IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ELOY LOY,** Defendant and Appellant.	S076175 **CAPITAL CASE**

Los Angeles County Superior Court No. NA029308
The Honorable Charles D. Sheldon, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an amended information filed by the District Attorney of Los Angeles County, appellant was charged with one count of special-circumstance murder. (Pen. Code,[1/] §§ 187, subd. (a); 190.2, subd. (a)(17) [special circumstance involving lewd and lascivious act on a child under 14].) (2CT 403-404.) Appellant pled not guilty and denied the special allegation. (2CT 417.)

Trial was by jury. (2CT 483.) The jury found appellant guilty as charged. (3CT 528, 535.) At the conclusion of the penalty phase, the jury fixed the penalty at death. (3CT 683-684.)

Appellant's motion for a new trial was denied. Probation was denied. Appellant's automatic motion for reduction of sentence pursuant to section 190.4, subdivision (e), was likewise denied. The court imposed a sentence of death in accordance with the jury's verdict. (3CT 723-733; CT (Supp. IV) 49, 89-94.)

This appeal is automatic. (§ 1239.)

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1. All further statutory references will be to the Penal Code, unless otherwise noted.

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Prosecution's Case-In-chief

On May 9, 1996, appellant sexually assaulted and choked to death his 12-year-old niece, Monique A. After killing her, he dumped her naked body in a vacant lot near her house, where she rotted for nearly four days before she was discovered. Details of the offense follow.

a. Monique's Disappearance

In May 1996,[2/] twelve-year-old Monique lived with her parents, her two older brothers, Jose ("Joey") and Gabriel, and her older sister, Josette, in a house located on East M Street in Wilmington. (5RT 1086, 1166-1167; 6RT 1206; 7RT 1483-1484, 1537-1538.)

On May 8, while Monique was at school, Monique's mother, Rosalina, and Joey spent the day installing a sprinkler system in the front yard of the house. Appellant, Monique's maternal uncle, came over sometime between 2:00 and 3:00 p.m. and helped with the installation. (5RT 1087-1088, 1105; 7RT 1484-1485, 1504.)

Monique returned home from school between 2:45 and 3:00 p.m. At the time, Rosalina was talking to a "movie location manager" about using their house in a movie and having Monique appear as an "extra" in the movie. Excited about the prospect of being in a movie, Monique ran into the house to call her friends to tell them the news. (5RT 1088-1089, 1107; 7RT 1485-1486, 1505.)

Appellant and Joey worked on the sprinklers until between 4:00 and

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2. All subsequent dates refer to the year 1996.

5:00 p.m. Thereafter, they went to the store, purchased some beer, and returned to the house and drank it on the front porch. (5RT 1089, 1153; 7RT 1550.) They later returned to the store for more beer which they drank as they drove around in appellant's car. They visited appellant's friend, Christian, who joined them in the car until approximately 10:00 p.m. After driving Christian home, appellant drove to his girlfriend Yolanda's house. Joey sat in the car while appellant talked with Yolanda at her door for approximately 30 minutes. (5RT 1090-1091.)

At approximately 10:00 p.m., while appellant and Joey were still out, Monique went to bed. Rosalina cooked dinner for Gabriel, who had just returned home from work, and stayed downstairs with him until approximately 11:30 p.m. Rosalina then went upstairs to take a shower. While upstairs, she checked on Monique, who was asleep on her bed wearing shorts and a top. (7RT 1485-1486, 1489-1490, 1504, 1528.)

Meanwhile, appellant and Joey returned to Joey's house, and appellant parked on the east side of the house on the neighbor's sidewalk. Joey, however, refused to get out of the car because he was drunk. Appellant asked Joey to get out of the car three or four times, explaining that he had to go to work the next day, but Joey would not budge. Rosalina looked out an upstairs window and saw appellant and Joey talking. Thereafter, appellant knocked on the side door of the house, and Gabriel answered the door. Appellant asked Gabriel for help bringing Joey into the house because Joey was "really drunk." (5RT 1092-1093, 1096-1098, 1104; 6RT 1206-1209; 7RT 1486-1488.) Gabriel advised appellant to wait for Joey to get out of the car on his own because, based on prior experience, it was "not good to pull him out of the car." (6RT 1209.)

Appellant returned to his car, and Gabriel went to his room, which was near the side door. Shortly thereafter, Gabriel went upstairs to Joey's room to listen to the radio. While there, appellant and Joey appeared. Joey told Gabriel

and appellant to leave because he was tired and wanted to go to sleep. Appellant and Gabriel left, and Joey locked the door and "passed out." It was approximately 11:45 p.m. (5RT 1094, 1107, 1153-1154; 6RT 1210-1212; 7RT 1487-1488.)

After showering, Rosalina checked on Monique again. She was still asleep. Rosalina saw lights on in Joey's room and the bathroom. Gabriel, who was inside the bathroom, told Rosalina that Joey had "thr[own] [him] out of his room." (7RT 1491, 1524-1525.) Rosalina returned to her bedroom and went to sleep. She did not see appellant upstairs. (7RT 1484, 1488, 1491.)

