In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHESTER DEWAYNE TURNER,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S154459

Los Angeles County Superior Court Case No. BA273283
The Honorable William R. Pounders, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General
BLYTHE J. LESZKAY
Deputy Attorney General
State Bar No. 221880
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2274
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Blythe.Leszkay@doj.ca.gov
Attorneys for Respondent

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INTRODUCTION

Appellant was a serial killer who operated in drug-infested areas of Los Angeles for over eleven years. He was convicted of capital murder of ten women and one viable fetus after his DNA was matched to DNA from ten cold cases. Appellant primarily challenges the DNA evidence, particularly the statistical analysis of the DNA matches. This Court already held in *People v. Nelson* (2008) 43 Cal.4th 1242, that the product rule statistics used in this case were reliable, relevant, and admissible, and that no *Kelly* hearing was required. The statistics were properly admitted here, and appellant provides no basis to overturn the Court's well-reasoned decision.

STATEMENT OF THE CASE

On November 7, 2005, the Los Angeles County District Attorney's Office charged appellant with 11 counts of murder, including one count of murder of a fetus, in violation of Penal Code section 187, subdivision (a).[1] (1CT 133-138.) The special circumstance of murder in the commission of a rape, within the meaning of section 190.2, subdivision (a)(17), was alleged as to count 10. (1CT 137.) The special circumstance of multiple murder, within the meaning of section 190.2, subdivision (a)(3), was alleged as to all counts. (1CT 137.)

On April 30, 2007, the jury convicted appellant of all counts and found the special circumstances true. The jury set the degree of murder as first degree on all counts except count 5, murder of a fetus, which they set as second degree. (14CT 3547-3552.) After the penalty phase, on May 15, 2007, the jury returned death verdicts on all counts. (14CT 3624-3626.)

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

On July 10, 2007, the court sentenced appellant to death on all counts, except count 5, for which it sentenced appellant to 15 years to life in prison. (14CT 3708-3711.)

STATEMENT OF FACTS

Appellant sexually assaulted and strangled to death ten women, one of whom was pregnant with a viable fetus, between 1987 and 1998. All of the attacks occurred within blocks of appellant's residences in areas of Los Angeles known for prostitution and drugs. In 2002, appellant raped and strangled a woman who lived. She identified him as her attacker. His DNA was then matched to DNA found on the ten murdered women whose cases had grown cold.

A. Prosecution Evidence

1. General DNA Evidence

A DNA expert, Gary Sims, explained the basics of DNA. (13RT 1921.) DNA is like a genetic blueprint. (13RT 1922.) DNA is found inside chromosomes located inside nuclei, which are inside cells. (13RT 1923.) DNA can be obtained from cells in body tissues, such as blood, semen, saliva, urine, hair, teeth, bone, and skin. (13RT 1923.) A person's DNA is the same regardless of the type of tissue in which it is found and regardless of the person's age. (13RT 1924, 1948.) A majority of DNA is the same from person to person, but there are some portions where there are great variations between people, and those portions are the focus of forensic DNA typing. (13RT 1924.) The two main ways that people's DNA differs are the sequence of the DNA and how many times a sequence is repeated. (13RT 1925.)

A "locus" is "the location of a genetic marker or site of variation where that portion of DNA that you're interested in falls on a chromosome," which is like its address. (13RT 1926.) An "allele" is "an

alternative form at a particular locus, and you get two alleles per locus, one maternal and one paternal, and they may be the same or they may be different." (13RT 1926.)

The methodology for forensic typing of DNA is called STRS, which stands for Short Tandem Repeats. (13RT 1926.) The STRS methodology is useful because it is very sensitive and can get a type from a very small sample, about a billionth of a gram. (13RT 1927.) It can also get a type from a deteriorated sample. (13RT 1927.) It is also "very good at distinguishing one person's DNA from another person's DNA." (13RT 1927.)

The more loci that a test analyzed, the more rare it would be for two randomly chosen people to have the same identity, which is called the "probability of identity." (13RT 1928.) An early test that analyzed three loci had a probability of identity of one in 5,000. (13RT 1928-1929.) That was considered "very rare," but there was still some likelihood that two randomly chosen people would have the same types. (13RT 1928.) A later test examined nine loci, which led to a probability of identity of one in 100 billion. (13RT 1929.) That made it "extremely unlikely" that two randomly chosen people would have the same types at all nine loci. (13RT 1929.) The most recent STR test looked at 13 loci, which was "very powerful" at distinguishing a person's DNA. (13RT 1929.) The probability of identity was about one in 400 trillion in the Caucasian population and about one in two quadrillion in the African-American population. (13RT 1932.) There were about six-and-a-half billion people on Earth. (13RT 1931.)

After a sample is obtained from a crime scene, the DNA is extracted, quantified, and amplified to determine a profile. (13RT 1933-1935.) The profile focuses on the 13 loci that are typed. (13RT 1934.) That profile is compared to the profiles of known reference samples. (13RT 1933, 1935-

1937.) If there is a match, a report is generated with a "random match probability." (13RT 1933.)

The random match probability of a given profile is determined by calculating the percentage that the type at each loci of the profile appear within a particular population. (13RT 1938-1939.) The percentage of each of the 13 loci are multiplied, which results in a very rare profile. (13RT 1940.) The population percentages are based on data published in scientific journals, including one compiled by the FBI. (13RT 1940.)

A particular locus on DNA shows whether the sample came from a male or female. (13RT 1935.) When a sample contains a mixture of male and female DNA, such as in a vaginal swab after a sexual assault, a differential extraction can be performed to separate the male and female DNA. (13RT 1940-1942.)

A mixture of DNA may have a "major contributor," which is the person who donated the most DNA to the sample. (14RT 2083.) A "predominant contributor" is generally a single source sample with indications of a very limited minor contribution for which conclusions cannot be drawn. (14RT 2084.) When there is a major or predominant contributor, that means that person's DNA is present at all 13 loci, so they are a match. (14RT 2105.)

When a sample has degraded, it will not look as good as a fresh sample, and information from some loci may be lost, but the types at each loci do not change. (13RT 1942-1944.) If enough information remains to create a profile, then degradation is not a concern. (13RT 1945.)

2. Diane Johnson – Count 1 – March 9, 1987

On March 9, 1987, Larry Redmond discovered a body off of the southbound 110 Freeway at Grand Avenue and 103rd Street, and called the police. (6RT 841-843, 850.) There was construction in the area because the 105 Freeway was being built. (6RT 844.) The Figueroa area where Ms.

Johnson was found was known for prostitution and narcotics. (6RT 855, 860.)

Ms. Johnson was a 21-year-old African-American. (6RT 854, 858, 888; 12RT 1807.) She had been arrested for prostitution within a year of her murder. (15RT 2255.) She had .7 mg of cocaine in her system when she was killed. (13RT 1882.)

Ms. Johnson's body was found face-down. (6RT 854.) She was wearing a red top and was naked from the waist down. (6RT 854, 883-884.) There was blood on her nostrils (6RT 883-884.) Petechiae, or spots on her eyes, indicated that she had been choked or strangled. (6RT 888; 12RT 1796.) Long drag marks led to the body, and a tar-like substance was found on the tops of her feet. (6RT 856-857, 881-884.) The cause of death was strangulation. (12RT 1796.)

Sexual assault and trace evidence was collected from Ms. Johnson's body, including gravel in her vagina. (8RT 1122-1123, 1126, 1163.) Both the LAPD lab and Cellmark determined that DNA from the sperm fraction (male DNA) from an anal swab of Ms. Johnson matched appellant. (13RT 1995-1996; 14RT 2043.) There was an incomplete separation of male and female DNA, so there was some carryover of Ms. Johnson's DNA in the sperm fraction.[2] (13RT 1996.)

Appellant lived about six blocks from where Ms. Johnson was murdered. (15RT 2261.)

3. Annette Ernest – Count 2 – October 29, 1987

Charles Brown saw a woman's body on his way home from work after midnight on October 29, 1987. (6RT 919-920.) The body was alongside the 110 Freeway near 106th Street and Grand. (6RT 920-923;

[2] For efficiency and clarity, DNA tests that were inconclusive or where no DNA was detected are omitted as to each victim.

7RT 935.) Construction of the 105 Freeway was going on in the area. (7RT 944-945.) The area was known for narcotics and prostitution. (7RT 940, 953.) In particular, the area was known for "strawberries," women who prostituted themselves for cocaine. (7RT 954; 16RT 2311.)

Annette Ernest was a 26-year-old African-American. (6RT 915; 7RT 937; 12RT 1807.) She had a history of drug abuse and arrests for prostitution. (6RT 915-917; 15RT 2255.) She had .08 mg of cocaine in her system when she was killed. (13RT 1882.)

Ms. Ernest's body was face-down. (7RT 938, 946, 948.) Her jeans had been pulled down below her knees, her shoes were missing, and her top was partially pulled up above her midriff. (6RT 923-924; 7RT 937-939, 946.) There were ligature marks on Ms. Ernest's neck. (7RT 959; 12RT 1808.) There was a bite mark on her right breast. (12RT 1808.) The area around her body was gravel, and there were no gravel marks on her bare feet, which indicated she had not walked to that location. (7RT 960-961.) There was no sign of a struggle at the scene. (7RT 960-961.) The cause of death was strangulation. (12RT 1807.)

Sexual assault and trace evidence was collected from Ms. Ernest's body. (8RT 1129, 1152.) The LAPD lab determined that DNA in the sperm fraction from an external genital swab matched appellant. (13RT 1998-1999.) There was some carryover of Ms. Ernest's DNA at one loci. (13RT 1999.) A Cellmark analyst concluded that appellant was the major contributor of male DNA in that sample, and there was an unknown minor contributor. (14RT 2046-2047.) A "major contributor" was the person in a mixture who donated more DNA to a sample. (14RT 2083.) The LAPD lab found DNA in the epithelial fraction (female DNA) of the external genital swab was a mixture that included carryover from appellant's DNA and two other unknown DNA contributors. (13RT 1999-2001.) Cellmark found appellant was the major contributor of DNA in that sample and Ms.

Ernest was the minor contributor. (14RT 2047.) The major contributor in the sperm fraction of the anal swab matched appellant, with some carryover of Ms. Ernest's DNA. (14RT 2046.) The major contributor of DNA on the left nipple swab was appellant, with an unknown minor contributor of one allele consistent with Ms. Ernest. (14RT 2049, 2106.)

Appellant lived about eight to nine blocks from where Ms. Ernest was murdered. (15RT 2261.)

4. Anita Fishman – Count 3 – January 20, 1989

On January 20, 1989, when Enrique Alvarez was seven or eight years old, he discovered Anita Fishman's body in an alley near his home. (7RT 979-980, 995, 999.) The alley was behind South Figueroa between 98th and 99th Streets. (7RT 979, 997.) Alvarez went home and called the police. (7RT 980.)

Ms. Fishman had a history of excessive drug use and prostitution. (7RT 974; 15RT 2256.) A small off-white substance resembling crack cocaine was collected at the scene. (7RT 1013.) She had .81 mg of cocaine in her system when she was killed. (13RT 1882.)

Ms. Fishman's body was lying on its right side and was covered by a door that was propped up against a garage. (7RT 980, 985, 988, 997.) Her face was discolored, and her body showed signs of decomposition. (7RT 980, 988, 1001; 12RT 1810.) Her pants were pulled slightly down, exposing her left buttock. (7RT 999.) The cause of death was manual strangulation. (7RT 1008; 12RT 1809.) Los Angeles Police Detective Joe Callian believed that the body had been dumped in that location. (7RT 1030.)

Out of an abundance of caution, Detective Callian collected partial shoeprint impressions and shoeprint photographs around the scene, but the quality was poor. (7RT 1002-1005, 1044.) Shoe print evidence was not very reliable, especially after the passage of time. (7RT 1007-1008.)

A partial sexual assault kit was performed on Ms. Fishman's body. Only the body cavities were sampled. Decomposition would make surface samples basically useless. Trace evidence was also collected. (8RT 1172-1178.) DNA in the sperm fraction of a vaginal swab of Ms. Fishman matched appellant. (13RT 1990; 14RT 2050.) The epithelial fraction from the vaginal swab was a mixture that matched appellant and Ms. Fishman. (14RT 2050.) DNA from an oral swab was a mixture of Ms. Fishman and an unknown male. (14RT 2050.)

Appellant lived about a block-and-a-half from where Ms. Fishman's body was found. (15RT 2262.)

5. Regina Washington and Baby Girl Washington – Counts 4 and 5 – September 23, 1989

On September 23, 1989, Regina Washington's body was found in a "burnt out garage" on South Figueroa at 88th Street in the Figueroa Corridor. (7RT 1061-1062, 1075; 15RT 2262.) The area was known for prostitution and narcotics. (7RT 1068, 1077, 1091.) There were three boarded-up units on the property, and the garage was in the back. (7RT 1062-1063, 1089-1091.) In the garage was lots of trash, used condoms, and discarded clothing. (7RT 1076, 1091.) The garage was used for brief sexual encounters, drug use, and as a toilet. (7RT 1076-1077.)

Ms. Washington was a 27-year-old African-American. (7RT 1055, 1064; 12RT 1827-1828.) She had a history of drug abuse and prostitution. (7RT 1057; 15RT 2256.) At the time of her murder, Ms. Washington was pregnant and showing. (7RT 1055; 12RT 1819.) Ms. Washington had .08 mg of cocaine in her system when her body was discovered. (13RT 1889.) Baby Girl Washington had .09 mg of cocaine and .04 to .07 grams of alcohol in her system. (13RT 1890-1891.)

Ms. Washington's body was lying on a mattress with a black TV cable wrapped around her neck. (7RT 1064, 1075-1076.) She was face-

down, and the cable was tied to an electrical box and hook above and behind her. (7RT 1064-1065, 1075-1076, 1080.) Her baggy jeans were unfastened but pulled up. (7RT 1066-1067, 1078, 1082.) Her shirt was pulled up to her breast area. (7RT 1066, 1071-1072.) There was blood smeared on her face and nose, and there was petechiae in her eyes. (7RT 1083; 12RT 1815-1816.)

There appeared to be a partial shoe print on her shirt near her left rear shoulder area. (8RT 1204-1206.) A criminalist examined a one-square inch cutout containing the partial print, but it was an insufficient size and quality to make any determination. (8RT 1225-1226.)

The cause of Ms. Washington's death was asphyxia due to strangulation. (12RT 1812.) Baby Girl Washington died from "anoxic intrauterine fetal demise." That meant she died because her mother was strangled, and she was deprived of oxygen. The fetus was female, 825 grams, and approximately six-and-a-half months' gestation, which was about 27 to 28 weeks. (12RT 1820-1822.) At the time of Ms. Washington's death, the fetus was viable – a fetus is considered viable after the 22nd week if it weighs 500 grams or more. Ms. Washington's fetus was "well above that." (12RT 1822.) Neither the cocaine nor alcohol in the baby's system would have affected the fetus' viability. (13RT 1890-1891.)

Sexual assault evidence was collected from Ms. Washington. (7RT 1181-1183.) DNA in the sperm fraction of a vaginal swab of Ms. Washington matched appellant. (13RT 1993-1994; 14RT 2052.) Cellmark detected some carryover from Ms. Washington. (14RT 2052.) The sperm fraction from an external genital swab resulted in a mixture of appellant and an unknown person. (14RT 2053.) The epithelial fraction on the external genital swab included Ms. Washington and two unknown people; appellant could not be excluded as one of the contributors. (14RT 2053.)

Ms. Washington's 11-year-old daughter, Dorothy Patterson, was staying with her grandmother when her mother was killed. She had not seen her mother in about a week. (7RT 1056-1057.) She knew that her mother was pregnant with a baby girl. (7RT 1055.) Ms. Patterson was familiar with the area where her mother's body was found because her mother used to walk her to school near there. (7RT 1059.) Ms. Washington had taken martial arts lessons, and was known to be a strong fighter. (7RT 1058.) She may have had a mental disability. (15RT 2256.)

Appellant lived about 14 blocks from where Ms. Washington and her baby were murdered. (15RT 2262.)

6. Andrea Tripplett – Count 6 – April 2, 1993

On April 2, 1993, Stuart Young discovered a body in the backyard of a house on which he was working. (10RT 1401-1402.) The house, which was on Figueroa between 78th and 79th Streets, was trashed and boarded up. (8RT 1252, 1259; 10RT 1404.) The house looked like it may have been used as a "crash pad" or to use drugs. (8RT 1261; 10RT 1404.) Andrea Tripplett's body was near the wall at the back. (8RT 1261-1262.) A motel was on the other side of the wall, and there was barbed wiring on top of the wall.[3] (8RT 1259, 1262, 1267, 1269.) The area was a high crime area known for prostitution and drug use. (8RT 1255, 1279.)

Ms. Tripplett was a 29-year-old African-American. (8RT 1252, 1261-1262; 10RT 1403.) She had a drug problem. (8RT 1254; 15RT 2256.) She had 1.6 mg of cocaine in her system when she was killed. (13RT 1882.) Ms. Tripplett was found about two blocks away from where she lived with her mother. (8RT 1252-1253.) She was about five months pregnant when

[3] Red stains on the driveway of the motel contained an unknown male's DNA. (8RT 1267, 1271-1273; 14RT 2057-2058; 16RT 2371-2372.)

she died. (8RT 1253; 12RT 1832.) The fetus was pre-viable, at five months and 305 grams. (12RT 1832.)

Ms. Triplett's body was found face-down. (8RT 1262; 9RT 1300.) Her skirt was pushed up to her waist, and she was naked from the waist down. (8RT 1262.) She was wearing boots. (8RT 1262.) She had abrasions on her left inner thigh and the front of her neck. (9RT 1302.) There was petechiae, or red spots, in her eyes indicating she was strangled. (9RT 1303; 12RT 1831.) The cause of death was manual strangulation. (12RT 1828.)

A sexual assault kit and trace evidence were collected. (8RT 1264; 9RT 1301-1302, 1310.) The sperm fraction from a vaginal swab of Ms. Tripplett matched appellant. (13RT 1981; 14RT 2056-2057.) Some of Ms. Tripplett's DNA was still in the sample, so the separation of male and female DNA was incomplete, but appellant was the major donor. (13RT 1981; 14RT 2107-2108.)

One of appellant's addresses was about 22 blocks from where Ms. Tripplett was murdered. (15RT 2263.)

7. Desarae Jones aka Tracy Williams – Count 7 – May 16, 1993

On May 16, 1993, Maricela Leyva discovered Desarae Jones' body in an area behind her backyard. (9RT 1338-1340, 1343, 1345.) The body was beside a house that was trashy, vandalized, burned, and boarded up. (9RT 1346.) Police collected several pieces of trash from the area. (9RT 1348-1350, 1361-1362.) This was a high-traffic area, and there were partial footprints nearby, which were photographed and casted. (9RT 1349, 1352, 1356.) The area was known for narcotics and probably also prostitution. (9RT 1365.)

Ms. Jones was also known as Tracy Williams. (9RT 1331, 1354-1355.) She was a 29-year-old African-American woman with a history of

cocaine use and prostitution. (9RT 1331, 1334, 1347; 12RT 1833; 15RT 2257.)

She was found on her right side, with just a top on. (9RT 1347.) Ms. Jones was naked below the waist and had no shoes. (9RT 1353.) There were scratch marks on her neck. (9RT 1353-1354, 1366; 12RT 1833-1834.) Her eyes had hemorrhages and were "bugging out." (12RT 1835.) There was a possible bite mark on her finger. (12RT 1840.) The cause of death was asphyxia due to manual strangulation. (12RT 1833.)

Fingerprints were lifted from a beer bottle and a cardboard box that were not near the body. (9RT 1362, 1375-1376.) They did not match appellant. (9RT 1364.) A criminalist examined photographs of shoe print impressions, but was unable to make any determination. (8RT 1226-1227.) Comparing a shoeprint to a suspect's shoe from 20 years later would not lead to valuable evidence, especially if the shoe had been worn in the interim. A shoe pattern changes when a person walks because there are wear patterns that change over time, and the shoe can develop cuts or gouges. The more time that elapses between the shoe print and recovering a shoe for comparison, the less likely they could be associated. (8RT 1229-1230.)

A sexual assault kit was performed on Ms. Jones' body. (9RT 1350; 11RT 1544-1545.) DNA in the sperm fraction of an anal swab matched appellant. (14RT 2059.) Appellant was the major donor in the sperm fraction from an external genital swab. (13RT 1983-1984; 14RT 2060.) An unknown third party's DNA was present as well. (13RT 1983, 1985; 14RT 2060.) Appellant was the major contributor of DNA in the sperm fraction of an oral swab. (14RT 2063.) A right nipple swab included Ms. Jones' DNA as well as an unidentified male. (14RT 2063.) A left nipple swab was a mixture; appellant could not be excluded as a contributor, and Ms. Jones could not be excluded as a minor contributor. (14RT 2063.)

Condoms were tested that did not match either appellant or Ms. Jones. (14RT 2063-2065.)

One of appellant's addresses was about 30 blocks from where Ms. Jones was murdered. (15RT 2263.)

8. Natalie Price – Count 8 – February 12, 1995

On February 12, 1995, Natalie Price's body was found on the side of a house, toward the back, on 80th Street. (9RT 1379, 1382; 10RT 1427, 1430, 1447.) The house was being used as a "crash pad" where drug users would smoke and drink. (10RT 1437, 1450.)

Ms. Price was a 39-year-old African-American. (12RT 1845; 15RT 2257.) She abused cocaine and engaged in prostitution. (10RT 1407-1408; 15RT 2257.) She had been previously contacted by the police in the area in which her body was found. (15RT 2257.)

Ms. Price's blouse and bra were pushed up around her neck, and her pants were pulled down about mid-thigh. (9RT 1385; 10RT 1433-1435.) She was not wearing underwear. (10RT 1451.) Her left shoe was muddy, and her right shoe was off and next to her muddy foot. (10RT 1445-1446.) There was mud on her face and in her teeth, tongue, and nostrils, as well as on her pants, stomach, and forearms, indicating she had been face-down in the mud and turned over by her assailant. (10RT 1431-1434; 12RT 1842-1843.) There were lacerations on her face, near the top of her nose and eyebrow, and on the inside of her lower lip. (10RT 1432; 12RT 1842-1843.) Bruising under her scalp indicated blunt force trauma. (13RT 1891-1892.) There was petechiae in her eyes and redness and scratches on her neck. (10RT 1439, 1455-1457; 12RT 1841.) Fluid was seeping out of her vagina, and there were vaginal hemorrhages that could have been the result of sexual penetration. (10RT 1456; 12RT 1845-1846.) The cause of death was strangulation. (12RT 1841.)

A sexual assault kit was performed on Ms. Price's body. (10RT 1435; 11RT 1549.) The sperm fraction from a vaginal swab of Ms. Price matched appellant. (13RT 1978; 14RT 2066.) A partial male profile consistent with appellant was obtained from an anal swab. (14RT 2067.) Appellant matched DNA from the sperm fraction and epithelial fraction of an external genital swab. (14RT 2068.) A right nipple swab contained a mixture wherein appellant was the major contributor, Ms. Price could not be excluded as a contributor, and there was likely an unknown person. (14RT 2069.) A left nipple swab contained a mixture of at least two people, with appellant as the major contributor. (14RT 2069.)

Appellant lived about five blocks from where Ms. Price was murdered. (15RT 2263.)

9. Mildred Beasley – Count 9 – November 6, 1996

On November 6, 1996, Mildred Beasley's body was discovered near 96th and Broadway. (10RT 1489, 1491.) She was found on an embankment next to the 110 Freeway, through a hole in a fence in an alley. (10RT 1489-1493, 1507.) There were overgrown trees, shrubs, and trash in the area. (10RT 1493, 1500.) The embankment area was known for transients and drug activity. It was about a block from the Figueroa Corridor, which was known for prostitution and drugs. (10RT 1508-1509; 16RT 2308-2309.) A tissue and a pipe used to inhale cocaine were collected from the scene. (10RT 1517, 1531.)

Ms. Beasley was 45 years old. (10RT 1513; 15RT 2257.) She had a cocaine problem and frequented the Figueroa Corridor. (10RT 1479-1480, 1485-1487; 15RT 2258.) She left her home Saturday morning to take the bus to her sister's house, but never arrived. (10RT 1480.)

Ms. Beasley was wearing a jacket, t-shirt, and bra, which were pulled up to her neck. She was naked from the waist down. (10RT 1501, 1510, 1521.) There were socks, pants, and underwear underneath or near her.

(10RT 1510, 1517-1518, 1531.) Her legs were spread apart. (10RT 1511.) There was trauma to her neck and petechiae in her eyes. (10RT 1522; 12RT 1846.) She had a laceration and bruising on her lower lip. (12RT 1849-1850.) Her forehead and side of her head were bruised. (13RT 1878-1879.) There was blood in her vagina. (10RT 1533-1534.) There were a lot of ants and ant bites on her, suggesting that the body was beginning to decompose. (10RT 1510-1511, 1532; 12RT 1847-1848.) There were no drag marks or other indications that she was dumped there, indicating she likely died where she was found. (10RT 1519-1520.) The cause of death was asphyxia due to strangulation. (12RT 1846.)

A sexual assault kit was completed on Ms. Beasley's body. (10RT 1511-1512, 1527-1528.) The sperm fraction from a vaginal swab contained DNA that matched appellant. (13RT 1970; 14RT 2070.) Cellmark detected carryover from Ms. Beasley. (14RT 2070.) The sperm fraction from an anal swab matched appellant. (14RT 2071.) On an external genital swab, the major contributor of both the sperm fraction and epithelial fraction was appellant, with Ms. Beasley as the minor contributor on the epithelial fraction. (14RT 2071-2072.) A right nipple swab had a major profile that matched appellant and a minor profile that matched Ms. Beasley. (14RT 2072.)

Appellant lived about 18 blocks from where Ms. Beasley was murdered. (15RT 2263-2264.)

10. Paula Vance – Count 10 – February 3, 1998

On February 3, 1998, a security guard at 630 West Sixth Street discovered Paula Vance's body in a walkway of one of the buildings he guarded and called 911. (15RT 2233, 2236.) Paramedics responded first, and, believing she died of natural causes, covered her with a blanket. (11RT 1592, 1595; 15RT 2237.) Los Angeles Police Officer Mark Pompano saw Ms. Vance's body under a blanket on a walkway between

some buildings. (11RT 1593.) The area was about a mile from "skid row" in downtown Los Angeles and was primarily populated by transients at night. (11RT 1613.) There was a lot of cocaine use in the area. (16RT 2308.)

Two video surveillance cameras above the walkway pointed toward the area near the body. (11RT 1596, 1601, 1616-1617.) A tape from the cameras recorded what happened the previous night. (11RT 1602, 1619; 15RT 2239.) Officer Pompano viewed the videotape and called detectives. (11RT 1603-1604; 15RT 2247.) The jury viewed copies of the video collected that day. (15RT 2270, 2288.) The jury also received enhanced still photos made from the video. (16RT 2303-2307.)

The video lasted about 20 minutes. (11RT 1630.) It showed a male and female walking into the walkway area, the female following the male. (11RT 1630.) They walked to the area where Ms. Vance's body was later found. (11RT 1630, 1632.) The position of the female's body in the video appeared to be in the same position as Ms. Vance's body when it was found. (11RT 1635.)

