IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



| | |
|---|---|
| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>Plaintiff and Respondent,<br>v.<br>**RANDY EUGENE GARCIA,**<br>Defendant and Appellant. | **CAPITAL CASE**<br>S045696 |



Los Angeles County Superior Court No. BA077888
The Honorable Jacqueline A. Connor, Judge

# RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KEITH H. BORJON
Supervising Deputy Attorney General

JOHN R. GOREY
Deputy Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

RUSSELL A. LEHMAN
Deputy Attorney General
State Bar No. 149784

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2280
Facsimile: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov

Attorneys for Respondent

## TABLE OF CONTENTS

## TABLE OF CONTENTS (continued)

## TABLE OF CONTENTS (continued)

## TABLE OF CONTENTS (continued)

## TABLE OF CONTENTS (continued)

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)

## TABLE OF AUTHORITIES (continued)



**Constitutional Provisions**



**Statutes**

## TABLE OF AUTHORITIES (continued)



**Other Authorities**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | |
|---|---|
| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>Plaintiff and Respondent,<br>**v.**<br>**RANDY EUGENE GARCIA,**<br>Defendant and Appellant. | **CAPITAL CASE**<br>S045696 |

## STATEMENT OF THE CASE

In an indictment returned by the Grand Jury of Los Angeles County, appellant was charged in count I of case No. BA077888 with the murder of Joseph Finzel in violation of Penal Code section 187.[1/] It was further alleged that appellant committed the murder while engaged in the commission and attempted commission of burglary, robbery, rape and oral copulation within the meaning of section 190.2, subdivision (a)(17). (I CT 213-214.) In count II, appellant was charged with the attempted murder of Lynn Finzel in violation of sections 664 and 187, and it was further alleged that appellant committed that crime willfully, deliberately, and with premeditation. (I CT 215.) Count III charged appellant with first degree residential burglary in violation of sections 459 and 462, subdivision (a). (I CT 216.) Appellant was charged in count IV with first degree residential robbery in violation of section 211. (I CT 217.) Count V charged appellant with attempted forcible

1. All further statutory section references are to the Penal Code, unless specified otherwise.

rape in violation of sections 664 and 261, subdivision (a)(2). (I CT 218.) In counts VI and VII, appellant was charged with forcible oral copulation in violation of section 288a, subdivision (c). (I CT 219-220.)

It was further alleged, as to all counts, that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a), and that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). (I CT 213-220.) At to counts II through VII, it was alleged that appellant intentionally and personally inflicted great bodily injury within the meaning of section 12022.7. (I CT 215-220.) As to counts V through VII, it was alleged that appellant used a firearm within the meaning of section 12022.3, subdivision (a), and that he inflicted great bodily injury within the meaning of section 12022.8. (I CT 218-220.) Appellant pleaded not guilty and denied the special allegations. (I CT 227.)

Appellant was later charged in count I of an information filed in case No. BA084072 with an additional count of first degree residential burglary. (I CT 33.) Appellant pleaded not guilty. (I CT 45.) The prosecution's motion to consolidate the cases was granted and the count I residential burglary of case No. BA084072 became count VIII of case No. BA077888. (I CT 55, 247.)

Following the presentation of evidence, and argument by both parties, appellant's motion challenging the Grand Jury was denied. (II CT 307.) Trial was by jury. (II CT 321.) The prosecution's motion to dismiss count VII pursuant to section 1385 was granted. (II CT 328.)

Appellant was found guilty as charged of the remaining counts and the special allegations were found to be true. (II CT 370-380, 388-391A.) The jury found the murder (count I) to be murder in the first degree and further found the section 190.2, subdivision (a)(17), special-circumstance allegations to be true. (II CT 370-374.)

Following a penalty phase, the jury affixed the penalty at death. (II CT 446, 450.) Appellant's section 190.4, subdivision (e), motion to reduce the penalty to life imprisonment without the possibility of parole, as well as his motion for new trial, were heard and denied. (II CT 471-474.)

Appellant was sentenced to death on count I in accordance with the jury's verdict. (II CT 474.) Additionally on count I, the court selected and imposed a consecutive 5-year personal use of firearm enhancement pursuant to section 12022.5, but stayed a 1-year principal-armed enhancement pursuant to section 654. (II CT 474-475.) A consecutive sentence of life in prison with the possibility of parole was imposed on count II, but sentencing on applicable sentencing enhancements was stayed pursuant to section 654. The court selected count III as the principal determinate term and imposed a consecutive sentence of the upper term of 6 years, plus a consecutive 3-year great bodily injury enhancement imposed pursuant to section 12022.7, but stayed additional enhancements pursuant to section 654. On count IV, the court imposed a consecutive sentence of 1 year 4 months (one-third of the middle term), and stayed sentencing on applicable sentencing enhancements pursuant to section 654. On count V, the court imposed a consecutive term of 1 year (one-third of the middle term), and stayed sentencing on applicable sentencing enhancements pursuant to section 654. On count VI, the court elected to proceed under section 667.6 and imposed a full-term consecutive term of 8 years (upper term). On count VIII, the court imposed a consecutive term of 1 year 4 months (one-third of the middle term). (II CT 474-475, 480-481.)

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

## STATEMENT OF FACTS

### A. Evidence Presented At The Guilt Phase

#### 1. The Prosecution's Case

##### a. The Burglary Of The Kozak Residence

On May 6, 1993, Archie and Winona Kozak left their residence at 17639 Kornblum in Torrance and traveled to Las Vegas to celebrate Mother's Day. The house was locked. They returned to their residence on the evening of May 9, 1993 (Mother's Day) and the interior of the house was "disarranged." Drawers were pulled out, the bedspread was pulled back, the door was open, and the drapes were blowing outside. Coins and jewelry (see Peo. Exhs. 52A, 52B, 52C, 53, 54), including Mr. Kozak's wedding ring (see Peo. Exh. 52C), were missing. Appellant did not have permission to take any of the property belonging to the Kozaks. (9RT 1803-1811.)

Efforts at lifting identifiable fingerprints at the Kozak residence were unsuccessful. Torrance Police Officer Stephan Badenoch identified several latent fingerprints taken at the point of entry but those lifts revealed "absolutely no ridge detail at all." Thus, it was not possible to identify any fingerprints at the location. Officer Badenock observed what he believed were fabric particles on the lifts recovered from the Kozak residence. (7RT 1385-1387, 1390.)

##### b. The Murder Of Joseph Finzel And The Sexual Assault And Attempted Murder Of Lynn Finzel

On May 8, 1993, Lynn Finzel, her husband Joseph Finzel, the couple's two-month-old baby Brinlee, and Garrett, Mr. Finzel's son from a previous marriage, resided in a three-bedroom house at 3627 West 180th Place in Torrance. Garrett, Brinlee, and the couple each had their own bedroom. That evening, Mrs. Finzel and Brinlee were home alone. Garrett was spending the

weekend with his mother for Mother's Day and Mr. Finzel was visiting a friend. (9RT 1867-1870.)

Mrs. Finzel turned off all the lights in the house before retiring in her and her husband's bedroom. Mrs. Finzel, who was wearing shorts and a T-shirt, left the television on in her bedroom. The light from the television lighted the bedroom since it provided "a glow in the room." The bedroom door remained open. That evening, Brinlee slept in a bassinet located near the foot of Mrs. Finzel's waterbed. (9RT 1870-1878.)

Mrs. Finzel was awakened by a banging noise which she thought might be a cupboard door. The hallway outside the bedroom was dark and Mrs. Finzel could only see a portion of the hallway. From her waterbed, however, Mrs. Finzel thought she saw "something move in the shadow" in the hallway and then enter Brinlee's bedroom. Mrs. Finzel then saw the shadow of a person move a second time. When she saw the shadow a third time, appellant, holding a small silver gun in his hand, entered her bedroom and grabbed the bassinet containing Brinlee. (9RT 1875-1878, 1885.)

Appellant, who was bare chested, was wearing black gloves, a black shirt which covered his hair and forehead, jeans, a gold necklace, and a buddy pack or fanny pack around his waist. Appellant had a hard pack of Camel cigarettes in his front pocket and also "reeked of cigarette smoke." (9RT 1881-1882, 1899.) Mrs. Finzel positively identified appellant as the intruder. (9RT 1877-1878, 1891-1892.)

Appellant pulled the bassinet toward himself and told Mrs. Finzel, "Don't scream, my friend's outside with a shotgun, if you scream I'll hurt the baby." Appellant then instructed Mrs. Finzel to remove her pants and panties. She sat on the side of the waterbed and complied with appellant's order. Appellant then unzipped his pants, removed his penis, and told Mrs. Finzel "to suck on it." Mrs. Finzel, while sitting on the bed,

complied and orally copulated appellant because of the gun and her concern for Brinlee. Thereafter, appellant had Mrs. Finzel stand up and bend over. Appellant positioned himself behind Mrs. Finzel and told her to take his penis and place it in her vagina. Mrs. Finzel attempted to comply with appellant's directive but his penis was not erect and therefore she could not place it into her vagina. During this time, appellant repeatedly asked Mrs. Finzel, "Is it in?" and Mrs. Finzel repeatedly lied and said, "Yes." (9RT 1878-1881.)

Appellant then grabbed Mrs. Finzel's arm and led her down the hallway to Garrett's bedroom. The door was closed and appellant asked, "Who is in here?" Mrs. Finzel responded, "No one. My stepson is not here." Appellant opened the bedroom door to check. The door to Brinlee's bedroom was already open. Appellant returned Mrs. Finzel to her bedroom and told her to remove her shirt and "Let me see those titties." Mrs. Finzel complied and, once again, appellant told her to bend over and place his penis inside her vagina. Mrs. Finzel, once again, pretended to do it since appellant's penis was not erect. (9RT 1882-1885.)

Appellant asked Mrs. Finzel, "Where is the money?" and Mrs. Finzel said she did not have any. Appellant then asked, "Where's the money?" and "Where's the safe, where is the jewelry?" Mrs. Finzel said there was a jewelry box containing jewelry on top of the dresser. Appellant also asked, "Where is the gun?" Mrs. Finzel, who was frightened, responded, "It's in the drawer." Appellant looked in a drawer on the right side of the bed but did not find a gun. Appellant then opened the drawer of the waterbed on which Mrs. Finzel was laying, and found Mr. Finzel's .357 Magnum (Peo. Exh. 51; see Peo. Exhs. 49A-C). At this point, Mrs. Finzel believed appellant had "total control" of the situation. (9RT 1885-1890, 1894-1895.)

Appellant stuffed a sock in Mrs. Finzel's mouth and gagged her. He also had Mrs. Finzel lie on her stomach on the bed while he tied her hands

behind her back and her ankles together. Appellant used the nylon stocking to tie Mrs. Finzel's ankles and wrists together behind her back. (9RT 1891, 1893, 1894.) Appellant asked Mrs. Finzel about the whereabouts of her husband. Mrs. Finzel said that her husband was at a local restaurant called "Texas Loosey's." Appellant told Mrs. Finzel to turn around and not to look at him. Appellant then closed the bedroom door so that it was open only about five inches. (9RT 1894-1898.)

Mr. Finzel then returned home. Mrs. Finzel heard the sound of her husband's truck pull up outside. Thereafter, Mr. Finzel entered the house, opened the bedroom door which was ajar about five inches, and turned on the bedroom light. Mr. Finzel had look of "confusion on his face." He then looked to the side and saw appellant standing in the bedroom holding a .357 Magnum. Mrs. Finzel then heard her husband "scream the most horrible scream I've ever heard" and saw blood coming from her husband's stomach and chest. The bassinet was between appellant and Mr. Finzel at the time appellant fired at Mr. Finzel. Mrs. Finzel screamed and then there was "a lot of gunfire going off." Appellant turned off the light and ran out of the bedroom. With Brinlee crying in the bassinet, Mrs. Finzel, who was in pain, pleaded with appellant, "Don't leave us like this." It was approximately 11:30 p.m. (9RT 1897-1903, 1907, 1908.)

Appellant remained inside the Finzel residence for several hours following the gunfire. At one point, Mrs. Finzel crawled over to the phone and attempted to dial 9-1-1 using her face to hit the buttons but appellant came back into the bedroom and pulled the telephone out of the wall. Appellant returned to the bedroom about 10 to 15 minutes later and tapped Mrs. Finzel, who was pretending to be dead, on the back of her head. Appellant returned later to the bedroom, picked up Mrs. Finzel's right hand, let it drop, and declared, "She's dead." (9RT 1903-1907.)

After several hours, appellant exited the residence. Mrs. Finzel got up off the waterbed but fell to the ground since she "had no control over [her] body." She crawled to a file cabinet, picked herself up, crossed over her husband's body on the floor, and crawled down the hallway to the living room. Mrs. Finzel, who was naked, then made her way to her neighbor's house by walking and crawling. With her gag and pillowcase still around her, Mrs. Finzel knocked on the neighbor's door with her fist shortly after 2:00 a.m. and then fell to the ground in the fetal position on the front porch because of the pain she was experiencing. When the door opened, Mrs. Finzel told her neighbors, "I've been shot." The neighbors called 9-1-1 and gave Mrs. Finzel a towel to wrap around herself. Mrs. Finzel remained on the porch until the paramedics arrived "because I couldn't have made it another inch." (9RT 1908-1913.)

The neighbors, Sylvia and Johnny Neville, heard Mrs. Finzel "banging" on their door shortly after 2:00 a.m. Mrs. Finzel told them she had been shot and needed help. Mrs. Finzel also said that her husband had been shot as well and that her husband and baby Brinlee were still inside her residence. The Neville's called 9-1-1 and passed along the information provided by Mrs. Finzel. (6RT 1240-1242, 1247.)

The Neville's also testified that while watching the 11:00 p.m. news the previous evening, they heard a noise which sounded like three or four shots. Mr. Neville, who was awakened by the noise, asked his wife, "Did you hear that? What was it?" Mrs. Neville said, "I don't know. Maybe it was next door, maybe it was the goat or freeway, but I don't know." Mr. Neville walked around and then the couple went to bed until they were awakened by the "banging" on their front door shortly after 2:00 a.m. (6RT 1237-1240, 1243-1244.)

The paramedics and police arrived at the scene at the same approximate time shortly after 2:00 a.m. Mrs. Finzel was "huddled over" "in a squatting position leaning against the wall" on the Neville's front porch wrapped in a large blood-stained towel. Mrs. Finzel was "crying hysterically, stating more or less that her house had been robbed and that her husband had been shot, and that her infant child was inside the residence at 3627 180th Place." The police entered the house while paramedics attended to Mrs. Finzel who had a visible bullet wound in her upper torso. Mrs. Finzel appeared to be in shock. Although she was breathing on her own, Mrs. Finzel had a very weak pulse. The nylon stockings wrapped around her wrists and ankles, as well as the material wrapped around her neck, were removed so her breathing could improve. (6RT 1249-1255, 1257-1259, 1270-1274.)

Mrs. Finzel was placed in a "shock position" (head down, feet up) "due to the fact that she was pale, diaphoretic, sweaty, and we could tell that her level of consciousness was altered, meaning that she wasn't getting proper profusion." (6RT 1259.) Because of her low blood pressure, the paramedics attempted to insert an IV in her left arm but were unable to do so because of "crepitus," a situation where the bones move underneath the skin. (6RT 1259.) Mrs. Finzel was transported to Harbor General Hospital by ambulance as her condition worsened each minute. As noted by one of the attending paramedics, it "was very evident from the beginning, that if we did not work with her very quickly and get her to the hospital for some treatment, that she would possibly die very soon." (6RT 1255.)

Mrs. Finzel's condition was critical when she arrived at the emergency room of the hospital. She had suffered a gunshot wound. Her blood pressure was only 90. Because of the inability to insert an IV into her arm, the doctors had to do a "cut down" into the ankle to place an IV in her so they could get fluids into her body. There was tension in her thorax. She had a collapsed lung

and the cavity of the lung was filling with air preventing the lung from expanding and moving blood to the heart and in turn to the veins. Because of her critical condition, Mrs. Finzel was immediately taken to the operating room. The doctors, however, were unable to use general anesthesia for the surgery since Mrs. Finzel's condition was "so unstable." General anesthesia could cause her heart to weaken and further lower her blood pressure. Thus, the doctors gave Mrs. Finzel "a touch of narcotics" for the surgery so "she was almost in a twilight sleep." The surgery lasted three hours. (6RT 1223-1227.)[2/]

During the surgery, the doctors made an incision from the below the belly button all the way up toward the neck area. This allowed the "maximal exposure into the injured organs." The attending surgeon explained that when they are uncertain of what happened or what is occurring they use the midline incision (which is referred to as the "incision of indecision"). There was a large amount of blood in Mrs. Finzel's abdomen. There was also a hole in her diaphragm from a bullet which entered on her right side and shattered the dome of the liver. It appeared Mrs. Finzel suffered at least two, and possibly three, through-and-through gunshot wounds. (6RT 1226-1233, 1236.)

The attending surgeon testified at trial to the following:

> I have seen a lot of people in trauma situations and after looking at her injuries and later finding out what had happened to her and the length of time that she had been basically unattended between her time of initial injury and when we approached her and were able to help her in the operating room, I was amazed that she was alive.

---

2. Mrs. Finzel, however, could feel what the doctors were doing during the surgery. She testified at trial that "I remember trying to move my hands so I can signal to them that I wasn't numb and that I had feeling." She recalled the feeling of "cutting my stomach open" and the doctors "moving my organs around." The feeling of the pain during the surgery, explained Mrs. Finzel, was "worse than being shot." (9RT 1913-1915.)

He added, "[Mrs. Finzel] had lethal injuries in the sense that she had a collapsed lung, she was bleeding internally, and, you know, to survive that without medical attention is truly amazing. It is hard to believe." (6RT 1234-1235.)

Meanwhile, the police entered the Finzel residence. All the lights in the house were turned off. It appeared as if someone had gone through the cabinets in the kitchen and living room. The house appeared ransacked. There were blood stains in the hallway leading back toward the bedroom. The officers had difficulty opening the door of the master bedroom door and one of the officers kicked the door open about 12 to 15 inches so the officers "could squeeze through the door." Inside the bedroom, Mr. Finzel was lying on the floor. His body was the object blocking the opening of the door. Mr. Finzel was cold to the touch and demonstrated no vital signs. The pockets of his shorts were turned inside out. The officers removed a bassinet containing a small infant (Brinlee) which was located over one of Mr. Finzel's legs. The infant was checked to make sure she was not injured. The paramedics then entered the house to check on the condition of Mr. Finzel. He had no carotid pulse and was not breathing. His face was blue and there was lividity underneath his body, indicating he had probably been dead for some time. The paramedics used a stethoscope to determine Mr. Finzel was not breathing. Mr. Finzel also "flat-lined" on the EKG machine indicating the electrical portion of his heart had stopped. Mr. Finzel was pronounced dead at the scene. (RT 1260-1265, 1275-1283, 1285-1290, 1354.)

The autopsy on Mr. Finzel revealed that the cause of death was multiple gunshot wounds. Two gunshot wounds entered Mr. Finzel's chest and exited out his back. Both bullet wounds were fatal. One of the bullet wounds entered the upper chest area and went through the lung and aorta before lacerating the spine. The other bullet wound to the chest was fatal as it entered the heart

causing massive bleeding. As noted by the autopsy surgeon, "so this would alone, as the other wound, also would be fatal." (6RT 1295-1303.)

**c. The Crime Scene**

The police made a videotape (Peo. Exh. 16) of the crime scene and portions of the videotape were played for the jury. (6RT 1330-1346.)

The house appeared to have been ransacked. The cabinets in the kitchen and living room were open. The back door was open. All the lights in the house were turned off. The television in the master bedroom was on. A purse was lying in the doorway and objects "were strewn across the living room." There was a bronzed-colored Corvette parked in the driveway with a key in the ignition (but the car would not start). A diaper bag (see Peo. Exhs. 11A and 11B) was lying in a puddle of water near the back door. Two gates in the backyard were open. (6RT 1275-1282, 1336-1342; 7RT 1393-1394.)

The waterbed in the master bedroom was leaking and the police needed to "plug it from destroying any evidence on the floor." (6RT 1292-1293.) There was a hole, which appeared to be a bullet hole, above the doorknob of the bedroom door where Mr. Finzel's body was found. (6RT 1290-1291.) Another bullet hole was observed in the side of the entertainment center in the living room. It appeared the bullet hole in the entertainment center was fired from a weapon in the master bedroom. A projectile (Peo. Exh. 30) was recovered from the wall of the cabinet in the living room. (6RT 1345-1348; 7RT 1389-1390; see Peo. Exh. 21A-C.) A couple of days after the shooting, Donald Murphy, the brother of Lynn Finzel, found a bullet (Peo. Exh. 4) wrapped up in the blankets on the waterbed (see Peo. Exh. 2A to H). (6RT 1215-1217; 7RT 1416-1418.)

Police Officer Richard Long and his K-9 partner, Assai, searched for possible evidence in the area behind the house. Between the backyard and the

405 Freeway, they discovered "crushed vegetation" where someone had recently walked or stepped. Officer Long could see footprints or tracks leading through the grass and weeds in the area. Assai discovered a partially smoke Camel cigarette (Peo. Exh. 32) in the area. The cigarette found by Assai was similar to the partially smoked Camel cigarette (Peo. Exh. 17) found on the back porch of the Finzel residence. (6RT 1306-1323; 7RT 1397, 1399-1400.)

Stephen Badenoch, a police officer for the City of Torrance trained in crime scene investigation, attempted to develop fingerprints at the Finzel residence from all the surfaces in the hallway that someone could have touched (since it appeared that was the path the suspect would have used to enter and exit the residence). The hallway lead from the master bedroom where Mr. Finzel was found on the floor down the hallway and out into the living room. He also tried to lift prints from the hall cabinet and "all the surfaces in the hallway that someone could have touched." Officer Badenoch observed several glove marks but none of those glove marks had no ridge detail and thus a fingerprint identification was not possible. (7RT 1377-1385.)

**d. Appellant's Activities Prior To The Charged Crimes**

George Aguirre lived at 3431 Artesia Boulevard in apartment number 23, in Torrance. In 1993, he met appellant through a friend named Steffen. Appellant stayed at Aguirre's apartment for about two weeks prior to Mother's Day. After the stay, appellant returned to Portland, Oregon. Thereafter, appellant left Portland with Bruce Pierce in Pierce's gray Honda Accord LXI. Appellant and Pierce drove to Aguirre's Torrance apartment for the purpose of purchasing marijuana. Aguirre was going to introduce appellant to friends who sold marijuana. As explained by Pierce, "we would go down [to Torrance] and buy Mexican weed and bring it back to Oregon and make a profit." Appellant and Pierce arrived at Aguirre's apartment on the morning of May 8, 1993 – the

day before Mother's Day. During the day, Pierce recalled looking "at all the different kinds of [Mexican] weed coming in and out of [Aguirre's] apartment." (7RT 1427-1431, 1432; 8RT 1629-1631, 1633-1634.)

Around 9:00 or 10:00 p.m. that evening, appellant and Aguirre left the apartment to "take care of some business or a job or something," which meant, according to Pierce, that they were going to "break into a house and steal." Appellant and Aguirre took Pierce's Honda Accord because Pierce "didn't want anything to do with what they were going to do, so I gave my keys to [Aguirre] to drive." When they left the apartment, appellant was wearing blue levis, a black turtleneck, black tennis shoes, and a fanny pack or buddy pack around his waist. Inside the fanny pack were a pair of gloves (Peo. Exh. 41) and a chrome-colored .25 automatic caliber gun. (7RT 1432-1437; 8RT 1634-1635, 1637-1639.)

Appellant told Aguirre to drive him at least one mile from Aguirre's apartment. After driving around for awhile, Aguirre dropped off appellant on Fonthill Street in the area of 177th Street. Appellant got out of the car and told Aguirre to wait for him. Aguirre waited about 15 minutes and appellant did not return. Aguirre started the car and began driving back to his apartment when he saw appellant walking down the street. Appellant was carrying a bag (Peo. Exh. 41) which closed at the top with a rope. Appellant told Aguirre the bag contained "just a bunch of change." Appellant did not have the bag when he initially got out of the car earlier. (7RT 1438-1445.)

Appellant got into the car and Aguirre continued driving. Aguirre drove around and eventually stopped at a dead-end on 180th Street. Appellant got out of the car and left the bag (Peo. Exh. 41) in the backseat. Appellant jumped over a wall and Aguirre drove back to his apartment because "I didn't like the situation I was in." Aguirre arrived back at his apartment approximately 45 minutes after he initially left with appellant. Aguirre told Pierce he returned

to the apartment because he "got scared of the cops." Pierce told Aguirre that if appellant was not back by 3:00 a.m. that he (Pierce) was returning to Oregon so he could spend Mother's Day with his mother. Aguirre and Pierce watched television and fell asleep. (7RT 1445-1451; 8RT 1635-1636.)

**e. Appellant Returns To Aguirre's Apartment**

Aguirre and Pierce were awakened between 3:00 and 3:30 a.m. when appellant returned to the apartment. Appellant was carrying a women's leather purse and a bag made of cloth material. Appellant was also holding a Smith and Wesson .357 Magnum. Appellant announced, "I'm going to hell, straight to hell" because "[I] shot two people." Appellant said he got the .357 Magnum "from the second job." Appellant then expended all the casings out of the .357 Magnum and they landed on the floor. As noted by Pierce, "all the casings came out of the gun and hit the floor." Appellant dumped out the contents of the purse and cloth bag. Appellant and Aguirre went through the items and argued over who was going to keep which items. Appellant asked Aguirre if he could "get rid" of the .357 Magnum and Aguirre responded that he did not want the gun in his apartment. (7RT 1451-1454, 1483-1484; 8RT 1637-1639, 1640-1643, 1664.)

Appellant and Pierce decided to return to Oregon. Appellant took the .357 Magnum and the .25 caliber automatic handguns with him. Appellant also took the woman's purse and jewelry. They left for Oregon before 4:00 a.m. Appellant placed a Bulova watch (see Peo. Exh. 50J) and some jewelry in the glove compartment of Pierce's car. Appellant also threw some of the jewelry and the purse out of the car window on the 405 Freeway as they were leaving Los Angeles. (8RT 1643-1644; 9RT 1778-1779.)

### f. Aguirre Contacts The Police

Aguirre did not at first believe appellant's story about shooting two people. However, while watching the 11:00 p.m. news on Mother's Day in 1993 (May 9th), Aguirre saw a newscast about two people who had been shot (one killed) in Torrance the previous evening. The newscast related that someone burglarized and robbed a home and shot two people on 182nd Street. Aguirre then realized appellant was not kidding about shooting two people. Aguirre called the police because "I thought it was the right thing to do." (7RT 1455-1457.)

Detectives Mason and Nemeth came to Aguirre's house to interview him. Aguirre was not initially completely truthful because he did not acknowledge he drove appellant around and waited for him on the evening of May 8th "because I was scared for myself." But, Aguirre later admitted that involvement in appellant's activities before the Grand Jury. (7RT 1457-1458.) Aguirre gave the detectives the following when they arrived at his apartment: a box containing earrings and pendants (Peo. Exh. 33); a bullet casing (Peo. Exh. 39) found on the floor in the living room; and a package of Camel cigarettes. While the detectives were interviewing Aguirre, a detective found a turtleneck (Peo. Exh. 40) stuffed in the couch. Aguirre told the detectives that the turtleneck belonged to appellant and was the shirt appellant was wearing the previous evening. (7RT 1458-1462; 9RT 1824-1826.)

The detectives returned unannounced to Aguirre's apartment the next day. The detectives found a pair of gloves (Peo. Exh. 44) on the top of a wheel under the wheel rim of a car parked in the garage. The detectives also found a pair of black tennis shoes. Aguirre also gave the detectives additional bullet casings and bullets he had found inside a drawer in the living room next to the coffee table. Four of the bullets were empty and two were full bullets. They

were also given three expended cartridges (Peo. Exh. 57) from a .357 Magnum. (7RT 1463-1468; 9RT 1827-1830.)

On May 10, 1993 -- the day after Mother's Day -- Detective David Nemeth prepared a photographic lineup containing a photo of a faxed copy of appellant's photograph from authorities in Oregon. Detective Nemeth went to Harbor General Hospital and showed the photo display to Mrs. Finzel who was at that time "somewhat incoherent." Mrs. Finzel, however, selected appellant's photograph as the perpetrator and said either "That's him" or "It looks like him." (9RT 1833-1840.) Detective Nemeth then prepared a second photographic display (Peo. Exh. 25) and showed it to Mrs. Finzel the next day at the hospital. Mrs. Finzel was more coherent at this time and, unlike the previous day, was sitting up in bed. After the admonishment, Mrs. Finzel immediately pointed to appellant's photograph and said, "That's him." (9RT 1840-1843.)

At some point, Mr. Finzel's truck (see Peo. Exh. 37) was found in a parking complex for an apartment building in the 3500 block of Artesia Boulevard. Various credit cards (see Peo. Exh. 36) belonging to Mr. and Mrs. Finzel were found inside the truck. A smashed Camel cigarette butt (Peo. Exh. 40) was found on the ground between the wall and the driver's door. (7RT 1398, 1400-1404.)

### g. Significant Events Which Occurred After Appellant And Pierce Left For Oregon

During the trip to Oregon, appellant made statements to Pierce about shooting two people. Appellant said he shot a man when the man returned home and walked in on appellant and a woman. Appellant said he shot the man because the man saw his face. Appellant also said he shot the woman when she "freaked out." (8RT 1663-1664, 1686.)

When they got back to Oregon, Pierce dropped off appellant at appellant's brother's house. Before dropping off appellant, however, Pierce asked appellant if he could have the .357 Magnum so he could give it to his parents who had lost a .357 Magnum. Appellant gave Pierce the .357 Magnum (Peo. Exh. 51; see Peo. Exh. 49C). Pierce, in turn, gave the weapon to his mother that very day when he arrived at her house for Mother's Day. (8RT 1645-1648, 1653-1656, 1723-1726, 1727-1728; 9RT 1777-1778, 1779-1783.)

That evening, appellant went to the home of Suely Caramelo, a woman he had stayed with before he left for Los Angeles. Appellant was wearing a diamond ring (see Peo. Exh. 46C). Appellant gave Caramelo a small gold band with diamonds (see Peo. Exh. 45C). Appellant told Caramelo he obtained the jewelry at a flea market. (8RT 1696-1702, 1707-1708, 1709-1713.) Sometime after Mother's Day 1993, Pierce gave Diana Hammersmith a gold necklace (Peo. Exh. 50A). (8RT 1693-1694.)

On May 10, 1993, appellant contacted his friend and confidant Antoin Jackson at Fudrucker's where Jackson worked as a butcher. When he saw appellant, Jackson "gave him a bear hug." Jackson told appellant he would page him after a meeting so they could "hook up with all the old crew." Jackson paged appellant around 2:30 to 3:00 p.m. They spent the day together "catching up" and they "just sat and talked." That evening, they were "smoking out" and "getting high on marijuana." As Jackson explained, "that night we sat and drank and smoked weed and all the crew came over [to Jackson's house] and we all kicked it." There was no mention of what had occurred in Los Angeles. (9RT 1733-1743.)

