In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CARL EDWARD MOLANO,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S161399

Alameda County Superior Court Case No. H038118
The Honorable Allen Hymer, Judge

RESPONDENT'S BRIEF

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STATEMENT OF APPEALABILITY

This appeal is an automatic appeal following a judgment of death pursuant to Penal Code section 1249, subdivision (a).[1]

INTRODUCTION

On June 15, 1995, appellant raped and strangled to death 34-year-old Suzanne McKenna in her home using her panties, bra, and a shoestring. The next day, McKenna's belongings were found on the street and friends went to McKenna's apartment to check on her welfare. A man matching appellant's description was inside McKenna's kitchen and fled upon their approach. He was not identified nor apprehended. McKenna's nude body was found on the floor of her bathroom.

The case went cold until May of 2001, when appellant's 13-year-old son Robert Molano and ex-wife Brenda Molano came forward implicating appellant in McKenna's killing. The Molanos were neighbors of McKenna. On the day McKenna's body was discovered, Robert described finding appellant hiding in a shed behind their apartment. Appellant told his son he would kill him if he told anyone where he was or what he was doing. Brenda relayed that on the night McKenna was murdered, appellant did not come home until the next morning. Appellant told Brenda that he had been partying with a "neighbor lady" and had seen another man kill her. Appellant told Brenda that the man would kill them if appellant reported the crime. Appellant left again on the day McKenna's body was discovered. When he returned to their apartment he told Brenda that he had gone back to McKenna's apartment to remove any evidence and was seen while in the apartment. Scared, appellant cut his hair, shaved his beard and mustache,

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

and drove with Brenda to the Marina to get rid of the clothes he was wearing.

After hearing from Robert and Brenda, police took DNA samples from Brenda and appellant. DNA recovered from a shoe left at the scene, identified Brenda as a contributor. DNA recovered from the shoestring left around McKenna's neck identified appellant as a contributor.

In speaking with police, appellant admitted having sex with McKenna and strangling her to death, but claimed the sex was consensual and that the strangulation had been done at McKenna's request, as part of "rough sex," and that her death had been accidental.

Evidence that appellant had previously raped and attempted to strangle two other women was admitted at trial. In addition, evidence that appellant had previously attempted to strangle his ex-wife was admitted as well.

During the penalty phase of the trial, the prosecution relied on the facts of the crime and the evidence of appellant's two prior rapes and prior spousal battery on his former wife as well as the impact of McKenna's death on her family.

Appellant presented the testimony of several friends and family members describing his fatherless childhood. Seven correctional officers testified regarding appellant's work quality. A jail chaplain testified to his spiritual life. A forensic psychologist presented his social history. A neuropsychologist with specialties in brain dysfunction and cognitive impairment testified regarding his impaired attention and executive functioning. An expert in prison security testified that prisoners with sentences of life-without-possibility-of -parole do not receive conduct credits and do not go outside of the prison walls.

STATEMENT OF THE CASE

On February 18, 2005, the Alameda County District Attorney filed an information charging appellant Carl Edward Molano with one count of murder in violation of Penal Code section 187, subdivision (a), and further alleged that the offense was a serious felony within the meaning of § 1192.7, subdivision (c), and a violent felony within the meaning of § 667.5, subdivision (c). (4 CT 931.) The information further alleged as a felony-murder special circumstance that the murder was committed while appellant was engaged in the commission of the crime of rape (§190.2, subd. (a)(17)(C)). (4 CT 932.)

It was further alleged that appellant had suffered two prior forcible rape convictions (§261, subd. (2)), and one prior conviction for inflicting corporal injury to a spouse or cohabitant with great bodily injury. (§273.5, subd. (a).) (4 CT 932-934.)[2] Finally, the information alleged three prior prison terms (§ 667.5, subd. (a)); and that each prior conviction constituted a third strike offense. (§1170.12, subd. (c)(2)(A); 667, subd. (e)(2)(A), as well as a serious felony (§667, subd. (a)(1)). (4 CT 936, 939.)

On April 5, 2005, appellant entered a plea of not guilty and denied the prior conviction allegations. (4 CT 941-943, 947.)

On June 16, 2005, appellant moved to set aside the information on the grounds that the magistrate had erroneously admitted testimony of his statements to investigating officers in violation of *Miranda v. Arizona*.[3] (4 CT 950-971.) On August 5, 2006, the court heard and denied the motion. (4 CT 1024.)

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[2] Appellant waived jury trial on the three prior conviction allegations. (19 RT 2859.)

[3] *Miranda v. Arizona* (1996) 384 U.S. 336.

On August 20, 2007, the jury found appellant guilty of murder in the first degree and also found true the special circumstance allegation. (7 CT 1627.) On October 15, 2007, the jury returned a verdict fixing the penalty at death. (8 CT 1757-1758.)

On February 21, 2008, appellant filed a motion for a new trial. (8 CT 1867-1892.) On February 29, 2008, the court denied the new trial motion as well as the automatic motion for modification of the death penalty. (§190.4.) (9 CT 2079.)

On February 29, 2008 the court sentenced appellant to death. The court also imposed a $10,000 restitution fine (§1202.4, subd. (b)), and a $20 court security fee (§1465.8). (9 CT 2080.) Appellant was awarded custody credits of 1,797 days. (9 CT 2080.)

STATEMENT OF FACTS

I. THE GUILT PHASE

A. The Murder of Suzanne McKenna in June 1995

In June 1995, Suzanne McKenna was a 34-year-old woman living by herself in a small cottage located on Vallejo Street in Hayward. (12 RT 1674.) At the time, Suzanne was working as a waitress at Carrow's restaurant in Castro Valley. (12 RT 1676.)

On June 15, 1995, in the early afternoon, neighbor Paulette Johnson, knocked on the door to Suzanne McKenna's cottage to retrieve some houseplants. McKenna answered the door, let Johnson in, but had to leave quickly to get to work. This was the last time Johnson saw McKenna alive. (15 RT 2165-2166.)

The next day, June 16, 1995, at approximately 11:30 a.m., Alameda County waste collector Robert Ocon found an empty purse, a plastic shopping bag containing a glass bottle, and an old cigar box inside a curbside bin of yard clippings near an apartment complex on Vallejo Street.

(15 RT 2091-2092, 2095, 2097, 2100.) Before emptying the bin, Ocon placed the other items in the purse and left the purse on top of the compost bin. (15 RT 2101.) Later that day, ten-year-old Ashton Sheets was playing hide and seek with other neighborhood children when they found the purse, some photographs, and a glass bottle containing amber liquid near the bins. (12 RT 1661-1663.)

On the same afternoon, between approximately 1:30 and 2:00 pm., Victor Perry spotted a wallet lying on the ground on Western Boulevard, in close proximity to McKenna's address. (11 RT 1628-1629.) Perry found the name "Suzanne McKenna" on a number of items inside the wallet and decided to try and contact the owner. Perry reached McKenna's sister, Patti, and explained what he had found. (11 RT 1631-1634.)

At approximately 3:00 p.m., after being unable to reach McKenna, Patti attempted to contact McKenna's best friend, Judy Luque, concerned for McKenna's welfare. Judy's husband, Jeff Luque, took the call and relayed the concern to Judy when she returned home. (12 RT 1673, 1682, 1741.) After Judy Luque attempted unsuccessfully to reach McKenna several times by phone, she asked her husband to drive her to McKenna's cottage. (12 RT 1681-1683, 1742, 1760.)

Judy and Jeff arrived at McKenna's cottage at approximately 3:40 p.m.. They first noticed that McKenna's brown Mazda was parked in front of her cottage in its normal location. (12 RT 1684-1685, 1691.)

Judy went to the front door and knocked but there was no response. (12 RT 1685-1686.) She then went to the side door of the cottage located off the kitchen. Judy noticed that the bathroom window was closed. (12 RT 1687.) The kitchen door was near the bathroom window, but the blinds on the kitchen door were closed, and she could not see into the kitchen. (12 RT 1688.)

Judy returned to the front of the house without knocking on the side door. (12 RT 1688.) Judy again knocked on the front door, and noticed that the kitchen blinds were open slightly. She peered through the blinds and saw a man in McKenna's kitchen. (12 RT 1689-1690.) The man was a heavyset Mexican with brown hair dressed in a blue Pendleton shirt. (12 RT 1691.) The two made eye contact. (12 RT 1694.) Judy later identified appellant as the man she saw in the kitchen. (12 RT 1707-1711.) Judy observed appellant trying to open the back door, which she knew from experience to be difficult. (12 RT 1692.)

Shocked, Judy screamed to her husband Jeff that there was a man in McKenna's house. (12 RT 1692, 1746.) Jeff saw a man with a dark complexion, approximately 5'8" weighing 140-150, carrying something and walking quickly away from the cottage. (12 RT 1748.) Jeff shouted at him to stop and started chasing him. (12 RT 1749.) The pursuit was unsuccessful and Jeff lost sight of him. (12 RT 1750.) During the chase, Jeff came upon a neighbor pruning in his yard. (12 RT 1750-1751.) Jeff stopped to explain the situation to the neighbor when a little girl came out of a house and said that she had seen a man run across the driveway. (12 RT 1753.) Jeff and the neighbor followed the girl's direction but did not find anyone. (12 RT 1753.) On the way, Jeff found a pair of socks with individual toes draped over some bushes, later identified by Judy as belonging to McKenna. (12 RT 1706, 1754; 17 RT 2422.)

While Jeff pursued the man in the Pendleton shirt, Judy returned to the back door of McKenna's house and looked into the kitchen. Garbage lay all over the floor. (12 RT 1696.) Judy entered the cottage and detected the smell of feces. She walked into the main living room, observing it to be ransacked. (12 RT 1698.) After yelling for McKenna and hearing no response, Judy went back outside. (12 RT 1699.)

Judy spoke to a neighbor and had them call 911. Judy described the man she saw in McKenna's kitchen to the dispatcher. (12 RT 1701.) While waiting for sheriff deputies to arrive, a little boy approached and told Judy he had found a purse down the street in a dumpster. (12 RT 1701.) After they talked, the boy retrieved the purse, which Judy identified as McKenna's. (12 RT 1702.) During the course of their friendship, Judy knew McKenna to drink alcohol and to occasionally use methamphetamine. (12 RT 1712-1713.)

Alameda Sheriff's Deputy James Powell was on patrol and responded to the dispatch of a possible burglary in progress at McKenna's cottage. (12 RT 1771-1775.) When Powell arrived he was met by Alameda Deputy Sheriff Nelson. The two searched unsuccessfully for the man seen by the Luques fleeing from McKenna's apartment. (12 RT 1704, 1777.) When they were unable to locate the suspect, they searched McKenna's cottage. Once inside, they observed that the kitchen and living room appeared to have been ransacked. They found McKenna's body on the bathroom floor. (12 RT 1782.) Rigor had set in; her body was nude; her face was purple; and her bra, a pair of panties, and a leather string were wrapped around her neck. (12 RT 1784, 1803, 13 RT 1900.)

Sergeant Casey Nice arrived on the scene with his partner Charles Greene, approximately thirty minutes later. The search for the man seen leaving McKenna's cottage was still in progress. (16 RT 2305.) Nice took over as the lead investigator while Greene began to canvass the neighborhood. (12 RT 1788; 16 RT 2306, 17 RT 2306, 2421-2422.) Nice assigned Powell to be the field evidence technician. (12 RT 1781.) Nice contacted the crime lab and criminalist Kurtis Smith came to the scene. (16 RT 2108.)

Inside the cottage a feces stain was observed on the bathroom floor, with an imprint of a Reebok tennis shoe. (12 RT 1785,1867.) The feces

trailed from the living room to the bathroom (12 RT 1803-1805.) Deputy Powell also located a tin of individually packaged condoms. (12 RT 1806.) He recovered one empty condom wrapper from the seat of the couch, one single size tube of Aqualube, and one two-ounce tube of Pro Personal Lubricant. (12 RT 1806, 180.) No latent fingerprints were recovered. (13 RT 1870.) No prints were recovered from the empty condom wrapper or either container of lubricant. (13 RT 1876-1877.) A partial print was found on the doorjamb of the bathroom. (13 RT 1874.) Another partial print was recovered from an Early Times whiskey bottle. (13 RT 1892-1893.) One fingerprint was recovered from the front doorknob. (16 RT 2338.) One black Reebok tennis shoe was found on the ground in front of McKenna's cottage. (12 RT 1792, 1794.) Another matching tennis shoe was found near trash cans. (12 RT 1795.) At approximately 11:00 p.m., Sergeant Greene called the coroner's office, and a coroner's deputy came for McKenna's body. (13 RT 1831; 17 RT 2430.)

B. The Autopsy

Dr. Clifford Tschetter performed an autopsy on McKenna's body. (13 RT 1896.) McKenna's body was nude, had a bra, a pair of panties, and a length of leather material wrapped around her neck. (13 RT 1901-1902.) The bra was loosely tied about the neck; the panties were very tight about the neck and crossed in the back. (13 RT 1901.) Underneath the panties and bra were abrasions and contusions corresponding with the width of the panties. (13 RT 1904.) The color of the contusions suggested that pressure had been applied to the front the neck. (13 RT 1904.) Also observed were several abrasions and contusions on her forehead, mouth, face, as well as on her right breast and shoulder. (13 RT 1900, 1904-1905.) Her face was darkly discolored suggesting strangulation. (13 RT 1905.) She suffered petechial hemorrhages about her eyes, indicating that pressure had been applied to the jugular vein for three to four minutes until McKenna first

became unconscious and then died. (13 RT 1906, 1914, 1916.) The contusions on her mouth were consistent with multiple blows to the face with a closed fist. (13 RT 1906-1907.) She also had abrasions on her buttocks, consistent with being dragged across a surface on her back. (13 RT 1909.)

Dr. Tschetter took swabs from McKenna's vagina, anus and mouth for later testing. (13 RT 1911.) He also removed and examined the vagina and anus and found no evidence of trauma. (13 RT 1910, 1917.) Physician Assistant Lauri Paolinetti qualified as an expert in the examination of adult victims of sexual assault. Paolinetti testified that approximately 40% of rape victims do not suffer genital trauma. (18 RT 2580, 2587, 2599.) Paolinetti opined that genital injury is not an inevitable consequence of a sexual assault. (18 RT 2607.)

A toxicology screen indicated that McKenna had a blood alcohol level of .15% and 40mg/L of methamphetamine in her system. (13 RT 1919, 1923.) Dr. Tschetter opined that neither the drugs nor the alcohol in her system were sufficient to have rendered her unconscious or unable to resist. (14 RT 1929.)

The cause of death was determined to be Asphyxiation due to strangulation. (13 RT 1913.) Dr. Tschetter explained that it takes approximately three to four minutes to render someone unconscious by strangulation and another three or four minutes of continuous pressure to thereafter cause their death. (13 RT 1915.)

C. The Investigation Continues

More of McKenna's personal items were discovered in the days following the murder. Josef Kapper, the owner of the apartment building located at 21634 Vallejo Street, found a cigar box behind the mailboxes at that address. (12 RT 1650, 1654.) Inside the box, Kapper found several items, including an employee identification card. (12 RT 1655.) Believing

that there might be a connection between the cigar box and the murder that had occurred in the neighborhood, Kapper contacted the Sheriff's Department. (12 RT 1654.) Ryan Silcocks, then a civil technician for the Sheriff, took possession of the box and its contents, including McKenna's social security card, and turned them over to Sergeant Nice. (12 RT 1956.) Detective Greene contacted Victor Perry, took a statement from him and took possession of McKenna's billfold and the documentation within that Perry had found on the street. (17 RT 2425.) Among the items taken into evidence at the scene were the two black Reebok tennis shoes, papers, photographs, McKenna's driver's license, the socks that Jeff Luque found on the bushes, and McKenna's purse. (12 RT 1789-1800.) The following week, a crime scene technician returned to McKenna's apartment to dust the bathroom for latent fingerprints, and found two partial sets of prints in the bathtub. (16 RT 2340-2341.)

Nice interviewed Judy and Jeff Luque in the course of his follow-up investigation. He obtained blood, hair, and fingerprint samples in order to assist the crime lab's effort to eliminate suspects. (16 RT 2312.) The Luques helped Nice develop an additional list of people to interview. (16 RT 2312.) After talking with neighbors Paulette Johnson and Carla Fleming, Nice interviewed and obtained fingerprint, hair, and blood samples from Roland Lemmons, Richard Castro, Bill Lewis, and Michael Griffiths. (16 RT 2313-2315.) Appellant was never identified to police as a possible suspect. (15 RT 2142.)

On June 22, 1995, Nice had a conference with several criminalists from the Alameda County Sheriff's Department crime lab to discuss the evidence and investigatory priorities. (16 RT 2315; 17 RT 2444-2445.) Nice wanted the lab to determine whether any of the fingerprints, hair samples, or blood samples obtained at the scene of the crime, could be identified. (16 RT 2316-2317.) Nice also asked criminalist Sharon Smith

to examine various bodily fluid samples from McKenna's autopsy. (16 RT 2317.) Smith began examination and analysis the next day. (17 RT 2443-2447.) In 1995, the lab did not have the ability to make hair or fecal comparisons or to do DNA testing. (17 RT 2446-2449.) Smith conducted typing analysis on McKenna's blood and on the reference samples taken from William Lewis, Richard Castro, and Michael Griffiths. She also dried and froze a patch of McKenna's blood. (17 RT 2448, 2465.) Hair samples from McKenna's leg, hairbrush, and left middle finger, as well as fingernail clippings, were not examined or analyzed. (17 RT 2449-2451.) Smith examined McKenna's underpants and noted that they were not torn. (17 RT 2451-2452.) She also collected some hairs from the underpants and tested them for the presence of blood and semen. (17 RT 2452.) The underpants tested negative for semen and inconclusively for blood. (17 RT 2452.) Smith also examined the red bra, collected hairs and fibers found on it, and observed blood and apparent fecal stains. (17 RT 2454.) Smith examined the leather strap, and noted that it had hairs wound tightly around it. (17 RT 2456.) Three of the hairs had root ends. (17 RT 2457.) Smith tested a swab taken from the toilet seat at McKenna's cottage. The swab tested positive for human blood, and using genetic marker typing, Smith compared the swab with the reference samples to conclude that both McKenna and Michael Griffith were potential donors. (17 RT 2458.) Both shoes found near the scene tested negative for the presence of human blood. (17 RT 2460-2461.) Smith also found sperm present in both the vaginal swab and slide. (17 RT 2462-2463.) No semen was found on the oral or rectal swabs or slides.

In December of 1995, Smith prepared reference blood samples that were provided to the FBI in early January. (13 RT 1970; 16 RT 2318; 17 RT 2467.) When it could not be determined that any of these samples were present at the crime scene, the case went cold. (14 RT 2023.)

D. Brenda and Robert Molano Come Forward: The Case Reopens

On May 17, 2001, nearly six years after McKenna's death, appellant's wife, Brenda Molano, took their 13-year-old son, Robert Molano, to the Eden Township Substation of the Alameda County Sheriff's Department to make a statement. (16 RT 2191, 2192, 2222, 2345.) A few days later, Brenda returned and made a statement of her own. (16 RT 2223.)

Brenda and appellant married in March 1995. They had two children, Christopher and Robert. (16 RT 2191.) In June of 1995, they were living on Vallejo Avenue in Hayward. On the afternoon of June 16th 1995, Brenda was contacted at home by deputy sheriffs and told to remain inside as there was a neighborhood search in progress for an individual who had been spotted in a neighboring apartment where someone had been killed. (16 RT 2194.) Appellant had not come home the previous night and was not present when the officers came by. (16 RT 2196.) Brenda had not seen appellant since sometime between 6 and 7 that morning. (16 RT 2194.) When Brenda saw appellant that morning he appeared nervous and did not have on any shoes. Appellant admitted that he had been "over the fence" at a neighbor's place. (16 RT 2199.) Brenda had seen appellant sitting on the porch of one of the cottages several times on her way home from work. (16 RT 2200-2202.) Appellant told Brenda that he had spent the night with one lady and another man in her cottage, partying and drinking. (16 RT 2206.) He claimed the lady and the man got into an argument and he witnessed the man kill the lady. (16 RT 2203.) Appellant told Brenda the man knew their family and threatened to kill them if he went to the police. Appellant was afraid. (16 RT 2205.) Within 15 minutes, appellant got another pair of shoes from the apartment and left. (16 RT 2207.) Upset, Brenda did not go to work and remained at home. She did not see appellant again until two or three hours after the sheriff's deputy came to the apartment. (16 RT 2208,

2236.) Appellant was wearing a t-shirt, jeans, and a blue with red and white striped Pendleton shirt. (16 RT 2209.)