Gabriel returned to his bedroom on the first floor. He made sure the doors were closed, but did not check to see if they were locked. He also turned off all the lights. As he walked through the kitchen to his room, he saw the dark taillights of appellant's car outside. He thought appellant was behind him and was going to leave the house. However, he never heard the front or side door close or the sound of appellant's car before he fell asleep at approximately midnight. (6RT 1211-1213; 6RT 1384-1385; 7RT 1505.)

About 1:00 a.m., Rosalina woke up because she heard footsteps on the creaky stairs. She opened her bedroom door, noted that Monique's bedroom door was closed, yelled out to Gabriel and Joey, and listened. Hearing only silence, she went back to bed. (7RT 1492-1493, 1513-1515, 1526.)

The next morning, Monique's father, Jose, noticed that Monique was not in her bedroom before he left for work at 6:30 a.m. He informed Rosalina, who told him to check the bathroom and the front room. He did not look for Monique because he assumed she was in another room watching television or in the bathroom. Since Jose never reported back to her, Rosalina assumed nothing was wrong. (7RT 1512-1513, 1539-1541.)

As he left for work, Jose found the side door wide open and the security screen unlocked. He also noticed that a light in the garage and an outside light

near the side door were on. (7RT 1541-1542, 1547.)

Gabriel got up at approximately 7:00. School started at 7:45, so he got dressed, ate breakfast, and left for school at 7:35. (6RT 1213-1214.)

Josette had spent the night at her boyfriend's house. (5RT 1168-1169.) When she arrived home at approximately 7:20 a.m., she noticed Monique's flower-printed bed sheet in the middle of the driveway. (5RT 1169-1171; 7RT 1494, 1504.) Josette did not suspect that anything was wrong because her parents often went to their ranch and packed things in boxes with sheets. She thought that one of the sheets accidentally had fallen in the driveway. (5RT 1172.)

Josette entered the house through the front door and went up to the bedroom she shared with Monique. (5RT 1101-1102, 1167, 1172-1173.) Monique's alarm clock was blaring, and the room was "a little awkward." (5RT 1173-1174.) The sheets from Monique's bed were in the middle of the floor, and a sock was on the bed. (*Ibid.*)

Rosalina woke up when Monique's godmother arrived to pick Monique up for school. (7RT 1493-1494, 1532-1533.) At about the same time, Josette told Rosalina that Monique was "not around" and that Monique's alarm had been sounding since 7:00 a.m. She also said that she had seen Monique's bed sheet on the driveway. (5RT 1108, 1175; 7RT 1532-1533.) Josette and Rosalina searched the house, including Gabriel's room, which was located downstairs near the side entrance to the house. They also called relatives, friends, and school officials in an attempt to find Monique. (5RT 1098, 1175-1176, 1183; 7RT 1493-1494, 1494, 1507, 1542.) Josette checked to see if any of Monique's shoes or clothes were missing, but found nothing missing. (5RT 1183-1184.)

Rosalina awakened Joey and told him that Monique was missing. (5RT 1107-1108.) Gabriel, who had come home from school, and Joey went out and

looked for Monique. They searched the yard, walked around the neighborhood, and checked the school. (5RT 1108.) Joey opined that Monique's disappearance was unusual because Monique was a "scaredy-cat" who usually stayed at home. (5RT 1151-1152.)

After learning that appellant had been at the house with Joey the night before, Josette called appellant's brother, Leonard, and sister-in-law, Maria, because appellant was living with them. Josette told Maria that Monique was missing and asked to speak with appellant, who was asleep on the couch. Josette asked appellant what he had done after leaving their house, and he told her that he had gone back to his brother's house. (5RT 1183-1184; 7RT 1554-1556, 1568-1569, 1571-1572.)

Leonard had gone to bed at approximately 11:30 p.m. the previous night. Appellant was not home when he went to bed. Appellant was also not home when Leonard got up to use the restroom twice during the night -- at approximately 12:30 a.m., and again at 1:30 a.m. (7RT 1557-1563.) At 5:35 a.m., Maria awakened to the sound of appellant's alarm clock sounding in the front room. She got up and turned it off and noticed that appellant was not at home. Maria went back to bed until approximately 6:45 a.m., at which time appellant was asleep on the couch. (7RT 1569-1571.) Josette called sometime between 7:30 and 7:45 a.m. (7RT 1569-1572.)

Howard Wilson lived two houses away from Leonard and Maria and knew appellant. At approximately 2:30 a.m. on May 9, Wilson saw appellant slowly drive down the street in his car. Appellant stared at Wilson as he drove by and appeared to be looking for something. Appellant circled the area three times. Thereafter, Wilson saw appellant walk down the street, away from his brother's house. He was dressed in dark clothes and had his head down as he walked. (7RT 1638-1642.) The next morning, appellant's car was parked to the east of Leonard's house. Appellant normally parked on the west side of the

house. (7RT 1563-1564.)

Jose, Joey, and Josette looked for, and found no, signs of forced entry on any of the windows or doors in the house. (5RT 1115, 1181; 7RT 1543.) The alarm system on the house had not been activated the night Monique disappeared; however, even when it was not activated, three beeps would sound when the front or side door was opened. (5RT 1116.)