Ms. Vance was a 41-year-old African-American. (11RT 1612, 1636; 12RT 1852-1853.) She was new to the area and homeless with mental problems. (15RT 2253-2254.) She did not have any cocaine in her system. (13RT 1882.)

Ms. Vance's nylons and underwear were partially pulled down. (11RT 1612.) The crotch of her nylons was ripped. (12RT 1725.) She was wearing a sweater and jacket that were pushed up to her chest. (11RT 1612, 1638.) There was bruising around her neck and throat area and petechiae in her eyes. (11RT 1619-1620; 12RT 1851-1852.) The hyoid bone in her neck was fractured. (12RT 1850-1851.) There was a laceration on the area right behind the opening of the vagina, indicating sexual trauma. (12RT

1852.) The cause of death was asphyxia probably from manual strangulation. (12RT 1851.)

A sexual assault kit was performed on Ms. Vance's body. (11RT 1622; 12RT 1720.) The sperm fraction from a vaginal swab matched appellant. (13RT 1974; 14RT 2073.) The epithelial fraction matched Ms. Vance with carryover from appellant. (14RT 2073.) The sperm fraction from an external genital swab matched appellant. (14RT 2074.) The epithelial fraction matched appellant and Ms. Vance. (14RT 2074.) DNA on a right nipple swab matched appellant. (14RT 2075.)

Appellant lived about 14 blocks from where Ms. Vance was murdered. (15RT 2264.)

11. Brenda Bries – Count 11 – April 6, 1998

On April 6, 1998, police found Brenda Bries' body in a portable toilet on South Gladys Avenue near Fifth Street. (16RT 1674-1675, 1694.) The area was a "skid row" area with old motels, transients, narcotics, and prostitution. (11RT 1675, 1686-1687, 1702.) There was a condom and a wrapper inside the porta-potty. (11RT 1684-1686, 1703.) Fingerprints were taken of the porta-potty, but there was no match. (11RT 1706.)

Ms. Bries was a 37-year-old African-American. (11RT 1677, 1690, 1694.) She was homeless and stayed in hotels. (15RT 2254.) She was a drug user. (11RT 1701; 15RT 2254.) She had .64 mg of cocaine in her system at the time of her death, which was below the standard toxic level of .9 mg. (13RT 1882, 1887.)

Ms. Bries was slumped forward over the toilet seat, sitting on her hip with her feet, knees, and legs underneath her on the floor. (11RT 1677, 1681-1682.) Her pants and underwear were down around her knees, and her bra, shirt, and sweatshirt were pushed up around her neck. (11RT 1677, 1681, 1683, 1706; 12RT 1728.) There was a fabric cord, possibly the drawstring from her hooded sweatshirt, tied around her neck. (11RT 1680,

1691, 1704-1705.) The cord was pulled tight, cutting into her skin, and tied at the back of her neck. (11RT 1680, 1691, 1707; 12RT 1729.) Her bra was intertwined with the cord. (11RT 1680.) There was petechiae in her eyes. (11RT 1696; 12RT 1856.) There were bruises to both sides of her forehead and abrasions on her nose and lip, suggesting a struggle. (12RT 1855-1858; 13RT 1879-1880.) The cause of Ms. Bries death was asphyxia due to ligature strangulation. (12RT 1854-1855; 13RT 1883.) Although the medical examiner who did the autopsy listed acute cocaine intoxication and a seizure disorder as possibly contributing to death, the doctor who testified did not think that the seizure disorder had anything to do with Ms. Bries' death. (12RT 1856-1857.)

A sexual assault kit was performed on Ms. Bries' body. (11RT 1693; 12RT 1726.) The sperm fraction from a vaginal swab matched appellant. (13RT 2004; 14RT 2075.) The epithelial fraction of vaginal and external genital swabs matched Ms. Bries and appellant. (14RT 2076-2077.) The sperm fraction from anal and external genital swabs matched appellant. (14RT 2076-2077.) The sperm fraction from an oral swab was a mixture of Ms. Bries and an unknown male. (14RT 2077.) Left and right nipple swabs had an unknown male, who was different than the unknown male on the oral swab, and Ms. Bries as contributors. (14RT 2078.)

Appellant was living around the corner and about 50 yards from where Ms. Bries was murdered. (13RT 1876; 15RT 2265.)

12. 2002 Rape of Maria Martinez

On the night of March 16, 2002, appellant attacked and raped Maria Martinez. (14RT 2165, 2167.) Ms. Martinez was 47 years old, married, and homeless. (14RT 2160-2161.) She was a prostitute, and she had used and sold drugs. (14RT 2162-2163.) She knew appellant from the Midnight Mission where she sometimes received services, but she did not know his name. (14RT 2161, 2163-2165.)

Appellant approached Ms. Martinez on the street and asked to borrow a lighter. She gave him one, and he used it to light a cocaine pipe. (14RT 2169-2170.) Instead of giving the lighter back, appellant grabbed her arm with one hand and grabbed her neck with the other, and began choking her. (14RT 2170-2171.) She could not scream and could barely breathe. (14RT 2172.) He dragged her behind some dumpsters and told her to take her clothes off. (14RT 2172-2174.) She began to comply, then appellant took off her pants and opened her shirt. (14RT 2175.) Appellant pushed her to the ground on her knees, then flat on her stomach. (14RT 2176-2177.) He held her mouth and face in his hand and turned her face to the wall. (14RT 2177.) Appellant raped Ms. Martinez anally for about two hours, during which time he ejaculated. (14RT 2177, 2180.) Appellant told her he would kill her if he was arrested. (14RT 2181.)

Ms. Martinez walked about two blocks to a police station and told an officer that she had been raped. (15RT 2182-2183, 2219.) The officer told her to sit and calm down. She felt ignored, so she left. (15RT 2183, 2219-2220.) She went to a homeless shelter where she saw her husband and other people, but she did not tell anyone because she was scared of appellant's threat. (15RT 2183.) She took a shower and put her clothes in a trash bag because she felt "dirty" and "disgusting." (15RT 2184-2185.)

The next morning, Ms. Martinez reported the rape to the program director of the Midnight Mission in downtown. (14RT 2115, 2119, 2132; 15RT 2185.) She had bruises on her knee and chest. (14RT 2119.) Ms. Martinez identified appellant as working security there and having a distinct scar. (14RT 2121-2122.) He lived in the mission at the time and had lived there for more than a month. (14RT 2122.) Ms. Martinez told the director that she had not been smoking with appellant, but that he had smoked narcotics. (14RT 2129-2130.)

The police took Ms. Martinez to the hospital where a sexual assault examination was done. (14RT 2143.) The nurse noted bruising on the back of Ms. Martinez's neck and scratches on her right buttocks area. (15RT 2227.)

The police arrested appellant at the mission. (14RT 2123, 2139.) He tried to run when he saw the police. (14RT 2138-2139.) On September 17, 2002, he pled no contest to rape by force or fear and unlawful penetration. (15RT 2226.)

13. Appellant's DNA Profile

Police obtained cheek swabs from appellant on July 3, 2002. (13RT 1906, 1909.) The swabs were obtained because appellant was suspected of sexually assaulting of Maria Martinez. (13RT 1907-1908.) Appellant's DNA was typed by two labs at 13 loci from his reference sample. (13RT 1961-1962, 1965; 14RT 2039-2040.)

A vaginal swab from Ms. Martinez was separated into male and female DNA. The separation was imperfect, so some of Ms. Martinez's DNA remained, but other than that, the DNA in the sample matched appellant. (13RT 1966-1968.)

The LAPD DNA lab calculated the random match probability of appellant's profile as one in one quintillion. (13RT 1968-1969, 1973, 1976, 1978, 1981, 1983, 1994, 1996, 1999, 2004.) A quintillion is 1 followed by 18 zeroes. (13RT 1969.)

The statistical method used to generate the random match probability was based on the idea that each marker is independently inherited. The product rule was used because the probability of a particular marker at one locus is independent from the other loci, so the probabilities of each loci were multiplied. (13RT 2018.) The criminalist who analyzed the DNA evidence in the Los Angeles Police Department lab put the information of

each loci from appellant's profile into a computer program, and the program determined the random match probability. (13RT 2019.)

A Cellmark forensic laboratory also calculated the random match probability. (14RT 2081-2082.) That lab determined the probability of selecting a random person within the African-American population as having the same DNA profile as appellant was one in 6.725 quintillion. (14RT 2082.)

The DNA of unknown males found on some of the murder victims did not match unknown male DNA on other victims. (13RT 2007-2008; 14RT 2079, 2105.) Appellant's DNA was the only DNA that was found on multiple victims, and it was found on all ten victims. (14RT 2079-2080.) Contamination would not be a factor in a case where DNA taken from the bodies of ten separate women matched the DNA profile of one man. (8RT 1166.)

14. Appellant's Residency

Several police officers testified about encounters with appellant during which he revealed addresses that were in the vicinity of the murders. Between 1984 and about 1993, appellant lived at 614 West Century Boulevard, which was between Figueroa and Hoover. (12RT 1753-1754, 1756-1757, 1764, 1768-1769; 15RT 2261.) In at least 1987 to 1988, he worked at a Domino's Pizza in the Figueroa Corridor. (12RT 1758, 1761, 1764; 16RT 2313.) Around 1993 to 1995, appellant also lived in Utah. (15RT 2262; 16RT 2312.) On May 3, 1995, appellant lived at 226 West 85th Street. (12RT 1771; 15RT 2263.) On January 3, 1996, appellant said he lived at 9529 South Figueroa Street. (12RT 1774-1775.) That was around 95th and Figueroa, west of the 110 Freeway in the Figueroa Corridor. (12RT 1775-1776.) On October 22, 1996, an officer contacted appellant around East Sixth and Spring Streets in downtown, and appellant said he lived at 807 East 103rd Street. (12RT 1778-1779; 15RT 2263.)

By 1998, appellant had moved to the downtown area. (15RT 2264.) He told an officer that he was living at The Regal Hotel at 815 East Sixth Street in downtown Los Angeles. (13RT 1873.) In 1998, he also lived at the Midnight Mission at 396 South Los Angeles Street and The Panama Hotel at 403 East Fifth Street. (15RT 2264.) The Midnight Mission was about 10 blocks from The Regal Hotel. (15RT 2265.)

Appellant was about six feet two inches tall, and weighed between 175 and 256 pounds from 1984 to 2004. (12RT 1754, 1757, 1763, 1769, 1772, 1775, 1779; 13RT 1873; 15RT 2280.) Appellant stood before the jury next to his counsel, who was six feet tall. (12RT 1782.) Appellant also walked toward and away from the jury to demonstrate his walk. (15RT 2281.)

B. Defense Evidence

Marc Scott Taylor was a criminalist with Technical Associates, a private forensic lab. (16RT 2319, 2323.) When a sample had sperm cells, he did a differential extraction process. Since sperm cells had a special membrane to protect their DNA, they could be separated from non-sperm cells. The non-sperm cells were called the epithelial fraction. (16RT 2329.)

Mr. Taylor used a Y-STR test that separated out male DNA when a mixture was primarily female. The test focused on DNA on the Y chromosome, which is unique to males, so that the results pertained only to male DNA in the sample. (16RT 2324.) The profile results from a Y-STR test were less powerful than a DNA test that looked at multiple loci, with statistical numbers in the one in thousands rather than one in quadrillions. (16RT 2325-2326.) But it was a useful test for a mixture where the large amount of female DNA overwhelmed the male DNA. (16RT 2323-2326.) Mr. Taylor's results were sometimes different from the LAPD or Cellmark results because the Y-STR test filtered out female DNA

and only looked for male DNA, or because the samples may not have been homogeneous. (16RT 2391, 2393-2394.) For example, in the sperm cell fraction of Ms. Tripplett's anal swab, Cellmark showed only Ms. Tripplett, however, the Y-STR test revealed male DNA consistent with appellant and an unknown minor contributor. (16RT 2391.) "The reason Cellmark wouldn't detect that [male DNA] is because Miss Tripplett's DNA would overwhelm that." (16RT 2391.)

Mr. Taylor did Y-STR testing on samples in this case. (16RT 2326, 2355.) His testing thus only looked at male DNA. (16RT 2386.) When all 12 loci of a sample matched a reference sample, Mr. Taylor would indicate that he could not exclude the reference, rather than indicating a match. (16RT 2328, 2355-2356.) Y-STR testing was less definitive because profiles could overlap or mask one another and because the profiles were less rare. (16RT 2358-2359.)

There were times when it looked like there was a second unknown source of DNA, but it was just a "stutter artifact." (16RT 2344.) A stutter was a result of the testing process, where a repeated number might "slip" and include a lower or higher number. (16RT 2345.) For example, if a sample had "15 repeats in line, it sometimes will slip and give you a couple 14's in there." (16RT 2345.) In those cases, Mr. Taylor could not tell for sure if there was a second source of DNA. (16RT 2344-2345.)

Mr. Taylor looked at samples from nine of the victims, excluding Anita Fishman. (16RT 2363, 2384.) In each victim, there was DNA consistent with appellant. (16RT 2384.) In the samples that had profiles for unknown males, Mr. Taylor could not determine that any one unknown male profile repeated from victim to victim. Because he only had partial information for most other male profiles, it was difficult to do a comparison. (16RT 2384-2385.)

In an anal swab from Ms. Beasley, the epithelial fraction showed DNA consistent with appellant and no one else. (16RT 2327, 2378-2379.) On right and left nipple sperm fractions, there were profiles consistent with appellant as the major donor, and an unknown minor contributor. (16RT 2330-2332, 2379.)

In the epithelial fraction of an external genital swab of Ms. Bries, appellant was consistent with the sole source of the sample. (16RT 2332, 2382.) The sperm fraction was consistent with appellant as the major donor, and another minor contributor. (16RT 2332, 2382.) Other swabs, including an oral swab and nipple swabs, showed unknown male DNA. (16RT 2333-2335, 2382-2384.)

The epithelial fraction of Ms. Ernest's left nipple swab was consistent with appellant. The sperm fraction contained a mixture, with appellant as the primary donor, and an unknown male minor contributor. (16RT 2336, 2362-2363.) The sperm fraction of a vaginal sample was a mixture with the primary DNA consistent with appellant, and two other unknown minor contributors. (16RT 2336-2337.) The sperm fraction from an anal swab was consistent with appellant as the sole contributor. (16RT 2337, 2361-2362.)

The epithelial fractions of right and left nipple swabs from Ms. Johnson were mixtures of two unknown males, one of which was at trace levels. (16RT 2337-2338, 2360.) The sperm fractions contained a primary contributor that was consistent with appellant, with trace levels of a secondary donor that could be an artifact. (16RT 2338, 2360-2361.) Appellant was consistent with the sole contributor of DNA in the sperm fraction of a vaginal swab. (16RT 2338.)

In Ms. Vance's external genital swab, both the sperm and epithelial fractions were consistent with appellant as the sole

contributor. (16RT 2346, 2380.) Likewise, the sperm fraction of a right nipple swab showed only DNA consistent with appellant. (16RT 2346, 2380.) The epithelial fraction showed a major donor consistent with appellant, and trace DNA of an unknown male, which could have been an artifact. (16RT 2346, 2381.) The left nipple swab epithelial fraction showed only a trace level profile of an unknown male. (16RT 2346.)

From Ms. Washington's external genital swab, both the sperm and epithelial fractions showed results for appellant as the major donor, plus an unknown contributor. (16RT 2348, 2368.) The sperm fraction of a right nipple swab showed an unknown male. (16RT 2369.)

Both the epithelial and the sperm fractions from an external genital swab of Ms. Price revealed DNA consistent with appellant as the sole contributor. (16RT 2348, 2376.) The epithelial fraction from an anal swab was also consistent with appellant as the sole contributor. (16RT 2348-2349, 2376.) The sperm fraction had DNA consistent with appellant, with some trace alleles that could have been artifacts. (16RT 2349, 2375-2376.) The sperm fraction from a right nipple swab only had DNA consistent with appellant. (16RT 2377.) The epithelial fraction contained a mixture of DNA, with a primary donor consistent with appellant and an unknown secondary donor. (16RT 2349, 2377.) The sperm fraction from a left nipple swab was a mixed profile consistent with appellant as the major donor, and an unknown male as a secondary donor. (16RT 2349, 2377.)

The sperm fraction from Ms. Tripplett's anal swab was a mixture with the major donor consistent with appellant, and an unknown minor contributor. (16RT 2350, 2370.)

Both the epithelial and sperm fractions of an anal swab of Ms. Jones were consistent with appellant, with trace DNA that could have

been an artifact. (16RT 2351, 2372-2373.) The sperm fraction from a right nipple swab showed a major profile from an unknown male, a secondary profile that was consistent with appellant, and a third profile from another unknown male. (16RT 2350, 2374.) In the left nipple sperm fraction, there was a mixture consistent with appellant and two unknown males. (16RT 2350-2351, 2374-2375.)

Mr. Taylor opined that DNA from sperm in a living woman's vagina could be "completely removed" between 24 and 48 hours or could last up to a week. (16RT 2339.) With a dead female, the DNA from sperm could last as long as two weeks after death. (16RT 2340.) Assuming a female victim was located within one day after death, it was possible that detected sperm could have been deposited two to four days beforehand. (16RT 2341.) The fact that a profile was at a greater level, did not mean that the person with that profile was the one to last contribute DNA. (16RT 2396.)

It was stipulated that the defense requested discovery on DNA testing of any and all clothing associated with the case, and that neither the prosecution nor defense did any such testing. (16RT 2400.)

C. Penalty Phase Evidence in Aggravation

Appellant was convicted in 1997 of felony resisting arrest, and in 2002 of rape by force or fear and unlawful sexual penetration. (20RT 2924.)

1. Murder of Elandra Bunn – 1987

On June 5, 1987, when Alvin McThomas was 11 years old, he discovered Elandra Bunn's body in an alley in the Figueroa Corridor near 88th Street and Figueroa. (18RT 2626-2629, 2646-2647.) Her body was found about ten blocks from Anita

Fishman's and about one block from Regina Washington's, both of whom were murdered in 1989. (18RT 2668.)

Ms. Bunn had a cocaine problem. (18RT 2621.) Her toxicology report was positive for cocaine. (18RT 2707.) Ms. Bunn was in an early stage of pregnancy at the time of her death. (18RT 2707.)

Ms. Bunn's pants were pulled down around her ankles. (18RT 2647, 2651, 2672.) Her shirt was pulled up and bloody. (18RT 2652-2653, 2672-2673.) Blood splatter on her shirt was consistent with blunt force trauma. (18RT 2674-2675.)

She had "massive facial trauma," fresh blood on her face, and her left eye was swollen shut. (18RT 2647, 2651, 2675-2676.) It appeared that a struggle had taken place. (18RT 2665, 2677.) The injuries were consistent with blows to the face, and with her face being pushed into or dragged across a rough surface, like the ground. (18RT 2697-2698.)

There were many facial injuries, including bruising to the left eye, the right upper eyelid, and nose, a laceration and abrasions on the forehead, abrasions on the cheek, a large area of abrasion from inside the lower lip down to the chin, a laceration on the lip, and several abrasions on the neck including defensive crescent-shaped abrasions. (18RT 2694-2697, 2700-2701.) There was petechial hemorrhaging in her right eye, which indicated possible strangulation. (18RT 2653, 2676.) There were scratches and bruises on her neck as well as scratches on the left side of her body. (18RT 2647-2648, 2651, 2676.) There was blood on her left knee and other parts of her body. (18RT 2651, 2672-2673.) She had abrasions on the back of her right shoulder, left elbow, and back consistent with dragging. (18RT 2698-2700.) There

were hemorrhages in several neck muscles indicating pressure and manual strangulation. (18RT 2704-2706.) There was also a herniated disc in her neck, which indicated that her neck had been shaken back and forth. (18RT 2706-2707.) The cause of Ms. Bunn's death was strangulation, most likely manual strangulation because there were no ligature marks on her neck. (18RT 2694.)

A bloody tissue, about four to five feet from Ms. Bunn's knee, was booked into evidence. (18RT 2654-2656.) A pair of bloodstained shoes were nearby. (18RT 2648, 2654-2655, 2672.) One of the shoes was about six inches from the tissue. (18RT 2667.) Blood on the ground and on nearby vegetation was also booked. (18RT 2656-2657, 2667.) A sexual assault kit and trace evidence was collected, but the kit was destroyed in 1996. (18RT 2657-2659, 2676-2677.) The anal swab was bloody. (18RT 2678.)

In 2005, blood on the tissue and vegetation found at the scene was analyzed. (18RT 2684.) The blood found on the vegetation came from a female. (18RT 2685-2686.) DNA from the tissue matched appellant's profile. (18RT 2686-2687.) The random match probability was one in one quintillion. (18RT 2687.)

2. Assault of Carla Whitfield – 1996

Around 12:40 a.m. on October 22, 1996, Carl Whitfield was walking near Spring and Seventh Streets in Los Angeles when appellant grabbed her. (18RT 2605-2606.) He grabbed her arm with one hand and her crotch with the other. (18RT 2608.) He tried to drag her into an alley. (18RT 2609.) She screamed and kicked. (18RT 2609.)

A patrol car passed, and appellant ran away. (18RT 2608-2610.) Ms. Whitfield told the officers what happened and described appellant. (18RT 2610-2611.) The police detained him minutes later, and Ms. Whitfield identified him from a patrol car. (18RT 2610, 2615.) She also identified him in court before the jury. (18RT 2612.)

3. Resisting Law Enforcement – 1997

On March 9, 1997, Los Angeles Police Officer Christian Hanson and his partner, Officer Wilson, went to a motel near Broadway and 88th Street where appellant was staying. (18RT 2720-2722.) The motel was in the Figueroa Corridor, which was a moderate to high crime area. (18RT 2732.) They sought out appellant to investigate a complaint from an African-American woman. (18RT 2747, 2755.) Appellant opened the motel room door. (18RT 2723.) Officer Hanson asked if he was on parole, and he said yes. (18RT 2747.) Officer Hanson told him to turn around and put his hands behind his head so they could check for weapons. (18RT 2723, 2733.) Appellant would not put his hands completely behind his head. (18RT 2723.) Since appellant would not comply, Officers Hanson and Wilson grabbed appellant's wrists to handcuff him behind his back. (18RT 2724.) Appellant resisted, and the three struggled. (18RT 2724.)

Appellant dragged the two men down the hall of the motel about 10 to 20 yards to a parking lot. (18RT 2725.) He fell in the parking lot, taking the officers with him. (18RT 2725.) He kicked Officer Hanson several times in the chest and legs. (18RT 2725.) Appellant got his arm away from Officer Hanson and reached for the officer's gun. (18RT 2726.) Officer Hanson stood up and hit appellant's shoulder area with his baton six or seven times. (18RT

2726-2727.) Appellant pulled away from Officer Wilson and ran away. (18RT 2727.) Appellant jumped a cinder block wall and disappeared. (18RT 2727.)

Officer Hanson broadcasted a high priority call for help. (18RT 2727.) Officers responded and contained the area. (18RT 2727.) Officers, including a K-9 unit, searched the area. (18RT 2727-2728.) Officer Hanson was armed with a beanbag shotgun. (18RT 2730.) A search dog alerted on a woodpile, indicating appellant's possible presence. (18RT 2728.) Appellant was ordered out. (18RT 2729.) When appellant did not respond, the dog got closer. (18RT 2729.) When the dog was very close, appellant stood up and hit the dog's head with a fiberglass sink. (18RT 2729.) The dog bit him. (18RT 2742.) Appellant ran at the officers, and Officer Hanson shot him with the beanbag gun about six times. (18RT 2730.) Appellant continued charging the officers, and Officers Hanson and Weigh grabbed his arms. (18RT 2730.) The three fell to the ground, and appellant again kicked Officer Hanson several times. (18RT 2730.) Officer Hanson used his flashlight on appellant's knee and leg to stop him from kicking. (18RT 2730.) Appellant was taken into custody. (18RT 2730.)

4. Threatening a Sheriff's Deputy – 2006

On May 19, 2006, Los Angeles County Sheriff's Deputy Michael McMorrow was working at the men's Twin Towers Correctional Facility in a unit for high profile or hostile inmates. (19RT 2765-2766.) Deputy Natalie Jenkinson Uyetatsu was the only female in the unit. (19RT 2768.) Appellant was a chatty and good inmate with Deputy McMorrow and the other male deputy, but he was different with Officer Uyetatsu. (19RT 2770, 2845.)

If Deputy Uyetatsu entered, appellant's "whole demeanor would change." (19RT 2770, 2845.) He would stop talking and stare at her. (19RT 2770-2771.) He acted intimidating. (19RT 2771.) Appellant would put his hands up against the door of the cell and stare at her as long as she was in eye-shot. (19RT 2771-2772, 2779.)

Antonio M. was housed in the same unit as appellant. (19RT 2796.) Antonio had been convicted of several crimes, including making terrorist threats, petty theft with a prior, robbery, and burglary. (19RT 2794-2795.) He slipped a note about appellant to Officer McMorrow. (19RT 2773, 2775, 2798.)

Appellant had told Antonio that "if he got found guilty, he was going to kill the bitch," referring to Deputy Uyetatsu. (19RT 2798-2799.) Appellant was mad at her because she had put him on lockdown, and he could not take a shower or use the phones for two weeks. (19RT 2798-2799, 2810.) It was common to lock an inmate down for 24 hours for minor transgressions. (19RT 2786.) Antonio thought appellant was serious because he was very upset about losing privileges and thought Deputy Uyetatsu was "doing him dirty." (19RT 2800-2801.) Antonio put himself in jeopardy to write the note and give the information to Deputy McMorrow. (19RT 2774-2776.) Antonio believed that appellant would carry out his threat because of the charges against him and because it seemed like he hated women. (19RT 2803.)

Deputy Uyetatsu had written up appellant a couple of times for minor rule violations. (19RT 2831.) On Deputy Uyetatsu's first day in the unit, appellant did not stand at his cell door for his meal, as the rules required, so his meal was skipped. (19RT 2831-2832, 2840.) Appellant rang his emergency intercom button and

said he wanted his meal. (19RT 2832.) Deputy Uyetatsu told him he needed to be at his door when the meal was served. (19RT 2832.) Appellant repeatedly rang his emergency intercom button, and other deputies talked to him while Deputy Uyetatsu continued serving meals to other inmates. (19RT 2832-2833.) Deputy Uyetatsu spoke to her lieutenant about the situation. (19RT 2832-2833.)

Normal meal procedures were changed for appellant's next meal for safety reasons. Deputy Uyetatsu told appellant to sit or lie down if he wanted his meal, but he did not comply. (19RT 2833, 2839.) Appellant was placed on lockdown as a result, which meant losing his time out of his cell the next day. (19RT 2834.) Appellant complained that Deputy Uyetatsu had not fed him. (19RT 2834.) Deputy Uyetatsu was stricter than the other deputies and followed the rules to the letter, but she did not treat appellant any differently than the other inmates. (19RT 2836.)

Deputy Uyetatsu described appellant's attitude toward her as "utter disgust." (19RT 2834.) Appellant would look down at her, glare at her, and stand at his cell door with his arms raised up, which she "perceived as somebody that feels they're above you." (19RT 2834-2835.) When Deputy Uyetatsu learned of appellant's threat against her, she believed it was possible that he could kill her, and that he would do so if given the opportunity. (19RT 2836.)