When appellant returned, he told Brenda that he had gone back to the apartment to wipe away his fingerprints. Appellant believed the lady's brother had come in while he was there and had seen him. (16 RT 2210.) In response, appellant left through the bathroom window and ran. (16 RT 2210.) Worried that he would be identified, appellant took off his clothes, cut his hair, and shaved off his mustache with a barber kit in the house. (16 RT 2211, 2213.) Appellant wanted to get rid of the jacket he had been wearing. He and Brenda drove to the San Leandro Marina and sank the jacket in the water. (16 RT 2213.) The two never spoke more about that day. (16 RT 2215.)

The next year, on June 7, 1996, appellant assaulted Brenda in their home, twice strangling her until she became unconscious. (16 RT 2215-2222.) As a result, appellant returned to prison, and in 1999, Brenda sought a divorce. (16 RT 2222.)

In May of 2001, Brenda and appellant's son, Robert, approached his mother to tell her about an encounter he had with appellant in the summer of 1995 when they lived on Vallejo Street. (16 RT 2274.) Robert told Brenda that he wanted to take this information to the police. (16 RT 2275.)

Robert was seven years old in June of 1995. (16 RT 2251.) In the early afternoon of June 16, 1995, Robert was playing outside with his friends when he saw his father jogging from the area of the neighboring cottages toward the rear of the Molano's apartment complex. (16 RT 2254-2256.) Approximately 20 minutes later, Robert and his friends became aware of the commotion associated with the crime scene and went to see what was happening. (16 RT 2253, 2256.) After a while, they grew bored, and Robert went to the small storage unit behind his apartment to get his bicycle. (16 RT 2267, 2261-2262.) As he opened the door of the unit,

Robert was surprised to discover appellant, sweating and holding a white-handled barbeque fork. (16 RT 2264-2265.) Appellant told Robert that he would kill him if he told anyone where appellant was or that he had seen appellant do anything. (16 RT 2268.) Scared, Robert left the storage unit and returned to his friends. (16 RT 2269-2270.) Robert told no one except his 9-year-old brother Christopher. (16 RT 2269, 2293.)

After hearing Robert's account of the encounter with appellant on June 16, 1995, Brenda no longer believed that appellant had simply witnessed the lady being killed. A few days later she gave the police a statement recounting appellant's statements and actions around the time of McKenna's murder. (16 RT 2223-2224.)

In response to the Molanos' statements, the case was reopened. On May 17, 2001, Kevin Hart, who had been the patrol sergeant on duty during the initial crime scene investigation, and had since become a sheriff's investigator, reviewed the reports generated after the interview of Robert and Brenda Molano. (16 RT 2343, 2345.) Based on the content of the two interviews, Hart sent items related to the McKenna investigation to Forensic Analytical Services, an independent criminalists laboratory in Hayward for DNA examination. (16 RT 2346, 2374-2375.) On May 17, 2001, the Reebok tennis shoes recovered from McKenna's backyard were sent to Forensic Analytic. (17 RT 2374-2378.) The next day, Hart had McKenna's white bra, red panties, and the leather strap with hairs found on McKenna's body, as well as the oral, rectal, and vaginal swabs taken during the autopsy, sent to the same lab for testing. (15 RT 2110-2113; 17 RT 2378-2379.)

Hart also compiled a "six-pack" photographic lineup, which included a photograph of appellant. On May 18, 2001, Judy Luque viewed the photo lineup at Eden Township Substation and identified the photograph of appellant as the person she saw in McKenna's cottage in June 1995. (12

RT 1707-1708; 16 RT 2348-2354.) Luque stated that she was "95-percent certain." (16 RT 2353.) Hart then re-interviewed Brenda Molano and Robert Molano. (16 RT 2354.) On July 3, 2001, Hart sent the cigar box, plastic picture wallet, and change purse that were found in McKenna's neighborhood to Forensic Analytic. (15 RT 2113-2117.)

On September 19, 2002, Sheriff's Deputy Edward Chicoine was assigned to conduct further investigation into the McKenna case. (14 RT 1966-1967.) Appellant was now the prime suspect. (14 RT 1968.)

In October of 2002, Chicoine met with DNA analyst Lisa Calandro from Forensic Analytical to review evidence that had previously been submitted to them and to arrange for them to compare existent evidence to newly obtained evidence. Specifically, to examine the DNA that had been found on the Rebok shoe found at the scene. (15 RT 1972.) On October 29, 2002, Chicoine obtained a DNA sample from Brenda Molano. (15 RT 1973.) On November 13, 2002, Chicoine submitted a DNA collection kit taken from Brenda Molano to Calandro. (17 RT 2381.) Calandro compared the human DNA extracted from the right Reebok tennis shoe with the reference same collected from Brenda Molano and concluded that the likelihood that the contributor was someone other than Brenda Molano was "astronomically remote." (20 RT 2932-2937.) Calandro also analyzed the leather cord that was found around McKenna's neck and concluded that there was evidence of two contributors of DNA, one of whom was McKenna. (20 RT 2943-2945.) Calandro analyzed the vaginal slide and swab collected during the autopsy, found very low numbers of sperm, and could not establish a DNA profile from the sperm. (20 RT 2950-2952, 2961.)

E. March 21, 2003: Appellant Is Interviewed at San Quentin

Chicoine obtained a search warrant to gain a sample of appellant's DNA. (14 RT 1979.) On March 21, 2003, Chicoine went to San Quentin State Prison, where appellant was incarcerated for the assault on his former wife, to serve the warrant which authorized him to collect a buccal swab, blood samples, and other items from appellant. (14 RT 1980.)

Chicoine also wanted to interview appellant about the McKenna murder. (14 RT 1984-1985.) He and his partner, Sergeant Dudek, arrived at San Quentin at approximately 9:00 a.m. (14 RT 1985.) They were both dressed in sports jackets, ties, and shirts. (14 RT 1986.) They read appellant his *Miranda* rights, after which he signed a written waiver form and verbally agreed to speak with them. The interview was tape-recorded and played for the jury. (14 RT 1988, 2005.)

Chicoine did not tell appellant they wanted to talk about the McKenna murder. Instead, they told appellant they were there to investigate sex offenders and wanted to talk to him about his "prior crimes" and "check him out" before he was released from prison. (14 RT 1989, 2028.) After spending about 45 minutes discussing appellant's past, including his family life, relationship with his mother, and his substance abuse problems, Chicoine asked appellant about his 1982 and 1987 rape cases, as well as and his 1996 spousal abuse case involving Brenda Molano. (14 RT 1990, 2029-2030.)

Chicoine then asked appellant if he recalled a girl being killed in his old neighborhood. (14 RT 1991.) Appellant became nervous, but after some hesitation admitted that he had partied with the girl. After being shown her driver's license he remembered her as "Sue." (3 RT 326-327.) Appellant told deputies that they had smoked crack and crank together. He also admitted, after changing versions a couple times, that he had sex with

her, days before her death. (14 RT 1991-1996.) Appellant described the one-time sexual encounter with McKenna, as a "hit and run." He said this happened one to three days before her death. Because of his prior criminal record, he was concerned that he would be suspected in her death. However, no one ever came to talk to him, although he told his parole officer at the time. (People's Pretrial Exh. 3A at pp. 36-38, 42 (transcript of audiotape); People's Exhibit 38 (audiotape).)

According to appellant, he and McKenna had sex in the living room of her studio apartment. Appellant described the sex as "basic" "oral sex" and "[r]egular missionary style sex." Appellant explicitly denied that it was "rough sex." (People's Pretrial Exh. 3A at pp. 39-40 (transcript of audiotape); People's Exhibit 38 (audiotape).) Appellant described the sex as consensual. He denied that any violence was involved. (14 RT 1996.)

Chicoine then asked appellant what he thought or had heard happened to McKenna and whether anyone else thought he had something to do with her death because of his history. Appellant laughed and indicated that everyone did, even his wife. When pressed on why his wife thought he was involved, appellant indicated that he had told his wife what happened. (14 RT 1996.) He then told detectives that he urgently needed to use the bathroom. (People's Pretrial Exh. 3A at pp. 41-44 (transcript of audiotape); People's Exhibit 38 (audiotape); 14 RT 1994.) Upon returning, he immediately indicated that he wanted to terminate the interview. (14 RT 1997-1998.)

Chicoine immediately terminated the interview and executed the warrant. The same day, appellant's reference samples were delivered to Forensic Analytical. (14 RT 2000.) Calandro compared appellant's DNA reference sample to the DNA found on the leather cord and concluded that appellant could not be excluded as a contributor. Calandro explained that a determination that someone "could not be excluded" means that the various

markers for that person are the same as those found on the item where the DNA was extracted. (20 RT 2944.) In comparing the DNA found on the cord with appellant's genetic profile, the possibility of selecting an unrelated individual with the same DNA would be 1 in 1.7 billion for African-Americans, approximately 1 in 100 million for Caucasians, and approximately 1 in 75 million for Hispanics. (20 RT 2948.)

F. March 31, 2003: Appellant is Arrested For Murder, Gives a Statement to Sheriff's Deputies, and Requests to Speak with the District Attorney's Office

On March 31, 2003, Dudek and Chicoine returned to San Quentin Prison with a warrant for appellant's arrest for the murder of Suzanne McKenna. (14 RT 2007.) They transported appellant to the Eden Township Substation. (14 RT 2009.) They brought him into an interview room with a covert camera and microphone system to take his statement. (14 RT 2009-2010.) During the interview, appellant requested to speak to the district attorney's office. The district attorney on homicide duty was contacted and came to the station. (14 RT 2011-2013.)

Appellant then told the deputies that on the day of her death, he and McKenna had partied together in her apartment: he had smoked rock cocaine while McKenna smoked methamphetamine. They were drinking and began to fool around sexually, "kissing on each other, feeling on each other, rubbing on each other." They took off each other's clothes, all the while kissing and biting, consensually. They had had sex the previous day and McKenna had asked appellant to come to her apartment. (People's Pretrial Exhibit 5, and 5A at pp. 13-14.) Although they had previously had sex, this time it went to a different level. (People's Pretrial Exhibit 5, 5A at p. 15.) Although their sex was consensual, it became rough when McKenna slapped and scratched appellant and asked him to choke her during intercourse. According to appellant: "She's on, she's on the

bottom, I'm on the top, we're having intercourse, and its like she starts to like hitting me, slapping me." (*Id.* at p. 15.) According to appellant, McKenna asked him to choke her with either her panties or her bra. Appellant complied, but McKenna told him it was not hard or tight enough. Appellant tried to make it harder and tighter. (*Id.* at pp. 16-17.)

When appellant realized McKenna was dead, he panicked. He dragged her into the bathroom and tried to clean up, using some bleach in the apartment. (*Id.* at pp. 18-19.) Appellant indicated that McKenna had "soiled herself." (*Id.* at p. 30.) Appellant told the officers that he fled the cottage, discarding his shoes, her purse, and liquor bottles from her apartment, as he ran. (*Id.* at pp. 21-22.) Appellant identified the shoes as black Nikes. He suggested that he took them off once outside because he had stepped in McKenna's feces. (*Id.* at p. 30.) Appellant admitted going through McKenna's belongings, looking for drugs. (*Id* at p. 31.)

The next day appellant returned to McKenna's apartment to clean up and make sure that he had not left anything. While in her apartment, somebody knocked, saw him, and he ran out the back door. In an effort to hide, he went to his shed behind his apartment, where his son Robert discovered him. (*Id.* at p. 22.)

Appellant initially denied that McKenna ever asked him to stop choking her or conveyed to him that he was hurting her. However, moments later, he twice acknowledged that "she may have" asked him to stop. (*Id.* at pp. 25, 26.) He denied raping her. (*Id.* at p. 25.) Appellant acknowledged that he knew then and now what he did was wrong. (*Id.* at p. 27.)

When Deputy District Attorney Andy Sweet arrived, appellant was again admonished and waived his *Miranda* rights. Appellant told Sweet that on the night McKenna died they both got "loaded, one thing led to another, we had sex and it was, uh, it was I couldn't say passionate, rough

sex you know. We were, I was biting, I guess she was biting, hitting, uh, we slapped each other, you know. She asked me to choke her, I didn't mean for it to happen, man." (People's Exhibit 6, 6A at p. 6.) Appellant stated that they had gotten high before and had sex once before. (*Id.* at p. 7.) He admitted having "rough" sex with other women occasionally, but stated that this was the first time he and McKenna had rough sex. (*Id.* at p. 8.) Appellant described "rough sex" as "biting, hitting, scratching, light bondage, S & M, uh, role playing, threats." (*Id.* at p. 8.) Appellant stated it was a mutual idea to have sex and that McKenna indicated her desire to have sex with him by taking off his clothes. According to appellant, "she was the aggressor that night." (*Id.* at p. 8.) He choked her during intercourse. He could not remember if he used the panties or her bra. He could not remember whether he ejaculated inside of her or if he used a condom. He did remember that she had condoms in the apartment. (*Id.* at p. 12.)

Appellant never had a sexual partner lose consciousness before. (*Id.* at p. 11.) He could not explain why this time he strangled McKenna to the point of death. (*Id.* at p. 17.) Appellant made clear that McKenna had no reason to fight him off, and that she seemed to be enjoying being strangled. (*Id.* at p. 18.) Appellant realized after they finished having sex that McKenna was not breathing any longer and was dead. (*Id.* at p. 9.) Appellant panicked and tried to clean up. He took money and jewelry from her apartment to get high, but could not recall how much. (*Id.* at p. 15.)

All three of appellant's interviews were played for the jury. (14 RT 2019; 15 RT 2080.)

Paulette Johnson, neighbor and friend of McKenna's, testified at trial that she knew appellant from the neighborhood. Johnson described an evening in which she was at home with McKenna baking pies and appellant came by. According to Johnson, upon seeing appellant at the door,

McKenna frowned, rolled her eyes and indicated that it was "the guy named Carl." (15 RT 2161-2162.) When appellant left, McKenna told Johnson that appellant had previously tried to "hit on her," that he was married, and she did not like him. (15 RT 2165.) Johnson never saw appellant in or around McKenna's cottage any other time. (15 RT 2176-2177.)

G. Other Crimes Evidence

1. The rape and choking of 19-year-old Anne Hoon

On March 29, 1982, Anne Hoon was living with her husband in a two-bedroom apartment on a Navy base in Long Beach. (19 RT 2862.) Hoon was 19 years old and had been married for less than a year. (19 RT 2860.) Hoon's husband Daniel was away on ship. (19 RT 2862-2863.) Appellant, an acquaintance of her husband's for approximately a month, appeared at her front door. (19 RT 2861, 2865, 2867.) Hoon had spent time with appellant and her husband a few times previously, knew appellant was married, and had twice before met appellant's wife. (19 RT 2866.) Hoon invited appellant inside, where they talked about Navy life for fifteen minutes. During their conversation, Hoon mentioned that she had owned a cat when she lived with her parents and would like another one. (19 RT 2868.) After talking, appellant left. Later that evening he returned carrying a small striped kitten. (19 RT 2868.) Hoon again invited him in and they played with the kitten in the living room. (19 RT 2869.) Hoon shared a photo album her husband had put together with appellant. (19 RT 2870.) Appellant put his arm around Hoon. Hoon felt uncomfortable, told appellant she was tired, and asked him to leave. (19 RT 2871.) Hoon went to find the cat, which was on her bed. Appellant followed from behind and grabbed her by the neck. Hoon could not breath. (19 RT 2872-2873.) Appellant talked into her ear and told her that if she screamed he would kill her. Appellant continued to choke Hoon. Appellant then ripped her shirt

open, tearing the material itself, all the while keeping one of his hands around her neck. (19 RT 2873-2874.) Appellant told Hoon to take off her pants and that if she screamed he would kill her. Terrified, Hoon did as appellant told her. (19 RT 2875.) Appellant pushed Hoon on to the bed and forced his penis into her rectum from behind. (19 RT 2877.) Appellant forcefully sodomized Hoon for approximately ten minutes. (19 RT 2878.) Appellant grabbed Hoon by the hair and forced her mouth on to his penis. (19 RT 2878.) As he did so, he threatened her several times telling her that he would kill her if she did not comply. (19 RT 2879.) While he forced her to orally copulate him, he said things like "do I do it as good as your husband?" and "Is this how your husband does it?" (19 RT 2880.) In between sexual assaults, appellant told Hoon that if she told her husband, he would kill him. He made Hoon promise him that he could come back any time he wanted to and that she would allow him. (19 RT 2883.) Appellant again choked Hoon with both hands, threatening her. Afterward he forcibly sodomized her a second time until he ejaculated. (19 RT 2880, 2884-2885.) Appellant again forced Hoon to orally copulate his penis. Afterward, he got dressed and used the bathroom. Before leaving her home, appellant threatened Hoon that he would kill her unless she promised that she would permit him to come again. (19 RT 2887.)

After appellant left, Hoon called her sister, and was taken to the hospital to be examined. She had noticeable injuries, bruising, and swelling around her neck. (19 RT 2913.) Hoon identified appellant's residence for the police. (19 RT 2889.) Although Hoon had no independent recollection at trial, at the time of the attack she reported appellant having forcible intercourse with her as well. (19 RT 2894.)

On March 30, 1982, appellant was arrested and, after being advised of the charges and of his *Miranda* rights, elected to give a statement to police. (19 RT 2824-2828, 2901-2902.) Appellant initially claimed that he had

known Hoon for a year and had been over at her house numerous times. He first claimed that, although she flirted with him, he had never had any type of sexual contact with her. (19 RT 2903.) He admitted going to her house the night of March 29, 1982. He stated that he had gone to the house to visit her husband and that the Hoon had flirted wit him. (19 RT 2903.) He described the conversation about the cat and admitted leaving and returning with a kitten for Hoon. He claimed he presented her with the cat and asked for a kiss. The cat went into the bedroom, Hoon followed the cat, and appellant followed her. Hoon told him to remove his clothes, and the two engaged in consensual intercourse. (19 RT 2908.) Afterward he left and was surprised he was being arrested for rape. He admitted having intercourse, Hoon orally copulating him, and sodomizing her, but claimed that she requested and inserted his penis inside of her rectum. (19 RT 2908.) In one version, appellant expressed his remorse at having had sex with his friend's wife. (19 RT 2908.)

When confronted with the injuries Hoon sustained, appellant remained silent for several minutes and then stated that he did not know what happened as he was very drunk. Appellant remembered only the sexual acts, and could not recall whether he used force against Hoon. He also did not remember threatening her. He concluded that if she said that he did, he probably did. (19 RT 2912.) Two weeks later, appellant pleaded guilty to forcible rape. (20 RT 2970; People's Exhibit 65.)

2. The rape, stabbing, and choking of Mabel Lovejoy

Sixty-year-old Mabel Lovejoy had know appellant since he was child living in Oakland. (18 RT 2542-2543; 2568.) On November 5, 1987, in the early morning hours, appellant appeared at her door. (18 RT 2544.) Lovejoy had been sleeping and was dressed in her night clothes. Appellant asked to come in and use the bathroom. When he returned from the bathroom he knocked Lovejoy to the ground, removed her undergarment

and raped her. (18 RT 2544-2546.) No words were spoken between them. (18 RT 2547.) After raping her on the floor they both stood up and Lovejoy saw that appellant had a knife in his hands. (18 RT 2548.) She pleaded for her life. She told appellant that he did not have to kill her because she would not report him. Appellant did not respond in words. He raised the knife to stab her. Lovejoy ducked and was stabbed in the back. (18 RT 2549.) Appellant knocked Lovejoy to the ground and proceeded to choke her. (18 RT 2550.) Lovejoy tried to put her own hands on her throat to prevent him from strangling her. In response, appellant moved up Lovejoy's body towards her thighs. In so doing, Lovejoy was able to reach appellant's groin. Lovejoy reached out and grabbed appellant's testicles as hard as she could. (18 RT 2554.) Appellant released his grip on her neck and left her apartment. Lovejoy ran into her bedroom, grabbed a gun, and called the police.[4] (18 RT 2555.) Lovejoy then jumped out of her bedroom window into a hedge of juniper bushes where she was greeted by responding police officers. (18 RT 2560-2561; 2523.)

