "excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." [Citation.]

(*Id.* at p. 528.) This standard has been applied repeatedly in cases involving a trial court's exclusion of evidence pertaining to the impact of the sentence upon a defendant's family, resulting in "established precedent" that such evidence is irrelevant and thus properly excluded. (*People v. Williams* (2013) 56 Cal.4th 165, 197; *People v. Bennett* (2009) 45 Cal.4th 577, 601 [same]; *People v. Smith*, *supra*, 35 Cal.4th at pp. 366-367 [same]; *Ochoa*, *supra*, 19 Cal.4th at p. 454-456 [same].)

Appellant contends that this line of authority should be revisited, however, because Penal Code section 190.3 permits introduction of evidence "as to any matter relevant to . . . mitigation, and sentence," which he claims would encompass family member impact testimony. (AOB 155.) Further, appellant suggests, the electorate in 1978 probably intended that Penal Code section 190.3 permit capital case juries to consider family impact evidence because noncapital juries may do so pursuant to Rule 4.414(b)(5) of the California Rules of Court. (AOB 155-156.) He is wrong on both counts.

1. The proffered evidence was irrelevant

As to appellant's first point, this Court considered the "any matter relevant" language of Penal Code section 190.3 in *Ochoa*, *supra*, 19 Cal.4th at pages 455-456. Despite the breadth of the statute's wording, held the Court,

> what is ultimately relevant is a defendant's background and character—not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must decide whether the

> defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed.

(*Id.* at p. 456; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 98 [defense witness's opinion that the defendant should not be executed is irrelevant insofar as it reflects what the witness feels; the opinion may only be admitted to the extent that it provides insight about the defendant's character]; *People v. Vieira* (2005) 35 Cal.4th 264, 295 [same]; *People v. Sanders* (1995) 11 Cal.4th 475, 546 [same].) Here, Vicki Cordova's testimony that appellant's execution "would be devastating for the family" provided no supplemental insight into appellant's character, and was thus irrelevant. The trial court properly admonished the jury following Ms. Cordova's statement, because "trial courts . . . lack discretion to admit irrelevant evidence." (*People v. Vieira* (2005) 35 Cal.4th 264, 293.) There is no reason to revisit established authority supporting this conclusion.

Appellant argues, nonetheless, that "[i]f appellant has a family who sufficiently loves him that his execution would 'devastate' them, this is certainly logically relevant to the issue as to whether he deserves life over death. Logically speaking, the impact on appellant's family should be no less relevant than the impact on the victim's family. Both speak to the moral impact of the death sentence on those other than the victim and defendant." (AOB 157, citing *Payne v. Tennessee* (1991) 501 U.S. 808, 823.) Appellant misconstrues the authority of the United States Supreme Court on this issue, however.

Payne v. Tennessee, *supra*, 501 U.S. 808, explained that victim impact evidence at a capital case penalty phase "is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." (*Id.* at p. 825; see also *id.* at p. 821 [referring to victim impact evidence as "designed to portray for the sentencing authority

the actual harm caused by a particular crime"].) In other words, the relevance of victim impact evidence is tethered to its tendency to show the severity of the crime, in order "to assess meaningfully the defendant's moral culpability and blameworthiness." (*Id.* at p. 825; see *People v. Montes* (2014) 58 Cal.4th 809, 879 [victim impact evidence is admissible in penalty phase as a circumstance of the crime pursuant to Penal Code section 190.3, factor (a), because it is relevant to a defendant's moral culpability]; *People v. Harris* (2005) 37 Cal.4th 310, 351 [same].)

Evidence of the impact a sentence would have upon the *defendant's* family, in contrast, proves nothing whatsoever about the defendant's moral culpability and blameworthiness. This Court

> distinguished between "evidence that [a defendant] is loved by family members or others, and that these individuals want him or her to live . . . . [and evidence about] whether the defendant's family deserves to suffer the pain of having a family member executed." [Citation.] The former constitutes permissible indirect evidence of a defendant's character while the latter improperly asks the jury to spare the defendant's life because it "believes that the impact of the execution would be devastating to other members of the defendant's family." [Citation.]

(*People v. Bennett*, *supra*, 45 Cal.4th at p. 601.) Contrary to appellant's supposition, there is no "logical" equivalence between the two categories of evidence. Evidence related exclusively to a defendant's family members' sensibilities and sentiments, which are disconnected and unrelated to factors the jury may consider in deciding on punishment, is properly excluded.

2. Principles of statutory interpretation belie appellant's argument

Appellant's second point is that voters in 1978 must have intended that defense family impact evidence could be considered by capital case juries because, in 1978, an unrelated rule of court permitted judges to

consider such evidence in making probation decisions in noncapital cases. (AOB 155-156.) There is no basis, however, to assume that the electorate intended to incorporate into Penal Code section 190.3—without reference—one criterion set forth in an inapposite rule of court applicable only to probation decisions.

For a ballot initiative, such as Proposition 7 on the November 7, 1978, general election ballot, which added section 190.3 to the Penal Code, "it is the voters' intent that controls," and that intent is discerned by employing "the same rules that apply in construing a statute enacted by the Legislature." (*People v. Park* (2013) 56 Cal.4th 782, 796.) Reviewing courts will therefore "first look to 'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.' [Citations.]" (*Ibid.*) There will be no unjustified assumptions about the voters' intent: "Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543.)

Here, the plain language of Penal Code section 190.3 limits mitigating evidence to that which is "relevant." As discussed, this Court has determined repeatedly that the impact of a death sentence upon a capital defendant's family is irrelevant. Appellant argues nonetheless that this Court should reject established canons of statutory interpretation and assume an intent in conflict with that set forth unambiguously on the face of the statute (that only relevant evidence be considered in mitigation). Appellant's approach defies both controlling legal authority and common sense. It should be rejected.

Nothing in the ballot pamphlet for 1978's Proposition 7 suggested, moreover, that capital case juries would be permitted to consider the impact

of a death sentence upon a defendant's family. The only specific examples of mitigating factors noted by the legislative analysis included in the 1978 ballot materials were "extreme mental or emotional disturbance when the murder occurred." (Ballot Pamp., Gen. Elec. (Nov. 7, 1978), analysis of Proposition 7 by Legislative Analyst, p. 32.) There is no reason to assume that such language implied consideration of family impact evidence, particularly when the Legislative Analyst noted that "[t]here could also be an increase in the number of executions as a result of this proposition . . . ." (*Id.*, analysis of Proposition 7 by Legislative Analyst, p. 33.)