The next day – May 11th – was Jackson's birthday. Appellant and Jackson spent the day "partying" with friends. At approximately 5:30 p.m., while Jackson and appellant were sitting in the living room of Jackson's house, appellant received a page. After appellant got off the telephone, he walked

outside. When he returned to the living room, appellant asked Jackson "if he could speak to [him] in private." Appellant was "fidgety." Appellant and Jackson went into Jackson's bedroom and appellant said he (appellant) was going "to go to hell." When Jackson inquired why, appellant said because "he had killed someone." Jackson asked why he killed someone and appellant could not provide a clear answer. Appellant said, "I'm going to go to hell, I'm going to kill myself." Jackson said, "What's going on Randy?" Appellant said, "I killed someone." Jackson again asked "why" and appellant responded because he was going to go to prison for the rest of his life. Appellant told Jackson that he had shot a woman because she was screaming too loud. Appellant also told Jackson that he shot a man and that "the more [Jackson knew], the worse off [he] was going to be." They stopped talking about it and Jackson said, "Come on, let's go get high." (9RT 1743-1746.)

Appellant and Jackson thereafter went to downtown Portland and walked around. Jackson asked appellant to talk to him about what was going on. Appellant said "that he just killed someone." Jackson asked if it was over drugs and appellant said "yes." Jackson asked if he acted in self-defense and appellant said "Yes." Jackson told appellant "he had a good case then." Appellant repeated that the more Jackson knew about the situation the worse off he would be. Appellant told Jackson that he had broken into someone's house and shot a guy who walked in on him. Appellant said, "he was high and it was a mistake and she was just screaming too loud." Appellant said he shot the "bitch" (woman) because she was screaming too loud. Appellant also told Jackson that he remained in the house for "a few hours" after the shots were fired. Jackson was concerned about his "homie" (appellant) and also concerned appellant might follow through on his threat to kill himself. Jackson knew appellant had a gun at that time and that appellant "wasn't in the right frame of mind." (9RT 1747-1752.)

Appellant and Jackson got a cab and returned to Jackson's apartment where they continued to "get high." The conversation about the shootings also continued after everyone else left. Appellant told Jackson that he went to Los Angeles with Pierce but appellant never implicated Pierce in the shootings. In Jackson's bedroom, appellant told Jackson "about the murder." Appellant said "he was real high" and he used a stolen .357 Magnum for the murder. Appellant said he gave the .357 Magnum to Pierce but did not tell Jackson why he gave Pierce the weapon. Appellant told Jackson that he tried to steal a car at the house where the shootings took place but he could not get the car started. Everyone at the house then went to sleep. (9RT 1753-1759.)

Appellant was arrested, pursuant to a warrant, the next morning while he was lying face down on the couch in Jackson's house. Detective Paul Lazenby of the Washington County Sheriff's Department in Hillsborough, Oregon, was the lead investigator who collected the information which resulted in appellant's arrest for the murder of Mr. Finzel in Torrance. (See 9RT 1769-1792.) A .25 caliber silver semi-automatic pistol (see Peo. Exh. 56; Peo. Exh. 49A) was found in a black and turquoise fanny pack (Peo. Exh. 55) laying on the couch next to appellant. A bag of jewelry (see Peo. Exh. 45A) was also found near the couch at the time of appellant's arrest. Jewelry taken from the Kozak residence (see Peo. Exh. 50A, B and C) was found inside the bag. Appellant was handcuffed following his arrest. Appellant was advised of and waived his *Miranda* rights. Appellant inquired, "What's this about?" Detective Lazenby explained there was an outstanding murder warrant in Torrance for his arrest. Appellant said, "I am the wrong guy. I got in the with wrong people, they threatened me." (9RT 1783-1792, 1815-1817.) Detective Lazenby asked appellant where he got the gold ring (see Peo. Exh. 46C) on his finger with the four or five diamonds (Mr. Finzel's wedding ring). Appellant responded, "at the flea market." Detective Lazenby asked appellant if that was the same "flea

market" where he obtained the ring he gave Suely Caramelo. (9RT 1793-1794, 1799-1800, 1821-1824, 1917.)

Detective Lazenby also assisted in transporting appellant to the custody facility. Detective Lazenby asked appellant to tell him about the murder and why he (appellant) thought he was "the wrong guy." Appellant said again, "It's gang members, they'll kill me and my family." Then, without being asked a question, appellant said, "It's four Mexican gang members." However, when asked what gang, appellant said, "I can't tell, they will kill me and my family." Again, without being asked, appellant said, "I was down the street. They made me take the gun and jewelry. I didn't even hear the shots." Appellant said that the gang members told him that "they killed two people" because "it was business." When Detective Lazenby asked appellant why he told Pierce he was going to hell since he shot somebody, appellant responded that he told Pierce "they shot somebody." (9RT 1794-1795.) Appellant told Detective Lazenby that he did not know any of the details about the murder: "They just told me they killed two people and made me take the jewelry and gun or I would be killed." When asked who committed the murder, appellant said, "I can't tell you that, shit, I'm going to die." (9RT 1796.)

When Detective Lazenby asked appellant why Pierce would tell the police that appellant told him "I'm going to hell, I killed a man and woman," appellant just hung his head and did not answer the question. (9RT 1798.) Appellant told Detective Lazenby that all four gang members went into the house. Detective Lazenby then told appellant there was a problem. He asked appellant what he "would say if his DNA or blood type were matched to that found in [the victim's] body cavity." Appellant "hung his head and shook it back and forth slowly saying nothing." Detective Lazenby told appellant there was one additional problem and appellant inquired, "What?" Detective Lazenby told appellant that the female victim survived the shooting

and she said only one person entered the house and she selected appellant's photograph from a photo display as that person. Appellant turned pale, took a deep breath, and said "shit." (9RT 1798-1800.)

**h. Ballistic Evidence**

Los Angeles County Deputy Sheriff J.W. Whitmarsh, a firearm's examiner with the Scientific Services Bureau, test-fired Mr. Finzel's .357 Magnum (Peo. Exh. 51) and compared the test-fired bullets (Peo. Exh. 59) with the four expended cartridge casings (Peo. Exhs. 39 and 57) recovered from Aguirre's apartment and was "absolutely" certain the bullets were fired from the same weapon (Peo. Exh. 51): "It is my opinion that all four of these cartridge casings [Peo. Exhs. 39 and 57] were positively fired in this particular firearm [Peo. Exh. 51] that is before me now." (9RT 185-1862.)

Deputy Whitmarsh also compared the .38 caliber semi-wadcutter bullet (Peo. Exh. 4) recovered by Don Murphy in the blankets on the waterbed and the projectile (Peo. Exh. 18) found by Officer Reynolds in the drawer underneath the waterbed and concluded "they are consistent with the ammunition that would be fired out of the .357 that has been marked People's 51 for identification." (9RT 1862-1865.)

**2. Defense Evidence**

Appellant did not present any evidence at the guilt phase. (9RT 1931.)

**B. Evidence Presented At The Penalty Phase**

**1. Prosecution Evidence**

The prosecution presented two witnesses at the penalty phase: George Aguirre and Lynn Finzel, the wife of decedent Joe Finzel.

George Aguirre testified that appellant lived with him for about two weeks prior to Mother's Day in 1993. They confided in each other and "partied" together. (12RT 2329.)

One night when they were "partying real hard" appellant, with a serious look on his face, told Aguirre, "Dude, I wonder what it would be like to rape a woman at gunpoint." They then went on to talk about other topics and Aguirre did not think about appellant's statement again until the instant case "and then I looked back at the expression on his face." (12RT 2329-2333.)

Lynn Finzel testified as follows: her daughter Brinlee was born on February 28, 993 and was two months and nine days old on the day her husband was shot; her husband was the only son of Shirley and Joseph Finzel; her husband helped his parents whenever they needed something done around the house or motor home and his parents "relied on greatly" to help them with everyday life; and it was a "tremendous loss" to the Finzels to lose their only son. (12RT 2361-2363.)

On March 28, 1990, Mrs. Finzel met her husband Joe through friends at a restaurant in Torrance called Texas Loosey's. At first, Mrs. Finzel did not think Joe was her type. But, that first night impression changed when she learned he had a "very good sense of humor." Joe was going through a divorce at the time and thus Mrs. Finzel did not date him until his divorce became final about three months later. They developed a "good friendship" during that three-month period and started dating after his divorce was final. (12RT 2363-2367.)

After they started dating, the couple "fell in love and we enjoyed all the same things together" such as "outdoor activities, camping and boating and . . . horses." Joe liked the fact Mrs. Finzel was kind of a "Tomboy" and "thrilled that he had found someone who enjoyed all the same things he did and could feel like just one of the guys." (12RT 2367.)

The couple spent only one Christmas together while married. Joe gave her a basketball hoop as a present. The previous Valentine's Day, Joe proposed to Mrs. Finzel in the very bedroom where Joe was shot and killed by appellant. That memory remains a "pretty haunting" thought to Mrs. Finzel. But, when they got engaged, it was an exciting moment for the couple and they talked about their plans for the future – lots of children, moving out of California, wedding location and date. Mrs. Finzel had never before been married and it was "very special" to her. She dreamed about how she was going to get married -- the church, the dress, etc. Mrs. Finzel "definitely" believed this would be the one and only marriage she would ever have and in order to insure that they went to a marriage counselor and attended an "engagement weekend." During the weekend, they each wrote letters to each other. The letter written by each participant at the end of the engagement weekend was supposed to be to the person's best friend. Joe wrote his letter to Mrs. Finzel. (12RT 2363, 2368-2376.)

Joe did various romantic things for Mrs. Finzel: he bought her flowers, gave her gifts, and prepared a candlelight dinner. He took her on a one-day cruise for her birthday and birthdays were "a big deal." Joe bought her a new front door for the house for Mother's Day. He gave her cute cartoons such as the one that said, "Love is being your handyman." (12RT 2379-2380-2382.)

Joe had one son, Garrett, who was born on February 21, 1986. As noted by Mrs. Finzel, "I can't even put into words how much [Joe] loved his son" and "and what sticks in my mind always is how one day Joe said I can't wait until Garrett is 10 years old and we can go motorcycle riding together and do father and son things together." Mrs. Finzel felt close to Garrett and tried to be a good stepmother. (12RT 2382-2384.)

Mrs. Finzel noted that photographs have become "extremely more important" to her and "I wish I had more photographs of my husband." (12RT

2384.) One photograph (Peo. Exh. 78) shows Mrs. Finzel and Joe addressing the invitations for the wedding: "He helped me with every part of the wedding." (12RT 2384-2385.)

The couple married on May 16, 1992, in the church Mrs. Finzel always dreamed of getting arrived in. They wanted Garrett to feel included in the wedding so they gave him an inscribed bracelet during the ceremony. (12RT 2385-2387.) The wedding was "the happiest day" in her life. The videotape of their wedding is "painful to watch." (12RT 2388, 2390.)

Every year the couple returned to Texas Loosey's on March 28th – the date they met. People's Exhibit 56 is a photograph of them at the restaurant on March 28, 1993 – just weeks before Joe was killed. (12RT 2387-2388.)

Mrs. Finzel planned on having three children before she was 30 years of age. (12RT 2393.) Both Mrs. Finzel and Joe wanted to have a large family. (12RT 2400.) When she was pregnant with Brinlee, Mrs. Finzel gave Joe a card from his soon-to-be child which stated, "Dear dad, I'm not here yet but I will be soon." The couple also wanted to make sure Garrett felt included in the birth so they made him t-shirts which stated, "I'm a big brother." Joe was present during every step of the pregnancy with Brinlee: "He went to every doctor's appointment with me and he was there through Brinlee's birth." Brinlee was born with the umbilical cord wrapped around her neck and she needed to be resuscitated and taken to the intensive care unit. After the delivery, Joe brought Mrs. Finzel 100 red roses in the hospital. She was ready to have another child "right away." Joe was an "excellent" father. (12RT 2394, 2399-2405.)

Regarding the instant crime, Mrs. Finzel noted that at the time appellant entered her bedroom with a gun and threatened her child if she did not do what he said, "I can't explain how terrifying it is to be in that position with your child." Her greatest concern was for her daughter. After appellant found Joe's

.357 Magnum, Mrs. Finzel did not feel she could think for herself: "I had no control. I was no longer a human being, I was just doing what he told me to do." She also noted that "I can't even describe the feeling." (12RT 2408-2410.)

Mrs. Finzel will never be able to erase from her memory the look on Joe's face when he was shot. (12RT 2410.) When appellant was ransacking the house for a couple of hours following the shooting, Mrs. Finzel laid on the waterbed trying to figure out what to do and praying. She thought Brinlee's crying would make appellant leave the house but it did not. She heard Joe moan during this period of time so she knew he was still alive. Mrs. Finzel feared appellant would come back into the bedroom and shoot her again and "that fear stayed with me the whole time." (12RT 2410-2412.) Mrs. Finzel was also fearful of getting impregnated by a rapist and that is why she lied to appellant and told him his penis was inside her when it was not. (12RT 2413.)

As a result of the shooting, Mrs. Finzel was hospitalized for five days. She had difficulty breathing after surgery because of the tube in her throat and she thought she was going to die because she could not breath. Mrs. Finzel also explained, "I was in surgery and I could hear everything that they were saying and that's when I was trying to signal them or communicate . . . but as I lay there on the table, he [a doctor or nurse] said 'her husband has been murdered.'" Mrs. Finzel testified that finding out in that manner that her husband was dead was "brutal" and "I wanted to die at that point, but I still had my daughter, so I hung in there." (12RT 2413-2415.)

Mrs. Finzel noted that her daughter Brinlee will never know her father. Mrs. Finzel had a "perfect" life and now her life is "ruined." She never got to talk to Garrett following Joe's death and understands Garrett blames her for his father's death. Mrs. Finzel acknowledged she does not feel very good, needs help, and "I'm losing it." (12RT 2416-2418.) Mrs. Finzel testified, "I still can't

believe he's gone" and the only thing she wants back is her husband. (12RT 2418-2420.)

Mrs. Finzel has moved 10 or 11 times and is scared when she is alone because she starts "to hallucinate that there is somebody peeking around the corner . . . also afraid somebody looking at me through a window . . . and I need to keep all the lights on and TV on." (12RT 2421-2422.) Mrs. Finzel has relived the event many times. She also has nightmares about a gun pointed at her head, losing her daughter, going through the wedding without her husband, and pushing a stroller with her dead husband in the stroller. (12RT 2420-2422.) Mrs. Finzel fears for her safety, is afraid to be alone, has difficulty concentrating, bites her teeth down, clenches her jaw so hard its often sore; suffers anxiety attacks, and is afraid of certain places: "I have the feeling that there is – like there is a vise grip on my heart and my heart aches." (13RT 2433.)

Mrs. Finzel noted that it was "humiliating" and "embarrassing" for her to testify at the penalty phase about such very personal matters. (13RT 2434.) At the conclusion of Mrs. Finzel's direct testimony, a videotape (Peo. Exh. 61) was played for the jury. (13RT 2443.)

**2. Defense Evidence**

**a. Appellant's Childhood**

Suszanne Tugg, appellant's mother, married Adolpho (Rudy) Garcia when she was 18 years old. Suszanne had three children during the marriage. Fred Garcia was born in 1969; appellant was born in 1970 in Germany; and Teodi was born in 1972. Unbeownest to Fred and appellant, Rudy Garcia was not their biological father. Fred's father was Donald Baker and appellant's father was Patrick Grandchampt. (14RT 2615, 2656; 15RT 2671-2672, 2672; 16RT 2757.)

Suszanne had several men in her life and moved to many different locations while appellant was a child. Following the divorce from Rudy, Suszanne moved to Boise, Idaho, with her sons before appellant commenced kindergarten. Appellant started kindergarten in Boise but then Suszanne moved the family again to Texas where appellant finished kindergarten. By the time appellant finished the third grade, Suszanne had remarried and divorced Frank Poleta and took up with Bob Milsap in Idaho, Texas and Vancouver. Milsap "didn't want anything to do" with Suszanne's family. He was "extremely strict" and "didn't want any part of [Suszanne's children]." Milsap "felt used by his own family and wasn't about to take it again from somebody else's kids." (14RT 2617; 15RT 2672-2677, 2678-2679, 2682.)

After appellant finished the third grade, Suszanne decided "the kids have the right to know . . . the person they thought was their father." Suszanne returned the children to Rudy Garcia who lived in Georgia with his new wife Cecelia. Appellant had not seen his "father" Rudy in nearly six years. Living with Cecelia was described as "hell" as her methods of punishment far exceeded the norm. Some of her punishments included making Teodi lick feces out of the toilet for dirtying his underwear, slamming a car door on the hand of appellant because he accidentally closed the door on her hand, and making appellant, a frequent bed-wetter, stand outside the house in the front yard for hours with the wet underwear on his head and carrying a sign stating, "I am a bed-wetter." (14RT 2624-2626, 2660-2662; 15RT 2677-2679.) Teodi Garcia, appellant's younger brother, described Cecelia as the "wicked, evil stepmother." (14RT 2660-2662.)

After appellant finished the fourth grade in Georgia, he returned to Oregon and lived with his mother and Randy Newton. (15RT 2676-2680, 2682-2692.) While attending the 5th or 6th grade in Oregon, "[appellant] was disruptive in class, he couldn't concentrate, he wasn't getting anywhere."

Appellant was referred to a doctor. The doctor thought appellant might have hyperkinesis and prescribed ritalin. After taking the medicine for about three weeks, the teacher believed the ritilin "made a total difference." Appellant was the "most improved" student in the sixth grade. (15RT 2679-2682.)

Appellant's mother got involved with Tim Tugg in the summer before appellant started the seventh grade. (15RT 2682.) Tugg did not want anything to do with the parenting of Suszanne's children because "they weren't his blood, therefore, he didn't want them." Tugg also physically beat Suszanne in appellant's presence. Alcohol and cocaine were used on a daily basis in the house when Suszanne was with Tugg. Tugg was "physically and emotionally abusive to [Suszanne] and [the children]." He beat Suszanne and physically threatened her with death. Tugg also assaulted and beat Suszanne in the presence of her children. As noted by Suszanne, "I really believe [Tugg] enjoyed the fact that [the children] were seeing all this." (15RT 2682-2692.) As explained by Teodi Garcia, "[Tugg] started all kinds of stuff, fights. Just chaos, pretty much." (14RT 2656.) Fred Garcia related that it "was always difficult" living with his mother Suszanne but things "really [went] downhill when [Tugg] came into the picture. . . ." (14RT 2617-2621.)

Tugg and Suszanne had a son, Matthew, together. Tugg repeatedly told Suszanne there was no way she was going to leave the relationship with Matthew or "somebody would die." Tugg took "total control of Matthew. And if [she] wanted to see Matthew, it generally had to be in his presence. He was afraid [she] would try and run away with Matthew." Suszanne related that appellant "took a butcher knife with a blade about seven or eight inches long and shoved it up to my neck and told me if I tried to leave he would shove it through my throat. And if I did leave, somebody else would die." (15RT 2690-2691.)

Tugg was also physically abusive to appellant. Tugg beat appellant with a belt one day where it was necessary to call the police. Tugg also "slammed" appellant up against a wall. Tugg's "hatred toward [appellant] was more than anyone else's." Alcohol and cocaine were used on a daily basis in the household and available to appellant. (14RT 2620-2624; 15RT 2684-2687.)

And, Tugg is the person who woke up appellant in the middle of the night when he was 13 years old to tell him that the person appellant thought was his father was not, in fact, his father. Appellant looked at his mother and asked if that was true and she responded, "Yes." Appellant lost his identity at that point. He ran away, stole items, and got arrested. (14RT 2620-2623, 2624; 15RT 2682-2685, 2686-2690.)

**b. Officials From The Juvenile Court In Oregon Describe Appellant's Home Life After Appellant Returned From Georgia**

Appellant presented the testimony of a probation officer, a probation counselor, and a court counselor from Oregon regarding the instability of appellant's home life.

Larry Tomanka, a probation officer, was assigned to appellant's case in 1973 when appellant was 13 years of age. He was assigned to appellant's case for nearly four and one-half years. (13RT 2459-2460, 2471, 2512.) According to Tomanka, appellant's home life "wasn't looking too good" because "[t]here was basically no parenting provided, I mean minimal." Tomanka testified that "[appellant's mother] basically had no control" over appellant. As noted by Tomanka, appellant's mother "just [didn't] have parenting skills" and "there were no rules for [appellant]...the only rules [appellant] really had were the rules that the court or the judge imposed on him." (15RT 2459-2463, 2514-2515.)

Appellant's stepfather, Tim Tugg, refused to participate with probation and demonstrated no interest in the Tomanka's efforts at supervising appellant. There was also conflict between Tugg and appellant which "progressively just got worse and worse and worse." (13RT 2463-2464, 2486.)

When appellant returned from living in Georgia the second time, Tomanaka recommended sending appellant to McClaren Boys Home, a training school, rather than attempting to return appellant to his family because appellant had "no home to go to." Appellant "had no parental support. . . . And if there was any salvation for [appellant] at [that] point it was not to send him back home." Tomanka testified that "it's a last ditch effort to take the kid away from the family." And, in appellant's case, returning appellant to the family "was not in the cards" because "nothing was going on at home." (13RT 2465, 2466, 2467, 2511.)

Steven Walker, a juvenile probation counselor, had appellant under his supervision when appellant was at the Shelter Program – a program designed to determine if juveniles should be returned home or sent to another type of placement. (13RT 2518-2522, 2529-2530.) Walker "felt strongly [that appellant] needed to be in a structured program that could get him directed and pointed toward independent living." (13RT 2526.) Walker testified there was a "lot of stress at home" given the relationship between appellant's mother and appellant's stepfather and home "just wasn't a good situation" for him. (13RT 2523.)

Joan McCumby, a court counselor, conducted 10 to 15 scheduled meetings with appellant's family in her office. Appellant and appellant's mother attended the meetings. Appellant' stepfather, Tim Tugg, did not attend any of the meetings. (14RT 2547-2549.) Ms. Crumb visited appellant's residence only once or twice. The atmosphere in the household was "very tense." Although Tugg was present in the house at the time of Ms. Crumb's

visit, he did not participate in the meeting. (14RT 2549-2550.) During the portion of the visit when appellant and his mother were together, "they didn't want to divulge information, they appeared very guarded, reserved." (14RT 2551.) McCumby also noted that appellant's relationship with Tugg was not good. (14RT 2559-2560.)

McCumby noted that her "experience with [appellant's] family and my impression of this family is to me serious things" were taking place" and "it's like you are by yourself with these people. It's very, very strange." McCumby opined that appellant had virtually no chance of success on probation if he remained in the home with his family. (14RT 2601-2602, 2611.)

**c. The Experts**

Appellant presented the testimony of a clinical psychologist and a neurologist in mitigation.

Nancy Kaser-Boyd, a clinical psychologist, conducted a psychological evaluation of appellant. In order to familiarize herself with appellant's background, Kaser-Boyd interviewed several individuals including appellant's mother, appellant's two brothers, appellant's grandparents, and appellant's uncle. She also reviewed records from appellant's past, including school records and juvenile court records. Kaser-Boyd also spent approximately four to five hours interviewing appellant. (16RT 2769-2771.)

Kaser-Boyd also administered two psychological tests -- the MMPI and the Rorschach Test -- to appellant. The goal of these tests was twofold: (1) determine whether appellant suffered from an existing mental disorder; and (2) understand appellant's basic personality traits. (16RT 2772-2776.) Appellant's score on the MMPI revealed a "a high nine [scale] person, a mania person. . . ." According to Kaser-Boyd, the personality profile which emerged from the test results, which was confirmed by the other reviewed materials, was

that appellant demonstrated mania which is present in people who are "restlessly hyperactive." As explained by Kaser-Boyd, "They have a lot of energy, it's to much energy, they tend to be unfocused often, hyper would the lay person's use . . . ." (16RT 2776-2781, 2787-2788, 2789.)

Kaser-Boyd also opined that appellant "has a very clear history of ADHD [Attention Deficit Hyperactivity Disorder]" which could be genetic. (16RT 2792-2793, 2797, 2799, 2807.) She described ADHD as "a mental disorder beginning in childhood where the child is unable to focus, unable to concentrate, has a lot of excess energy . . . [which] causes them to be impulsive." (16RT 2792.)

Kaser-Boyd testified that there is "a considerable overlap in the population of children who are ADD and ADHD that become involved in substance abuse." She opined that appellant's history suggested he fell into the group of people inclined to get involved in narcotics. (16RT 2800-2804.)

Kaser-Boyd also discussed various "risk factors" identifying conditions during childhood and adolescence which puts a person at risk for adult misfunction, adult mental illness, adult criminality etc. The "risk factors" in appellant's case included: (1) appellant's history of ADHD; (2) a childhood history of sexual abuse (based, in part, on information Kaser-Boyd received appellant's grandfather, Fred Baumgarte, that Rudy Garcia touched appellant in a sexual way when appellant was three or four years of age); and (3) physical abuse and considerable psychological abuse as a child. (16RT 2803-2807.)

Kaser-Boyd opined that appellant "was born with ADHD. So he was a hyperactive person with the cause likely being neurological." (16RT 2807.) She also opined that children with both ADHD and "enuresis" (bed-wetting) "tend to have abnormal brain functions" which "might have been inherited." (16RT 2807.)

Kaser-Boyd also opined that appellant commenced "spiraling in a downward direction" as he reached adolescence:

> Just at the time he was becoming an adolescent, he was pulled off Ritalin and probably just as a coincidence his stepfather at that time, Mr. Tugg, told him that Mr. Garcia was not his real father, and apparently that was done in kind of a confrontive way or woke him up in the middle of the night and told him. And the feelings that came from that were never really dealt with in a therapeutic environment with the family talking about it. It was upsetting. And he manifested his upset the way teenagers often do, by acting out. He started to run away.
>
> That was when he first started to be involved in burglaries. And I think it was at that point somewhere in there he stole a car with a friend. His drug use got worse and things started spiraling in a downward direction.

(16RT 2808.)

Arthur Kowell, a neurologist, administered a BEAM study (Brain Electrical Activity Mapping) to appellant. The four tests which comprise the BEAM study are designed to test the individual's "brain electrical activity." (15RT 2702, 2704-06.) Two of the four tests – the "visual evoke potential test" and the "auditory evoke potential test" – "demonstrate[d] abnormality" in appellant's brain. The "visual evoke test" revealed "abnormalities in the mid frontal region [of appellant's brain], the vertex, [a region] which is sort of an area between the — encompasses the back part of the frontal lobes and the front part of the parietal lobes, and also [in] the right central region, an area again involving the frontal lobe portion of it and the parietal loeb." The auditory evoke test revealed "an abnormality over [appellant's] left mid temporal region." (15RT 2715-2716.)

Appellant's results from the BEAM Study are "compatible" with Attention Deficit Hyperactivity Disorder, "meaning that we have had patients who have been diagnosed as having Attention Deficit Hyperactivity who will have abnormality areas of the brain temporal and frontal lobes." (15RT 2717-2718.) The findings, however, are not conclusive that a person has ADHD. The abnormality could be due to a brain tumor, head trauma, multiple sclerosis etc. Although the BEAM test "doesn't make a diagnosis," Dr. Kowell noted that "[p]atients with ADHD, attention deficit hyperactivity disorder, frequently have abnormalities in these parts of the brain." (15RT 2718.) As explained by Dr. Kowell, the findings of the BEAM are "consistent with abnormalities of the brain. But beyond that, I can't tell you what the measure of those abnormalities are." (15RT 2741.) Dr. Kowell acknowledged that he has seen "perfectly normal" BEAM test results "with somebody who has a brain tumor" and, on the other hand, test results which come out "completely abnormal on all scales" have originated from a person that has "very little going on in terms of abnormalities." (15RT 2742.)

**3. Prosecution Rebuttal Evidence**

Fred Baumgarte, appellant's grandfather, observed an incident when appellant was three or four years of age. Rudy Garcia was getting appellant ready to take a bath. Appellant was standing on a table without his underwear. Appellant's penis was between Rudy's thumb and forefinger. Mr. Baumgarte did not, at the time, think anything of a sexual nature was taking place. Twenty years later, however, he thinks the incident might have involved sexual molestation. (18RT 3025-3030, 3040.) Mr. Baumgarte also did not recall talking about the incident to Kaser-Boyd. (18RT 3030-3031, 3040.)

Dorothy Baumgarte, appellant's grandmother, did not recall talking with

Kaser-Boyd about her husband seeing Rudy Garcia inappropriately touching appellant as a child. She also did not remember her husband telling her that he observed Rudy getting appellant ready for a bath and that Rudy touched appellant's penis. (18RT 3042-3044.)

Amy York, a paralegal for the defense, interviewed Fred Garcia on June 13, 1994. Her notes from that interview indicate that Fred told her the following: (1) his mother, Suszanne, "was hard-working, strong, dedicated, and that he was always close with her and she was easy to talk to"; and (2) that Tugg physically abused Suszanne, but not the children. (18RT 3046-3050.)

## ARGUMENT

## I.

## THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT

Appellant contends the trial court erred in denying his motion to dismiss the indictment, because he made a prima facie showing that Hispanics and women had been systematically excluded from serving on Los Angeles County grand jury that indicted him.[3/] Appellant alleges this was error under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and argues his convictions should be reversed as to the indicted counts. (AOB 60-103.) Respondent submits that appellant's motion was properly denied. While respondent agrees with appellant's assertion that the trial court employed an erroneous legal standard for rejecting his claim below, the trial court did make a factual finding that Hispanics and women were not being intentionally excluded from grand jury service. This finding has ample support in the record, dispelled any inference of intentional discrimination, and should be upheld on appeal.

### A. Applicable Law

There are two primary constitutional challenges for addressing the underrepresentation of a cognizable group in a defendant's grand or petit juries. One is a Fourteenth Amendment equal protection claim based on intentional discrimination in excluding cognizable groups in the composition of the jury, and the other is a Sixth Amendment fair cross-section claim based on the

---

3. Appellant was indicted on counts I through VII in case BA077888, which included the capital murder charge. (ICT 213-220.) The case later was consolidated with one initiated by information (BA084072), which added count VIII to case BA077888.

systematic exclusion of a cognizable group in the jury selection process. (*People v. Corona* (1989) 211 Cal.App.3d 529, 534-535 [noting distinction]; see also *Duren v. Missouri* (1979) 439 U.S. 357, 368, fn. 26 [99 S.Ct. 664, 58 L.Ed.2d 579] (*Duren*) [discussing differences in proof and rebuttal of the two types of challenges].) Both require a defendant to establish a prima facie case for the violation, which is subject to rebuttal by the prosecution. (*Duren, supra*, at pp. 364, 368-369 [discussing requirements for Sixth Amendment prima facie case and rebuttal]; *Castaneda v. Partida* (1977) 430 U.S. 482, 494-495, 498 [97 S.Ct. 1272, 51 L.Ed.2d 498] (*Castaneda*) [discussing requirements for Fourteenth Amendment prima facie case and rebuttal].) A Fourteenth Amendment equal protection violation requires automatic reversal of a defendant's conviction (*Vasquez v. Hillery* (1986) 474 U.S. 254 [106 S.Ct. 617, 88 L.Ed.2d 598], whereas a Sixth Amendment violation is subject to harmless error analysis (*People v. Corona, supra*, at pp. 535-537, and cases cited).