Oakland Police Sergeant Williams responded to Lovejoy's 911- call. (17 RT 2480.) Williams found several blood stains on the living room floor and a bloody knife on the dresser inside of the bedroom (17 RT 2493.) Responding Oakland Police Officer Vincent Chan found blood on the living room floor and pair of panties. (18 RT 2534.) Lovejoy was taken to the emergency room at Highland Hospital. (18 RT 2561.) Lovejoy suffered a stab wound to her left flank, a superficial laceration below her belly button and lacerations and abrasions to her neck, consistent with having been choked. (18 RT 2570.) A sexual assault examination was conducted and genital trauma consistent with forcible intercourse was

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[4] A copy of the 911 call made by Lovejoy was played for the jury. (18 RT 2560; People's Exh. 53.)

observed. (18 RT 2574.) Lovejoy was interviewed by police the next day and identified appellant by name and photograph. (20 RT 3026-3028.) Four days later, appellant was arrested. (20 RT 3030.) Appellant admitted to police that he stabbed someone. (20 RT 3032.) In the course of the same interview appellant stated "he had sex with a woman with her consent." (20 RT 3033.) Appellant subsequently pleaded guilty to forcible rape with a knife. (20 RT 2971.)

3. The choking of Brenda Molano

On the afternoon of June 7th 1996, appellant's ex-wife Brenda Molano was in their bedroom taking a nap while their two boys were watching television and playing video games in the living room. (16 RT 2215.) Appellant came into the bedroom and they began talking about his return to using drugs. (16 RT 2217.) Brenda became upset and attempted to get up from their bed. (16 RT 2217.) Appellant grabbed her around the neck and started choking her. Brenda resisted, but appellant continued choking her until she was unconscious. (16 RT 2218.) When Brenda awoke, she found that her wrists and hands were tied up with scarves and that appellant had put a pillowcase in her mouth and tied it behind her neck. (16 RT 2218-2219, 2238.) Again, Brenda tried to struggle free and make some noise so that someone would come to her aid. (16 RT 2219.) In response appellant choked her again until she was unconscious. (16 RT 2219.) When she awoke, she was no longer bound and appellant had left their apartment and taken her car. (16 RT 2219,2241.) Brenda was gasping for air, could hardly swallow and blood was coming out of her mouth. She crawled to the living room, and barely able to talk, told her sons, "Carl choked me" and to call 911. (16 RT 2220, 2297.) An ambulance took her to Eden Hospital where she was treated and released. (16 RT 2221-2222.) Emergency room records indicated that Brenda suffered some bruising and swelling over the anterior aspect of he neck, as well as some petechiae--

small hemorrhages caused by increased pressure in the blood vessels-- in her mouth and soft palate, consistent with being choked. (17 RT 2365-2366.) Brenda's voice returned to normal approximately six months later. (16 RT 2245.)

When appellant met with the probation officer assigned to write the sentencing report in connection with assault, appellant admitted, "I choked my wife. I was under the influence of crack and I got paranoid. I thought she was going to call the police." (17 RT 2411.)

H. The Defense Case

After the conclusion of the prosecution's case, appellant presented no evidence in his defense. (20 RT 3040.)

II. THE PENALTY PHASE

In addition to the facts of the crime, and the facts of appellant's prior rapes of Anne Hoon and Mabel Lovejoy, and his prior spousal abuse of Brenda Molano, the prosecution presented the testimony of McKenna's immediate family on the impact of McKenna's death on their family.

A. Victim Impact Evidence

Suzanne McKenna's brother, Ronald McKenna, described his sister as a happy, outgoing and free-spirited person. Ron was Sue's older brother and they were close. McKenna loved his kids, was a great aunt and sister. (25 RT 3303-3305.) McKenna's death had a devastating impact on his children and the entire family. (25 RT 3309.) Her death effected him "really bad, still is to this day. (24 RT 3310.) McKenna's death had a very bad effect on her sister Lori, whom he described as still suffering. (25 RT 3310.) Most profoundly effected was his other sister Patti, who had a special bond with McKenna. Patti died seven months after McKenna died. (25 RT 3317, 26 RT 3337.) Patti had suffered from significant psychological problems before McKenna's death, and Ron considered

McKenna's relationship with Patti as a sort of "lifeline." (25 RT 3311.) In Ron's view, their mother suffered "horribly" as a result of McKenna's death. (25 RT 3312.) Ron indicated that their family has "kind of split apart" since McKenna's death. (25 RT 3313.)

Suzanne McKenna's mother, Yvonne Searle, described her daughter as the youngest of her McKenna children. Searle believed that the only thing McKenna wanted out of life was a husband and children. (25 RT 3318.) McKenna had a special relationship with her nephew Michael. (25 RT 3319.) McKenna spent a lot of time with Michael despite being estranged from Michael's mother, her sister Lori. (25 RT 23319.) McKenna's care of Michael enabled Searle to care for her other daughter Patti, who was a recluse. (25 RT 3320.)

McKenna's death had a devastating impact on her sister Lori, who had a "breakdown" because of the guilt of them having been estranged. (25 RT 3325.) Similarly Patti was devastated. Patti was not only a recluse, but a chronic alcoholic and McKenna was her lifeline and the person who brought her alcohol. Patti's psychological inability to leave her house precluded her from attending McKenna's memorial service. (25 RT 3325.)

Lori McKenna was only 14 months younger than her sister. (26 RT 3336.) McKenna had been Lori's confidant and best friend growing up. (26 RT 3338.) Approximately 6 years before McKenna was murdered they became estranged. Lori had not spoken to McKenna since June 1994, a year before her death. (26 RT 3341.) Despite their estrangement, McKenna spent a lot of time with Lori's son Michael. (26 RT 3341.) Lori was devastated when McKenna was killed. (26 RT 3344.) She described holidays as "just horrible" and that trying to explain what happened to McKenna to her 10-year-old was painful. (26 RT 3349.)

B. Mitigating Evidence

The defense called a total of seventeen witnesses to present mitigating evidence: six family members and friends; seven correctional officers who had know appellant through his previous incarcerations; a jail chaplain; a forensic psychologist; a neuropsychologist; and an expert in prison security.

1. Family and friends

Dountes Diggs's testified that his cousin was married to appellant's mother. (26 RT 3361.) They lived down the street from one another and spent a lot of time as kids at one another's houses. (26 RT 3363.) Appellant has a sister Cynthia and a brother Ernest. Cynthia was approximately five years younger and Ernest was older, they had a different father from appellant. (26 RT 3363-3364.) Diggs described Cynthia as a drug addict and Ernest as an alcoholic. (26 RT 3367-3368.)

Appellant grew up without a father in the house. (26 RT 3364.) Appellant and his mother and sister moved to New York for a period of time in the 1970's and then returned to Oakland. (26 RT 3365-3366.) Diggs and appellant had a great friendship. They rode bikes, went to clubs and lived together for awhile. They sometimes used recreational drugs and alcohol together. Diggs described appellant as a good and kind person. (26 RT 3369-3370.)

Appellant's half brother Ernesto Molano lived in the same household with appellant, their mother Maria Hargerty and his sister Cynthia Hargerty. (26 RT 3373.) Ernesto was two years younger than appellant. (26 RT 3375.) Ernesto and appellant changed their last name from Hargerty to Molano when they were in the teens, at the behest of their sister Cynthia. (26 RT 3376-3377.)

As brothers, they partied together in their teens, trying marijuana and cocaine. (26 RT 3378.) Their mother did not work. (26 RT 3379.) She

handled discipline through spankings. She used her hand, a belt, or anything she could get her hands on. (26 RT 3379.) He described her relationship with the kids as loving, if they didn't do anything bad. (26 RT 3380.) According to Ernesto, appellant continued to use alcohol as an adult. (26 RT 3383.) His sister Cythnia used drugs as a teenager, but stopped after going into a long-term drug program. (26 RT 3384.) Ernesto completed a 6-month drug program after suffering three DUIs. Ernesto still drinks alcohol. (26 RT 3385.)

Appellant's grandmother, Lula Ellis played a positive role in their lives growing up and appellant loved her and took care of her before she died. (26 RT 3387.)

On cross-examination, Ernesto admitted that their mother raised them on her own, and that they always had a roof over their home and were clothed and fed. (26 RT 3389.) Ernesto felt that his mother loved him, appellant and Cythnia, and punished them only when they deserved it. (26 RT 3391.)

Dottie Harris had known appellant since 1981. (27 RT 3440.) They had a romantic relationship between 1984 and 1988. (27 RT 3441.) After their romantic involvement ended, they remained friends. (27 RT 3442.) Harris observed appellant with his 4-year-old daughter. She testified that they were very close and that he was good father. (27 RT 3444.) Appellant also had a very positive relationship with Harris' son, Raoul. (27 RT 3445.)

Harris had opportunities to see appellant's relationship with his mother. Harris believed that appellant loved his mother, but described their relationship as one of love-hate. (27 RT 3450.)

Harris knew of appellant's involvement with drugs, but never saw him use drugs. Harris described appellant as a social drinker. (27 RT 3450.) Appellant was always supportive of Harris, and helped her in times of distress. (27 RT 3446.) Appellant always appeared healthy to Harris, and

considered his appearance to one of his best qualities. The last time Harris saw appellant was in 1989. (27 RT 3447-3451.)

Evelyn Horne met appellant in 1982. (27 RT 3455.) They were romantically involved for several months. (27 RT 2457.) Horne described the neighborhood appellant grew up in as "rough." (27 RT 3462.) Although she never saw appellant use drugs, she heard that he did and recognized the crowd he was keeping as one which was involved in drugs. (27 RT 3461-3462.) According to Horne, appellant was always very kind and supportive. Appellant helped Horne end an abusive relationship. (27 RT 3463.) Horne also observed appellant's relationship with his mother, which she perceived to be "good." (27 RT 3472.) His relationship with his niece Bianca was good as well and it was clear that he loved her. (27 RT 3475-3476.) It was clear to Horne that appellant was close to and loved his family. (27 RT 3476-3477.)

Ernestine Marshall was the attendance secretary with the Oakland Public Schools and knew appellant for approximately 30 years. (27 RT 3478.) Marshall met appellant through his daughter Jody. (27 RT 3479.) According to Marshall, appellant was "very helpful." Appellant would help around the house and Marshall viewed him as almost another son. (27 RT 3481.) Appellant attended several holidays and went to church with Marshall. (27 RT 3482-3483.)

Ronald McReynolds met appellant when he was five and appellant was eleven. Their mothers were friends. (30 RT 3716-3718.) Appellant became a sort of big brother to McReynolds. (30 RT 3719.) Appellant helped McReynolds get along with his family and do well in school. (30 RT 3719-3720.) McReynolds described appellant as a mentor, father-figure who had a very important positive impact on his life. (30 RT 3723.)

2. Correctional officers

Retired correctional officer William Watts was a lieutenant at Soledad State Prison while appellant was incarcerated at that facility. (28 RT 3517-3519.) Appellant was Watts' assigned clerk from 1991 and 1994. (28 RT 3519.) While supervising appellant, Watts prepared several inmate evaluations for him. Watts gave appellant high marks in all categories regarding his attitude towards others, work ethic, and ability as a worker. (28 RT 3523-3524.) Appellant timely completed his assignments and successfully supervised other inmates. (28 RT 3525.) According to Watts, appellant always tried his best. (28 RT 3526.)

Conception Aguilar was a correctional officer at Soledad State Prison while appellant was incarcerated at that facility. (28 RT 3535.) Appellant worked with Aguilar in the Culinary Department, serving food to other inmates. Aguilar reported that appellant was a good, dependable worker. (28 RT 3537.) Appellant got along with other inmates and was respectful. (28 RT 3538.)

Bryan Kingston was a correctional officer in Susanville in 1988 and 1989. (28 RT 3540.) Kingston could not recall appellant but reported that he was an exceptional clerk in all categories. (28 RT 3542-3543.)

Retired correctional officer Wendall Zuigley worked at Soledad State Prison in 1982 and 1983. (28 RT 3547.) Zuigley supervised appellant in prison industries and highly recommended him for a pay raise. (28 RT 3550.)

Retired correctional officer Effie Gandy supervised appellant at Soledad State Prison in 1982 and 1983. Appellant worked for him as a clerk typist. (28 RT 3557-3558.) Gandy gave appellant positive evaluations. Specifically Gandy remarked that appellant was knowledgeable, had a good attitude and took directions with very little supervision. (28 RT 3559-3560.)

Martin Elias was a correctional officer for the California Department of Corrections who supervised appellant in 1999 at Soledad State Prison. (29 RT 3594-3595.) Elias prepared an evaluation of appellant describing him as a fast learner, good worker, model prisoner with good morale. (29 RT 3596-3597.)

Ron Higginbotham was a correctional officer for the California Department of Corrections who supervised appellant in 1992 as his clerk. (29 RT 3602-3605.) Higginbotham gave appellant positive evaluations, noting that he was "doing a good job." (29 RT 3607.)

The defense and prosecution stipulated that if called, Kathy Dyer, Jerry Foster, Lisa Kemball, Robert Potteigher, and Daniel Ryan are or were California State Prison correctional officers who at different times supervised appellant and prepared reports evaluating his work. The reports by those individuals were admitted as well. (28 RT 3554.)

3. Experts

Dr. Rahn Minagawa testified as a child development expert with a specialty in physical abuse and substance abuse in children. Dr. Minagawa was retained to compile appellant's social and family history. (26 RT 3403.) Dr. Minagawa evaluated the long-term effects of that history on appellant's social development. (26 RT 3404.)

Dr. Minagawa explained that it was difficult to compile a social history for appellant because there were no school records and only three of his half-siblings were reachable and willing to talk to him. (26 RT 3404.) Much of Minagawa's history was based on his interviews with appellant. Appellant was born in 1956 at Travis Air Force Base. (26 RT 3409.) He is Puerto Rican. His father is unknown. The name listed on his birth certificate is Bennet, but he also understood Joseph Molano to be his father as well. Bennett disclaimed being his father. (26 RT 3414.) Appellant was very upset not knowing his father's identity and angry at his mother for not

disclosing it to him. (26 RT 3419.) Appellant's mother had seven children by different men. (26 RT 3410-3412.) Appellant described his relationship with his mother as "very conflicted." (26 RT 3415.) Appellant reported her as verbally and physically abusive. According to appellant she told him that she hated him and that she wanted to give him up for adoption. Appellant stated that if he ever did anything wrong his mother whipped him. (26 RT 3415-3416.) Appellant spent a lot of time with his older brother Ernesto using alcohol and drugs. (26 RT 3417.) Appellant started drinking alcohol when he was about 12 years old. (26 RT 3417.) He started using cocaine in high school (26 RT 3417.)

Dr. Minagawa opined based on appellant's social history of being poor, physically and emotionally abused by his mother, and not having a stable family background, that the long-term effects can include addiction, psychological disorders including depression, suicidality, and aggression. (26 RT 1422.)

Neuropsychologist Myla Young testified as an expert in neuropsychology with specialties in brain dysfunction and cognitive impairment. (29 RT 3616.) Young twice met with appellant and conducted neuropsychological tests. (29 RT 3617.) This kind of testing is intended to understand the relationship between the brain and one's functioning. (29 RT 3622.)

After explaining the different functions of the brain, Young administered tests to appellant designed to determine if he was malingering. Her assessments indicated he was not. (29 RT 3628-3639.) Young tested appellant's IQ to be 85, which was lower than two previous IQ tests of 109 in 1982 and 94 in 1998. (29 RT 3640-3642.) Young found that appellant suffers from significantly impaired attention. (29 RT 3644, 3646.) She testified that appellant's mildly impaired verbal memory indicates damage to the hippocampus and frontal lobe. (29 RT 3650.) She also found

appellant's executive functioning to be impaired, indicating a limited ability to conceptualize and plan. (29 RT 3666.) Appellant's cognitive flexibility is also impaired, indicating diffuse brain dysfunction. (29 RT 3667-3668.) In addition to the testing, Young reviewed a single-photon emission computed tomography image of appellant's brain and opined that the image confirmed damage to the same areas of the brain as indicated by the neuropsychological testing. (29 RT 3672-3674.) Based on her assessment of appellant, Young testified that appellant should be able to function well in structured environments. (29 RT 3671.)

Frank Agee is a member of a nondenominational church called Cornerstone Fellowship. (30 RT 3701.) As part of his participation in the church he serves as a chaplain at the Santa Rita Jail to provide spiritual counseling for inmates. Appellant was one of the first people Agee provided counseling. He and appellant met weekly for several months while appellant was awaiting trial. (30 RT 3702-3704.) Agee perceived appellant to be a born-again Christian, like himself, and with whom he shared the same religious values. (30 RT 3704.) Agee moved out of the area, but remained in contact with appellant. Appellant completed a course in Bible study and sent Agee the certificate he received. (30 RT 3706-3708.) In Agee's opinion, appellant has made genuine spiritual growth. (30 RT 3708.)

Retired correctional officer Daniel Vasquez testified as an expert in prison security and prison classification. (28 RT 3568.) Vasquez testified people sentenced to life-without-possibility-of-parole do not receive conduct credits and do not go outside of the prison walls. (28 RT 3574.)

ARGUMENT

I. APPELLANT'S STATEMENTS WERE PROPERLY ADMITTED: ALL THREE WERE VOLUNTARY AND MADE AFTER APPELLANT WAIVED HIS *MIRANDA* RIGHTS AND/OR REINITIATED CONVERSATION

Appellant was interviewed about McKenna's murder, three times. All were recorded; two of the three interviews were video-taped. Appellant's first interview took place on March 21, 2003, at San Quentin Prison, before appellant was charged. Prior to this interview, appellant was advised, both orally and in writing, of his rights pursuant to *Miranda*, and signed a written waiver. The next two interviews were conducted after appellant was arrested on March 31, 2003. Appellant's statements were made back-to-back at his initiation. Appellant first spoke to the arresting detectives, and then to a deputy district attorney that was called to the police station at appellant's request. Prior to making each of these two statements, appellant was advised and waived his *Miranda* rights. In addition, appellant affirmatively acknowledged at the time of these interviews that these statements were being given at his behest and that his statements were made voluntarily. After reviewing the interviews, and hearing testimony from the detective and district attorney who conducted them, the trial court admitted appellant's three statements, finding that they were knowingly, intelligently, and voluntarily made.

Appellant here contends the trial court erred. He argues the statement he gave to detectives on March 21, 2003, at San Quentin was inadmissible because they did not tell him at the time he waived his *Miranda* rights that the subject of their interview with him would include the McKenna murder. He contends that their trickery rendered his waiver involuntary. (AOB 37-89.)

Appellant also contends that his subsequent two interviews on March 31, 2003, at the Alameda sub-station were involuntary because having invoked his right to counsel on March 21, 2003, he never reinitiated. In the alternative, he asserts that if he did reinitiate contact with the detectives, he was subsequently "softened up" and invoked his right to counsel again on March 31, 2003. He claims his second invocation was not honored. (AOB 90-126.) Respondent submits each of the claims lack merit.

A. Factual Background

1. March 21st: Detectives interview appellant at San Quentin Prison and execute search warrant

On March 21, 2003, Alameda County Sheriff's Deputies Sergeant Scott Dudek and Edward Chicoine went to San Quentin Prison to interview appellant about the McKenna murder and to execute a search warrant. (3 RT 311.) Appellant was brought into an interview room, his restraints were removed, and the detectives introduced themselves. Appellant was informed that the interview would be tape recorded. Chicoine testified that they gave him "a ruse" that they were sexual offender investigators and that because he would soon be retuning to the community they wanted to interview him about his "crimes in the past and things he has done." (3 RT 316.) Specifically, appellant was told, "we want to talk to you about some of your past crimes and some of the sex registration laws and things like that." (People's Pretrial Exh. 3A at p.1 (transcript of audiotape); People's Exhibit 38 (audiotape)) They read appellant the *Miranda* warnings. (3 RT 317-318; 14 RT 1989; People's Pretrial Exhibit 3A at pp. 1-2.) Appellant asked the detectives if his failure to answer their questions would impact his parole and they unequivocally assured him that it would not. (*Id.*) Appellant signed a form waiving his rights. (People's Pretrial Exh. 1; 3 RT 320-321; Defense Pretrial Exh. A.)