After an investigation, Deputy Uyetatsu was moved out of appellant's area. (19RT 2776-2777.)

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5. Victim Impact Testimony

Anita Fishman's older sister, Sheryl King, and Ms. Fishman's mother, Phyllis Fishman, testified about her. (19RT 2851, 2857.) Ms. Fishman was a normal child, but her life "went on a detour" when she got involved with drugs. (19RT 2852.) Ms. Fishman loved to sing. (19RT 2852, 2859.) She wanted to have children, which she was never able to do. (19RT 2852.) She wanted to go to law school and was a good student until she got involved with drugs. (19RT 2859.) She had gotten clean and was attending "N.A." and paralegal school. (19RT 2859.) The day Ms. King got a call from her mother about her sister's murder was the worst of her life. (19RT 2854.) The murder changed her life forever because her kids will never know Ms. Fishman, and she and Ms. Fishman will never get to do the things they planned as children. (19RT 2852, 2854.) Her family still missed her. (19RT 2854, 2860.) They believed that she would have recovered from her addiction and had a "normal life." (19RT 2855, 2861.) It was hard waiting so long to find out what had happened to her. (19RT 2854, 2860.)

Dorothy Patterson was Regina Washington's only child. (19RT 2862, 2865.) They had a close relationship and went everywhere together. (19RT 2863-2864.) Ms. Washington was sweet, friendly, and outgoing. (19RT 2864.) She cared about her appearance and being healthy, and she always carried a Bible. (19RT 2864.) It hurt Ms. Patterson that her mother was no longer here, and it hurt her to explain to her three children why. (19RT 2865.) She felt a huge loss and often sought motherly love from friends. (19RT 2865.) Ms. Patterson had a hard time coping with the loss. (19RT 2866.) She cried all the time and thought about

her mother and the way she died all the time. (19RT 2866.) She felt a lot of pressure waiting so long and wondering if justice would be served. (19RT 2867.) Ms. Washington's mother and sister also had a hard time dealing with her loss. (19RT 2868.)

Tiviea Wade-Moore was Desarae Jones' niece. (19RT 2869.) She identified Ms. Jones' body when she was 16 years old, which was traumatic. (19RT 2870, 2872.) They had a close relationship because they were close in age, about ten years apart. (19RT 2870, 2874.) Ms. Jones had a drug problem, but taught Ms. Wade-Moore to avoid them. (19RT 2871.) Ms. Wade-Moore was motivated by the murder to attend law school. (19RT 2871-2872.) It was "brutal" and "overwhelming" to wait so long to find out who had murdered her aunt. She thought she would have to find out herself. (19RT 2873.) The whole family had been deeply affected by the "horrendous act." (19RT 2873-2874.) Patricia Jones was Ms. Jones' mother. (19RT 2876.) Ms. Jones had been a quiet, sweet girl. (19RT 2876.) She helped out at a "board and care home" that the family owned. (19RT 2877.) Patricia Jones passed out when she learned that her daughter had been murdered and saw a police picture. (19RT 2879.) She would never get over losing her daughter or knowing how her daughter was taken from her. (19RT 2879.) The family believed that Ms. Jones would have overcome drugs. (19RT 2875, 2878.)

Tacora Leggett was Natalie Price's daughter. (19RT 2881.) Ms. Price had five children. (19RT 2882.) The youngest was one year old when she was killed. (19RT 2882.) Immediately after the murder, the children were all split up to live with different family members, which was hard. (19RT 2883-2884.) A few months later, they went to live with their grandmother. (19RT

2882, 2884.) Their grandmother was sick, but they had help from the family. (19RT 2882-2883.) It took Ms. Price's grandmother a long time to accept that she was gone. (19RT 2884.) Ms. Price had four siblings. (19RT 2883.) Ms. Price's sister, who was very close to Ms. Price and identified her body, was very hurt by the loss and rarely spoke about it. (19RT 2885.) It was hard waiting so long to learn if someone would be held responsible for the murder because no one would give them information, and they had to learn about the case from the news. (19RT 2886.)

Shantell Jackson was Mildred Beasley's niece. (19RT 2888.) Ms. Beasley had helped raise her and her sister, and they were very close. (19RT 2888-2889.) Ms. Beasley had four sons. (19RT 2890.) Ms. Jackson was like the daughter Beasley never had. (19RT 2890.) She was 21 when Ms. Beasley was killed. (19RT 2889.) Ms. Beasley was nonjudgmental, and Ms. Jackson could talk to her about anything. (19RT 2889.) She was "cool" and sweet and was "always laughing and dancing." (19RT 2889.) Ms. Jackson did not know that Ms. Beasley used drugs because she was functional. (19RT 2890.)

The whole family was devastated by Ms. Beasley's murder. (19RT 2891, 2900.) They had to have a closed casket funeral. (19RT 2891.) Not knowing what had happened was the worst part. (19RT 2891.) Ms. Jackson felt like everyone she saw was a suspect. (19RT 2891.) It was a nightmare. She could not eat or sleep. She was scared and paranoid and "always wondering." (19RT 2891.) The pain of Ms. Beasley's death was still with her. (19RT 2892.) Ms. Beasley's sons were devastated, and their lives changed completely. (19RT 2894.) They could not bear to be in

court. (19RT 2896.) They had problems and had all been incarcerated. (19RT 2897.)

Bobbie Williams was Ms. Beasley's younger sister. There were six siblings. (19RT 2895.) Ms. Beasley was "a sweetheart." (19RT 2896.) She was Ms. Williams' best friend and a mother to everyone in the neighborhood. (19RT 2896.) She was caring and giving. (19RT 2896.) Ms. Williams "lost it" when she heard that Ms. Beasley had been murdered partly because they did not know who murdered her or why. (19RT 2899.) The fact that Ms. Beasley had been "degrade[d]" and raped was "the coldest thing that [she] could imagine." (19RT 2899.) She was angry and hurt, but thankful to have a name for the killer. (19RT 2900.)

Mildred White was Annette Ernest's mother. (19RT 2902.) Ms. Ernest was a happy girl who loved people and liked to have fun. (19RT 2903.) She wanted to be a police officer. (19RT 2904.) She had two children, Lannette and Lonnie, who were six and four, respectively, when their mother was killed. (19RT 2904.) Ms. White raised them afterward. (19RT 2905.) She knew that Ms. Ernest had a drug problem. (19RT 2907-2908.) It hurt badly that her daughter had been sexually assaulted. (19RT 2908.) It was devastating to bury her own child. (19RT 2909.)

Jerri Johnson was Andrea Tripplett's mother. (19RT 2910.) Her daughter was a cheerleader and a Girl Scout, and she was in the church choir and on her high school basketball team. (19RT 2911.) She had two children, Keandra and Daniel, who were seven and ten when their mother was murdered. (19RT 2911-2912.) Ms. Johnson took over their care and became a mother again. (19RT 2912.) The two children were scarred and for a long time could not understand why their mother did not come

home. (19RT 2912.) Ms. Johnson was indescribably impacted by burying her own child. (19RT 2914.) She and Mildred White, Ms. Ernest's mother, had been friends for about 30 years through bowling. (19RT 2906, 2915.) They consoled each other through the losses of their daughters. (19RT 2907, 2915-2916.) They learned through the news that the same man had killed both of their daughters. (19RT 2916-2917.) They had many conversations about losing their daughters and having to become mothers again. (19RT 2917-2918.) It was "very frightening and agonizing" to have her daughter murdered near their home and not know what happened. She felt like it could be someone in the neighborhood, and she might see the person without knowing. She felt like something could happen to her or her children or grandchildren, like they might "go to school and never come back." (19RT 2918-2919.)

D. Penalty Phase Evidence in Mitigation

Appellant's mother, Audrey Turner, testified that appellant was born in 1966 in Arkansas, when she was married to his father. (20RT 2928.) When appellant was one year old, Ms. Turner and her husband separated, and she raised appellant without assistance from his father. (20RT 2929-2930.) In 1970, when appellant was four, she moved to California. (20RT 2930.) She worked full time while a friend took care of her son. (20RT 2932-2933.) Appellant did not do well in elementary school and got into trouble with other children in the neighborhood. (20RT 2934.) When appellant was nine, he and his mother lived alone on Century Boulevard in Los Angeles. (20RT 2932.) For a year, appellant went back to Arkansas to live with his father, but after that, he had no contact with him. (20RT 2957, 2963.) Ms. Turner

had a second son, Anthony Vick, in 1980. (20RT 2939, 2941.) He was 14 years younger than appellant. (20RT 2973.)

When appellant was about 15, Ms. Turner got a second job working at night. (20RT 2935.) She had two jobs until 1991 and was very busy working, but she sometimes saw appellant at night. (20RT 2939-2940.) In 1984, Ms. Turner's father moved in with them to help care for appellant and his younger brother. (20RT 2939.)

Appellant dropped out of high school. (20RT 2940-2941.) He delivered pizzas for Domino's for many years. (20RT 2951, 2963.) He and his mother had a strained relationship. (20RT 2951.) Ms. Turner kicked appellant out of the house when he was about 17 because he and his friends would drink, smoke, and use drugs there. (20RT 2952.) She let him move back home after he got shot. (20RT 2954.) Appellant sometimes helped around the house and helped his mother at one of her jobs. (20RT 2954-2955.)

Ms. Turner moved to Salt Lake City in 1991. (20RT 2945.) Appellant and her younger son stayed behind so Mr. Vick, who was 11 or 12, could continue in the same school; for about six months to a year, Mr. Vick lived with Ms. Turner's father, appellant, one of appellant's children, and the child's mother. (20RT 2945-2947, 2974-2975.) Appellant got him up to go to school, made breakfast, and took care of his clothing. (20RT 2974, 2976.) Appellant was his primary caretaker and was like a father. (20RT 2975, 2979.) Appellant kept him out of trouble and warned him to stay in school. (20RT 2976-2977.) After moving to Salt Lake City with his mother, Mr. Vick returned to spend the summers with appellant and other family. (20RT 2978.) Mr.

Vick had a conviction for felony possession of cocaine. (20RT 2979-2980.)

Appellant had four children. (20RT 2947.) Appellant did not support them because he was in trouble with the law and in and out of custody. (20RT 2965.) Ms. Turner helped raise the children in Salt Lake City. (20RT 2965.) He cared for his children when they were with him. (20RT 2956.) Appellant wrote to some of his children from prison. (20RT 2968.)

ARGUMENT

I. AS THIS COURT HAS HELD, THE DNA STATISTICAL CALCULATIONS DID NOT REQUIRE A *KELLY* HEARING, AND THEY WERE PROPERLY ADMITTED HERE

Appellant contends that the trial court erred by denying his motion for a hearing under *People v. Kelly* (1976) 17 Cal.3d 24 ("*Kelly*"), on the applicability of the random match probability statistic ("RMP"), which is derived from the product rule, to a cold hit case. (AOB 36-85.) However, eight of the ten murders here were not discovered through a cold hit database search, so this is not a true cold hit case. Moreover, as appellant concedes, this Court has held that "use of the product rule in a cold hit case is not the application of a new scientific technique subject to a further *Kelly* (or *Kelly*-like) test." (*People v. Nelson* (2008) 43 Cal.4th 1242, 1263-1264 ("*Nelson*").) Appellant presents no credible basis to overturn *Nelson*. Finally, any possible error was harmless.

A. Background of DNA Statistical Analysis

"Forensic DNA analysis is a comparison of a person's genetic structure with crime scene samples to determine whether the person's structure matches that of the crime scene sample such that the person could have donated the sample." (*Nelson*, *supra*, 43 Cal.4th at pp. 1257-1258.) Certain regions on a DNA sample, called loci, are compared to determine

whether the evidence and suspect samples match at each loci. (*Id.* at p. 1258.) Specifically, it is the repetition of "base pairs" at each loci, called alleles, that are compared. (*Ibid.*) In this case, 13 loci were compared. (13RT 1961-1962, 1965; 14RT 2039-2040.) Once a match is found, the statistical significance of the match must be determined. (*Nelson*, at p. 1258.)

"Experts use a statistical method called the 'product rule' to calculate the rarity of the sample in the relevant population." (*Nelson*, *supra*, 43 Cal.4th at p. 1259.) The rarity of a profile is sometimes referred to as its frequency, and it is calculated by determining the frequency of each allele in the relevant population, then multiplying those frequencies to determine the overall rarity of the profile:

> The frequency with which each measured allele appears in the relevant population is estimated through the use of population databases. . . . The frequencies at each tested locus are multiplied together to generate a probability statistic reflecting the overall frequency of the complete multilocus profile. . . . The result reflects the frequency with which the complete profile is expected to appear in the population. . . .

(*Ibid.*, quotation marks omitted, ellipses in original.) The result of the product rule is also "sometimes expressed as the probability that the DNA of a person selected at random from the relevant population would match the evidentiary sample at all tested loci." (*Ibid.*) In other words, the product rule results in a single number that is used to express two related concepts: the profile's rarity or frequency ("the rarity statistic"), and the profile's RMP. (*Id.* at p. 1266; *United States v. Jenkins* (D.C. 2005) 887 A.2d 1013, 1018 ("*Jenkins*").)

There is no question that the product rule accurately and reliably represents those two statistics in a case where the crime scene evidence is compared one-to-one to a known suspect sample. (*Nelson*, *supra*, 43 Cal.4th at p. 1259; *People v. Soto* (1999) 21 Cal.4th 512, 541 ("*Soto*").)

The question that appellant raises here, and which *Nelson* already answered, is the reliability and admissibility of these statistics in a "cold hit" case, when the suspect sample is obtained after searching a database. (See *Nelson*, at pp. 1259-1260.)

In a cold hit case, in addition to the product rule statistics, three "additional methods" for calculating the statistical significance of a match have been discussed to account for the fact that the match was found because of a database search. (*Nelson*, *supra*, 43 Cal.4th at p. 1261, 1263.) After the product rule, the second method (the first of the additional three) is known as the NRC-1 method. (2CT 210; *Nelson*, at pp. 1261-1262.) Taken from the 1992 National Research Council report, it suggests that "'one set of loci could be used to screen and identify a suspect and then a different set of loci could be used to confirm a match. Statistical analysis using the product rule would be done on the second set of loci.'" (*Id.* at p. 1261.) Because it would use fewer loci, the result would be reliable, but "unnecessarily conservative." (*Ibid.*) It appears that this method has not been used or discussed as a viable option. (See *id.* at pp. 1261-1262; *Jenkins*, *supra*, 887 A.2d at p. 1022, fn. 17.)

The third method (second additional) is called the "database match probability," and was developed by the second National Research Council in 1996, or NRC-II. (2CT 211; *Nelson*, *supra*, 43 Cal.4th at p. 1262.) This method takes the product rule result and multiplies it by the number of profiles in the searched database. (*Nelson*, at p. 1262.) "The result would be the expected frequency of the profile in a sample the size of the databank and thus the random chance of finding a match in a sample of that size. The result may be significant when few loci are tested and the discriminatory power of the testing is limited, but the significance tends to disappear when many loci are tested." (*Ibid.*, citation and quotation marks omitted.)

The fourth and final method is called the Balding-Donnelly approach or the Bayesian method. (*Nelson*, *supra*, 43 Cal.4th at p. 1263.) Under this method, "'a match becomes more significant with larger database searches. [This method] posit[s] that in obtaining a match in a database search, one simultaneously eliminates other profiles as being the source of the sample. This elimination of known persons increases the chances that the identified individual is the actual source of the sample DNA.'" (*Ibid.*, quoting *Jenkins*, *supra*, 887 A.2d at p. 1020.) With this method, "'there is a slightly greater probability that the person identified is the source of the DNA'" compared to the product rule and RMP, so it "would result in evidence slightly more favorable to the prosecution." (*Ibid.*, quoting *Jenkins*, at p. 1020.)

Only the product rule statistics were admitted here, and appellant never attempted to admit statistics under any other method, so the only question on appeal is whether admission of the product rule statistics was proper.

B. Relevant Trial Court Proceedings

During an early appearance on discovery, the prosecutor summarized the process by which appellant was linked to each of the ten victims. First, the Los Angeles Police Department's Cold Case Unit submitted old cases with biological evidence to the crime lab to try to obtain DNA profiles. (1RT 37.) If a profile was found, it was "uploaded to the state data base run by the Department of Justice, the CODIS."[4] (1RT 37-38.)

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[4] CODIS stands for the "Combined DNA Index System," and it is "the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases." (<https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> [as of October 5, 2015].) As part of CODIS, the state has a database of offender and arrestee profiles, called the "State (continued...)

> Then what would happen is occasionally the Department of Justice would notify LAPD, all right, there's been a hit from the profile that you submitted to somebody that is in our data base for whatever reason. At least back at that time because they were -- had been convicted of some type of qualifying offense.
>
> Early on in 2003, the Los Angeles Police Department was notified that a CODIS match had been made to Mr. Turner as to two of the charged victims in this case. Once the investigators received that information, they then took a look at approximately 25 murder cases where there was biological evidence where the victims were female, perhaps prostitutes, sexually motivated type killings that were in the area where Mr. Turner either lived, worked or was known to associate.
>
> Of those approximate [*sic*] 25 cases, eight more were made through a CODIS match to Mr. Turner.

(1RT 38.) Ms. Beasley and Ms. Vance were the two initial cold-hit matches. (1RT 50.)

After defense counsel argued that he should be given discovery of investigations by the "South Side Slayer Task Force," the prosecutor stated that the murders in this case were not identified by the Task Force, but through cold case work by two investigators:

> In this particular case, what the investigators did is when they started looking at some of these old cases, after they got the first two hits as to Mr. Turner, and that was pretty early on in them looking at taking a fresh look at some of these old cases, that's when they accumulated approximately 25 murders that happened in the area where Mr. Turner lived, worked or associated, and got biological evidence from those approximately 25 cases and had -- had DNA profiles uplifted to CODIS.

(...continued)
DNA Index System," or SDIS. (*Ibid.*; <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure> [as of October 5, 2015].)

> Of those approximate 25 cases, there were eight matches by CODIS to Mr. Turner.

(1RT 49-50.)

The prosecutor emphasized that until the first two matches came back to appellant, the investigators were randomly searching, but afterward, they focused their investigation on him:

> Up to that point in time they were just randomly selecting cases that had potential DNA evidence, sending them wholesale to the crime lab, getting profiles developed and sending those profiles up to CODIS.
>
> When they got in September of 2003, I believe on the same day or within days of each other, notification that Mr. Turner was made on two of the cases, that's when they began to focus on him. So up until that point in time, they were simply going through old cases, determining if there was biological evidence, determining if there was evidence from which you could get a DNA profile. If you could get a DNA profile, they send it to the crime lab to work up a DNA profile, the DNA profile was uplifted to the state data bank.

(1RT 50-51.)

Later, appellant moved to exclude the DNA evidence, including the RMP statistics. (2CT 202-215.) He argued that RMP statistics were not generally accepted as reliable within the relevant scientific community under *People v. Kelly* (1976) 17 Cal.3d 24 ("*Kelly*") because this was a "coldhit case," and because there were three competing statistical methods for such cases.[5] (2CT 206-214.) He further argued that "[w]ithout a

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[5] Defense counsel did not describe the method by which appellant was tied to each murder or the details of the searches, but he suggested that the searches included comparison to a small group, which he called an "informal database." (See 2CT 204, 208, 214.) At no time did defense counsel dispute the prosecution's explanation of the search and identification process.

statistical analysis, the DNA match has no meaning," and should be excluded. (2CT 213.)

The prosecution opposed appellant's motion, arguing that the statistical methods suggested by appellant were not competing methodologies because they each answered different questions. (2CT 221-227.) Each of them was generally accepted as reliable under *Kelly*, so the only question was whether they were legally relevant. (2CT 225-230.)

More specifically, the prosecution asserted that the "product rule" answered two separate but related statistical questions: 1) How rare is the DNA profile (the rarity statistic)? and 2) What is the probability that the profile would match one randomly selected person (the RMP)? (2CT 221, 225.) In cases involving a database search, a third question could be answered with a second calculation: What is the probability of finding a coincidental match by searching a database of a given size (the database match probability)? (2CT 221, 225-226.) A third calculation, the Balding-Donnelly calculation, answered yet another question in cold hit cases: The probability in a database search "'that the person identified is the source of the sample in light of the fact that all other persons in the data base search were eliminated.'" (2CT 226, 229.)

The prosecution explained that, regardless of the answer to the other questions, statistics achieved by the product rule (rarity and RMP) remain the same. (2CT 221-222, 225-226.)

> In other words, nothing about the circumstances of a cold hit case changes the rarity of the DNA profile at issue, or the relevance and general acceptance of a rarity statistic. Accordingly, the existence of a cold hit database statistic does not justify withholding from the jury the rarity statistic of the DNA profile shared by the defendant and the crime scene evidence.

(2CT 222.) Moreover, none of the questions were the same, and none of the answers were mutually exclusive. (2CT 226, 229.) Finally, the use of a

DNA profile's rarity/RMP using the product rule was well-settled in California, obviating the need for a *Kelly* hearing. (2CT 223-225-227, 234.)

The prosecution relied on *Jenkins*, *supra*, 887 A.2d at p. 1016, which addressed the same issue and found, "'there was no debate in the relevant scientific community over the methodology, mechanics, or mathematics underlying the various statistical formulas,'" used to interpret DNA evidence. (2CT 223.) The federal equivalent of the first step of *Kelly* was thus met, according to *Jenkins*, and the only question was the relevance of the various statistics. (2CT 223.) Of course, the relevance of any particular statistic in a given case was a legal issue, not a scientific one. (2CT 226-227, 229.) The prosecution asserted that the relevance of the product rule statistics was no less in a cold hit case than any other. (2CT 227-230.)

On June 16, 2006, the trial court held a hearing on appellant's motion and heard arguments from both parties. (2RT 62-71.) The court suggested that identifying a suspect through a database search was similar to a reliable confidential informant identifying a suspect without percipient knowledge, after which an investigation is conducted by law enforcement. (2RT 70-71.) Both were a "point of initiating the investigation as to a particular suspect." (2RT 71.) The court concluded that a *Kelly* hearing was unnecessary because the RMP statistical analysis was generally accepted. (2RT 72.) The court accordingly denied the motion. (2RT 72.)

C. This Is Not Exclusively a Cold Hit Case

Appellant's basic claim is that *Kelly* should apply because this was a cold hit case, wherein crime scene evidence was compared to DNA profiles in a database of offenders, which resulted in matches to appellant's DNA. (AOB 36-37.) However, it appears that this "database trawl" process was used with only two of the ten victims. The other eight victims were matched to appellant after the police focused their attention on him and

decided to investigate other crimes possibly related to him. In other words, eight victims were identified through more traditional investigative methods and were not cold hits.

The investigators who received the two initial cold hit matches to appellant thereafter used traditional investigative methods to identify 25 other unsolved murders possibly connected to him. Specifically, they looked for cases with similar victims (women who were possible prostitutes), where the killings appeared to be sexually motivated, and that were located in an area where appellant had lived, worked, or been known to associate. (1RT 38, 49-50.) They also looked for cases with biological material from which DNA profiles could be obtained. (1RT 49-50.) They then attempted to match the profiles in those 25 cases to appellant by running them through CODIS. (1RT 38, 49-50.) The fact that the police had at that point identified appellant as a possible suspect and were specifically looking for a match to him, rather than blindly searching the database, is a critical distinction and separates this case from a true cold hit case.

There is no question that the product rule statistics (both rarity and RMP) are admissible in a non-cold-hit case. (*Nelson*, *supra*, 43 Cal.4th at pp. 1259, 1263; *People v. Soto*, *supra*, 21 Cal.4th at p. 541.) Once the police focused on appellant and looked for cases possibly connected to him through variables unconnected to DNA, this case transformed from a cold hit case to a non-cold-hit case. It became like any other case where the police identify a possible suspect through means other than a database search, then use the DNA comparison to confirm his involvement or not. On this basis alone, no *Kelly* hearing was required for admission of the product rule statistics for eight of the ten victims. Once the statistics were admissible as to any of the victims, they were admissible as to all of them. The matching profiles, and the corresponding statistics, were the same for

all of the victims. (13RT 1968-1969, 1973, 1976, 1978, 1981, 1983, 1994, 1996, 1999, 2004.)

The fact that the subsequent search of 25 possible profiles was done through CODIS rather than through a one-to-one comparison does not alter this analysis, other than to strengthen the match. Once the police identified the 25 cases that they wanted to compare to appellant's profile, they did so by uploading the profiles to CODIS and determining if any matched appellant. (1RT 38, 49-50.) They could have instead sent appellant's known profile as well as the 25 unknown profiles to a crime lab for a more direct, one-to-one comparison.[6] However, the result is the same because the 25 profiles were sent to CODIS specifically to determine whether any matched appellant's known profile. Statistically, this method eliminated the "ascertainment bias" that can occur in a cold database search. (See *Nelson*, *supra*, 43 Cal.4th at p. 1266 [explaining that database match probability is used to "'overcome the ascertainment bias' of database searches," and defining ascertainment bias as "the bias that exists when one searches for something rare in a set database"].) Indeed, this method creates an even stronger match than a one-to-one comparison because the CODIS search not only matched eight of the 25 profiles to appellant, but it also necessarily eliminated all of the other profiles in the database.

In sum, this issue does not apply to eight of the ten victims in this case because they were identified through traditional investigative methods, and were not cold hits. Even though the other two victims were identified through a cold database search, the profiles and statistics were the same for

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[6] There is no information in the record as to why the investigators ran the profiles through CODIS rather than attempting a one-to-one match. Presumably, a CODIS search was easier, faster, and/or cheaper. Searching CODIS rather than conducting one-to-one comparisons had the added benefit of excluding all the other profiles in the CODIS database.

all of the victims, so the statistics were admissible for all ten. However, even if the Court finds that the two victims who were matched to appellant through a cold hit database search should be treated differently than the other eight, this Court properly determined in *Nelson* that no *Kelly* hearing was required.

D. Pursuant to *Nelson*, No *Kelly* Hearing Was Required

The *Kelly* test has been summarized relating to this issue as follows: "The 'admissibility of expert testimony based on "a new scientific technique" requires proof of its reliability – i.e., that the technique is '"'sufficiently established to have gained general acceptance in the particular field to which it belongs.'"'"[7] (*Nelson*, *supra*, 43 Cal.4th at p. 1257, quoting *People v. Venegas* (1998) 18 Cal.4th 47, 76 ("*Venegas*").)

The comparison and statistical analysis of DNA evidence is not new. More specifically, the product rule, used here, is not new. This Court held as early as 1999 that "when a suspect's sample is compared to a crime scene sample, the product rule 'has gained general acceptance in the relevant scientific community and therefore meets the *Kelly* standard for admissibility.'" (*Nelson*, *supra*, 43 Cal.4th at p. 1259, quoting *Soto*, *supra*, 21 Cal.4th at p. 541.) Once a published opinion has affirmed a trial court ruling admitting evidence that is based on a new scientific technique, that precedent obviates the need for a *Kelly* hearing at future trials, unless new

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[7] This was previously known as the *Kelly/Frye* test, but *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, was abrogated by Federal Rules of Evidence, rule 702. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 [113 S.Ct. 2786, 125 L.Ed.2d 469].) *Kelly* remains the law in California. (See *People v. Venegas* (1998) 18 Cal.4th 47, 76, fn. 30.) Once reliability is established, the *Kelly* test has two additional prongs that are not at issue here (AOB 47): 2) a witness testifying about a new technique's general acceptance must be qualified, and 3) correct scientific procedures must have been used in this case. (*Id.* at p. 78.)

evidence is presented that reflects a change in the scientific community's acceptance. (*Nelson*, *supra*, 43 Cal.4th at p. 1257.) Appellant did not present evidence of a change in the scientific community's acceptance of the product rule calculations, and thus no *Kelly* hearing was required.