Even if voters in 1978 were familiar with what then existed as rule 414 of the California Rules of Court,[49] the latter was facially inapplicable to capital case penalty phase procedures. (Cal. Rules of Court, rule 414, West's Cal. Rules of Court (1978 ed.) (hereinafter referred to as "rule 414").) Rule 414, entitled "Criteria Affecting Probation," enumerated criteria a sentencing court may use in noncapital cases to decide whether "to grant or deny probation . . . ." (*Ibid.*) Among those criteria was "[t]he likely effect of imprisonment on the defendant and his dependents." (Rule 414(d)(7).) For example, in *People v. Lai* (2006) 138 Cal.App.4th 1227 the defendant cited her likely "deportation and separation from her five children" as a consideration under that criterion as set forth in the version of the rule then in effect. (*Id.* at p. 1257.) There is no authority suggesting, however, that the electorate inferred that Penal Code section 190.3 implicitly incorporated the criteria for deciding questions of probation into the criteria for deciding questions of the death penalty.

Such an assumption would have been unwarranted and absurd. Rule 414 was expressly limited to "the decision to grant or deny probation," rendering it flatly inapplicable to capital cases. Additionally, the content of

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[49] Rule 414 was renumbered as rule 4.414 effective January 1, 2001.

rule 414 indicated its limited application by referring to considerations incongruous to a capital case penalty phase. For example: "Whether the defendant inflicted bodily injury" (rule 414(c)(4)); "Willingness to comply with the terms of probation" (rule 414(d)(3)); and "The possible effects on the defendant's life of a felony record" (rule 414(d)(8)). Appellant cites no evidence that, despite these incongruities, the electorate would have nonetheless analogized a decision to grant or deny probation to a death penalty decision, such that it would have assumed silent incorporation of selective criteria informing the former into factors informing the latter. This absence of authority stands to reason, because "[o]bviously death is qualitatively different from all other punishments and is the 'ultimate penalty' in the sense of the most severe penalty the law can impose." (*People v. Hernandez* (1988) 47 Cal.3d 315, 362.)

D. Appellant's Constitutional Rights Were Unimpaired

Appellant concludes his argument by asserting that the trial court's instruction that the jury not consider the impact of a sentence on appellant's family violated his Eighth and Fourteenth Amendment rights to a "fair determination of penalty." (AOB 156-158.) But, because appellant's claim that such family impact evidence is relevant fails on its merits as discussed above,[50] his constitutional claims follow suit. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 408, fn. 7 ["rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well"].)

Even considered independently, there is no authority that instructing the jury to disregard the impact of penalty on appellant's family violates federal constitutional protections. To the contrary, as noted, "established precedent" holds that exclusion of such evidence, which is irrelevant to the

[50] In addition to being forfeited.

jury's penalty determination, does not infringe upon a defendant's constitutional rights. (*People v. Williams*, *supra*, 56 Cal.4th at p. 197 [it is a matter of "established precedent" that instructing the jury not consider the impact of the sentence upon a defendant's family does not violate the Eighth Amendment].) More broadly, excluding irrelevant evidence does not violate the Constitution. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605, fn. 12 ["Nothing in this [capital case] opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense"].)

E. Any Error Was Harmless

Finally, assuming for the sake of argument that exclusion of the defendant's family impact evidence was erroneous, it was harmless beyond a reasonable doubt when considered in the context of the totality of evidence received in the penalty phase. (*Chapman*, *supra*, 386 U.S. at p. 36.) The horrific nature of appellant's crime, coupled with compelling evidence refuting and rebutting defense witness testimony about his character, could not have been unbalanced by consideration of how appellant's sister-in-law would feel were appellant to receive the death penalty.

Additionally, despite the trial court's admonishment during Vicki Cordova's testimony, appellant managed to elicit several statements from other family members that they did not wish him to be executed: "Q. Do you have any desires with respect to whether or not your dad is executed? A. I wouldn't like to see him executed, no, I wouldn't like it." (20 RT 4641 [Phillip Cordova].) And: "Q.—you think should happen? A. No. My brother's—nobody deserves to have a death penalty. It's a strong belief in Catholic belief. We do not believe in death penalties." (20 RT 4654 [Linda Gurule].) And: "[W]ith respect to this jury, you know that they have to make a decision about whether Joe should be executed or not. Do you have

a desire in that respect? A. For him to be executed? Of course not." (20 RT 4709-4710 [Kelly Cordova].) The trial court did not admonish the jury in response to any of this testimony, making Vicki Cordova's statement cumulative to similar statements from several other defense witnesses. In short, any error was harmless beyond a reasonable doubt.

XI. THE TRIAL COURT PROPERLY PERMITTED QUESTIONING ABOUT APPELLANT'S THREAT TO MURDER A FEMALE COLORADO PROSECUTOR

Appellant asserts that the trial court erred in permitting the prosecutor to elicit, on cross-examination during the penalty phase, evidence that appellant threatened to kill a female prosecutor in Colorado while the latter was prosecuting him for domestic violence. (AOB 158-163.) The questioning occurred in response to defense witness testimony about appellant's good character—specifically his treatment of women. Appellant argues, however, that his statement, "If I'd had a gun in court, I would have killed that bitch," did not directly relate to defense evidence about his courteous treatment of women, and was thus inadmissible character evidence under Penal Code section 190.3. (AOB 160-162.) Further, he argues, evidence of his threat, which was issued during an anger management class, was protected by the psychotherapist-patient privilege set forth in Evidence Code section 1014[51] and should have been precluded accordingly. (AOB 162.)

Appellant's claim lacks merit. Evidence of the threat was appropriately responsive to defense evidence of appellant's character. And, even if appellant uttered his threat in confidence during a psychotherapist-patient consultation—which the record fails to support—his assertion of

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[51] In his opening brief appellant mistakenly refers to Evidence Code section 1012 as the codification of the privilege. (AOB 162.) Respondent assumes that he meant to cite section 1014.

privilege is defeated by operation of Evidence Code section 1024 because the psychotherapist perceived him as a danger to the Colorado prosecutor and reported the threat to authorities. Appellant's claim, in any event, is forfeited.

A. Factual Background

During penalty phase in limine motions, the trial court considered the People's request to admit, under Penal Code section 190.3, factor (b), evidence that appellant threatened to kill a particular Colorado prosecutor. The threat was issued indirectly; appellant made it during a group therapy session for batterers, led by a woman named Lori Clapp. (8 CT 2074 [People's motion]; 19 RT 4390-4398, 4463.) In its responsive pleading and argument to the court, the defense contended only that the incident would be inadmissible as aggravating prior criminal activity under Penal Code section 190.3, factor (b). (8 CT 2000-2001; 19 RT 4390-4396.)

At the time appellant issued his threat he was being prosecuted for domestic violence. (19 RT 4395.) The therapy session was part of a batterers' treatment program. (19 RT 4394, 4395.) The trial court initially ordered the evidence excluded as aggravation under Penal Code section 190.3, factor (b), because there was no indication that appellant intended that his threats be communicated to the prosecutor, thus failing to satisfy the elements of criminal menacing as defined by Colorado law. (19 RT 4396-4397, 4463-4464.)