Thereafter, Chicoine told appellant that these kinds of interviews were standard in Alameda. (People's Pretrial Exh. 3A at p.2 (transcript of audiotape); People's Exhibit 38 (audiotape).) The detectives proceeded to discuss with appellant what his plans were when he was paroled and whether he had a job lined up. Appellant described his employment and living ambitions, volunteered a description of his family history, and discussed his relationship with his mother and his children. (People's Pretrial Exh. 3A at pp. 3-11 (transcript of audiotape); People's Exhibit 38 (audiotape).) Detectives then discussed with appellant the circumstances of his two prior rape convictions as well as his recent conviction for spousal abuse. (People's Pretrial Exh. 3A at pp. 12-34 (transcript of audiotape); People's Exhibit 38 (audiotape).)

After discussing these prior crimes, Chicoine told appellant they wanted to talk with him about other cases that he may have been involved in prior to his last offense in 1987 that had occurred in the same area that appellant was living. (People's Pretrial Exh. 3A at p. 34 (transcript of audiotape); People's Exhibit 38 (audiotape).)

At this point Chicoine asked appellant if he remembered an incident where a girl died. Appellant recalled that his neighbor died, but could not remember her name. (People's Pretrial Exh. 3A at p. 34 (transcript of audiotape); People's Exhibit 38 (audiotape).) Chicoine testified that appellant's demeanor changed and he became nervous and guarded. (3 RT 323.) Appellant told the deputies that he had once had a drink with her and that they had gotten high together. Dudek showed appellant a picture of McKenna. Appellant recognized her as "Sue." Appellant told deputies that they had smoked crack and crank together. Appellant also admitted that he had once had sex with McKenna, which he termed a "hit and run." He said this happened one to three days before her death. Because of his prior criminal record, he was concerned that he would be suspected in her death.

However, no one came to talk to him, although he told his parole officer about his concern at the time. (People's Pretrial Exh. 3A at pp. 36-38, 42 (transcript of audiotape); People's Exhibit 38 (audiotape).)

According to appellant they had sex in the living room of her studio apartment. Appellant described the sex as "basic," "oral sex," and "[r]egular missionary style sex." Appellant explicitly denied that it was "rough sex." (People's Pretrial Exh. 3A at pp. 39-40(transcript of audiotape); People's Exhibit 38 (audiotape).)

Chicoine then asked appellant what he thought or had heard on the streets had happened to McKenna and whether anyone else thought he had something to do with her death because of his history. Appellant laughed and indicated that everyone did, even his wife. When pressed on why his wife thought he was involved, appellant indicated that he had told his wife what happened. He then told detectives that he urgently needed to use the bathroom. (People's Pretrial Exh. 3A at pp. 41-44 (transcript of audiotape); People's Exhibit 38 (audiotape).) Appellant was permitted to leave the interview room and the tape recorder was turned off. At this point the interview had lasted approximately 75 minutes.

Appellant returned five minutes later and the tape was turned back on. Appellant immediately told the detectives: "No disrespect to both of you gentlemen. I understand where this is leading to, this conversation and I would rather not say anything else until I have a public defender of mine." (People's Pretrial Exh. 3A at p. 44 (transcript of audiotape); People's Exhibit 38 (audiotape).) Detective Chicoine responded: "Ok. And we'll stop the interview here." (*Id.*)

The detectives then served appellant with the search warrant. After explaining the items covered in the warrant, they explained to appellant that if appellant wanted to talk again, he would have to initiate the contact. In response, appellant asked if they had a business card. The detectives gave

him their card and reiterated that he would have to get in touch with them if he wanted to talk. The tape was then again turned off. (People's Pretrial Exh. 3A at pp. 44-46 (transcript of audiotape); People's Exhibit 38 (audiotape).)

Chicoine testified that appellant also told him that he wanted to tell the detectives what happened, but before he did that he wanted to talk with a counselor. Chicoine understood appellant to be referring to a psychologist or religious counselor. (3 RT 336.) Chicoine memorialized his recollection of this exchange with appellant in a supplemental report. (3 RT 497; Defense Pretrial Exh. C.)

2. March 31st: Detectives execute appellant's arrest warrant; transport him from San Quentin; and appellant makes two statements

Six days later, on March 27, 2003, the Alameda County District Attorney's Office filed a complaint alleging that appellant had murdered McKenna and a warrant for appellant's arrest issued. (3 RT 340.)

On March 31, 2003, Chicoine and Dudek returned to San Quentin to arrest appellant and move him to housing in Alameda County. (3 RT 341.)

Detectives met appellant in the receiving area. Upon seeing them, appellant told Chicoine that he wanted to talk to them. He stated that he had been meaning to call them, that he already talked to his counselor, that he knew they would be coming back to San Quentin, and that he had intended to call them. (3 RT 343.) Appellant indicated his desire to get "the whole thing over with." (3 RT 345.)

Chicoine had not questioned appellant nor had any contact with him since they last met at the prison on March 21, 2003. (3 RT 343-344.) Chicoine understood appellant's remarks as wanting to reinitiate and continue their conversation regarding McKenna's murder that had taken

place on March 21st. Chicoine told appellant to wait and they would talk to him later. (3 RT 344.)

Chicoine and Dudek put appellant into their vehicle. Chicoine sat with appellant in the rear, Dudek drove. The detectives brought a tape recorder with them in the vehicle. The recorder was in plain sight and turned on during the 40 minute ride to Alameda County. (3 RT 346-350.) Only portions of their recorded conversation are intelligible. Many of appellant's statements and responses can not be heard. (3 RT 461; People's Pretrial Exh. 4 and 4A.)

Appellant was not questioned about McKenna's murder during the car ride. (3 RT 351; People's Pretrial Exh. 4A.) Chicoine testified that appellant had indicated he wanted to talk about the murder. Appellant was told that they did not want to discuss it now, but that they would give him the opportunity later. (3 RT 351-352.) Dudek told appellant that discussing the murder was his decision. Appellant was neither threatened nor promised anything. (3 RT 352.) During the drive, appellant asked about his options: whether he could talk to a public defender or talk with them and get this over with. (3 RT 352.) Dudek told him that all of those were options. (3 RT 352-353.) Dudek told appellant to hold off on saying anything until they arrived. Dudek made clear to appellant that if he wanted to talk about the murder they would have to first read him his rights. According to Chicoine, appellant appeared to understand. (3 RT 353.)

Throughout the ride, appellant was repeatedly told that it was his choice whether to speak with them or not. It was repeatedly explained to him that he would be given an opportunity to talk with them when they arrived and would also have an opportunity to talk to an attorney if he so chose. Again and again, appellant was told that how they proceeded was entirely up to him. (People's Pretrial Exh. 4 and 4A.) When they arrived at

the substation, the tape was turned off. (People's Pretrial Exh. 4 and 4A. at p. 9.)

Prior to exiting the vehicle, appellant asked how he could enter a plea, get sentenced, and have the case over with as soon as possible. Dudek told him that he would let the district attorney know if that was his wish, but that the district attorney would be informed through his public defender regardless. (People's Pretrial Exh. 4 and 4A. at p. 7.)

Upon exiting the vehicle, appellant returned to this subject, telling Chicoine that he wanted to get this over with and that fellow inmates had told him not to speak to police and he knew his public defender would recommend the same, however, they did not walk in his shoes and he wanted to get closure, tell the story, and get it over with. (3 RT 357.)

Chicoine memorialized this conversation in his report of the day's events. (Defense Pretrial Exh. C.) Specifically, Chicoine wrote at the time:

> After parking at ETS, the tape recorder was turned off. After Molano exited the vehicle, he told Dudek and I that he wanted to tell us everything. He explained that he did not want the court procedure to be a long drawn-out ordeal. Dudek reiterated that he should wait until we got into the station where we could read him his rights again. Molano told me that he had been given advice by fellow inmates in prison not to talk to us and he believed a public defender would tell him the same. Molano added that other people including the public defender do not have to live in his shoes. Molano stressed that he was tired of living without closure to the 1995 event. Molano adamantly told me that he wanted to tell what happened without an attorney stopping him, and then have whatever happens to him, happen quickly, so that he could move on. Molano added that he wanted to be sentenced quickly, regardless of whether the result would be death or life in prions."[5]

(2 RT 499, quoting Defense Pretrial Exh. C.)

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[5] Appellant made statements during his interview with detectives, echoing this same sentiments. (See e.g. People's Exhibit 5, 5A at p. 29.)

Chicoine then told appellant to wait until they got inside and that he would be given an opportunity to talk with them, after they read him his rights and could record his statement. (3 RT 357.)

Once inside, appellant was taken to an interview room that allowed for both videotaping and audiotaping. (3 RT 360.) All that transpired in that room was recorded. (3 RT 363.)

Dudek attempted to summarize the course of events wherein they had interviewed appellant ten days earlier at San Quentin and during the course of that interview appellant had invoked his right to counsel. Thereafter, when the deputies returned to San Quentin to arrest appellant he had indicated that he wanted to speak to them. (People's Pretrial Exhibit 5, 5A at pp. 1-2.) The summary ended with the following exchange:

> Q: It may be a little confusing. So you're freely giving up your rights at this point here, and then I'm gonna advise him. You approached us, is the only thing I'm getting to, is that correct?
>
> A. Uh-huh.
>
> Q. Without any promises from us or anything, correct.
>
> A. Correct.

(People's Pretrial Exhibit 5, 5A at p. 3.)

Thereafter Dudek advised appellant of his *Miranda* rights and they began to discuss some of the information they had about the case and what appellant had previously told them about his drug usage at the time and his contacts with McKenna. Before delving into specific facts of the murder appellant expressed his aversion to having to "relive this" and that if he chose to tell them all the details of what happened, he only wanted to do it once. (People's Pretrial Exhibit 5, 5A at pp. 6-7.) The following colloquy ensued:

> [Dudek]: You, you you said you just kinda want to get on with it and get some closure right?

[Appellant]: Uh-huh

[Dudek]: the way to get on with it, this is public information. How it becomes public information is how? It goes to trial, okay? You understand that, right?

[Appellant]: Uh-huh.

[Dudek]: I mean you've been in this system.

[Appellant]: I've been in this system yeah.

[Dudek]: You understand that. There's certain ways that, you know if you want closure then you know there's, there's certain ways that you can get closure where it may not even go into trial, and that's a decision that you are gonna have to make. It's not a decision I can make for you or Ed can make for you, okay? You want to spare your kids from hearing the gritty details of how you killed Susan correct?

[Appellant]: I want to ss..., I want to spare all that I...

[Dudek]: I understand that.

[Appellant]: I just want to, I want to get it over.

[Dudek]: I understand that.

[Appellant]: If, if I can ask you this question, you know.

[Dudek]: And I want you to ask, 'cause that's the best.

[Appellant]: And this is, this is the question that concerns me, all right?

[Dudek]: Right

[Appellant]: I would, if I ca.., I can what I would like, you know I can talk to you guys. I can even talk to the DA.

[Dudek]: Ok.

[Appellant]: You know with my Public Defender there or whatever right, and after I say what I have to say, just ask to be sentence, if I can be sentenced.

[Dudek]: Ok.

[Appellant]: You know I'm not asking for a jury trial 'cause I don't want a jury trial.

[Dudek]: Right

[Appellant]: I just want you know, if I can, if what I'm saying, if I can have that, right, I can get this all over with.

[Dudek]: I understand what your saying.

[Appellant]: Ok, but you'd like, I understand you thought you guys say you can't promise me that.

[Chicoine]: Right.

[Dudek]: I can't guarantee you that, I can walk out of this room, and say you know what, the guy wants to plead guilty tomorrow to murder, and can he just get sentenced on Thursday? I would be absolutely lying to you if I told you that, 'cause that's just not the way the system works, okay? But we can let 'em , can we let em know that that's your request? We can let them know verbally and they're gonna watch this too, so.

[Appellant]: Ok, can you... I can sit down wit' you two and the DA right?

(People's Pretrial Exhibit 5, 5A at pp. 8-9.)

Dudek explained to appellant that the district attorney on-call could come and take a statement from him. Appellant asked how long it would take for a district attorney to arrive, and then directed them to call the him. (3 RT 366-367; People's Pretrial Exhibit 5, 5A at p. 10.) Dudek left the interview room, called the district attorney, and informed appellant that it would be between 30 and 40 minutes before the district attorney arrived. (*Id.*)

After describing how he killed McKenna, appellant confirmed that he left the apartment but returned the next day to further clean the apartment. While inside, some one knocked, saw him, and he fled, hiding in his shed

behind his apartment. Appellant apologized to his family and the McKenna family. He told the deputies that he had felt they were going to come for him. He claimed that if they hadn't discovered him, he would have turned himself in because he "re-lives" the event in his mind everyday and wants to get it over with. (*Id.* at p. 24.) After discussing more details of the crime, appellant acknowledged that he knew what he did to McKenna was wrong. He then stated: "What I'm doing now you know, I know my Public Defender would say it's wrong, you know but he doesn't have to wear my shoes, I understand his job, I understand everybody's job., you know. (*Id.* at p. 30.)

Deputy district attorney Andy Sweet and district attorney investigator Lynne Breshears arrived and the deputies left the interview room to brief Sweet and Breshears. (3 RT 373.) Sweet and Breshears introduced themselves to appellant. The following colloquy ensued:

> Q. Okay. One thing before we do anything formal, we just wanted to introduce ourselves. We understand you were asking that a D.A. come down and talk to you.
>
> A. Huha.
>
> Q. I'm the on duty guy so I got the call. Lynn and I work together. And we're here to listen to what you have to say. Okay? What I want to do. . . you know we've been out there for a while now looking through your case, talking to these cops about what they know about your case, what you said about the case, and things like that, okay? So, we're kind of up to speed on it. You'll have to fill us in on the rest of it as best you can. Okay? You know I want to talk to you just before we go on tape. Because I want to put you on tape in a few minutes, okay? I want to talk to you about the trip you had from San Quentin back here. These guys came and picked you up today, right?
>
> A. hm hmm.
>
> Q. And they came and ... I think they had murder warrant for you, right? And they took you on that authority, correct?

A. Today?

Q. Today.

A. Yes.

Q. But they had come and talked to you already once, right?

A. Yeah.

Q. And you invoked at that point and said, "hey man, I don't' want to talk to you guys anymore," right?

A. hm hmm.

Q. But then all of a sudden you started . . . you did want to talk.

A. Yeah.

Q. What changed from before to now?

A. I just...I'm ... I'm tired.

Q. It was your decision to start talking.

A. It was my decision. I'm tired now.

Q. Okay.

A. In my mind, they didn't press the issue, understand me?

Q. That's cool. We'll talk about it in a second. Now is there anything you want to talk about with us before we pop on tape and start talking and then we'll get out of your hair?

A. My thing is I just...I just want to get it over with. You know. Take it. . .I'm not trying to . . I just want a speedy trial. You know, speedy trial, judge sentences me and whatever and get it over with.

(People's Pretrial Exhibit 6, 6A at pp. 2-3.)

Immediately thereafter Sweet turned on a tape recorder, introduced everyone and identified their location. Sweet read appellant his *Miranda*

rights and appellant waived them. (*Id.* at p. 4.) Thereafter the following colloquy ensued:

> Q. Ok. You were picked up today by the Alameda County Sheriff's Department at San Quentin. Is that true?
>
> A. Correct.
>
> Q. And you were driven here to their offices here in Alameda County. Correct?
>
> A. Correct.
>
> Q. The officers who came to pick you up had already been to see you once. Isn't that true?
>
> A. Yes.
>
> Q. Ok. And they had a conversation with you about an incident that we're going to talk about in a minute. Is that accurate?
>
> A. Its accurate.
>
> Q. During that initial conversation you had with the Sheriff's Department you talked to them for a little while and then you invoked your rights to remain silent and talk to a lawyer. Is that true?
>
> A. That's true.
>
> Q. Okay. When they came to pick you up today, some place between San Quentin and here, the Sheriff's Department in Alameda County, you started talking to the officers about your case and about what was going on. Isn't that true?
>
> A. That's correct.
>
> Q. Why did you change your mind from your invocation to wanting to talk about the case?
>
> A. Because I'm tired I just want, I'm tired and I just want closure.
>
> Q. Was it your decision to talk or was it the officer's decision?
>
> A. My decision.

Q. Was there anything they said or anything they did that made you think that you needed to talk to them?

A. No. I asked them on the way here if I would be able to talk to a D.A.

Q. Ok. Would it be a fair statement to say that you reinitiated kind of the discussion about the case?

A. Ok. I, it, that would be fair because I asked like if I will be straight up with you both like I was with them, right. I understand ok. I don't have the money for a public defender, blah, blah, blah. Right. But I understand my public defender said well, look you shouldn't do this you shouldn't do that because they're not here. Ok. I know what I did. All right. And I just want to get it over with.

Q. Ok.

A. That's all.

Q. They didn't ask you any questions, you were the one asking them questions to start the conversation going again. Correct?

A. Yeah.

Q. Ok. Uhm.

A. They made me no promises or anything. My only, my main concern was that you were to come down here.

(People's Pretrial Exhibit 6, 6A at pp. 4-5.)

During appellant's confession, he told Sweet, that even if they had not found him, he would have eventually come forward because he was "tired" and knew what he did was wrong. (*Id.* at p. 7.)

B. The Trial Court's Ruling

The trial court found the March 21st statement admissible reasoning as follows:

[THE COURT:] All right. With respect to the March 21st statement, I will find that the appropriate *Miranda* admonition was given and that the defendant expressly waived after it had

been given and I've taken into consideration the defense argument that the admonition was vitiated by the ruse about discussing sex registration laws. I will note also what the detective before the admonition not only referred some of the sex registration laws, but referred that they wanted to talk about some of your past crimes which could well have alerted the defendant that this event was fair game. But at any rate, there is a valid *Miranda* admonition, therefore, without getting into whether any portion needs to be redacted, that up until the time of the invocation, that it is legally admissible.

(4 RT 600.)

The trial court found both March 31st statements to be voluntary reasoning as follows:

"...there are numerous indications in subsequent statements of the defendant and the various interrogations to substantially corroborate the statement under oath of the sheriffs of the statement that was not recorded at San Quentin, that the defendant basically communicated that he knew that they would be coming back and he meant to call them and that he wanted to talk to them and that he wanted to get the whole thing over with. And I find that most particularly in the statement that you referred to Andy Sweet during the arguments, I find that even if they were not under the authority of the *Bradford* case, which is [sic] a trial court, I'm bound to follow that any conduct of Sergeant Dudek in his statements in the trip down from San Quentin to ETS were not so psychologically compelling that they would have overborne Mr. Molano's free will. And in fact is belied by the sheriff's officers preventing Mr. Molano from making his statement until after he had been given his *Miranda* rights, and he was perfectly free once given those *Miranda* rights to reaffirm that he wanted an attorney or that he wanted to remain silent. So under either analysis under voluntary reinitiation, or under voluntariness analysis, I believe that Mr. Molano was given his *Miranda* rights at ETS and that by continuing talking as pointed out that he impliedly waived those rights, and therefore will find that the subsequent statement to the officers and the subsequent statement to District Attorney Sweet were legal and voluntary.

(4 RT 601-602.)

C. Applicable Legal Principles Regarding *Miranda*

The well-known *Miranda* warnings (the right to remain silent; the right to consult a lawyer; the right to have a lawyer present during questioning; and the right against self-incrimination) are designed to protect the privilege against compelled self-incrimination from "the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation." (*Berkemer v. McCarthy* (1984) 468 U.S. 420, 428.) Hence, before interviewing suspects who are in custody, the police must inform the suspects of their *Miranda* rights, and obtain a voluntary, knowing, and intelligent waiver of those rights. (*Fare v. Michael C.* (1979) 442 U.S. 707, 717-718; *Miranda v. Arizona, supra*, 384 U.S. at pp. 444, 478-479.)

A court analyzing whether a defendant voluntarily, knowingly, and intelligently waived his or her *Miranda* rights, must consider two distinct components:

> "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."

(*People v. Whitson* (1998) 17 Cal.4th 229, 247, quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421, 422-423.)

In the trial court, the prosecution has the burden of showing the validity of the defendant's waiver of his or her constitutional rights by a preponderance of the evidence. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168-169; *People v. Markham* (1989) 49 Cal.3d 63, 71.)