Two days after Monique's disappearance, Joey searched Monique's bedroom. He found the black and white T-shirt that Monique had been wearing prior to her disappearance; it was crumpled up on the closet floor underneath a pile of clothes. (5RT 1109-1110, 1149-1150, 1184.) Clothes that Josette and Monique frequently wore were in the front of their drawers, not at the bottom of a pile in the closet. (5RT 1191-1192.)

Approximately one month before Monique's disappearance, appellant complained to his sister-in-law, Maria, that he was upset with Monique because she had revealed details about his past to his girlfriends. He referred to Monique as a "brat" and told Maria that he would "get" Monique. Maria told appellant to "calm down" because Monique was just "a little girl." (7RT 1575-1577.)

b. The Discovery Of Monique's Body

At approximately 11:25 p.m. on May 12, Los Angeles Police Detective Stephen Watson received a call that a body had been found in a dark, vacant lot on the southeast corner of Anaheim Street and Dominguez Avenue in Wilmington. The lot, which was located between one-half and three-quarters of a mile from Monique's house, was surrounded by a six-foot-high, chain-link fence and was filled with high weeds. The body, later identified as Monique's, was covered, not wrapped, with a comforter and was located in the far south end of the lot, away from the street. Monique's hand and shoulder protruded

from underneath the comforter. (6RT 1235-1236, 1436-1442, 1444; 7RT 1454, 1460, 1463.)

Investigators lifted the comforter from Monique's body. She was lying on her back, naked. Her legs were bent at the knees, and her chin was slightly elevated. Unweathered trash bags surrounded Monique's body in the weeds. (6RT 1443-1445; 7RT 1460-1462.)

Due to decomposition, Monique could not be visually identified. She was identified through dental records. (6RT 1235-1236, 1243-1244, 1444-1445.) Her body was covered with maggots. (6RT 1240, 1243-1245, 1444.)

c. Investigation Of The Murder

Deputy Medical Examiner Lisa Scheinin performed an autopsy on Monique. She determined that the cause of Monique's death was asphyxia due to compression of the face, neck, and/or body. (6RT 1232-1237, 1254-1256.) Dr. Scheinin discovered a hemorrhage on the "underside" of the skin on the back of Monique's head, which suggested that Monique was either hit in the head or her head struck something before she died. (6RT 1246, 1265-1271, 1288, 1377.) Dr. Scheinin also noted three abrasions on one of Monique's breasts, "just to the inside of the nipple." (6RT 1249.) She opined that the abrasions were not bite marks because they were too straight, not in a teeth-like, arc formation. (6RT 1249.) Monique also had a contusion on the back of her left hand, and an abrasion over her right knee. (6RT 1250-1251.) Dr. Scheinin suggested, but could not be sure, that the mark on the back of Monique's hand was a defensive wound. (6RT 1253-1254.)

Dr. Scheinin described the decomposition of Monique's body as "moderate to severe" and noted extensive maggot activity on her face and the right side of her body. (6RT 1247-1248.) Dr. Scheinin found "no obvious trauma" to Monique's genitalia based on a visual examination because the area

was so decomposed. (6RT 1250.) However, microscopic examination revealed vaginal bleeding, which was consistent with sexual penetration. (6RT 1255-1256, 1272-1275, 1278-1281, 1287-1288; 6RT 1369-1371, 1377-1378.) The injury to Monique's vagina occurred before she died. (6RT 1275, 1280, 1286-1287.) Dr. Scheinin opined that asphyxia was a common cause of death in cases of where the victim had been sexually assaulted. (6RT 1371-1372.)

There was also blood found in the tissues of Monique's neck. The presence of blood in the neck tissue signified an injury that was inflicted prior to death. (6RT 1281-1288, 1373.) The injury was consistent with asphyxia. (6RT 1377.)

David Faulkner, an entomologist, examined the maggots that were recovered from Monique's body. He determined that there were two types of flies present: flesh flies and greenbottle flies. Based on the development of the flies and the appearance of the victim in the crime scene photographs, Faulkner opined that, at the time they had been collected and preserved, the flies had been "associated with" Monique's body for 3.5 to 3.7 days, which meant that the flies appeared on Monique's body sometime between 10:00 a.m. and 2:00 p.m. on May 9. (8RT 1769-1775, 1821, 1835.) Faulkner explained that flies do not fly at night. Thus, even if a host (in this case a body) had been available at 1:00 a.m. on May 9, the flies would not have appeared until approximately 10:00 a.m. because the flies would have been inactive until that time. The only way flies would have been on the body early in the morning, i.e., 1:00 a.m., on May 9 was if the body had been left before sundown on May 8. (8RT 1775-1776.)

William Moore, a forensic toxicologist with the Scientific Investigation Division of the Los Angeles Police Department, responded to the vacant lot where Monique's body was found, preserved and collected stained portions of the comforter, and conducted serological examinations of the stains. He

determined that the stains on the comforter were blood stains, not semen stains, and the blood all belonged to the same person. Moore opined that the absence of semen did not mean that a sexual assault did not take place because ejaculation does not occur during every sexual assault and a condom could have been used. (7RT 1668-1673, 1675-1676.) Based on the way the stains appeared on the comforter, it appeared that they leaked out of Monique's vagina and rectum and dripped down to the comforter. (7RT 1674-1675.)