In the course of his direct examination of Vicki Cordova, defense counsel elicited that she had "never seen [appellant] mistreat any woman or be violent with any woman, you know." (20 RT 4622.) "[H]e was like a magnet with the girls," continued Ms. Cordova, "he treated everyone, as far as I could tell, including my family, very well, very kind." (20 RT 4622.) In cross-examining Ms. Cordova, the prosecutor asked a series of questions

about prior bad acts committed by appellant. (20 RT 4635-4636.) The dialogue proceeded as follows:

> Q. Okay. Now, you said that he's always treated women in your experience very, very well?
>
> A. Yes.
>
> Q. Are you aware of the fact that he was convicted, pled guilty, to molesting a 12-year-old girl?
>
> A. Not until this proceeding.
>
> Q. That's not really treating females very well, is it?
>
> A. I didn't know about that, and I wasn't there at that time.
>
> Q. And were you aware that at the time that he was—the day that he molested the 12-year-old boy that he also sexually assaulted a 19-year-old girl, a sleeping woman, that he put his hands on her in a sexual manner while she was sleeping?
>
> A. I didn't know anything about that until this proceeding.
>
> Q. And that doesn't change your opinion as to him and his character for treating women well?
>
> A. From their testimony? No.
>
> Q. And –
>
> A. I'm just judging from my own experience.
>
> Q. And that's pretty much what your opinion is . . . just how he's treated you, the wife of his brother?
>
> A. And other women that I've been around when he's around them, yes.
>
> Q. And that's been in family context?
>
> A. Pretty much.
>
> Q. You weren't in his house when he threatened one of his girlfriends, a woman by the name of Janice Linnebor –

A. No.

Q. —with a rifle?

A. No.

Q. You weren't in his house when he physically beat Kelly Cordova and threatened her with a knife?

A. I didn't know anything about that.

Q. You didn't know anything about those? And you didn't know anything about, until this trial, that he threatened to kill a female DA that was prosecuting him?

A. I never heard that until the trial.

Q. So you're basing your opinion just strictly on the limited experience that you've had with the defendant throughout his life?

A. Since I've been 13 years old.

Q. Thank you.

(20 RT 4635-4636.)

At that point, defense counsel asked for a chambers conference, in which he voiced an objection and argued that the People's question about the threat to the Colorado prosecutor violated the trial court's ruling on that particular evidence, even though "[appellant's] character has certainly been put before the court." (20 RT 4636-4637.) The trial court overruled the objection: "[T]he implication certainly of [Ms. Cordova's] testimony is that [appellant is] a person of good character, especially dealing with women. In light of that, that was certainly fair questioning." (20 RT 4637.)

Appellant's counsel was the next to refer to his client's threats against the Colorado prosecutor. In direct examination of appellant's wife Kelly Cordova, counsel elicited evidence that, 15 years earlier, appellant was arrested for domestic violence in Golden, Colorado, following a fight with

Kelly Cordova in which he threatened her with a knife and hit her on the head. (20 RT 4697-4698, 4703.) After his release from custody, but while charges were pending, appellant "went to the VA hospital and he got himself in . . . [a] domestic violence class" that involved anger management. (20 RT 4699, 4700, 4701-4702.) Kelly Cordova testified that attempts to settle the underlying case failed, and animosity developed between the Cordovas and the female Deputy District Attorney handling the case. (20 RT 4701.) Shortly thereafter, appellant was rearrested "at the VA hospital at the end of one of his classes," and bail was set at one million dollars. (20 RT 4702.) Kelly Cordova stated that she was aware of the circumstances that resulted in the subsequent arrest, but did not elaborate further on direct examination. (20 RT 4702.) She also testified that, during their time together, appellant "treated me like a wife should be treated" and was "good with the kids." (20 RT 4708, 4709.)

On cross-examination the prosecutor probed the incident at the VA hospital to which Kelly Cordova had alluded:

> Q. And because the charges were pending, you said the defendant went to domestic violence anger management classes?
>
> A. Yes, he did.
>
> Q. And he was taking anger management classes when he threatened to kill the DA that you said didn't like you; isn't that right?
>
> A. Yes.
>
> Q. And that threat was such a threat that –
>
> [DEFENSE COUNSEL]: Excuse me. Excuse me.
>
> THE COURT: Sustained.
>
> [PROSECUTOR]: Your Honor, he –
>
> [DEFENSE COUNSEL]: Excuse me.

THE COURT: No, no. Ask questions. The question you were embarking upon assumed facts not in evidence.

[PROSECUTOR]:

Q. Well, let me ask you. You said you were aware of the situation on direct examination, correct?

A. I'm sorry?

Q. You were aware of the situation as to why he was arrested and why there was a million-dollar bail.

A. I was aware that they had him arrested after class and that there was a million-dollar bail, yes.

Q. And that arrest was based on these threats?

[DEFENSE COUNSEL]: Excuse me.

THE COURT: Wait a minute. The way you're phrasing it, sustained.

[PROSECUTOR]:

Q. Was it your understanding –

THE COURT: Lack of foundation.

[PROSECUTOR]:

Q. Was it your understanding from your awareness that that arrest was based on these threats?

[DEFENSE COUNSEL]: Excuse me. Objection. Move to strike. Counsel knows better.

THE COURT: Now she's asking about her state of mind. Overruled.

[PROSECUTOR]:

Q. You need the question read back?

A. Please.

THE COURT: Do you need the question back, ma'am? The question was, was it your understanding from your awareness that that arrest was based on these threats? The threats to the district attorney.

THE WITNESS: The threat that he was angry at the plea bargain that she had offered him, yes.

[PROSECUTOR]:

Q. So it was threats made to a counselor during domestic violence counseling?

A. It was a matter of opinion.

Q. It was a matter of opinion? What was a matter of opinion?

A. It was a matter of opinion the reason why he was arrested.

(20 RT 4727-4729.)

Appellant testified in the penalty phase. During the prosecutor's cross-examination, the following exchange took place:

Q. During the prosecution of that case, you got very angry with the female D.A., correct?

A. During the prosecution of it?

Q. Yeah.

A. No.

Q. During the course of the prosecution.

A. No.

Q. No?

A. Not during the course of it. Are you talking about during the trial or before the trial or court proceedings or what?

Q. During court proceedings.

A. No, because we wasn't even in the courtroom when we was talking.

Q. Did you ever threaten to kill her?

A. No.

Q. You didn't tell Lori Clapp that you wanted to kill the D.A.?

A. No, I did not. I told her I could have—I was mad enough I could have killed her.

Q. Did you say, "If I'd had a gun in court, I would have killed that bitch"?

A. Yes. I said that if I would have had a gun, I would have killed that bitch.

Q. She responded she hoped you were not serious, and you responded you were very serious.

A. Yes. It was an anger management class. In order to get your anger out, you have to say what you feel. And that's what I felt at the time.