Determinations as to the validity of a waiver of *Miranda* rights, a predominately legal mixed question, are reviewed independently (*People v. Mickey* (1991) 54 Cal.3d 612, 649), although the trial court's findings as to the circumstances surrounding the statements at issue—including "the characteristics of the accused and the details of the interrogation—are clearly subject to review for substantial evidence" (*People v. Benson* (1990) 52 Cal.3d 754, 779). Also affirmed if supported by substantial evidence are the trial court's resolution of disputed facts and reasonable inferences from the facts, and its credibility evaluations. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128; *People v. Wash* (1993) 6 Cal.4th 215, 235.)

D. Appellant Knowingly, Voluntarily, And Intelligently Waived His *Miranda* Rights on March 21st

Appellant does not claim that any police action caused him to misunderstand the nature of his rights or the consequences of his decision to waive them. Nor does he dispute that he was given *Miranda* warnings before being interviewed about any possibly incriminating matters and signed a written waiver relinquishing those rights. Instead, appellant claims that his *Miranda* waiver was otherwise involuntary because Sergeants Dudek and Chicoine deceived him as to their purpose in questioning him and failed to disclose that they were investigating the McKenna murder. (AOB 72.)

In *Colorado v. Spring* (1987) 479 U.S. 564, (*Spring*), the Supreme Court heard and rejected this precise argument. There, agents arrested the defendant on a firearms charge and obtained his waiver without revealing that they actually intended to question him about a murder. (*Spring,* 479 U.S. at p. 567.) The defendant later claimed that his wavier was invalid because he was not warned beforehand that he was going to be asked about the murder. *Id.* at p. 568. As in appellant's interview, there was no element of duress or coercion in Spring's interview, nor was there any dispute that

he understood the *Miranda* warnings and the consequences of his decision to talk to the agents. (*Id.* at pp. 573, 575.) In those circumstances, the Supreme Court rejected the claim ruling that "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." (*Id.* at p. 574.) The Court observed that when a suspect is warned that he is free to refuse to answer questions, he "is in a curious posture to later complain that his answers were compelled." (*Id.* at p. 576.) In the Court's words:

> We have held that a valid waiver does not require than an individual be informed of all information 'useful' in making his decision or all information that 'might . . . affect his decision to confess.' We have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. Here, the additional information [regarding the agents' intention to ask about the murder] could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature. According, the failure of the law enforcement officials to inform [the defendant] of the subject matter of the interrogation could not affect [his] decision to waive his Fifth Amendment privilege in a constitutionally significant manner.

(*Id.* at pp. 576-77.)

Thus, the Court made clear that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation *is not relevant* to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." (*Id.* at p. 577 (emphasis added).) In short, appellant was not entitled to be informed in advance of all the areas of interrogation, it is therefore constitutionally irrelevant that appellant waived his rights in advance of knowing the topics to be discussed.

Appellant argues, however, that *Spring* does not dispose of the issue because the high court "expressly left open the question whether, and under what circumstances, affirmative misrepresentations by the police about the scope of their investigation might invalidate a *Miranda* waiver." (AOB 76.)

He asserts that because the detectives "trickery" was not limited to their silence regarding their desire to speak with appellant about the murder, but included an affirmative "ruse" that they were there to discuss his sex offenses prior to his release, his claim survives. Not so.

In *People v. Tate* (2010) 49 Cal.4th 635, 684 (*Tate*), this Court considered the observation appellant advances here:

> Defendant points out that, in *Spring*, the United States Supreme Court left open whether, and under what circumstances, "affirmative misrepresentations" by the police about the scope of their investigation might vitiate a *Miranda* waiver. (*Spring*, *supra*, 479 U.S. 564, 576, fn. 8, 107 S.Ct. 851.) However, as examples of the "certain circumstances" under which the court had previously invalidated Fifth Amendment waivers procured by affirmative police misrepresentations, *Spring* cited cases involving falsehoods that were of a coercive nature, and thus reasonably calculated to induce false confessions. (See, e.g., *Lynumn v. Illinois* (1963) 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 [misrepresentation by police officers that suspect would be deprived of state financial aid for her dependent child unless she cooperated]; *Spano v. New York* (1959) 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 [misrepresentation by suspect's friend that friend would lose his job if suspect failed to cooperate].)
>
> We have recently confirmed that "[t]he use of deceptive statements during an interrogation ... does not invalidate a confession [as involuntary, unknowing, or unintelligent] unless the deception is ' " 'of a type reasonably likely to procure an untrue statement.' " ' (*People v. Jones* (1998) 17 Cal.4th 279, 299 [70 Cal.Rptr.2d 793, 949 P.2d 890]; see *People v. Thompson* (1990) 50 Cal.3d 134, 167 [266 Cal.Rptr. 309, 785 P.2d 857].)" (*People v. Carrington* (2009) 47 Cal.4th 145, 172, 97 Cal.Rptr.3d 117, 211 P.3d 617 (*Carrington*).)
>
> Defendant urges that by deceptively minimizing the seriousness of the investigation, the officers induced false statements that were later used against him, but his argument fails to persuade.

(*Tate,* at p. 684.)

Appellant argues that *Tate* is either wrongly decided or distinguishable. (AOB 77-87.) Again we disagree. *Spring* clearly teaches that the only "trickery" that is constitutionally relevant in assessing the validity of a *Miranda* waiver is misinformation that would effect an accurate understanding of the nature of the rights being waived, or would have a coercive impact on the suspect's decision to waive. Both the Supreme Court's jurisprudence and all courts to consider the issue have consistently drawn a distinction between information that is coercive or affects the accused understanding of his rights, and information that affects the wisdom of exercising or waiving those rights. (See e.g., *Spring* at pp. 576-77; *Moran v. Burbine*, *supra,* 475 U.S. 412, 421, [upholding validity of waiver even though police failed to tell defendant his lawyer had called the station trying to reach him, and falsely told lawyer his client was not being interrogated]; *Hart v. Attorney Gen. of the State of Fla.* (11th Cir. 2003) 323 F.3d 884, 894-95 [detective contradicted *Miranda* warnings by telling suspect that having a lawyer present would be a "disadvantage" and that "honesty wouldn't hurt him"];*United States v. Beale,* (11th Cir.1991) 921 F.2d 1412, 1435 [agents told illiterate defendant that signing waiver form "would not hurt him"].) Trickery or ruses, that merely affect the "wisdom" of the decision to waive, be it a failure to convey information or a communication of misinformation are not simply not relevant. *United States v. Farley* (2010) 607 F.3d 1294 [FBI agent's "trickery" in telling defendant that agents wanted to question him about terrorism, when actually they suspected him of planning to have sex with a child, did not render his consent to the search of his laptop computer involuntary].) The analysis employed by this Court in *Tate* is in accord.

Judged by the above principles, the detectives' "ruse" affected nothing more than possibly the "wisdom" of appellant waiving his rights. Stated differently, it cannot be said that telling appellant that they were there to

talk with him as part of his a pre-release evaluation of sex offenders influenced his decision in a "constitutionally significant" manner, because the ruse was not of a coercive nature calculated to induce a false confession, nor one which caused appellant to "misunderstand the nature" of the rights he waived. Appellant was informed that that they wanted to talk to him about "some of your past crimes" and he was also assured that talking with them would not impact his parole.[6] (People's Pretrial Exh. 3A at p.1 (transcript of audiotape); People's Exhibit 38 (audiotape)) Nothing about the "ruse" impacted, much less calls into question appellant's understanding of his legal rights or suggests that his statements were untrue. The claim must therefore be rejected.

E. Appellant's Videotaped Statements Make Clear That He Reinitiated Conversation with Sheriff's Deputies

As discussed above, constitutional safeguards against compelled self-incrimination require that a custodial interrogation be preceded by an advisement that the accused has the right to remain silent and the right to the presence of an attorney. (*Miranda, supra*, 384 U.S. at pp. 478-479.) If an accused asserts his right to an attorney during the interrogation, he may not be subjected "to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 (*Edwards*).) "'An accused "initiates"' further communication, exchanges, or conversations of the

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[6] Appellant's suggestion that Chicoine's comment regarding staying out of his "red files" constituted a threat that appellant needed to talk with them at San Quentin or suffer consequences once outside (AOB 89.), is belied by the record. Read in context, Chicoine's remark could have been understood by appellant only to mean that that once released from prison appellant should stay out of trouble. Chicoine clearly told appellant that his decision to talk with them would not effect his release.

requisite nature 'when he speaks words or engages in conduct that can be "fairly said to represent a desire" on his part "to open up a more generalized discussion relating directly or indirectly to the investigation." '[Citation.]" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 642 (*San Nicolas*).)

In this case there is substantial evidence that after appellant invoked his *Miranda* rights at San Quentin on March 21st, his invocation was scrupulously honored and detectives did not speak with him again until he initiated further conversation.

Detective Chicoine testified that after appellant invoked on March 21, 2003, there was no contact with appellant until March 31, 2003, when Chicoine and Dudek returned to San Quentin Prison to arrest appellant. (3 RT 343-344.) Chicoine testified that when he returned to San Quentin, they met appellant in the receiving area. Upon seeing them, appellant told Chicoine that he wanted to talk to them. Appellant stated that he had been meaning to call them, he already had talked to his counselor, he knew they would be coming back to San Quentin, and he had intended to call them. (3 RT 343.) Appellant indicated to Chicoine his desire to get "the whole thing over with." (3 RT 345.) Chicoine understood appellant's remarks as wanting to reinitiate and continue the conversation that had taken place on March 21st regarding McKenna's murder. Chicoine told appellant to wait and they would talk to him later. (3 RT 344.)

Appellant now boldly contends Chicoine "lied on the stand" in claiming that he reinitiated contact at San Quentin. (AOB 93.) Appellant asserts "the evidence in this case does not support Chicoine's self-serving testimony regarding appellant's change of heart in the receiving area." (AOB 102.) In his ensuing discussion of the "evidence in the case" appellant goes to considerable lengths discussing the conversation during the ride from San Quentin Prison to Alameda County, pointing out the lack of any specific remark by appellant reflecting his "alleged" desire to

reinitiate talking about the McKenna murder. (AOB 103-108.) He quotes at length from one of Chicoine's reports in an effort to present a lack of parity between the report and Chicoine's testimony.[7] (AOB 102-103.)

Shockingly absent from any discussion of the evidence, particularly in light of the allegations of perjury, is appellant's recorded testimony corroborating Chicoine's account of events.

The videotapes of appellant's two interviews from March 31st make it abundantly clear that it was appellant's decision to start talking to detectives about the McKenna murder. Appellant told the district attorney, "[i]t was my decision".... "[i]n my mind, they did not press the issue, understand me?" (People's Pretrial Exhibit 6, 6A at p. 3.) When asked again by deputy district attorney Sweet whether it was appellant's decision or the officer's decision to resume talking about the McKenna murder after appellant had invoked, appellant told him, "My decision." Appellant repeatedly confirmed that there was nothing the detectives said or did that made him feel he needed to talk to them. He confirmed that it was him, not the detectives, that asked the questions and that it was a "fair statement" to say that he "reinitiated" the discussion about the case. (People's Pretrial Exhibit 6, 6A at pp. 4-5.)

Appellant told the detectives virtually the same thing. He agreed with the detectives characterization that it was he who approached them, "without any promises or anything." (People's Pretrial Exhibit 5, 5A at p. 3.) As the trial court observed in finding that appellant reinitiated, " there are numerous indications in subsequent statements of the defendant and the various interrogations to substantially corroborate the statement under oath

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[7] Appellant fails to reconcile the fact that Chicoine's report reflects that because appellant was re-initiating contact with them, they did not want him to talk about the case until he was re-advised of his rights at the station. (Defense Exh. C.)

of the sheriffs of the statement that was not recorded at San Quentin" (4 RT 601-602.) Appellant's failure to acknowledge, much less address, these statements is fatal to his claim. Appellant's recorded statements make clear that he initiated further conversation with detectives Chicoine and Dudek within the meaning of *Edwards*.

F. Appellant's March 31, 2003 Miranda Waivers Were Voluntary: Appellant Was Neither Softened-Up Nor Did He Invoke His Right to Counsel on March 31, 2003

Appellant alternatively contends that even if Chicoine's account is credited and he expressed his desire to reinitiate his conversation about the McKenna murder when he met the deputies at San Quentin, his subsequent *Miranda* waivers at the substation were not voluntary because he was either "softened-up" by Chicoine and Dudek during the 40-minute car ride from San Quentin to Alameda County , or because he again invoked his right to counsel during the car ride. Respondent disagrees.

1. The car ride from San Quentin to Alameda County

After appellant was arrested he was driven from San Quentin Prison to the Alameda Substation. Accompanying him was Dudek and Chicoine. The ride lasted approximately 40 minutes. The prosecution did not seek to offer anything said by appellant during the car ride. During the drive appellant asked: "I can sit down and talk with my PD first, then talk with you all?" This question was posed during the following colloquy:

> APPELLANT: I ought to be arraigned Wednesday (unintelligible).
>
> DUDEK: You'll probably just be arraigned, they'll ask you your financial status, more than likely you'll be assigned a PD your next court appearance, but you could get one right off the get go on something like this, I'm, I'm, probably you will actually.
>
> APPELLANT: Can I ask you a question?

DUDEK: Sure.

APPELLANT: They assign me a PD right?

DUDEK: Right.

APPELLANT: I can sit down and talk with my PD first, then talk with you all?

DUDEK: Yeah.

APPELLANT: Can I do that?

DUDEK: Yeah. I mean, that's one of your options and that's why we're here, you know.

APPELLANT: That's I would, I would (unintelligible)[8]

DUDEK: If your going to do that we're gonna go through that formally when we get to the tape, we're gonna say Carl Molano, you understand you're being charged with this, and then, and then we're gonna go through the rights thing again. It's at that time, you know, you can say, hey, let me talk to my PD and I'll talk to you again, but you know, that's entirely up to you. We're here only to do shit on the up-and-up. If we don't do it on the up-and-up then we might as well just throw it away right now, you know what I mean?. . .

(People's Pre-trial Exh. 4(a) at pp. 3-4.)

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[8] Appellate counsel has listened to a copy of the tape recording of the car ride (People's Pre-trial Exh. 4) and asserts that appellant can be heard ending his sentence saying "feel more comfortable." Respondent's counsel has attempted to listen to a copy of the tape recording and because of the poor quality of the tape cannot confirm or deny whether these words can be heard. We note no mention is made by trial counsel during cross-examination of Chicoine about this portion of the tape, the entirety of which counsel played for Chicoine during her examination. (3 RT 448-469.) Nor did trial counsel refer to or suggest in her argument that Molano made such a statement and that it constituted and invocation of counsel. (3 RT 578-599.) Respondent also notes that the trial court indicated listening to the tape several times. (3 RT 455.)

The conversation then turned briefly to the topics of appellant's children, the publicity the case might receive, some drawings appellant did, whether the temperature in the vehicle was comfortable, and whether appellant smoked in prison. Appellant expressed his desire to have his family informed of his arrest. The following colloquy ensued:

APPELLANT: Hey.

DUDEK: Unintelligble.

APPELLANT: (Unintelligible), if I want to get this over as soon as possible right?

CHICOINE: Un-huh

APPELLANT: Who (unintelligible) to?

CHICOINE: (Unintelligible)

APPELLANT: (Unintelligble)

CHICOINE: (Unintelligble)

DUDEK: Yeah, you mean just wanna plead and get, get on with your time?

APPELLANT: Yeah.

DUDEK: Yeah.

APPELLANT: (Unintelligible) sentence, you know, or whatever

DUDEK: Yeah, We can, we can let the DA know that that's your, your wish (unintelligible), I mean, they're they're gonna go on the guidance of your PD anyway to . . .

APPELLANT: Yeah.

DUDEK: But you know, that . .

APPELLANT: PD doesn't (unintelligible)

DUDEK: (Unintelligible).

CHICOINE : (Unintelligible).

APPELLANT: Right.

CHICOINE: Most guys waive time (Unintelligible) waive time. (Unintelligible).

APPELLANT: (Unintelligible) waive time (unintelligible)

DUDEK: It's going to be up to you. You're defense attorney's. . .

CHICOINE: (Unintelligible) that 's something (unintelligible).

DUDEK: There to advise you, but you, your still in the driver's seat, you know, its your defense, I mean, he's there to advise you, but if you say hey, you know, you're still a young guy, let's just get on with this so I can. .

APPELLANT: I'm the only one that (unintelligible). I actually, you know, it's like (unintelligible).

DUDEK: Exactly.

CHICOINE: Exactly. (Unintelligible) trying to say is (unintelligible).

DUDEK: When we get here it's a lot easier, let, let us do what we gotta do and then we can talk to you and you can talk to us (unintelligible). I mean, I understand what you said before, but let's just, just get in here and do what we gotta do.

(People's Pre-trial Exh. 4(a) at pp. 7-8.)

2. The car ride from San Quentin to Alameda County did not constitute a "custodial interrogation" within the meaning of *Miranda/Edwards.*

The *Miranda* admonishment is required only where a suspect is in custody and being subject to interrogation by law enforcement. (*Miranda v. Arizona, supra*, 384 U.S. at p. 444.) "Interrogation encompasses not only express questioning but its "functional equivalent." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301.) The functional equivalent of interrogation

includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." (*Id.* at p. 301, footnote omitted.)

The United States Supreme Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3 (*McNeil*) (dicta).) Thus, a suspect may not invoke *Miranda* rights except during the custodial interrogation against which they are being asserted. (*People v. Avila* (1999) 75 Cal.App.4th 416, 422.) This is because, "[a]llowing an anticipatory invocation of the *Miranda* right . . . would extend an accused's privilege against self-incrimination far beyond the intent of *Miranda* and its progeny." (*Avila, supra*, 75 Cal.App.4th at p. 423; see also *People v. Calderon* (1997) 54 Cal.App.4th 766 [rejecting anticipatory invocation of *Miranda* right to counsel]; *People v. Nguyen* (2005) 132 Cal.App.4th 350, 355, 33 Cal.Rptr.3d 390 [defendant who called attorney during arrest but before interrogation did not effectively assert right to counsel].) [9]

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[9] Several federal circuit courts have reached the same conclusion holding that the *Miranda* right to counsel cannot be invoked prior to or outside of custodial interrogation. (See *United States v. Grimes* (11th Cir. 1998) 142 F.3d 1342, 1347-1348 ["claim of rights" form signed by defendant ineffective to invoke his *Miranda* rights]; *United States v. LaGrone* (7th Cir. 1994) 43 F.3d 332, 339 [for defendant to invoke his *Miranda* rights, custodial interrogation must have begun or be imminent]; *Alston v. Redman* (3d Cir. 1994) 34 F.3d 1237, 1245 [signing invocation of counsel form in cell while speaking with representative of Public Defender's office did not trigger *Miranda* right to counsel]; *United States v. Wright* (9th Cir. 1992) 962 F.2d 953, 954 [defense counsel's request at plea proceeding to be present at subsequent interviews of the defendant insufficient to invoke the *Miranda* right to counsel for custodial interrogations concerning separate investigations].)

Here, there was no "interrogation" within the meaning of Miranda during the ride from San Quentin to Alameda.[10] (*People v. Ray* (1996) 13 Cal.4th 313, 337-338 [not all conversation between a police officer and a suspect is interrogation. An officer may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response].) At the time appellant asked about an attorney he was neither being interviewed, much less interrogated, about the charged crimes. In fact, no discussion of the crimes occurred during the ride. Rather, appellant's query regarding an attorney was part of a larger conversation regarding the next steps in the process. The question was one of several appellant asked of the detectives. The question came after appellant was correctly informed he would be arraigned and an attorney would be appointed. Appellant confirmed he would be assigned a public defender and asked Dudek if he could have the opportunity to speak with an attorney before talking with the detectives. Appellant was told, "Yeah," and that it was his choice. The detectives explained that when they arrived at the substation he would be informed of the charges, his rights, and if he wanted to speak to attorney before talking to them "that's entirely up to you." (*Id.* at p. 4.) Nothing said by either Dudek or Chicoine during the car ride was intended nor reasonably likely to elicit an incriminating response. As there was no custodial interrogation, appellant's query, "I can sit down and talk with my PD first, then talk with you all?" could not have been an invocation of his right to counsel under *Miranda.*

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[10] Respondent anticipates that appellant may attempt to rely on *People v. Ireland* (1969) 70 Cal.2d 522. As a preliminary matter, the Court's decision on the *Miranda* issue was purely advisory as it reversed the judgment on an entirely separate ground. (*Ireland, supra*, at p. 532.) Additionally, the validity of the logic behind *Ireland* is questionable, considering *McNeil*'s subsequent denouncement of anticipatory invocations of *Miranda*.