Moore also examined appellant's car and found a bright red human blood stain on the interior lid of the trunk. The bright red color of the stain suggested that it had been shed while the person was alive. A blood stain deposited after death would have been darker in color. (7RT 1676-1680.)

Susan Brockbank, a criminalist in the Trace Analysis Unit of the Scientific Investigation Division of the Los Angeles Police Department, recovered trace evidence, including hair, fibers, dirt, and plant material, from the comforter that had covered Monique's body. She compared the fibers recovered to carpet fibers taken from both appellant's car and the staircase of Monique's house. (7RT 1579-1587.) She determined that 20 fibers recovered from the comforter "were similar in microscopic characteristics, shape, size, color, color variation . . . and fiber type to the carpet" on the front floorboard of appellant's car. (7RT 1588-1589; 8RT 1734-1740.) The carpet fibers taken from the staircase in Monique's house were different than the fibers recovered from the comforter. (8RT 1742-1743.)

On cross-examination, Brockbank said she also recovered hairs from the sheet found on the driveway, the blanket recovered from Monique's room, the beds in Monique's room, and the comforter Monique was wrapped in. None of the hairs found on the items matched appellant's head or pubic hair. Two pubic hairs that were recovered from the comforter belonged to neither appellant nor Monique. (8RT 1749-1760.)

Erin Riley, a criminalist in the Serology Unit of the Scientific Investigation Division of the Los Angeles Police Department, obtained DNA samples from both appellant and Monique and compared them to DNA recovered from the comforter (Peo. Exhs. 12-13) and the blood stain found in the trunk of appellant's car. Riley concluded that Monique's DNA was consistent with that found on the comforter and in the trunk of appellant's car. She excluded appellant as a source of the DNA found in the blood stain on the trunk of the car, but found "faint" DNA markers on the comforter that could have been contributed by appellant. (7RT 1595-1601, 1635.) Riley opined that 1 in 125,000 individuals shared the same DNA type as the type found in the blood stain found in the trunk of the car. (7RT 1602.)

Appellant's left palm print was lifted from the outside portion of the doorframe of Monique's bedroom. (7RT 1651-1654.)

d. Appellant's Relationship With Monique

Appellant lived with Monique's family for two or three weeks in March or April. During his stay, appellant slept in the front room of the house and used the bathroom in Gabriel's room. (5RT 1095, 1105, 1176-1177; 6RT 1215; 7RT 1505-1506.) He did not have a house key, and he was not permitted to go upstairs without an escort. (5RT 1105, 1177; 6RT 1214; 7RT 1508.) On one occasion, appellant needed to take a shower, so Joey escorted him to and from the upstairs bathroom. (5RT 1104-1105; 7RT 1551-1552.) Appellant moved out of the house after getting a car and a job. (5RT 1106.) He did not visit much between the time he moved out and the murder. (5RT 1106-1107.)

Monique began locking her bedroom door shortly after appellant moved out of the house. However, following an argument with Josette a week and a half before her murder, Monique stopped locking the door. Josette was upset when the door was locked because, when it was locked, she could not get into

her room to sleep without disturbing everyone in the house because Monique was a heavy sleeper. (5RT 1109, 1181-1183; 7RT 1490.)

Monique was "indifferent" toward appellant. (5RT 1105; see 6RT 1385.) She sometimes "g[o]t along" with him; other times she would tease him by calling him names, such as "loser," "dead-beat dad," and "pimp." (5RT 1105-1106, 1150-1151; 6RT 1385.) She also teased appellant about being 40 years old and "trying to pick up on high school girls that want nothing to do with [him]." (5RT 1151.) Her teasing aggravated appellant, and she teased him more after learning about "his record and what he had done in the past." (5RT 1106; see 5RT 1151.) On one occasion while appellant was living at the house, Josette heard appellant tell Monique about his sexual intercourse with his girlfriend. Monique told him that she did not believe him because "no girl would ever be with him." (5RT 1177-1178, 1180-1181.)

A week before Monique disappeared, Monique told her friend Sara M. that she was afraid of appellant because he had "sneak[ed]" up to her room and touched her chest and "grab[bed] her crotch" earlier that day. Monique said that he also "ma[d]e weird looks at her." Although Monique was upset when she told Sara about the touching incident, she made Sara promise not to tell anyone about it. (7RT 1723-1726, 1730.)

Joey never saw Monique near the trunk of appellant's car. (5RT 1116-1117.)

e. Evidence Admitted Under Evidence Code Section 1108

The prosecution presented evidence that appellant had suffered two prior convictions for crimes involving violent sexual assault. (7RT 1646-1651.)