Q. But you were threatening to kill her to the point where she --

A. I was not threatening to kill her. I was expressing my anger.

Q. All right.

A. And I did not say I was going to go out there and kill her. I said I could have killed her at the time. There's a difference between saying "I could have" and "going to."

Q. And you spent all weekend thinking about killing her.

A. No.

Q. Didn't you tell Miss Clapp that?

A. No. I said I went out and started smoking joints again. I was slacking off some. And I was mad enough at the time where I needed something to relax me and marijuana relaxes me.

Q. Did you tell Miss Clapp that you felt you lost everything and had nothing to lose by killing the D.A.?

A. Well, at the time, if I would have went and killed the D.A., I would have lost everything, right?

Q. And you didn't care because you were that mad. That's what you said.

A. At the time, if would've went out there and say I was going to kill her and did kill her, yeah, then it's logical. It's commonsense if you go out and kill somebody, you're going to lose everything.

Q. Did you say your entire focus was on killing her?

A. No.

Q. You didn't tell Miss Clapp that?

A. Because if it was, if my entire focus was on killing her, I would have went on through and did it.

(20 RT 4830-4833.)

On redirect examination with defense counsel, appellant referred to the setting in which he issued his threats as one of a series of weekly "anger management classes." (20 RT 4844.) The classes "had about 20 people in there." (20 RT 4845.) He described the circumstances surrounding his comments about the female prosecutor:

Q. And those classes were, what, in your understanding?

A. Well, we had one class was for alcohol and drugs. That lasted an hour. And then we would have anger management group therapy. We had about 20 people in there. Everybody would get in there and express their angers and this and that and what happened over –

Q. What sort of angers would other people express?

A. People had anger about their wives or their mothers or— some guy kept trying to kill himself every weekend. Just, you know, fed up with the world and this and that, you know. She asked me what happened in court. She knew I was going to court. And I told her what happened, and that's when I told her I was mad enough that I could have killed the bitch.

Q. Did you expect that was not going any further?

A. No. Everything that—we signed a piece of paper that says everything we say in there is confidential.

(20 RT 4845-4846.)

The trial court addressed the topic in its penalty phase jury instructions: "The evidence you heard regarding a comment made by defendant concerning a district attorney did not disclose a crime covered by Factor B and may not be considered by you as an aggravating factor under that paragraph. It may, however, be considered by you for the purpose and to the extent that it may serve to negate any mitigating evidence." (22 RT 5171.) Appellant offered no objection to this instruction when it was read. Nor did he object during preliminary discussions that had taken place previously between the trial court and counsel about the wording of the instruction. (21 RT 5110-5111; 22 RT 5155, 5159.) In fact, defense counsel agreed that appellant's threat against the Colorado prosecutor was relevant, admissible, and could be considered by the jury to rebut a mitigating consideration:

[DEFENSE COUNSEL]: I would ask though that—there were two uncharged and unspecified and I don't think factor (b) incidents referred to in this case so far that I can think of. One of them, of course, being the threat against the district attorney, which did not involve any crime for which there's any evidence . . . I think we'll be requesting a specific direction that they're not to consider those –

[PROSECUTOR]: Well –

[DEFENSE COUNSEL]:—as aggravating factors under (b) or (c), period. They're not—I mean, they might reduce the mitigation. They may have relevance as to challenging a mitigating consideration, but they have no relevance as an aggravating.

THE COURT: Yeah.

[PROSECUTOR]: And I agree with that.

(21 RT 4898.)

In closing argument the People made brief mention of the threat to the Colorado prosecutor, insofar as it demonstrated that any evidence about appellant's treatment of women failed to qualify as mitigation:

> And then he threatened to kill a female district attorney who had the gall to prosecute him for beating his wife. Now he's going to tell you, "Oh, no, that was just anger management. I was just venting." But the reality is that after that venting, the police came with guns drawn and arrested him, and his bail was hiked up to a million dollars. So somebody took it as more than venting.
>
> *Nothing about that can be aggravating, but there's nothing about his relationships with women or his treatment of women that is mitigating.*

(22 RT 5205-5206, italics added.)

In his closing argument, defense counsel mentioned appellant's threat to the Colorado prosecutor as well:

> And because he made a stupid comment in the anger management class that incensed a female prosecutor—there's a certain irony here, isn't there? Just a tiny little bit of irony? Is it just me, or is there a tiny bit of irony here?—that incensed a female prosecutor, legitimately perhaps, to the point where the book was thrown at him. No more 90 days for you, mister. You're going down. You're going down big time.[52]

(22 RT 5262.)

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[52] There is no indication in the record that the Colorado prosecutor was "incensed," or that appellant's threats resulted in a longer sentence. In fact, Kelly Cordova's testimony was that plea negotiations had broken down before appellant issued his threats. (20 RT 4701.) Appellant, apparently, was the one who became "incensed."

B. Appellant Has Forfeited His Claim

Appellant's claim on appeal is that his threats to kill the Colorado prosecutor were inadmissible to rebut favorable character evidence presented under Penal Code section 190.3, factor (k). (AOB 160-162.) At trial, however, appellant never objected to the evidence on that theory. (See *People v. Low*, *supra*, 49 Cal.4th at p. 393 [failure to raise particular theory at trial forfeits appellate claim based on those principles and authorities].)

Defense counsel argued exclusively that the evidence was inadmissible as factor (b) aggravating evidence of prior criminal activity. (8 CT 2000-2001; 19 RT 4390-4396.) Nor did appellant object to the jury instruction governing consideration of the evidence for purposes of rebutting defense character testimony. (21 RT 5110-5111; 22 RT 5155, 5159.) Appellant's counsel even agreed that the conduct in question "might reduce the mitigation. [It] may have relevance as to challenging a mitigating consideration . . . ." (21 RT 4898.) Further, defense counsel referenced facts surrounding appellant's threats on his direct examination of Kelly Cordova, and during his redirect examination of appellant. (20 RT 4071-4072; 4844-4846.) Finally, appellant never asserted at trial that his comments in an anger management class were protected by the psychotherapist-patient privilege. Consequently, appellant is foreclosed from contending for the first time on appeal that the trial court erred in allowing evidence of the threat to kill the Colorado prosecutor as rebuttal character evidence, and is likewise foreclosed from asserting a related evidentiary privilege. (Evid. Code, § 353; see *People v. Wilson* (2005) 36 Cal.4th 309, 357; *People v. Ramos*, *supra*, 15 Cal.4th at p. 1171.)