This Court has repeatedly rejected attempts to reconstitute different applications of already-accepted scientific methodologies as new techniques triggering *Kelly* scrutiny. (See e.g., *People v. Cordova* (2015) __ Cal.4th __ [194 Cal.Rptr.3d 40] [using the Identifiler DNA testing kit instead of the previously-approved Cofiler and Profiler Plus was "merely another in a series of improved ways to apply long-accepted science, not a new scientific technique in the *Kelly* sense"]; *People v. Walsh* (1993) 6 Cal.4th 215, 243 [no new *Kelly* hearing required when electrophoresis was used to analyze semen, which was complicated by degradation and presence of other fluids, rather than blood stains]; *People v. Cooper* (1991) 53 Cal.3d 771, 812-813 [once electrophoresis testing was admitted by a court, criticism of specific methodology goes to weight of the evidence]; see also *People v. Hill* (2001) 89 Cal.App.4th 48, 57-58 [once PCR/STR genetic testing accepted as scientifically reliable under *Kelly*, different methods of doing that test need not be subjected to *Kelly* prong one analysis]; *People v. Bui* (2001) 86 Cal.App.4th 1187, 1195-1196 ["That [the defense expert] disagreed with the conclusions [prosecution expert] Logan drew from his research does not make Logan's methodology a new scientific technique."]; cf. *Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893, 901-902 [*Kelly* did not apply where experts' novel opinion that product caused plaintiff's illness was based on techniques generally accepted in the scientific community, like peer-reviewed research papers and studies].)

Here, there is no credible claim that the scientific community views the product rule methodology for statistical calculations as "'experimental

or of dubious validity.'" (See *People v. Leahy* (1994) 8 Cal.4th 587, 602, quoting *People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) There is certainly nothing new about the calculation of DNA statistical match probabilities for estimating the rarity or RMP of crime scene profiles in the general population, whether in a cold hit case or otherwise. (*Nelson*, *supra*, 43 Cal.4th at pp. 1259-1260, 1263-1264; *People v. Soto*, *supra*, 21 Cal.4th at p. 515.) Accordingly, as *Nelson* previously held, *Kelly* is not implicated.

E. *Nelson* Was Properly Decided

Appellant asserted below, and does so again in this Court, that other statistical calculations available in a cold hit case render the product rule unreliable. As appellant acknowledges (AOB 46), this claim was squarely rejected by this Court in *Nelson*. Appellant contends that *Nelson* was improperly decided, but *Nelson* carefully considered the issue and appropriately characterized the scientific debate about which calculation best reflects the statistical reality of a cold hit case, as one of relevance. (*Nelson*, 43 Cal.4th at pp. 1260-1265.)

The Court in *Nelson* first examined each of four methods of calculating the statistical significance of a DNA match, set out above (see, *supra*, Arg. I.A), including the product rule. (*Nelson*, *supra*, 43 Cal.4th at pp. 1259, 1261-1263.) The Court explained that, in addition to the product rule, other "methods can be used to calculate the significance of a match" in a cold hit case. (*Id.* at p. 1263.) The Court discussed the nature of the scientific disagreement about these methods:

> The record in this case suggests some disagreement among experts as to which of these methods is the best, i.e., the most probative, way to judge the significance of a cold hit. But the question before us is not what technique is "best," but whether use of the product rule in a cold hit case is permissible. As the Court of Appeal in this case noted, "[n]othing in the *Kelly* test requires that there be one and only one approach to a scientific problem. The question is whether scientists significant in

> number or expertise publicly oppose a technique as unreliable, not whether some scientists believe there may be an alternative, perhaps even better, technique available." It is already settled that the product rule reliably shows the rarity of the profile in the relevant population. (*People v. Soto*, *supra*, 21 Cal.4th 512, 88 Cal.Rptr.2d 34, 981 P.2d 958.) To this extent, the product rule has already passed the *Kelly* test.

(*Ibid.*)

The Court quoted the D.C. Court of Appeal in *Jenkins* at length to further explain why the nature of the scientific debate is one of relevance:

> "There still exists controversy as to the appropriateness of the use of the rarity statistic, database match probability, or Balding-Donnelly calculation in a cold hit DNA match. This debate, however, still does not address the mathematics or methodology of the various computations. The argument . . . is to the relevancy of the statistics, not the soundness of the calculation . . . . [¶] The rarity statistic, the database match probability, and the Balding-Donnelly formulation do not purport to address the same issue. In reality, each formula answers a distinctly different question that may be of concern in a cold hit case . . . . [T]he rarity statistic simply answers the question: 'How rare is this specific combination of genetic material'? The database match probability answers the question: 'What is the chance/probability of obtaining a match by searching this particular database'? And the Balding-Donnelly calculation answers the question: 'What is the chance/probability that the person identified is the source of the sample in light of the fact that all other persons in the database were eliminated'? [Fns. in original and *Nelson* omitted.] None of the questions are the same; more importantly, none of the answers are mutually exclusive. [¶] The debate that exists is solely concerned with which number – rarity, database match probability, Balding-Donnelly, or some combination of the above – is most relevant in signifying the importance of a cold hit."

(*Nelson*, *supra*, 43 Cal.4th at pp. 1264-1265, quoting *Jenkins*, at pp. 1024-1025, ellipses and other alterations in *Nelson*.)

The Court further found that relevancy is a legal issue appropriately determined by courts rather than scientists. (*Nelson*, at p. 1265.) The Court accordingly concluded that the admissibility of a calculation derived from the product rule in a cold hit case turns on the legal question of relevance. (*Ibid.*)

Appellant first asserts that the *Nelson* Court's analysis misapplied California law because it contradicted its prior holdings in *Venegas* and *Soto*. (AOB 60-68.) As an initial matter, appellant misstates this Court's holding in *Nelson* as: "this Court for the first time held that DNA statistics were exempt from *Kelly* analysis." (AOB 61.) Rather, the *Nelson* Court held that "the use of the product rule in a cold hit case is not the application of a new scientific technique subject to a further *Kelly* (or *Kelly*-like) test." (*Nelson*, 43 Cal.4th at pp. 1263-1264.) In other words, the product rule had already passed the *Kelly* test in the context of DNA rarity, and it need not do so again, simply because of the cold hit context. This holding in no way contradicted either *Venegas* or *Soto*, but rather applied those holdings to the circumstance of a cold hit case.

In *Venegas*, this Court first held that the reliability and general scientific acceptance of the DNA extraction and comparison method used in that case (RFLP) had been "clearly established." (*Venegas*, *supra*, 18 Cal.4th at p. 79.) It then held that a *Kelly* hearing was required to determine what statistical probability calculations were admissible because the calculations were much more complex in the RFLP method for examining DNA than prior non-DNA uses of similar calculations. (*Id.* at pp. 82-84.) The Court upheld the trial court's determination that a "modified ceiling approach" to the product rule, which accounted for the possible non-independence of some alleles in some ethnic subgroups at that time, was scientifically accepted under *Kelly*'s first step. (*Id.* at pp. 84-89.)

Soto answered a question not raised in *Venegas*, and held that use of the unmodified product rule had gained general scientific acceptance for calculating the RMP of a DNA profile, and it was thus admissible under *Kelly*. (*Soto*, *supra*, 21 Cal.4th at p. 541.) The product rule statistics were subject to *Kelly* scrutiny because of "a then ongoing dispute" among population geneticists about using the product rule where it was questioned whether each multiplied frequency was independent from all others given concerns about the effect of population substructure (racial subgroups) on DNA data. (*Id.* at p. 515-516, 525 [the product rule "will produce an accurate result only to the extent that each multiplied frequency is statistically independent from all the others"].) In other words, general acceptance of the fundamental accuracy of the product rule with respect to DNA evidence was at issue.

In contrast, here, there is no evidence that scientists fundamentally disagree about whether the product rule accurately represents a profile's rarity. The disagreement here is simply about whether that calculation, or some other or both, should be used in a cold hit case. Unlike the question in *Soto*, whether the results of the calculations are relevant or probative to the issues in the case are not subject to a *Kelly* prong one analysis.

The *Nelson* Court relied on *Soto* to find the issue "now settled" that the product rule was admissible to calculate the rarity of a DNA profile "when a suspect's sample is compared to a crime scene sample." (*Nelson*, *supra*, 43 Cal.4th at p. 1259, citing *Soto*, *supra*, 21 Cal.4th at p. 541; *id.* at p. 1263 ["It is already settled that the product rule reliably shows the rarity of the profile in the relevant population"].) It then found that application of the product rule to a cold hit case was not a "new scientific technique" as understood by *Kelly*. (*Id.* at pp. 1264-1265.) This conclusion was sound and comports with every other court to have considered the issue.

The *Nelson* Court followed the reasoning of *United States v. Jenkins*, *supra*, 887 A.2d at pages 1022-1025, and found that each of the four proposed statistical calculations available in a cold-hit case answers a different question. (*Nelson*, *supra*, 43 Cal.4th at pp. 1264-1265.) The scientific debate is about which question is most appropriate, not about how to arrive at the correct answer. (*Ibid.*) There is no question that the various calculations reliably answer the proposed questions. (*Ibid.*) In particular, there is no question that the product rule calculation reliably answers the question of how rare a particular genetic profile is in a given population. (*Id.* at p. 1264.) The only issue is whether that is the question that should be asked in a cold hit case. That, of course, is a question of relevance, not science. (*Id.* at pp. 1264-1265.) Hence, as *Nelson* concluded, the application of the product rule in a cold hit case is not a "new scientific technique" under *Kelly*. (*Id.* at pp. 1263-1264.)

The *Nelson* Court summarized:

> The court does not determine whether the technique is reliable as a matter of scientific fact; rather, the court defers to the scientific community and considers whether the technique is generally accepted as reliable in the scientific community. [Citation.] But when, as here, use of the product rule has been found reliable, it was for the trial court, not the scientific community, to determine the relevance of the technique to this criminal prosecution.

(*Nelson*, *supra*, 43 Cal.4th at p. 1265, internal quotation marks omitted.)

Every court to have examined this issue has held, like this Court in *Nelson*, that statistics generated by the product rule are admissible in a cold hit case, and that no *Kelly*-type of hearing is required. (See *Com. v. Bizanowicz* (2011) 459 Mass. 400, 406-409, 945 N.E.2d 356 [upholding admission of the RMP in a cold hit case, the court found that "[t]he scientific debate concerns only which method or combination of methods is most relevant"]; *United States v. Davis* (D. Md. 2009) 602 F. Supp. 2d 658,

676-677 [following *Jenkins* and *Nelson* in finding the various cold hit statistics were question of relevance and permitting admission of the product rule as well as other statistics if offered]; *State v. Bartylla* (Minn. 2008) 755 N.W.2d 8, 20 ["while there may be more than one way of expressing the statistical significance in cold hit cases, those different methods do not involve issues of scientific technique and no *Frye-Mack* hearing was required"]; *United States v. Jenkins*, *supra*, 887 A.2d 1013.)

Appellant argues that the different statistical calculations available in a cold hit case are not answering different questions, as the *Nelson* Court stated. (AOB 68.) In support, appellant relies on an article by Dr. Balding, which criticized the NRC II Report. (AOB 69.) However, that article explicitly states that the fundamental problem with the NRC II Report on the topic of database searches, was that it "address[ed] the wrong question."[8] (Balding, *Errors and Misunderstandings in the Second NRC Report* (1997) 37 Jurimetrics J. 469, 472-473.) The DNA Advisory Board, which discussed and endorsed the NRC II Report, identified two distinct questions that "arise when a match is derived from a database search":

> (1) What is the rarity of the DNA profile? and (2) What is the probability of finding such a DNA profile in the database searched?

(DNA Advisory Board, *Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA Profiles Calculated From Pertinent Population Database(s)* (2000) 2 Forensic Science Comm.

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[8] The other article cited by appellant, Balding & Donnelly, *Evaluating DNA Profile Evidence When the Suspect is Identified Through a Database Search* (1996) 41(4) J. Forensic Sci. 603, does not address the methodology recommended by the 1996 NRC committee, as appellant states (AOB 68), but instead criticizes the methodology of the 1992 NRC committee, which has since been abandoned (see *Jenkins*, 887 A.2d at pp. 1022-1023, fn. 17).

No. 3, <https://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2000/dnastat.htm> [as of August 20, 2015] ("DNA Advisory Board, *Genetics Issues*").) The Board explicitly stated that "[t]hese two questions address different issues." (*Ibid.*) The Board noted that the first question, which "addresses the random match probability," or RMP, "is often of particular interest to the trier of fact." (*Ibid.*) The NRC II Report's database match probability statistic, on the other hand, was aimed at the second question. (*Ibid.*)

Another group of scientists explained that the NRC II Report's database match calculation "was not intended to supersede" the RMP statistic because "it addresses a different issue." (Budowle, B., et al., *Clarification of Statistical Issues Related to the Operation of CODIS*, National Forensic Science Technology Center, <http://projects.nfstc.org/fse/pdfs/budowle.pdf> [as of August 20, 2015] at p. 8-9 ("Budowle, *Clarification*") ["The different questions will produce different answers for the same profile because they address different issues."].) Relying on language in the NRC II Report, they further stated that presenting the database match probability in place of the RMP would create a "false impression." (*Id.* at p. 9.)

Appellant also argues that this Court was "wrong" in *Nelson* when it characterized the question before it as "'not what technique is "best," but whether use of the product rule in a cold hit case is permissible.'" (AOB 72, quoting *Nelson*, *supra*, 43 Cal.4th at p. 1263.) Appellant suggests that rather than a debate about which statistical calculation is best (or "the 'best' way to calculate the statistic," about which there is no controversy), the question is which statistic is "right." (AOB 72.) Appellant cites nothing to support this formulation of the issue, which suggests a single correct statistic. Indeed, on the previous page, appellant himself describes the scientific controversy as "what is the *best* way to quantify the chances of a

coincidental match when the match is not random?" (AOB 71, italics added.) And, in introducing a statistician upon whom appellant heavily relies to explain the debate, Dr. Keith Devlin, appellant states that Dr. Devlin "observed that the profession remains divided about what [is] the *best* way to understand the statistical significance of a cold hit match." (AOB 69-70, italics added.)

Scientists addressing this issue recognize that there are multiple ways of approaching statistics in a cold hit case. The NRC II Report itself described "alternate methods for assessing the probative value of DNA evidence." (DNA Advisory Board, *Genetics Issues*.) The DNA Advisory Board, which recognized two relevant questions in a database search case, stated, "Rarely is there only one statistical approach to interpret and explain the evidence."[9] (*Ibid.*)

Contrary to appellant's assertion, this Court correctly described the scientific debate as revolving around which calculation best provides a useful statistic in cold hit cases. (*Nelson*, *supra*, 43 Cal.4th at p. 1263.) Since each calculation (correctly) answers a different question (see *Jenkins*, *supra*, 887 A.2d at p. 1023 [each approach "accurately answers the question it seeks to address"]), the legal issue is which question can be answered within the realm of relevant evidence in a particular case. Since the product rule statistics were the only ones offered here, the more narrow issue is whether those statistics were relevant and admissible. (See *Nelson*, at p.

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[9] The first question, the rarity of the matched profile, was answered by the RMP and was "of particular interest to the fact finder." (DNA Advisory Board, *Genetics Issues*.) There was no controversy about this. The second question, the probability of finding a profile match in a database search, could be answered by either the NRC II method or the Balding-Donnelly method, albeit with potentially different results. (*Ibid.*) As to the second question, the Board considered which of the two competing "treatments is better for the legal setting." (*Ibid.*)

1263, 1265 ["the admissibility of the calculation derived from the product rule in this case turns on the legal question whether it is relevant"].) The questions answered by the product rule – what is a particular profile's rarity in the population or what is the likelihood of a random match in the population – are relevant and admissible in a cold hit case, as discussed below (Arg. I.F).

Appellant next asserts that the *Nelson* Court improperly and simplistically focused on the accuracy of the math underlying the statistics. (AOB 72-73.) However, the Court was not focused on the abstract mathematical formula; its discussion of the underlying math was made in the context of explaining the nature of the statistical debate, and specifically that each statistic answers a different question, and answers it correctly. (*Nelson*, *supra*, 43 Cal.4th at p. 1264.) The Court stated:

> "[T]here is no controversy in the relevant scientific community as to the accuracy of the various formulas. In other words, the math that underlies the calculations is not being questioned. Each approach to expressing significance of a cold hit DNA match accurately answers the question it seeks to address. The rarity statistic accurately expresses how rare a genetic profile is in a given society. Database match probability accurately expresses the probability of obtaining a cold hit from a search of a particular database. Balding-Donnelly accurately expresses the probability that the person identified through the cold hit is the actual source of the DNA in light of the fact that a known quantity of potential suspects was eliminated through the database search. These competing schools of thought do not question or challenge the validity of the computations and mathematics relied upon by the others. Instead, the arguments raised by each of the proponents simply state that their formulation is more probative, not more correct. Thus, the debate . . . is one of relevancy, not methodology. . . ."

(*Nelson*, *supra*, 43 Cal.4th at p. 1264, quoting *Jenkins, supra,* 887 A.2d at pp. 1022-1023, ellipses in *Nelson*.) As thus understood, the debate is not about whether each statistic is mathematically correct or whether it

correctly answers the question it purports to answer. (*Jenkins*, *supra*, 887 A.2d at pp. 1022-1024 ["The debate does not address the underlying principles, math, or science behind the various formulas. . . . [E]ach school of thought recognizes and accepts that the other school has accurately and properly reached its conclusion."].) The debate is simply about whether the statistic is relevant in a cold hit case, i.e., which question should be answered for the jury. (*Id.* at p. 1024 [noting defendant's expert opined that "the database match probability was 'the question to be addressed'"]; see also *Nelson*, at pp. 1264-1265.)

The fact that scientists have written and debated about legal issues does not convert those legal issues into scientific ones. (See *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1148 ["*Kelly* does not apply to every dispute among experts, even strident, deep-seated ones. Experts frequently clash, even about basic principles and issues. Such disagreement does not trigger application of the *Kelly* test; instead, what is required is the utilization of a new scientific technique."].) Likewise, the fact that scientists may believe that they should get to weigh in on the legal decision does not make it a scientific issue or a debate about a scientific technique. (See AOB 69-71, citing Devlin, Keith, *Statisticians Not Wanted*, Devlin's Angle (Sept. 2006) <https://www.maa.org/external_archive/devlin/devlin_09_06.html>.) As Justice Chin (who authored *Nelson*) succinctly stated in a legal treatise, "Ultimately, the choice of statistics in a cold hit DNA case is a question of legal relevancy and probative value for trial court judges to resolve, not a question of science for scientists to resolve. (*People v. Nelson*, 43 Cal. 4th at 1264-65.)" (Chin et al., Forensic DNA Evidence: Science and the Law (The Rutter Group 2015) Statistics for Autosomal STR Profiles, § 5:4 ("Chin, Forensic DNA Treatise").)

The question here is not whether some other statistical calculations might be relevant or admissible. Notably, appellant did not attempt to admit any other statistic at trial.[10] The question here is also not what calculation is best in a cold hit case. The sole question is whether use of the product rule, which was the only statistic sought to be admitted here, required a *Kelly* hearing simply because appellant was initially identified by searching a database. *Nelson* correctly answered that question in the negative.

F. *Nelson* Correctly Held That the Product Rule Calculation Is Relevant in a Cold Hit Case

Appellant argues that the *Nelson* Court was incorrect in finding the product rule calculation relevant in a cold hit case. (AOB 74-78.) However, the *Nelson* Court correctly concluded that the well-established and validated product rule is relevant for estimating the rarity of a crime scene profile, regardless of how appellant was linked to the profile. (*Nelson*, *supra*, 43 Cal.4th at pp. 1266-1267.)

The product rule statistic is relevant because it describes how rare a profile is in the population. (*Nelson*, *supra*, 43 Cal.4th at p. 1267.) The trier of fact is asked to infer identity because the perpetrator's DNA profile is exceedingly rare, and the defendant's profile matches it. (*Ibid.* ["'[i]t is relevant for the jury to know that most persons of at least major portions of the general population could not have left the evidence samples'"].) This rarity statistic, also expressed as the RMP, exists independently of the means by which the defendant has become a suspect in the case. The product rule statistics relate to the DNA profile taken from the evidence,

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[10] Appellant asserts that the statistical interpretation of a DNA match is "pivotal" and that the DNA evidence means nothing without it (AOB 47), yet appellant's own DNA expert at trial did not testify about the statistical import of his analysis – under any statistical method.

without regard to a particular suspect's profile. (See *Venegas*, *supra*, 18 Cal.4th at p. 64, fn. 16 ["the 1996 NRC Report . . . recommends use of the DNA profile of the *questioned sample* to calculate the probability of a random match in the pertinent population," italics added]; *People v. Johnson*, *supra*, 139 Cal.App.4th at p. 1151 [product rule calculates "the frequency of the *perpetrator's* profile in the relevant population," not the suspect's].)

It is thus irrelevant for purposes of the product rule how the suspect was located, whether through a database search or other methods. (*Jenkins*, *supra*, 887 A.2d at p. 1024 [defendant's expert agreed that "an initial database search does not change the rarity of a particular profile"].) As the court in *People v. Johnson* put it:

> [T]he fact that here, the genetic profile from the evidence sample (the perpetrator's profile) matched the profile of someone in a database of criminal offenders, does not affect the strength of the evidence against appellant. The strength of the evidence against him (at least in terms of the DNA evidence) depends upon the confirmatory match between *his* profile and that of the perpetrator, and the calculation of the frequency of the *perpetrator's* profile in the relevant population. That population is the population of possible perpetrators, not the population of convicted offenders whose DNA has been entered into CODIS. The fact appellant was first identified as a possible suspect based on a database search simply does not matter.

(*People v. Johnson*, *supra*, 139 Cal.App.4th at p. 1151, italics in original.) However, the statistic's answer to the question of how rare a profile is in the population remains highly relevant. (*Jenkins*, at p. 1025 ["likelihood that the suspect is the actual source of the DNA is best expressed through the rarity of a particular profile," which "will always be relevant"].) In both situations, the perpetrator's DNA profile is known from the outset. It is derived from the crime scene evidence. The product rule statistics are generated based on that profile, without reference to a suspect's reference

sample. (See *People v. Xiong* (2013) 215 Cal.app.4th 1259, 1274 [both the frequency (rarity) and RMP "refer to the *perpetrator's* profile and therefore are unaffected by any particular defendant or suspect"]; *People v. Johnson*, *supra*, 139 Cal.App.4th at pp. 1150-1151.)

"Statistics in cases like this one, especially where the profile includes 13 to 15 loci, are typically described as 'astronomical' (e.g., *Nelson*, *supra*, 43 Cal.4th at p. 1259, 78 Cal.Rptr.3d 69, 185 P.3d 49) because the denominators are incredibly large," which means the frequency of the profile in the relevant population is extremely rare. (*People v. Xiong*, *supra*, 215 Cal.App.4th at p. 1277 [supposing a database searched had 9 million profiles, the RMP of one in 270 sextillion (270 followed by 21 zeros) would become one in 30 quadrillion (30 followed by 15 zeros), which is "still astronomical"]; see also *People v. Johnson*, *supra*, 139 Cal.App.4th at pp. 1145, 1147 [statistics of one in 130 quadrillion, one in 240 quadrillion, and one in 4.3 quadrillion were "astronomical"]; *Young v. State* (2005) 388 Md. 99, 879 A.2d 44, 56-57 [when a 13-loci match yields "an astonishingly small random match probability," expert can declare the profile "unique" without testifying about the statistics].) These "astronomical" numbers are made even more so when put into context of the United States population, which is currently about 321 million, and the population of the entire planet, which is about 7.2 billion. (<http://www.census.gov/popclock/> [as of August 25, 2015]; see also *People v. Johnson* at p. 1155, fn. 19; 13RT 1931.)

The DNA Advisory Board, which endorsed the NRC II Report's formulation for determining the probability of finding a match in a database search, nonetheless found that a DNA profile's rarity, as determined by the RMP, "is often of particular interest to the fact finder." (DNA Advisory Board, *Genetics Issues*.) Another group of scientists went even further, stating that the rarity of a DNA profile "is always of interest to the fact

finder and forms the foundation" for the other statistics. (Budowle, *Clarification* at p. 8.) In other words, the existence of one statistic does not hamper the importance of the other, and the product rule statistics remain relevant.

The question of whether other statistics might also be relevant and admissible is not before the Court because appellant did not attempt to introduce them, did not question any of the expert witnesses about them, and did not argue that the prosecution must introduce them along with the product rule statistic. (Cf. *People v. Wilson* (2006) 38 Cal.4th 1237, 1250 ["Of course, defendant was entitled to cross-examine the witness regarding other possible population groups . . . or present his own evidence in that regard."].)

Moreover, it would be illogical to exclude DNA evidence because appellant was located in an offender database, which was expressly designed to help solve cases like this one. (*Com. v. Bizanowicz*, *supra*, 459 Mass. at pp. 408-409 ["defendant's argument would eviscerate the purpose for which the Legislature created the CODIS database"].) "Were we to accept the defendant's argument, DNA evidence from convicted offenders whose DNA is stored in a CODIS database could never be used at trial unless it was obtained without using the CODIS database." (*Ibid.*) This would defeat the intent of the legislatures in creating the national and state databases. (<https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> [as of October 5, 2015] ["CODIS was established by Congress to assist in providing investigative leads for law enforcement in cases where no suspect has yet been identified"]; accord, *People v. Xiong*, *supra*, 215 Cal.App.4th at pp. 1266-1267, fn. 4; § 295, subd. (c) [purpose of the state DNA database program "is to assist federal, state, and local criminal justice and law enforcement agencies within and

outside California in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes"].)

G. The Trial Court Did Not Rely on Reasoning That the Evidence Was Admissible Because Confirmed by Later Tests

Appellant asserts that the trial court relied on *People v. Johnson*, *supra*, 139 Cal.App.4th 1135, and "denied the *Kelly* motion based on the assumption that the problem with a database search disappears once the match is replicated with a fresh sample from the suspect" (the verification process). (AOB 79.) Appellant misconstrues the trial court's ruling. The trial court expressly declined to rely on *Johnson* because it was not final at the time of the trial court's decision, and the trial court made no mention of replicating the match with a fresh sample.