(1) Sexual Assault Of Ramona M. in 1975

Ramona M. met appellant while "cruising" in a mall in March 1975. Ramona, who was 16 years old at the time, was with her two sisters and two girlfriends when appellant and two men he introduced as his nephews approached and began to talk to the girls. (6RT 1413-1414.) During the conversation, the group decided to attend a friend's wake. Ramona and one of her sisters joined appellant and his nephews in appellant's car. The plan was for appellant to follow the other three girls, who were in a separate car, to the wake. Instead of following the girls, appellant got on the freeway and drove Ramona to a house in Wilmington. Frightened, Ramona "begged" appellant to turn around. (6RT 1414-1415.) When they arrived at the house, Ramona was introduced to two individuals named Fred and Stan. Ramona then went into the kitchen and talked to appellant. During their conversation, appellant grabbed Ramona by the hand and told her that they needed to leave the house immediately to avoid being killed. Appellant explained that one of the men in the house had a gun and was angry over a pound of marijuana that had been stolen from the freezer. Appellant took Ramona to his car and drove her away. Appellant told Ramona that her sister and his nephew would jump through a window to escape. (6RT 1416-1417.)

Appellant drove Ramona to a dark, secluded area behind San Pedro College, locked the doors, and put the seats down in the car. He then bit a finger on her left thumb and undressed her. Every time Ramona struggled to get away, appellant hit her. Appellant released Ramona's thumb when she scratched his face. (6RT 1417-1420.) After removing Ramona's clothes, appellant made her lie down and he touched and bit her breasts near the nipples. (6RT 1421.) Appellant removed his own clothes and told her to "suck" his penis. He threatened to kill her if she did not comply. (6RT 1421-1422.) Ramona put his penis into her mouth to avoid being hit. During the ensuing

three-hour assault, appellant repeatedly raped and sodomized Ramona and forced her to put his penis into her mouth. To minimize Ramona's resistance during the assault, appellant hit, kicked, and choked her. At one point, appellant told Ramona that he would kill her if she did not make him ejaculate within 50 seconds. Appellant then ejaculated on Ramona's stomach. (6RT 1422-1424.)

After the assault, appellant told Ramona to turn around and he put what felt like a gun next to her head. Appellant told Ramona to get out of the car or he would kill her. She grabbed her blouse and pants and got out of the car, and appellant drove away. Ramona flagged down a security guard in a truck and begged him to help her. He took her back to his office and called the police. Appellant returned while Ramona was in the office, but he did not see her. (6RT 1420, 1424-1425.)

Ramona went to the hospital. Doctors discovered a blood clot in her throat, which was the result of appellant forcing his penis deep into her mouth. Ramona also had bite marks on her nipples and around her breasts, vaginal and anal bleeding, bruises on her thighs, and a thumb injury. Appellant had bitten Ramona's thumb to the bone. (6RT 1423, 1434-1435.)

(2) Sexual Assault Of Lillian S. in 1980

On November 10, 1980, Lillian S. went to a Howard Johnson's coffee shop with her cousin. While there, appellant and a friend approached and engaged the women in conversation. The group later decided to go elsewhere for breakfast. Lillian accompanied appellant in his car, and appellant's friend went with Lillian's cousin. After leaving Howard Johnson's, appellant told Lillian that he needed to go to his apartment to retrieve something. Appellant got on the freeway and drove very quickly to his apartment. (7RT 1467-1470.) Lillian had a "bad feeling" as they drove. (7RT 1470.) When they arrived at

the apartment, Lillian told appellant that she would wait for him inside the car, but he insisted that she accompany him inside. (*Ibid.*)

Once inside, Lillian became scared when she was confronted by two big dogs. Appellant took her into the kitchen, retrieved something from the top of the refrigerator, swallowed it, and then turned off the lights. Lillian asked appellant to turn on the lights, but appellant refused, telling her that he was going to "make love" to her. (7RT 1471-1472.) Lillian refused, and appellant punched her in the stomach. Lillian crawled to a window and unsuccessfully tried to break it. Angered by her actions, appellant punched and kicked Lillian until she lost consciousness. When she regained consciousness, appellant forced her to put his penis into her mouth. As she did so, he choked her until she "pass[ed] out" again. (7RT 1472-1473.) He then tried to wake her up by hitting her. He became more physically violent and verbally abusive as the assault proceeded. (7RT 1473-1474.)

Lillian regained consciousness and found appellant having vaginal intercourse with her. Appellant also forced her to orally copulate him, and he sodomized her. Appellant repeatedly punched Lillian and bit her breasts and arms as she struggled against him. (7RT 1473-1474.)

Lillian lost and regained consciousness again during the attack. Upon awakening, appellant told her to get dressed. He then drove her to her cousin's house, carried her to the door, and drove away. Lillian was in shock and bleeding. Her cousin called the police, and she was transported to the hospital in an ambulance and admitted to the intensive care unit. Her ribs had been broken during the assault. (7RT 1475-1477.)

2. Defense

Mario Soto worked at an AM/PM mini market located on North Avalon Boulevard in Wilmington. Sometime between 2:00 and 2:30 a.m. on May 9,

a girl entered the market. The girl was with some friends, who were in a car outside. The next day, a person visited the market, told Soto that Monique was missing, and showed Soto a picture of Monique. Soto had never met Monique, but believed that one of the girls who had been in the car the previous night resembled Monique. (8RT 1979-1982.)