C. The Trial Court Did Not Abuse Its Discretion in Permitting the People to Question Defense Witnesses About the Threatening Comments

As set forth more fully in section IX.D., above, once the defense presents evidence pursuant to factor (k), relevant prosecution evidence may be admitted in rebuttal. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) Reciprocal character evidence "to present a more balanced picture of the defendant's personality" is a common manifestation of this rule. (*Valdez*, *supra*, 55 Cal.4th at p. 170.) A trial court possesses "broad discretion" to allow rebuttal character evidence; its decision to do so is reviewed for an abuse of discretion and will not be overturned "absent palpable abuse . . . ." (*Ibid.*) There was no abuse of discretion in receiving evidence of the threats to the Colorado prosecutor in this case.

As a preliminary point, it would be incongruous to find that the trial court abused its discretion when appellant's own counsel implicitly agreed that the evidence in question was admissible to rebut appellant's mitigating evidence of good character. (21 RT 4898.) Defense counsel had ample reason for declining to argue against admission of the evidence as rebuttal character evidence. Before the subject of the Colorado threats was first mentioned in front of the jury, appellant's first two penalty phase witnesses—Abe and Vicki Cordova—testified extensively and broadly about appellant's good character, including what they contended was his commendable treatment of and attitude toward women.

Abe Cordova told the jury that appellant did not "get in trouble" or "do anything cruel" as a youth in their Colorado community. (20 RT 4579.) Rather, suggested Abe, appellant was a "jokester" and "pretty joyful all the time." (20 RT 4579, 4580.) Appellant was never "weird" toward any of his sisters, nor did he ever say anything that hinted of "anything weird" in his relationships with them. (20 RT 4580.) Appellant was

Catholic and attended church, noted Abe. (20 RT 4585, 4593.) As an adult, recounted Abe, appellant was much admired by women he met in pool halls: "All the women that came to the bar, they all came up and hugged and kissed him. They all liked him. My buddy and I'd say, What do they see in this guy? He's got this beard and all that stuff. It's funny; these gals all liked him. He'd go there and buy them a drink and come back and play with us. He got along with all those women that came in the bar. They all liked him." (20 RT 4599-4600.) And, appellant was an honest and trustworthy person. (20 RT 4600.) At the conclusion of his direct examination, Abe expressed his disbelief that someone with appellant's good character could have raped and killed a small girl: "Knowing my brother all these years I've known him, I'd say that couldn't have been my brother that done this. Knowing my brother the way I know him, that wasn't him that did this crime. It just doesn't put together. I just can't believe it." (20 RT 4601.)

Vicki Cordova, in turn, reiterated positive impressions of appellant's character. She described how appellant treated her in a "very respectful" manner, "[l]ike a queen." (20 RT 4621.) She noted more generally that she had "never seen him mistreat any woman or be violent with any woman . . . ." (20 RT 4622.) Ms. Cordova described appellant as a "charmer" while around women—"he was like a magnet with the girls"—and opined that "he treated everyone, as far as I could tell, including my family, very well, very kind." (20 RT 4622.) "I've never seen him act as a jerk," she asserted. "All the time I've known him I've never seen that." (20 RT 4626.) She never saw him "drunk or stoned or acting badly." (20 RT 4627.) Like her husband, Vicki expressed disbelief that appellant committed the capital offense, calling it "[o]ut of character, totally." (20 RT 4628, 4629.) In short, Vicki Cordova's testimony about appellant's character in relation to women was not limited in scope, as appellant

claims, to "the very narrow issue of how appellant treated women in public settings." (AOB 161.) Rather, Ms. Cordova's evaluation of appellant's character—not to mention Abe Cordova's—was sweeping and generalized.

Only after all of this positive character evidence had been received did the prosecutor, during her cross-examination of Vicki Cordova, first mention appellant's threat to kill the deputy district attorney in Colorado. It consisted of one question: "And you didn't know anything about, until this trial, that he threatened to kill a female DA that was prosecuting him?" (20 RT 4636.) The question was appropriate, because someone who threatens to kill a woman it is certainly not being "kind," "charm[ing]," or "respectful." And, the incident was inconsistent with Abe and Vicki's portrayal of appellant as a happy-go-lucky prankster who was well liked by women he met and who never "act[ed] badly," in a "weird" manner, or "as a jerk." In that sense, it is immaterial that the prosecutor whom appellant threatened was a woman; the incident would have been equally admissible to rebut Abe and Vicki's generalized views of appellant's good character had the prosecutor been male. Either way, the subject was directly responsive to the defense case, and thus relevant and admissible.

The circumstances presented here closely paralleled those in *Valdez*, *supra*, 55 Cal.4th 82. There, the capital defendant offered penalty phase character evidence "regarding his intelligence, his positive performance in school, and other positive aspects of his background, including his religious upbringing, his participation in youth sports, his participation in the Navy Reserve, his work history, and his efforts to care for his grandfather and to support his younger brother." (*Id.* at p. 170.) In response, the People presented rebuttal evidence that, when detained by school officials following a high school fight, defendant threatened to kill his a campus supervisor by "'put[ting] a bullet in [his] head,' called another supervisor 'his bitch,' and said he was going to 'kick' the other supervisor's 'ass.'"

(*Id.* at pp. 100, 169.) This Court held that the trial court did not abuse its discretion in receiving the rebuttal testimony of the threatening behavior "to present a more balanced picture of defendant's personality." (*Id.* at p. 170; see *People v. Mickle* (1991) 54 Cal.3d 140, 190-192 [in penalty phase cross-examination of defendant, questions about his prior threatening conduct was admissible to rebut defense evidence of nonviolent character]; accord *People v. Raley*, *supra*, 2 Cal.4th at p. 913 [evidence that police had seized pornographic photographs of women in bondage from defendant's bedroom was "relevant to rebut defendant's claim that he had a respectful, kind and chivalrous attitude toward women"].) The same result, based on analogous facts, is merited here.

If anything, additional details elicited by both parties about the Colorado incident served to confirm its admissibility as rebuttal character evidence. Kelly Cordova related how appellant's threats were issued, ironically, in the course of an anger management class he enrolled in while being prosecuted for domestic violence. (20 RT 4699, 4700, 4701-4702.) She described the animosity that developed between appellant and the female deputy district attorney prosecuting the case, with whom appellant presumably had every incentive to remain on good terms. (20 RT 4701.) Appellant provided additional detail during his testimony. He recalled stating to the entire class "that if I would have had a gun, I would have killed that bitch." (20 RT 4831.) His use of the derogatory term "bitch" to refer to the female prosecutor underscored the probative value of the incident as a counterbalance to evidence of appellant's positive and courteous interactions with women.