After hearing argument from the prosecution and defense counsel, the trial court questioned defense counsel:

> THE COURT: I see a parallel between confidential reliable informants that point the finger of suspicion but don't have percipient knowledge about a criminal case where it's then followed up by law enforcement.
>
> Isn't there a parallel there that it really isn't significant?
>
> [DEFENSE COUNSEL]: I can't answer that.
>
> THE COURT: The cold case hit is a point of initiating the investigation as to a particular suspect, and the fact that like the confidential reliable informant might know something about the suspect or in the cold case hit we get some general statistics, you don't know the data base itself that was used, what difference does it make?
>
> [DEFENSE COUNSEL]: It's the issue of is this the same thing as a confidential reliable informant? There is my controversy. And the confidential reliable informant, we have everything all set up and it's right there, whereas I'm not giving the DNA that confidential reliable informant position.

THE COURT: But it just points the finger of suspicion, doesn't it?

[DEFENSE COUNSEL]: Correct.

(2RT 70-71.)

The court asked if either side had further argument, and it then ruled:

THE COURT: I do conclude that no *Kelly/Frye* hearing is necessary. The statistical analysis is generally accepted, and so the motion to exclude -- well, the motion to exclude DNA evidence and the random match probability is denied.

And that's not based on the *Johnson* decision, although I do believe that that is also determinative.

. . . [¶] . . .

. . . It will be roughly July 25th before it's final and could be relied on by the Court, but it is persuasive, and yet I have not considered it as part of the decision in this case.

(2RT 72.)

As an initial matter, the basis that the trial court relied on to deny the *Kelly* motion was that "the statistical analysis is generally accepted." (2RT 72.) That was an appropriate basis for denying the motion and was the same basis later relied on by *Nelson*, *supra*, 43 Cal.4th at pages 1259 to 1265.

Second, the trial court expressly did not rely on *Johnson*. The trial court went to great lengths to say that it was not relying on *Johnson*, which had just come out and was not yet final. (2RT 72 ["that's not based on the *Johnson* opinion"; "I have not considered it [*Johnson*] as part of the decision in this case"].) Even ignoring the court's express statements about *Johnson*, the trial court did not suggest in any way that its decision was based on replicating the profile match with a fresh sample from appellant. The court suggested the irrelevance of the fact that appellant was brought to police attention through a database search because all that did was "point[]

the finger of suspicion." (2RT 71.) The court did not mention the verification process (discussed below) in any way.

Third, to the extent that the trial court stated that the initial database search was irrelevant to the rarity of the profile, that reasoning was correct. (See, *supra*, Arg. I.F.) In questioning defense counsel, the trial court compared finding a suspect through a database search to a confidential reliable informant and suggested that both were means of pointing the investigation toward a particular suspect. The court suggested that the means that a person became a suspect did not matter because it "just points the finger of suspicion," with which defense counsel agreed. (2RT 71.)

The *Johnson* court focused on the two different uses of DNA in a cold hit case. First, the DNA from the crime scene was used to search through a database and find a hit. (*People v. Johnson*, *supra*, 139 Cal.App.4th at p. 1151.) That was an investigatory use of the DNA because it focused police attention on the subject of the hit as a potential suspect. (*Ibid.*) The DNA match was then verified with a new sample and statistical calculations determined how rare the crime scene profile was. (*Ibid.*) It was the verification and statistical calculation that was of evidentiary value and was introduced at trial. (*Ibid.*) The initial use of the DNA to conduct a database search was hence irrelevant. (*Ibid.*)

As the defendant there recognized, the product rule and the database match probability answered two different questions The product rule addressed the """rarity of the DNA profile in the population at large," and the database match probability answered "the probability of finding such a DNA profile in the database searched."" (*People v. Johnson*, *supra*, 139 Cal.App.4th at p. 1151.) The court agreed, and found that only the answer to the first question mattered. (*Ibid.*) Viewing the two uses of DNA evidence as the court did helps explain the product rule's relevance. The product rule relates to the second use of the DNA evidence – the

verification and calculation of the profile's rarity. In contrast, the database match probability relates to the initial investigative use of the DNA evidence – the database search – which the court found irrelevant.

The *Johnson* court compared the DNA cold hit case to a fingerprint case in which the defendant was initially identified through a database search. (*People v. Johnson*, *supra*, 139 Cal.App.4th at pp. 1152-1153 [acknowledging that this Court has found fingerprint and DNA evidence different for purposes of *Kelly*'s third prong because jurors can see fingerprints for themselves].) In *People v. Farnam* (2002) 28 Cal.4th 107, the police ran crime scene fingerprints through a database, which identified a list of possible matches. (*People v. Johnson*, at p. 1152.) Two analysts examined the prints and determined that the defendant's prints matched. (*Ibid.*, citing *People v. Farnam* at p. 159.) This Court found *Kelly* inapplicable:

> "Although the police used the CAL-ID system to narrow the range of potential candidates whose fingerprints might match the latent prints, the prosecution relied on a long-established technique – fingerprint comparison performed by fingerprint experts – to show the jury that defendant's fingerprints matched those found at the [crime scene]."

(*Id.* at p. 1153, quoting *Farnam* at pp. 159-160, italics removed.) The *Johnson* court found a parallel:

> *Kelly* is equally inapplicable here: police used [a DNA database] to narrow the range of potential candidates whose genetic profiles might match that of the evidence sample (the perpetrator's profile), after which the prosecution relied on scientifically accepted techniques to show the jury that appellant's genetic profile matched that of the perpetrator, and the astronomical rarity of that profile in the population of possible perpetrators.

(*Ibid.*)

The fact that *Nelson* did not address the *Johnson* court's reasoning on this point does not make it incorrect, as appellant suggests. (AOB 79.) Nothing in *Nelson* contradicted or repudiated *Johnson*, and the *Nelson* Court favorably cited *Johnson*, including the portions of the opinion that discussed this reasoning. (*Nelson*, *supra*, 43 Cal.4th at pp. 1262, fn. 1, 1263-1264, 1267.) Moreover, since *Nelson*, the California Court of Appeal has followed the reasoning of both *Nelson* and *Johnson*. (*People v. Xiong*, *supra*, 215 Cal.App.4th at 1271-1276.)

Appellant asserts that the trial court and *Johnson* court's reliance on the verification is "flawed" because the profile from the database search, which produced the initial match, will necessarily be the same as the subsequent verification profile, which will necessarily produce another match. (AOB 80-82.) However, *Johnson* did not rely on the verification step to the extent appellant claims, and the trial court here did not rely on it at all. Although the verification process should and usually does result in the same result as the initial database match, the verification is necessary for other reasons. It ensures that the match from the database was in fact the defendant's profile, and it avoids any claim of an error in the database profile or the search. Once a match is confirmed between the crime scene profile and the defendant's profile with a new sample, then the match is appropriately treated like a DNA match in any other case, and the product rule is used to show how rare the matching profile is. Regardless of how the defendant's DNA profile came to the attention of police, it remains true that the evidence profile has a particular rarity, and that the defendant's profile matches it.

The result would be the same in a case where the database profile match was not verified with a new sample from the defendant. The prosecution could still show that the evidence profile had a particular rarity, and that it matched the defendant's profile. The verification match was not

critical to the *Johnson* court's reasoning, nor was it any part of the trial court's decision.

More important to the issue raised by appellant here was the *Johnson* court's finding that the "debate" over cold hit statistics "is fundamentally different" from the disagreement about population substructuring that had "caused courts in this state initially to hold that the determination of a match's statistical significance had not yet received general scientific acceptance." (*People v. Johnson*, *supra*, 139 Cal.App.4th at p. 1155.) The court likewise concluded that "*Kelly* is not implicated" because "no new methodology is involved in 'cold hit' cases." (*Ibid.*)

In any event, even if the trial court's ruling could be interpreted to be based on the *Johnson* court's reasoning, and even if that reasoning is improper, this Court reviews a trial court's ruling, not its reasoning. (See *People v. Brown* (2004) 33 Cal.4th 892, 901 ["If a judgment rests on admissible evidence it will not be reversed because the trial court admitted that evidence upon a different theory, a mistaken theory, or one not raised below."]; *People v. Smithey* (1999) 20 Cal.4th 936, 971.)

H. Appellant's Constitutional Rights Were Not Violated by Admitting the DNA Evidence and the Product Rule Statistics

Appellant finally asserts that the trial court's asserted error in admitting the DNA evidence violated his constitutional rights to due process, a fair trial, a jury trial, and against cruel and unusual punishment. (AOB 82-85.) "No separate constitutional discussion is required . . . when rejection of a claim on the merits necessarily leads to rejection of any constitutional theory or '"gloss"' raised for the first time here." (*People v. Nelson* (2011) 51 Cal.4th 198, 210, fn. 5, citing *People v. Loker* (2008) 44 Cal.4th 691, 704, fn. 7, and *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17; *People v. Davis* (1995) 10 Cal.4th 463, 506, fn. 7 [a defendant who

simply "recasts his state claim under constitutional labels" does not create a federal constitutional violation].)

Because the trial court did not err under state law, for all of the reasons set out above, there was no constitutional error. (See *People v. Roybal* (1998) 19 Cal.4th 481, 506, fn. 2.) While the Court's rejection of appellant's state law claim necessarily implies a similar rejection of the federal constitutional claim, respondent respectfully requests that this Court expressly reject the federal constitutional claim to make clear, for possible review on federal habeas corpus, that the Court did entertain and reject the claim. (See *Johnson v. Williams* (2013) __ U.S. __ [133 S.Ct. 1088, 185 L.Ed.2d 105] [examining whether presumption that state court of appeal adjudicated federal constitutional claim on the merits had been rebutted where "California Court of Appeal never expressly acknowledged that it was deciding a Sixth Amendment issue"].)

I. Any Error Was Harmless

To the extent that the trial court should have granted a *Kelly* hearing regarding whether the product rule statistics were reliable as to the two victims identified through a cold hit, any such error was harmless. It is not "reasonably probable the verdict would have been more favorable to defendant in the absence of the error." (*Venegas*, *supra*, 18 Cal.4th at p. 93 [applying standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 to *Kelly* error]; accord, *People v. Doolin* (2009) 45 Cal.4th 390, 448; *Kelly*, *supra*, 17 Cal.3d at p. 40.)

Appellant was charged with ten murders. Eight of the ten victims were matched to appellant through non-cold-hit methods. (1RT 38, 49-50.) The relevance and admissibility of the product rule statistics as to each of those victims is without question. (*Nelson*, *supra*, 43 Cal.4th at pp. 1259, 1263, citing *Soto*, *supra*, 43 Cal.4th at pp. 512, 541.) All ten victims were connected in part because all ten had appellant's DNA on and/or in them.

(See, *supra*, Stmt. of Facts, Parts A.2-11, 13.) Appellant's DNA was the only DNA that was connected to more than one victim. (13RT 2007-2008; 14RT 2079-2080, 2105.) Because the statistics were admissible in relation to eight of the ten victims, any improper admission regarding the other two would not have made any difference in the outcome.

Moreover, as discussed below (see, *infra*, Arg. II), appellant admits that the product rule statistic, as expressed as a profile's "rarity," remains relevant in cold hit cases. Thus, the same number that was admitted here as the RMP (one in one quintillion), would have been properly admitted as an expression of the profile's rarity, even as to the two victims identified through a cold hit. As set out in detail below (see, *infra*, Arg. II), the jury was informed that the RMP was an expression of the profile's rarity. (13RT 1928, 1931-1933, 1940.) Any difference in expression of that number as the rarity or RMP would not have affected the jury's analysis.

Also, each of the ten murders here had striking similarities in terms of the victims, the sexual assaults, the method of killing, and the locations. All of the victims were African-American women who were older than appellant. Most were known drug users, and many had cocaine in their systems when they were killed. Several had a history of prostitution. All of the women bore evidence of sexual activity, if not sexual assault. Most were found face-down, with their tops pushed up, and their pants pulled down or off. All of the victims were strangled to death. All were found in areas known for drug-use and prostitution, either in the Figueroa Corridor or near Skid Row. And all were located near appellant's places of residence or work. (See, *supra*, Stmt. of Facts, Parts A.2-11, 14.)

Finally, even if the trial court had held a *Kelly* hearing, for all of the reasons discussed above, it would have found the product rule statistics reliable and relevant. It thus would have permitted the same statistical

evidence to be admitted. Accordingly, any error was harmless, and this claim fails.

II. SUBSTANTIAL EVIDENCE WAS INTRODUCED ABOUT THE RARITY OF THE MATCHING DNA PROFILES

Appellant asserts that insufficient evidence supported the verdicts because the RMP statistic, which the jury heard, was irrelevant, and the only relevant statistic, the profile's rarity, was not introduced. (AOB 86-94.) However, the jury was informed of the link between the RMP and a profile's rarity. Both are derived from the product rule, and both are the same number. Both are relevant and admissible under California law, and substantial evidence thus supported the verdicts.

A. Applicable Law: A Verdict Will Be Upheld If Supported by Substantial Evidence

Evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560], italics in original; *People v. Zamudio* (2008) 43 Cal.4th 327, 357; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) An appellate court must ensure that a conviction is supported by substantial evidence – evidence that is "reasonable, credible, and of solid value" – however it must not reweigh evidence, reappraise the credibility of witnesses, or resolve conflicts in the evidence. (*People v. Scott* (2011) 52 Cal.4th 452, 487; *People v. Zamudio* at p. 357.) These functions are reserved for the trier of fact. (*People v. Zamudio*, at p. 357.) A reviewing court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*Ibid.*) These principles apply regardless of whether the prosecution relies on direct or circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

B. The Jury Heard Evidence Linking the RMP to a DNA Profile's Rarity

Here, the jury was presented with statistics based on the product rule. (13RT 1938-1940, 2018.) It heard that there was DNA evidence on and/or in the body of each of the 10 murdered women that matched appellant's profile at 13 loci. (See, *supra*, Stmt. of Facts, Parts 2-11, 13.) The odds of those profiles were given as one in one quintillion, or one in 6.725 quintillion in the African-American population. (See, e.g., 13RT 1968-1969, 2004; 14RT 2082.) These statistics were characterized as the RMP. (See 13RT 1933, 1938-1940; 14RT 2081-2082.) However, DNA experts informed the jury that the RMP statistic was an expression of the profile's rarity, so the jury would have understood that the numbers they heard showed how rare the profile was.

The key expert who testified about DNA and the related statistics expressly equated a profile's rarity with the RMP, both of which were the result of the product rule. Gary Sims, the laboratory director at the California Department of Justice DNA Laboratory, provided the jury with background information about DNA in forensics. (13RT 1921.) As part of his explanation of an earlier DNA testing kit, he stated, "the likelihood that you'd be able to separate out *two randomly chosen people* would be about one in 5000 that they would be the same, so it's *very rare* that two people would be the same, but still one in 5000." (13RT 1928, italics added.) He then explained the kits used in this case, which provided information at 13 loci: "It just makes the comparison that much more *rare*, so the *probability that two people would be the same* in those 13 just becomes *extremely rare*." (13RT 1931, italics added.) He further explained the meaning of the large numbers produced by the statistics: "[I]f we have that kind of power to discriminate between one person's DNA to another, to distinguish those, that it becomes *extremely rare* and almost extremely *unlikely that two*

people would be the same, unless they're identical twins." (13RT 1931-1932, italics added.)

In giving an overview of the entire process, he explained, "If a match occurs, we *determine the rarity* of a DNA profile and then we generate a case report with a *random match probability*." (19RT 1933, italics added.) Mr. Sims finally explained the product rule and its relationship to rarity and RMP:

> So we look at this calculation for each one of these 13 loci or sites or addresses, and we multiply them across, and that's how we come up with a *very rare frequency* overall. In this case one in four trillion for Caucasians.
>
> So the *probability that a randomly chosen person would match* the evidence profile is about one in four trillion in the Caucasian population. That's called the *random match probability*.
>
> And what one would do would be to look at that *random match probability* for various ethnic groups, and as I mentioned, the -- these overall profiles are *very rare*, no matter what ethnic group you look at.

(13RT 1940, italics added.)

Likewise, defense expert witness, Marc Taylor, who tested several evidence samples, explained that the tests he used "look at DNA that man or woman can have and give us these *extraordinarily rare profiles*." (16RT 2323, italics added.) He gave an example of a bloodstain that "may occur only at one in a quadrillion people. You know, the numbers are very difficult to even comprehend." (16RT 2323-2324.)

Based on all this evidence, the jury would have understood that the RMP statistics that they heard were the same as the profile's rarity. Thus, even assuming that stating the product rule statistic as an RMP was irrelevant in a cold hit case, the evidence showed that the same number represented the profile's rarity. The number is the important part of the

statistic for the jury. Had the jury heard that the "rarity" of the matching profile was one in one quintillion instead of hearing that the odds that the profile might randomly match someone in the population was one in one quintillion, it would not have made a difference. And, indeed, based on the information from the experts quoted above, there was no real difference. Regardless of exactly how it was framed for the jury, the product rule result was the relevant statistic, and it provided substantial evidence to support the verdicts. (See *People v. Xiong*, *supra*, 215 Cal.App.4th at pp. 1277-1278 [DNA profile was "so rare, in terms of the total world population, that it constituted 'powerfully incriminating evidence,' . . . even assuming the calculations, or manner in which they were described for or presented to the jury, were somehow inaccurate in terms of precisely what statistic they represented"].)

C. The Product Rule, as Expressed by Either the RMP or Rarity Statistic, Is Relevant and Admissible

It has repeatedly been stated that the product rule results in a single number that represents two different but related concepts: "'(1) the frequency with which a particular DNA profile would be expected to appear in a population of unrelated people, in other words, how rare is this DNA profile ("rarity statistic"), and (2) the probability of finding a match by randomly selecting one profile from a population of unrelated people, the so-called "random match probability."'" (*Nelson*, *supra*, 43 Cal.4th at p. 1266, quoting *People v. Jenkins*, *supra*, 887 A.2d at p. 1018 [rarity and RMP are "identical numbers" that "represent two distinct and separate concepts"].). When presenting this information to a jury, identifying the statistic as the rarity versus the RMP is a distinction without a difference because they are two ways of describing the same thing. (*People v. Xiong*, *supra*, 215 Cal.App.4th at p. 1274 [rarity (or frequency) and RMP are "two ways of representing the same thing, the same numbers couched in different

concepts"].) Whether it is called the rarity statistic or the RMP, it is the same calculation that results in the same number with the same basic understanding by the jury – these are the astronomical odds that show how unique the perpetrator's profile is.

Appellant relies on *Nelson* to assert that the RMP, as calculated by the product rule, is irrelevant. (AOB 87-88.) However, neither *Nelson* nor any other decision has found the RMP statistic to be irrelevant or inadmissible – in fact, they have said the exact opposite. The *Nelson* Court stated that "'it is relevant for the jury to know that most persons of at least major portions of the general population could not have left the evidence samples.' [Citation.] We agree . . . that this remains true even when the suspect is first located through a database search." (*Nelson*, *supra*, 43 Cal.4th at p. 1267, citing *People v. Wilson*, *supra*, 38 Cal.4th at p. 1245 and *People v. Johnson*, *supra*, 139 Cal.App.4th at 1135.) Following *Nelson*, the California Court of Appeal in *People v. Xiong*, *supra*, 215 Cal.App.4th at page 1274, stated that "both the frequency [rarity] and the random match probability are relevant in cold hit cases." Even more to the point, Justice Chin's legal treatise stated, "The rarity of the DNA profile shared by the perpetrator and defendant, expressed by the random match probability statistic, is always relevant and admissible, even in cold hit cases." (Chin, Forensic DNA Treatise.)

In *Xiong*, the court addressed the same issue raised by appellant. It found that *Nelson*, despite some unclear language, concluded that both the rarity and RMP are relevant in cold hit cases. (*People v. Xiong*, *supra*, 215 Cal.App.4th at p. 1273.) It further found that these statistics "lose *none* of their relevance when a match is found in a database." (*Id.* at p. 1274.) It first explained that, as set out above (see, *supra*, Arg. I.F), both statistics "refer to the *perpetrator's* profile and therefore are unaffected by any particular defendant or suspect." (*Id.* at p. 1274.) "[T]hey can be

calculated before any suspect is located. They are fixed and unchanging." (*Ibid.*) The rarity and probability of the perpetrator's profile "remain the same" no matter how the suspect is located. (*Ibid.*) Importantly, the information that the statistics convey to the jury is "perspective on how few people are likely to have this profile and how incriminating it is that the defendant has it – regardless of how he was found." (*Ibid.*)

The second reason the *Xiong* court gave for finding both statistics relevant is that both "refer to the rarity of the profile in the *relevant population(s)*." (*People v. Xiong*, *supra*, 215 Cal.App.4th at p. 1274.) The court explained:

> In general, an offender database is not the relevant population. Thus, we think the chance of finding a match *in a database* generally does not matter. And we think *Nelson* agrees. (*Nelson, supra,* 43 Cal.4th at p. 1267, 78 Cal.Rptr.3d 69, 185 P.3d 49 ["The database match probability ascertains the probability of a match from a given database. 'But the database is not on trial. Only the defendant is.'"].) But defendant argues, as others do, that the random match probability is not relevant in cold hit cases because the match to the particular defendant, made by searching an offender database, is not random. In our opinion, this misses the point. The point is the rarity of, or the chance of finding, the perpetrator's profile in the perpetrator's population(s). The chance of finding a particular defendant in an artificially created "population" of criminals and arrestees is not germane.

(*Id.* at pp. 1274-1275)

The *Xiong* court's reasoning on these points was discussed with approval in Justice Chin's treatise. (Chin, Forensic DNA Treatise.) The treatise went on to state that the database match probability or other statistics may also be admitted if relevant and probative in a particular case, but that did not deprive the product rule statistics, both rarity and RMP, of their relevance. (*Ibid.*)

Appellant first argues that the *Xiong* court's reasoning is contrary to *Nelson*. (AOB 88-89.) He quotes part of a passage from *Nelson*, in which the Court quoted *Jenkins* at length. Appellant leaves out the beginning of that passage, which states that "*the government [in Jenkins] had conceded* 'that in a cold hit case, the product rule derived number no longer accurately represents the probability of finding a matching profile by chance.'" (*Nelson*, *supra*, 43 Cal.4th at p. 1266, italics added.) This does not mean that the RMP statistic is rendered irrelevant. Indeed, after quoting *Jenkins* for two paragraphs on this topic, the *Nelson* Court concluded that "'[i]t is relevant for the jury to know that most persons of at least major portions of the general population could not have left the evidence samples," even in a cold hit case. (*Id.* at p. 1267.) *Nelson*, although somewhat unclear, did not find the RMP irrelevant. Even a court that found the RMP statistic "incomplete" and "misleading" in the cold hit context, nonetheless held that it was "clearly probative of guilt." (*Crews v. Johnson* (W.D. Va. 2010) 702 F.Supp.2d 618, 638-639 [it was reasonable to admit RMP statistic of 90 million to one as "clearly probative of guilt," even though the database match probability statistic might have been as low as 667 to one].)

Appellant's disagreements with the *Xiong* court's reasoning (AOB 90-91) go to the weight of the evidence, not its admissibility. The RMP is simply a different way to express the rarity of the perpetrator's profile in the relevant population, and the defendant's match of that profile "tends logically, naturally, and by reasonable inference to establish [a] material fact[]," namely, identity. (See *People v. Xiong*, *supra*, 215 Cal.App.4th at p. 1271, quoting *People v. Wilson*, *supra*, 38 Cal.4th at p. 1245, internal quotation marks omitted.) It is thus relevant, admissible, and substantial. (*Id.* at pp. 1273-1278.) Whether its probative force is lessened in a cold hit case, either because the match "is not random" (AOB 90), or because it

"understates the chances of a coincidental match" (AOB 91), is a matter of weight. Those issues could easily be explored through cross-examination or a defense witness. As the *Xiong* court recognized, when the statistics are "so rare, in terms of the total world population," as they are here, they are "'powerfully incriminating evidence.'"[11] (*Id.* at p. 1277.) This remains true, even if the "manner in which they were described for or presented to the jury, were somehow inaccurate in terms of precisely what statistic they represented." (*Ibid.*; cf. *Soto*, *supra*, 21 Cal.4th at p. 541 [the experts conclude "that when, as in the present case, the probabilities of a random match are very rare – one in the multimillions or billions – substantial variations in such frequencies have no practical significance"].) Accordingly, even if the RMP statistic could be considered irrelevant, the rarity statistic is the same number, and the jury heard the relevant information, just presented in a slightly different way.

For all of these reasons, substantial evidence supported the verdicts.

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[11] Here, the lowest odds presented at trial for the rarity or RMP were one in one quintillion. (See, e.g., 13RT 1968-1969.) The database search was done in 2003. (1RT 38, 50-51.) In 2004, the national CODIS database contained just over 2 million offender profiles. (<https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure> [as of October 5, 2015].) That would result in a database match probability estimate of about one in 500 billion (1 quintillion divided by 2 million). That is still an astronomically rare profile in terms of the world population, which was about 6.5 billion at the time of trial in 2007 (13RT 1931), and the DNA evidence would remain "powerfully incriminating." (See *People v. Xiong*, *supra*, 215 Cal.App.4th at p. 1277.) This demonstrates the NRC-II's statement that the significance of the database match probability result "'tends to disappear when many loci are tested.'" (*Nelson*, *supra*, 43 Cal.4th at p. 1262, quoting Nat. Research Council, The Evaluation of Forensic DNA Evidence (1996).)

III. THE TWO CHALLENGED JURORS WERE PROPERLY EXCUSED BECAUSE THEY WOULD BE SUBSTANTIALLY IMPAIRED IN PERFORMING THEIR DUTIES

Appellant asserts that two prospective jurors (Prospective Juror No. 4 and Prospective Alternate Juror No. 1) were improperly excused for cause. (AOB 95-112.) However, the trial court acted well within its discretion in finding that both jurors would have been prevented or substantially impaired in the performance of their duties because of their unwillingness or inability to impose the death penalty. Both were thus properly excused.

A. Relevant Trial Court Proceedings

1. Prospective Juror No. 4

On the jury questionnaire form filled out by Prospective Juror No. 4,[12] there were a few indications that she might not be able to fairly decide the case. First, the questionnaire asked, "The murders alleged in this case involve the special circumstances of multiple murder. Do you think that, depending on the circumstances of this case and the evidence to be presented in the penalty phase, if any, you could impose the death penalty in such a case?" Rather than circle "Yes" or "No," she wrote in, "possibly." (3CT 445.) Second, when asked if she could "set aside any sympathy, bias, or prejudice [she] might feel toward any victim, witness, or defendant," she answered, "No." She explained, "Being a female that was killed, I would have sympathy for that person." (3CT 449.) The last question asked if there was "any reason why you would not be a fair and

[12] This juror was alternately identified in the record as "Prospective Juror No. B-8301," "No. 8301," "Prospective Juror No. 4," "Juror No. 4," and "No. 4." (See 3RT 318, 333, 339.) It appears that all of these references are to the same juror, whose Juror ID was 061938301. (3CT 435-454; 3RT 318, 333, 339, 371-375.) For consistency, this juror is referred to herein as Prospective Juror No. 4.

impartial juror for both the prosecution and the defense," and she answered, "Yes." She did not explain her answer on the form. (3CT 453.)