Appellant raises only a Fourteenth Amendment equal protection challenge here, based on the underrepresentation of Hispanics and women on the grand jury that indicted him. The United States Supreme Court "has long recognized that 'it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury . . . from which all persons of his race or color have, solely because of that race or color, been excluded by the State." (*Castaneda, supra*, 430 U.S. at pp. 492-493 and cases cited.) Substantial underrepresentation also violates equal protection, "if it results from purposeful discrimination." (*Id.* at p. 493, and cases cited.) A criminal defendant has third-party standing to assert the equal protection rights of groups other than his own who were excluded from grand jury service. (*Campbell v. Louisiana* (1998) 523 U.S. 392, 400 [118 S.Ct. 1419, 140 L.Ed.2d 551].)

A defendant who alleges an equal protection violation, in the context of grand jury selection, establishes a prima facie case of presumptive discriminatory intent upon a showing that (1) the excluded group is one that is a recognizable, distinct class, singled out for different treatment under the laws; (2) the group was underrepresented over a significant period of time when comparing the proportion of the group in the total population with the proportion called to serve as grand jurors; and (3) the selection procedure was "susceptible of abuse or not racially neutral," which "supports the presumption of discrimination raised by the statistical showing." (*Castaneda, supra*, 430 U.S. at pp. 494-495; *People v. Brown* (1999) 75 Cal.App.4th 916, 924.) Once a defendant establishes such a prima facie case, the burden of proof shifts to the state "to dispel the inference of intentional discrimination." (*Castaneda, supra*, 523 U.S. at pp. 497-498; *People v. Brown, supra*, 75 Cal.App.4th at p. 925.)

**B. Relevant Proceedings**

Appellant was indicted by the 1992-1993 Los Angeles County grand jury.[4/] (2RT 314; see ICT 213-220.) Appellant filed a written motion to set aside the indictment, based upon "a denial of equal protection in the selection of the grand jury." (1CTSupp.I 51, 1CT Supp.VIII 8; see also 1CTSupp.I 49-53; 1CT Supp.VIII 6-10; 2RT 335.) Although the written motion did not specify which groups were being denied equal protection, appellant orally argued that females and Hispanics were underrepresented on the grand jury.

---

4. In arguing the motion, the court and counsel mistakenly referred to the grand jury that indicted appellant as sitting in 1993-1994, rather than 1992-1993. (See 2RT 463.) Appellant was indicted on June 3, 1993. (2CT 213-220.) Grand jury terms are for one year and run from July 1 to June 30 (1CT Supp.VII 126), meaning that appellant was indicted by the 1992-1993 grand jury.

In support of the motion, appellant was allowed to incorporate transcripts of a hearing on a grand jury challenge in another Los Angeles County case, *People v. Vallarino et al.,* BA027100 (*Vallarino*), which included expert testimony on population statistics, evidence relating to the county's grand jury selection procedures, and gender, race, and ethnicity information of grand jurors for the six-year period preceding appellant's 1992-1993 grand jury. (2RT 347-348, 373, 377, 423.) These transcripts are located at 1CTSupp.VII through 19CTSupp.VII. Additionally, the final briefs on the issue filed by the parties in *Vallarino* were incorporated into this case. (2RT 425.)[5/]

Appellant also presented seven exhibits for the court's consideration, without objection. These included population figures, the nominees and actual grand jurors for 1986-1987 through 1993-1994, and guidelines for judges who nominate grand jurors and interview volunteer grand juror applicants. (2RT 418-422.) Copies of these seven exhibits are located at 1CTSupp.V 3-19.)

When the trial court asked if appellant was planning on calling any witnesses in support of his grand jury challenge, counsel replied, "It's my belief that once I show that the jurors upon whom we are focusing are members of cognizable classes and that there is a disparity in the proportion of those persons represented in the grand jury as opposed to their representation in the population, that the burden shifts to the People to show that the system employed is not susceptible to abuse." (2RT 425-426.) Defense counsel cited to *Castaneda, supra*, 430 U.S. 482, and stated that he was prepared to argue

---

5. During the record correction proceedings, respondent received copies of these briefs from the Superior Court clerk, but respondent's copies were not paginated or incorporated into a clerk's transcript. The briefs include "People's Post-Hearing Brief Regarding the Racial Composition of the 1990-91 Grand Jury," filed on July 9, 1993, and "Points and Authorities in Support of Motion to Quash Grand Jury Indictment," filed by defense counsel on July 9, 1993.

that there was "sufficient proof to make the burden shift to the People," but also was prepared to call a witness if the court disagreed. (2RT 426.)

The prosecutor arguing the motion was not the trial prosecutor in this case, but was the prosecutor who had litigated the grand jury challenge in the *Vallarino* case. (See 2RT 417.) He stated his belief that *Duren, supra,* 439 U.S. 357, a Sixth Amendment fair-cross-section case, "superseded *Castaneda*, and the defense has the burden of showing that three-part formula that *Duren* puts forth." (2RT 429.)

The trial court said it read *Duren* the same way as the prosecutor, and asked defense counsel why *Duren* did not supersede *Castaneda*. (2RT 429.) Counsel's brief response focused on the factual difference that *Castaneda* involved grand juries, while *Duren* involved petit juries. (2RT 429-430.) The court stated it agreed with the prosecution's position that "*Duren* does supersede, and I think the burden is still yours." (2RT 430.)

Appellant then called one witness, Gloria Gomez, to testify on his motion. Gomez had served as the manager for juror services in Los Angeles County for approximately two years prior to her testimony on November 4, 1994 (2RT 439), and she described how grand jurors were recruited, nominated and selected during her tenure. (2RT 431-441.)

Based upon the seven exhibits appellant submitted, and a stipulation regarding total population figures, as opposed to age-based population figures, from the 1990 census, appellant presented the court with calculations in support of his motion, including the percentages of women and Hispanics nominated for the grand jury over a seven-year period, the percentage of women and Hispanics selected from the nominees to be grand jurors over a four-year

period, and the disparity between those percentages and the percentage of women and Hispanics in the total population. (2RT 448-453.)[6/]

Appellant cited the statistics as "almost res ipsa loquitur," and argued it was impossible to conclude from them that the county's grand jury selection system had been designed or employed fairly. To demonstrate there was "something wrong with the way the system is designed or being employed," appellant pointed to the county's use of a "disfavored," "key man" system, which was "highly susceptible to unfair application" in that the judges were allowed to select the prospective grand jurors. (2RT 453-454.) Appellant noted there was an alternative statutory procedure (Pen. Code, § 904.6) for the random selection of a second grand jury to hear criminal matters that, as Gomez testified, had not been employed in Los Angeles County. (2 RT 454-455; see also 2RT 440 [Gomez testimony]). When the trial court said it recalled testimony in the transcripts of the *Vallarino* hearing that it would cost the county $700,000 to employ a second grand jury, appellant agreed, but argued monetary concerns should not override liberties and constitutional rights. (2 RT 454-455; see also 6CTSupp.VII 1250, 1263-1264 [discussing cost of second grand jury].) Citing *Castaneda*, appellant urged the court to quash the indictment because "our statistics raised the presumption of discrimination," and the "key man" system that is employed to select grand jurors "does buttress and confirm the presumption of discrimination." (2RT 460.)

The court encouraged the prosecutor to give only a short response, stating that it had read the final pleadings that were submitted by the parties in the *Vallarino* case. (2RT 461; see also 2RT 425 [incorporating those pleadings into this hearing].) The prosecutor complied, stating that "the crux" of appellant's arguments had been addressed in those pleadings. He cited

---

6. These statistics are summarized in Argument I(C)(2)(a), *post*.

*People v. Bell* (1989) 49 Cal.3d 502, 529 (a Sixth Amendment fair cross-section case), and criticized appellant's use of total population figures, rather than adjusted figures to account for the specific qualifications required for grand jury service, in calculating the disparity of women and Hispanics on the grand jury. (2RT 461-462.) He questioned the relevance of appellant's statistics regarding the number of women and Hispanics who actually sat on grand juries, since grand jurors are randomly selected each year from the pool of nominees. (2RT 462-463.)

The trial court agreed with the prosecution that statistics regarding the actual grand jurors were unhelpful, since it was the pool of nominees that was at issue. (2RT 463.) The court also found that total population statistics were unhelpful, in the "it makes no sense to consider an entire pool where a large portion of that pool is not eligible either by reason of citizenship or age or English speaking abilities or all the other factors that have gone into the differences in the numbers that have been presented." (2RT 464.) Regarding appellant's argument on the "key man" system, the court noted that there were "two types of nominees," those who were solicited by a judge,[7] and volunteers who ended up being nominated by judges. (2RT 464-465.) The court stated that volunteers, regardless of race, "are all nominated for the most part, and they find themselves in the pool, and I find that the efforts do not suggest any discriminatory impact by the system." (2RT 467.) The court then made its ruling on the motion as follows:

> To the extent that the first prong is met, I don't think I even want to get into the second prong. On appeal that is going to be argued forever as to which numbers are right.

---

7. There was evidence that any sitting superior court judge of the county was entitled to nominate up to two candidates for the grand jury. (2RT 433; 1CTSupp.VII 145.)

I don't think the third prong has been met. I don't find there has been any discriminatory system in place by the superior court. I don't find any fault with the key man system to the extent that the key man system doesn't have the impact it could conceivably have as described by one of the defense witnesses based on his experience, experiences 20 years ago in the south.

Frankly, I don't think [ ] the defense has met their burden. To the extent that you have argued under *Castaneda*, the burden is a little differently [sic] than the court sees it.

(2RT 467-468.) After citing efforts that had been made to recruit and nominate minority grand jurors, the court stated, "I don't think the third prong has been met. And the motion to challenge the grand jury is denied. To the extent there is a request to dismiss the indictment, it is denied." (2RT 469.)

## C. Summary Of Evidence

### 1. Grand Jury Selection Procedure

#### a. Testimony Of Gloria Gomez

Gloria Gomez was the manager of juror services and responsible for grand and petit juries in Los Angeles County at the time of the hearing on appellant's motion to dismiss the indictment. She had been in that position for approximately two-and-a-half years when she testified on November 4, 1994. (2RT 431, 439.)

Gomez said that grand jury nominees were recruited year-round "nowadays," and described specific recruitment efforts that began in August 1993.[8/] (2RT 431-432, 434.) In testimony that appeared to refer to earlier

---

8. As previously noted, appellant was indicted on June 3, 1993 (2CT 213-220), meaning that he was indicted by the 1992-1993 grand jury.

years, she indicated that "normally" in September, there was a press release and commencement of "a very substantial recruitment effort." This included sending notices to prior grand jury applicants who were not selected; letters to community-based organizations, the Board of Supervisors, every mayor in the county, and professional organizations; and "call[ing] upon judges to keep in mind that the nomination process has commenced." (2RT 432, 439.)

In November and December, the people recruited were interviewed by the Grand and Trial Jurors Committee of judges "and are rated, whether they are qualified or not qualified for [ ] grand jury service."[9] (2RT 432-433.) The applications and ratings were then circulated to the superior court judges, who were free to nominate any of the recruits. (2RT 433.)

The recruits (also known as "volunteers") who were nominated by judges were added to the pool of people who had been directly nominated by the judges ("direct nominees"), and constituted the tentative list of potential nominees. This tentative list was circulated and if any superior court judge had an objection to a person on the list, the objection was resolved by the judges on the Grand and Trial Jurors Committee. (2RT 433.) The tentative list then became the final list, from which random drawings were conducted to select the actual grand jurors. (2RT 434, 436.)

**b. Testimony Of Juanita Blankenship**

Juanita Blankenship testified at the *Vallarino* hearing[10] and provided more details about the grand jury selection process, which she described as

---

9. There were written guidelines for the interviewing judges, which were introduced at the hearing as Exhibit 6. A copy of Exhibit 6 is located at 1CTSupp.V 17.

10. Blankenship testified at several different times during the *Vallarino* hearing. Her testimony can be found at 1CT Supp.VII 121-225, 2CTSupp.VII 414-444, 6CTSupp.VII 1155-1289, and 14CTSupp.VII 3161-3178.

being "pretty much the same every year" between 1986 and 1992. (6CTSupp.VII 1187.)

Blankenship was the director of juror management from 1988 to January 1992, and started working with jury services in 1981. (1CT Supp.VII 122; see 1CTSupp.VII 173, 6CTSupp.VII 1245.) Los Angeles County is the largest in the state, and grand jurors were requested to serve for one full year, from July 1 to June 30. On average, the grand jury sits for four full days every week, and grand jury candidates are told it is a full-time job. (1CTSupp.VII 126-128.) Because the grand jurors have "responsibilities in the civil side" to work with an auditor and prepare a report, Blankenship testified that "the judges had identified certain skills that they attempt to seek" in candidates for the grand jury. (1CTSupp.VII 129.) The "Guidelines for Interviewing Prospective Grand Jurors," promulgated by the Grand and Trial Jurors Committee of the Los Angeles Superior Court, list those skills and other considerations for grand jury candidates.[11/] (1CTSupp.VII 130-144.) Grand jurors are paid $25 per day plus mileage, an amount established by the Board of Supervisors and not the courts. (1CTSupp.VII 131-132, 150.)

Blankenship explained that in order to become a grand juror for Los Angeles County, a person must be nominated by a Los Angeles Superior Court judge. There were two ways to become nominated: (1) a person could be directly nominated by a judge,[12/] or (2) a person could volunteer to be nominated by a judge. (1CT Supp.VII 126, 145-146.)

Every person who is interested in volunteering is given an application. (6CTSupp.VII 1158-1159.) The volunteers are then interviewed and rated

---

11. These guidelines were introduced by appellant at his hearing as Exhibit 6. (See 1CTSupp.V 17.)

12. At the time Blankenship testified, there were 238 Los Angeles Superior Court judges. (1CTSupp.VII 188.)

by judges, whereas the direct nominees are not. (1CTSupp.VII 131, 144-145, 182; see also 6CTSupp.VII 1169-1172.) Volunteers are interviewed for approximately 10 minutes by the first available judge among seven or eight judges who are scheduled to conduct such interviews. (6CTSupp.VII 1172.) After the interviews, the applications, and the interviewing judge's ratings, are copied, placed into notebooks, and circulated among the judges for possible nomination. (6CTSupp.VII 1169, 1173-1174.) In order to nominate one of the volunteers, a judge simply signs the application form; no further interviews or ratings are done. (6CTSupp.VII 1177, 1258.) All nominees, whether directly nominated or volunteered, fill out the same application form that is signed by the nominating judge, and this form gives the nominee the option of providing race or ethnicity information. (1CTSupp.VII 160, 181-182; 6CTSupp.VII 1176-1177.) Generally, there were between 150-175 nominees a year, although the number has been as high as 200. (2CTSupp.VII 417.)

A tentative list consisting of all the nominees is compiled, and is published in the media and circulated to all judges, who are invited to lodge any objections. (1CTSupp.VII 146; 2CTSupp.VII 418; 6CTSupp.VII 1177-1178.) Objections are infrequent and made only because of a nominee's relationship to a judge, resulting in not more than one or two nominees being eliminated in any year. (2CTSupp.VII 418-419.) Following the resolution of any objections, the final list of nominees is compiled, and 40 names and 10 alternates are randomly drawn from a jury wheel. (2CTSupp.VII 418-420, 6CTSupp.VII 1179, 1182.) Background checks are conducted by the sheriff on the 50 potential grand jurors, after which a second random draw is conducted from the 50 names to determine who will be seated as grand jurors. (2CTSupp.VII 423; 6CTSupp.VII 1184.)

Blankenship described the process for recruiting grand jury volunteers as occurring primarily through the media. Press releases were sent to over

35 publications, and over the years, public service announcements and cable TV bulletin boards were employed for television and radio stations, and contacts were made to community organizations to attract grand jury volunteers.[13] (1CTSupp.VII 148-150.) Affirmative efforts were made to attract Hispanic volunteers, especially by Blankenship's predecessor Ray Arce, and included judges contacting various Hispanic groups within the community. (*Id.* at p. 150.)

Since 1981 when Blankenship began her time with the county's jury service, she believed the judges of the superior court have been concerned with the grand jury being representative of the county's population. (1CTSupp.VII at pp. 172-173; 6CTSupp.VII 1245.) She had conversations with the presiding judge and with the chairperson of the Grand and Trial Jurors Committee regarding their desire for minority representation on the grand jury.[14] (2CTSupp.VII 423-424.)

---

13. In *Vallarino*, the prosecutor introduced the multi-page distribution list of the one-hundred-plus entities to which press releases were sent seeking grand jury volunteers. (2CTSupp.VII 433-434.) A copy of this distribution list is located at 16CTSupp.VII 3693-3710. A copy of a press release issued on November 21, 1989, is at 15CTSupp.VII 3687-3688, and includes a quote from the presiding judge of the Los Angeles Superior Court, encouraging Hispanics and other minorities to apply for the grand jury "in light of their historical underrepresentation."

14. Exhibit 12 at the *Vallarino* hearing included a copy of a letter sent by the presiding judge in 1989, to all superior court judges in the county, reminding them "that, whenever possible, qualified minority citizens should be considered" in making grand juror nominations. A copy of this letter is at 15CTSupp.VII 3686.

### 2. Statistical Evidence

#### a. Statistics Offered By Appellant's Trial Counsel

At the hearing on appellant's challenge to the composition of the grand jury that indicted him, defense counsel offered statistical evidence by way of exhibits, and calculations derived from the exhibits.

Exhibit 1 was a chart showing the 1990 population of Los Angeles County by race and ethnicity. The source is listed as the "1990 U.S. Census Public Law 94171 file." According to this exhibit, the number of Hispanics of all ages was 3,351,242 (37.8% of the county's population), and the number of Hispanics 18 years and older was 2,177,546 (33.3% of the county's population). (1CTSupp.V 3.)

Exhibits 2A through 2K showed the gender makeup of the population in each of Los Angeles County's judicial districts, based upon the 1990 census. For the entire county, 50.6% of the population were women, and 49.4% were men. (1CTSupp. 4-13.)

Exhibit 3 showed the "Grand Jury Nominee Pool," i.e., the number of nominees for grand jury for the years 1986-1987 through 1993-1994, listed separately by year, and by the ethnicity and gender of the nominees. (1CTSupp.V 14.)

Exhibit 4 showed the ethnicity of the 23 seated grand jurors and the four alternates for the years 1990-1991, through 1993-1994 (1CTSupp.V 15), and exhibit 5 showed their gender (1CTSupp.V 16).

Based upon these exhibits, defense counsel presented the following disparity percentages for the grand jury nominees pool, which were calculated by subtracting the percentage of the cognizable class that was in the pool

from the percentage of that class in the general population. (2RT 448-449.) Counsel's disparity calculations are as follows:[15]

| Year | # Nominees | % Females | % Hispanics | % Disparity | |
|---|---|---|---|---|---|
| 1987-1988 | 152 | 45% | 4.7% | 5% | (women) |
| | | | | 33.1% | (Hispanics) |
| 1988-1989 | 157 | 40% | 5.7% | 10% | (women) |
| | | | | 32.1% | (Hispanics) |
| 1989-1990 | 146 | 43% | 6.2% | 7% | (women) |
| | | | | 31.6% | (Hispanics) |
| 1990-1991 | 121 | 43% | 4.2% | 7% | (women) |
| | | | | 31.6% | (Hispanics) |
| 1991-1992 | 178 | 43% | 9.8% | 7% | (women) |
| | | | | 29%[16] | (Hispanics) |
| 1992-1993 | 175 | 36% | 1% | 14% | (women) |
| | | | | 33.6% | (Hispanics) |
| 1993-1994 | 183 | 34% | 1% | 16% | (women) |
| | | | | 33.6% | (Hispanics) |

(2RT 450-451.)

Appellant's counsel also presented similar disparity calculations regarding the percentage of women and Hispanics who were selected as grand jurors from the random draw of the nominees pool, but limited to four years, 1990-1991 through 1993-1994. (2RT 451-453.) As the trial court noted, disparity statistics regarding the actual grand jurors were unhelpful since the grand jurors were drawn randomly from the pool of nominees, and it was

---

15. For the convenience of the Court, respondent has included the total number of grand jury nominees for each year, as presented to the trial court in appellant's Exhibit 3.

16. This should have been 28%, based upon Hispanics making up 37.8% of the county's population.

the selection of nominees for that pool which was relevant to appellant's equal protection challenge. (See 2RT 463-463.) Respondent therefore has not prepared a chart summarizing counsel's calculations on this point.

### b. Statistical Evidence Presented At The *Vallarino* Hearing

Three experts testified at the *Vallarino* hearing. Dr. Nancy Minton Bolton, an urban researcher and demographer on "people mapping" who worked with Los Angeles County to develop population estimates and projections for planning purposes, and who had worked with the county's jury service as a consultant, was called as a witness for both the defense and prosecution. (1CTSupp.VII 233-239, 258-259, 310, 347, 14CTSupp.VII 3338.) Dr. Dennis Willigan, a demographer and associate professor at the University of Utah, testified for the defense. (1CTSupp.VII 452.) Dr. William Clark, an urban geographer, professional demographer, and professor at the University of California Los Angeles (UCLA), who taught courses that included population and population analysis, testified for the prosecution. (8CTSupp.VII 1708-1710; see also 8CTSupp.VII 1646-1668.)

The testimony of these experts, given over the course of more than a year, comprises most of the 19 volumes of CTSupp.VII. For purposes of respondent's analysis, relevant portions of their testimony include the following:

#### (1) Dr. Nancy Bolton

Dr. Bolton presented her "big picture" regarding the ethnic composition of Los Angeles County grand juries and the county's population in Exhibit 47. (14CTSupp.VII 3338-3340.) A copy of this exhibit is located at 18CTSupp.VII 4348-4362. Dr. Bolton observed that a Los Angeles County grand juror must have resided in the county for at least one year, be at least 18

years old, a United States citizens, and able to speak and read English. (18CTSupp.VII 4352.)

In Dr. Bolton's opinion, the requirements of one-year county residency and United States citizenship would tend to reduce the number of Hispanics eligible to serve as grand jurors, because of a higher migration rate and lower rate of citizenship. (18CTSupp.VII 4352.) Additionally, Dr. Bolton cited a study conducted Dr. Jeff Passel when he was the Assistant Division Chief in the Population Division of the United States Census Bureau, based upon the 1980 census, regarding the misreporting of citizenship. Dr. Passel's study found that, of those persons of Mexican birth residing in Los Angeles County who reported themselves to be United States citizens, "only 35% could have been naturalized based on the number of INS recorded naturalizations that have occurred for Mexican born persons." (18CTSupp.VII 4354; see also 14CTSupp.VII 3357-3379.) Based upon the 1990 census, with an adjustment using the ratio of misreporting found by Dr. Passel in the 1980 census, Dr. Bolton calculated that the true percentage of Hispanic citizens in Los Angeles County population, and who were 18 years and older, was 16.5%. (14CTSupp.VII 3379, 3383, 18CTSupp.VII 4354.) Dr. Bolton concluded there was a disparity of 9.7% when comparing that percentage to the 6.8% Hispanic applicants, and 6.8% Hispanic nominees, for the grand juries between 1986 and 1991. (15CTSupp.VII 3466; see also 18CTSupp.VII 4350-4351, 4354, 4360.)

Dr. Bolton considered whether race-conscious criteria or some other explanation accounted for this 9.7% disparity. (15CTSupp.VII 3441-3442, 18CTSupp.VII 4358.) She analyzed the pool of grand juror applicants, all of whom she considered to be volunteers even if directly nominated by a judge because no one was compelled to serve, based on characteristics other than race, and found that those likely to apply did not mirror a random sample of the population. (15CTSupp.VII 3443-3444; see also 15CTSupp.VII 3441-3442.)

Instead, regardless of race, grand juror applicants tended to be older (97% over the age of 35 and 92% over the age of 45), more educated (99% attended high school), registered voters (99%), and English-speaking (none indicated otherwise). (15CTSupp.VII 3441-3442, 18CTSupp.VII 4358-4359.)

Looking at the grand jury information for the years 1986-1987 through 1991-1992, Dr. Bolton also found that after all volunteer applicants were interviewed by the superior court judges, 73% of all Hispanics interviewed were nominated for the grand jury, compared to 46% of white applicants. (15CTSupp.VII 3456, 18CTSupp.VII 4360-4361.) In other words, the judges had been enriching the nominee pool after the interview process, by nominating Hispanics at a higher rate than white applicants. (15CTSupp.VII 3456, 19CTSupp.VII 4554.)

In Dr. Bolton's opinion, the disparity between the percentage of Hispanics in the general population and in the pool of grand jury nominees was attributable to United States citizenship, English-speaking ability, the socio-economic characteristics of those likely to volunteer to serve, and data problems that include the small sample size and how information was collected. (15CTSupp.VII 3466-3467, 18CTSupp.VII 4360.)

### (2) Dr. Dennis Willigan

Dr. Willigan described the Los Angeles County grand jury selection process as using a "key man" system, "and that means that there's a group of individuals who come together and nominate individuals to serve," creating a greater chance for abuse than using random selection. (3CTSupp.VII 510, 525, 650-651.) Dr. Willigan testified he was convinced that the underrepresentation of Hispanics on the Los Angeles County grand juries was due to white judges disproportionately nominating white applicants. (4CTSupp.VII 960-961; see also 3CTSupp.VII 506-507.) To him, there was no other rational explanation

for the disparity. (*Ibid.*) It was "virtually impossible" for the disparity to have occurred by chance. (13CTSupp.VII 3036-3037.)

Dr. Willigan presented statistics to the court by way of charts and graphs.[17] (See 15CTSupp.VII 3638-3676 [Exh. 12]); 17CTSupp.VII 4041-4047 [Exh. 24]; 4205-4250 [Exhs. 37-39].) Looking at 11 of 13 Los Angeles County superior court judges who were on the 1989 Grand and Trial Jurors Committee, 10 of them lived in areas of the county with the lowest percentage of Hispanic population. (3CTSupp.VII 552-553, 6CTSupp.VII 1283-1284.) Data regarding grand jury nominees showed that the nominees came from areas of the county with the lowest percentage of Hispanic population. (3CTSupp.VII 516-517.) Also, areas with the heaviest concentration of Hispanics had no grand juror nominees. (3CTSupp.VII 520.)

In Dr. Willigan's view, this showed that "whatever goes on in the nomination process results in the skewed distribution but how or why it does, I don't know." (3CTSupp.VII 539.) He opined, however, that it was connected to the key man system, and may have been the result of judges knowing or being familiar with "certain racial or ethnic groups," resulting in unfamiliar groups being left out. (3CTSupp.VII 541.)

Based on the grand juries of 1987-1988 through 1991-1992, Dr. Willigan calculated a disparity of 13.5% when comparing the percentage of Hispanic grand juror nominees to the percentage of Hispanics in the county who were over 18 years old and who were citizens and spoke some English. (3CTSupp.VII 582, 589, 591.) Upon receiving more data, Dr. Willigan revised his calculation upward and indicated the disparity was "about 14.6%."

---

17. Because the *Vallarino* hearing lasted over a year, Dr. Willigan updated his statistics and charts as more current census data and other relevant statistics became available.

(13CTSupp.VII 3071.) If eligible adult Hispanic citizens had been nominated in proportion to their numbers in the county's population, there should have been many more Hispanic grand jury nominees for each of these years. (3CTSupp.VII 603-604.)

Dr. Willigan criticized Dr. Bolton's reliance on Dr.Passel's misreporting ratio to reduce her Hispanic disparity calculation and noted she had not considered the undercounting of Hispanics in the census, suggesting the two would "cancel" each other out. (3CTSupp.VII 486.)[18/] Dr. Willigan also believed that circumstances regarding the Hispanic population and citizenship had changed since the 1980 census that was the basis for Dr. Passel study's, so that applying his citizenship misreporting statistics to 1990 census figures was not appropriate. (See 19CTSupp.VII 4601-4604.)

In giving consideration to grand jury selection factors such as the low pay, long term of service, and desirable "technical skills," Dr. Willigan expected the grand jury pool "would be made up largely of retired non-Hispanic whites," who would either volunteer or be known to and selected by the judges. (3CTSupp.VII 554-555.)

### (3) Dr. William Clark

Dr. Clark was contacted by the prosecution to do an analysis regarding the relationship between Hispanic representation on the grand jury and the Hispanic population of Los Angeles County. (8CTSupp.VII 1720.) He prepared charts and graphs to illustrate statistical data, which are at 8CTSupp.VII 1669-1682.

---

18. Dr. Bolton testified that in her calculations, she did not adjust the census figures for the undercount of Hispanics, because she might be increasing any error in assuming there would be the same citizenship rate among counted and uncounted Hispanics. (2CTSupp.VII 333.)

Comparing population percentages determined from the raw numbers in the 1990 census, which Dr. Clark described in his testimony and used in his charts (8CTSupp.VII 1670, 1728-1729, 1752), with the six-year average of 6.7%[19] Hispanic representation in the grand jury pool between 1986-1987 through 1991-1992 (9CTSupp.VII 1792, 1794-1795, 1798), Dr. Clark calculated the following disparities: 13.1% when considering the 6.7% grand jury representation and the 19.8% of all voting age Hispanic citizens in the county population; 12.4% when considering voting age Hispanic citizens who speak some English; and 10.5 % when considering voting age Hispanic citizens who speak English very well.[20] (9CTSupp.VII 1791-1792, 1801-1804.)

Dr. Clark testified that misreporting of citizenship is "well-established," and the issue is the magnitude of the misreporting. (8CTSupp.VII 1758; 9CTSupp. 1865.) The data on misreporting "comes from a number of research articles that were published during the 1980's," but primarily from a study published in August 1987 by Dr. Jeffrey Passel in the Journal of Demography, the primary journal on demographic issues in the United States. The article had been the subject of peer review, as well as internal census review, and was respected by the demographic community. (8CTSupp.VII 1755-1758.)

If the incidence of citizenship misreporting found by Dr. Passel in the 1980 census was applied to the 1990 census data, Dr. Clark calculated that the 19.8% of the county's population who were voting age Hispanic citizens would

---

19. Dr. Clark later testified that the percentage should be 6.6 if there were four, and not five, Hispanics in the pool for 1990-1991. (9CTSupp.VII 1842.) Dr. Clark also testified that if a five-year average was used, as Dr. Willigan did, the percentage of Hispanics in the grand jury pool would be 5.7%. (9CTSupp.VII 1792, 1798-1799.)