Finally, appellant's contention that evidence that he threatened to kill the Colorado prosecutor was "highly prejudicial," because it illuminated "a violent disposition that extended to homicidal thoughts" (AOB 161, 162), is specious. While evidence of the incident certainly painted appellant in an

unfavorable light, Vicki Cordova's concession that she had not heard "that he threatened to kill a female DA that was prosecuting him" was not unduly prejudicial. It came on the heels of several questions concerning appellant's violent or threatening acts toward women, as well as his sexual molestation of two children. (20 RT 4635-4636.) Evidence that he threatened to kill an adult, unaccompanied by any information about whether appellant was armed or under what circumstance the threat was issued, would have been less prejudicial than mention of his actual sexual molestation of a boy and a girl (20 RT 4635), that he threatened a girlfriend with a rifle (20 RT 4636), or that he beat his wife and threatened her with a knife (20 RT 4636).

The question to Vicki Cordova that triggered appellant's instant claim was, moreover, brief, largely devoid of detail, and consistent with the tone and content of the cross-examination that preceded it. Specifically, the People first asked Vicki Cordova whether she was "aware of the fact that he was convicted, pled guilty, to molesting a 12-year-old girl," and whether she knew that "he also sexually assaulted a 19-year-old girl, a sleeping woman, that he put his hands on her in a sexual manner while she was sleeping," followed by questions illustrating that Vicki had not witnessed appellant's multiple acts of aggression toward women, including "when he threatened one of his girlfriends, a woman by the name of Janice Linnebor . . . with a rifle," and "when he physically beat Kelly Cordova and threatened her with a knife." (20 RT 4635-4636.) In view of this line of questioning, to which appellant offered no objection, the topic of the threat to the Colorado prosecutor was thematically and substantively unremarkable, and not unduly prejudicial. It was merely one of a series of questions that sought to challenge Vicki's testimony about appellant's positive treatment of women and generally good character, while demonstrating that her opinions were based on selective and incomplete perceptions. (See *People*

v. Hinton (2006) 37 Cal.4th 839, 901 ["Once these witnesses testified that, to their knowledge, defendant had never exhibited any violent behavior, the prosecutor was entitled to cross-examine them about specific instances of defendant's violent behavior"]; *People v. Clair* (1992) 2 Cal.4th 629, 684-685.) The trial court did not abuse its discretion in finding that the prosecutor's questions were "certainly fair" in light of defense evidence of appellant's "good character, especially dealing with women" (20 RT 4637), and in rendering its related ruling.

D. Appellant's Threat Was Not a Privileged Communication

Appellant also argues, in a somewhat cursory fashion, that the trial court erred in permitting the prosecutor to question Vicki Cordova about his threat to kill the Colorado prosecutor because the statement was a privileged patient-psychotherapist communication pursuant to Evidence Code section 1012.[53] (AOB 162.) Appellant's argument fails for three reasons.

First, appellant never raised the question of privilege at trial, and never made a specific and timely objection on that ground. He has thus forfeited the concomitant claim on appeal. (Evid. Code, § 353; *People v. Combs*, *supra*, 34 Cal.4th at p. 863 [failure to invoke evidentiary privilege at trial forfeits related claim on appeal].)

Second, even if appellant's claim were cognizable, his assertion of psychotherapist-patient privilege is misplaced. Evidence Code section 1014 provides that an evidentiary privilege may be claimed in order to protect confidential communications between patient and psychotherapist.

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[53] While appellant cites Evidence Code section 1012, the psychotherapist-patient privilege is actually codified in Evidence Code section 1014. Section 1012 defines confidential communications subject to the privilege.

But, the privilege did not exist at trial. According to the People's offer of proof,

> [t]he defendant told Ms. Clapp that he wanted to kill [the prosecutor], that if he had a gun he would have shot her, and despite all Ms. Clapp's attempts to make him see the consequences of his plan would be more imprisonment, he insisted he still wanted to kill her. He indicated he was very serious about this. The defendant waited the entire weekend thinking about killing [the prosecutor], and after the weekend stated he was even more angry than before. Ms. Clapp was so concerned with the nature of these threats . . . that she broke confidentiality and warned [the prosecutor].

(8 CT 2074; see also 20 RT 4702, 4846.) As set forth in Evidence Code section 1024, the psychotherapist-patient privilege does not exist when "the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." (Evid. Code, § 1024; *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 449; *People v. Wharton* (1991) 53 Cal.3d 522, 554-555.) Ms. Clapp's actions fell within the scope of section 1024. Consequently, no privilege related to the comments at issue here could have formed or been successfully asserted at trial. (Evid. Code, § 1024.)

Third, the record is largely devoid of information indicating whether Lori Clapp, who facilitated appellant's "anger management class" (20 RT 4831) was a psychotherapist within the meaning of Evidence Code section 1010, whether appellant was a "patient" within the meaning of Evidence Code section 1011, or whether the 20 other people in the class (20 RT 4845) were, as required by Evidence Code section 1012, "present to further the interest of the patient in the consultation." (Evid. Code, §§ 1010 [defining "psychotherapist" for privilege purposes], 1011 [defining "patient" for privilege purposes], 1012 [defining "confidential

communications between patient and psychotherapist"].) Had a psychotherapist-patient privilege been advanced at trial, the trial court could have conducted a hearing and made findings about the structure and nature of the anger management class and the specific nature of the threats articulated by appellant—including the resulting actions of the group facilitator—to determine whether a privilege existed. As it stands, there is a paucity of useful information on those subjects in the record, and what little there is falls short of substantiating appellant's claim.

E. Any Error Was Harmless

Regardless, any error in questioning Vicki Cordova about the Colorado threats was harmless. In evaluating the impact of either state law error or violation of federal constitutional protections, prejudice exists "when there is a reasonable possibility such an error affected a verdict." (*People v. Jones*, *supra*, 29 Cal.4th at p. 1264, fn. 11.) No such possibility existed here. (See *People v. Martinez* (2003) 31 Cal.4th 673, 695 [improperly admitted rebuttal character evidence in penalty phase harmless in view of other aggravating circumstances].)

The trial court instructed the jury that, at most, evidence of the Colorado threats could be considered as a counterweight to any mitigating evidence. (22 RT 5171.) The People reiterated in their closing argument that "[n]othing about [the Colorado threat evidence] can be aggravating . . . ." (22 RT 5205.) To the extent, then, that the jury considered the Colorado threats as rebuttal character evidence, there is no reasonable possibility it impacted the penalty phase verdict.

In this case, the People's primary case for the death penalty rested upon the horrific aggravating circumstances of the crime itself. The prosecutor told the jury, "Well, you know what, we didn't talk about factor (a), the circumstances of the crime and the special circumstances, but you know what, that's the whole case, and that's what I'm going to talk about

now because that, ladies and gentlemen, is the case here." (22 RT 5217.) The prosecutor continued: "In this case there is no real mitigation evidence, but even if there was, the aggravating facts that surround this . . . crime are just too great to be outweighed by any mitigating factors." (22 RT 5217; see also 22 RT 5186-5187, 5217-5223 [People's argument concerning circumstances of the case].) The final comments offered by the prosecutor characterized the argument's theme: "Every moral value society has tells us that any adult who could treat an 8-year-old girl this way, could horribly violate her trust, could brutally violate her body, could cruelly squeeze the life out of her and then callously dump her nude in the back yard to be eaten by the ants, that person doesn't deserve to live." (22 RT 5222-5223.) Any rebuttal of defense character evidence, improper or not, was collateral to that central focus and likely made no difference whatsoever.