During questioning in court, the following colloquy took place:

> THE COURT: Talking then about the penalty phase. I asked the question on page 9, "the murders alleged in this case involve the special circumstances of multiple murder and also the one allegation of murder during the course of rape as a special circumstance.
>
> "Do you think that depending on the evidence, the circumstances of the case and the evidence presented in the penalty phase," and again I mentioned that unusual evidence that include attempting to save someone's life in a fire, perhaps an arson fire or something like that and risking their own lives to save that individual, art work, poetry, anything could be offered during that phase.
>
> Do you think that depending on the aggravating and mitigating circumstances in the penalty phase, you could impose the death penalty in such a case?
>
> PROSPECTIVE JUROR NO. 4: I'd have to hear everything.
>
> THE COURT: I understand. The question is though whether you're open –
>
> PROSPECTIVE JUROR NO. 4: I am open.
>
> THE COURT: -- in making that decision. [¶] Could you actually vote for death?
>
> PROSPECTIVE JUROR NO. 4: I would not vote for death.
>
> THE COURT: I'm sorry. You would not?
>
> PROSPECTIVE JUROR NO. 4: No. I'd have to listen to everything and, you know, get an understanding and the good and the bad and all of that.
>
> THE COURT: All right.

PROSPECTIVE JUROR NO. 4: And it would be a hard decision to say now.

THE COURT: There are some people that believe in the death penalty, support it but cannot participate in the process.

PROSPECTIVE JUROR NO. 4: Right.

THE COURT: Is that you? You could not vote for death, no matter what the evidence is in the penalty phase?

PROSPECTIVE JUROR NO. 4: Possibly, yeah.

(3RT 375-376.)

The court followed up on the juror's answers about having sympathy for the female victims and not being able to be fair:

THE COURT: Page 13 about setting aside any feelings of sympathy, bias or prejudice you might feel toward any victim, witness or the accused.

I asked whether you could do that, and you said no. Being that a female was killed, you would have sympathy for that person.

Having sympathy is not wrong. Making a decision based on the sympathy you might have for a victim is wrong.

You've got to decide whether defendant is guilty or not guilty based on the evidence and the law and then make a judgment in the penalty phase as to whether it should be death or life without parole, if we get there.

Do you feel that because in this case ten of the victims that are alleged in this case are female, one is a fetus, meaning logically one of the other victims was pregnant at the time she was killed, do you feel that that fact alone would cause you to have a sympathy for the victim such that you'd be biased against the defense?

PROSPECTIVE JUROR NO. 4: Of course I'd have the sympathy, but I would still have to go by the law and the evidence.

THE COURT: Okay. That's what I'm getting at. That's correct.

Final question on page 17, kind of a catchall, is there any reason why you would not be a fair and impartial juror for both the prosecution and the defense in this case?

PROSPECTIVE JUROR NO. 4: No.

THE COURT: There is not. You said yes in the questionnaire.

PROSPECTIVE JUROR NO. 4: I was confused, but no, there is no.

THE COURT: You can be fair to both sides?

PROSPECTIVE JUROR NO. 4: I can be fair.

(3RT 376-378.)

When the prosecutor questioned Prospective Juror No. 4, she stated that she had watched the juror "answering the judge's questions on the penalty issue, and [she] saw some reluctance on [her] part about this decision." (3RT 413.) The juror said that she thought she could judge the defendant and determine whether he "deserve[d] to die." (3RT 413.) The juror said she understood that it was a moral decision to choose between death or life without the possibility of parole. (3RT 414.) The prosecutor then asked:

[PROSECUTOR]: And so given some of the reluctance that I'm seeing in you, knowing that it's a choice, do you think that if you have the option of giving a person, a human being life without parole, that you would always choose that?

PROSPECTIVE JUROR NO. 4: I have a hard time putting someone to death. Most likely my choice would be the life in prison.

[PROSECUTOR]: Okay.

PROSPECTIVE JUROR NO. 4: I would have a hard time with the other.

[PROSECUTOR]: All right. So do you think that you might, if we get to penalty phase, walk in predisposed to life without parole?

PROSPECTIVE JUROR NO. 4: Most likely, yes.

[PROSECUTOR]: Okay. And would the prosecution have quite a burden to prove to you that death would be appropriate to overcome that predisposition?

PROSPECTIVE JUROR NO. 4: Yeah.

(3RT 414.)

The prosecutor challenged her for cause, arguing:

I noted during her questioning by the court some visible reluctance on her part, and I don't know if the Court heard it, but she did, in response to one of the questions, state sort of in a very low voice, "I would not vote for death."

And then in my questioning of her, I think that she's the kind of person that might support it in the abstract but does not possess the personal conviction to actually make that choice.

She stated in many different terms that it would be hard, it would be a difficult choice, but she would go into penalty predisposed to life without parole and require a significant amount from the prosecution to overcome that predisposition.

I think she is substantially impaired.

(3RT 425-426.)

Defense counsel responded:

Your Honor, I think that's what we are supposed to do when we go into a penalty phase. It's supposed to be a difficult decision to put a person to death, and I think she says it would be very difficult, but I think that's what you're supposed to do.

She did not say it was impossible, she just said it would be very difficult, and I think that's what you're supposed to do

when you go in and make that kind of decision is to consider it a very difficult decision.

(3RT 426.)

The Court observed:

> I did notice also her body language as she was answering the questions, and she seemed to be very tightly drawn, is what I would say. That's a bad description, but not open and free with her feelings about it but somewhat defensive about it.
>
> I had marked her as a question on the questionnaire on the penalty, and my conclusion after questioning her myself was that she would not fairly impose the death penalty.
>
> She answered that key question on page 9 as to whether she could. She said possibly, but here she's made I think it awfully clear that she would not.

(3RT 426.) The court excused Prospective Juror No. 4 for cause. (3RT 427-428.)

2. Prospective Alternate Juror No. 1

The answers in Prospective Alternate Juror No. 1's[13] questionnaire were relatively consistent in indicating that he was opposed to the death penalty and would not impose it. He stated that the murder charges alone would make it "difficult or impossible for [him] to be fair and impartial." (10CT 2380.) His religious or moral feelings "would make it difficult or impossible for [him] to sit in judgment of another person." He specifically explained that this would be true if the case "[i]nvolves the death penalty." (10CT 2380.) He stated that his religious organization was "anti death penalty." He also stated he felt "obligated to accept that view," but added

[13] This juror was alternately identified in the record as "O-6780," and "Prospective Alternate Juror No. 1." (See 5RT 682.) It appears that these refer to the juror whose Juror ID was 061996780. (10CT 2374-2393; 5RT 682-684.) For consistency, this juror is referred to herein as Prospective Alternate Juror No. 1.

that he "can do what [he is] ask[ed] to do regardless of [his] views." (10CT 2385.) When asked his "philosophical opinion," he answered that he was "strongly against" the death penalty. (10CT 2382.)

Although he answered "No," to the question of whether he would "always vote against death," he wrote above that question, "I'm not for the death penalty." (10CT 2382.) When asked what he believed about how often the death penalty was imposed, he did not circle any of the options, but wrote in, "I'm not sure; I don't feel it should be use[d]." (10CT 2384.) When asked whether he could impose the death penalty in a case involving multiple murder, he circled "Yes," and wrote in: "I will perform my civil duty but I'm not for it." (10CT 2384.) He answered that he could reject life in prison without the possibility of parole and choose the death penalty "in the appropriate case." (10CT 2385.) He stated that he "agree[d] somewhat" that someone who intentionally killed "should never get the death penalty," and wrote, "I'm not for the death of anyone." (10CT 2389.) When asked whether he would follow the judge's instruction on a law that was different from his beliefs, he stated that he would follow the instruction. (10CT 2389.) Finally, he stated that there was no reason that he would not be a fair and impartial juror. (10CT 2392.)

During questioning by the court, the juror gave additional answers:

> THE COURT: Okay. You've indicated on page 7 you are strongly against the death penalty.
>
> Do you feel there are any circumstances in which you could vote for the death penalty?
>
> I've given you, of course after the questionnaire, all of those factors to consider, not only the circumstances of the crime and prior felony convictions, if any, but also the unusual things like art work, poetry, extraordinary efforts on the part of the defendant to save someone's life, things like that have to be considered as well.

No matter what you hear, would you always vote against the death penalty?

PROSPECTIVE ALTERNATE JUROR NO. 1: Not always, but I'd say if it was on a scale, it would be more towards life than death.

THE COURT: Okay. But open to -- open to making that vote?

PROSPECTIVE ALTERNATE JUROR NO. 1: If I have to, you know, I will follow the instructions I was given, so.

THE COURT: Okay. Now, the instructions are as I've -- there is nothing mysterious about it.

PROSPECTIVE ALTERNATE JUROR NO. 1: That's what I said, my own personal view, I would lean towards life.

THE COURT: Is it a realistic, practical possibility, depending on that evidence in the penalty phase that you hear, realistic, practical possibility that you might vote for the death penalty?

PROSPECTIVE ALTERNATE JUROR NO. 1: It would be -- it would be kind of tough for me.

THE COURT: Kind of tough meaning what? You really don't see yourself ever voting for the death penalty?

PROSPECTIVE ALTERNATE JUROR NO. 1: Not really.

THE COURT: Okay. You had said in the questionnaire, "I would perform my duty, but I'm not for it."

Now, again as I've said, there are no circumstances under which you must vote for the death penalty. You're never compelled to make that decision in favor of the death penalty. It's a judgment that each juror has to reach.

PROSPECTIVE ALTERNATE JUROR NO. 1: Yes.

THE COURT: But you feel then given that kind of leeway, that you would never vote for the death penalty?

PROSPECTIVE ALTERNATE JUROR NO. 1: I say I could, I could perform my duty, but you said my personal view, I would lean towards life.

THE COURT: Okay.

PROSPECTIVE ALTERNATE JUROR NO. 1: That's what I'm saying.

THE COURT: Your duty is only to consider the evidence fairly, but once you've done that, could you vote for the death penalty if you felt that the aggravating circumstances were so substantial in comparison to the mitigating circumstances that it warranted the greater penalty, could you vote for death?

PROSPECTIVE ALTERNATE JUROR NO. 1: Yes.

(5RT 684-686.)

The prosecutor followed up on some of the questions. Prospective Alternate Juror No. 1 affirmed that he generally believed the death penalty should not be used. (5RT 706.) The following questions and answers were given:

[PROSECUTOR]: Let me just ask you very directly. Given that you are opposed to the death penalty because of your religious and moral views and you don't think that it should be used, do you want to be in that position where you might have to actually come in and make a decision that would end a man's life?

PROSPECTIVE ALTERNATE JUROR NO. 1: I'm not sure if I could do that.

[PROSECUTOR]: Okay. So at this point do you think that it would be a very -- and it should be a difficult decision, but what I'm asking is do you think that it might get to a point where because of your views, you might have a block, you might not be able to?

PROSPECTIVE ALTERNATE JUROR NO. 1: Based on the way you explained it the other day, family members or somebody here, would you be comfortable with that, I don't know if I could.

[PROSECUTOR]: Okay. And I'm letting you know that that is a possibility, because we do everything here in open court. You may see some people in the audience and they may be his family members, and, in fact, regardless of family members, you're looking at a human being regardless of what the crimes are, this is a human being.

PROSPECTIVE ALTERNATE JUROR NO. 1: Yes.

[PROSECUTOR]: And so do you think you could do it?

PROSPECTIVE ALTERNATE JUROR NO. 1: I'm not sure.

(5RT 708.)

The prosecutor moved to excuse Prospective Alternate Juror No. 1 for cause: "He's stated that he's strongly against the death penalty, and it's grounded in religious and moral views, and I think based upon my questioning, he is substantially impaired and would not realistically consider the death penalty as a viable option." (5RT 714.)

Defense counsel agreed that he was strongly against the death penalty, but argued that he said he would comply with the law, that "he would listen to the evidence, and if the law required him to vote for death, that he would." (5RT 714.) The court responded, "But that was the answers to the questions [*sic*] that he gave to the prosecution that indicate he couldn't do that, especially if there were any people in the courtroom related to the defendant." (5RT 714.) The court excused Prospective Alternate Juror No. 1 for cause. (5RT 714-715.)

B. Applicable Law: The Trial Court May Excuse a Prospective Juror for Cause When His or Her Views Would Prevent or Substantially Impair the Performance of His or Her Duties

A criminal defendant has the right to a trial by an impartial jury. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Martinez* (2009) 47 Cal.4th 399, 425.) "[A] prospective

juror's personal views concerning the death penalty do not necessarily afford a basis for excusing the juror for bias" because he or she might still be able to make a fair penalty decision. (*People v. Martinez*, at p. 425, citing *Uttecht v. Brown* (2007) 551 U.S. 1, 6 [127 S.Ct. 2218, 167 L.Ed.2d 1014].) Rather, "the law permits a prospective juror to be challenged for cause only if his or her views in favor of or against capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with instructions and the juror's oath." (*People v. Blair* (2005) 36 Cal.4th 686, 741, citations and quotation marks omitted.)

"There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity." (*People v. Abilez* (2007) 41 Cal.4th 472, 497-498, citations and quotation marks omitted.) "[I]t is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*Ibid.*, citations and quotation marks omitted.)

"The trial court's determination is reviewed for abuse of discretion." (*People v. Martinez*, *supra*, 47 Cal.4th at p. 426, citing *People v. Abilez, supra,* 41 Cal.4th at pp. 497-498.) This Court "defer[s] to the trial court on the essentially factual question of the prospective juror's true state of mind." (*Ibid.*, citing *People v. Lewis* (2008) 43 Cal.4th 415, 483.)

> Indeed, "the [trial court's] finding may be upheld even in the absence of clear statements from the juror that he or she is impaired because 'many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.' [Citation.] Thus, when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's]

> demeanor, [is] entitled to resolve it in favor of the State.'" (*Uttecht v. Brown, supra,* 551 U.S. at p. 7, 127 S.Ct. 2218.) In sum, even when "'[t]he precise wording of the question asked of [the venireman], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty,' the need to defer to the trial court remains because so much may turn on a potential juror's demeanor." (*Id.* at p. 8, 127 S.Ct. 2218.)

(*Ibid.*)

This Court has stated that "[t]he deference owed to the trial court's determination bears emphasis." (*People v. Martinez*, *supra*, 47 Cal.4th at p. 426.) The trial court "'is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.'" (*Ibid.*, quoting *Uttecht v. Brown, supra,* 551 U.S. at p. 9.) This Court has recognized "'that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record.'" (*Ibid.*, quoting *People v. Stewart* (2004) 33 Cal.4th 425, 451.)

Particularly in cases where a juror has given "conflicting or equivocal responses," "the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind." (*People v. Martinez*, *supra*, 47 Cal.4th at p. 426, citing *People v. Hamilton* (2009) 45 Cal.4th 863, 890.) The trial court's determination "as to [the juror's] true state of mind is *binding* on an appellate court" as long as it is supported by substantial evidence. (*Id.* at pp. 426-427, citations and quotation marks omitted, italics in original.)

C. The Trial Court Acted Within Its Discretion When It Excused the Two Challenged Jurors for Cause

1. Prospective Juror No. 4

Prospective Juror No. 4 initially wrote in the questionnaire that she "possibly" could impose the death penalty in a multiple murder case. (3CT 445.) When the trial court expanded on this question, explaining several circumstances that might favor mitigation, the juror initially stated that she would "have to hear everything." (3RT 375.) When the court asked if she was "open . . . in making that decision," she interrupted to say, "I am open." (3RT 375-376.) The court then asked directly, "Could you actually vote for death?" She answered unequivocally, "I would not vote for death." (3RT 376.) The court asked, "You would not?" The juror answered, "No." She went on to state again that she would have to listen to "the good and the bad and all of that." She explained that "it would be a hard decision to say now." (3RT 376.) The court tried to clarify by explaining that some people believe in the death penalty in the abstract but could not "participate in the process." The court asked if she felt that way, and further asked, "You could not vote for death, no matter what the evidence is in the penalty phase?" She answered, "Possibly, yeah." (3RT 376.)

When the prosecutor questioned the juror, she twice pointed out that the juror had shown "some reluctance" when answering questions about the penalty. The juror did not disagree with that characterization. (3RT 413-414.) The juror explained that she "would have a hard time putting someone to death." She said that "[m]ost likely her choice would be life in prison," and that she "would have a hard time with the other." (3RT 414.) Finally, she agreed that she would be predisposed to life without the possibility of parole and that the prosecution would "have quite a burden to prove to [her] that death would be appropriate to overcome that predisposition." (3RT 414.)

In her questionnaire and in the judge's questioning on imposing the death penalty in this case, the juror displayed equivocation when she suggested that she would consider any aggravating and mitigating evidence. However, she also made the clear statement that she "would not vote for death." (3RT 376.) The prosecutor later noted that the juror made this statement in a "very low voice." (3RT 425.) Her low tone of voice when making this clear statement suggested that Prospective Juror No. 4 may have been reluctant to express her true feelings of unwillingness to vote for death. The juror's reference to the death penalty as "the other" (3RT 414), further indicated her unspoken difficulty or reluctance with voting for death. It also appears that the juror's answers changed depending on whether she was asked more general questions about the penalty process versus being asked to consider how she might actually vote in this case. This indicated that her general pro-death penalty beliefs were not aligned with her willingness to personally participate in the penalty process. When the judge suggested as much, the juror seemed to agree. The court explained that some people believe in the death penalty "but cannot participate in the process," to which the juror responded, "Right." The court then asked if that described the juror, and she said, "Possibly, yeah." (3RT 376.)

Prospective Juror No. 4's overall answers and expressions about her ability to perform her duties as a juror were conflicting or equivocal at best. For this reason the trial court's decision should be upheld, even if she had made no clear statements that she would be impaired. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 7; *People v. Martinez*, *supra*, 47 Cal.4th at p. 426.) However, here the juror also stated unequivocally that she "would not vote for death." (3RT 376.) Despite stating that she would need to hear the evidence and circumstances (3RT 375-376), she also stated that she "possibly" could not vote for death. (3CT 445; 3RT 376.) She indicated that she would be predisposed to voting against the death penalty, and that

it would be difficult to overcome that predisposition. (3RT 414.) This is precisely the kind of situation where the trial court's in-person assessment of the juror's demeanor is critical and where deference is most appropriate. (See *People v. Martinez*, at p. 426; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 890.)

The prosecutor noted, both to the juror and at sidebar, that the juror appeared "reluctan[t]." (3RT 413-414, 425.) Neither the juror, the court, nor defense counsel disagreed with that description. As noted above, the juror's voice was "very low" when making the clear statement that she "would not vote for death." (3RT 425.) The court also noticed the juror's body language, describing her as "tightly drawn." The court stated that she appeared defensive and was "not open and free with her feelings about" the penalty decision. (3RT 426.) The court found after questioning that the juror had made "it awfully clear that she would not" impose the death penalty. (3RT 426.) It concluded that "she would not fairly impose the death penalty." (3RT 426.) The court's findings are undisputed, are supported by the record, and are entitled to deference. Because the court's findings and conclusions were amply supported by substantial evidence, as discussed, they are binding on this Court. (*People v. Martinez*, *supra*, 47 Cal.4th at pp. 426-427.)

This case is unlike *People v. Pearson* (2012) 53 Cal.4th 306, 327-333, wherein the challenged juror was excused because of her ambivalent statements about the death penalty as a general concept. This Court found error because the juror expressed a "definite and consistent" ability to impose the death penalty in an appropriate case despite her "vague and largely unformed" opinion about capital punishment. (*Id.* at p. 330.) In contrast, Prospective Juror No. 4 here was consistent in her belief in favor of the death penalty, but expressed equivocation, at best, about her ability

to impose it. It is for this reason that she was properly excused, and the trial court's decision should be upheld.

2. Prospective Alternate Juror No. 1

Overall, Prospective Alternate Juror No. 1 indicated that he was strongly opposed to the death penalty for religious and moral reasons. He did state more than once that he would be willing to set aside his views and perform his duty, but his answers were equivocal. For example, when asked in the questionnaire whether he could impose the death penalty in a case involving multiple murder, appellant answered "Yes," then explained that he would perform his duty with the qualification, "but I am not for it." (10CT 2384.) The juror also said in court that he could perform his duty and vote for death, but immediately reiterated that he leaned toward life. (5RT 686.) In court, the judge asked if he would be open to voting for death, and he said he would follow the court's instructions, again with a qualification, "[i]f I have to." (5RT 685.) The judge narrowed him down more and asked if he would realistically and practically vote for death. He initially answered that it would be "kind of tough." The judge then asked what "kind of tough" meant: "You really don't see yourself ever voting for the death penalty?" The juror answered "Not really." (5RT 685.)

When questioned by the prosecutor about whether he could be in a "position where [he] might have to actually come in and make a decision that would end a man's life?" he answered, "I'm not sure if I could do that." (5RT 708.) The prosecutor asked if he would "have a block" that might prevent him from voting for death. The juror said that he did not know if he could vote for death if appellant's family members were present. The prosecutor said that family members could be present, but that even without family present, he would be "looking at a human being." Given that, she asked if he thought he "could do it," and he answered, "I'm not sure." (5RT 708.)

Prospective Alternate Juror No. 1 was more than philosophically opposed to the death penalty. His answers showed that when faced with the decision about how he might vote, he did not know if he could ever vote for death. Although some of his answers indicated that he might generally believe he could do it, his answers overall showed that he "would not realistically consider the death penalty as a viable option." (5RT 714.) He specifically expressed reluctance at the idea of appellant's family in the courtroom and deciding to vote for the death of a human being before him. (5RT 708.) The juror himself raised the issue of the presence of family members, showing that it was something he had been worrying about. Like the prior juror, at best, this juror was conflicting or equivocal. He was "not sure" whether he would be able to vote for death in this case. (5RT 708.) Thus, his duties as a juror would be substantially impaired, and the trial court did not abuse its discretion in excusing him. (See *People v. Solomon* (2010) 49 Cal.4th 792, 835-836 [juror properly excused who stated that "the thought of sending someone to death . . . would disturb me," said she would listen to the evidence and instructions, but did not know if she could vote for death]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279-1281 [jurors properly excused who were against death penalty, said they would listen to evidence and follow court's instructions, but gave conflicting and ambiguous answers about whether they could vote for death].)

Appellant argues that the prosecutor asked improper questions "to create hesitation on the part of the prospective juror by suggesting that he would personally have to sentence the defendant to death and that he, not the State of California, bears responsibility for his execution." (AOB 111.) The prosecutor's questions did no such thing. The prosecutor properly asked the juror to consider whether he would be able to vote for death with the understanding that his vote would impact a real human being. (5RT 708.) The prosecutor's questions here were "'an acceptable means of

impressing upon each prospective juror that the verdict of death would affect a real person who would be in the courtroom at that time, and sought to elicit whether, under these circumstances, the prospective juror nevertheless would be able to vote for death.'" (*People v. Lynch* (2010) 50 Cal.4th 693, 734, quoting *People v. Samayao* (1997) 15 Cal.4th795, 853.) "The inquiry therefore was directed toward ascertaining whether each prospective juror's views concerning capital punishment would prevent or substantially impair the performance of his duties as a juror." (*Ibid.*)

The court's findings and conclusions in excusing Prospective Alternate Juror No. 1 were amply supported by substantial evidence, as discussed, and they are thus binding on this Court. (*People v. Martinez*, *supra*, 47 Cal.4th at pp. 426-427.) Accordingly, the trial court properly excused both Prospective Juror No. 4 and Prospective Alternate Juror No. 1 because of their unwillingness or inability to impose the death penalty.

IV. THE TRIAL COURT PROPERLY EXCLUDED THIRD PARTY CULPABILITY EVIDENCE

Appellant claims that the trial court's exclusion of shoeprint evidence was an abuse of discretion and violated his right to present a defense. (AOB 113-125.) Specifically, a criminalist was unable to exclude a third party's shoe as matching a one-square-inch partial shoeprint left at the scene of Ms. Washington's death (counts 4 and 5), the quality of which was too poor to make any determination about the source of the print. The trial court properly excluded this unreliable and irrelevant evidence, and any possible error was harmless.

A. Relevant Trial Court Proceedings

Before trial, defense counsel informed the court that he intended to raise issues about the partial shoeprint left at the scene of Ms. Washington's death. The prosecutor explained that someone named Ray Anthony Williams' tennis shoes could not be eliminated as having made the partial

shoeprint, but "[f]urther comparison could not be made due to lack of definition and sight of the partial shoe print." (5RT 786.) Defense counsel stated that any evidence found near the crime scene was relevant. (5RT 786.) The prosecutor stated he had no "problem with the shoe print coming in, but [he] would have a problem with trying to tie it to some individual. . . ." (5RT 786.) The court delayed ruling and stated, "we'll have to see how strong that evidence is and also how significant the print is, meaning that how close to the crime scene and what kind of crime scene. If it's an area of high transient traffic, it may not mean anything." (5RT 786-787.)

During direct examination, criminalist Lloyd Mahaney testified that there appeared to be the outline of a shoeprint on the right rear shoulder of Ms. Washington's T-shirt. (8RT 1204-1206.) He cut the T-shirt off of Ms. Washington to preserve it. (8RT 1207.) In an Evidence Code section 402 hearing, the prosecution informed the court that a second criminalist, William Lewellen, examined the shoeprint, which was about one square inch and "of a quality that no further comparison could be made." (8RT 1220.) Lewellen compared the partial print to an impression from Ray Anthony Williams' shoe. Mr. Williams' shoe could not be eliminated as having made the print. Mr. Williams had been connected to the case by unspecified hearsay evidence. (8RT 1220-1221.) The prosecution asked that they be permitted to ask Lewellen about the size and quality of the print, but requested that the defense be precluded under Evidence Code section 352 ("section 352")[14] from asking about Mr. Williams or the comparison with his shoe. (8RT 1221.)

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[14] Section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of (continued...)

Defense counsel argued that if the prosecution could introduce the evidence, the defense should be permitted to ask about the comparison. (8RT 1221.) The court explained that the defense's proposed questions had to be relevant. "That's the issue of third party culpability is relevance and 352, and the problem is this: by making the comparison, it suggests to the jury that there was a reason for the comparison, which is hearsay, which is not admissible. [¶] So you can't get the reason for doing the comparison in front of the jury." (8RT 1222.) The court stated it would permit Lewellen to testify about the print, such as what it showed, how much of the print was present, and whether it was an actual print. (8RT 1222.)

Defense counsel argued that he should be permitted to ask whether Lewellen made any comparison to try to eliminate anyone as a suspect. (8RT 1222-1223.) The court found that the print was insufficient to include or eliminate anyone, and "by bringing forth the fact of the comparison, it suggests that there is more than the actual evidence in the case, which is the reason for it [the comparison], which is hearsay." (8RT 1223.) The court thus precluded the defense from introducing evidence of the comparison. (8RT 1223.) After ruling, the court added, "Obviously comparisons wouldn't have anything to do with [appellant]. Whether he did or didn't would be appropriate." (8RT 1223.)

Mr. Lewellen testified that he examined a part of a T-shirt with a partial shoeprint on it. He measured the shoeprint to be about one square inch. (8RT 1225.) The print was not enough in terms of size and quality to be able to make any determination. (8RT 1226.) A partial print would not permit him to determine the shoe's size. (8RT 1228-1229.) He had not

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(...continued)
time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

been asked to compare any of appellant's shoes to any print. (8RT 1229.) He explained that there would be no value in comparing a shoe 20 years after a print was made, especially if the shoe had been worn in the meantime because the shoe pattern would have changed as it was worn. (8RT 1229-1230.)