20. The English-speaking information was obtained from self-reporting in the census. (See 9CTSupp.VII 1787-1789.)

be reduced to somewhere between 16.4% and 18.6%. (8Supp.CTVII 1758, 12CTSupp.VII 2831-2832.) Dr. Clark's calculations did not factor in the undercounting of Hispanics in the census, because he believed it would have very little effect on the citizenship percentage reported in the census, in that the undercounting appeared to be concentrated in younger age groups and non-citizens. (9CTSupp.VII 2005-2006, 12CTSupp.VII 2702, 2743,-2744, 2831.) Moreover, there was an issue as to the undercounting of African-Americans, most of whom were citizens because they were born in this country, and adding those citizens to the pool would decrease the proportion of Hispanics in the pool of citizens. (12CTSupp.VII 2834-2835.)

In Dr. Clark's opinion, the grand jury selection system itself was not the explanation for the underrepresentation of Hispanics on the grand jury. Instead, he believed the explanation related to factors such as the age and education of the county's Hispanic population. For example, there were fewer Hispanics citizens over the age of 55, and hence fewer retired Hispanics who could afford to serve. (9CTSupp.VII 1987-1991.) If an advertisement in the newspaper stated that analytical skills would be useful, it would tend to attract people who believed they had such skills and not attract those who believed they lacked those skills. (12CTSupp.VII 2800.)

**D. Analysis**

On appeal, as he did below, appellant raises a Fourteenth Amendment equal protection challenge based on the underrepresentation of Hispanics and women on the Los Angeles County grand jury that indicted him. (AOB 60-103; 1CTSupp.I 51, 1CT Supp.VIII 8; see also 1CTSupp.I 49-53; 1CT Supp.VIII 6-10; 2RT 335.) Appellant made no claim below, and makes no claim on appeal, that the underrepresentation violated his Sixth Amendment fair cross-section right.

Appellant correctly asserts that the applicable legal standard for proving a Fourteenth Amendment equal protection violation is set forth in *Castaneda, supra*, 430 U.S. at pp. 494-495, and not *Duren, supra*, 439 U.S. 357, a Sixth Amendment fair cross-section case, as mistakenly urged by the prosecution and adopted by the trial court. (See RT 429-430, 468.) *Castaneda* required appellant to establish the following for a prima facie showing in support of his equal protection claim: (1) that Hispanics and women were members of cognizable groups; (2) that these groups were underrepresented for a significant period of time; and (3) the selection procedure was susceptible of abuse or not racially neutral, which would support the presumption of discriminatory intent raised by the statistical showing. (*Castaneda, supra*, 430 U.S. at pp. 494-495; *People v. Brown, supra*, 75 Cal.App.4th at p. 925.)

Under the erroneous *Duren* standard employed by the trial court, the first two prongs were identical to the *Castaneda* standard. (See *Duren, supra*, 439 U.S. at p. 364.) The trial court implicitly found the first prong had been met and declined to make any finding on the second prong. (2RT 467-468 ["To the extent that the first prong is met, I don't think I want to get into the second prong. On appeal that is going to be argued forever as to which numbers are right"].) In determining whether appellant met the third prong, the court mistakenly applied *Duren's* Sixth Amendment fair cross-section requirement that a defendant demonstrate the underrepresentation was due to the systematic exclusion of the group in the jury selection process. (2RT 429-430, 468.) The court found that appellant had not sustained his burden of meeting that inapplicable requirement (2RT 468), and denied appellant's motion to dismiss the indictment. (2RT 469.)

Appellant argues that "the trial court, utilizing the wrong legal standard, abused its discretion in finding that appellant failed to establish a prima facie case." (AOB 100.) Respondent respectfully submits that regardless of the trial

court's error, appellant's contention should be rejected because the court's ultimate ruling, that Los Angeles County did not employ a discriminatory system in selecting grand jurors, was a finding that Hispanics and women had not been intentionally excluded. This finding, which was overwhelmingly supported by the record before the trial court, defeats appellant's equal protection challenge. (See *Duren, supra*, 439 U.S. at p. 368. fn. 26 ["essential element" of equal protection violation is discriminatory purpose]; *Castaneda, supra*, 430 U.S. at pp. 492-493 [official act is not unconstitutional merely because it has racially disproportionate impact; constitutional violation occurs if exclusion or underrepresentation is the result of "purposeful discrimination"].) The trial court's denial of appellant's motion to dismiss the indictment on equal protection grounds was correct and should be affirmed, despite the error.

In the normal case, a finding that the defendant failed to make the required prima facie showing would mean the burden of proof never shifted to the prosecution "to dispel the inference of intentional discrimination." (See *Castaneda, supra*, 430 U.S. at pp. 497-498; *People v. Brown, supra,* 75 Cal.App.4th at p. 925.) Under that circumstance, the record might be devoid of any rebuttal evidence. Here, however, in lieu of live testimony, the parties agreed the trial court could consider the transcripts and final pleadings of the *Vallarino* hearing in ruling on appellant's equal protection challenge. (2RT 347-348, 373, 377, 423; see also 2RT 461 [court's reference to its review of the *Vallarino* record].) These transcripts included evidence rebutting any inference that the underrepresentation of Hispanics and women on the Los Angeles County grand juries was due to any discriminatory purpose or intent. (See 13CTSupp.VII 2976-2977 [referring to rebuttal evidence having being admitted prior to that point]; 15CTSupp.VII 3396-3415 [argument regarding rebuttal evidence being presented before the court found prima facie case].)

Therefore, when the trial court ruled that appellant failed to establish a prima facie case under *Duren*, relevant rebuttal evidence in the *Vallarino* transcripts was before it. That evidence informed the court's specific factual finding: "I don't find there has been any discriminatory system in place by the superior court. I don't find any fault with the key man system to the extent that the key man system doesn't have the impact it could conceivably have as described by one of the defense witnesses based on his experience, experiences 20 years ago in the south." (2RT 468.) This constituted a factual determination by the trial court that there had been no discriminatory purpose or intent to exclude Hispanics or women from appellant's grand jury. Regardless of whether appellant had presented a prima facie case under the correct legal standard, this factual finding plainly established that any inference of discrimination had been rebutted by the evidence.

As to underrepresentation of Hispanics, the finding of no discriminatory intent or purpose was virtually compelled by the evidence. First, there was evidence that the selectors of grand jury nominees, who were the 238 Los Angeles County superior court judges, engaged in efforts to include rather than exclude Hispanics. In the *Vallarino* transcripts, there was testimony from the director of jury services about the extensive efforts to recruit grand jurors generally and minority grand jurors specifically in Los Angeles County. (1CTSupp.VII 148-150; see 2CTSupp.VII 433-434, 15CTSupp.VII 3687-3688; 16CTSupp.VII 3693-3710.) This effort included judges contacting various Hispanic groups in the community. (1CTSupp.VII 150.)

The director of jury services testified it was her belief that the judges of the superior court were concerned about the grand jury being representative of the county's population, and said she had conversations with the presiding judge and judge who chaired the court's Grand and Trial Jurors Committee regarding their desire for minority representation. (1CTSupp.VII 172-173,

2CTSupp.VII 423-424, 432-433, 6CTSupp.VII 1245.) Corroborating evidence included a letter sent by the presiding judge in 1989 to all of the county's superior court judges, reminding them that minority citizens should be considered in making grand juror nominations. (15CTSupp.VII 3686.)

There were approximately 150-175 nominees in the years preceding 1992. (2CTSupp.VII 417.) The number of applicants varied from year to year, with some applicants applying repeatedly, and most applicants being nominated (all applicants were nominated in 1990-1991). (See 6CTSupp.VII 1173; 19CTSupp.VII 4552; see also 17CTSupp.VII 4088-4093.) Although any of county's 238 judges were entitled to directly nominate up to two grand jury candidates a year (2RT 433; 1CTSupp.VII 145), direct nominees accounted for only about 60% of the pool. (1CTSupp.VII 147.) The rest of the pool came from volunteers who were interviewed, rated, and then nominated by a superior court judge. (1CTSupp.VII 126, 145-146, 131, 144-145, 182; 6CTSupp.VII 1169-1174, 1177.) There was evidence that for the grand juries of 1986-1987 through 1991-1992, judges nominated 73% of Hispanic volunteers compared to 46% of white volunteers. (15CTSupp.VII 3456, 19CTSupp.VII 4554.)

Second, there was evidence in the *Vallarino* transcripts of other, race-neutral factors that accounted for the underrepresentation of Hispanics on the county's grand juries. As previously noted, grand jurors must be United States citizens, over 18 years old, have resided in the county for one year immediately before being selected, and possess sufficient knowledge of English. (Pen. Code, § 896; see also 1CTSupp.VII 183.) Los Angeles County was the largest county in the state, and grand jurors were expected to work at least four full days a week for one year to fulfill their duties of investigating and reporting on county operations, while being paid $25 per day plus mileage. (1CTSupp.VII 126-128, 131-132; see Pen. Code, §§ 914.1, 933.) In connection with the required duties, certain skills had been identified by the

superior court judges as being desirable, such as accounting, communications, report writing, and interviewing. (1CTSupp.V 17; 1CTSupp.VII 129.)

Dr. Nancy Bolton testified that in her opinion, the residency and citizenship requirements would tend to reduce the number of Hispanics eligible to serve (18CTSupp.VII 4352), and there was evidence that Los Angeles County had "by far the largest concentration of undocumented Hispanics in the nation" (18CTSupp.VII 4416). Dr. Bolton indicated that socio-economic factors such as English-speaking ability and higher education also were relevant considerations. (15CTSupp.VII 3466-3467, 18CTSupp.VII 4360.) In her view, these reasons, rather than race discrimination, accounted for the underrepresentation of Hispanics on the county's grand juries. (15CTSupp.VII 3441-3442, 3466-3467, 18CTSupp.VII 4358, 4360.)

In Dr. William Clark's opinion, underrepresentation of Hispanics on the grand jury was not due to the selection system, but because there were fewer Hispanic citizens over the age of 55, and hence fewer retired Hispanic citizens who could afford to serve as grand jurors.[21/] (9CTSupp.VII 1987-1991.) Insofar as Hispanics generally had less education (see 4CTSupp.VII 962), Dr, Clark believed that a stated desire for analytical skills would tend not to attract those who thought they lacked such skills. (12CTSupp.VII 2800.)

Even the defense expert, Dr. Dennis Willigan, testified that the Hispanic population in the county tended to be "younger, more noncitizens, lower educational achievement, lower income" (1CTSupp.4 965), and he expected the grand jury nominees pool to consist of mostly retired non-Hispanics due to the low pay, long term of service, and desirable skills. (3CTSupp.VII 554.) This

---

21. There was evidence that, regardless of race, the nominees in the grand jury pool tended to be older. (15CTSupp.VII 3441-3442, 18CTSupp.VII 4358-4359.)

was an implicit acknowledgment that grand jury service conditions, rather than intentional discrimination, resulted in the underrepresentation of Hispanics.

Insofar as Dr. Willigan testified that the "key man" selection system for county grand jurors must be the cause of the Hispanic underrepresentation (3CTSupp.VII 510, 525, 650-651, 3CTSupp.VII 506-507, 4CTSupp.VII 960-961), the totality of the record did not support an inference of discriminatory exclusion. While Dr. Willigan opined that the cause of the disparity was white judges disproportionately nominating white applicants (4CTSupp.VII 960-961; see also 3CTSupp.VII 506-507), he acknowledged that the conditions and requirements for grand jury service explained such underrepresentation. (3CTSupp.VII 554.) There was ample other evidence, already discussed, about the selection process itself that undermined any inference that the Los Angeles Superior Court judges were deliberately excluding Hispanics from the grand jury nominees pool, including Hispanic recruitment efforts, and that the judges nominated 73% of the Hispanics who volunteered for grand jury service, compared to 46% of white volunteers. (15CTSupp.VII 3456, 19CTSupp.VII 4554.)

The trial court in appellant's case inevitably reached the only reasonable conclusion that was possible on this record. That is, the underrepresentation of Hispanics on appellant's grand jury was not actually caused by any discriminatory intent or purpose to exclude that group from service. Under the circumstances, the trial court's mistake in applying the wrong standard was immaterial, since the standards in both *Castaneda* and *Duren* address the burden and order of proof, and the trial court had been presented with all of the relevant evidence from the *Vallarino* case, including evidence rebutting any inference of discrimination. (See *People v. Brown, supra*, 75 Cal.App.4th at p. 925-928 [prima facie showing of equal protection violation rebutted by

testimony from court executive officer, not selectors, that race was not selection factor, and by showing that selection criteria as specific and job-related].)

Turning to appellant's claim the women were underrepresented on his grand jury, the trial court properly denied relief even though it applied the incorrect *Duren* standard.[22/] According to the statistics provided by appellant, the absolute disparity percentages for women were 5%, 10%, 7%, 7%, and 7% for the five years preceding his grand jury, and 14% for his grand jury. (2RT 450-451.) The low disparity percentages for the five years prior to appellant's grand jury did not rise to level of a constitutional violation (see *People v. Burgener* (2003) 29 Cal.4th 833, 860), and thus there is no constitutionally significant pattern of exclusion to warrant an inference that the 14% absolute disparity for his grand jury was the product of intentional discrimination. (See *Castaneda, supra*, 430 U.S. at p. 493.)

Moreover, the trial court's factual finding that there had been no "discriminatory system in place" (2RT 468) applied to women under the evidence that was before the court. This included the testimony from the *Vallarino* transcripts that the superior court judges wanted the grand jury to be representative of the county's population (1CTSupp.VII 172-173, 6CTSupp.VII 1245), and evidence that almost all of grand jury applicants were nominated. (See 17CTSupp.VII 4088-4093.)

As was true for Hispanics, the court's mistaken application of the *Duren* standard does not require remedial appellate relief on appellant's claim that women were underrepresented in his grand jury, since the court's factual finding of no discriminatory intent to exclude that group was the only reasonable one it could make based on the statistics and extensive record before it.

---

22. The trial court did not make a separate ruling with regard to appellant's equal protection claim involving women.

If this Court disagrees with respondent's analysis, appellant's conviction should not be reversed as he requests. (See AOB 100-103.) Although appellant claims that a remand is inappropriate because he would not be able to have a full and fair hearing, respondent submits that appellant should not be entitled to an entirely new hearing, because he had been given the opportunity to present all of his evidence in support of a prima facie case. (See 2RT 426 [defense counsel stated he was prepared to make his argument that he had presented enough evidence to shift the burden of proof].)

Instead, the matter should be remanded for the trial court to apply the correct standard, including resolution of the undecided issue of whether appellant met *Castaneda's* second prong for establishing a prima facie case of a Fourteenth Amendment equal protection violation based on the underrepresentation of Hispanics and women on his grand jury. If the court finds that appellant had established a prima facie case, the prosecution should be allowed to present any additional rebuttal evidence. (See *People v. Johnson* (2006) 38 Cal.4th 1096, 1099-1104, cited by appellant at AOB 100.)

However, based upon the facts and circumstances surrounding the litigation of this issue and the trial court's ruling, respondent respectfully submits that this Court should affirm the order denying appellant's motion to dismiss the indictment.

## II.

## THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR G. FOR CAUSE

Appellant contends the trial court violated his state and federal constitutional rights to an impartial jury, a fair and reliable capital sentencing hearing, and due process by erroneously excluding prospective juror Dianna G. for cause based on her views on the death penalty, thus requiring reversal of his death sentence. (AOB 104-124.) Respondent disagrees and submits the record instead shows that the trial court and counsel conducted a full and adequate inquiry based upon which the trial court properly and permissibly concluded that prospective juror G.'s views regarding capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with the instructions and her oath. Indeed, under the circumstances and pursuant to governing law, this Court is bound to uphold the trial court's determination on appeal.

### A. Background

Prior to conducting oral voir dire of the prospective jurors, the court had each of them complete a standard 17-page questionnaire. When the first 18 prospective jurors were drawn to sit in the jury box, and as they were excused and replaced by new prospective jurors, the trial court conducted initial voir dire, then allowed both counsel to inquire further.

#### 1. Prospective Juror G.'s Questionnaire Responses

In the section of the questionnaire entitled "**ATTITUDES TOWARD CAPITAL PUNISHMENT**," in response to the question asking, "What are your GENERAL FEELINGS about the death penalty?" prospective juror G. unequivocally declared, "I do not believe in the death penalty." Asked if there were any particular reason why she felt as she did about the death penalty,

prospective juror G. explained, "I believe if there has been a violent crime committed, he or she should be placed in jail for life." Prospective juror G. stated she had never held a different opinion. In response to a question asking if her feelings about the death penalty were very strong, prospective juror G. circled both "YES" and "NO," but clarified and reiterated, "I don't believe a human being should die at the hands of the death penalty." (1 CT Supp. IV 223.) Prospective juror G. did not believe in an "EYE FOR AN EYE" and a "TOOTH FOR A TOOTH." (1 CT Supp. IV 224.)

Prospective juror G. indicated that if appellant were found guilty of first degree murder and a special circumstance was found to be true, she would not always vote for death and reject life without parole and would not always vote for life without parole and reject death, regardless of the evidence presented at the penalty trial. Asked, "In what cases do you believe the Death Penalty may be appropriate?" prospective juror G. did not provide a response. However, when conversely asked, "In what cases do you believe the Death Penalty may not be appropriate?" she answered "all cases." (1CT Supp. IV 225.) Prospective juror G. confirmed she believed she should hear all of the circumstances surrounding a case and concerning the defendant and his background before deciding between the penalties of life without parole and death. (1 CT Supp. IV 226.)

Asked if she could see herself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole, and conversely, if she could see herself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty, prospective juror G. circled the "NO" response to both questions. Prospective juror G. strongly disagreed with the statement: "Anyone who commits murder, attempted murder and sexual assaults should always get the death penalty," reiterating in support of that response, "I don't believe in the death penalty."

Conversely, she strongly agreed with the statement: "Anyone who commits murder, attempted murder and sexual assaults should never get the death penalty." Asked to explain that response, prospective juror G. pointed to her previous explanation, i.e., that she did not believe in the death penalty. (1 CT Supp. IV 227.)

Prospective juror G. indicated she would follow the instructions of the judge. Asked what kind of information would be significant or meaningful to her on the question of penalty, prospective juror G. did not provide an answer. (1 CT Supp. IV 228.)

**2. Oral Voir Dire Examination Of Prospective Juror G.**

The trial court began its oral voir dire examination of prospective juror G. by noting her indication in the questionnaire of strong feelings about the death penalty. Prospective juror G. confirmed that she had very strong feelings about the death penalty, and orally reiterated, "I just don't believe in the death penalty." Nothing in the court's explanation of the death penalty changed anything about prospective juror G.'s feelings in this regard. When the court noted that prospective juror G. had circled the "NO" response to both questions asking alternatively if she could see herself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole, and conversely, if she could see herself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty, prospective juror G. clarified that while she could easily vote for life, there were not any circumstances she could imagine under which she would think that death might be appropriate. (3RT 652-653.)

Asked if death might be appropriate for "Charlie Manson, serial killer?" prospective juror G. said she did not know. Asked if she could vote for death for Jeffrey Dahmer, prospective juror G. answered, "No, I couldn't. I am just

one that don't believe in the death penalty." When asked by the court if there was anything that would suggest she could possibly vote for death, prospective juror G. explained, "It would be hard for me to, you know, vote that way. But again, I just don't believe in the death penalty. That is just my belief. I believe that we are put here on this earth to remain here unless otherwise, you know, from an illness or some other act we are taken away from here. I just can't see it. I just don't believe in it." (3RT 654-655.)

After the court and counsel returned to the courtroom from the lunch recess that day, but before the prospective jurors did, the court asked appellant's counsel if he wanted to stipulate to excusing prospective juror G. for cause. Appellant's counsel indicated he did not, and that he wanted to conduct further voir dire examination of her. (3RT 671-672.)

When offered his opportunity to voir dire the prospective jurors, appellant's counsel started with prospective juror G., first confirming that she understood that a criminal defendant was entitled to a jury of his peers, i.e., a jury with members "that have all kinds of views." Prospective juror G. confirmed her understanding that if the matter reached a penalty phase, and even if the "bad" evidence outweighed the "good" evidence, she would not be required to vote for death and that she would still be following the law if she nonetheless chose the penalty of life without the possibility of parole. Prospective juror G. agreed that the judge had a duty to enforce the law and to convey the law to the jurors and expect them to follow the law, and that it is every citizen's duty to set aside his or her personal opinion about the law. (3RT 710-712.) In further questioning, prospective juror G. confirmed she understood that if she were selected as a juror, the judge would tell her that she must set aside her personal opinions and follow the law and render a fair and impartial verdict, and that she would follow such an instruction. However, when asked if she "would fulfill [he]r civic duty in this case and fairly and

impartially weigh the evidence and follow the law according to the judge's instructions," prospective juror G. answered, "I would follow the law, although I still would – don't believe in the death penalty." (3RT 712.) Prospective juror G. stated she would follow the law as given to her by the judge and that, if the law told her that there is a certain point at which she could consider the death penalty, if the "bad" sufficiently outweighed the "good" at a penalty phase, she would honor that instruction and would have to "consider" the death penalty. (3RT 713.)

In her voir dire examination of prospective juror G., the prosecutor elicited the following clarifying colloquy:

> [Prosecutor]: Now, you understand that, that you talked to [appellant's counsel] about how you would follow the law.
>
> In terms of your own personal feelings, however, you have indicated that you could not personally vote for the death penalty.
>
> Is that how you feel?
>
> Prospective Juror G.: That's exactly how I feel.
>
> [Prosecutor]: So it does not matter what the case is; you could not do that?
>
> Prospective Juror G.: Yes.

(3RT 722-723.)

### 3. The Prosecution's For-Cause Challenge Of Prospective Juror G. And The Trial Court's Ruling Thereon

Following the court's and counsels' voir dire examination, at sidebar, the prosecutor challenged prospective juror G. for cause. Appellant's counsel argued the challenge should not be granted based on his voir dire examination of prospective juror G. Based on its percipient observation of prospective juror G. and the proceedings, the court found that, even after having been "very well carried" through appellant's counsel's voir dire examination of her, prospective

juror G. still "slipped out a little burst of independent thought there that she was not in favor of the death penalty. [¶] I think her feelings are clearly strong enough to interfere with following the court's instruction. I think it's clear cause." Accordingly, the court granted the prosecution's for-cause challenge of prospective juror G.. (3RT 739-740.)

**B. Applicable Law And Argument**

The applicable standards governing this Court's review of for-cause dismissals of prospective jurors in capital cases, such as those challenged by appellant here, are well established. As the United States Supreme Court held in *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841], under the federal Constitution, a trial court may properly excuse a prospective juror for cause in a capital case if, "the juror's views [regarding capital punishment] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (Accord *People v. Gray* (2005) 37 Cal.4th 168, 192; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Barnett* (1998) 17 Cal.4th 1044, 1114.) This Court applies the same standard under the California Constitution. (*People v. Gray*, *supra*, 37 Cal.4th at p. 192.) As this Court has further explained, "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 975; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1114.) "The real question is ""'whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*.'""" (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 431, quoting *People v. Bradford*

(1997) 15 Cal.4th 1229, 1318, in turn quoting *People v. Hill* (1992) 3 Cal.4th 959, 1003, italics supplied.)

On appeal, if the responses of the prospective juror in question are ambiguous or equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's true state of mind is *binding on this Court.* (*People v. Gray*, *supra*, 37 Cal.4th at p. 193; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 432; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1319; *People v. Holt* (1997) 15 Cal.4th 619, 651; *People v. Cooper* (1991) 53 Cal.3d 771, 809.) Thus, to the extent a prospective juror's responses could support multiple inferences, this Court defers to a trial court's determination of her unfitness to serve. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 432.)

With regard to the complete appellate deference owed to a trial court's determination of such an issue when fairly supported by the record, as the high court expressly emphasized in *Witt* in language particularly applicable to appellant's claims here, the governing standard:

> does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

(*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 424-425; accord *People v. Gray*, *supra*, 37 Cal.4th at p. 192.) A finding concerning a particular prospective juror's true state of mind, "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 428; accord *People v. Barnett*, *supra*, 17 Cal.4th at p. 1115.) Thus, though the trial judge applies a legal standard in resolving a challenge for cause, "his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 429.)

As the Supreme Court similarly observed and emphasized in *Patton v. Yount* (1984) 467 U.S. 1025, 1039 [104 S.Ct. 2885, 81 L.Ed.2d 847]:

> Jurors [] cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.

Application of the governing standards cited and explained above to the pertinent record fully supports the trial court's excusal for cause of prospective juror G. Accordingly, under the circumstances, this Court is bound to uphold the trial court's determination. As related above, in her questionnaire, prospective juror G. unequivocally declared she did "not believe in the death penalty," and expressed her beliefs that violent criminals should instead be "placed in jail for life" and that no "human being should die at the hands of the death penalty." (1 CT Supp. IV 223.) When asked, "In what cases do you believe the Death Penalty may not be appropriate?" she answered "all cases." (1 CT Supp. IV 225.)

On oral voir dire by the trial court, prospective juror G. orally reiterated, "I just don't believe in the death penalty." Prospective juror G. clarified that while she could easily vote for life, there were not any circumstances she could imagine under which she would think that death might be appropriate. (3RT 652-653.) When asked by the court if there was anything that would suggest she could possibly vote for death, prospective juror G. explained, "It would be hard for me to, you know, vote that way. But again, I just don't believe in the death penalty. That is just my belief. . . . I just can't see it. I just don't believe in it." (3RT 654-655.)

On further oral voir dire by appellant's counsel, when asked if she "would fulfill [he]r civic duty in this case and fairly and impartially weigh the evidence and follow the law according to the judge's instructions," prospective juror G. equivocated, "I would follow the law, although I still would – don't believe in the death penalty." (3RT 712.) In response to the prosecutor's further oral voir dire examination, prospective juror G. clarified that given her personal feelings, she could not vote for the death penalty regardless of the particular case. (3RT 722-723.)

Based on the instant record and the governing law cited and explained above, the trial court's determination to excuse prospective juror G. for cause must be upheld. As summarized above, Prospective juror G.'s responses about whether she could ever vote for death in this case or any case, were at least equivocal and inconsistent. Indeed, even when asked point-blank if she "would fulfill [he]r civic duty in this case and fairly and impartially weigh the evidence and follow the law according to the judge's instructions," prospective juror G. was only able to equivocate, "I would follow the law, although I still would – don't believe in the death penalty." (3RT 712.) Fairly read, this suggested that while prospective juror G. would generally follow the law as given to her by the court, based on her strong and unwavering disbelief in the death penalty, she

would not in any event impose that penalty. Indeed, in response to further oral voir dire by the prosecutor, prospective juror G. clarified that given her personal feelings, she could not vote for the death penalty regardless of the particular case. (3RT 722-723.) Under such circumstances, the trial court's determination of prospective juror G.'s true state of mind *is binding on this Court.* (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 432; *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1319-1321; *People v. Holt*, *supra*, 15 Cal.4th at p. 651; *People v. Hill*, *supra*, 3 Cal.4th at pp. 1004; *People v. Cooper*, *supra*, 53 Cal.3d at p. 809.)

In urging a different result, appellant cites and attempts to analogize to this Court's decision in *People v. Heard* (2003) 31 Cal.4th 946. (See AOB 121.) However, an examination of that decision shows it is readily distinguishable and therefore provides appellant with no assistance. In *Heard*, this Court reversed the sentence of death based on its conclusion, as shown by the particular record before it in that matter, that the trial court conducted a "seriously deficient" examination of the prospective juror in question and thereby excused that prospective juror for cause in the absence of adequate justification. (*People v. Heard*, *supra*, 31 Cal.4th at pp. 950-951, 958-968.) In reaching that result in *Heard*, the majority particularly noted: the trial court's "imprecise questioning" (*Id.* at p. 964); the absence of anything in the prospective juror's response that supported a finding that his views were such as to prevent or substantially impair the performance of his duties as a juror (*Id.* at pp. 965, 968); and the absence of any clarifying follow-up questions by the trial court or the prosecutor (*Ibid.*). As shown above, however, none of these distinguishing characteristics is present here. Rather, the record shows exactly the opposite.

Appellant similarly cites and places great reliance on this Court's opinion in *People v. Stewart* (2004) 33 Cal.4th 425. (See AOB 117-118, 124.) However, examination of the decision in *Stewart* shows it is even more readily

distinguishable from the instant case than *Heard*. Indeed, to the extent this Court's decision in *Stewart* addresses the situation in the instant case, it points to the conclusion that the trial court's determination that prospective juror G.'s views regarding capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath is entitled to deference and must consequently be upheld.

In *Stewart*, the trial court, with input from counsel, prepared a 13-page written questionnaire which it had each of the prospective jurors complete. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 441.) Only one of the questions in the questionnaire focused on the prospective juror's views concerning the death penalty and, as phrased, that question "did not directly address the pertinent constitutional issue." (*Id.* at pp. 442-443, 447.) Prior to any oral voir dire of the prospective jurors being conducted, the prosecutor challenged five prospective jurors for cause based on their checked and written responses on the questionnaire. The defendant's counsel objected to each of the prosecutor's challenges for cause on the ground that the checked answers and brief written comments left ambiguity as to whether each of the prospective jurors challenged by the prosecution would be able to serve and follow the instructions of the court. The trial court found each of the challenged prospective juror's checked answer and brief written response to be clear and unambiguous, and granted the for-cause challenges. (*Id.* at p. 444-445.)

In his automatic appeal to this Court, defendant Stewart contended that, "the trial court erroneously excused [the] five prospective jurors for cause, based solely upon their written answers to [the] jury questionnaire concerning their views relating to the death penalty, and without any opportunity for follow-up questioning during which the court and counsel might have been able to clarify the responses and determine whether, in fact, the prospective jurors were disqualified from service." (*People v. Stewart*, *supra*, 33 Cal.4th at p.

440.) Based on the record before it in *Stewart*, this Court agreed "that the trial court erred in excluding the[] prospective jurors on the basis of their questionnaire responses alone," (*Id.* at p. 445), i.e., it concluded that "the trial court erred in dismissing the five prospective jurors for cause without first conducting any follow-up questioning," (*Id.* at p. 451).

Such a holding, however, can have no application to the situation here. The trial court did not grant the prosecution's for-cause challenge to prospective juror G. solely on the basis of her responses to the written questionnaire. Rather, in addressing and ruling on the prosecution's for-cause challenge to prospective juror G., the trial court conducted substantial oral voir dire of prospective juror G. and allowed both counsel to conduct further oral voir dire of her to discern whether her views regarding capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath. Because the situation in *Stewart* is readily distinguishable from that presented here, *Stewart* is inapposite and provides appellant with no assistance.