Even if the question of appellant's character mattered to the jury, evidence of the Colorado threats was insignificant in view of additional and comprehensive evidence rebutting defense witnesses' favorable impressions of appellant's character and reputation for treatment of women. In particular, the prosecutor reminded the jury about appellant's abysmal treatment of his seven children, most of which he ignored and abandoned (22 RT 5202-6303), how he battered his wife Kelly and then resisted arrest (22 RT 5203, 5205), his transient and shallow associations with women (22 RT 5204-5205), how Tangie Hollis had to threaten him with a gun to convince him to leave her (22 RT 5205), how he molested a 19-year-old woman while the latter was sleeping (22 RT 5205), his failure to acknowledge sexually molesting Nina S. and Curtis B. (22 RT 5211), his dishonorable military experience that he subsequently lied about to curry favor (22 RT 5208), and his general immoral and dishonest character (22 RT 5211, 5214-5216). In short, the threat issued to the Colorado

prosecutor was only one event out of an adult life characterized by deceit, violence, sexual predation, and general licentiousness. There is no reasonable possibility it made a difference.

XII. THE BREADTH OF CALIFORNIA'S DEATH PENALTY LAW DOES NOT CONFLICT WITH FEDERAL CONSTITUTIONAL PROTECTIONS

Appellant contends that Penal Code section 190.2 is constitutionally defective because it fails to properly narrow the class of death-eligible defendants. (AOB 163-165.) This Court has repeatedly rejected this claim and appellant has not presented anything to distinguish this case from those previously decided. (See, e.g., *People v. Duff* (2014) 58 Cal.4th 527, 568; *People v. Montes*, *supra*, 58 Cal.4th at pp. 898-899; *People v. Jackson* (2014) 58 Cal.4th 724, 773; *People v. Williams*, *supra*, 58 Cal.4th 197, 294-295; *People v. Contreras* (2013) 58 Cal.4th 123, 172.)

XIII. PENAL CODE SECTION 190.3(A) DOES NOT PERMIT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH

Appellant contends that Penal Code section 190.3, factor (a), fails to adequately guide the jury's deliberations and thus licenses the arbitrary and capricious imposition of the death penalty. (AOB 165.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Williams*, *supra*, 58 Cal.4th at p. 295; *People v. Contreras*, *supra*, 58 Cal.4th at p. 172; see also *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 975-976, 978.)

XIV. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE FEDERAL CONSTITUTIONAL PROTECTIONS AGAINST ARBITRARY OR CAPRICIOUS SENTENCING, AND DOES NOT DEPRIVE DEFENDANTS OF THEIR FEDERAL CONSTITUTIONAL RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME

Appellant argues that California's death penalty law, unlike those in other jurisdictions, lacks various procedural safeguards "to guard against the arbitrary imposition of death." (AOB 166-176.) Respondent addresses appellant's specific contentions as follows:

A. Proof Beyond a Reasonable Doubt

Appellant argues that the absence of requirements of proof beyond a reasonable doubt of (1) aggravating circumstances, (2) that aggravating circumstances outweigh mitigating circumstances, and (3) that death is the appropriate penalty violates the Sixth and Fourteenth Amendments to the federal Constitution as set forth in *Ring v. Arizona* (2002) 536 U.S. 584. (AOB 167-169.)

As to proof of aggravating circumstances, the Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Livingston* (2012) 53 Cal.4th 1145, 1180; *People v. Enraca* (2012) 53 Cal.4th 735, 769; *People v. Farley*, *supra*, 46 Cal.4th at p. 1134; *People v. Mendoza* (2007) 42 Cal.4th 686, 707.)

As to proof that aggravating factors outweigh mitigating factors, the Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Thomas* (2012) 53 Cal.4th 771, 839; *People v. Lynch* (2010) 50 Cal.4th 693, 766; *People v. Snow* (2003) 30 Cal.4th 43, 126.)

As to proof that death is the appropriate penalty, the Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Williams*, *supra*, 58 Cal.4th at p. 295.)

Moreover nothing in the U. S. Supreme Court decisions rendered in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, or *Apprendi v. New Jersey* (2000) 530 U.S. 466 has undermined this Court's conclusions on these issues. (*People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Duff*, *supra*, 58 Cal.4th at p. 569; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Williams*, *supra*, 58 Cal.4th at p. 295.)

B. Equal Protection: Capital Versus Non-Capital Cases

Appellant contends that that the absence of burden upon the prosecution in a capital case to prove that death is the appropriate penalty, whereas an analogous burden of persuasion exists in non-capital cases, violates principles of due process, equal protection, and cruel and unusual punishment pursuant to the Sixth, Eighth, and Fourteenth Amendments. (AOB 169-170.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 900; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Duff*, *supra*, 58 Cal.4th at p. 570; *People v. Williams*, *supra*, 58 Cal.4th at p. 295; *People v. Jones*, *supra*, 57 Cal.4th at p. 979.)

C. Burden of Proof as to Aggravating Factors, Mitigating Factors, and Appropriate Penalty

Appellant asserts that the absence of a jury instruction providing for a burden of proof with respect to the existence of aggravating factors, that aggravating factors outweigh mitigating factors, and that death is the appropriate penalty violates the Fifth, Eighth, and Fourteenth Amendments

to the Constitution. (AOB 170.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Rodriguez* (2014) 58 Cal.4th 587, 653; *People v. Livingston*, *supra*, 53 Cal.4th at p. 1180; *People v. Enraca*, *supra*, 53 Cal.4th at p. 769; *People v. Farley*, *supra*, 46 Cal.4th at p. 1134; *People v. Mendoza*, *supra*, 42 Cal.4th at p. 707.)

D. Juror Unanimity on Aggravating Factors

Appellant argues that that the absence of a requirement of juror unanimity on the existence of aggravating factors "violates the due process and cruel and unusual punishment clauses of the state and federal Constitutions." (AOB 171.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Rodriguez*, *supra*, 58 Cal.4th at p. 653; *People v. Williams*, *supra*, 58 Cal.4th at p. 295.)

E. Written Findings on Aggravating Factors

Appellant contends that that the absence of a requirement that the jury make written findings on aggravating factors violates the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 172.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Duff*, *supra*, 58 Cal.4th at p. 569; *People v. Rodriguez*, *supra*, 58 Cal.4th at p. 653; *People v. Williams*, *supra*, 58 Cal.4th at p. 295.)