B. Applicable Law: Third Party Culpability Evidence Is Admissible Only If It Is Capable of Raising a Reasonable Doubt

It is not required "'that any evidence, however remote, must be admitted to show a third party's possible culpability.'" (*People v. Page* (2008) 44 Cal.4th 1, 38, quoting *People v. Hall* (1986) 41 Cal.3d 826, 833.) Third party culpability evidence is admissible only if it is "'capable of raising a reasonable doubt of defendant's guilt.'" (*Ibid.*, quoting *People v. Hall*, at p. 833.) Third party culpability evidence is treated like other exculpatory evidence: "the evidence [has] to be relevant under Evidence Code section 350 and its probative value [can]not be 'substantially outweighed by the risk of undue delay, prejudice, or confusion' under Evidence Code section 352." (*People v. Geier* (2007) 41 Cal.4th 555, 581, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 685; accord, *People v. Hall*, at p. 834.) For example, "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall,* at p. 833.)

The exclusion of evidence is reviewed for abuse of discretion. (*People v. Brady* (2010) 50 Cal.4th 547, 558, citing *People v. Avila* (2006) 38 Cal.4th 491, 577-578.)

C. That Someone Other Than Appellant Could Not Be Eliminated from a Small Partial Shoeprint of Poor Quality Would Not Raise a Reasonable Doubt As to Appellant's Guilt

Here, evidence that Ms. Washington had a shoeprint on her left rear shoulder was relevant to show that her killer had likely stepped on her and held her down with his foot while he strangled her. (See 17RT 2455.) The criminalist who analyzed the one-square-inch partial shoeprint testified that the print was too poor in terms of size and quality to be able to make any determination, even of the shoe's size. (8RT 1225-1226, 1228-1229.) Thus, the fact that someone's shoe had been compared to the print and could not be eliminated was meaningless. Under the circumstances, the comparison could not even suggest that that person left the print or was at the crime scene. It was thus irrelevant and properly excluded.

The trial court recognized the potential importance of the nature of the print evidence before trial. The court stated that it would "have to see how strong that evidence is and also how significant the print is." The court speculated that, depending on the circumstances, the print "may not mean anything." (5RT 786-787.) As it turned out, the small size and poor quality of the partial print indeed rendered it insignificant and irrelevant.

Even if the evidence had some mild probative value, it was properly excluded under section 352 because it would have been substantially confusing and unduly time confusing. The partial print, which the jury knew to be of poor size and quality for a comparison, was nonetheless compared to the shoe of Ray Anthony Williams. Mr. Williams was connected to Ms. Washington by hearsay evidence, and that information would thus not be provided to the jury. Without some information about Mr. Williams and his connection to the victim, the inconsequential comparison evidence would have left a gaping hole in the evidence, with no

explanation for the jury. And attempting to explain his involvement would have unnecessarily wasted time.

The trial court recognized this problem under the rubric of relevance and section 352: "by making the comparison, it suggests to the jury that there was a reason for the comparison, which is hearsay, which is not admissible. [¶] So you can't get the reason for doing the comparison in front of the jury." (8RT 1222.)

This evidence also lacked a link to the crime, as required for third party culpability evidence. (*People v. Hall*, *supra*, 41 Cal.3d at p. 833.) Because the comparison resulted in an inability to eliminate Mr. Williams, rather than matching his shoe to the mark, the evidence did not link him to the crime. The fact that he could not be eliminated was not the same as linking him to the murder. Because of the poor size and quality of the print, it is entirely possible that appellant's shoes or even counsel's shoes could not have been eliminated, had they been compared. Moreover, there was no evidence that Mr. Williams had either a motive or the opportunity to commit the crime. (See *People v. Page* (2008) 44 Cal.4th 1, 35-36, 39 [evidence that police investigated two other suspicious men in area of crime was properly excluded because the evidence did not link them to the crime]; *People v. Sandoval* (1992) 4 Cal.4th 155, 176-177 [papers and appointment book with names indicating victim's involvement in criminal drug operation were properly excluded because there was no evidence that any had a motive to kill the victim, and those with possible motives had nothing linking them to the actual perpetration of the crimes].)

Appellant conflates the failure to eliminate Mr. Williams as a source of the partial shoeprint with matching his shoe to the print and treats the evidence as if it had the same force and effect as a match. (AOB 116-125.) For example, appellant asserts that the "inability to exclude Ray Williams as the source of the shoe print" showed that someone other than appellant

was present and committed the crime. (AOB 116-117.) However, it showed no such thing. As set out above, the inability to eliminate a random person as matching a print so small and poor in quality that no determination could be made from it meant nothing. It certainly did not exclude appellant as the one who left the print. Appellant's assertions to the contrary are speculative at best. (See *People v. Lewis* (2001) 26 Cal.4th 334, 373 [speculative evidence of third party culpability properly excluded].) "The flaw in defendant's theory is that the proffered evidence has no tendency to establish any relevant fact." (*People v. Page* (2008) 44 Cal.4th 1, 37.)

The poor size and quality of the partial print, as well as the lack of an inclusive finding or a match, made the proffered evidence irrelevant. Even if there was some mild relevance, it would have confused and misled the jury, and/or entailed the undue consumption of time to explain to them. The trial court therefore did not abuse its discretion in excluding the evidence.

Appellant's related federal constitutional claim (AOB 120-121), is preserved but should likewise be rejected. "Constitutional claims raised for the first time on appeal are not subject to forfeiture only when 'the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution.' [Citations]" (*People v. Tully* (2012) 54 Cal.4th 952, 979-980.) While the Court's rejection of appellant's state law claim necessarily implies a similar rejection of the federal constitutional claim (*People v. Boyer*, *supra*, 38 Cal.4th at p. 441, fn. 17), respondent respectfully requests that this Court expressly reject the federal constitutional claim to make clear, for possible federal habeas corpus review, that the Court did entertain and reject the

claim. (See *Johnson v. Williams*, *supra*, __ U.S. __ [133 S.Ct. 1088, 185 L.Ed.2d 105].)

Because the trial court did not err under state law, for all of the reasons set out above, there was no constitutional error. (See *People v. Roybal*, *supra*, 19 Cal.4th at p. 506, fn. 2.) The trial court's application of the ordinary rules of evidence to an irrelevant and potentially confusing piece of evidence did not violate appellant's right to present a defense. (*United States v. Scheffer* (1998) 523 U.S. 303, 308 [118 S.Ct. 1261, 140 L.Ed.2d 413] [defendant's right to present even relevant evidence is "not unlimited, but rather is subject to reasonable restrictions" including evidentiary rules of exclusion]; *Michigan v. Lucas* (1991) 500 U.S. 145, 149 [111 S.Ct. 1743, 114 L.Ed.2d 205]; *Rock v. Arkansas* (1987) 483 U.S. 44, 55-56 [107 S.Ct. 2704, 97 L.Ed.2d 37] [constitution does not relieve a defendant from compliance with "'rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence'"]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [93 S.Ct. 1038, 35 L.Ed.2d 297] [right to present defense may "'bow to accommodate other legitimate interests in the criminal trial process'"]; *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [constitutional right to present a defense not implicated by trial court's exclusion of third party culpability evidence].)

D. Any Error Was Harmless

Finally, any possible error in excluding the evidence was harmless. Appellant cannot show that it is reasonably probable that a result more favorable to him would have been reached had the evidence been admitted. (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 611 ["we have consistently assumed that when a trial court misapplies Evidence Code section 352 to exclude defense evidence, including third-party-culpability evidence, the

applicable standard of prejudice is that for state law error," in *People v. Watson*, *supra*, 46 Cal.2d at p. 836].)

The evidence tying appellant to Ms. Washington's murder was extremely strong. Appellant lived just 14 blocks from where Ms. Washington was murdered (15RT 2262), and his DNA was found in and on Ms. Washington. Appellant's DNA was identified in swabs of Ms. Washingon's vagina and external genitals. (13RT 1993-1994; 14RT 2052-2053; 16RT 2348, 2368.) Like the other victims on whom appellant's DNA was found, Ms. Washington was strangled to death in an area known for drugs and prostitution just blocks from appellant's home. (7RT 1061-1062, 1075-1077; 12RT 1812; 15RT 2262.) Like the others, she was an African-American woman who was older than appellant. (7RT 1055, 1064; 12RT 1827-1828.) She was a known drug-user and prostitute and had drugs in her system. (7RT 1057; 13RT 1889; 15RT 2256.) Appellant had initially been identified by a woman, also a known drug-user and prostitute, whom he had choked and raped near where he lived and worked. (14RT 2121-2122, 2162-2163, 2170-2177, 2180.) His DNA was obtained and typed as a result of that attack. (13RT 1906-1909, 1961-1962, 1965.)

Even if evidence was admitted that the shoe of an unconnected third person, Ray Anthony Williams, could not be eliminated as having made a partial print that was of such poor size and quality that no determination could be made, it would have made no difference in the verdicts or death sentence. Because of the poor quality of the print, the failure to eliminate a particular shoe from making it was basically meaningless. The inability to eliminate Mr. Williams' shoe (or anyone else's for that matter) did not mean that he was present at the scene. It certainly did not mean that appellant was *not* present. This evidence could not in any way have created doubt about appellant's guilt on the charges involving Ms. Washington and her baby, or any others. Moreover, in the face of the circumstances of the

crimes, the mountain of aggravating evidence, and the paltry mitigating evidence, this evidence could not have affected the jury's penalty determination. Any error in excluding this evidence was thus harmless under any standard.

V. THE JURY WAS PROPERLY INSTRUCTED ON FETUS VIABILITY

Appellant was charged and convicted in count 5 with the 1989 murder of the fetus carried by Ms. Washington. (1CT 135; 14CT 3625.) He claims that the court's instruction on viability of the fetus was inadequate, permitting conviction upon proof of less than beyond a reasonable doubt. (AOB 126-134.) However, the instruction properly defined viability as the capability of maintaining independent existence outside the womb, and this claim should therefore be denied.

A. Relevant Trial Court Proceedings

After the preliminary hearing, appellant moved to dismiss count 5 based on the lack of evidence of fetus viability. (1CT 170-179.) The prosecution opposed the motion, setting out the 1989 law on viability. (1CT 180-188.) After a minimal hearing, the court denied the motion. (1CT 193; 2RT 48.)

At trial, medical examiner Dr. Lisa Scheinen testified that Ms. Washington's fetus was about six-and-a-half months old, or 27 to 28 weeks. (12RT 1822.) In examining the autopsy report, which had been prepared by a different examiner, she testified that it "doesn't really say anything specific about whether the baby could have survived, but just looking at the numbers, the age of the baby would indicate that it was a viable fetus, meaning it has a chance for life by itself." (12RT 1822.) She explained the medical standards for viability and found that Baby Girl Washington far exceeded them: "[T]he World Health Organization generally says that a fetus can be considered viable after the 22nd week or a weight of 500

grams. [¶] In this case we have a gestational age that is well above that. You're talking 27 to 28 weeks, and you have a weight that is 825 grams rather than 500 grams." (12RT 1822.) The same standards applied in 1989. (12RT 1823.)

Dr. Scheinen presented a chart (People's Exhibit No. 141), which listed different gestational ages and weights. (12RT 1823-1825.) Using the chart, she described a dividing line between fetuses that were considered viable and pre-viable:

> The most important thing is this is the line right here that says, "stage of viability." [¶] So this is the line that you have to be concerned about. Anything to the left of this line is considered a pre-viable fetus and anything to the right of it is considered viable.

(12RT 1825.) She used the chart to show the dividing line of 500 grams and fertilization age of 22 weeks, and again described Baby Girl Washington as far exceeding those minimums:

> [In the weight column], right here this little number here is 500 grams, so that's where the limit of viability is the dividing line, 500 grams. [¶] Down here we have the line going between fertilization age of 22 weeks and/or menstrual age of between 22 and 24 weeks. [¶] So the fetus in this case is about 27 to 28 weeks, so we're talking a fetus in this ballpark about here. This is seven months. The baby is about six and a half months, according to the medical examiner who did the autopsy, so we're talking somewhere around here, so the baby is in this ballpark here, and about in this ballpark here by weight, so it's clearly well into the range that's defined as viable.

(12RT 1825-1826.)

Dr. Scheinen further described the fetus as what "appeared to be a normally developing healthy baby." (12RT 1826.) The fetus was described in the autopsy report as "generally as well or better preserved than the mother." (12RT 1826.) It had no congenital or developmental abnormalities. (12RT 1826.) The cocaine levels found in Ms. Washington

and the fetus and the alcohol levels in the fetus did not impact Dr. Scheinen's conclusion that the fetus was healthy and viable. (12RT 1827, 1889-1891.)

During a jury instruction conference, the prosecutor said that she would check to see if the 1989 definition of viability was the same as that listed in the version of CALJIC No. 8.10 that they were using:

> Your Honor, the only other thing I could think possibly on the instruction is 8.10, the definition of a viable fetus may have been different in 1989, and that would be the correct year for Regina Washington's murder.
>
> I'm going to look into that to see if the definition that we have in the instruction is the same as what we would have had in 1989.

(17RT 2415.) The court stated that it would look as well and cautioned that they would have to be careful about the law used in the case because the crimes spanned 12 years, from 1987 to 1998. (17RT 2415.)

The court instructed the jury pursuant to a modified version of CALJIC No. 8.10,[15] which stated in pertinent part:

> In the crime of murder, a human fetus is defined as a viable unborn child. Viability is defined as the capability of the fetus to maintain independent existence outside of the womb even if this existence required artificial medical aid.

(14CT 3508; 17RT 2541-2542.)

B. Applicable Law: In 1989, a Viable Fetus Was One Capable of Independent Existence

In 1970, the California Legislature amended the murder statute "to include within its proscription the killing of a fetus." (*People v. Davis*

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[15] The 1988 version of CALJIC No. 8.10, applicable at the time of appellant's 1989 crime, stated: "A viable human fetus is one who has attained such form and development of organs as to be normally capable of living outside of the uterus."

(1994) 7 Cal.4th 797, 803.) As amended, the statute provided that "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) In 1973, the United States Supreme Court decided *Roe v. Wade*, which held that a state had no legitimate interest in protecting a pre-viable fetus when balanced against the mother's privacy interest in an abortion. (*Roe v. Wade* (1973) 410 U.S. 113, 163 [35 L.Ed.2d 147, 93 S.Ct. 705]; *People v. Davis*, at p. 803.) The Supreme Court defined viability in the abortion context as when a fetus had the "capability of meaningful life outside the mother's womb." (*Ibid.*; *People v. Davis*, at p. 803.)

A few years later, the California Court of Appeal, relying on language and reasoning in *Roe v. Wade*, construed the term "fetus" in the murder statute to mean a "viable fetus," which had "the capability for independent existence." (*People v. Smith (Karl Andrew)* (1976) 59 Cal.App.3d 751, 757 ("*People v. K.A. Smith*").) The court specifically defined viability as: "'having attained such form and development of organs as to be normally capable of living outside the uterus.'" (*Id.* at p. 758, quoting Webster's Third New Internat. Dict. (1966 ed.) p. 2548.)

Other court of appeal cases followed suit. (*People v. Smith (Robert Porter)* (1987) 188 Cal.App.3d 1495, 1514 [noting viability defined by prior courts as: "[H]aving attained such form and development of organs as to be normally capable of living outside the uterus," and "being capable of surviving the trauma of birth with the aid of normal medical science"] ("*People v. R.P. Smith*"); *People v. Apodaca* (1978) 76 Cal.App.3d 479, 489 ["A fetus is viable when it has achieved the capability for independent existence; as we have indicated, a fetus is deemed viable when it is possible for it to survive the trauma of birth, although with artificial medical aid."].)

In *People v. Hamilton* (1989) 48 Cal.3d 1142, 1171-1172, this Court declined to address the issue of a viability requirement in the murder statute

or the proper definition of viability. It instead found that any error in defining viability for the jury was harmless because uncontradicted evidence showed that the fetus was viable under any definition. (*Id.* at p. 1172.)

That was the law as it stood in 1989 when appellant murdered Baby Girl Washington. In 1994, this Court would hold that viability is not required to prosecute the murder of a fetus, but that holding was expressly made prospective only. (*People v. Davis*, *supra*, 7 Cal.4th at p. 810-811.)

C. The Trial Court Properly Instructed the Jury That a Fetus Was Viable If It Was Capable of Maintaining Independent Existence

The trial court instructed the jury pursuant to a modified version of CALJIC No. 8.10. It defined viability as "the capability of the fetus to maintain independent existence outside of the womb even if this existence required artificial medical aid." (14CT 3508; 17RT 2541-2542.) This was an accurate definition under 1989 law. (*People v. R.P. Smith*, *supra*, 188 Cal.App.3d at p. 1514; *People v. Apodaca*, *supra*, 76 Cal.App.3d at p. 489; *People v. K.A. Smith*, *supra*, 59 Cal.App.3d at p. 757.)

Appellant asserts that the definition here was deficient because it stated that the fetus had to have the "capability" of maintaining independent existence, rather than stating that it was "normally capable" of living outside the uterus. (AOB 131-132.) Appellant relies on statements in this Court's 1994 *Davis* decision to support his claim, however, *Davis*, to the extent it applies here, stated no such thing.

In *Davis*, the defendant shot a pregnant woman, killing her unborn child. (*People v. Davis*, *supra*, 7 Cal.4th at p. 800.) At the time, CALJIC 8.10 defined viability as a fetus "'who has attained such form and development of organs as to be normally capable of living outside of the uterus.'" (*Id.* at p. 801.) The trial court instead instructed the jury that it

could "convict defendant of murder if it found the fetus had a possibility of survival: 'A fetus is viable when it has achieved the capability for independent existence; that is, when it is *possible* for it to survive the trauma of birth, although with artificial medical aid.'" (*Ibid.*, italics in original.) The *Davis* Court held that the trial court's "possibility" language "lowered the viability threshold" applicable at the time:

> [T]he wording of CALJIC No. 8.10, defining viability as "normally capable of living outside of the uterus," while not a model of clarity, suggests a better than even chance—a probability—that a fetus will survive if born at that particular point in time. By contrast, the instruction given below suggests a "possibility" of survival, and essentially amounts to a finding that a fetus incapable of survival outside the womb for any discernible time would nonetheless be considered "viable" within the meaning of section 187, subdivision (a). Because the instruction given by the trial court substantially lowered the viability threshold as commonly understood and accepted (as defined by *Roe v. Wade*, *supra*, 410 U.S. at pp. 162-164 [35 L.Ed.2d at pp. 182-183], *K.A. Smith*, *supra*, 59 Cal.App.3d at pp. 752-753, and its progeny), we conclude that the trial court erred in instructing the jury pursuant to a modified version of CALJIC No. 8.10.

(*Id.* at p. 814.)

The instruction here did not use the word "possibility" or anything else that "lowered the viability threshold." The trial court's instruction properly followed the law at the time by using the term "capability." (*People v. R.P. Smith*, *supra*, 188 Cal.App.3d at p. 1514 [one definition for viability was "being *capable* of surviving the trauma of birth with the aid of normal medical science"]; *People v. Apodaca*, *supra*, 76 Cal.App.3d at p. 489 ["A fetus is viable when it has achieved the *capability* for independent existence"]; *People v. K.A. Smith, supra*, 59 Cal.App.3d at p. 757 [a viable fetus had "the *capability* for independent existence"]; see also *Roe v. Wade*, *supra*, 410 U.S. at p. 163 [a viable fetus is one with "the *capability* of meaningful life outside the mother's womb"].)

Contrary to appellant's assertion (AOB 131-132), the *Davis* Court did not suggest, even in dicta, that the phrase "normally capable" was any different or more appropriate than the term "capability."[16] Both terms equally "suggest[] a better than even chance – a probability – that a fetus will survive." (*People v. Davis*, *supra*, 7 Cal.4th at p. 814.) Indeed, requiring the jury to find that the fetus had the "capability" of "maintain[ing]" independent existence is slightly more burdensome than simply requiring them to find that such a fetus would be "normally capable" of independent existence. The language used here suggests a focus on the specific fetus that was killed rather than on a "normal" fetus like it. It also requires the fetus to be able to "maintain" independent existence, which implies a longer period of existence.

Appellant also asserts that the trial court's instruction here somehow implied "that if a fetus has the capacity to survive for just a moment or two it is viable." (AOB 132.) Appellant does not explain the basis of this assertion. However, the trial court's instruction explicitly defined viability as having the capability "to *maintain* independent existence outside of the womb." (14CT 3508; 17RT 2541-2542, italics added.) "Maintain" is defined as "to keep in existence or continuance; preserve." (<http://dictionary.reference.com/browse/maintain> [as of October 5, 2015].) Requiring the capability to "maintain independent existence" requires more than momentary survival; it requires continued existence. (See *Smith v. Superior Court* (2006) 39 Cal.4th 77, 84 [relying on dictionary definition for commonly understood meaning]; *People v.*

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[16] Appellant incorrectly states that the trial court only required the jury to find the "capacity" to survive, rather than the "capability." (AOB 132.)

Mullendore (2014) 230 Cal.App.4th 848, 855 [same].) Thus, even if sustained survival was a requirement, it was met by the court's instruction.

D. Any Error Was Harmless

Appellant asserts that the *Chapman* standard should apply (AOB 132-133), but this Court has determined that the *Watson* standard applies to a failure to adequately define viability. (*People v. Davis*, *supra*, 7 Cal.4th at p. 814.) Regardless of the standard applied, even assuming that the trial court's instruction was somehow erroneous, any error was harmless.

"[T]he failure to instruct on an essential element of the offense actually charged is not prejudicial where the People's evidence conclusively establishes the existence of that element and there is absolutely no evidence deserving of any consideration whatsoever from which a jury could have found in favor of the defendant on that specific point." (*People v. Apodaca*, *supra*, 76 Cal.App.3d at p. 487, citing *People v. Thornton* (1974) 11 Cal.3d 738, 769, fn. 20 (maj. opn.) and pp. 771-775 (conc. and dis. opn., Mosk, J.), *People v. Morse* (1969) 70 Cal.2d 711, 736, and *People v. Saterfield* (1967) 65 Cal.2d 752, 760.) Where no evidence in the record contradicts the prosecution's medical testimony that the fetus was viable, an error in instructing on the definition of viability is harmless. (*Id.* at p. 488.) That is true even if no viability definition was given at all. (*People v. R.P. Smith*, *supra*, 188 Cal.App.3d at pp. 1514-1515.)

In *People v. Apodaca*, *supra*, 76 Cal.App.3d at page 487, "it was undisputed that the fetus was between 22 and 24 weeks old when the attack occurred, and the uncontradicted medical testimony was that it was viable at the time it was slain. Under those circumstances, any error in the court's failure to define the word 'fetus' in terms of viability, as appellant requested the court to do, was not prejudicial."

In *People v. R.P. Smith*, *supra*, 188 Cal.App.3d at page 1501, a medical expert testified that a fetus the size of the one killed, which was

1200 grams and 28 to 30 weeks, had an "85 percent survival rate or chance of being viable." The court found that "appellant has not suffered prejudice," from the failure to define viability. (*Id.* at pp. 1514-1515.) The record there "clearly demonstrate[d] the existence of the element of viability of the fetus, and there is no evidence deserving of any consideration whatsoever from which the jury could have found in appellant's favor on this point." (*Ibid.*)

Similarly here, Dr. Scheinen testified without contradiction that Baby Girl Washington was viable. (12RT 1822, 1825-1827, 1889-1891.) The baby's gestational age was about 27 to 28 weeks, and her weight was 825 grams. (12RT 1822.) She explained that the minimum age and weight for a viable fetus was 22 weeks and 500 grams, and used a chart to show that Baby Girl Washington was "clearly well into the range that's defined as viable." (12RT 1822-1823, 1825-1826.) She further described the fetus as a "normally developing and healthy baby." (12RT 1826.) The cocaine and alcohol levels in the fetus did not impact Dr. Scheinen's conclusion that the fetus was healthy and viable. (12RT 1827, 1889-1891.)

As in *Apodaca* and *R.P. Smith*, therefore, the undisputed evidence here conclusively demonstrated that Baby Girl Washington was viable. There was simply no evidence "from which the jury could have found in appellant's favor on this point." (*People v. R.P. Smith*, *supra*, 188 Cal.App.3d at pp. 1514-1515.) Appellant therefore could not have suffered prejudice, even if the trial court erred in instructing the jury on the definition of viability, and any error was harmless.

VI. SUFFICIENT EVIDENCE SUPPORTED THE CRIMINAL THREATS INCIDENT AS A CRIME INVOLVING THE THREAT OF VIOLENCE

Appellant asserts that the evidence of a criminal threat against Deputy Uyetatsu was insufficient to support its admission as other criminal activity under section 190.3, subdivision (b) ("factor (b)"). (AOB 135-149.) On

the contrary, sufficient evidence supported the admission of this evidence, and any error was harmless beyond a reasonable doubt.

A. Relevant Proceedings Below

During the penalty phase, the prosecution presented five separate violent or threatening criminal acts under factor (b) (see, *supra*, Stmt. of Facts, Parts A.12 & C.1-4), of which the criminal threats against Deputy Uyetatsu was one. (20RT 3006-3007.) Appellant did not object.

The court instructed the jury as follows:[17]

> Evidence has been introduced for the purpose of showing that the defendant Chester Turner has committed the following criminal acts or activities which involve the express or implied use of force or violence or the threat of force or violence: the murder of Elandra Joyce Bunn, rape by force or fear of Maria Martinez, forcible sexual penetration of Maria Martinez, sexual battery of Carla Whitfield, resisting an executive officer, Officer Christian Hansen, and criminal threats against Deputy Natalie Uyematsu [*sic*].
>
> Before a juror may be considered -- may consider any criminal acts or activities as an aggravating circumstance in this case, a juror must be satisfied beyond a reasonable doubt that the defendant did in fact commit the crimes -- the criminal acts or activities. A juror may not consider any evidence of any other criminal acts or activities as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

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[17] The defense specifically did not request an instruction defining criminal threats and setting out its elements (20RT 2987-2988), and the court properly did not give it. (See *People v. Grant* (1988) 45 Cal.3d 829, 852 ["no sua sponte duty to instruct on the elements of the crimes constituting 'other criminal activity' under section 190.3"].)

> As to unadjudicated criminal acts. [¶] The defendant is presumed to be innocent until the contrary is proved. The People have the burden of proving him guilty beyond a reasonable doubt.

(20RT 3063-3064.)

B. Applicable Law: A Jury May Consider Uncharged Violent or Threatening Criminal Activity in Aggravation

Evidence is generally admissible under factor (b) "if it shows the defendant engaged in criminal activity that violated a penal statute and involved '"the use or attempted use of force or violence or the express or implied threat to use force or violence."'" (*People v. Jackson* (2014) 58 Cal.4th 724, 759, quoting *People v. Thomas* (2011) 52 Cal.4th 336, 363.) "The evidence must be sufficient to 'allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt.'" (*Ibid.*, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 584; see Arg. II.A for sufficiency standard.)

The purpose of evidence admitted under factor (b) is "'to enable the jury to make an individualized assessment of the character and history of the defendant to determine the nature of the punishment to be imposed.' [Citation.] The probative value of this evidence lies in the defendant's conduct that gave rise to the offense." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1146, quoting *People v. Davis* (1995) 10 Cal.4th 463, 544.)