3. Appellant did not unequivocally invoke his right to counsel on March 31, 2003

Even if appellant is deemed to have made this query during a "custodial interrogation" his remark was not an unequivocal request for counsel within the meaning of *Edwards.*

It is well established that if a suspect asserts "in any manner and at any stage of the process, prior to or during questioning, that he wishes to consult with an attorney, the defendant may not be interrogated." (*People v. Storm* (2002) 28 Cal.4th 1007, 1021.) The interrogation must cease and the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona*, *supra*, 451 U.S. at pp. 484-485.)

However, an accused must clearly assert his right to counsel. (*Edwards v. Arizona*, *supra*, 451 U.S. at p. 485.) This is an objective inquiry. A statement either is an assertion of the right to counsel or it is not. (*Davis v. United States* (1994) 512 U.S. 452, 459.) At a minimum, the accused must make "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." (*McNeil v. Wisconsin*, *supra*, 501 U.S. 171, 178; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1123.)

In reviewing that issue, this Court must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125.)

The following statements are not unequivocal requests for counsel: "I think I would like to talk to a lawyer" (*Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1070-1072); "Maybe I should talk to a lawyer" (*Davis v. United States*, *supra*, 512 U.S. at p. 462); "Should I talk to a lawyer?" (*Soffar v.*

Cockrell (5th Cir. 2002) 300 F.3d 588, 591); "I think I need a lawyer" (*Burket v. Angelone* (4th Cir. 2000) 208 F.3d 172, 196-198); "Do you think I need a lawyer?" (*Diaz v. Senkowski* (2nd Cir. 1996) 76 F.3d 61, 63-65); "Can I call a lawyer?" (*People v. Roquemore* (2005) 131 Cal.App.4th 11, 24-25); "Did you say I could have a lawyer?" (*People v. Crittenden* (1994) 9 Cal.4th 83, 123-131); and "Maybe I ought to talk to my lawyer" (*People v. Johnson* (1993) 6 Cal.4th 1, 27-30, overruled on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 878-879).

Judged by these standards, appellant's inquiry: "I can sit down and talk with my PD first, then talk with you all?" was not an unequivocal request for counsel. As discussed above, appellant was not being questioned about the crimes charged when he asked whether he would be able to speak to an attorney before speaking with the detectives. Nor had he yet begun any conversation with the detectives, about which he might want to consult counsel. Rather, his conversation with Dudek about the process was unmistakably about what *would* happen when they arrived, and how appellant *might* want to proceed when they arrived. Appellant was told, correctly, that he could speak with an attorney, and that how he proceeded was entirely up to him, and that it was his choice. It was explained to appellant that when they arrived at the station they would go through all of his rights again formally and he could tell them how he wanted to proceed at that time. True to their word, that is exactly what happened. There is no merit to appellant's claim that he invoked his right to counsel and that his invocation was ignored. As appellant's factual predicate for his assertion that his subsequent *Miranda* waivers at the substation were involuntary lacks merit so too his claim of involuntariness fails as well.

4. Appellant was not softened-up

Nor is there any merit to appellant's claim that his *Miranda* waiver at the substation was involuntary because he had been "softened-up" by improper interrogation during the ride from San Quentin Prison. (AOB 118.)

People v. Honeycutt (1977) 20 Cal.3d 150, upon which appellant relies is distinguishable. The defendant in *Honeycutt* was arrested and placed in a patrol car without *Miranda* admonitions. The defendant refused to talk until he realized he was acquainted with the detective transporting him to the station. At the station, the defendant was hostile to a second detective, who left the room, and the first detective then engaged the defendant in a half-hour unrecorded conversation about past events, former acquaintances, and the victim. The detective "mentioned that the victim had been a suspect in a homicide case and was thought to have homosexual tendencies." (*Honeycutt, supra,* 20 Cal.3d at p. 158.) At the end of the half-hour, the defendant "indicated he would talk about the homicide." (*Ibid.*) He then was read his rights, waived them, and confessed. Based on these facts, the court concluded that "[w]hen the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Id.* at pp. 160-161.)

The facts of this case could not be further from those in *Honeycutt*. There was no evidence suggesting that the manner in which Dudek and Chicoine talked with appellant overbore his free will. (*People v. Gurule* (2002) 28 Cal.4th 557, 602 [distinguishing Honeycutt].) Upon meeting appellant at the prison to arrest him, appellant told them he wanted to talk and had been meaning to call them. They told appellant to wait until they

got him to the station to talk about the case. The record makes clear that both detectives were courteous to appellant at all times. Appellant was not subject to any interrogation ploy. There was no "good cop, bad cop" dynamic between appellant, Dudek, and Chicoine. Nor was the victim disparaged. During the drive from San Quentin appellant was treated cordially and with respect. His questions regarding the process he was about to undergo were answered honestly. His rights were correctly explained to him and he was told in no uncertain terms that the decision to speak with the detectives was his to make. Put simply appellant was not "softened-up" within the meaning of *Honeycutt*; his *Miranda* waivers were clearly voluntary.

G. Any Error Was Harmless

When involuntary or *Miranda*-violative statements are erroneously admitted into evidence, no reversal is required if the prosecution can show the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) That is certainly the case here.

Appellant's DNA was found on the shoestring that was wrapped around McKenna's neck and used to strangle her. McKenna's body was naked and she suffered bruising on her face, indicative of a struggle. Unidentified sperm was found inside of her vagina. Appellant admitted to his wife that he was in the apartment when she was killed and characterized it as a intentional rather than accidental death. Consistent with a consciousness of guilt, appellant returned to McKenna's cottage to clean away any evidence of his presence. He was seen and identified in McKenna's cottage by Judy Luque. Appellant hid from police on the day McKenna's body was found and threatened to kill his seven-year-old son if he disclosed his whereabouts to anyone. Not insignificantly, appellant has

been convicted of strangling three other women, and raping two. The two women he raped he also strangled. The two women he raped, he also claimed consented to having sex with him. Thus, notwithstanding appellant's self-serving statements describing a consensual sexual encounter and accidental strangulation, the evidence established overwhelmingly that appellant raped McKenna and strangled her to death. The admission of appellant's statements was harmless.

II. APPELLANT'S PRIOR TWO CONVICTIONS FOR RAPE AND CONVICTION FOR SPOUSAL ABUSE WERE PROPERLY ADMITTED AND DID NOT VIOLATE DUE PROCESS: EVIDENCE CODE SECTION 1108 IS NOT UNCONSTITUTIONAL AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING APPELLANT'S CONVICTION FOR SPOUSAL ABUSE PURSUANT TO EVIDENCE CODE SECTION 1101(B)

The prosecutor sought to admit evidence of appellant's two prior convictions for rape pursuant to Evidence Code section 1108 and 1101. (6 CT 1435-1455; 1469-1483 .) The prosecutor argued that these convictions were relevant to show propensity, intent, lack of consent, and the absence of mistake. (*Id.*) The prosecutor also sought to introduce appellant's prior conviction for spousal abuse pursuant to Evidence Code section 1101(b), to establish intent and to refute appellant's assertion that he strangled McKenna accidently. (6 CT 1448.) The defense filed oppositions to both motions. With respect to Evidence Code section 1108, the defense argued that the admission of the prior sex offense would violate Evidence Code section 352. (6 RT 1374-1381.) With respect to Evidence Code section 1101(b), the defense argued that the prior act evidence was irrelevant to any disputed issue because the acts were not sufficiently similar to provide a rational inference of identity, common design or plan, intent, or absence of mistake. (6 CT 1312.) The defense also argued the prejudicial effect of the prior act evidence outweighed its probative value. (6 CT 1314.)

On June 14 and June 18, 2007, the court heard argument on the admissibility of the three prior convictions. (2 RT 102-128, 162-193.)

The prosecutor argued that evidence of the Hoon rape was admissible to prove intent and the absence of mistake and to rebut appellant's statements that McKenna's death occurred during consensual rough sex. In particular, the prosecutor argued that appellant's statements during his interrogation following the Hoon incident, in which appellant had initially asserted the sex was consensual, provided the jury with evidence necessary to evaluate his similar statements in this case. (2 RT 113.) The prosecutor made the same argument with regard to the Lovejoy rape, as appellant initially claimed that Ms. Lovejoy had consented to sex with him. (2 RT 121-123.)

The prosecutor agued that the choking of Brenda Molano was relevant to establish appellant's intent during the choking of McKenna and to rebut appellant's contention that the choking death was the result of consensual sex and an accident or mistake. (1 RT 113-114.) The defense argued that the Molano choking was too dissimilar to be admitted under Evidence Code section 1101(b), as it did not occur during a rape.

The trial court admitted the two prior rape convictions under Evidence Code section 1108. (7 CT 1525; 2 RT 192-193.) It found the rape priors not barred by Evidence Code section 352 reasoning that "the probative value, particularly under the situation presented in this case, is extremely strong" given the consent defense and lack of physical injuries to McKenna. (2 RT 192.) The court found the Brenda Molano choking incident was admissible under Evidence Code section 1101(b), to rebut appellant's statement that the choking was accidental. Additionally, the court observed that there was sufficient evidence indicating that "strangulation is a method employed when facing psychological dissonance by the defendant." (2 RT 193.)

Appellant contends the admission of this evidence violated due process. He asserts that Evidence Code section 1108 is unconstitutional and that the spousal abuse conviction was irrelevant to any purpose permitted by Evidence Code section 1101(b). (AOB 147-172.) The claims lack merit.

A. Evidence Code Section 1108 Is Constitutional

Appellant does not here challenge the efficacy of the trial court's specific ruling permitting admission of his two prior rape convictions pursuant to Evidence Code section 1108, nor could he. Rather, he contends that the admission of impermissible character evidence, violates due process guarantees. (AOB 147-157.) However, appellant did not make this argument below and concedes that this Court has considered and rejected this precise argument. (AOB 147; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 907 [§1108 does not infringe upon due process rights]; *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013 [reaffirming constitutionality of section 1108]; *People v. Lewis* (2009) 46 Cal. 4th 1255, 1298-1289 [declining defendant's invitation to reconsider to *Falsetta*].)

Respondent notes as well that the federal courts are in accord. (See *United States v. Sioux* (9th Cir. 2004) 362 F.3d 1241, 1244 [upholding Fed. R. Evid. 413, which allows propensity evidence in sexual assault cases]; *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1026 [upholding Fed. R. Evid. 414, which allows propensity evidence in child molest cases]; and see *Mejia v. Garcia* (9th Cir. 2001) 534 F.3d 1036, 1047 fn. 5 ["California Evidence [Code, section] 352 establishes a similar threshold for the propensity evidence introduced at Mejia's trial, suggesting that under *LeMay*, [Evid. Code, section] 352, like Federal Rules 402 and 403, safeguards due process and protected Mejia's trial from fundamental unfairness."].)

Respondent submits for the reasons set forth in *Falsetta*, as well as those given by the federal courts, appellant's claims with respect to the constitutionality of Evidence Code section 1108 must be rejected.

B. Appellant's Prior Spousal Abuse Conviction Was Properly Admitted Pursuant to Evidence Code Section 1101

Evidence Code section 1101, subdivision (a) prohibits admission of past convictions or uncharged misconduct to prove the conduct of the accused on a specified occasion. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) "Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of [a past conviction or] uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition."[11] (*Ibid.*) Thus, evidence of a prior conviction can be used to demonstrate motive, intent, identity, knowledge, or absence of mistake or accident. (*Id.* at p. 402, fn. 6.) In *People v. Thompson* (1980) 27 Cal.3d 303, this Court held: "As with other types of circumstantial evidence, . . . admissibility [of other crimes evidence] depends upon three factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence." (*Id.* at p. 315; see also

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[11] Evidence Code, section 1101, subdivision (b) provides:

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

People v. Gray (2005) 37 Cal.4th 168, 202; *People v. Ewoldt, supra,* 7 Cal.4th at p. 404; *People v. Robbins* (1988) 45 Cal.3d 867, 879.)

Thus, before admitting other crimes evidence, a trial court must also examine whether the probative value is "'substantially outweighed by the probability that its admission [would . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*Ewoldt, supra,* 7 Cal. 4th at 404.) Evidence is not unduly prejudicial merely because it is so probative as to cause damage to the defense case. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) As this Court has explained, "[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging." ' " (*Id.*)

The trial court's rulings under Evidence Code sections 1101 and 352 are reviewed for an abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) The trial court's exercise of discretion shall not be disturbed except upon a showing that it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Judged by these principles, appellant's prior conviction for spousal abuse was properly admitted on the issue of appellant's intent and to refute the defense that McKenna's death by strangulation was accidental. Evidence of prior conduct is admissible "'in cases where the proof of defendant's intent is ambiguous, as when he admits the acts and denies the

necessary intent because of mistake or accident.'" (*People v. Robbins*, *supra*, 45 Cal.3d at p. 879, quoting *People v. Kelley* (1966) 66 Cal.2d 232, 242-243; *People v. Sully* (1991) 53 Cal.3d 1195, 1224-1225; *People v. Singh* (1995) 37 Cal.App.4th 1343, 1380-1381.)

That is exactly the case here. Appellant admitted strangling McKenna but claimed that he only did so at her request as part of a "rough sex" sexual encounter. Appellant specifically denied any intent to kill, insisting that she wanted to be strangled and that her death was accidental. Thus, his intent in strangling McKenna was directly at issue. Appellant's choking incident with his wife, wherein he twice strangled her to a point of unconsciousness, was highly probative as it tended to cast significant doubt on appellant's assertion that he strangling McKenna at her request and for the purpose of sexual arousal.

This Court has "long recognized '"that if a person acts similarly in similar situations, he probably harbors the same intent in each instance [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is disposed to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.'" (*People v. Rowland* (1992) 4 Cal.4th 238,. 261, quoting *People v. Robbins*, *supra*, 45 Cal.3d at p. 879.) Evidence that appellant strangled his ex-wife when he believed she was going to report him to his parole officer, tended to show that appellant acted with the same intent when he strangled McKenna: to prevent her from reporting that he had raped and assaulted her. Thus, the choking incident with Brenda was probative circumstantial evidence of appellant's specific intent when he strangled McKenna.

Appellant contends the circumstance wherein he choked Brenda was not sufficiently similar to be prove probative. In support, he proffers the

straw man argument that his assault on Brenda was admitted to show a common plan or design, where the greatest degree of similarity between the charged and uncharged crimes is required. (AOB 162-165.) Common plan or design, however, was not the basis for the admission of this evidence. As discussed, the evidence was proffered on the issue of appellant's specific intent and to refute appellant's defense that McKenna's death was accidental. (6 CT 1448-1450.) For evidence of an uncharged crime to be admissible under section 1101(b) to prove such facts as intent or motive, the charged and uncharged misconduct must only be "sufficiently similar to support a rational inference" of such material facts. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) Stated differently, the uncharged misconduct need only be sufficiently similar to support the inference that the defendant probably harbored the same or similar intent in each instance. (*Ewoldt, supra*, 7 Cal.4th at p. 402; see *People v. Memro* (1995) 11 Cal.4th 786, 864-865.) Here, appellant's act of strangling Brenda because he believed she was going to report him to his parole officer is sufficiently similar to his act of strangling McKenna to support the inference that appellant likewise strangled McKenna to prevent her from reporting his crimes.

Appellant also argues that the choking incident with Brenda was not relevant because appellant neither killed nor raped Brenda. Again, the claim misses the mark. As previously explained, appellant's intent in strangling McKenna was clearly a disputed issue. Appellant stated his intent in strangling her was to satisfy her sexually; it was done as part of some mutually agreed upon sexual tryst involving "rough sex." The prosecution asserted that appellant intended to kill her and that it was a nonconsensual assaultive act upon an unsuspecting victim. Appellant's attack on Brenda, wherein he twice choked her, and then fled with her keys and money, is strong circumstantial evidence tending to support the prosecution's theory that appellant acted with the same assaultive intent

when he choked McKenna, took her possessions and fled. Such evidence casts doubt on the defense theory that choking McKenna was done at her request and with her consent.

Nor did the trial court abuse its discretion in determining that the probative value of the evidence outweighed any prejudice. As described above, the incident was extremely probative to the disputed issue of appellant's intent in strangling McKenna and whether her death was an accident. Moreover, the risk of undue prejudice was minimal. The incident was not unduly inflammatory compared to the crimes charged and appellant was convicted of spousal abuse and sentenced to prison. Hence, "the jury would not be tempted to convict [him] simply to punish him for the other offenses, and ... the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses." (*People v. Falsetta, supra,* 21 Cal.4th at p. 917.)

C. Admission of the Spousal Abuse Prior Was Harmless

Even if the evidence was erroneously admitted, it is not reasonably probable the jury would have reached a more favorable verdict. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence of appellant's assault on Brenda Molano was relatively brief and much less inflammatory than the circumstances of the current offences. The prosecution's evidence against appellant was particularly compelling. There was strong evidence that McKenna suffered a violent death at appellant's hands. McKenna's bruised body, consistent with blows to the face, was found nude on her bathroom floor. (13 RT 19051907.) She had been strangled to death. Appellant's DNA was on the shoestring found still attached around McKenna's neck. (20 RT 2948.) Unidentified semen was found in McKenna's vagina. The jury heard expert testimony from the coroner that appellant would have had to apply extreme pressure on McKenna's neck for several minutes to render her unconscious and another several minutes

of pressure was required thereafter to kill her. (13 RT 1914-1916.) The jury also heard that although drugs were found in McKenna's system, there were not sufficient amounts to have prevented her from struggling against appellant's assault. (14 RT 1929.)

Appellant's actions after McKenna's death also strongly supported the prosecution's case. The jury heard evidence that appellant told his wife that McKenna (the neighbor lady) had been murdered, albeit by a different man. (16 RT 2203.) Appellant returned to the scene of the crime to remove any incriminating evidence. When hiding from police, appellant threatened to kill his son if he disclosed his whereabouts. (16 RT 2267-2268.) Appellant shaved his beard and cut his hair and "sunk" the clothes he was wearing in the bay to avoid detection. (16 RT 2211-2213.) And not insignificantly, appellant had twice raped and strangled two other woman. In the case of the rape and assault of Ms. Lovejoy, it was only her good fortune that by grabbing appellant's testicles she was able to stop him from strangling her to death. Given the evidence in the case, the admission of appellant's conviction for spousal battery was not prejudicial.

Appellant argues that admission of this evidence violated due process and the federal standard of review must apply. Issues relating to the admission of evidence typically do not raise a federal constitutional question. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; see also *Dowling v. United States* (1990) 493 U.S. 342, 352-354.) In *Dowling v. United States*, *supra*, 493 U.S. 342, the United States Supreme Court held that admission of evidence of a prior burglary, of which the defendant had been acquitted, did not raise a federal constitutional issue. (*Id.* at pp. 352-354.) The court explained the admissibility of such potentially prejudicial evidence depends on rules of evidence rather than concepts of federal due process. (*Ibid.*)

McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378, cited by appellant is distinguishable. In that case, with equally plausible circumstantial evidence

against the husband and the son of the murder victim, the prosecution pursued a highly inflammatory course of character assassination against the defendant-son, offering "the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall and occasionally venturing forth in camouflage with a knife strapped to his body." (*Id.* at p. 1385.) The Ninth Circuit found the evidence was "emotionally charged" and had no relevance whatsoever to any issue before the jury. (*Ibid.*) *McKinney* recognized, however, that """"the category of infractions that violate 'fundamental fairness'"" is a very narrow one." (*McKinney v. Rees*, *supra*, F.2d at p. 1380; quoting *Estelle v. McGuire*, *supra*, 502 U.S. at p. 73, and *Dowling v. United States*, *supra*, 493 U.S. at p. 352.) Here, the evidence was not so prejudicial as to violate due process.