Lolina Tuisaloo worked at Burger King in Harbor City in May 1996.[3/] On May 9, at approximately 6:30 p.m., four teenage girls entered the restaurant. The next day, Monique's family members visited the restaurant, showed Tuisaloo a photograph of Monique, and asked Tuisaloo if she had seen Monique. Tuisaloo thought that Monique looked like one of the girls who had been in the restaurant the previous evening. (9RT 2121-2123.)

On May 9, Los Angeles Police Sergeant Michael Rogers went to Leonard and Maria's house and searched appellant's car after speaking with Monique's family members. There was nothing in the car that indicated Monique had been inside the car. (8RT 1913-1917.)

Los Angeles Police Detective Richard Simmons searched Monique's house on May 10, looking for evidence of Monique. He also searched appellant's car and Leonard and Maria's house and collected some of appellant's clothing. (8RT 1926-1930.) Additionally, Detective Simmons obtained videotapes from a Burger King and an AM/PM Market, hoping that Monique was depicted on the tapes. He returned the tapes after family members failed to identify Monique on either of the tapes. (8RT 1931-1933.)

Kathleen Ledesma lived on Sanford Avenue, near the vacant lot where Monique's body was found. On May 12, Ledesma's daughter, who had been playing outside, summoned Ledesma to an alley near the vacant lot and pointed

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3. Tuisaloo was asked about events that occurred on March 9, 1996. (9RT 2121.) In context, it appears defense counsel meant to ask about events that occurred on May 9, 1996. (9RT 2121-2128.)

to a blanket. Ledesma saw a blanket covering something. It was approximately five feet away from a chain-link fence that surrounded the vacant lot. Ledesma returned to her house and called the police. She returned to the area where she had seen the blanket and waited for the police to arrive. Officers had to cut through the chain link fence to access the lot because there was no public access. (8RT 1845-1853.)

Peter Barton owned a business on East Anaheim Street. The back of his business faced the vacant lot located on a cul-de-sac on Dominguez Avenue. Barton, who worked seven days a week, noticed no unusual smells in the air on the weekend of May 11 and 12. On the evening of May 12, as Barton watched television, he learned that a body had been found in the vacant lot located next to his business. The next day, Barton noticed a smell of "death" while he was at work. The smell lingered for three days. (8RT 1962-1964, 1967-1972.)

A corner of the fence that surrounded the lot where the body was found was sometimes turned down by transients so that they could access the lot. Barton believed that the fence was "hooked up" the weekend the body was found because, had it not been secured, transients would have been occupying the lot. (8RT 1970-1971.)

Appellant was arrested on May 13. (8RT 1914.) The same day, Monique's brother, Gabriel, told Los Angeles Police Sergeant Chris Waters that the night Monique disappeared he had been upstairs with his brother and appellant. He said that he and appellant left his brother's room at the same time, that appellant was in front of him going down the stairs, and that appellant left the house through the front door. Gabriel stated that he then turned off the lights and made sure the back door was locked. (8RT 1909-1911.)

The parties stipulated that Los Angeles Police Detective Taylor interviewed Joey on May 21, and Joey told him that he did not remember stopping at Yolanda's house the night he went out drinking with appellant.

(8RT 1942.)

Gary Kellerman, a coroner's investigator, responded to the scene at approximately 12:30 a.m. on May 13. (9RT 2009-2010.) He examined Monique's body and noted that there was a concentration of maggots on her face, neck, and upper chest. The maggots were collected at 4:00 a.m., but Kellerman did not collect them, and he did not recognize the handwriting on the bottle of maggots that were collected. (9RT 2011-2012, 2014, 2018.) In his report, Kellerman noted that the body was surrounded by tall grass and was not easily visible from the street or the walkway at the south end of the lot. (9RT 2015.)

Christine Sanders, a criminalist in the Serology Unit of the Scientific Investigation Division of the Los Angeles Police Department, searched appellant's car, a 1978 Cadillac Coupe de Ville, on May 10, the day after Monique disappeared. The car was parked outside Leonard and Maria's house. Sanders collected trace evidence, including hair, from the car, and looked for signs of blood. She also searched the trunk for any female clothing. She found no such clothing. (8RT 1882-1884.)

Sanders also assisted in a search for trace evidence in Monique's bedroom. She tested the bedding on both beds in the room, and none of the bedding tested positive for semen. (8RT 1886-1889.) Some blood was found on a bedskirt in the room. (8RT 1905.)

On May 17, after Monique's body had been found and appellant's car had been impounded, Sanders assisted Moore in a more thorough search of the car. The blood stain on the interior lid of the trunk was found during this search. Although it was Moore's habit and custom to photograph every stain that tested positive for blood, there was no photograph of the blood stain on the trunk in this case. (8RT 1885-1886, 1921-1924.)

The same day, Sanders accompanied criminalist Ron Raquel to the

vacant lot where Monique's body was found. They collected a soil sample and part of a metal sheeting wall that was adjacent to the alley that bordered the lot. The portion of the wall that was removed appeared to have a red paint transfer. Raquel compared the red paint transfers to paint samples from appellant's car, which was also red. He concluded that the paint transfers on the wall had not come from appellant's car. (8RT 1890-1893, 1991-1993, 1997-1998.)