Moreover, to the extent this Court's decision in *Stewart* touches on the situation in the instant case, it only reaffirms the conclusion that the trial court's determination concerning prospective juror G. is entitled to deference and must therefore be upheld. As this Court noted in explaining its decision in *Stewart*, the combination of checked answers and written responses of the five prospective jurors at issue "provided a *preliminary* indication that each juror *might* prove, upon further examination, to be subject to a challenge for cause." (*People v. Stewart, supra*, 33 Cal.4th at p. 449, italics in original.) Thus, as this Court further explained, "[h]ad the trial court conducted a follow-up examination of each prospective juror and thereafter determined (in light of the questionnaire responses, oral responses, and its own assessment of demeanor and credibility) that the prospective juror's views would substantially impair the

performance of his or her duties as a juror in this case, the court's determination would have been entitled to deference." (*Id.* at p. 451.) This, of course, is exactly and what the trial court did here and, accordingly, pursuant to the authorities cited and explained above, its determination must therefore be deferred to and upheld.

The thrust of appellant's contrary contention appears to be that the trial court could have come to a different conclusion than it did. However, as this Court reiterated in *People v. Ochoa*, *supra*, 26 Cal.4th at p. 432, "To the extent the[] responses [of the prospective jurors in question] could support multiple inferences, we defer to the trial court's determination of their unfitness to serve." (Accord *People v. Cox* (1991) 53 Cal.3d 618, 647 ["In the final analysis, 'the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record,' and ambiguities are to be resolved in favor of the trial court's assessment"].)

Based on the above, the trial court's for-cause excusal of prospective juror G. must be upheld, appellant's contrary contention rejected, and his death sentence affirmed.

## III.

## THE TRIAL COURT PROPERLY FOUND THAT APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE THAT THE PROSECUTION USED ITS PEREMPTORY CHALLENGES TO EXCLUDE PROSPECTIVE JURORS BASED ON GENDER

Appellant contends his conviction and sentence must be reversed because the prosecutor improperly struck three prospective women jurors in violation of appellant's rights under the state and federal Constitutions. (AOB 125-134.) Respondent disagrees and submits that because the record shows the trial court properly ruled that appellant failed to meet his burden of establishing a prima facie case that the prosecution had used its peremptory challenges in a discriminatory manner, this Court should affirm that ruling, as well as the judgment of conviction and sentence.

### A. Background

Prior to conducting oral voir dire of the prospective jurors, the court first had each of the prospective jurors not initially excused for hardship complete a standard 17-page questionnaire. In conducting the oral in-court voir dire, the court had its clerk draw an initial 18 prospective jurors to sit in the jury box, then conducted its initial voir dire of them, and allowed both counsel to inquire further. After the court ruled on the parties' challenges for cause, the parties were permitted to alternately exercise their peremptory challenges. Anytime the number of prospective jurors in the jury box shrank to 11, the clerk would draw seven more prospective jurors to replace those excused and the process described above was repeated.

As the initial 18 prospective jurors to undergo oral voir dire, the clerk drew 13 women[23] and 5 men.[24] (3RT 576-577.) After the trial court ruled on the parties' challenges for cause,[25] it then had the parties alternately exercise their peremptory challenges until the number of prospective jurors in the jury box shrank to 11. In this regard, the prosecution used its first peremptory challenge to excuse prospective juror Marietta E. After appellant then peremptorily challenged prospective juror Robert W., the prosecution exercised its second peremptory challenge to excuse prospective juror Tammy B. Appellant then used his second peremptory challenge to excuse prospective juror Kathryn H. and the prosecution used its third peremptory challenge to excuse prospective juror Nanah F. (3RT 742-743.) No objection or motion was voiced by appellant at that time, and the court indicated it would have its clerk call seven more prospective jurors. (3RT 743.)

Back in open court, the trial court thanked and excused the jurors that had been peremptorily challenged and had its clerk call seven more prospective jurors into the jury box to replace those excused. (3RT 744-745.) For the balance of the court day, the court and counsel conducted oral voir dire of one of the newly called and seated prospective jurors, Gloria C. (3RT 746-756.)

---

23. I.e., prospective jurors Christine R., Jewel J., Marietta E., Tammy B., Kathryn H., Nanah F., Dianna G., Kathleen M., Gwen H., Suzanne T., Linda R., Mary F., and Norma M. (3RT 576-577.)

24. I.e., Robert W., Van M., Mark N., Miguel D., and Arthur P. (3RT 576-577.)

25. In this regard, as set forth in greater detail in Argument I, *ante*, the trial court granted the prosecution's for-cause challenge as to prospective juror Dianna G. (3RT 740.) The record also reflects that, by that point, prospective juror Kathleen M. had been excused pursuant to the stipulation of the parties. (3RT 662.)

At the conclusion of a session during which prospective juror Gloria C. was questioned at sidebar, appellant's counsel stated, "Judge, I want to make this as timely as possible. The three peremptories that were exercised by [the prosecutor] were all women, so I am making a motion under *Wheeler*[26] for mistrial." Asked if she wanted to respond, the prosecutor argued that appellant had failed to make a prima facie showing that the prosecutor had used her peremptory challenges based on gender. The court ruled, "There has been no prima facie showing." The court further explained that while, normally, when handling *Wheeler* motions, even when it found that no prima facie showing had been made, it liked to invite the party responding to the motion to state its reasons for the record, it was inappropriate to do so at that time.[27] (3RT 756.) Back before the jury, the court admonished the prospective jurors and adjourned for the day. (3RT 758.)

The next morning, the trial court continued its oral voir dire of the newly seated prospective jurors and allowed counsel to question them. The court then heard argument concerning and ruled on the parties' for-cause challenges. (4RT 760-810.) Appellant's counsel used his third peremptory challenge to excuse prospective juror Suzanne T. When the prosecutor then used her fourth peremptory challenge to excuse prospective juror Miguel D., appellant's counsel stated that he was "renewing my *Batson*[28]*-Wheeler* motion. The court accurately noted that prospective juror Miguel D. was a man.

---

26. *People v. Wheeler* (1978) 22 Cal.3d 258.

27. The record suggests that the trial court understandably felt it inappropriate to develop such a further record at that time because it was at the end of the day and the court had to conduct a hearing involving a different jury which was apparently then deliberating another case pending before the court. (3RT 757-758.)

28. *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69].

Appellant's counsel argued that prospective juror Miguel D. was, however, Hispanic, and that one of the other prospective jurors peremptorily excused by the prosecutor was too. The court found "clearly there's no prima facie case," but asked the prosecutor to list her reasons. (4RT 811-812.)

As to prospective juror Marietta E., the prosecutor noted many of the prospective juror's friends were incarcerated and her answers on the questionnaire made her unlikely to ever vote for the death penalty. As to prospective juror Miguel D., the prosecutor noted his statements that he did not believe in the death penalty and that capital punishment involved no moral quandary. When the court asked about prospective juror Tammy B., the prosecutor explained she had left her notecards concerning the prospective jurors dismissed the previous day in her office. As to prospective juror Nanah F., the prosecutor pointed to the prospective juror's indication she had previously sat on a hung jury and the experience had taught her to "stick to her guns" and "never change her mind," and responses which indicated she would be unlikely to impose the death penalty. The court ruled, "The *Wheeler* motion is denied for lack of prima facie case." (4RT 812-813.)

**B. Applicable Law And Argument**

The use of peremptory challenges to remove prospective jurors because of their gender violates both a criminal defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and his right to equal protection under the Fourteenth Amendment to the United States Constitution. (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 130-131, 146 [114 S.Ct. 1419, 128 L.Ed.2d 89]; *People v. Bonilla* (2007) 41 Cal.4th 313, 341; *People v. Bell* (2007) 40 Cal.4th 582, 596; *People v. Gray, supra,* 37 Cal.4th at p. 184.) There is a rebuttable presumption that a peremptory challenge has been properly

exercised, and the burden is on the moving party to demonstrate impermissible discrimination on the part of the party exercising the challenge. (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834]; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 341.) In order to meet that burden,

> a defendant must first "make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial [or gender] exclusion' by offering permissible race-neutral [or gender-neutral] justifications for the strikes. [Citations.] Third, '[i]f a race-neutral [or gender-neutral] explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful . . . discrimination.' [Citation.]"

(*People v. Bonilla*, *supra*, 41 Cal.4th at p. 341, quoting *Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129]; accord *People v. Howard* (2008) 42 Cal.4th 1000, 1016;*People v. Bell*, *supra*, 40 Cal.4th at p. 596; *People v. Gray*, *supra*, 37 Cal.4th at p. 186.)

In attempting to make his prima facie showing, the defendant should make as complete a record of the circumstances as is feasible. (*People v. Gray*, *supra*, 37 Cal.4th at p. 186; *People v. Yeoman* (2003) 31 Cal.4th 93, 115; *People v. Boyette* (2002) 29 Cal.4th 381, 422; *People v. Box* (2000) 23 Cal.4th 1153, 1187; *People v. Howard* (1992) 1 Cal.4th 1132, 1154.) While this Court ordinarily reviews a trial court's denial of a *Wheeler/Batson* motion deferentially and considers only whether the trial court's conclusion is supported by substantial evidence, in cases where the trial court found no prima facie case had been established, but it is unclear whether it applied the correct "reasonable inference" standard or the since-disapproved "strong likelihood" standard, this Court "review[s] the record independently to 'apply the high

court's standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis." (*People v. Bonilla*, *supra*, 41 Cal.4th at pp. 341-342, quoting *People v. Bell*, *supra*, 40 Cal.4th at p. 597; accord *People v. Howard*, *supra*, 42 Cal.4th at p. 1017-1018; *People v. Bell*, *supra*, 40 Cal.4th at p. 597; *People v. Gray*, *supra*, 37 Cal.4th at p. 187.) In determining whether a prima facie case was established, the reviewing court considers the entire record before the trial court. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 342; *People v. Gray*, *supra*, 37 Cal.4th at p. 186; *People v. Yeoman*, *supra*, 31 Cal.4th at p. 116; *People v. Box*, *supra*, 23 Cal.4th at p. 1188.) However, as this Court has emphasized,

> certain types of evidence may be especially relevant: "[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention."

(*People v. Bonilla*, *supra*, 41 Cal.4th at p. 342, quoting *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281; accord *People v. Bell*, *supra*, 40 Cal.4th at p. 597.)

Here, an independent review of the instant record only confirms the trial court's finding that appellant utterly failed to establish a prima facie case that the prosecution had impermissibly exercised its first three peremptory strikes on the basis of gender. While appellant did note that the prosecution used its first three peremptory challenges to excuse women prospective jurors, that was the *entirety* of his showing in support of his motion. Appellant never came close to showing and did not even attempt to make any showing that the prosecution struck most or all of the women from the venire. Similarly, he made no effort to demonstrate that the challenged jurors in question shared only their gender and that in all other respects they were as heterogenous as the community as large. (See *People v. Bell*, *supra*, 40 Cal.4th at p. 598.) Nor does appellant contend that the prosecution's questioning of the challenged jurors in question was cursory or material different from its questioning of male jurors. (See *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343; *People v. Bell*, *supra*, 40 Cal.4th at p. 598.) Appellant, of course, is not himself a woman. (See *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343; *People v. Bell*, *supra*, 40 Cal.4th at pp. 598-599.) And, while the victim appellant succeeded in murdering, Joe Finzell, was a man, the surviving victim, Lynn Finzell, is a woman. Thus, like the defendant in *Bonilla*, appellant failed to establish or even make any attempt at establishing any of the circumstances deemed especially relevant by this Court.

Rather, appellant's showing in support of the subject *Batson/Wheeler* motion consisted, *in its entirety*, of noting that the prosecution had used its first three peremptory challenges to excuse women prospective jurors. As this Court's precedents and even those of the United States Court of Appeals for the Ninth Circuit have unwaveringly held since *Wheeler* and *Batson*, however, such a minimal "showing" by the movant is patently insufficient, basically as a matter of law, to establish the requisite prima facie case.

(See, e.g., *People v. Yeoman*, *supra*, 31 Cal.4th at p. 115 [defendant's cursory reference to prospective jurors by name, number, occupation and race was insufficient]; *People v. Boyette, supra*, 29 Cal.4th at p. 422; *People v. Box*, *supra*, 23 Cal.4th at pp. 1188-1189 ["the only basis for establishing a prima facie case cited by defense counsel was that the prospective jurors – like defendant – were Black. This is insufficient."]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1201; *People v. Turner* (1994) 8 Cal.4th 137, 167; *People v. Howard*, *supra*, 1 Cal.4th at p. 1154; *Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665, 681; *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1198; *United States v. Wills* (9th Cir. 1996) 88 F.3d 704, 715 ["We have previously held that a peremptory challenge to the only members of a similar racial group on the venire does not constitute a pattern of exclusion sufficient to establish a prima facie case"]; *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902 ["Using peremptory challenges to strike Blacks does not end the inquiry; it is not per se unconstitutional without more, to strike one or more Blacks from the jury"].) Accordingly, the trial court's ruling should be affirmed.

In support of his contrary contention, appellant points to his showing below that the prosecution had used its first three peremptory challenges to excuse women prospective jurors, and asserts that "[A] defendant can make a prima facie case showing based on statistical disparities alone." (AOB 129.) However, *Batson* instructs that the inquiry must "consider all relevant circumstances," including jury voir dire in evaluating the defendant's prima facie showing. (*Batson*, *supra*, 476 U.S. at pp. 96-97.) Also, contrary to his apparent belief, appellant never made or even attempted to make any showing of any statistical disparity. In particular, appellant never made any effort to note such things as how many women prospective jurors were in the venire, how large the venire was, or how many women ultimately sat on the jury. As the Ninth Circuit explained in *Williams v. Woodford*, *supra*, 306 F.3d

at p. 682, under such circumstances, "it is impossible to say whether any statistical disparity existed that might support an inference of discrimination."

As noted, appellant's entire showing consisted only of his pointing out that the prosecution had exercised its first three peremptory challenges against women prospective jurors. However, as this Court has explained in rejecting analogous claims, "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible." (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 343, quoting *People v. Bell*, *supra*, 40 Cal.4th at p. 598.) Indeed, here, when the prosecution exercised the three peremptory challenges at issue, there were 11 women and 5 men prospective jurors in the jury box. Given this more than 2-to-1 ratio, it is particularly unremarkable and unalarming that the prosecution happened to use its first three peremptory challenges to excuse women prospective jurors.

Since the United Supreme Court's decision in *Johnson v. California*, this Court has affirmed trial-court findings that defendants failed to establish prima facie cases of discriminatory use of peremptory challenges, even when such showings have been far more substantial than appellant's minimal showing here that the prosecution exercised its first three peremptory challenges against women. For example, in support of his *Wheeler* motion in *People v. Gray*, *supra*, 37 Cal.4th at p. 184, the defense counsel first noted that his client was African-American, the murder victim was White, and the venire of about 100 prospective jurors included eight African-Americans. Defense counsel then continued in his showing, explaining that, from a prosecutorial perspective, nothing about the juror in question was objectionable, particularly noting the prospective juror's moderate views on the death penalty and that his stepson was a police captain. (*Ibid.*) Despite defendant Gray's greater showing in this regard, this Court held that the trial court had nonetheless properly found the defendant failed to make a prima facie case that the prosecution's exercise of

its peremptory challenge was motivated by racial bias. (*Id.* at p. 186-188.) Given appellant's much lesser showing, which amounted to his merely pointing out that the prosecution exercised its first three peremptory challenges against women prospective jurors, it necessarily follows that the same holding must obtain here.

Based on the above, this Court should reject appellant's contention and instead affirm the trial court's finding that appellant failed to establish a prima facie case that the prosecution used its peremptory challenges based on gender.

## IV.

## THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION, COMMITTED NO ERROR, AND DEPRIVED APPELLANT OF NO CONSTITUTIONAL RIGHT IN ADMITTING VICTIM IMPACT EVIDENCE

Appellant contends his death sentence must be reversed because the trial court's admission of victim impact evidence at the penalty phase prejudicially denied him his rights to a fair and reliable determination of penalty, the effective assistance of counsel, and due process under the state and federal Constitutions. (AOB 135-169.) Respondent disagrees and submits application of governing law on the subject to the instant record instead shows: (1) the admission of such evidence was proper under section 190.3, factor (a), as part of the "circumstances of the crime of which the defendant was convicted in the present proceeding;" and (2) the trial court acted well within its broad discretion, committed no error, and denied appellant no constitutional right in admitting the victim impact evidence at issue. The victim impact evidence did not render the penalty trial fundamentally unfair. Moreover, even assuming arguendo the trial court somehow erred in admitting the victim impact evidence at the penalty phase, the reversal sought by appellant would nonetheless remain unwarranted because the record demonstrates that any such assumed error was harmless.

### A. Background

After the jury's guilt and special-circumstance verdicts were received and recorded on December 13, 1994, the court continued the penalty phase to commence on January 3, 1995. (II CT 391A.)

Prior to the commencement of the penalty phase, appellant served and filed a Memorandum of Points and Authorities in Opposition to Admission of "Victim Impact" Evidence, in which he moved to prohibit the prosecution from

presenting victim impact evidence on the stated grounds that: interpreting section 190.3, subdivision (a), broadly to allow the admission of victim impact evidence would render that statute impermissibly broad and vague in violation of the federal and state Constitutions; the victim impact evidence proffered by the prosecution was unduly prejudicial and its admission would thus violate his federal and state constitutional rights to due process; and the victim impact evidence proffered by the prosecution was inadmissible under Evidence Code section 352 because any probative value was greatly outweighed by the danger of undue prejudice. In his written memorandum, appellant did not actually identify or refer to any evidence the prosecution sought to present, but further argued that the trial court should hold a hearing pursuant to Evidence Code section 402 to determine whether the proposed victim impact evidence should be excluded or limited. (II CT 392-405.)

Towards the end of the court's morning session on January 3, 1995, after the trial court had continued the commencement of the penalty phase trial to Monday, June 9, 1995, the court asked if the parties had anything else to be dealt with or ruled upon. The prosecutor noted the opposition to victim impact evidence filed by appellant and asked the court if it had reviewed a copy of it. The court answered it had not, but its clerk confirmed the court's receipt of appellant's motion. The prosecutor cited the governing cases of *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] and *People v. Edwards* (1991) 54 Cal.3d 787, 835, and advised that she had brought with her a victim impact videotape that Lynn Finzel had made which the prosecutor sought to present at the penalty trial in conjunction with Lynn's testimony. The court and counsel then played and viewed the videotape. (11RT 2212-2213.)

In summary, the video, the total length of which is approximately 11 minutes 45 seconds, begins silently with three frames of simple white lettering on black background which collectively read: "On the eve of Mother's Day,

1993 an intruder entered the home of Joe and Lynn Finzel . . . altering their lives, and the lives of their family and friends . . . Forever." A clip of Lynn speaking then commences. Lynn is shown from the shoulders up in a simple black T-shirt with sunglasses on her head in front of a plain dark-gray background. She recounts the circumstances of appellant's shooting of Joe, her mental impressions at the time, and how difficult it was under the circumstances for her to physically go get help. The video is interspersed with video clips from Joe and Lynn's wedding, followed by another clip of Lynn recounting how good her life with Joe and Garrett and Brinlee was before the subject crimes, which is interspersed with short video clips depicting Lynn near a camper, Joe near a motorboat, Joe with Brinlee, Garrett holding his "Big Brother" T-shirt and wearing his "Big Brother" hat, and Joe, Lynn, Garrett, and Brinlee together while Lynn was feeding Brinlee with a bottle. (Peo.'s Exh. 61.)

The video then shows clips from Joe and Lynn's wedding depicting Joe and Garrett waiting to enter the church for the ceremony, Joe and Lynn walking down the aisle, and Joe repeating the traditional wedding vows as prompted by the minister. When Joe completes his vows with the traditional "until death do us part," the audio of that phrase is repeated two more times. (Peo.'s Exh. 61.)

Lynn is then again shown speaking to the camera about the effects of Joe's murder on her including the facts that she then had to take antidepressants, sleeping pills, and antianxiety pills, and that she remained afraid that someone would assault her, continued to constantly feel unsafe, and was afraid of being alone. Lynn also related that she was not working, that Joe had provided the majority of the financial support for the young family, and that she was consequently living on disability. Lynn explained that at that time she was "kinda living out of [her] car" and that she and Brinlee had been staying with different family members. (Peo.'s Exh. 61.)

As the audio of Lynn's recounting of her and Brinlee's first Christmas following Joe's death, i.e., "the most miserable Christmas of my life," the video shows a short clip of Lynn and Brinlee visiting Joe's grave that day. Lynn laments the unfairness of Brinlee and Garrett not being able to be together or to have Joe there to enjoy the occasion with them. A short video clip shows Joe's gravestone. Lynn then reappears speaking to the camera, relating that appellant took everything away from her and ruined her life. Lynn notes that her daughter will never know her father and will not have him there to walk her down the aisle when she gets married. At this point, a tear forms in Lynn's eye and falls down her cheek. Lynn relates that she does not think she will ever find a more perfect husband, that Garrett will never get to spend time with his father again, and that the subject crimes were senseless. (Peo.'s Exh. 61.)

The video shows a clip from Joe and Lynn's wedding in which they are holding hands, looking at each other, and kissing. Lynn states she would give all the money in the world to have her husband back. Lynn is then shown speaking to the camera again. Lynn explains that she and Joe had gone to an "engagement encounter" before they got married and, as part of that program, Joe had written a letter to her as his best friend. Lynn reads the letter on camera. (Peo.'s Exh. 61.)

The video closes with an approximately 80-second audio of a song about "the hero" accompanied by the following sequence of photographs and video clips: two photographs of Joe as a young boy; a photograph of Joe and Lynn next to a sign that reads "Rent a Pony;" a photograph of Lynn and Joe together; a photograph of Lynn and Joe kissing on the shore of a body of water; a video clip of a white rose being pinned on Joe's lapel before his and Lynn's wedding; a video clip of the couple kissing during their wedding; two video clips depicting Joe on their honeymoon cruise; a video clip of Joe with Brinlee; and a final vide clip of Joe apparently on a camping trip wearing a large straw hat.

At the end of the final video clip and the end of the song, the frame stops on Joe's face, and the video ends.[29] (Peo.'s Exh. 61.)

After the court and counsel viewed the proffered videotape, the court indicated it had just received appellant's motion a few minutes earlier and had consequently not had a chance to review it. Appellant's counsel confirmed that he did object to the admission of the videotape, and that he would like to articulate the reasons for his objection at the parties' next appearance. The trial court asked the prosecutor why the videotape should be admitted, and the prosecutor explained that it was important for the jurors to see Lynn at the point in time when the video was made, which was about a year before the penalty trial. The prosecutor argued that while Lynn would also testify at the penalty trial, the videotape would not be cumulative, would comprise only a relatively small portion of the evidence presented, and was extremely important for the jurors to understand what kind of impact appellant's commission of the charged crimes had had on her. (11RT 2213-2214.)

Appellant's counsel noted that the court had the discretion to exclude or limit the proffered videotape if presentation of it would be so inflammatory as to divert the jury's attention from its proper role or invite an irrational response. Counsel conceded he did not doubt the genuineness of everything expressed in the videotape, but argued that Ms. Finzel was already compelling and moving in her own right in that her testimony at the guilt phase was "utterly riveting," and that when she gave it, all present in the courtroom felt "tremendous pathos from her experience." Counsel argued that "[t]o have that reiterated to the jury [i.e., apparently through Ms. Finzel's anticipated testimony at the penalty phase] will geometrically increase the jury's awareness of her suffering," and that to

---

29. Appellant has set forth a more detailed "summary" – indeed, a generally verbatim account – of the videotape in his opening brief. (See AOB 146-152.)

add evidence of the videotape would take the jurors away from the rational decision-making process and "put[] them in realm of having been delivered emotionally to a preordained conclusion." Counsel argued that the videotape was very moving and inappropriate. (11RT 2215-2216.)

The court inquired when the videotape had been made and the prosecutor discerned it must have been no earlier than January 1994. In response to appellant's argument, the prosecutor argued that viewing the videotape would not take the jurors away from their rational decision-making duties. What the video showed was Joe Finzel during his lifetime and what Lynn was feeling when it was taped. The prosecutor noted that, while the prosecution's case in aggravation would probably take but a half a day to present, appellant's anticipated presentation of evidence in mitigation would likely take three days and would entail the rendering of emotional testimony concerning emotional subject matter. The prosecutor noted that applicable caselaw from this Court and the United States Supreme Court holds that victim impact evidence is admissible, and argued that the proffered videotape was appropriate and exactly the type of evidence courts have held relevant to the penalty determination. (11RT 2216-2219.)

Appellant's counsel argued the nature of the production of the videotape including its "written narrative lead-in," "flashbacks," and "voice-overs," was unprecedented. The trial court noted that the "flashbacks" referred to by appellant's counsel were actually just depictions of photographs and video clips. Appellant's counsel stated that there was a difference between a video that is "available" and a video that was "prepared." The court found there was no such distinction sufficient to warrant exclusion. The court explained that it had taken notes concerning the contents of the videotape, then accurately recounted what it had depicted. The trial court then explained that, given its percipient review of the proffered videotape, it did not see it as particularly or

overly inflammatory, noting that there was really no question the contents of the videotape could be presented through oral testimony as proper victim impact evidence. The court expressly recognized and specifically focused on and evaluated "The only two parts that show a little dramatization," i.e., "the echo of the wedding vows and the musical selection," but found they were not so unduly inflammatory or prejudicial as to outweigh their probative value. The court found that presentation of the videotape would not be cumulative to testimony by Ms. Finzel, and indicated it would likely allow the prosecution to present it. (11RT 2219-2221.)

Appellant's counsel then requested that the prosecution list the evidence it intended to present as victim impact evidence and that the trial court hold a hearing to determine the admissibility of such evidence under Evidence Code section 352. The court reiterated that it had yet to have a chance to review appellant's Memorandum in Opposition in any detail and suggested that it and counsel return to the issue once it had done so. Asked by the court for an offer of proof concerning what Ms. Finzel would testify to, the prosecutor gave a detailed listing of what she would seek to develop through Ms. Finzel's testimony. The prosecutor explained she would also seek through Ms. Finzel's testimony to authenticate and admit evidence of pertinent photographs, a poem Joe Finzel had on his desk, a "Love is . . . being a handyman" cartoon Joe gave to Lynn, a Christmas card Lynn made, and notes and letters such as the engagement encounter letter. After listing such evidence, the prosecutor argued it was all appropriate and admissible victim impact evidence. (11RT 2221-2224.)

During a hearing two days later, on Thursday, January 5, 1995, appellant's counsel asked the court to "rerun" the videotape so counsel could take the court "frame-by-frame" through those parts he sought to have the court excise or limit pursuant to Evidence Code section 352. (11RT 2262.) The

court agreed to do so, and appellant's counsel pointed to the written titles at the beginning of the video, the first scene with Ms. Finzel talking to the camera about the circumstances of the crimes and their aftermath, and the song played at the end of the video, which counsel argued had "lyrics specifically geared to speak to this fact situation that have to do with villains should go to jail and the good guys should be free." Appellant's counsel also pointed to the video clip of Joe repeating his wedding vows and the echo of "until death do us part," but the court reminded him it had specifically considered and ruled upon that issue the previous day. Appellant's counsel further pointed out that the video had "clear indications of editing." Counsel pointed to the depiction of photographs and video clips and "voice-over narration." Appellant's counsel posited that the videotape would be cumulative to any testimony given by Ms. Finzel, but argued that complaint was "almost insignificant compared to the professionally manipulative tenor of th[e] video." Counsel argued that the video was like something one would see on a television news magazine show and that the music in the video, like a score to a film, was geared to evoke an emotional response. Appellant's counsel summed up by arguing that in addition to being cumulative, the videotape would only "remove the jurors from any rational ability to weigh the circumstances in aggravation versus mitigation." (11RT 2264-2267.)

Asked by the court for her response, the prosecutor stressed that the videotape was something that Lynn Finzel had put together on her own initiative and that she had chosen its contents. The prosecutor further noted the short length of the videotape and its brief reference to the topics covered. She also again noted that whereas the People's case in aggravation would last only half of a day, appellant's case in mitigation would likely consume three court-days, and argued that while the videotape would supplement Ms. Finzel's in-

curt testimony, it was not cumulative in the legal sense. The videotape was highly probative and not overly prejudicial. (11RT 2268-2269.)

Appellant's counsel argued that, if the court was going to admit the videotape, it should exclude the music and lyrics, the echo effect of Joe's wedding vows, the opening written introduction, certain portions of the photographs and video clips, as well as any spoken narrative by Ms. Finzel because such was hearsay, and because the videotape had been edited. (11RT 2269-2270.)

The court explained that, based on its viewings of the videotape, it found the videotape was less emotional and intense than Ms. Finzel's testimony at the guilt phase. The court did not find the videotape to be particularly professional. It further found that the videotape was not inflammatory, especially in that Ms. Finzel could, in any event, testify to the contents of the videotape. The court ruled it would allow the videotape to be admitted in the penalty trial and asked appellant's counsel to be specific about what pictures or parts of the video he felt were objectionable. Regarding the song at the end of the video and the echoing of Joe's wedding vows, while the court acknowledged that Ms. Finzel would not be able to present those through oral testimony, it found they were not enough to disallow use of the videotape and that they need not be edited out. (11RT 2270-2273.)

The following Monday morning, before the penalty trial was actually commenced, appellant's counsel asked the court to revisit the admissibility of the videotape and indicated he wanted to be more specific about which portions he wanted deleted. In this regard, counsel pointed to the opening written portion's reference to how the incidents at issue affected the lives of Lynn Finzel's "family and friends," and argued that the crimes' impact on friends was not contemplated as proper victim impact evidence. The court indicated that, to the extent appellant's counsel was technically correct, as a practical

matter, the impact on the victim's friends was commonly addressed in penalty trials, and that it would not exclude the opening title pursuant to Evidence Code section 352. (12RT 2288-2289.)

Counsel next argued that the video clip of Lynn and Brinlee's first Christmas visit to Joe's grave should be excluded because, he posited, it was made with the thought of presenting it as victim impact evidence in mind. Indeed, the entire videotape should be excluded because it was prepared for the purpose of presenting it in litigation. The prosecutor argued that would not be a basis for exclusion, and argued the fact that Ms. Finzel had the videotape put together so that people would better know Joe, and better appreciate the relationship they had that was taken from them, made it all the more probative and appropriate. The court found that even if the video was created after the crimes and for the purpose of being presented as victim impact evidence, such evidence was appropriate under Evidence Code section 352 and permissible. (12RT 2289-2290, 2292-2293.) Appellant's counsel argued that the defense could not overcome the emotional impact the videotape would create and could not have a fair penalty hearing if it were admitted. The prosecutor noted that the jurors had already heard Ms. Finzel's testimony at the guilt phase, and that her proper testimony at the guilt phase would also be more emotional than her rather unemotional speaking tone on the videotape. (12RT 2293-2294.) The court agreed and specifically noted that Ms. Finzel's testimony at the guilt phase, in which she properly recounted the events in question, was extremely intense and emotional, i.e., "a hundred times more powerful" than her "fairly straightforward recitation on the video in which there are a few tears, but nothing, nothing even close to" her guilt-phase testimony. The court stressed how its main response to the video was how calm it was, particularly in contrast to the depth of emotion displayed in Ms. Finzel's testimony at the guilt phase when recounting the circumstances of the crimes. (12RT 2294-2295.)