III. THE JURY WAS PROPERLY INSTRUCTED WITH CALJIC NO. 1194

Appellant repeatedly told police that he and McKenna had consensual sex prior to the date she was murdered. In his statement on March 21, 2003, appellant told detectives that he had a one-time sexual encounter with McKenna. In both of his March 31, 2003, statements, appellant stated that he and McKenna had engaged in consensual sex a couple of times prior to the date of the murder. Based on the admission of this evidence and the mandate of Penal Code section 1127d,[12] the court gave the limiting

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[12] Penal Code section 1127d provides:

(a) In any criminal prosecution for the crime of rape, or for violation of 261.5, or for an attempt to commit, or assault with intent to commit, any such crime, the jury shall not be instructed that it may be inferred that a person who has previously consented to sexual intercourse with persons other than the defendant or with the defendant would be therefore more likely to consent to sexual intercourse again. However, if evidence

(continued...)

instruction on consent and prior sexual intercourse evidence embodied in CALCRIM No. 1194. This limiting instruction explained to the jury that it could consider the evidence that McKenna had prior consensual sex with appellant only for the limited purpose of determining whether McKenna consented to the sexual intercourse that occurred with appellant at the time of her death, and whether appellant had a reasonable good faith belief that she consented to sex with him. (21 RT 3063; 7 CT 1596.)

The court instructed as follows

> You have heard evidence that Suzanne McKenna had consensual sexual intercourse with the defendant before the act that is charged in this case. You may consider that evidence only to help you decide whether the alleged victim consented to the charged act and whether the defendant reasonably and in good faith believed that Suzanne McKenna consented to the charged act. Do not consider this evidence for any other purpose.

(CALCRIM No. 1194; RT 3174; CT 1648.)

In closing argument, defense counsel relied on this instruction to the extent that it cast reasonable doubt on whether appellant raped McKenna or had consensual sex with her as he claimed in his previous statements.

Appellant now argues it was error to give the instruction without modifying it to permit the jury to consider this evidence for the additional

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(...continued)

> was received that the victim consented to and did engage in sexual intercourse with the defendant on one or more occasions prior to that charged against the defendant in this case, the jury shall be instructed that this evidence may be considered only as it relates to the question of whether the victim consented to the act of intercourse charged against the defendant in the case, or whether the defendant had a good faith reasonable belief that the victim consented to the act of sexual intercourse. The jury shall be instructed that it shall not consider this evidence for any other purpose.

purpose of determining whether he had an honest even if *unreasonable* belief that McKenna consented to the charged act. (AOB 173.) Appellant reasons that because, as part of the felony-murder doctrine and to support a special circumstance finding, the jury must conclude that he had the specific intent to rape McKenna, such specific intent could be negated even by an *unreasonable* mistake of fact in her consent. Appellant contends the instruction precluded him from presenting a complete defense and likely confused the jury on the specific intent element effectively lowering the prosecution's burden of proof.

Appellant has not preserved the claim. Considered on the merits it fails as well for there is no unreasonable mistake of consent defense. Even if such a defense exists, there was not substantial evidence in this case to warrant such an instruction. For the same reason, any error was harmless.

A. Appellant Has Forfeited the Claim

As a preliminary matter respondent asserts that appellant has waived this issue. A defendant may not "remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.) The record makes clear that trial counsel requested CALCRIM No. 1194 be given and did not request that it be modified so that the jury could consider whether appellant's belief in consent was honest but unreasonable. Under these circumstances, appellant has either invited any alleged error or waived it. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1036-107 [challenge to section 1101 instruction forfeited for failure to object or seek clarification of allegedly ambiguous language].)

B. There is No Imperfect Consent Defense to Rape Felony Murder and Rape Special Circumstance

Even if the claim is not forfeited, it is meritless.

Rape is a general intent crime wherein the defendant engages in forcible sexual intercourse that is nonconsensual either because consent is not given, is coerced, or is unavailing for one of the reasons specified in subdivisions of Penal Code section 261. In *People v. Mayberry* (1975) 15 Cal.4th 143("*Mayberry*"), this Court held that "[i]f defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the *wrongful intent* that is a prerequisite under Penal Code section 20 to a conviction of either kidnaping (§ 207) or rape by means of force or threat (§ 261, subds. 2 & 3)." (*People v. Mayberry*, *supra*, 15 Cal.3d at p. 155 [italics added].)[13] *Mayberry* provides a complete defense to rape.

In *People v. Williams* (1992) 4 Cal.4th 354 ("*Williams*"), this Court clarified that for the *Mayberry* defense to apply, the defendant must not only honestly and in good faith, albeit mistakenly, believe that the victim consented to sexual intercourse, but that his mistake must be reasonably based on the victim's equivocal conduct. (*Williams*, at pp. 361-362.) As this Court explained: "[B]ecause the *Mayberry* instruction is premised on mistake of fact, the instruction should not be given absent substantial

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[13] *Mayberry* relied heavily on *People v. Hernandez* (1964) 61 Cal.2d 529, in which the defendant was convicted of statutory rape. There, the Court upheld the defendant's contention that the trial court had erred by excluding evidence that the defendant had a good faith and reasonable belief that the prosecutrix was at least 18-years-old. (*People v. Mayberry*, *supra*, 15 Cal.3d at pp. 154-155.) The *Mayberry* Court emphasized that the *Hernandez* opinion "indicated that the defendant's belief must be, inter alia, reasonable in order to negate criminal intent. (61 Cal.2d at pp. 534-536.)" (*People v. Mayberry*, *supra*, 15 Cal.3d at p. 155.)

evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (*Id.* at p. 362.

Rape felony murder and the rape felony murder special circumstance both require the additional element of specific intent to commit the underlying felony. (*People v. Haley* (2004) 34 Cal.4th 283, 314.)

Relying on appellate court cases holding that the specific intent required for theft can be negated by an unreasonable mistake of fact,[14] appellant argues that in the context of felony murder and the special circumstance of rape, this Court should expand the defense recognized by *Mayberry*, to include an *unreasonable* mistake of fact as a basis for precluding a finding of wrongful intent. (AOB 176-177.) As described above, appellant reasons that under these circumstances a defendant must have the specific, as opposed to general, intent to rape and thus, even an unreasonable belief in consent by the victim will negate that specific intent.

To date, this Court has not recognized an honest but unreasonable mistake defense under the circumstances presented here. We urge it not to do so now. In permitting a mistake of fact defense in the context of rape, the *Mayberry* Court relied upon *People v. Vogel* (1956) 46 Cal.2d 798, 801, which held that, under Penal Code section 20, every crime requires a union

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[14] Appellant's reliance on theft cases for the proposition that an unreasonable mistake of fact can negate the specific intent required for theft is unavailing here. (See *People v. Navarro* (1979) 99 Cal.App.3d Supp 1, *People v. Mares* (2007) 155 Cal.App.4th 1007, 1010; and *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425; CALJIC No. 4.35; CALCRIM No. 3406.) Assuming these cases are correctly decided, public policy has placed significant restrictions on mistake of fact defenses, even where property is at issue, if force or violence is involved. (See, e.g., *People v. Tufunga* (1999) 21 Cal.4th 935, 954-956 [claim-of-right defense does not apply to robberies perpetrated to satisfy, settle, or otherwise collect a debt].)

of act and "wrongful intent" unless excluded expressly or by necessary implication. (*People v. Mayberry*, *supra*, 15 Cal.3d at p. 154.)

In *Williams,* this Court reiterated that *"Mayberry* is predicated on the notion that under section 26, reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent. " (*Williams*, at p. 360.) Respondent submits that an *unreasonable* mistake of fact regarding consent *is* compatible with the existence of wrongful intent. In the context of rape, the perpetrator has engaged in a forceful act of intercourse against the will of a the victim. If the perpetrator's mistaken believe in consent is not objectively reasonable, he is morally culpable. As this Court has repeatedly stated, the mistaken believe of consent "must be formed under circumstances society will tolerate as reasonable . . ." (*People v. Williams, supra,* 4 Cal.4th at p. 361.) The reason for the rule is obvious. Society cannot tolerate such a violent act under circumstances where no reasonable person would understand the victim to be consenting. Especially where, as here, the perpetrator not only sexually violates the victim, but kills her.

Nor can society tolerate an individual setting his own standard in the context of such a violent act. For example, when a defendant kills in the heat of passion, his culpability will be mitigated and malice deemed negated, only if an ordinary and reasonable person would have acted the same under the circumstances. This is because, "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. (citation omitted) " (*People v. Beltran*, (2013) 56 Cal.4th 935, 951("*Beltran*").) And even where the law has permitted consideration of an honest but unreasonable belief in the need to use violence, the result is that culpability is mitigated; exoneration is not available. (See *People v. Flannel* (1979) 25 Cal.3d 668.) The reason for this result is particularly apt

here: ". . . [A] defendant has no legitimate interest in complete exculpation when acting outside the range of reasonable behavior." (*Id.* at p. 680.) Differently stated, "the killer who acts unreasonably commits a crime." (*Beltran, supra,* 56 Cal.4th 935, 951.) So too here where appellant's intrusion upon the victim is so serious. As one court of appeal concluded in a civil case rejecting an honest but unreasonable belief in consent as a defense to a charge of assault with intent to commit forcible oral copulation under Penal Code section 220, "Although the law recognizes one might have a nonculpable state of mind if one has a reasonable bona fide belief in consent (*People v. Mayberry* (1975) 15 Cal.3d 143, 155 [125 Cal.Rptr. 745, 542 P.2d 1337], the law would impose criminal responsibility where the belief in consent was unreasonable." (*Merced Mut. Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 51.)

In sum, if a defendant is aware of facts which render a belief in the consent of his victim wholly unreasonable, he cannot claim any legitimate interest in complete exculpation for he cannot be deemed to be morally innocent. In acting under such circumstances he has acted with a wrongful intent that society cannot tolerate. Under these circumstances, no defense should be available as a matter of sound public policy.

C. Even if A Cognizable Defense, No Evidence Supported An Instruction that Appellant Honestly But Unreasonably Believed McKenna Consented To Sex; Such An Instruction Would Have Been At Odds With Appellant's Theory Of Actual Consent

Even were this Court to recognize such a defense, there was no evidence in this case to support it.

It is well established that a trial judge has a responsibility to correctly instruct the jury and limit argument to defenses supported by substantial evidence. A judge must instruct on the law applicable to the facts of the case and a defendant has a right to an instruction that pinpoints the theory

of the defense. (*People v. Mincey* (1992) 2 Cal.4th 408, 437; *People v. Benson* (1990) 52 Cal.3d 754, 806; *People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Sears* (1970) 2 Cal.3d 180, 189-190). However, a trial judge must give only those instructions which are supported by substantial evidence. (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4; *People v. Flannel, supra,* 25 Cal.3d 668, 684.

All of appellant's statements and accordingly the defense theory of the case was that his sexual encounters with McKenna were consensual. Appellant repeatedly told investigators and the district attorney that prior to the night McKenna was killed he and she had consensual "basic" "oral sex" and "[r]egular missionary style sex." There was no violence involved. (14 RT 1996 (People's Pretrial Exh. 3A at pp. 39-40 (transcript of audiotape); People's Exhibit 38 (audiotape).)

Likewise, on the night he strangled McKenna, appellant continually asserted that the sex between them was mutually initiated and consensual. According to appellant, McKenna indicated her desire to have sex with him by taking off his clothes. In appellant's words, "she was the aggressor that night." (People's Exhibit 6, 6A at p. 8.) While they engaged in what he described as "rough sex," which involved her biting and hitting him and both of them slapping each other, appellant was clear that it was McKenna who requested him to choke her during intercourse and who insisted that the pressure he applied to her neck was not sufficient and that she wanted him to apply more. (*Id.* at p. 6.) Appellant unfailingly described the sex as consensual and denied that any violence was involved. (14 RT 1996.) This testimony, if believed, established a complete defense of unequivocal and actual consent by McKenna.

The theory of the defense was in accord. During closing remarks appellant's counsel argued that the lack of forced entry, the opened condom, the level of alcohol and methamphetamine in McKenna's system, the lack

of genital trauma or torn clothes, and the evidence that appellant and McKenna had been seen socializing together, were reasons to believe appellant's version of events that he "did not rape her" and that McKenna wanted to have sex with him. Neither version of events suggests an actual and honest but *unreasonable* "mistake" in understanding between appellant and McKenna regarding her desire to have sexual intercourse.[15] Because there was no substantial evidence supporting this instruction, the trial court did not err in failing sua sponte to modify CALCRIM 1174.

D. Any Error Was Harmless

For the same reason, any such error was clearly harmless. Failing to provide sua sponte instructions on a defense, such as mistake of fact, is an error of state law that is reversible only if there was a reasonable probability of a more favorable result absent the error. (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051; see also *People v. Breverman* (1998) 19 Cal.4th 142, 165 [applying same standard to requirement of sua sponte instructions on lesser included offenses].)

In this case, there a complete absence of any evidence that appellant acted with an actual and honest albeit unreasonable mistaken belief that McKenna was consenting to intercourse with him. To the contrary, appellant's previous rape convictions and his course of action in strangling McKenna to death, running from the scene and not coming forward,

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[15] Respondent notes that if appellant's account of their sexual encounter is believed, i.e., that the roughness was mutually desired and consented to, then it would not be "unreasonable" for him to interpret any acts of resistance by McKenna, as simply part of the sexual encounter to which they had both agreed. However, given the evidence and arguments in this case, we question, whether appellant was even entitled to a *Mayberry* instruction. (*Williams*, *supra,* 4 Cal.4th 354, 362 ["a reasonable belief of consent instruction is not required and should not be given where the defense is express consent." (*People v. Burnett* (1992) 9 Cal.App.4th 685, 691.].)

provided compelling evidence that appellant acted, not under any mistake, but with the specific intent to have forcible sexual intercourse. (See *People v. Stitely* (2005) 35 Cal.4th 514, 532. [evidence that appellant acted with innocent intent sharply reduced by evidence that he previously committed forcible non-consensual sex acts.]) Given the evidence that appellant had strangled two other women during the course of a rape, both of whom he initially claimed consented to sex with him, it is not reasonably probable that even had the jury been permitted to consider whether appellant had an actual and honestly held, albeit unreasonable, belief that McKenna was consenting, the result would have been different.

IV. THE PROSECUTOR DID NOT COMMIT MISCONDUCT AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL BASED ON THE ADMISSION OF VICTIM IMPACT EVIDENCE; ANY PREJUDICE WAS CURED BY THE COURT'S INSTRUCTION TO DISREGARD THE TESTIMONY

McKenna's sister, Patti Dutoit, died of a drug overdose several months after McKenna's murder. (6 CT 1297.) Members of her family believed her death was a suicide committed in response to McKenna's murder. (2 RT 134.) The defense opposed the admission of any evidence regarding Dutoit's death, as well as any testimony by family members that her death was a suicide committed in response to McKenna's murder. (6 CT 1291-1296.)

The trial court denied the defense motion that no reference be made to Dutoit's death, but prohibited McKenna's family from describing the death as a suicide. (24 RT 3256.) The court made clear, however, that the prosecutor was permitted to elicit testimony from family members regarding the impact that McKenna's death had on Patti Dutoit. The prosecutor informed the family members of the court's ruling.

Despite the court's ruling and the prosecutor's admonishment to the family members, McKenna's brother, Ron McKenna, testified that Dutoit committed suicide in response to McKenna's death and that in his view appellant was responsible for the death of both of his sisters. (25 RT 3311.) The defense objected and moved to strike or clarify the testimony. (25 RT 3311.) The court immediately admonished the jury that "you are not to consider the suicide mentioned as in any way relating to the defendant Molano." (25 RT 3311.)

A sidebar was had in which the defense sought further information in relation to the utterance. The court noted that the prosecutor did further admonish Ronald McKenna regarding the court's ruling and had a further conversation with Yvonne Searle not to mention the suicide. The prosecutor made clear to the court that prior to their testimony, he had admonished both Ronald McKenna and Yvonne Searles regarding the court's order:

> Mr. Meehan: For the record, I did this morning in no uncertain terms make it very clear to both Yvonne Searle and Ron McKenna that there would be no mention of Patti committing suicide. I even explained the basis of the ruling and discussed the parameters of what could be shared in court, and frankly Mr. McKenna wasn't listening very closely because we were all here when he did make the statement.

(25 RT 3334.)

The defense moved for a mistrial, which was denied by the court. At the close of the penalty phase, the court gave the jury a pinpoint instruction directing that it disregard the opinion testimony of Ron McKenna that his sister committed suicide in reaction to Suzanne's death and the appellant was responsible. (8 CT 1887; 26 RT 3350-3359; 30 RT 3803.)

Appellant contends the court abused its discretion in denying his motion for a mistrial. He claims the prosecutor committed misconduct in violating the court's order and that the admission of this evidence violated

the Fifth, Sixth, Eighth, and Fourteenth Amendments, and deprived him of a fair trial and due process. The claims lacks merit.

A. Law on Prosecutorial Misconduct

The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"'(*People v. Stanley* (2006) 39 Cal.4th 913, 951, citations omitted.) Under state law, "a prosecutor commits misconduct by using deceptive or reprehensible methods of persuasion." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133, citations omitted.) The defendant need not show that the prosecutor acted in bad faith or with an appreciation for the wrongfulness of his/her conduct, nor is a prosecutorial misconduct claim defeated by showing the subjective good faith of the prosecutor. (*People v. Price* (1992) 1 Cal.4th 324, 447, citations omitted.) Although a prosecutor commits misconduct when he or she intentionally elicits inadmissible testimony, mere eliciting of evidence is not misconduct. (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380.)

"At the penalty phase, as at the guilt phase, on appeal a defendant may not complain of prosecutorial misconduct if the defendant does not timely object and request an admonition, unless an admonition would not have cured the harm." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019.) Furthermore, when misconduct has occurred, the defendant must also demonstrate that it was prejudicial. (*Ibid.*) "In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner." (*Ibid.*)

B. Any Claim of Prosecutorial Misconduct Is Waived on Appeal

Appellant *never* objected on prosecutorial misconduct grounds when Ron McKenna blurted-out that his sister Patti Dutoit had committed suicide and he blamed appellant. Rather, counsel's objection after Ron McKenna's testimony was by way of moving for a mistrial. At no time did counsel suggest, much less assert, that the prosecutor had intentionally elicited inadmissible evidence. Nor can appellant take refuge in the futility exception, as the jurors were specifically instructed to disregard McKenna's lay opinion. Accordingly, this claim is waived and may not be considered on appeal. (*People v. Hill*, (1998) 17 Cal.4th 800, 820.)

C. Even If Preserved, Appellant's Claim of Misconduct Lack's Merit

The court ruled that the evidence of Patti Dutoit's passing was admissible victim impact evidence. Only the *cause* of her death could not be brought to the attention of the jury. The prosecutor explicitly asked the court, "Will I be able to ask surviving family members how Patty [sic] reacted to Sue's murder?" (24 RT 3256.) The trial court responded: "Yes, but you should caution witnesses not to use that as an excuse – to say that she reacted by committing suicide or anything of that nature." (24 RT 3254-2355.) The prosecutor assured the court that he had admonished his witnesses. Thus, notwithstanding appellant's assertion to the contrary, the prosecutor did not ask Ron McKenna a question designed to elicit inadmissible evidence, rather, he asked his witness the very question he had previous obtained permission from the court to ask—"How did Patti take the news of Sue's death." (25 RT 3311.) Moreover, the prosecutor made clear that he had told all of the family members before they testified that there could be no mention of Patti committing suicide, even explaining the reasoning of the court's order and its parameters. (25 RT 3334.)

Nowhere does it appear in the record, that his credibility on this point was doubted.

In short, the prosecutor was not attempting to infect the trial or contravene the court's ruling. The prosecutor got express permission to ask the question he did, and took all reasonable steps prior to the family testifying to ensure that they were informed and would adhere to the court's order. On this record it cannot be said the prosecutor intentionally elicited inadmissible evidence. While Ron McKenna's remark contravened the court's ruling, it is clear that he expressed his opinion in spite of the prosecutor, not because of him. The remark, made by an obviously still-grieving but properly admonished family member could not have been anticipated and it can hardly constitute the type of "deceptive or reprehensible methods" that would constitute misconduct. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072; *People v. Price*, *supra*, 1 Cal.4th at p. 447.) Appellant's contention is therefore without merit.

D. Any Misconduct Did Not Prejudice Appellant

Even assuming misconduct, appellant was not prejudiced as there is no reasonable possibility that had the alleged misconduct not occurred appellant would have received an LWOP sentence. (*People v. Brown*, (1988) 46 Cal.3d 432, 446-448 ["reasonable possibility" of a different result is the harmless-error test for state-law error at the penalty phase]; see *Chapman v. California*, *supra*, 386 U.S. 18, 23-24 [federal constitutional error does not require reversal where the error is harmless beyond a reasonable doubt, and, there is "little, if any, difference between our statement . . . about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."]) By parity of reason, in no way did the misconduct rise

to the level of a due process violation in that the prosecutor's challenged questions rendered appellant's penalty trial fundamentally unfair.