Sanders also analyzed a T-shirt, blue jeans, boxer shorts, shoes, and socks for blood. All of the items tested positive for blood, but only the T-shirt, boxer shorts, and shoes had a sufficient amount of blood for DNA testing. Sanders gave those three items to Erin Riley for DNA testing. (8RT 1893-1896, 1904-1905.)

Criminalist Michael Mastrocovo tested the sheet Josette found in the driveway and a blanket recovered from Monique's bed for the presence of seminal fluid. He concluded there was no seminal fluid on either item. (8RT 1751-1752, 1873-1876.)

William Arndt, a mechanic for the Los Angeles Police Department, measured the fuel tank contents of appellant's car on May 18. He recovered close to a gallon of fuel. Arndt opined that the gas mileage on appellant's car, which had a V-8 engine and was in poor condition, was probably less than 10 to 12 miles per gallon. (8RT 1878-1881.)

At the end of July, Sanders collected more exemplars from the floor mats, front and rear carpet, door panels, rear seat, passenger dashboard, and rubber molding of appellant's car. She collected the evidence because Brockbank needed a better representative sample of fibers from appellant's car for her fiber analysis. (8RT 1899-1901, 1905-1906.)

Brockbank compared a "very small" piece of foam recovered from the comforter to the foam and rubber extracted from various parts of appellant's car. None of the foam taken from appellant's car matched the foam found on

the comforter. (8RT 1987-1990.)

Criminalist Cheryl Will compared imprints of tire tracks at the scene with tire track exemplars taken from appellant's car and determined that the tracks did not match. (9RT 2103-2104, 2115-2117.) She also compared the imprints of three pairs of appellant's shoes with shoe prints found on the comforter that covered Monique's body as well as prints found at the scene. She concluded that none of appellant's shoe prints matched those found on the comforter or at the scene. (9RT 2104-2115, 2119-2120.)

Dr. Sharon Van Meter, a forensic pathologist and an expert in performing autopsies on decomposed bodies, reviewed the autopsy findings in this case, including microscopic slides of Monique's tissues. (9RT 2020-2030.) She noticed that all of Monique's tissues were in a "very advanced stage of decomposition," such that she could not recognize from which organs some of the tissues had come. She stated that, in performing an autopsy on a decomposed body, the body is first examined externally for signs of injury or disease or other identifying characteristics. Thereafter, an internal examination is performed, wherein all of the organs are removed and checked for gross abnormalities, and specimens are taken, put on slides, and labeled for microscopic examination. (9RT 2031-2034, 2068-2069.) She concluded, based on her review of the case, that the cause of Monique's death could not be determined. (9RT 2070-2071.)

In reaching that conclusion, Dr. Van Meter attempted to determine whether blood was present in certain tissues. She explained that blood cells are very small and similar in shape and size and, when they decompose, they lose their contents and become "ghost" cells. Based on the photographs and slides she examined, Dr. Van Meter found what appeared to be decomposed blood in one of Monique's lungs. However, she found nothing that looked like blood in Monique's adrenal gland or hand. In what Dr. Van Meter was told was

occipital tissue, Dr. Van Meter said that she could not tell whether blood was present. (9RT 2039-2050, 2053-2055, 2058-2059, 2064-2066.) Regarding tissue taken from Monique's neck, Dr. Van Meter identified some "intense red staining material," but could not conclude that it was blood. (9RT 2052, 2057-2058.) She explained that a red stain on decomposed tissues does not necessarily mean that blood is present because different tissues have different staining qualities, and decomposition changes the appearance of tissues. She also opined that hemorrhaging does not necessarily occur when a person is strangled to death, and noted that the medical examiner who performed the autopsy in this case did not consider whether Monique's occipital injuries could have been caused by a bump on the head. (9RT 2056-2057, 2067-2070.)

In cases of suspected sexual assault, Dr. Van Meter explained that she looks for hemorrhage and/or lacerations in all of the tissues involved, including the internal and external genital organs. She opined that, even with a decomposed body, one would be able to see a tear in the vaginal area. In this case, Dr. Van Meter found no definite hemorrhaging in Monique's vaginal area. (9RT 2061-2062, 2065-2066.) In photographs of Monique's vaginal soft tissue and "rectovaginal" area, Dr. Van Meter opined that, although there was some material that resembled decomposed blood, she could not "definitively" say that it was blood. (9RT 2051-2052, 2065-2066, 2071.) Dr. Van Meter concluded that there was no evidence of sexual assault in this case based on the pathological and the microscopic findings. (9RT 2071-2072.)

3. Rebuttal

Los Angeles Police Officer Trinity Steele responded to the call regarding the discovery of a dead body. He arrived at the vacant lot at approximately 8:10 p.m. and accessed the lot by walking through a gap between two fence poles. He did not have to cut the fence to enter the lot. It did not appear that personnel

from the fire department, who were already on the scene, had cut the fence to access the lot. Officer Steele noted that the wind was blowing toward the east, i.e., down the alley, at the time. (9RT 2130-2133.)

Kathleen Ledesma recalled smelling an odor in the air for three days prior to the time Monique's body was found. (9RT 2151-2152, 2154.)