C. Sufficient Evidence Supported Appellant's Criminal Threats

Criminal threats under section 422 has five elements:

> (1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat –

> which may be "made verbally, in writing, or by means of an electronic communication device" – was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.

(*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) Appellant asserts that the evidence was insufficient to support elements three (specific and unequivocal threat) and four (sustained fear). (AOB 141-143.) However, the evidence was sufficient to allow a jury to find beyond a reasonable doubt that appellant made unequivocal threats against Deputy Uyetatsu and that she was in sustained fear.

First, as to element 3, "'A threat is sufficiently specific where it threatens death or great bodily injury. A threat is not insufficient simply because it does 'not communicate a time or precise manner of execution.'" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 806.) "A prosecution 'under section 422 *does not* require an unconditional threat of death or great bodily injury.'" (*Ibid.*, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 338, italics in *Wilson.*) The word "unconditional" in the context of section 422 ""'was not meant to prohibit prosecution of all threats involving an 'if' clause, but only to prohibit prosecution based on threats whose conditions precluded them from conveying a gravity of purpose and imminent prospect of execution.'"" (*Ibid.*, quoting *People v. Bolin*, at p. 339.)

"'The "immediate *prospect* of execution" in the context of a conditional threat is obviously to be distinguished from those cases dealing with threats of immediate harm, recognized at the very moment of the threat.'" (*People v. Wilson*, *supra*, 186 Cal.App.4th at p. 807, quoting

People v. Melhado (1998) 60 Cal.App.4th 1529, 1538.) The court further explained this concept:

> "How are we to understand the requirement that the prospect of execution be immediate, when, as we have seen, threats often have by their very nature some aspect of conditionality . . . . [W]e understand the word 'immediate' to mean that degree of seriousness and imminence which is understood by the victim to be attached to the *future prospect* of the threat being carried out, should the conditions not be met."

(*Ibid.*, quoting *People v. Melhado*, at p. 1538.)

The threat "'cannot be determined only at face value.'" (*People v. Wilson*, *supra*, 186 Cal.App.4th at p. 807, quoting *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137.) The threat should "'be examined "on its face and under the circumstances in which it was made." The surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat.'" (*Ibid.*, quoting *In re Ricky T.*, at p. 1137.)

Here, the threat was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat." (See *People v. Toledo*, *supra*, 26 Cal.4th at pp. 227-228.) Appellant told a fellow inmate, Antonio, that "if he got found guilty, he was going to kill the bitch," referring to Deputy Uyetatsu. (19RT 2798-2799.) This threat was conveyed in such a convincing manner that Antonio felt it was serious enough to risk passing a note to a deputy. (19RT 2774-2776, 2800-2801.) Antonio thought appellant was serious because he was very upset about losing privileges and thought Deputy Uyetatsu was "doing him dirty." Antonio believed that appellant would carry out his threat because of the charges against him and because it seemed like he hated women. (19RT 2803.)

The circumstances of appellant's attitude and behavior toward Deputy Uyetatsu also lent the threat a gravity of purpose and immediate prospect of

execution. Appellant acted differently toward Deputy Uyetatsu, the only female deputy on his floor, compared to the male deputies. (19RT 2770, 2845.) Appellant's "whole demeanor would change" when she was present. (19RT 2770, 2845.) Appellant would stand at his cell door with his arms raised up, look down at her, and stare at her as long as she was in eye-shot. (19RT 2770-2772, 2779, 2834-2835.) One of the male deputies described appellant's actions toward Deputy Uyetatsu as "intimidating." (19RT 2771.) Deputy Uyetatsu felt that appellant's attitude toward her conveyed "utter disgust." (19RT 2834.)

Appellant asserts that there was "less of a possibility of [him] carrying out the threat after he was found guilty of capital murder." (AOB 142.) However, the fact that the threat was conditioned on appellant being convicted made it even more likely that he would attempt to carry it out. At that point, appellant would be facing life in prison or the death penalty, and he would have nothing to lose. He was basically targeting Deputy Uyetatsu as his next victim once he knew that there was no chance of getting out. Appellant's custodial status would not necessarily prevent him from attempting to carry out his threat. Inmates have the ability to kill guards and have done so, and Deputy Uyetatsu specifically testified that she believed appellant could kill her. (19RT 2836.) Indeed, she was moved from his area after an investigation into the threat. (19RT 2776-2777.) For all of these reasons, sufficient evidence supported element 3.

Second, element 4, the sustained fear requirement, has both objective and subjective components. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 417.) The victim's "fear must have been reasonable, and it must have been real." (*Ibid.*) Appellant does not suggest that the objective component was not met. Reasonable inferences from the evidence show that the subjective component was likewise met here. (See *ibid.*) The victim need not testify

that he or she was afraid. (*Ibid.*) Evidence of the threat and surrounding circumstances may allow a jury to find actual fear. (*Ibid.*)

As set out above, the circumstances of appellant's attitude and history of behavior toward Deputy Uyetatsu supported finding that she was in fear. Specifically, appellant's "intimidating" demeanor and actions toward her permitted an inference of fear. (19RT 1771.) Additionally, Deputy Uyetatsu believed it was possible that appellant could kill her, and that he would do so if given the opportunity. (19RT 2836.) Appellant was a large man, six feet two inches and 256 pounds when he was arrested. (15RT 2280.) Deputy Uyetatsu would have known that appellant had been charged with murdering 10 women. (*People v. Wilson*, *supra*, 186 Cal.App.4th at p. 808 ["victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear"].) She had to take special safety measures just to give him his food. (19RT 2833, 2839.) Appellant nevertheless remained insubordinate with her and refused to follow her orders, even though it meant he did not get his meal and lost privileges. (19RT 2831-2834, 2839.) After an investigation into the threat, Officer Uyetatsu was moved out of appellant's area. (19RT 2776-2777.)

A jury could reasonably infer from these circumstances that Deputy Uyetatsu was in sustained fear because of appellant's threat against her. The surrounding circumstances of appellant's intimidating attitude and insubordinate behavior toward her, his history of violence toward women, and the violent and direct nature of the threat supported a finding of sustained fear. There was certainly no evidence suggesting that she was not in fear or that any such fear dissipated. (See *People v. Ortiz*, *supra*, 101

Cal.App.4th at p. 417.) Thus, sufficient evidence thus supported element 4.

To the extent appellant claims that the lack of evidence to support the criminal threat as prior criminal activity under factor (b) violated the constitution, the Court should reject such claims for the same reasons. (*People v. Jackson* (2014) 58 Cal.4th 724, 761 [in rejecting the defendant's claim of insufficiency to support factor (b), the Court "further reject[ed] his derivative constitutional claims"], citing *People v. Kipp* (2001) 26 Cal.4th 1100, 1134.) Specifically, evidence that appellant uttered a death threat against the only female deputy was serious and specific enough in the circumstances that a fellow inmate risked potential harm to report it, and that it warranted removing the deputy from appellant's area. It was not "de minimus" or constitutionally irrelevant in any way. (See AOB 144-147.) It was exactly the kind of incident for which factor (b) (which explicitly includes "the express or implied threat to use force or violence") was designed. (See *People v. Cruz* (2008) 44 Cal.4th 636, 683 [defendant's threat to get a gun and shoot deputy in the back of the head when he got out of jail "constituted evidence of a prior *express* threat to use force or violence, and was therefore properly admitted at the penalty phase as a factor in aggravation under section 190.3, factor (b)"].)

D. Any Error Was Harmless

"Error in the admission of evidence under factor (b) is reversible only if 'there is a reasonable possibility it affected the verdict,' a standard that is 'essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].'" (*People v. Collins* (2010) 49 Cal.4th 175, 220, quoting *People v. Lancaster* (2008) 41 Cal.4th 50, 94.) Here, there is no reasonable possibility that any error in admitting the criminal threats evidence affected the verdict.

First, the criminal threats incident was only one of five separate violent or threatening crimes admitted under factor (b). (See 20RT 3063-3064.) It was the most minor of those incidents in that it was the only one that did not involve outright physical force or violence. In addition to the criminal threat against Deputy Uyetatsu, the jury learned that appellant murdered another woman (see, *supra*, Stmt. of Facts, Part C.1), sexually assaulted a woman (see, *supra*, Stmt. of Facts, Part C.2), forcibly raped a woman (see, *supra*, Stmt. of Facts, Part A.12), and forcibly resisted officers attempting to arrest him (see, *supra*, Stmt. of Facts, Part C.3). As in *People v. Collins*, *supra*, 49 Cal.4th at page 220, "[t]he jury properly heard evidence of defendant's other criminal activity, . . . [and] [t]here is no reasonable possibility that the jury's penalty decision was improperly affected by this relatively minor incident." (See also *People v. Jackson*, *supra*, 58 Cal.4th at p. 761 [even if evidence did not demonstrate violent criminal activity, any error was "undoubtedly harmless" in part because of "the properly admitted evidence of defendant's cold-blooded murder of Monique and attempted murder of Robert, his prior armed robberies, and his violent and assaultive conduct in other prison incidents"]; (*People v. Romero* (2008) 44 Cal.4th 386, 422 [any error in admitting evidence of defendant's use of a small ax against hearsay declarant was harmless under *Chapman* because "the prosecution introduced sufficient evidence of other incidents of defendant's violent propensities," including attempted robbery, the firing of shots into a home, and participation in brutal prison beatings].)

Second, the criminal threat incident was decidedly minor in comparison to the ten charged murders. As in *Collins*, "'The actual – and proper – focus of the penalty phase was defendant and his capital crime.'" (*People v. Collins*, *supra*, 49 Cal.4th at p. 219, quoting *People v. Clair* (1992) 2 Cal.4th 629, 681.) The incident there involving a "Molotov cocktail was 'of marginal significance to the picture presented of the

murder and the murderer.'" (*Ibid.*) Likewise, here, the threat against Deputy Uyetatsu was marginally significant compared to the picture of appellant as a serial murderer of at least ten women over eleven years.

Third, even if the evidence here was insufficient to support a completed crime of criminal threats, it may have supported an attempted criminal threat. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607 [crime of attempted criminal threat exists when all elements are met except there is no evidence that victim was in sustained fear]; see also *People v. Toledo*, *supra*, 26 Cal.4th at pp. 230-231.) In *People v. Collins*, *supra*, 49 Cal.4th at pages 218-219, the Court presumed the evidence was insufficient to support the crime of possessing a destructive device, but found submission of the facts to the jury harmless because the defendant, at a minimum, aided and abetted vandalism. "[A] rational trier of fact could have found that defendant engaged in criminal activity involving an implied threat of violence. 'The proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on his character, rather than on the labels to be assigned' to those crimes." (*Id.* at p. 219, quoting *People v. Cain* (1995) 10 Cal.4th 1, 73.) Thus, even if the conduct here may have been given an inappropriate label, that is not prejudicial, "particularly since the jury was never instructed with the elements of the offense." (See *ibid.*)

Finally, the trial court found the aggravating factors supporting death overwhelming. In ruling on the defendant's motion to reduce his sentence to life, the court stated: "This is a case that basically if the jury found the facts to be true would, I think, in any court demand a death verdict, and I do agree with the jury's decision on that subject. I don't think any jury would arrive at a different conclusion either." (20RT 3092.)

Appellant asserts that any error is reversible under *Brown v. Sanders* (2006) 546 U.S. 212 [126 S.Ct. 884, 163 L.Ed.2d 723]. (AOB 143-148.)

Sanders does not apply here. In *Sanders*, the Supreme Court considered when an invalidated sentencing factor required reversal of a death sentence as unconstitutional. (*Brown v. Sanders*, at pp. 214, 216.) This Court had invalidated two out of four special circumstances found true by the jury. (*Id.* at pp. 214-215, 223 [the burglary-murder special circumstance was set aside under the merger rule, and the "heinous, atrocious, or cruel" special circumstance was held unconstitutionally vague].) The United States Supreme Court announced the following rule: "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process[] *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Id.* at p. 220, footnote omitted.) The Court's only consideration was the proper result once a sentencing factor was found invalid but evidence had been *properly admitted* under that factor. (See *id.* at pp. 220-221 ["The issue we confront is the skewing that could result from the jury's consideration as aggravation *properly admitted evidence* . . .," italics altered].)

Here, appellant is not asserting that factor (b) was legally invalid. The question here is a purely factual one. Even if the Court finds the facts supporting appellant's criminal threat were insufficient, there were four other properly-admitted offenses supporting factor (b). This factor was thus valid and properly considered by the jury. The Supreme Court in *Sanders* did not address the situation of a validly-considered sentencing factor, for which a small part of the support may have been inadmissible. It is thus inapposite.

Because there is no reasonable possibility that evidence of the criminal threats incident affected the verdict, any possible error in admitting it was harmless beyond a reasonable doubt.

VII. THIS COURT HAS REPEATEDLY REJECTED APPELLANT'S CHALLENGES TO THE DEATH PENALTY STATUTE AND INSTRUCTIONS

As appellant concedes (AOB 150-166), this Court has rejected each of the following claims. He has not presented any argument to compel the Court to reconsider any of these issues.

A. Section 190.2 Is Not Impermissibly Broad

Section 190.2, which sets out the special circumstances that render a defendant eligible for the death penalty, adequately narrows the class of eligible offenders in conformity with the requirements of the Eighth and Fourteenth Amendments. (See AOB 150-151; *People v. Lee* (2011) 51 Cal.4th 620, 653-654; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Riggs*, *supra*, 44 Cal.4th at p. 329; *People v. Salcido* (2008) 44 Cal.4th 93, 166.)

B. Section 190.3, Subdivision (a), Is Not Applied So Broadly as to Violate Appellant's Constitutional Rights

Section 190.3, subdivision (a) ("factor (a)"), allows the trier of fact, in determining penalty, to take into account: "(a) The 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." Appellant contends the death penalty is invalid because factor (a), as applied, allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 151-152.) Specifically, appellant contends that factor (a) has been applied in a "wanton and freakish" manner such that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (AOB 152.) However, the United States Supreme Court has specifically found factor (a) constitutionally valid.

In *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], the Court stated: "We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." (*Id.* at p. 976.) This Court has been presented with ample opportunity to revisit this issue since the *Tuilaepa* holding but has consistently rejected the claim and followed the United States Supreme Court's ruling. (See, e.g., *People v. Lee*, *supra*, 51 Cal.4th at p. 653; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Parson*, *supra*, 44 Cal.4th at p. 369.)

C. The Death Penalty Statute and Instructions Adequately Set Forth the Appropriate Burden of Proof

1. The Jury Need Not Make Findings Beyond a Reasonable Doubt

This Court has held that the failure to require that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt, to require that the jury find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty does not violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 152-154; *People v. Lee*, *supra*, 51 Cal.4th at p. 651; *People v. Parson*, *supra,* 44 Cal.4th at p. 370; *People v. Salcido*, *supra*, 44 Cal.4th at p. 167.) This Court has also expressly found that the United States Supreme Court's decisions interpreting the Sixth Amendment's jury trial guarantee (*Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *Blakely*

v. Washington (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]) do not alter this conclusion or affect California's death penalty law. (*People v. Lee*, *supra*, 51 Cal.4th at pp. 651-652; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228; *People v. Salcido*, *supra*, 44 Cal.4th at p. 167.)

2. No Burden of Proof Was Required, and the Jury Need Not Be Instructed That There Was No Burden of Proof

Appellant asserts that some burden of proof is required at the penalty stage and, if not, the jury should be so instructed. (AOB 155-156.) This Court has determined that a burden of proof as to penalty is not required and its absence does not violate the Eighth or Fourteenth Amendments. As this Court explained in *People v. Carpenter* (1997) 15 Cal.4th 312:

> [T]he sentencing function is inherently moral and normative, not factual; the sentencer's power and discretion under [California's death penalty law] is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances. [Citation.] Because of this, instructions associated with the usual fact-finding process – such as burden of proof – are not necessary. [Citations.]

(*Id.* at pp. 417-418, internal quotation marks and citations omitted.) In other words, "[t]here is no penalty phase burden of persuasion." (*People v. Smith* (2005) 35 Cal.4th 334, 370-371; *People v. Riggs*, *supra*, 44 Cal.4th at p. 329; *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 227.)

Accordingly, the trial court need not instruct the jury that there is no burden of proof. (*People v. Lee*, *supra*, 51 Cal.4th at p. 652 ["The lack of any burden of proof or persuasion as to penalty does not violate the Eighth or Fourteenth Amendment, and the trial court does not have to instruct the jury that there is no burden of proof or persuasion."]; *People v. Whisenhunt,*

supra, 44 Cal.4th at p. 227; *People v. Moon* (2005) 37 Cal.4th 1, 44; *People v. Blair, supra,* 36 Cal.4th at p. 753.)

3. The Jury Need Not Be Unanimous or Make Findings As to the Aggravating Factors or Unadjudicated Criminal Activity

Appellant claims that the jury should have been required to unanimously agree and make findings as to the aggravating factors that it relied upon in arriving at a death verdict. (AOB at 156-157.) Appellant further claims that unanimity was required for the prior unadjudicated crimes alleged. (AOB 157.) "Jury unanimity as to aggravating circumstances is not required." (*People v. Lee*, *supra*, 51 Cal.4th at p. 652, citing *People v. Whisenhunt, supra,* 44 Cal.4th at p. 227, and *People v. Moon, supra,* 37 Cal.4th at p. 43.) This Court has held that "'[t]he jury's reliance on unadjudicated criminal activity as a factor in aggravation under section 190.3, factor (b), without unanimously agreeing on its existence beyond a reasonable doubt, does not deprive a defendant of any rights guaranteed by the federal Constitution, including the Sixth Amendment right to jury trial.'" (*People v. Whalen* (2013) 56 Cal.4th 1, 91, quoting *People v. Clark*, *supra*, 52 Cal.4th at p. 1007.)

4. The Instructions Were Not Impermissibly Vague and Ambiguous

Appellant asserts that the term "so substantial" in the following instruction was impermissibly broad, vague, directionless, and ambiguous: the jurors must be "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (AOB 158-159, quoting 14CT 3596.) This Court has held that the phrase "so substantial" in this context is not unconstitutional. (*People v. Lee*, *supra*, 51 Cal.4th at p. 652; *People v.*

Moon, *supra*, 37 Cal.4th at pp. 42-43; *People v. Boyette* (2002) 29 Cal.4th 381, 465.)

5. The Instructions Properly Informed the Jury to Determine If the Death Penalty Was Warranted

Appellant asserts that CALJIC No. 8.88 did not inform the jury that its ultimate determination was whether the death penalty was appropriate, rather than whether it was warranted. (AOB 159.) The instruction's use of the term "warrants" in this context has been repeatedly upheld. (*People v. Lee*, *supra*, 51 Cal.4th at p. 652; *People v. Moon*, *supra*, 37 Cal.4th at pp. 42-43; *People v. Boyette*, *supra*, 29 Cal.4th at p. 465.)

6. The Instructions Need Not Require the Jury to Return a Life Sentence If the Mitigation Outweighed Aggravation

Appellant claims that the jury should have been instructed that it must return a verdict of life without the possibility of parole if it found that the mitigating circumstances outweighed the aggravating ones. (AOB 160.) However, this Court has held that the instructions are "not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without the possibility of parole." (*People v. Lee*, *supra*, 51 Cal.4th at p. 652; *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Dennis* (1998) 17 Cal.4th 468, 552.)

7. Instructions Need Not Provide That There Was No Burden of Proof or Unanimity Requirement for Mitigating Circumstances

Appellant asserts that the instructions were constitutionally required to inform the jury that there was no standard of proof or unanimity requirement for mitigating circumstances. (AOB 161-162.) This Court has held that the trial court need not instruct jurors that their findings regarding mitigating circumstances need not be unanimous or proven beyond a

reasonable doubt. (*People v. Valdez* (2012) 55 Cal.4th 82, 179; *People v. Lewis*, *supra*, 43 Cal.4th at p. 534.)

8. The Jury Need Not Be Instructed on the Presumption of Life

Contrary to appellant's assertion (AOB 162-163), "[t]he death penalty statute is not deficient by failing to require that the jury be instructed on the presumption of life, nor was there any error because the jury was not so instructed." (*People v. Johnson* (2015) 61 Cal.4th 734, 786; *People v. Young* (2005) 34 Cal.4th 1149, 1233.)

D. Written Findings Were Not Required

Appellant claims that the failure to require written findings during the penalty phase violated the Sixth, Eighth, and Fourteenth Amendments as well as his right to meaningful appellate review. (AOB 163.) However, California's death penalty statute is not unconstitutional in failing to require the jury to make written findings concerning the aggravating factors it relied upon, nor does it fail to provide a procedure permitting meaningful appellate review. (*People v. Lee*, *supra*, 51 Cal.4th at p. 653; *People v. Parson*, *supra*, 44 Cal.4th at p. 370; *People v. Riggs*, *supra,* 44 Cal.4th at p. 329; *People v. Salcido*, *supra*, 44 Cal.4th at p. 166.)

E. The Instructions on Mitigating and Aggravating Factors Were Proper

1. The Instructions Used Proper Restrictive Adjectives in the List of Potential Mitigating Factors

Appellant argues that California's death penalty law creates an impermissible barrier to consideration of mitigating evidence by precluding reliance on certain factors unless such factors are "extreme" and/or "substantial," in violation of the federal Constitution. (AOB 163, citing § 190.3, subds. (d) & (g), CALJIC No. 8.85, and 14CT 3593.) This Court has

repeatedly rejected the claim that the use of the terms "extreme" or "substantial" in section 190.3 improperly limits the jury's consideration of mitigating evidence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Parson*, *supra,* 44 Cal.4th at pp. 369-370; *People v. Williams*, *supra*, 43 Cal.4th at p. 649; *People v. Thornton*, *supra*, 41 Cal.4th at p. 469.)

2. Inapplicable Sentencing Factors Need Not Be Deleted

Appellant claims that the trial court erred in failing to delete irrelevant mitigating factors. (AOB 164.) But the trial court need not delete any inapplicable mitigating factors from CALJIC No. 8.85. (*People v. Contreras* (2013) 58 Cal.4th 123, 173; *People v. Cook* (2006) 39 Cal.4th 566, 618.) This Court has found that "deletion of any potentially mitigating factors from the statutory list could substantially prejudice the defendant. We believe that the jury is capable of deciding for itself which factors are 'applicable' in a particular case." (*People v. Ghent* (1987) 43 Cal.3d 739, 776-777.)

3. No Instruction Was Required Stating That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

Contrary to appellant's contentions (see AOB 164-165), the trial court was not constitutionally required to inform the jury that certain sentencing factors are relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not unconstitutionally suggest that the absence of such factors amounted to aggravation. (*People v. Lee*, *supra*, 51 Cal.4th at p. 653; *People v. Parson*, *supra*, 44 Cal.4th at p. 369; *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 228.)

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F. The Court Need Not Conduct Intercase Proportionality Review

Both the United States Supreme Court and this Court have held that intercase proportionality review is not constitutionally required. (AOB 165; *Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Lee*, *supra,* 51 Cal.4th at p. 651; *People v. Parson*, *supra*, 44 Cal.4th at pp. 368-369; *People v. Riggs*, *supra*, 44 Cal.4th at p. 330.)

G. California's Death Penalty Statute Does Not Violate Equal Protection by Treating Capital and Noncapital Defendants Differently

Appellant argues that the absence at the penalty phase of a burden of proof, a requirement that jurors agree on what aggravating circumstances apply, and a statement of reasons for a death sentence provides greater protection to noncapital defendants than to capital defendants and violates equal protection. (AOB 165-166.) But this Court has repeatedly rejected this contention, finding that the two categories of defendants are not similarly situated. (*People v. Lee*, *supra*, 51 Cal.4th at p. 653 ["The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two categories of defendants are not similarly situated."], citing *People v. Redd*, *supra*, 48 Cal.4th at p. 758, and *People v. Martinez*, *supra*, 47 Cal.4th at p. 968; *People v. Riggs*, *supra*, 44 Cal.4th at p. 330.)

H. International Norms of Humanity and Decency Do Not Render Appellant's Sentence Unconstitutional

Finally, contrary to appellant's assertion (see AOB 166), "[t]he alleged inconsistency between regular imposition of the death penalty and international norms of human decency does not render that penalty cruel and unusual punishment under the Eighth Amendment [citation]; nor does 'regular' imposition of the death penalty violate the Eighth Amendment on

the ground that '"[i]nternational law is a part of our law"' [citation]." (*People v. Lee*, *supra*, 51 Cal.4th at p. 654; *People v. Salcido*, *supra*, 44 Cal.4th at pp. 168-169; *People v. Watson*, *supra*, 43 Cal.4th at p. 704.) To the extent that appellant argues California's use of the death penalty violates international law, this Court has rejected that contention. (*People v. Lee*, at p. 654; *People v. Parson*, *supra*, 44 Cal.4th at p. 372; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1332.) This Court has likewise rejected the application of *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, in this context. (*People v. Mai* (2013) 57 Cal.4th 986, 1058.)

VIII. THERE WERE NO ERRORS AT THE GUILT OR PENALTY PHASE REQUIRING REVERSAL OF THE DEATH JUDGMENT

Appellant contends the cumulative impact of the errors of state and federal law that occurred at the guilt and penalty phases of his trial rendered the trial fundamentally unfair and its results unreliable, requiring reversal of the judgment. (AOB 167-168.) Because there was no error, there is no cumulative impact of errors in this case. (*People v. Lee*, *supra*, 51 Cal.4th at p. 657; see also *People v. Riggs*, *supra*, 44 Cal.4th at p. 330 ["In those few instances in which we have found error or assumed the existence of error, we have concluded that any prejudice was minimal or nonexistent. In combination, these errors do not compel the conclusion that defendant was denied a fair trial, either."].) Appellant was entitled to a fair trial, not a perfect one. He received a fair trial, and therefore, his claim of cumulative error should be rejected. (*People v. Welch* (1999) 20 Cal.4th 701, 775.)

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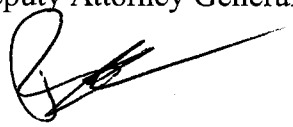
CONCLUSION

Accordingly, respondent respectfully asks that the judgment of conviction and sentence of death be affirmed.

Dated: November 13, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General



BLYTHE J. LESZKAY
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 41,499 words.

Dated: November 13, 2015

KAMALA D. HARRIS
Attorney General of California

BLYTHE J. LESZKAY
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: *People v. Turner*

No.: **S154459**

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 November 13, 2015, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Mary K. McComb
Supervising Deputy State Public Defender
Office of the State Public Defender
770 L Street, Suite 1000
Sacramento, CA 95814

Robert Grace
Deputy District Attorney
Los Angeles County District Attorney's Office
18000 Foltz Criminal Justice Center
210 West Temple Street, 18th Floor
Los Angeles, CA 90012

The Honorable William R. Pounders
Assigned Judge
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street
Los Angeles, CA 90012-3210

Maria Elena Arvizo-Knight
Death Penalty Appeals Clerk
Los Angeles County Superior Court
Criminal Appeals Unit
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street, Room M-3
Los Angeles, CA 90012

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

Governor's Office
Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

On November 13, 2015, I caused **eight** copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **OnTrac, Tracking # B10313641570.**

On November 13, 2015, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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 November 13, 2015, at Los Angeles, California.

Marianne A. Siacunco
Declarant


Signature

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