To begin, the jury was told not to consider the testimony. (30 RT 3803.) It is presumed that the jury followed the instructions and admonitions given it. (*People v. Jones* (1997) 15 Cal.4th 119, 168; *People v. Wash*, *supra*, 6 Cal.4th 215, 263.) Moreover, the prosecution presented a powerful case in aggravation, particularly the circumstances of the crime and appellant's prior history of violence. The aggravating factors clearly outweighed the defense case in mitigation. There exists no reasonable possibility the jury would have reached a different penalty verdict had it not heard that one family member believed his seriously depressed sister had committed suicide because of McKenna's death. Appellant's penalty trial was not fundamentally unfair.

E. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Motion for a Mistrial

1. Applicable legal principles

A trial court's denial of a motion for a mistrial is reviewed under the deferential abuse-of-discretion standard. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 314. A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) Whether a particular incident is incurably prejudicial is by its nature a speculative matter and the trial court is vested with considerable discretion in ruling on mistrial motions. (*Ibid*; *People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) When a witness blurts out something unexpected, an admonition to disregard the testimony is ordinarily sufficient to cure the harm. (E.g., *People v. Price* (1991) 1 Cal.4th 324, 454-455.)

2. The trial court's ruling

After hearing argument, the trial court denied the motion for mistrial reasoning as follows:

> I believe that taken together with my immediate admonition to the jury that the – that there was not incurable prejudice. I believe that the admonition in context taken together with the District Attorney's further examination and the defense's further examination, that Patricia Dutoit had preexisting depression and problems, did much to reduce that prejudice so that any prejudice was curable.
>
> That being said, I have prepared an instruction which – however, I appreciate that the defense may not want it in, that there's the question of ringing a bell over and over again. The instruction which I'll give you copies if you decide you do want it would read as follows: it would be headed number 303. During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other. Specifically, Ron McKenna's stated opinion that Suzanne McKenna's death was a motivating factor in the death by suicide of their sister Patricia Dutoit has no basis in evidence as that suicide may just as or more likely have been motivated by any a number of other reasons. Therefore, you are to consider the fact of Patricia's death only for the limited purpose to provide context to any impact that Suzanne McKenna's death has had on her family.

(26 RT 3359.)

3. The trial court did not abuse its discretion in denying the motion for mistrial

The Eighth Amendment to the federal Constitution erects no per se bar prohibiting a capital jury from considering victim impact evidence relating to a victim's personal characteristics and impact of the victim's murder on the family and community. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825, 827.) The evidence, however, cannot be cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair" under the Fourteenth Amendment. (*Id.* at p. 825.)

This Court has found victim impact evidence and related "victim character" evidence to be admissible as a "circumstance of the crime" under Penal Code section 190.3, factor (a). (*People v. Robinson* (2005) 37 Cal.4th 592, 650; *People v. Panah* (2005) 35 Cal.4th 395, 494-495; *People v. Edwards* (1991) 54 Cal.3d 787, 832-836.) "The word 'circumstances' as used in factor (a) of section 190.3 does not mean merely immediate temporal and spatial circumstances" but also extends to those which surround the crime "'materially, morally, or logically.'" (*People v. Edwards, supra*, 54 Cal.3d at p. 833.) Factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*Id.* at pp. 833-836; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171.) In *Edwards* this Court directed trial courts to weigh the probative value of the victim impact evidence against its prejudicial effect. (*Edwards, supra,* 54 Cal.3d at p. 836.)

This Court has also repeatedly held that the prosecution is entitled to present the full impact of the victim's death on his or her survivors. Significant here, suicide attempts by surviving family members have been deemed to be proper victim impact evidence. (*People v. Tully* (2012) 54 Cal.4th 952, 032; see, e.g., *People v. Booker* (2011) 51 Cal.4th 141, 193, [testimony by victim's mother about her suicide attempt and hospitalizations "was relevant victim impact evidence"]; see also *People v. Wilson* (2005) 36 Cal.4th 309, 356, [the victim's sister testified concerning her daughter's attempted suicide]; *People v. Panah, supra,* 35 Cal.4th 395, 495 (family member's two suicide attempts need not be excluded as unduly prejudicial.)

Erring on the side of caution, the trial court here concluded that the jury was not to learn that family members considered Dutoit's death to be a

suicide.[16] However, as the cases above make clear, suicidal reactions by a victim's family are clearly within the purview of Penal Code section 190.3. Thus, while Ron McKenna's remark violated the court's order, it was otherwise admissible victim impact evidence, and its inadvertent admission could not have denied appellant a fair trial, or provide a basis for a mistrial.

Assuming arguendo the evidence was properly excluded, the inadvertent admission was not incurably prejudicial. To begin, we observe that had the trial court's ruling been strictly observed, (the propriety of which appellant does not challenge), the jury would have learned that the impact of McKenna's death on her family was additionally profound because of the subsequent loss of Dutoit seven months later. The jury would have learned that Dutoit was deeply disturbed by McKenna's death. The jury would have known that Dutoit was an alcoholic recluse who suffered from chronically severe psychological problems. The jury would also have learned that McKenna had been a major support system for Dutoit. Thus, even in the absence of Ronald McKenna's lay opinion that Dutoit committed suicide in response to McKenna's murder, the jury would have heard sufficient evidence inferentially suggesting some causal link between Dutoit's death and the absence of McKenna in her life.

In any event, as the trial court reasoned, the jury was immediately admonished that "it was not to consider the suicide mentioned as in any way relating to the defendant Molano." (25 RT 3311.) It was later

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[16] There was ample evidence before the court that supported the McKenna family's belief that Dutoit's death was a suicide and that McKenna's murder was a contributing factor to Dutoit's death. (See 2 RT 134; see also Court's Exhibit 10 at pp. 8-9; Court's Exhibit 11 at pp. 12-14; Court's Exhibit 12, at 8-9.) Dutoit overdosed. According to her sister Lori McKenna, after McKenna was murdered, Dutoit threatened to kill herself and indicated that she had no reason to live. (24 RT 3253.) McKenna was considered to be a "life-line" for Dutoit.

instructed that "the opinion testimony of the witness Ron McKenna that his sister Patricia Dutoit had committed suicide in reaction to Sue McKenna's death and that Carl Molano was responsible for Patria Dutoit's death has no basis in fact and that testimony was ordered stricken from the record. You must not consider it for any purpose." (8 CT 1887; 30 RT 3803.) Respondent submits the trial court's subsequent specific admonition to the jurors cured any prejudice arising from the remark. This Court has consistently stated that on appeal it is presumed that the jury is capable of following the instructions they are given. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337.)

Although it is true, as appellant points out, that a witness's volunteered statement can, under some circumstances, provide the basis for a finding of incurable prejudice, this is not one of those rare circumstances. (See *People v. Wharton* (1991) 53 Cal.3d 522, 565, [motion for mistrial properly was denied because court's admonition and witness's later testimony under cross-examination dispelled prejudice]; *People v. Rhinehart* (1973) 9 Cal.3d 139, 152, [witness's inadvertent answer was insufficiently prejudicial to justify a mistrial]; *People v. Anderson* (1990) 52 Cal.3d 453, 468 [claim that trial court improperly disclosed to jury that the defendant previously had been sentenced to death for the same offense not prejudicial].)

Here, the jury was not only immediately admonished and subsequently instructed to disregard and not consider the evidence, but as the court noted, through subsequent examination and cross-examination, the jury heard from family members that well before McKenna's death, Dutoit was a reclusive, long-time alcoholic, suffering from significant psychological problems. The subsequent examinations by the prosecutor and defense made clear that Patti Dutoit's problems were independent from and long predated McKenna's death. A reasonable juror would see Ron

McKenna's comment for what it was, a remark driven by grief rather than fact or reason. Taking together the brevity of the remark, the subsequent examination, the admonishment and the pinpoint instruction regarding the remark, the court did not abuse its discretion in denying appellant's motion for a mistrial.

Nor as appellant suggests, was the Eighth Amendment violated by the admission of this evidence. As discussed above, aside from the victim impact evidence, there were compelling aggravating facts which individually and collectively warranted the imposition of the death penalty, the most obvious of which were the circumstances of the murder and appellant's violent history predating and postdating the charged crime. Not only were the aggravating facts strong, there was virtually a complete absence of anything to mitigate appellant's conduct other than having a bad relationship with his mother, and not knowing his father. Put simply, this single remark fell far short of anything that might implicate the Eighth Amendment. It was traditional victim-impact evidence, "permissible under California law as relevant to the circumstances of the crime, a statutory capital sentencing factor." (*People v. Cole* (2004) 33 Cal.4th 1158, 1233.)

V. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND AS APPLIED AT APPELLANT'S TRIAL, VIOLATES NEITHER THE UNITED STATES CONSTITUTION NOR INTERNATIONAL LAW

Appellant raises a number of routine challenges (AOB 215-248), to California's death penalty statute, all of which have previously been rejected by this Court—a fact he readily admits. Although he urges this Court to reconsider its well-reasoned and well-established rejection of these challenges, appellant fails to provide any legitimate reason for this Court to do so, thus making a minimalist effort to preserve these challenges for federal review. (AOB 215-248.)

A. Appellant Has Forfeited His Claim

Appellant did not request the trial court modify the instructions now challenged on appeal. Thus, this claim is not preserved for this appeal. (*People v. Carpenter* (1997) 15 Cal.4th 312, 391, superseded by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.)

B. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant claims that section 190.2 fails to meaningfully narrow the number of death-eligible murder cases in California. (AOB 217.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. (See, e.g., *People v. Moore* (2011) 51 Cal.4th 1104, 1144; *People v. Carrington* (2009) 47 Cal.4th 145, 199; *People v. Salcido* (2008) 44 Cal.4th 93, 166; *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Beames* (2007) 40 Cal.4th 907, 933; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43; *People v. Stitely, supra,* 35 Cal.4th 514, 573.)

C. Penal Code Section 190.3, Factor (a) Is Not Impermissibly Overbroad

Appellant claims that because it is permissible to rely upon the circumstances of the crime under section 190.3, factor (a), including victim impact evidence, factor (a) is, therefore, overbroad. (AOB 219-221.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. Because the factors in section 190.3 do not perform a narrowing function, they are not subject to the Eighth Amendment standard used to define death-eligibility criteria. They violate the Eighth Amendment only if they are insufficiently specific or if they direct the jury to facts not relevant to the penalty evaluation. California's factors suffer no such deficiencies. (*People v. Thomas* (2011) 52 Cal.4th 336, 365; *People v. Lee* (2011) 51 Cal.4th 620, 653; *People v. Hartsch*

(2010) 49 Cal.4th 472, 516; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228; *People v. Harris* (2005) 37 Cal.4th 310, 365; *People v. Hughes* (2002) 27 Cal.4th 287, 404-405; *People v. Cain* (1995) 10 Cal.4th 1, 68-69; *People v. Bacigalupa* (1993) 6 Cal.4th 457, 478-479.)

D. There Are No Constitutional Requirements That the Jury Unanimously Find Aggravating Factors, Make Written Findings Regarding Aggravating Factors or Find Aggravating Factors Beyond a Reasonable Doubt

Appellant raises several claims regarding the jury's findings as to aggravating factors under California's death penalty statute and jury instructions (AOB 221-238), all of which have been previously rejected by this Court. Each is addressed separately below.

Appellant alleges that, in order to pass constitutional muster, aggravating factors must be found to exist by the jury beyond a reasonable doubt. (AOB 222.) This Court has repeatedly held that the absence in Penal Code section 190.3 and CALJIC No. 8.88 of any burden of proof except as to prior criminal acts under factor (b) is not unconstitutional and appellant provides no reason to revisit this holding. See, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 697; *People v. Elliot* (2005) 37 Cal.4th 453, 487-488; *People v. Moon* (2005) 37 Cal.4th 1, 43; *People v. Prieto* (2003) 30 Cal.4th 226, 275; *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Lucero, supra*, 23 Cal 4th at p. 741; *People v. Samayoa* (1997) 15 Cal.4th 795, 862; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 595.)

Appellant also argues that the jury's findings regarding the presence of aggravating factors must be unanimous. This Court has repeatedly held that the jury need not achieve unanimity as to specific aggravating factors and appellant provides no reason to revisit this holding. (See, e.g., *People v. McKinnon, supra,* 52 Cal.4th at pp. 697-698; *People v. Brasure* (2008) 42 Cal.4th 1037, 1068; *People v. Moon, supra,* 37 Cal.4th 1, 43; *People v.*

Boyette (2002) 29 Cal.4th 381, 465; *People v. Taylor*, (1990) 52 Cal.3d 719, 749; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.)

Appellant also argues that the jury must be instructed that it may impose a sentence of death only if it finds beyond a reasonable doubt that aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (AOB 231-235.)

We disagree. A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision. The sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty. (*People v. Sanders*, (1995) 11 Cal.4th 475, 564.) This Court has repeatedly held that the jury need not find the death penalty appropriate beyond a reasonable doubt. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1129; *People v. Burney* (2009) 47 Cal.4th 203, 268; *People v. Carrington, supra*, 47 Cal.4th 145, 199-200; *People v. Stanley* (2006) 39 Cal.4th 913, 963.)

Furthermore, "[n]either the federal nor the state Constitution requires that the penalty phase jury make unanimous findings concerning the particular aggravating circumstances, find all aggravating factors beyond a reasonable doubt, or find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors." (*People v. Jennings* (2010) 50 Cal.4th 616, 689.)

Appellant last contends that, to pass constitutional muster, the jury must have rendered specific written findings regarding aggravating factors. (AOB 236.) This Court has repeatedly held that such written findings are not constitutionally mandated and that the lack of such written findings does not preclude meaningful appellate review, and appellant provides no reasons for revisiting these holdings. (See, e.g., *People v. Wilson* (2008) 43 Cal.4th 1, 32; *People v. Moon, supra*, 37 Cal.4th at p. 43; *People v. Brown*,

supra, 33 Cal.4th at p. 402; *People v. Nakahara* (2003) 30 Cal.4th 705, 721; *People v. Williams* (1997) 16 Cal.4th 153, 276; *People v. Visciotti* (1992) 2 Cal.4th 1, 79; *People v. Thompson* (1988) 45 Cal.3d 86, 143; *People v. Allen* (1986) 42 Cal.3d 1222, 1285.)

There is no reason for this Court to revisit these decisions.

E. Inter-case Proportionality Review of a Capital Sentence Is Not Required Under Either the Federal or State Constitutions

Appellant claims his death sentence violates the Eighth and Fourteenth Amendments because California does not provide intercase proportionality review of sentences in capital cases. (AOB 238-240.) The United States Supreme Court examined California capital sentencing laws and held inter-case proportionality review was not required by the Eighth Amendment. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51.) This Court has consistently found that state capital law does not necessitate this type of review. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Harris*, *supra*, 37 Cal.4th at p. 366; *People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Moon*, *supra*, 37 Cal.4th at p. 48; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276.) Appellant's claim should be denied.

F. The Use of Restrictive Adjectives in Mitigating Factors Did Not Impermissibly Bar Consideration of Mitigation in Appellant's Case, Nor Did the Failure to Instruct that Mitigating Factors Are Only Potential Preclude Fair, Reliable and Evenhanded Application

Appellant raises two claims concerning factors in Penal Code section 190.3, and the language of CALJIC No. 8.85 (AOB 240-243), both of which have been previously rejected by this Court. Each is addressed separately below.

Appellant first alleges that inclusion of the adjectives "extreme" in factor (d), and "substantial" in factor (g) as read in CALJIC No. 8.85, acted as a bar to its meaningful consideration in mitigation. (AOB 240.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. (See, e.g., *People v. Lee* (2011) 51 Cal.4th 620, 653; *People v. Gamache* (2010) 48 Cal.4th 347, 406; *People v. Davis* (2009) 46 Cal.4th 539, 627; *People v. Perry* (2006) 38 Cal.4th 302, 319; *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Weaver* (2001) 26 Cal.4th 876, 993; *People v. Lucero* (2000) 23 Cal.4th 692, 727-728; *People v. Holt* (1997) 15 Cal.4th 619, 698-699.)

Appellant next contends that, because factors (d), (e), (f), (g), (h) and (j) each "includes the qualifiers 'whether or not'", the jury was precluded from making "a reliable, individualize capital sentencing determination as required by constitutional law." (AOB 240.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. (See, e.g., *People v. Lee*, *supra*, 51 Cal.4th at p. 653; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249; *People v. Tafoya* (2007) 42 Cal.4th 147, 198; *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Morrison* (2004) 34 Cal.4th 698, 730.)

G. Section 190.3 and Implementing Instructions Do Not Violate Equal Protection Principles

Appellant also contends that the absence of various procedural safeguards in section 190.3 violates his right to equal protection because he was treated differently than non-capital defendants. (AOB 243-246.) This Court has repeatedly held that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Morrison* (2004) 34 Cal.4th 698; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v.*

Boyette (2002) 29 Cal.4th 381, 465-467; and *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) Accordingly, appellant's equal protection claim is without merit.

H. California's Death Penalty Does Not Violate Either the Eighth and Fourteenth Amendments or International Law

Finally, appellant contends that his death sentence under California's death penalty statute violates both the Eighth and Fourteenth Amendments to the U. S. Constitution as well as international law. (AOB 246-248.) This Court has repeatedly held that a "[d]efendant's death sentence violates neither international law nor his rights under the Eighth and Fourteenth Amendments to the federal Constitution, as no authority 'prohibit[s] a sentence of death rendered in accordance with state and federal constitutional and statutory requirements'" and appellant provides no reason to revisit this holding. (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 697, citing *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; accord *People v. Thomas* (2011) 51 Cal.4th 449, 507; *People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 925; *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Brown*, *supra*, 33 Cal.4th at 403-404; see also *People v. Mendoza* (2007) 42 Cal.4th 686, 708 [California's imposition of death does not offend international norms of humanity and decency]; *People v. Beames*, *supra*, 40 Cal.4th at p. 935 [same].)

Based on the foregoing, appellant's claim that California's death penalty statute as interpreted and applied at his trial violates the U. S. Constitution and international law must be denied.

VI. THERE IS NO CUMULATIVE ERROR

Appellant claims that the cumulative effect of the alleged errors requires reversal. (AOB 249-251.) This claim is meritless.

Appellant was "entitled to a fair trial but not a perfect one." (*Lutwak v. United States* (1952) 344 U.S. 604, 619-620; *People v. Miranda* (1987) 44 Cal.3d 57, 123, overruled on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) When a defendant invokes the cumulative-prejudice doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Appellate courts review claims of cumulative prejudice by assessing the cumulative effect of any errors to see if "it is reasonably probable that the jury would not have convicted appellant of the charged offenses." (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.) Applying that analysis to the instant case, appellant's contention should be rejected.

Where none of the claimed errors actually constitute individual errors, there is no prejudice to cumulate. (*People v. Beeler* (1995) 9 Cal.4th 953, 994.) Since appellant's claims of error all lack merit, they could not—separately or together—infringe on appellant's state or federal constitutional, statutory, or other legal rights. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1111.)

Moreover, review of the record shows that appellant received a fair and untainted trial. The Constitution requires no more. Whether viewing all appellant's allegations of error individually or cumulatively, it is not reasonably probable that absent the alleged errors, appellant would have received a more favorable verdict. (See *People v. Wrest*, *supra*, 3 Cal.4th at p. 1111.)

CONCLUSION

Respondent respectfully requests that the judgment be affirmed.

Dated: February 6, 2014

Respectfully submitted,

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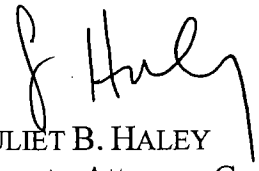

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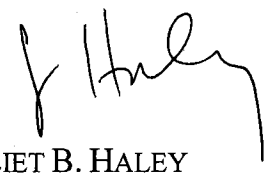
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 31,879 words.

Dated: February 6, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Carl Edward Molano***

No.: **S161399**

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 February 6, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Wesley A. Van Winkle
Attorney at Law
P. O. Box 5216
Berkeley, CA 94705-0216
(2 copies)

County of Alameda
Criminal Division
Rene C. Davidson Courthouse
Superior Court of California
1225 Fallon Street, Room 107
Oakland, CA 94612-4293

The Honorable Nancy O'Malley
District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

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

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 February 6, 2014, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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