F. Inter-Case Proportionality Review

Appellant argues that the absence of inter-case proportionality review for capital cases violates the Eight Amendment to the United States Constitution. (AOB 172-173.) The Court has repeatedly rejected this

claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Rodriguez*, *supra*, 58 Cal.4th at p. 653; *People v. Williams*, *supra*, 58 Cal.4th at p. 295.)

G. Proof Beyond a Reasonable Doubt of Unadjudicated Criminal Activity

Appellant asserts that the absence of a requirement that unadjudicated criminal activity as an aggravating factor be proved beyond a reasonable doubt violates the Sixth and Fourteenth Amendments to the Constitution. (AOB 173-174.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Duff*, *supra*, 58 Cal.4th at pp. 569, 570; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Contreras*, *supra*, 58 Cal.4th at p. 172; *People v. Homick* (2012) 55 Cal.4th 816, 902; *People v. Beames* (2007) 40 Cal.4th 907, 934.)

H. Use of Qualifying Adjectives

Appellant argues that the inclusion of qualifying adjectives in various factors set forth in Penal Code section 190.3 inhibits "consideration of mitigation" in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 174.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Duff*, *supra*, 58 Cal.4th at p. 570; *People v. Contreras*, *supra*, 58 Cal.4th at p. 172; *People v. Manibusan* (2013) 58 Cal.4th 40, 100.)

I. Labeling Sentencing Factors as Aggravating, Mitigating, or Either[54]

Appellant asserts that the absence of a jury instruction identifying sentencing factors as aggravating, mitigating, or either potentially misled the jury into favoring death, and thus violated the Eighth Amendment and state law. (AOB 174-175.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 899; *People v. Contreras*, *supra*, 58 Cal.4th at p. 171; *People v. Samayoa* (1997) 15 Cal.4th 795, 862; *People v. Pollack* (2004) 32 Cal.4th 1153, 1193; *People v. Prieto* (2003) 30 Cal.4th 226, 271-272.)

J. Prosecutorial Discretion to Seek Death Penalty

Appellant contends that the discretion possessed by county district attorneys to seek the death penalty in eligible cases risks "county-by-county arbitrariness" and "compounds the . . . vagueness and arbitrariness" of California's death penalty law. (AOB 175-176.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Myles* (2012) 53 Cal.4th 1181, 1224; *People v. Scott* (2011) 52 Cal.4th 452, 489; *People v. Lee* (2011) 51 Cal.4th 620, 654; *People v. Dykes* (2009) 46 Cal.4th 731, 820.) Nor does this prosecutorial discretion create a constitutionally impermissible risk of arbitrary outcomes that differ from county to county. (See, e.g., *People v. Myles*, *supra*, 53 Cal.4th at p. 1224; *People v. Bennett*, *supra*, 45 Cal.4th at p. 629; *People v. Keenan* (1988) 46 Cal.3d 478, 505.)

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[54] Appellant transitions from subdivision H of his argument to subdivision J, omitting I. (AOB 174-175.) Respondent assumes that the second paragraph of appellant's subdivision J was intended as a separate argument, and addresses it as "I" herein.

XV. CALIFORNIA'S DEATH PENALTY LAW COMPLIES WITH FEDERAL EQUAL PROTECTION STANDARDS

Appellant reformulates the argument addressed in section XIV.B., above, and again alleges that California's death penalty law violates constitutional standards of equal protection by providing "fewer procedural perfections for persons facing a death sentence than are afforded persons charged with non-capital crimes." (AOB 176.) As noted previously, the Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Montes*, *supra*, 58 Cal.4th at p. 900; *People v. Jackson*, *supra*, 58 Cal.4th at p. 773; *People v. Duff*, *supra*, 58 Cal.4th at p. 570; *People v. Williams*, *supra*, 58 Cal.4th at p. 295; *People v. Jones*, *supra*, 57 Cal.4th at p. 979; *People v. Lee*, *supra*, 51 Cal.4th at p. 654; *People v. Redd* (2010) 48 Cal.4th 691, 758.)

XVI. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE FEDERAL CONSTITUTIONAL PROTECTIONS WHEN CONSIDERED IN THE CONTEXT OF INTERNATIONAL APPROACHES TO CRIMINAL JUSTICE

Appellant argues that California's death penalty law is inconsistent with "international standards," and thus violates the Eighth and Fourteenth Amendments to the Constitution. (AOB 176-177.) The Court has repeatedly rejected this claim and appellant has provided no persuasive reason to reexamine it. (See, e.g., *People v. Jones*, *supra*, 57 Cal.4th at p. 981; *People v. Mai* (2013) 57 Cal.4th 986, 1058; *People v. Rogers* (2013) 57 Cal.4th 296, 350; *People v. Homick*, *supra*, 55 Cal.4th at p. 904.)

XVII. THERE IS NO REVERSIBLE CUMULATIVE ERROR

Contrary to appellant's claim (AOB 177-178), there was no error in either the guilt phase or penalty phase, and thus nothing to cumulate. Even assuming error, no prejudice to appellant resulted in either the guilt or penalty phase. This conclusion holds true whether any error is considered

individually or in the aggregate. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458.) Like other criminal defendants, a capital defendant is entitled to a fair trial, but not a perfect one. (*People v. McDowell* (2012) 54 Cal.4th 395, 442; *People v. Stewart* (2004) 33 Cal.4th 425, 522.) The record demonstrates that appellant received a fair trial. His claim of cumulative error should, therefore, be rejected.

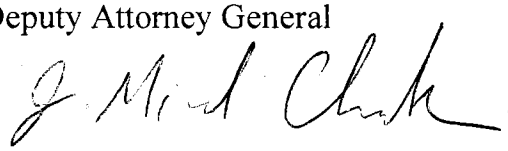
CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: April 28, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GLENN R. PRUDEN
Supervising Deputy Attorney General
DONNA M. PROVENZANO
Deputy Attorney General



J. MICHAEL CHAMBERLAIN
Deputy Attorney General
Attorneys for Respondent

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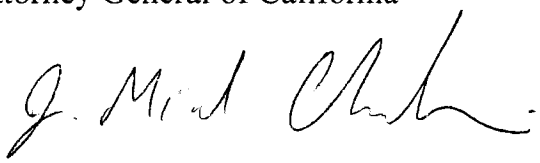
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 68,093 words.

Dated: April 28, 2014

KAMALA D. HARRIS
Attorney General of California



J. MICHAEL CHAMBERLAIN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Joseph Cordova***

No.: **S152737**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 28, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Glen Niemy
Attorney at Law
P.O. Box 764
Bridgton, ME 04009
(2 copies)

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3672

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

The Honorable Mark Peterson
District Attorney
Contra Costa County District Attorney's Office
900 Ward Street
Martinez, CA 94553

Contra Costa County Superior Court
Main Courthouse
P.O. Box 911
Martinez, CA 94553

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 28, 2014, at San Francisco, California.

S. Chiang
Declarant

Signature