Later, after the court and counsel discussed other evidence, appellant's counsel noted that the prosecution wanted to present photographs showing some "happy moments," some of which were reminiscent of those depicted in the videotape, as well as "baby clothes." The prosecutor explained that what counsel was referring to were Garrett's "Big Brother" shirt and hat, which Lynn felt were important in showing the closeness of the family and their excitement at the prospect of Brinlee's birth. The prosecutor also explained that up until the time Brinlee was born, Joe Finzel thought she would be a boy. Because Brinlee had to spend time in intensive care, Lynn and Joe had to go home without her. That night, someone brought a pink dress as a gift for Brinlee and, when Joe saw it, he shed tears. This showed the depth of Joe's feelings for his daughter and better demonstrated her loss. The court ruled that while, Lynn could testify to the anecdote, the dress would not be admitted. As to Garrett's "Big Brother" shirt and hat, the court ruled them admissible, finding that they were probative of the closeness of the family appellant broke up and not particularly emotional (12RT 2308-2311.)

Appellant's counsel also indicated that the prosecution intended to have Lynn Finzel hold the baby for a moment in front of the jury. The prosecutor confirmed she would have Lynn Finzel initially go to the witness stand with Brinlee and introduce Brinlee to the jury and then have Brinlee removed by someone in the courtroom. When the court stated it did not see a problem with this, appellant's counsel objected to the proposed procedure as "extraordinary theatrics," which would be so "heart-tugging" that it would take the jurors away from their ability to perform their penalty phase evaluation. The court rejected the argument noting that the courtroom setting was very antiseptic and sanitized and that the prosecution had the right to humanize the victims. Thus, there was no problem with the jurors briefly viewing Brinlee. (12RT 2311-2312.) The trial court then reviewed and ruled on the admissibility of the individual

photographs the prosecution sought to introduce at the penalty phase. (12RT 2314-2320.)

The jury was returned to the courtroom for an explanatory introduction by the court, the prosecution's opening statement, and the testimony of George Aguirre. (12RT 2320-2337.) The court then ruled on the admissibility of other individual photographs proffered by the prosecution. (12RT 2340-2344.)

Just before Lynn Finzel testified at the penalty trial, appellant's counsel reiterated his objection about Brinlee being brought to the witness stand. The prosecutor explained she would just have Lynn take Brinlee with her to the witness stand and, while both were there, ask Lynn how old Brinlee was and when she was born, and then Brinlee would be taken away. When the court inquired of appellant's counsel how this proposed procedure would be prejudicial, he argued it would be "a theatrical production that can only elicit tremendous emotional response." The court overruled appellant's objection, additionally noting that Brinlee would be before the jury only briefly. (12RT 2355-2356.)

Following a further brief discussion concerning other evidence, Lynn Finzel was called and sworn as a witness. At the beginning of Ms. Finzel's testimony, as indicated, the prosecutor had Ms. Finzel introduce Brinlee and answer questions establishing her date of birth and age at the time of the crimes. Brinlee was then apparently taken from Ms. Finzel. When she was taken from her mother, Brinlee said, "Bye-bye." (12RT 2362.) Ms. Finzel went on to testify at the penalty trial as summarized above in the Statement of Facts. (12RT 2362-2423; 13RT 2429-2442.)

When Ms. Finzel was testifying about the engagement encounter weekend she went on with Joe and the written materials from it, appellant's counsel asked to approach and, at the bench, objected for the first time to the prosecution's presentation of "poems and letters and such" written by Joe to

Lynn on the grounds that they were cumulative and very heart-rending. The court overruled the objections. As to a poem and three photographs of Garrett that Joe kept on his desk, which the prosecution also proffered, the trial court sustained appellant's objection. The court admitted a cartoon Joe gave to Lynn, but sustained appellant's objection to admission of a Christmas card prepared by Lynn for the first Christmas after the murder. The court admitted Garrett's note that he left on Joe's grave reading "I will see you some day." (12RT 2371-2375.)

At the end of Ms. Finzel's direct testimony, the videotape (Peo.'s Exh. 61) was played for the jury. (13RT 2443.) At a bench conference, appellant's counsel indicated that when Brinlee was on the witness stand with Lynn, the prosecutor retrieved Brinlee from Lynn and handed Brinlee to someone near the court railing, and that shortly after that, Brinlee called out "Mama." Counsel also stated that during Ms. Finzel's testimony, she shed "audible tears," and that during the showing of the video, jurors and Ms. Finzel were crying. The trial court indicated it saw only one juror briefly wipe some tears away, and that Ms. Finzel had cried softly at certain points during the showing of the videotape. (13RT 2444-2445.)

**B. Applicable Law And Argument**

In *Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, the United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876], which had generally barred the admission of victim impact evidence and prosecutorial argument concerning it at the penalty phase of a capital trial. In overruling *Booth* and *Gathers* in *Payne*, the Court conversely held that the Eighth Amendment does

not bar the admission of victim impact evidence in the sentencing phase of a capital trial. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 824-827.)

In *Payne*, the defendant was convicted of the first degree murder of a mother and her two-year-old daughter and first degree assault with intent to murder her three-year-old son. The capital sentencing jury heard that defendant was a caring and kind man who went to church and did not abuse drugs or alcohol. He was a good son and suffered from low intelligence. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 814.) The prosecution presented testimony from the three-year-old victim's grandmother that he missed his mother and baby sister. (*Id.* at pp. 814-815.) As the Court found, her testimony "illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." (*Id.* at p. 826.)

More broadly, the *Payne* Court recognized that, within constitutional limitations, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished," and "the Court has deferred to the State's choice of substantive factors relevant to the penalty determination." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 824.) As the Court explained:

> The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.

(*Id.* at pp. 824-825.) Thus, the Court concluded in *Payne* that:

> a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have

before it at the sentencing phase evidence of the specific harm caused by the defendant. "The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

(*Id.* at p. 825.)

Thus, if a state chooses to permit the admission of victim impact evidence and prosecutorial argument based thereon,

the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

(*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827.) Accordingly, the federal Constitution only bars victim impact evidence if it is "'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 364; *People v. Kelly* (2007) 42 Cal.4th 763, 793; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

Shortly after the high court's decision in *Payne*, this Court held, as a matter of state law, "that factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835; accord *People v. Boyette, supra,* 29 Cal.4th at pp. 444-445; *People v. Sanders* (1995) 11 Cal.4th 475, 549; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017; *People v. Raley* (1992) 2 Cal.4th 870, 915; *People v. Howard, supra,* 1 Cal.4th at p. 1190.) This Court went on to explain that its holding in *Edwards* "only

encompasses evidence that logically shows the harm caused by the defendant," and "does not mean there are no limits on emotional evidence and argument." (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836.) Rather,

> the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*Id.* at p. 836.) Accordingly, "[u]nder California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

Application of these principles here demonstrates that the trial court's rulings should be upheld. Plainly, the victim impact evidence admitted by the trial court helped "logically show[] the harm caused by [appellant]." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835.) Such evidence was highly relevant to the jury's penalty determination in that it "could provide legitimate reasons to sway the jury to . . . impose the ultimate sanction." (*Id.* at p. 836.) Conversely, although such evidence, "would naturally have tended to arouse emotion and evoke strong feelings of sympathy for" Lynn, Garrett, and Brinlee Finzel, "it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response." (*People v. Mitcham* (1992) 1 Cal.4th

1027, 1063.) As this Court found in *Mitcham*, here, the testimony given at the penalty trial and statements on the videotape by Ms. Finzel, i.e., herself "a surviving victim of [appellant]'s attempted murder, [evidencing] the psychological and emotional trauma suffered by her as a direct result of [appellant]'s homicidal conduct, related to the nature and circumstances of the capital offense." (*Ibid.*) "The evidence therefore was relevant to factor (a) under section 190.3."[30/] (*Ibid.*) As this court observed in *People v. Kelly*, *supra*, 42 Cal.4th at p. 793, the victim impact evidence presented here, "properly focused on [Joe]'s life and the pain [his] death caused [his] family.... This testimony was rather typical of the victim impact evidence we routinely permit."

As to the videotape, this Court has explained that:

> "Case law pertaining to the admissibility of videotape recordings of victim interviews in capital sentencing hearings provides us with no bright-line rules by which to determine when such evidence may or may not be used. We consider pertinent cases in light of a general understanding that the prosecution may present evidence for the purpose of '"reminding the sentencer... [that] the victim is an individual whose death represents a unique loss to society"' (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825), but that the prosecution may not introduce irrelevant or inflammatory material that '"diverts the jury's attention from its

---

30. As an apparent side argument, appellant asserts that, "if the victim impact evidence in this case was in fact admissible, as 'circumstances of the crime,' then Penal Code section 190.3, factor (a), is unconstitutionally overbroad and vague." This Court has consistently rejected this same argument in the past and should continue to do so here. (See, e.g., *People v. Zamudio*, *supra*, 43 Cal.4th at pp.364-365; *People v. Lewis and Oliver*, 39 Cal.4th at p. 1057; *People v. Pollock*, *supra*, 32 Cal.4th at p. 1183.)

proper role or invites an irrational, purely subjective response.'" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.)"

(*People v. Kelly*, *supra*, 42 Cal.4th at p. 794.) Here, the record shows the trial court was acutely aware of *Payne* and *Edwards* in that both parties cited and emphasized them in their written and oral arguments. The record also shows that the trial court personally viewed the proffered videotape and that it specifically considered and ruled upon all of appellant's arguments against admission. As generally found by the trial court, the victim impact evidence presented by the prosecution, reminded the jury that Joe Finzel was an individual whose death represented a unique loss to society and especially to his immediate family, but did not divert the jury's attention from its proper role or invite an irrational, purely subjective response.

As this Court also cautioned in *Kelly*, in order to combat the possibility that the medium of a videotape itself may assist in creating an overly emotional impact on the jury, "courts must strictly analyze evidence of this type and, if such evidence is admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion." (*People v. Zamudio*, *supra*, 43 Cal.4th at 367; *People v. Kelly*, *supra*, 42 Cal.4th at p. 796.) The instant record shows this is exactly what the trial court did below.

Like *Kelly*, "this is not a case of one witness after another giving repetitive victim impact testimony." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 797.) Rather, only one witness, Lynn Finzel, testified about the impact of appellant's murder of Joe. (See *Ibid.*) As in *Kelly*, "The videotape supplemented, but did not duplicate [Lynn]'s testimony. For the most part, the videotape, including [Lynn]'s narrative, was not unduly emotional and presented material that was relevant to the penalty determination." (*Ibid.*) Indeed, here, the trial court specifically assessed the videotape in this regard and

found that, especially given the facts of the subject crimes, of which Lynn herself was also a victim, and the magnitude of what she had suffered as a result of them, the tone and demeanor of her statements on the videotape was amazingly matter-of-fact and unemotional. A viewing of the videotape fully bears the trial court out on this point. The videotape, "humanized [Joe Finzel], as victim impact evidence is designed to do," and thereby "helped the jury to understand 'the loss to the victim's family . . . which has resulted from the defendant's homicide.'" (*Ibid.*)

As in *Kelly*, "the videotape helped the jury to see that defendant took away [Joe]'s ability to enjoy h[is] favorite activities [with his family], to contribute to the unique framework of h[is] family[,] . . . and ti fulfill the promise to society that someone [so] stable and loving [] can bring." (*People v. Kelly*, *supra*, 42 Cal.4th at 797.) Without question, "The viewer knew [Joe] better after viewing the videotape than before, but the tape expressed no outrage over h[is] death, just implied sadness. It contained no clarion call for vengeance." (*Ibid.*; accord *People v. Zamudio*, *supra*, 43 Cal.4th at p. 367.) Accordingly, the trial court's ruling admitting the videotape and other victim impact evidence should be upheld.

In support of his contrary contention, appellant asserts that, "consistent with *Payne v. Tennessee*," "victim impact evidence should be limited to those effects which were known or reasonably apparent to the defendant at the time he committed the crime . . ." (AOB 155), and complains that,

> In the present case, the challenged victim impact evidence included numerous details about Joe's family life, none of which appellant could possibly have known anything about, such as Joe's relationship with his son Garrett or that Garrett blames his former stepmother (Lynn) for what happened to his father and this tortures her, the complications that attended Brinlee's birth, or fact about Joe's parents.

(AOB 156.) This Court, however, has consistently rejected such arguments and should again do so here. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1057 ["victim impact evidence is not limited to circumstances known or foreseeable to the defendant at the time of the crime"]; *People v. Pollock*, *supra*, 32 Cal.4th at p. 1183 ["Defendant is mistaken. We have approved victim impact testimony from . . . witnesses . . . who described circumstances and victim characteristics unknown to the defendant"]; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 440-441, 443-445.) Moreover, even if the well established rule in this state were otherwise, it really would not benefit appellant, who was well aware of Joe's role as both a husband and father when he purposefully shot Joe in front of his wife and child.

Appellant also complains of what he calls "various special effects" in the videotape including "flashbacks" to scenes from Joe and Lynn's wedding, a "photo montage," music, lyrics, "echo effects," and "voiceovers," which were "purposely designed to tug at the jurors' heartstrings in an effort to get them to vote for death." (AOB 159.) However, respondent submits an actual review of the videotape shows that it comes off as quite amateurish, with choppy segues between clips and photographs and audible background noise in those parts where Lynn is speaking. No juror would have been overwhelmed by the purported "professional" quality of the videotape.

Respondent further submits that, under the particular circumstances, the trial court did not abuse its discretion or err in making its considered ruling not to exclude the song about the "hero" played at the end of the videotape. Respondent notes that in *Kelly* this Court commented that the background music which played "[t]hroughout much of the video" at issue in that case, and which "had no connection to [the victim] other than that her mother said it was some of [the victim]'s favorite music," "seem[ed] unrelated to the images it accompanied and may have only added an emotional element to the

videotape." (*People v. Kelly*, *supra*, 42 Cal.4th at pp. 796, 798.) However, the instant case is readily distinguishable from *Kelly* on a couple of important grounds. First, unlike the situation in *Kelly*, the "hero" song played at the end of the videotape in this case was not played "[t]hroughout much of the video." Rather, it was played only during the final 80 seconds of the 11-minute-45-second videotape. Furthermore, given the evidence presented here, it cannot be said that the song "had no connection to [the victim]" or "seem[ed] unrelated to the images it accompanied." The evidence established that the man appellant purposefully elected to shoot and kill was a superlatively loving husband and father and that Lynn and Garrett generally did view Joe as a hero.

Neither the music, nor the words, nor the style of singing of the song is particularly emotional or dramatic. And, here, the trial court expressly considered appellant's request to exclude the song before denying it. Under the circumstances, the trial court could properly conclude that the inclusion of the song was "not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1180.) Accordingly, the trial court's ruling in this regard should also be upheld.

Appellant further contends that, "In addition to being highly prejudicial, much of the victim impact evidence in this case was also irrelevant . . . ." Thus, appellant argues, "its probative value was clearly outweighed by its prejudicial effect, and it should have been excluded on that ground. (Evid. Code, § 352.)" (AOB 162.) In this regard, appellant explains that the "highly prejudicial evidence" to which he refers consisted of: "displaying Brinlee from the witness stand, Lynn's testimony regarding the serious complications suffered by Brinlee at her birth, evidence concerning Joe's funeral, and Lynn and Brinlee's staged visit to Joe's grave on Christmas Day, which appears on the victim impact video." (AOB 162.) Respondent disagrees and submits an examination of the

instant record instead shows that the trial court's sound exercise of the broad discretion conferred upon it by Evidence Code section 352 should be upheld.

Evidence Code section 352 provides that,

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

As the this Court has explained:

> Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Dyer* (1988) 45 Cal.3d 26, 73 [].) Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."

(*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, original italics, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316; accord *People v. Anderson* (2001) 25 Cal.4th 543, 591.) Stated another way, a trial court's exercise of its broad evidentiary discretion in this regard will be disturbed on appeal only if it "manifestly" constituted an abuse of that broad discretion, i.e., only where the trial court's decision "exceeds the bounds of reason." (*People v. Siripongs* (1988) 45 Cal.3d 548, 574; *People* v. *Funes* (1994) 23 Cal.App.4th 1506, 1519.) Application of this deferential standard of appellate review here mandates that the trial court's exercise of its sound discretion be upheld.

First, the trial court committed no error in allowing the prosecution to have Lynn Finzel introduce Brinlee to the jury and establish her age at the beginning of Lynn's testimony at the penalty phase. Although Brinlee was not alleged as a victim of any of the charged counts, she was in every real sense a victim of appellant's crimes. Indeed, upon noticing Brinlee in her bassinet, appellant immediately seized the opportunity to threaten harm to her to secure her mother Lynn's compliance in the forced sexual acts he forced her to perform. Appellant was well aware that Brinlee was Joe and Lynn's daughter when he purposefully killed Brinlee's father and attempted to kill her mother in Brinlee's presence. Similarly, it is significant that due to her tender years, Brinlee was disqualified to be a witness under to Evidence Code section 701, subdivision (a). Under these circumstances, the trial court committed no error in having Brinlee introduced to the jury as she was. The procedure was probative in that it allowed the jury to see and evaluate the daughter appellant purposefully elected to orphan, but was not prejudicial in the least. The jury was by then undoubtedly well aware of Brinlee's presence, and her appearance before the jury was exceedingly brief and unemotional.

Brinlee's brief appearance before the jury was simply not "'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" Indeed, respondent submits any rule concerned with "fundamental fairness" such as the instant one, must hold that appellant, having purposefully elected to use Brinlee as a tool to force her mother to submit to forcible sex acts, and having further purposefully elected to shoot her father and mother in Brinlee's presence, cannot be heard to complain that the jury was permitted to briefly view the child that he deliberately orphaned. Contrary to appellant's suggestion otherwise, there was absolutely no danger any reasonable juror would be left with "the image that the prosecutor was acting on Brinlee's behalf, as opposed to her proper function of acting on behalf of the People," (AOB 163), based on the prosecutor briefly

receiving Brinlee from Lynn and handing her to another care giver so Lynn could testify at the penalty phase. (AOB 163.)

Appellant further posits that the trial court abused its discretion under Evidence Code section 352 by not excluding Lynn's "testimony concerning the difficulties experienced by Brinlee at the time of her birth," which appellant argues, "had nothing to do with the circumstances of the crime." (AOB 164.) Respondent again disagrees. Lynn's testimony concerning complications at the time of Brinlee's birth was probative in that it helped explain the depth of experiences Lynn and Joe had recently gone through shortly before appellant committed the subject crimes together, which helped demonstrate their closeness to each other. On the other hand, there was no probability that admission of such evidence would create a danger of undue prejudice toward appellant. Lynn's testimony about Brinlee's birth-complications constituted an infinitesimally small portion of her testimony, and no reasonable juror would have seen appellant as in any way responsible for events which took place two months before he committed the subject crimes.

Finally appellant argues that "the evidence concerning Joe's funeral and visits to Joe's grave by Lynn, Brinlee and others was particularly prejudicial because it inappropriately drew the jury into the mourning process." (AOB 164.) In this regard, appellant elaborates,

> the erroneously admitted evidence includes (1) Lynn's testimony concerning Joe's funeral, including her testimony about the various personal items that were buried with Joe, including certain photographs and a cookie that Joe's son, 'Garrett[,] gave him so he would have something to eat when he got down there"; (2) Lynn's testimony describing the significance of the markings on Joe's gravestone; (3) Lynn's testimony concerning her twice weekly visits to Joe's grave; (4) the video depicting Lynn and Brinlee's staged visit to Joe's grave on

> Christmas Day, showing Joe's grave adorned with flowers and a decorated Christmas tree and Brinlee playing with a Santa doll; and (5) Lynn's testimony concerning the note left by Garrett under the Christmas tree at Joe's grave, which contained some drawings, a photograph of Garrett, and the words, "I will see you some day."

(AOB 164-165.) Respondent submits this portion of appellant's argument is equally devoid of merit.

Joe's burial was, of course, a direct consequence of appellant's murder of him, and evidence concerning how Joe's son Garrett grieved and mourned his loss was highly probative in showing the killing's impact on him. The evidence of the markings on Joe's gravestone, Lynn's twice-weekly visits to Joe's grave, and of Lynn and Brinlee's first Christmas at Joe's grave following appellant's murder of him, was also highly probative in showing the killing's impact on them. There was nothing "staged" about Lynn and Brinlee's visit to Joe's grave on Christmas. Indeed, in viewing the video, it becomes plain that a number of other families had similarly visited the cemetery, and placed flowers and decorated Christmas trees at, the nearby graves of their loved ones that day. Nor was there anything particularly prejudicial or overly emotional about such evidence in the larger context of all that was presented at the penalty phase. Indeed, this Court has recently and consistently rejected legally indistinguishable arguments. (See *People v. Zamudio*, *supra*, 43 Cal.4th at pp. 367-368 ["This assertion fails under both *Kelly*, in which the videotape ended with a brief view of the victim's grave marker (*Kelly, supra*, 42 Cal.4th at p. 797), and *People v. Harris* (2005) 37 Cal.4th 310, 352 [], which held that a photograph of the victim's gravesite, as 'further evidence relating to her death and the effect upon her family . . . was properly admitted as a circumstance of the murders'"]; *People v. Brown* (2004) 33 Cal.4th 382, 398 [upholding trial court's admission of evidence of "the residual and lasting impact [the murder

victim's surviving family members] continued to experience – such as [one family member]'s feelings when passing his brother's grave"].)

The testimony and videotaped segments of Ms. Finzel, i.e., "a surviving victim of [appellant]'s attempted murder, [evidencing] the psychological and emotional trauma suffered by her as a direct result of [appellant]'s homicidal conduct, related to the nature and circumstances of the capital offense." (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1063.) "The evidence therefore was relevant to factor (a) under section 190.3." (*Ibid.*) Thus, as in *Taylor*, such evidence "f[e]ll squarely within that category." (*People v. Taylor* (2001)) 26 Cal.4th 1155, 1172.)

Conversely, as the trial court further found, admission of the subject evidence at the penalty phase did not create a substantial danger of undue prejudice to appellant. On this point, appellant seems to equate emotional with prejudicial. However, as this Court explained in *Edwards* and has consistently reiterated since then, pursuant to section 190.3, factor (a), a trial court "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) The victim impact evidence admitted by the trial court constituted just such evidence. And, although some of such evidence "would naturally have tended to arouse emotion and evoke strong feelings of sympathy for" Lynn, Garrett, and Brinlee, "it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response." (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1063.)

Indeed, respondent submits appellant's claim that the admission of the victim impact evidence was unduly prejudicial is really just a complaint that it was so powerfully probative of that which it was admitted to show: the impact of appellant's crimes on the surviving victims and family members. However,

as this Court has stressed, the prejudice which Evidence Code section 352 seeks to avoid is not is not the "prejudice" or damage to a defense that naturally flows from relevant, probative evidence. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "In applying section 352, prejudicial is not synonymous with damaging." (*Ibid.*)

As this Court has explained, a trial court's discretion to exclude relevant evidence as unduly prejudicial pursuant to Evidence Code section 352 at the penalty phase of a capital trial is *narrower* than its discretion to do so at the guilt phase, and this is especially so as to evidence of the "circumstances of the [capital] crime" under section 190.3, factor (a), such as that permitted by the trial court here. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 591-592.) The trial court did not abuse its broad discretion, and therefore did not err, in admitting the victim impact evidence at issue. Certainly, appellant has not shown that, in admitting the challenged evidence, "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice," or that the trial court's ruling in this regard "exceed[ed] the bounds of reason."

Here, the challenged evidence admitted by the trial court was precisely the type of victim impact evidence expressly countenanced by the high court in *Payne*. It helped inform the jury "about the specific harm caused by the crime in question," (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825), aided the jury's ability to "assess meaningfully the defendant's moral culpability and blameworthiness," and helped remind the jury of the "unique loss to society and in particular to his family" (*Id.* at p. 825) occasioned by appellant's murder of Joe Finzel. Quite simply, as this Court explained in *People v. Taylor*, *supra*, 26 Cal.4th at p. 1171, "Victim impact evidence of this kind, directed toward showing the impact of the defendant's acts on the family of his victims, is admissible at the penalty phase of capital trials."

Nor did the trial court's admission of the victim impact evidence deprive appellant of due process by rendering his penalty trial fundamentally unfair. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) While somewhat emotional, as found by the trial court, the challenged victim impact evidence was far less inflammatory and emotional than the evidence presented at the guilt phase concerning the facts of appellant's commission of the underlying crimes which spawned it. (See *Id.* at p. 832 (conc. opn. of O'Connor, J.).)

Rather, as Justice Souter explained in his concurrence in *Payne*, no unfairness can be said to result from the admission of such evidence at the penalty phase:

> Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harm and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctively hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to

some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

That foreseeability of the killing's consequences imbues them with direct moral relevance, [citation], and evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence of the risk that the defendant originally chose to run despite the kinds of consequences that were obviously foreseeable.

(*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 838-839 (conc. opn. of Souter, J.).)

As this Court found in *Mitcham*,

Although [the victim impact evidence] would naturally have tended to arouse emotion and evoke strong feelings of sympathy for [Lynn, Garrett, and Brinlee's] condition, it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response. In short, the [evidence] in question did not undermine the fundamental fairness of the penalty-determination process.

(*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1063.)

Indeed, had the trial court excluded the victim impact evidence proffered by the prosecution as urged by appellant, it would only have prejudiced the People by unfairly "depriv[ing] the State of the full moral force of its evidence and . . . prevent[ing] the jury from having before it all the information necessary to determine the proper punishment . . . ." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see *Id.* at p. 839 (conc. opn. of Souter, J.) ["[G]iven a defendant's option to introduce relevant evidence in mitigation, [citations], sentencing without such evidence of victim impact may be seen as a significantly imbalanced process"].) "[T]here is nothing unfair about allowing the jury to bear in mind th[e] harm [caused by the murder] at the same time as it considers the mitigating evidence introduced by the defendant." (*Id.* at p. 826.)

Based on the above, appellant's contention should be rejected and the judgment affirmed.

Finally, respondent submits that, even assuming arguendo the trial court somehow erred in admitting some of the victim impact evidence at the penalty phase, the record shows any such assumed error was harmless beyond a reasonable doubt in that there was no reasonable possibility of a more favorable penalty verdict for appellant even had the erroneous evidence not been admitted. (See *People v. Kelly*, *supra*, 42 Cal.4th at p. 799 ["We see no reasonable possibility these portions of the videotape affected the penalty determination or, to state the equivalent, any error was harmless beyond a reasonable doubt"]; *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1058 ["Even assuming such testimony offended the constitutional principle on which defendants rely, any error was harmless beyond a reasonable doubt"]; *People v. Ochoa* (1998) 19 Cal.4th 353, 479 [the reasonable possibility standard for assessing penalty phase errors is "the same in substance and effect" as the harmless-beyond-a-reasonable-doubt standard of *Chapman* v. *California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]].)

To the extent that the trial court erred in admitting any of the victim impact evidence, the record nonetheless shows that, "Most of the [victim impact evidence] was factual, relevant, and not unduly emotional." (*People v. Kelly*, *supra*, 42 Cal.43th at p. 799.) To the extent the victim impact evidence admitted by the trial court "contained aspects that were themselves emotional without being factual," the record shows that any such assumed error "was harmless in light of the trial as a whole." (*Ibid.*)

Even if the victim impact evidence aroused emotions and evoked sympathy, "it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response." (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1063.) Also, the trial court's instructions told the jurors

they must not to be influenced by bias or prejudice against appellant (II CT 436 [CALJIC No. 8.84.1]), and that they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider" (II CT 442 [CALJIC No. 8.88]). On appeal, this Court presumes that the jury understood and followed these instructions. (*People* v. *Wash* (1993) 6 Cal.4th 215, 263; *People* v. *Fauber* (1992) 2 Cal.4th 792, 823; *People v. Rich* (1988) 45 Cal.3d 1036, 1089-1090.)

Moreover, by the time of the penalty trial the jury had already heard evidence of the callousness and brutality of the murder and other crimes appellant committed. As shown by the overwhelming and generally undisputed evidence, appellant invaded the Finzels' home, threatened to harm the then 2-month-old Brinlee, and forced Lynn Finzel to orally copulate him and attempted to rape her multiple times. After hogtying Lynn and securing Joe's .357 handgun, appellant purposely left the door to the bedroom ajar so that Joe would enter it and, when he did, appellant shot him in the chest twice, brutally killing him in front of his wife and daughter. Not content to kill only Joe, appellant also shot and tried to kill Brinlee's other parent Lynn and remained in the house to check to make sure she was dead. Still not content with having apparently murdered both Joe and Lynn, appellant rifled through Joe's pockets for valuables and even stole Joe's wedding ring, which he was still wearing at the time of his arrest. Appellant then tried to steal Joe's Corvette, but was unable to get it to start, so he instead stole Joe's truck. When apprehended, appellant lied. As this Court has observed, "among the most significant considerations [in the jury's assessment of punishment] are the circumstances of the underlying crime. [Citations.]" (*People v. Mitcham, supra*, 1 Cal.4th at p. 1062.) As the trial court specifically found, the aggravating evidence of the murder and other crimes committed by appellant, made the victim impact evidence "pale" by comparison. The admission of the challenged victim impact

evidence "did not undermine the fundamental fairness of the penalty-determination process." (*People v. Mitcham, supra*, 1 Cal.4th at p. 1063.) Thus, assuming arguendo any or some of the victim impact evidence was admitted in error, even if it had been excluded, there was no reasonable possibility that the jury would have returned a different sentence and any alleged error was harmless beyond a reasonable doubt.

## V.

## THE TRIAL COURT ACTED WELL WITHIN ITS BROAD DISCRETION, COMMITTED NO ERROR, AND DEPRIVED APPELLANT OF NO CONSTITUTIONAL RIGHT IN DENYING HIS REQUEST FOR A CONTINUANCE AT THE PENALTY PHASE

Appellant contends the trial court committed prejudicial error by denying his request for a continuance to present further testimony by Dr. Kaser-Boyd on surrebuttal at the penalty phase, and that such alleged error requires the reversal of his death sentence because it denied him his state and federal constitutional rights to counsel, present evidence, due process, a fair trial, and to a reliable penalty determination. (AOB 170-186.) Respondent disagrees and first submits appellant forfeited his newfound constitutional claims on appeal by failing to assert them in the trial court. On the merits, respondent submits that the record instead shows that, under the circumstances, the trial court acted well within its broad discretion, committed no error, and denied appellant no constitutional right in denying his request for a continuance at the penalty phase. Moreover, even assuming arguendo the trial court somehow erred in refusing the continuance, the record shows any such assumed error was nonetheless and necessarily harmless, thus precluding reversal in any event.

### A. Background

As noted above, after the jury's guilt-phase verdicts and special-circumstance finding were received and recorded on December 13, 1994, the court continued the penalty phase to commence on January 3, 1995. (II CT 391A.)

When the court and counsel reconvened as scheduled on the morning of Tuesday, January 3, 1995, as scheduled, the prosecutor explained that on the previous Friday, she had finally been able to meet with Dr. Kaser-Boyd

concerning her proposed testimony, but only for about two hours. During that time, the prosecutor was able to review some of Dr. Kaser-Boyd's notes, at which time she first became aware that it was claimed that appellant had suffered sexual abuse. The prosecutor objected to such evidence being presented in that an insufficient foundation had been shown, and also noted that Dr. Kaser-Boyd had indicated she had a conversation with appellant's grandparents concerning an alleged incident of sexual abuse. The prosecutor complained she had not received any information concerning how to contact and interview appellant's grandparents, and asked the court to order appellant's counsel to provide such information. The court ordered appellant's counsel to do so. (11RT 2187-2189, 2192-2193.)

Two days later, a further hearing was held at which the prosecutor related that she had been given the telephone number for appellant's grandparents, Fred and Dorothy Baumgarte, by the defense investigator, but not their address. The prosecutor called the number and spoke to Mrs. Baumgarte who said she did not want to talk to the prosecutor until she first talked to appellant's counsel or the defense investigator. Appellant's counsel said he would tell Mrs. Baumgarte that it was all right for her to talk to the prosecutor. (11RT 2251-2252.) The prosecutor indicated she had been able to speak briefly with Fred Baumgarte about the alleged sexual molestation and that, based on that conversation, she would need Mr. Baumgarte present at court to potentially testify at the penalty phase. (11RT 2255-2256.) Near the close of that hearing, the prosecutor advised that she had conducted a very thorough review of the notes she had been provided from Dr. Kaser-Boyd, which appeared to suggest that the Baumgarte's were not present for a purported interview of them. Thus the prosecutor asked to be provided with notes concerning the interview of the Baumgartes and another opportunity to meet with Dr, Kaser-Boyd to discuss

them. Appellant's counsel indicated he would have Dr. Kaser-Boyd cooperate in such a further meeting. (11RT 2284.)

The penalty trial commenced on Monday, January 9, 1995. During a break between the testimony of Mr. Aguirre and Ms. Finzel, the prosecutor objected to appellant's counsel making any reference to alleged sexual molestation of appellant in his opening statement, and objected to the admission of any testimony about such alleged incidents, subject to a hearing concerning their admissibility pursuant to Evidence Code section 402. The prosecutor explained that Dr. Kaser-Boyd had indicated that she talked to Mr. Baumgarte, who indicated he saw perhaps a fondling of appellant's penis, but that he was not sure and did not tell anyone about the alleged incident until much later. When the prosecutor spoke to Mr. Baumgarte about the alleged incident, however, he indicated he had walked into a living room and thought that appellant's stepfather, Rudy Garcia, was getting appellant ready for a bath and that he saw appellant's penis between Rudy's finger and thumb, and that when Mr. Baumgarte walked in, Rudy stopped. Mr. Baumgarte did not think anything of it at the time or at any other time until much later when he heard news reports concerning child molestation. The trial court found that such concerns went to weight, rather than admissibility, and that it was inclined to admit Dr. Kaser-Boyd's proposed testimony about Mr. Baumgarte's account of the alleged incident. The prosecutor stated that, in that case, it was imperative that she be able to transport Mr. and Mrs. Baumgarte to potentially testify at the penalty trial, and that she was in the process of doing so. (12RT 2346, 2348-2349.)

When the court and counsel returned to the courtroom following the lunch recess the next day, the prosecutor advised that she had been able to speak to Mrs. Baumgarte and that based on her conversations with Mr. and Mrs. Baumgarte, the prosecutor believed they would be important rebuttal

witnesses concerning Dr. Kaser-Boyd's expected testimony in mitigation. The prosecutor advised that her office was therefore in the process of getting money to the Baumgarte's to pay for them to drive out to the location of the trial, and it was anticipated that the Baumgarte's would arrive by Monday, January 16, 1995. Since the court was going to allow Dr. Kaser-Boyd to testify concerning the alleged incident of sexual abuse observed by Mr. Baumgarte, the prosecutor argued, she should be permitted to meet such evidence with the Baumgartes and live rebuttal witnesses. Appellant's counsel stated he did not think the court had obtained from the prosecutor an offer of proof as to what the Baumgartes were being brought in to impeach, and predicted that when the court heard what the alleged discrepancy was between what the Baumgarte's told Dr. Kaser-Boyd and what they told the prosecutor, the court would not find it worthy of a continuance to allow the Baumgarte's to testify in rebuttal. The prosecutor confirmed that it was her aim to show by such rebuttal testimony that Dr. Kaser-Boyd was not accurate in taking notes. The court indicated it would wait until after it had heard Dr. Kaser-Boyd's testimony and further argument from counsel, before deciding if the discrepancy warranted continuing the penalty trial over the weekend so the Baumgarte's could testify in rebuttal. (13RT 2448-2850.)

On the morning of Thursday, January 12, 1995, at a hearing at the bench, the prosecutor noted that Monday, January 16, would be a court holiday, and that the Baumgartes would arrive by the previous day, Sunday, January 15. Since it appeared Dr. Kaser-Boyd would still be completing her testimony in mitigation into Friday, January 13, the prosecutor proposed having the Baumgarte's testify in rebuttal, if warranted, on Tuesday, January 17, and noted that it would be more appropriate under the circumstances for the parties to give their penalty arguments that day as well. The trial court indicated it anticipated the parties would give their penalty arguments that Tuesday, and noted that it

may turn out that the prosecutor would decide not to call the Baumgartes as rebuttal witnesses. (15RT 2663.)

Dr. Kaser-Boyd began her testimony in mitigation on the morning of Friday, January 13, continued to testify throughout the session on Tuesday, January 17, and completed her testimony on Wednesday, January 18. As part of her testimony on direct examination, Dr. Kaser-Boyd testified that the applicable "risk factors" in appellant's case included a childhood history of sexual abuse based in part on information she obtained from appellant's grandfather Fred Baumgarte that appellant's stepfather Rudy Garcia had touched appellant in a sexual way when appellant was about three or four years old. (16RT 2804-2805.) On cross-examination, Dr. Kaser-Boyd elaborated that, according to her notes, Mr. Baumgarte had told her that on an occasion when Rudy Garcia and appellant's mother had been staying at the Baumgarte's house when appellant was about three or four years old, Mr. Baumgarte walked in a bedroom and saw that "Rudy had [appellant] standing on a little table and Rudy was playing with [appellant's] privates. I walked in, and he stopped. I can't remember any more of it. I let it go." Dr. Kaser-Boyd testified that Mr. Baumgarte did not say anything about appellant being prepared for a bath, and added that Mr. Baumgarte was hard of hearing, so it was very difficult to interview him on the telephone. Dr. Kaser-Boyd was unsure what room Mr. Baumgarte told her this incident had occurred in. Mr. Baumgarte told Dr. Kaser-Boyd that at the time he witnessed the incident, "it gave him a funny feeling." (16RT 2840-2842.) At the close of the session on Friday, January 13, which ended while the prosecutor was still conducting her cross-examination of appellant, the court met with counsel at the bench and inquired how much longer the prosecution anticipated her cross-examination would take. The court noted it had "an awful calendar" awaiting it on Tuesday, January 17, and that two other last-day "10 of 10" trials that had

to commence by Wednesday, January 18. The court asked if the prosecutor would have any witnesses in rebuttal after appellant's counsel finished his cross-examination of Dr. Kaser-Boyd, and the prosecutor explained she was not sure, but would decide over the weekend and that, if she did call rebuttal witnesses, they would be very brief. (16RT 2865-2866.)

The next court day, Tuesday, January 17, was consumed by further cross-examination and redirect examination of Dr. Kaser-Boyd. At a bench conference held as the court and counsel returned from the lunch recess that day, the court stated its opinion that the original time estimate for completing the penalty trial was "way off" and that the court had lost two alternate jurors and was down to four. The court noted that the jury was exhibiting a lot of restlessness and "squirming." In an effort to complete the penalty phase evidence and argument the next day, the trial court cleared its morning calender so that it could be in session all day. The court explained that it had to stop proceedings in appellant's case early that day at 3:30 p.m., because it had to impanel another jury for a last-day case also pending before it. (17RT 2898.)

During the next morning's session, after appellant's counsel completed his redirect examination and the prosecutor completed her recross examination of Dr. Kaser-Boyd, the trial court asked if the witness could be excused, and both counsel answered in the affirmative. Accordingly, the court excused Dr. Kaser-Boyd. Appellant's counsel confirmed he had no more witnesses to call in his case in mitigation, and the prosecutor confirmed she would call some rebuttal witnesses. Following a ten-minute break, the prosecution called Fred Baumgarte as a rebuttal witness. (18RT 3022.)

Mr. Baumgarte testified that when appellant was three or four years old, while appellant's mother was married to Rudy Garcia and they were living in Fort Hood, Mr. and Mrs. Baumgarte went to visit them. On one occasion when Mr. Baumgarte was entering the house trailer they lived in, he saw appellant

with his underpants off. Mr. Baumgarte admitted that he told the prosecutor that he thought Rudy was getting appellant ready to take a bath. Appellant was standing on a table or a bench in front of Rudy and Rudy reached up and was playing with appellant's penis. Rudy held appellant's penis between his thumb and a finger. When Mr. Baumgarte entered the room, appellant stopped. Mr. Baumgarte did not think the touching was sexual when he observed it. Only many years later, about four or five years before he testified at the penalty trial, did Mr. Baumgarte conclude that Rudy had done something that "he wasn't supposed to be doing," based on Mr. Baumgarte's viewing of television and radio programs about children being molested. Mr. Baumgarte did not remember talking to Dr. Kaser-Boyd, but he had been present at appellant's mother's when Dr. Kaser-Boyd talked to appellant's mother and Mrs. Baumgarte. Mr. Baumgarte had difficulty hearing and did not remember talking to Dr. Kaser-Boyd about the incident he observed. He did recall telling the paralegal employed by the defense, Amy York, about it. Mr. Baumgarte did not specifically recall telling his wfe about that incident, but was sure that he did. (18RT 3026-3031.)

On cross-examination, Mr. Baumgarte confirmed that he had witnessed the incident he described, but testified that it seemed wrong to him at the time. Mr. Baumgarte remembered Mrs. Baumgarte talking to Dr. Kaser-Boyd, but he did note remember talking to her himself. Mr. Baumgarte clarified that Mrs. Baumgarte talked to him and then talked to Dr. Kaser-Boyd. (18RT 3035-3037.) On redirect examination, Mr. Baumgarte reiterated that he did not remember giving any information to Dr. Kaser-Boyd, not even through his wife. Appellant's counsel passed on the opportunity for recross examination, and Mr. Baumgarte was excused as a witness. (18RT 3040.)

The prosecutor then called Dorothy Baumgarte as the next rebuttal witness. At a bench conference, appellant's counsel asked for an offer of proof

as to what Mrs. Baumgarte would testify to, and the prosecutor explained she expected Mrs. Baumgarte to testify that she did not remember talking to Dr. Kaser-Boyd on the telephone. Appellant's counsel stated, "That is great because then we have to bring Kaser-Boyd back. This is actually legitimately in dispute." (18RT 3041.)

Mrs. Baumgarte was sworn as a witness and testified that she recalled a time during the previous summer when she and Mr. Baumgarte and Dr. Kaser-Boyd were at appellant's mother's house. Mrs. Baumgarte did not remember talking to Dr. Kaser-Boyd about Mr. Baumgarte having seen Rudy Garcia touch appellant. On the previous Sunday, three days before she testified in rebuttal, Mrs. Baumgarte told the prosecutor that she did not remember talking to anyone but Amy York about that. (18RT 3043-3044.) On cross-examination by appellant's counsel, Mrs. Baumgarte testified she suffers anxiety attacks and stressful things cause her quite a bit of a problem. (18RT 3044-3045.)

The prosecution then called Ms. York as its third and final rebuttal witness, who testified as summarized in the Statement of Facts, *ante*. Upon the completion of Ms. York's testimony, the prosecution rested its penalty case in rebuttal subject to the court's rulings on the admissibility of proffered exhibits. When the trial court then asked appellant's counsel if he had anything further to present, appellant's counsel answered "Yes," and the court called counsel to sidebar. At sidebar, the court asked appellant's counsel if the witness he wished to call was present. Appellant's counsel answered, "No," and stated he needed to get ahold of Dr. Kaser-Boyd, who was no longer there. The court indicated it was disinclined stop the trial for appellant to locate Dr. Kaser-Boyd, noting that it had set aside that day to complete the testimony and argument, and that through appellant's counsel's cross-examination of Mr. and Mrs. Baumgarte, he had made it very clear to the jury that they were "two elderly people who

really don't remember the conversations." The trial court indicated that, under the circumstances, it was "not going to shut down the trial, we are proceeding." Appellant's counsel argued that "every single underpinning of Dr. Kaser[ Boyd]'s testimony" was "being deranged by this fallacious specious suggestion that she fabricated an interview with that person." The court noted that in the three days Dr. Kaser-Boyd was on the witness stand testifying, she was asked by both counsel about who she talked to and the contents of those conversations. The court did not think it was necessary or warranted to have Dr. Kaser-Boyd re-cover what she had already stated during her lengthy testimony. Appellant's counsel confirmed he had no witnesses present, and the court indicated it and counsel would discuss exhibits. (18RT 3052-3054.)

During the court's ensuing discussion with counsel about which exhibits would be admitted and the penalty phase jury instructions it would give, appellant's counsel stated that the defense had "reason to believe that Dr. Kaser-Boyd may still be in the building but we are not sure which courtroom she may be in, so we are asking leave of court to have time to find her." Appellant's counsel indicated the defense was looking for Dr. Kaser-Boyd at that time. The court indicated it would instruct the jury then, but would not have the prosecutor commence her penalty argument until after lunch. The court indicated that if Dr. Kaser-Boyd was located by noon, she might be able to return to the courtroom and quickly testify before the penalty arguments. When the prosecutor indicated she needed some time to retrieve and organize exhibits, the court suggested she take that time then, so as to provide additional time to look for and locate Dr. Kaser-Boyd. (18RT 3063-3064.)

Following a recess, at the bench, the court inquired if the defense had any luck in finding Dr. Kaser-Boyd, and appellant's counsel answered, "No." (18RT 3065.) Following a further discussion regarding jury instructions and exhibits, appellant's counsel informed the court that the defense had been

unable to locate Dr. Kaser-Boyd and that the defense was requesting "a slight delay to try to retrieve her and get her in the courtroom." The court ruled, "That request at this point is denied," but added that, "If at some point you find her, you can let me know and we will see where we are and if there is something we can do." (18RT 3067.)

Moments later, at a bench conference, appellant's counsel asked that the notes Dr. Kaser-Boyd took during her interview of Mr. Baumgarte be admitted into evidence. The court indicated it was inclined to do so, but asked to see the notes to see if there was anything objectionable in them. (18RT 3068.)

Back in open court in front of the jury, the trial court read the penalty jury instructions and the prosecutor commenced her penalty argument. (18RT 3070-3096.) When the court and counsel reconvened following that day's lunch break, appellant's counsel presented the court with Dr. Kaser-Boyd's singe page of notes concerning her interview of Mr. Baumgarte. The page was entitled with Mr. Baumgarte's name at the top of the page as well as his telephone number, the date of the telephone call, and Mrs. Baumgarte's name circled. The notes indicated that Mr. Baumgarte was "hard of hearing" and had notations concerning "sexual molestation" and that "something was naked at that time." The notes confirmed Mr. Baumgarte said he saw Rudy had appellant standing on a little table and Rudy was playing with appellant's privates. The notes had further notations of "I walked in and he stopped," "three, four years old," "something about unsure or something," and "I can't remember anymore. I let go of it, told my wife." Over the prosecution's objection, the trial court admitted Dr. Kaser-Boyd's notes concerning her interview of Mr. Baumgarte (Def. Exh. T) so that appellant's counsel could refer to and interpret them for the jury in his penalty argument. (18RT 3098-3099.) The parties then completed their penalty arguments and the matter was submitted to the jury.

**B. Applicable Law And Argument**

As noted above, appellant claims on appeal that the trial court committed prejudicial error by denying his request for a continuance to present further testimony by Dr. Kaser-Boyd on surrebuttal at the penalty phase, and that such alleged error requires the reversal of his death sentence because it denied him his state and federal constitutional rights to counsel, present evidence, due process, a fair trial, and to a reliable penalty determination. (AOB 170-186.) While appellant did ask the trial court to delay the penalty trial so he could try to get Dr. Kaser-Boyd back to the courtroom, he never asserted any constitutional claim below. Accordingly, under such circumstances, appellant should fairly be held to have forfeited such claims on appeal. (See *United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1170, 123 L.Ed.2d 508] ["'"No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."'"]; *People v. Earp* (1999) 20 Cal.4th 826, 893; *People v. Carpenter* (1997) 15 Cal.4th 312, 385; *People v. Saunders* (1993) 5 Cal.4th 880, 589-590.) In any event, as explained more fully below, even had appellant properly preserved his claims for this Court's review, application of applicable law to the instant record shows they would fail on the merits.

As mandated by section 1050, subdivision (e), "Continuances shall be granted only upon a showing of good cause." The decision whether good cause exists, i.e., whether or not to grant a continuance, rests within the trial court's broad and sound discretion. (*People v. Beames* (2007) 40 Cal.4th 907, 920; *People v. Jenkins, supra,* 22 Cal.4th at p. 1037; *People v. Beeler* (1995) 9 Cal.4th 953, 1003; *People v. Howard, supra,* 1 Cal.4th at p. 1171; *People v. Mickey* (1991) 54 Cal.3d 612, 660.) Thus, such rulings are reviewed on appeal

under the deferential abuse of discretion standard. (*People v. Wilson* (2005) 36 Cal.4th 309, 352; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1037; *People v. Mickey*, *supra*, 54 Cal.3d at p. 660.) On appeal, the party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion and, "discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered." (*People v. Beames*, *supra*, 40 Cal.4th at p. 920; *People v. Beeler*, *supra*, 9 Cal.4th at p. 1003; *People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.) As this Court has noted, "[A]n order of denial is seldom successfully attacked." (*People v. Beeler*, *supra*, 9 Cal.4th at p. 1003; accord *People v. Beames*, *supra*, 40 Cal.4th at p. 920.) In the absence of showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance cannot result in a reversal. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840; *People v. Fudge* (1994) 7 Cal.4th 1075, 1105; *People v. Zapien* (1993) 4 Cal.4th 929, 972.) Appellant has shown neither an abuse of discretion nor prejudice here.

In considering a motion for continuance in the midst of trial, a court considers "not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1037; *People v. Barnett, supra,* 17 Cal.4th at p. 1126; *People v. Zapien*, *supra*, 4 Cal.4th at p. 972.) When, as here, a defendant seeks to continue trial to secure the attendance of a witness, in order to show good cause warranting such a continuance, the defendant bears the burden of establishing that he exercised due diligence to secure the witness's attendance, that the missing witness's expected testimony is material and not cumulative, that the testimony can be obtained within a reasonable time, and that the facts to which the witness will testify cannot otherwise be proven. (*People v. Jenkins*, *supra*, 22 Cal.4th

at p. 1037; *People v. Beeler*, *supra*, 9 Cal.4th at p. 1003; *People v. Howard*, *supra*, 1 Cal.4th at p. 1171; *People v. Mickey*, *supra*, 54 Cal.3d at p. 660.) The instant record reveals not only that appellant failed to make all of these required showings, but that he failed to make *any* of them.

First, there was no showing the defense exercised due diligence in securing Dr. Kaser-Boyd's attendance as a surrebuttal witness. "Indeed, the facts strongly suggested the opposite []." (*People v. Mickey*, *supra*, 54 Cal.3d at p. 660.) As summarized above, the instant record establishes that by the time the defense had completed its case in mitigation, it was more than clear that the prosecution may call witnesses in rebuttal and that, if it did, those witnesses would be Mr. and Mrs. Baumgarte, who would be called in an effort to raise questions about any discrepancies between their accounts and Dr. Kaser-Boyd's account of what, if anything, they had conveyed to Dr. Kaser-Boyd. It further appears from the record, given the 10-minute break following the conclusion of Dr. Kaser-Boyd's testimony and short testimony presented in rebuttal by the prosecution, that all the defense would have to have done to secure Dr. Kaser-Boyd's attendance as a surrebuttal witness, was to have her remain in the courtroom hallway for about an hour. Despite the plain prospect that the prosecution would likely call the Baumgartes in rebuttal to try to dispute what Dr. Kaser-Boyd testified they conveyed to her, the defense did not take any such simple step to avoid the need for a continuance. Under these circumstances, appellant failed to show he exercised any diligence in securing Dr. Kaser-Boyd's attendance as a surrebuttal witness (See *People v. Wilson*, *supra*, 36 Cal.4th at p. 352.)

Nor did appellant establish that Dr. Kaser-Boyd's expected testimony in surrebuttal would be material and not cumulative. Indeed, the instant record establishes just the opposite. As accurately noted by the trial court, Dr. Kaser-Boyd had already testified over the course of three days, during which she was

asked by both counsel about who she talked to and the contents of those conversations. The court properly determined it was neither necessary nor warranted to have Dr. Kaser-Boyd re-cover what she had already stated during her lengthy testimony. As also noted by the trial court, by the end of Mr. and Mrs. Baumgarte's testimony, it was very clear to the jury that they were "two elderly people who really don't remember the conversations." In her penalty argument, while the prosecutor questioned whether what Mr. Baumgarte observed was actually an instance of sexual abuse (18RT 3146-3148), contrary to appellant's counsel's stated fear, the prosecution did not argue that the Baumgartes were never actually interviewed or that Dr. Kaser-Boyd had "fabricated" her interview of Mr. Baumgarte. That Mr. Baumgarte had been interviewed and that the contents of that interview were conveyed to Dr. Kaser-Boyd were generally uncontested. Thus, the testimony appellant sought to elicit from Dr. Kaser-Boyd on surrebuttal was cumulative and not material.

Appellant similarly failed to establish the testimony he sought to present could be obtained within a reasonable time. While counsel offered vague notions that Dr. Kaser-Boyd might be in the building, even following a recess, the defense was unable to locate her and there was no suggestion as to when she might be located.

Appellant also failed to establish that the facts he wanted Dr. Kaser-Boyd to testify to on surrebuttal could not otherwise be proven. In fact he established the opposite. As noted, in Dr. Kaser-Boyd's absence, at appellant's request and over the prosecution's objection, the trial court admitted Dr. Kaser-Boyd's notes concerning her interview of Mr. Baumgarte, which confirmed that the interview had been conducted, when it had been conducted, and its subject matter.

The trial court's exercise of discretion in denying a continuance was also supported by its wholly proper consideration of the burden a continuance would

impose on jurors and the court itself. Just the previous day, the trial court had stated its opinion that the original time estimate for completing the penalty trial was "way off" and that the court had already lost two alternate jurors. The court noted that the jury was already exhibiting a lot of restlessness and "squirming." In an effort to complete the penalty phase evidence and argument the next day, the trial court cleared its morning calender so that it could be in session all day. The court explained that it had to stop proceedings in appellant's case early that day because it had to impanel another jury for a last-day case also pending before it. Plainly, the court could and did properly consider such matters in concluding that halting the otherwise complete evidentiary portion of the penalty phase was unnecessary and unwarranted under the circumstances. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1038.)

Based on the above, respondent submits this Court should find, as it did in *Howard*, that, "On this weak showing, we cannot conclude that the trial court's ruling was an abuse of discretion." (*People v. Howard*, *supra*, 1 Cal.4th at p. 1171.) Certainly, there has been no showing that the trial court's ruling denying the requested continuance "exceed[ed] the bounds of reason, all circumstances being considered."

This also means that, contrary to appellant's further assertion, no violation of any of his federal constitutional rights resulted from the trial court's denial of a continuance. In that there was no abuse of discretion or error under state law, there is consequently no basis for appellant's asserted claims of error under the federal Constitution. (*People v. Roybal* (1998) 19 Cal.4th 481, 506, fn. 2 ["The superior court did not abuse its discretion; there is thus no predicate error on which to base the constitutional claims"]; *People v. Samayoa*, *supra*, 15 Cal.4th at pp. 840-841; see *People v. Osband* (1996) 13 Cal.4th 622, 727-728; *People v. Memro* (1995) 11 Cal.4th 786, 886.) As both this Court and the United States Supreme Court have explained,

> "[I]t is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [84 S. Ct. 841, 849, 11 L. Ed. 2d 921].) Instead, "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge . . . ." (*Ibid.*)

(*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1039; *People v. Howard*, *supra*, 1 Cal.4th at pp. 1171-1172.) As this Court went on to explain in *Jenkins*, even in capital cases, where, as here, the defendant fails to show he has been diligent in securing the attendance of a witness or that material evidence would be presented, "'[g]iven the deference necessarily due a state trial judge in regard to the denial or granting of continuances,' the court's ruling denying a continuance does not support a claim of error under the federal Constitution." (*People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1039-1040, quoting *Ungar v. Sarafite*, *supra*, 376 U.S. at p. 591; accord *People v. Howard*, *supra*, 1 Cal.4th at p. 1172.)

Finally, even assuming, contrary to the actual record, the trial court somehow abused its discretion and thereby erred in denying appellant's request for a continuance at the penalty phase, appellant would remain incapable of showing any prejudice, i.e., that there was a reasonable possibility of a more favorable penalty verdict in the absence of the error. (See *People v. Ochoa, supra,* 19 Cal.4th at p. 479 [the reasonable possibility standard for assessing penalty phase errors is "the same in substance and effect" as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California, supra,* 386 U.S. at p. 24].) As noted above, even after the Baumgartes testified in rebuttal, there really was no dispute as to whether Mr. Baumgarte had been interviewed about the incident he observed or whether his account had been conveyed to Dr. Kaser-Boyd. Also, although the trial court did not find good cause to

warrant a continuance of indeterminate duration, at appellant's request and over the prosecution's objection, it admitted Dr. Kaser-Boyd's notes concerning her interview of Mr. Baumgarte, which confirmed that the interview had been conducted, when it had been conducted, and its subject matter. In her penalty argument, while the prosecutor questioned whether what Mr. Baumgarte observed was actually an instance of sexual molestation (18RT 3146-3148), she did not argue that the Baumgartes were never actually interviewed or that Dr. Kaser-Boyd had "fabricated" her interview of Mr. Baumgarte. Under these circumstances, it is plain that even if the trial court had continued the penalty trial and even if Dr. Kaser-Boyd had reiterated on surrebuttal that she interviewed Mr. Baumgarte, it would have had absolutely no effect on the jury's penalty verdict. Any assumed error would consequently have to be deemed utterly harmless.

Accordingly, appellant's contention should be rejected and the judgment affirmed.

## VI.

## APPELLANT FORFEITED HIS CLAIMS OF PROSECUTORIAL MISCONDUCT IN THE PENALTY PHASE BY FAILING TO OBJECT IN THE TRIAL COURT ON THE SAME BASES HE ATTEMPTS TO ASSERT FOR THE FIRST TIME ON APPEAL; MOREOVER, THE RECORD SHOWS APPELLANT'S CLAIMS OF PROSECUTORIAL MISCONDUCT ARE WITHOUT MERIT; IN ANY EVENT, THE RECORD FURTHER SHOWS ANY ERROR AS ALLEGED BY APPELLANT WAS HARMLESS

Appellant contends that by referring to him as an animal a number of times and by conveying the impact of his murder of Joe Finzel on Mr. Finzel's young children through the rhetorical device of short letters the children might have written had they been old enough to do so during her penalty phase argument, the prosecutor thereby committed prejudicial misconduct which denied appellant his rights to confront witnesses against him, a fair trial, and a reliable penalty determination under both the state and federal Constitutions. (AOB 187-199.) Respondent disagrees for the following reasons. First, appellant forfeited all of his claims based on the state and federal Constitution and most of his state-law claims concerning the specific instances he points to, by failing to assert them below. Moreover, even had appellant properly preserved such questions for this Court's review, an examination of the record shows the prosecutor did not engage in any misconduct as alleged. Finally, any error as alleged by appellant, had such occurred, would have to be deemed harmless on the instant record.

### A. Background

The prosecutor's penalty argument comprises approximately 75 pages of the record on appeal. After having delivered approximately 61 pages of her 75-page penalty argument with only a couple of objections by appellant's

counsel, none of which are raised by appellant on appeal, while recounting and discussing the circumstances of appellant's commission of the crimes as an aggravating factor under section 190.3, subdivision (a), the prosecutor commented, "That's how you've got to look at [appellant]. That's the kind of behavior you need to look at when you decide what penalty is appropriate in this case. It's that kind of thinking, that kind of animalistic action that you should make him come to grips with." At this, appellant's counsel asked to approach and, at sidebar, stated, "That reference to animalistic behavior is improper." The trial court overruled the objection, finding that the prosecutor's use of the term "animal" was permissible "in terms of the way the argument [wa]s posed." (18RT 3155.)

The prosecutor went on to refer to appellant as an "animal" in a few select instances in the remainder of her penalty argument: "This man, this animal, after intending to deprive Brinlee of both parents, took everything that he could from the house" (18RT 3155); "Lynn Finzel is living with a guilt that is unjustified because of the animal at the end of this table, [appellant]" (18RT 3161); "Brinlee and Garrett will never get to [write letters to their deceased father]. But if they could, I would submit, ladies and gentlemen, that they would write letters as I am going to indicate to you and instead they can't because their father, their father's life was snuffed out, just like that, by that animal, and that's just what he is. He acts like an animal, and that's what he is" (18RT 3164.)

After accurately noting that the penalty phase evidence showed that appellant was able to begin corresponding with his biological father after committing the charged crimes, but that Brinlee and Garrett would never be able to write a letter to their father, the prosecutor commented:

> But, ladies and gentlemen, if Garrett could write a letter, if he was able to do that, I would submit to you that he would write something like

this: Dear dad, I love you very much. I miss you so very much. I know some day I'll see you again. But in the meantime, I remember how you were my best buddy, how you tucked me in at night, how we played together, camped together, and how you wanted to ride motorcycles together with me, and how you and mom included me in everything. I remember the wedding. And I remember Christmas's with you. I remember when you and mom took me to my first day of school. You were always there, dad. Then [appellant] took you away from me one weekend when I was visiting my real mother. I never got to say good-bye to you, dad. That hurts real bad. My heart aches so much I think it's worse than any pain I will ever know. Now you will never take me to school again. You will never come and watch any game I play, baseball, basketball, soccer, football. You will never see me graduate from elementary school, junior high school.

(18RT 3164-3165.) At this point, appellant's counsel asked to approach and, at the bench, stated, "I'm objecting that that is improper argument. I don't know if that is supposed to be a letter the young man actually wrote or it's one the prosecutor is reading." The trial court explained, "I think she's reading it as if he had written it. I think it's an argument she can make. I don't think it's inflammatory. I don't think it's unduly prejudicial." Appellant's counsel continued, "I ask the court to stop the references to the jury he is an animal. That was prosecutorial misconduct, . . . ." The trial court ruled, "The objection is overruled on both counts." (18RT 3165-3166.)

Back before the jury, the prosecutor continued her penalty argument by completing the letter Garret might have written his father if he could as follows:

You will never see me graduate from elementary school, junior high school, high school or college. I won't have you to give me the kind of advice a dad gives his son while growing up. How will I talk to my

mother about girls and boys kind of stuff? You will never be able to meet the woman that I marry. She won't even know you. And that breaks my heart, dad. And it hurts so badly that my children will never know their grandfather. And what a wonderful grandfather you would have been. But the thing that hurts the worst, and it hurts every day and I cry every day, I will never see you during my life here on earth, a life that could be very long. I will miss you, dad, and I'll think of you every day. I know you know how much I miss you because I know you miss me in the same way. So until we meet, dad, I love you with all my heart.

(18RT 3166-3167.) The prosecutor then continued:

And if Brinlee could write to the father that she has never known, I think she would say something like this: Dad, I am so sorry that I never even got to know you. I will only get to know you from photographs and stories that mom and other people tell me about you. I will only know you from videos and things that mom had saved, but I know how much you loved me. I can tell from those stories and from those photographs. Mom's made it clear how much you loved me. I wish I even had one hour with you that I could remember. But I have no memories at all because [appellant] took your life as a lay by you in my bassinet. I will never have you to walk me to school at all. I will never have you to walk me down the aisle and to give me away at my wedding. You will never know my children. Dad, why does [appellant] get to meet his dad and have a relationship with him when I'll never get that same opportunity?

(18 RT 3167-3168.) A bit later, in wrapping up her penalty argument, the prosecutor remarked, without objection:

I would submit to you it is not even a close call when you have a man who acts as the defendant acted, not as a frightened animal but as

a predator animal, as a hunter who has gotten his prey, trapped it and killed it. He is a predator. He was out see[k]ing his animalistic sadistic passions. He is a self-absorbed cold-blooded hunter who caught his prey when they were most vulnerable.

(18RT 3168.)

## B. Applicable Law And Argument

### 1. Appellant Forfeited His Newfound Constitutional Claims On Appeal

As this Court has repeatedly and consistently held, a defendant will not be heard to complain on appeal about alleged prosecutorial misconduct at trial unless, in a timely fashion and on the same ground urged on appeal, he made an assignment of misconduct and requested that the jury be admonished to disregard the purported impropriety. (*People v. Valdez* (2004) 32 Cal.4th 73, 132; *People v. Gurule* (2002) 28 Cal.4th 557, 657; *People v. Frye* (1998) 18 Cal.4th 894, 969-970; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) As the trial court is not expected to recognize and correct all possible or arguable misconduct on its own motion, the defendant bears the responsibility to object and seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry. (*People v. Visciotti* (1992) 2 Cal.4th 1, 79.)

Here, as summarized above, a review of the record shows that while appellant voiced an initial objection that the prosecutor's reference to animalistic behavior was "improper" (18RT 3155), and a later objection that the prosecutor's presentation of what Garrett would write to Joe Finzel in a letter if he could was "improper argument" and that the prosecutor's references to the jury that appellant was an animal were prosecutorial misconduct (18RT 3165-3166), appellant never voiced any objection or claim based on the state or

federal Constitution. Under such circumstances, appellant must be held to have forfeited his newfound constitutional claims on appeal. (See *United States v. Olano, supra,* 507 U.S. at p. 731 ["'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it'"]; *People v. Earp, supra,* 20 Cal.4th at p. 893; *People v. Carpenter, supra,* 15 Cal.4th at p. 385; *People v. Saunders, supra,* 5 Cal.4th at pp. 589-590.) In any event, as explained more fully below, even had appellant properly preserved his claims for this Court's review, the record shows they would fail on the merits.

**2. Under The Circumstances, The Prosecutor Did Not Commit Misconduct By Referring To Appellant As An "Animal" And To His Conduct In Committing The Subject Crimes As "Animalistic"**

"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.'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 960, quoting *People v. Samayoa, supra,* 15 Cal.4th at p. 841.) '"[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*Ibid.*; accord *People v. Valdez, supra,* 32 Cal.4th at pp. 132-133; *People v. Cunningham, supra,* 25 Cal.4th at p. 1019;

*People v. Frye*, *supra*, 18 Cal.4th at p. 970.) "The same standard applicable to prosecutorial misconduct at the guilt phase is applicable at the penalty phase." (*People v. Valdez*, *supra*, 32 Cal.4th at p. 132; accord *People v. Samayoa*, *supra*, 15 Cal.4th at p. 853.) Adjudged by these governing standards, appellant's claims fail.

First, given the evidence presented at the guilt phase and penalty phase, the prosecutor did not commit misconduct in the few instances in which she referred to appellant as an "animal" and his conduct in committing the crimes of which he was convicted as "animalistic." As this Court has repeatedly held and explained in rejecting similar arguments, "Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence." (*People v. Sandoval* (1992) 4 Cal.4th 155, 180, citing *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 ["Argument may be vigorous and may include opprobrious epithets reasonably warranted by the evidence"].) Here, as argued by the prosecutor, the evidence showed that appellant had acted as a predatory animal in committing his crimes against the Finzels. In particular, as the prosecutor noted in argument, the evidence showed that, before breaking into the Finzels's home, appellant lurked at a fence in the back of the property and enjoyed a cigarette as he watched Ms. Finzel put Brinlee to bed and go to bed herself, to better ensure that Ms. Finzel would be at her most vulnerable when appellant broke into the home and commanded her to commit the heinous forced sex acts he did. (18RT 3151.) Thus, given the evidentiary record, likening appellant to a predatory animal was fully warranted by the evidence. Furthermore, more generally, given the undisputed evidence of appellant's actions and statements before, during, and after he committed the charged crimes, the prosecutor's brief and isolated references to appellant as an "animal" and his conduct and behavior as "animalistic" were entirely accurate and fully supported by the

evidence. As this Court found in *People v. Sandoval*, *supra*, 4 Cal.4th at p. 180, "the prosecutor's argument was based on the evidence and amounted to nothing more than vigorous yet fair argument." As in *People v. McDermott* (2002) 28 Cal.4th 946, 1003, "These remarks were a permissible form of argument designed to show the circumstances in which society may be justified in taking one life to protect the lives of others."

In this regard, respondent notes this Court has routinely upheld the use of far more colorful and forceful epithets when supported by the evidence. For example, in *People v. McDermott*, *supra*, 28 Cal.4th at 1002, this Court upheld the prosecutor's argument that the defendant should not "be categorized as a human being" based on evidence showing the defendant's planning of the killing of the victim. Similarly, in considering the prosecutor's descriptions of the defendant as "a mutation of a human being," a "wolf in sheep's clothing," a "traitor," a person who "stalked people like animals," and someone who had "resigned from the human race," this Court held such "references are within the permissible bounds of argument, and in any event would not have had such an impact 'as to make it likely the jury's decision was rooted in passion rather than evidence.'" (*People v. McDermott*, *supra*, 28 Cal.4th at p. 1003.) In rejecting the defendant's like claim that the prosecutor committed misconduct by comparing the defendant to "a germ, a mad dog, and a snake," this Court found such remarks "were a permissible form of argument designed to show the circumstances in which society may be justified in taking one life to protect the lives of others." (*Ibid.*)

In *People v. Farnam* (2002) 28 Cal.4th 107, 199-200, this Court upheld the prosecutor's references to the defendant as a "monster," an "extremely violent creature," and the "beast who walks upright," as "fair comment on the evidence presented." In *People v. Hawkins* (1995) 10 Cal.4th 920, 961, this Court found no misconduct in the prosecutor's reference to

the defendant as "coiled like a snake," or the prosecutor's comparison between sentencing the defendant to life in prison and "putting a rabid dog in the pound," emphasizing that "when the prosecutor's penalty phase argument is viewed as a whole, these epithets played an extremely minor role, in comparison to the lengthy discussion of defendant's prior criminal and violent acts." In *People v. Thomas* (1992) 2 Cal.4th 489, 537, this Court found that the epithets used by the prosecutor in referring to the defendant during closing arguments in that case – i.e., "mass murderer, rapist," "perverted murderous cancer," and "walking depraved cancer" – were "within the range of permissible comment regarding egregious conduct on defendant's part." In *People v. Sully* (1991) 53 Cal.3d 1195, 1249, this Court found no misconduct in the prosecutor's remarks calling the defendant a "human monster" and a "mutation," finding that "the use of these kinds of terms can constitute permissible comment regarding egregious conduct on defendant's part." In *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1030, this Court upheld the prosecutor's reference to the defendant as a "snake in the jungle," noting that, "[a]rgument may be vigorous and may include opprobrious epithets reasonably warranted by the evidence." In *People v. Terry* (1962) 57 Cal.2d 538, 561, this Court found that the prosecutor's characterization of the defendant as an "animal" "f[e]ll properly under the rule that prosecuting attorneys are allowed a wide range of descriptive comment and the use of epithets which are reasonably warranted by the evidence."

Respondent submits that, especially given the evidence presented at the guilt and penalty phases at appellant's trial concerning the crimes appellant committed and the way he committed them on the one hand, and the relatively mild epithets used by the prosecutor ("animal" and "animalistic") on the other, the same result must obtain here. As in *People v. McDermott*, *supra*, 28 Cal.4th at p. 1003, when considered in the context of the evidence of appellant's

commission of the charged crimes, the prosecutor's brief references to appellant as an "animal" and to his conduct as "animalistic" were "within the permissible bounds of argument, and in any event would not have had such an impact 'as to make it likely the jury's decision was rooted in passion rather than evidence.'" Under the circumstances, such remarks "were a permissible form of argument designed to show the circumstances in which society may be justified in taking one life to protect the lives of others." (*Ibid.*)

Given the evidence presented, the prosecutor's references to appellant as an "animal" and to his conduct as "animalistic" "constituted fair comment on the evidence presented." (*People v. Farnam*, *supra*, 28 Cal.4th at p. 200.) In comparison to the prosecutor's lengthy and accurate discussion of the facts and circumstances of appellant's crimes, the prosecutor's brief and limited use of the mild epithets "animal" and "animalistic" played an extremely minor role when the prosecutor's penalty phase argument is viewed as a whole. (See *People v. Hawkins*, *supra*, 10 Cal.4th at p. 961.) Such epithets were "within the range of permissible comment regarding egregious conduct on [appellant]'s part." (*People v. Thomas*, *supra*, 2 Cal.4th at p. 537.) Given the above, as this Court commented in rejecting a similar claim in *People v. Sully*, *supra*, 53 Cal.3d at p. 1236, "Judged against our cases, the prosecutor's characterizations of [appellant] and his conduct were a permissible comment on the evidence." As in *People v. Edelbacher, supra*, 47 Cal.3d at p. 1030, "The prosecutor's comments were based on the evidence and amounted to no more than vigorous but fair argument."

Accordingly, appellant's claim that the prosecutor committed misconduct by referring to him on a few occasions as an "animal" and to his conduct in committing the crimes of which he was convicted as "animalistic" should be rejected.

### 3. Nor, Under The Circumstances, Did The Prosecutor Commit Misconduct By Presenting What Mr. Finzel's Children Might Write To Him In A Letter If They Could

Respondent further submits that the prosecutor did not commit any misconduct by presenting her argument concerning the impact of appellant's murder of Mr. Finzel on his young children through the rhetorical device of letters the children might write to him if they could.

As this Court has repeatedly held, "it is proper at the penalty phase for a prosecutor to invite the jurors to put themselves in the place of the victims and imagine their suffering." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1212, citing cases.) In *People v. Edwards*, *supra*, 54 Cal.3d at pp. 833-836, this Court held that the immediate effects of a capital crime on the victim's family constitute part of the "circumstances of the crime" under section 190.3, factor (a), which the prosecutor may argue at the penalty phase. (See *People v. Kirkpatrick*, *supra,* 7 Cal.4th at p. 1017.) This is all the prosecutor did here through the letters, and properly so.

As noted above, "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841; accord *People v. Valdez*, *supra*, 32 Cal.4th at pp. 132-133; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1019; *People v. Frye*, *supra*, 18 Cal.4th at p. 970.) Here, the prosecutor made it very clear she was presenting her argument through the device of letters the children might have written if they could. Thus, contrary to appellant's objection, there was no likelihood any juror somehow misunderstood or misconstrued this. Furthermore, the references in the letters concerning the types of events and activities Garrett and Brinlee would not be able to enjoy with their father as a consequence of appellant's

murder of him found full support in the victim impact evidence presented by the prosecution at the penalty phase. In general, the letters merely referred to "the predictable and obvious consequences" to the victim's children of appellant's murder of their father. (See *People v. Sanders* (1995) 11 Cal.4th 475, 550.)

In any event, as this Court has noted, "The argument need not be based upon specific testimony of the victim's family members describing their emotions; the prosecutor can urge the jury to draw reasonable inferences concerning the probable impact of the crime on the victim and the victim's family." (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1017.) As basically found by the trial court, who sat through the trial and argument, the remarks concerning the letters were "not so inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (*People v. Sanders, supra,* 11 Cal.4th at p. 550; *People v. Zapien, supra,* 4 Cal.4th at p. 992; see *People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836.)

No deceptive or reprehensible method was employed to persuade the jury here. It also necessarily follows that, even assuming arguendo the prosecutor somehow committed misconduct as alleged, given the very limited portions of the prosecutor's argument pointed to by appellant, such assumed misconduct could not have comprised a pattern of conduct so egregious that it infected the trial with such unfairness as to make the penalty determination a denial of due process. (See *People v. Farnam*, *supra*, 28 Cal.4th at pp. 200-201; *People v. Sanders*, *supra*, 11 Cal.4th at p. 550; Appellant's claims of prosecutorial misconduct should accordingly be rejected and the judgment affirmed.

### 4. Any Prosecutorial Misconduct As Alleged By Appellant Was Harmless

Finally, respondent submits that, even assuming arguendo the prosecutor engaged in misconduct in her penalty argument as alleged by appellant, any

such misconduct was harmless. Even when prosecutorial misconduct has been shown to have occurred, the defendant must demonstrate that it was prejudicial. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1019, citing *People v. Williams* (1997) 16 Cal.4th 153, 255, and *People v. Sanchez* (1995) 12 Cal.4th 1, 66.) To be deemed prejudicial at the penalty phase, there must be a reasonable possibility that the jury would have reached a different result without such misconduct. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 200; *People v. Valdez*, *supra*, 32 Cal.4th at p. 132; *People v. Cunningham*, *supra*, 25 Cal.4th at p.1019; *People v. Jackson* (1996) 13 Cal.4th 1164, 1240.)

Here, the record discloses no such reasonable possibility. As for the prosecutor's few references to appellant as an "animal" and his behavior in committing the crimes as "animalistic," such references "were brief and isolated instances, and emanated from the heinous details of [appellant]'s crimes." (*People v. Sully*, *supra*, 53 Cal.3d at p. 1250.) Furthermore, the epithets were accurate and well-earned and, "in light of the evidence adduced in the long trial of this case, they could not have carried such an emotional impact as to make it likely the jury's decision was rooted in passion rather than evidence." (*People v. Thomas*, *supra*, 2 Cal.4th at p. 537.)

Nor could appellant have been prejudiced by the small portion of the prosecutor's argument delivered through the rhetorical device of the letters from Mr. Finzel's children. As noted above, the contents of the letters found full support in the victim impact evidence presented by the prosecution. Indeed, the contents were for the most part indisputable truisms; the children would never be able to engage in activities or attend important milestone events with their father because appellant murdered him. Had the prosecutor simply made the statements in the letters without presenting them through the device of the letters, there is no question that the argument would have been wholly

unobjectionable. The presentation of such argument through the letters made no difference.

Based on the instant record, even in the absence of the prosecutor's few references to appellant as an "animal" and the rhetorical device of the letters Mr. Finzel's children might have written him if they could, there was no reasonable possibility that the jury would have reached a different result. Accordingly, the judgment should in any event be affirmed.

## VII.

## THE TRIAL COURT WAS NOT REQUIRED TO GIVE AN INSTRUCTION LIMITING THE JURY'S CONSIDERATION OF VICTIM IMPACT EVIDENCE SUA SPONTE

Appellant contends the trial court committed reversible error by not giving the jury a limiting instruction regarding the "appropriate use" of victim impact evidence[31] sua sponte and that such alleged error violated his constitutional rights to a decision by a rational and properly-instructed jury, to a fair trial, and to a fair and reliable capital penalty determination. (AOB 200-204.) Respondent disagrees and notes this Court recently squarely addressed but flatly rejected this identical contention in *People v. Zamudio*, *supra*, 43 Cal.4th 327, 369-370. For the reasons stated by this Court in *Zamudio*, and in the interests of stare decisis, appellant's identical claim must be rejected as well.

As this Court explained in *Zamudio*, insofar as the proposed instruction would have been legally correct in advising the jury that its consideration of victim impact evidence "must be limited to a rational inquiry into the culpability

---

31. In this regard, appellant suggest for the first time on appeal that, "An appropriate cautionary instruction would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(AOB 202.)

of the defendant, not an emotional response to the evidence," "it would not have provided the jurors with any information they did not otherwise learn from CALJIC No. 8.84.1." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 369; see *People v. Valencia* (2008) 43 Cal.4th 268, 310 ["Because the standard instructions adequately inform the jury of its duty, the court was not required to instruct on how the jury may consider victim impact evidence"]; *People v. Ochoa, supra,* 26 Cal.4th at p. 455 ["The proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1"]; II CT 436 [CALJIC No. 8.84.1].) "Moreover," as this Court further explained, "because jurors may, in considering the impact of a defendant's crimes, 'exercise sympathy for the defendant's murder victims and . . . their bereaved family members' [citation], the proposed instruction is incorrect in suggesting that a juror's 'emotional response' to the evidence may play no part in the decision to vote for the death penalty." (*Ibid.*; see *People v. Pollock, supra,* 32 Cal.4th at p. 1195.)

Similarly, in that appellant proposes the exact same language as that proposed by the defendant on appeal in *Zamudio*, it necessarily follows that:

> The first two sentences of the proposed instruction were adequately covered by another instruction the trial court gave, CALJIC No. 8.85. In this regard, the trial court instructed the jury to "consider, take into account, and be guided by," among other factors, "the circumstances of the crime of which the defendant was convicted in the present proceeding." We have held that this instruction adequately "instruct[s] the jury how to consider" victim impact evidence.

(*People v. Zamudio*, *supra*, 43 Cal.4th at 369; see *People v. Valencia*, *supra*, 43 Cal.4th at p. 310 ["We see no need to elaborate on the standard instructions regarding how the jury should consider any particular type of penalty phase evidence"]; II CT 438 [CALJIC No. 8.85].)

Finally, as this Court held in *Zamudio*,

> The remainder of the proposed instruction, even if we assume it to be legally correct, is not the type to give rise to a sua sponte duty to instruct. A trial court must instruct sua sponte "only on those general principles of law that are closely and openly connected with the facts before the court and *necessary for the jury's understanding of the case.* [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 442 [], italics added.) Instructions informing the jurors that the law does not deem the life of one victim more valuable than another, and cautioning them not to draw an adverse inference from a victim impact witness's silence regarding capital punishment, were not necessary to the jury's understanding of this case. Therefore, the trial court had no sua sponte duty to give such instructions.

(*People v. Zamudio*, *supra*, 43 Cal.4th at p. 370.) It necessarily follows that appellant's identical claim must be rejected on the same grounds.

## VIII.

## CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant raises several claims regarding the constitutionality of the death penalty law as interpreted by this Court and as applied at appellant's trial. He maintains that many features of the death penalty law violate the federal Constitution. (AOB 205-222.) As he himself concedes (AOB 205), these claims have been raised and rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected. Moreover, it is entirely proper to reject appellant's complaints by case citation, without additional legal analysis. (*People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbanks* (1997) 16 Cal.4th 1223, 1255-1256.)

First, appellant's claim that the instruction which set forth Penal Code section 190.3, factor (a), as applied, resulted "in the arbitrary and capricious imposition of the death penalty" (AOB 205-206) has been repeatedly rejected by this Court. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1165; *People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Smith* (2005) 35 Cal.4th 334, 373; see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [explaining that section 190.3, factor (a), was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]). It should be rejected again in this case.

Second, appellant contends that the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof. Specifically, appellant raises the following claims: (1) the death penalty statute and accompanying instructions unconstitutionally failed to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty (AOB 207-208); (2) the Sixth, Eighth

and Fourteenth Amendments to the federal Constitution require the State to bear some burden of proof at the penalty phase and, if not, the jury then should have been specifically instructed that there was no burden of proof at the penalty phase (AOB 209-210); (3) the Sixth, Eighth and Fourteenth Amendments require juror unanimity as to the aggravating factors (AOB 210-211); and (4) the instructions violated the Eighth and Fourteenth Amendments because they failed to inform the jurors (a) that the central determination is whether death is the appropriate punishment (AOB 212-213); (b) that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole (AOB 213-214); (c) that even if they determined aggravation outweighed mitigation, they could still return a sentence of life without the possibility of parole (AOB 214-215); (d) there was no need for unanimity as to mitigating circumstances (AOB 216-217); and (e) there was a presumption of life (AOB 217-218). These claims are meritless.

This Court has repeatedly rejected each of the foregoing arguments. For example, this Court has held that the sentencing function at the penalty phase is not susceptible to a burden-of-proof qualification. (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Burgener, supra,* 29 Cal.4th at p. 885; *People v. Anderson, supra,* 25 Cal.4th at p. 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Also, there is no requirement that the penalty jury be instructed concerning burden of proof – whether beyond a reasonable doubt or by preponderance of the evidence – as to existence of aggravating circumstances (other than -other-crimes evidence), greater wight of aggravating circumstances over mitigating circumstances, or appropriateness of a death sentence. There is also no requirement that the penalty jury achieve unanimity as to the aggravating circumstances (*People v. Samuels* (2005) 36 Cal.4th 96, 137) and there is no basis for a claim that the penalty jury must be instructed on the absence of a burden of proof (*People v. Cornwell* (2005) 37 Cal.4th 50, 104).

A trial court's failure to instruct that reasonable doubt standard does not apply to mitigating factors and does not violate a defendant's criminal rights, and neither does a failure to instruct that the jury needs to unanimously agree on such factors. (*People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Jablonski* (2006) 37 Cal.4th 774, 873; *People v. Sapp* (2003) 31 Cal.4th 210, 316.) Moreover, the death penalty statute is not unconstitutional because it does not require that the jury find death as the appropriate penalty beyond a reasonable doubt. (*People v. Jablonski, supra,* 37 Cal.4th at p. 873; *People v. Stitley* (2005) 35 Cal.4th 514, 573.) And, no presumption exists in favor of either death or life imprisonment without the possibility of parole in determining the appropriate penalty, and thus such an instruction would have been improper. (*People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. San Nicolas* (2004) 34 Cal.4th 614, 662-667; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137; *People v. Arias* (1996) 13 Cal.4th 92, 190.)

Finally, nothing in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, or *Blakely v. Washington* (2004) 542 U.S. 296, impacts what this Court has stated regarding the sentencing function at the penalty phase not being susceptible to a burden-of-proof quantification. This Court has expressly rejected the argument that *Apprendi, Ring,* and/or *Blakely* affect California's death penalty law or otherwise justifies reconsideration of this Court's prior decisions on this point. (*People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.) Thus, appellant's claims must be rejected.

Third, appellant's claim that written findings regarding the aggravating factors is required by the federal Constitution (AOB 218) has been rejected by this Court on numerous occasions. (*People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Prieto, supra,* 30 Cal.4th at p. 275; *People v. Snow, supra,*

30 Cal.4th at p. 127; *People v. Lucero* (2000) 23 Cal.4th 692, 741.) It should be rejected again in this case.

Fourth, appellant's claims that the instructions to the jury on mitigating and aggravating factors violated his constitutional rights (AOB 218-220) have been previously rejected by this Court. For example, contrary to appellant's claim (AOB 219), there is no requirement the trial court delete inapplicable factors. (See *People v. Stitley, supra,* 35 Cal.4th at p. 574; *People v. Kipp, supra,* 26 Cal.4th at p. 1138; *People v. Reil* (2000) 22 Cal.4th 1153, 1225; *People v. Earp, supra,* 20 Cal.4th at p. 899; *People v. Carpenter* (1999) 15 Cal.4th 1016, 1064.) Likewise, appellant's claim that the failure to instruct that statutory mitigating factors are relevant solely as mitigators violated the Eighth and Fourteenth Amendments (AOB 219-220) has been rejected by this Court. (*People v. Hinton, supra,* 37 Cal.4th at p. 912; *People v. Morrison, supra,* 34 Cal.4th at p. 730; *People v. Kraft* (2000) 23 Cal.4th 978, 1078-1079.) And, finally, contrary to appellant's claim (AOB 218-219) the use of the adjective "extreme" in factors (d) and (e) and the adjective "substantial" in factor (g) did not act as a barrier to the consideration of mitigating evidence in violation of the Sixth, Eighth and Fourteenth Amendments. (*People v. Prieto, supra,* 30 Cal.4th at p. 276; *People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Maury, supra,* 30 Cal.4th at p. 429; *People v. Brown* (1997) 15 Cal.4th 119, 190.) Appellant has not presented this Court with any persuasive reason to reconsider its prior holdings on these issues.

Fifth, appellant contends that the absence of intercase proportionality review from California's death penalty law violates his Eighth and Fourteenth Amendment right to be protected from the arbitrary and capricious imposition of the death penalty. (AOB 220-221.) Appellant's point is not well taken. Neither the federal or state Constitutions require intercase proportionality review. (*People v. Jablonski, supra,* 37 Cal.4th at p. 837; *People v. Panah,*

*supra,* 35 Cal.4th at p. 500; *People v. Kipp, supra,* 26 Cal.4th at p. 1139.) The United States Supreme Court has held that intercase proportionality review is not constitutionally required in California (*Pulley v. California* (1984) 465 U.S. 37, 51-54) and this Court has consistently declined to undertake it as a constitutional requirement (*People v. Jablonski, supra,* 37 Cal.4th at p. 837; *People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Welch, supra,* 20 Cal.4th at p. 772; *People v. Majors* (1998) 18 Cal.4th 385, 442.); *People v. Fiero* (1991) 1 Cal.4th 173, 253.) Appellant's claim should thus be rejected.

Sixth, appellant claims California's death penalty law violates the Equal Protection Clause of the federal Constitution because non-capital defendants are accorded more procedural safeguards than a capital defendant. (AOB 221.) This Court has held many times that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Manriquez, supra,* 37 Cal.4th at p. 590; *People v. Hinton, supra,* 37 Cal.4th at p. 912; *People v. Smith, supra,* 35 Cal.4th at p. 374; *People v. Boyette, supra,* 29 Cal.4th at pp. 465-467.) Thus, appellant's claim is meritless.

Finally, appellant's claim that the use of the death penalty as a regular form of punishment falls short of international norms (AOB 221-222) has been repeatedly rejected by this Court (*People v. Cook, supra,* 39 Cal.4th at pp. 618-619; *People v. Snow, supra,* 30 Cal.4th at p. 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779) and appellant has not presented any significant or persuasive reason for this Court to reconsider its prior decisions.

## IX.

## APPELLANT RECEIVED A FAIR TRIAL AS THERE WAS NO CUMULATIVE PREJUDICE

Appellant's final contention is the combined effect of the errors at the penalty phase warrant reversal of the death verdict. As explained by appellant, "[b]ecause it cannot be shown beyond a reasonable doubt that [the errors at the penalty phase], either individually or collectively had no effect on the penalty verdict, reversal of appellant's death judgment is required." (AOB 223-224.) Respondent disagrees.

Respondent submits that when the merits of the issues are considered, there are no multiple errors to accumulate. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the penalty phase of the trial. (See *People v. Guerra, supra,* 37 Cal.4th at p. 1165; *People v. Hinton, supra,* 37 Cal.4th at p. 913; *People v. Jablonski, supra,* 37 Cal.4th at p. 837; *People v. Panah, supra,* 37 Cal.4th at p. 1165; *People v. Burgener, supra,* 29 Cal.4th at p. 884.) The records shows that appellant received a fair trial. Nothing more is required. This Court should, therefore, reject appellant's claim of cumulative error.

## CONCLUSION

Accordingly, for the reasons stated, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: June 30, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

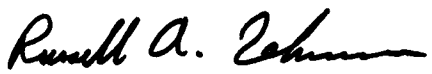
DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KEITH H. BORJON
Supervising Deputy Attorney General

JOHN R. GOREY
Deputy Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General



RUSSELL A. LEHMAN
Deputy Attorney General

Attorneys for Respondent

RAL:vg
LA1995XS0006
60314453.wpd

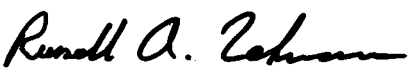
## CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Brief** uses a 13 point Times New Roman font and contains **47,897** words.

Dated: June 30, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



RUSSELL A. LEHMAN
Deputy Attorney General

Attorneys for Respondent

**DECLARATION OF SERVICE BY U.S. MAIL**

**DEATH PENALTY CASE**
Case Name: **People v. Randy Eugene Garcia**
Number: **S045696**

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 and 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 that same day in the ordinary course of business.

On June 30, 2008, I served the attached

## RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Peter R. Silten, Assistant State Public Defender
State Public Defender's Office - San Francisco
221 Main Street, 10th Floor
San Francisco, CA 94105
Counsel for Appellant Randy Eugene Garcia

Michael G. Millman, Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814 — E-15

The Honorable Jacqueline A. Connor, Judge
Los Angeles County Superior Court
1725 Main Street, Department I
Santa Monica, CA 90401

Sally Thomas, Deputy District Attorney
Los Angeles County District Attorney's Office
201 North Figueroa Street, Room 1525
Los Angeles, CA 90012

Addie Lovelace, Death Penalty Appeals Clerk
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street, Room M-3
Los Angeles, CA 90012

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 June 30, 2008, at Los Angeles, California.

Virginia Gow
Declarant

Virginia Gow
Signature

RAL:vg
LA1995XS0006
60315054.wpd