Dr. James Ribe, a Senior Deputy Medical Examiner for the Los Angeles County Coroner's Office, had experience doing autopsies on decomposed bodies and had reviewed Dr. Scheinin's findings in this case. He reviewed the slides of tissue that Dr. Scheinin had taken from Monique's occipital region, neck region, and vaginal area. He opined that in the occipital and vaginal areas, there was "definite tissue hemorrhage," and there was "possibl[y]" a very small area of hemorrhaging in the neck area. (9RT 2134-2137.) With regard to the occipital tissue, Dr. Ribe explained that there was a large number of intact red blood cells in the tissue, which was primarily "spread along fascial planes," meaning in the connective tissue in the back of the neck. (9RT 2138.) Dr. Ribe also explained that there was a large amount of "obvious blood" present on the slide of vaginal tissue. He noted "clearly recognizable red blood cells" in the vaginal tissue that were "highly characteristic of tissue hemorrhage." (*Ibid.*) As to the neck area, Dr. Ribe said that the slide showed mostly decomposed soft tissue. However, he noted one small area that had material resembling "extravasated" blood, which was blood that was outside blood vessels and embedded in tissue. (9RT 2138-2139.)

Dr. Ribe compared Dr. Scheinin's findings regarding the occipital, neck, and vaginal tissues with all of the other organ tissue slides and found nothing on the slides of the other organs that looked like extravasated blood. (9RT 2136-2139.) He disputed Dr. Van Meter's findings that there was no apparent blood in the occipital region or vaginal area on three grounds. First, he noted that there were red blood cells in the tissues, which established that it was

blood. Second, there were "artifacts" in the form of brown pigments in other tissues that looked "completely different" than what Dr. Van Meter referred to as "artifacts" in the occipital and vaginal tissues. Third, the slides showed that the red blood cells spread into the tissue and stopped when they encountered "a strip of fascia," i.e., strong connective tissue. Dr. Ribe explained that "artifact" does not spread the same way; rather, it randomly spreads through tissue and migrates toward the edges of tissue. Additionally, Dr. Ribe stated that blood that is lodged in tissue, i.e., a hemorrhage, decomposes at a slower rate than blood contained in blood vessels. Thus, blood from a hemorrhage is "more recognizable in decomposition" than blood in blood vessels. (9RT 2139-2141.)

Dr. Ribe noted that the blood evidence correlated with the gross findings in this case. For example, Dr. Scheinin found an area of hemorrhage in the back of Monique's neck, which corresponded to the evidence of blood in the tissue on the microscopic slide. One would not expect to see blood in tissue unless there was some kind of injury. (9RT 2141-2142.)

4. Surrebuttal

The parties stipulated that, during an interview on May 12, Ledesma told Officer Steele that she noticed a strange smell coming from the field on May 11, but she thought nothing of it. (9RT 2157.)

B. Penalty Phase Evidence

1. People's Case

The prosecution presented the following aggravating evidence in addition to the guilt phase evidence.

a. Victim Impact Evidence

After it was discovered that Monique was missing, Monique's mother searched for her everywhere. Kinko's donated the fliers that were circulated, and the whole neighborhood donated money so that T-shirts could be made and distributed in an effort to find Monique. Monique's mother said the three-day search felt like a three-month search, and it was on Mother's Day that Monique's mother found her "baby thrown in the field like trash." (10RT 2403.)

After Monique's death, a karate tournament was established in Monique's honor with the goal of teaching children how to defend themselves. The local chiropractor also instituted an annual event that enabled children to be fingerprinted and videotaped. (10RT 2404-2405.) Additionally, a tree was planted in Monique's memory, and flowers and candles were always present in the lot where Monique was found. (10RT 2406.)

Monique and her mother were very close. Monique's mother did not work so that she could stay at home and raise the children, and Monique was her "baby." (10RT 2403, 2405-2406.) Monique had a "great future" and, at the time of her death, she was learning to play the piano and work on the computer. (10RT 2406.)

Monique and her father also had a close relationship. Monique's father helped her with her homework, took her camping, and sang with her in the church choir. Almost every day when Monique's father returned home from work, Monique would go out to greet him at his car. On one occasion, Monique's father arrived home late to find Monique crying because she was worried about him. He was late because he had stopped to get his car fixed on the way home. (10RT 2392, 2395-2398.)

Monique's parents referred to Monique as their "miracle child" because Monique's mother was not expected to carry Monique to full term due to her

advanced maternal age. Monique was healthy at birth, so her parents always considered her their "special baby." (10RT 2393-2394.) Monique's parents explained that Monique had been the "heartbeat of [their] home" due to her "tremendous" energy and love for her family. Since Monique's death, Monique's father found it difficult to celebrate holidays. (10RT 2398-2399, 2403.)

Monique's godfather made a banner for what would have been her thirteenth birthday on November 3, 1996. The banner was a collage of photographs that tracked Monique's life. (10RT 2393-2395.) Monique's oldest brother, Joey, prepared a written memorial for her birthday that described her many interests and explained how her death had affected so many people. (10RT 2400-2402.) Her death affected him very "dearly." (10RT 2400.) On what would have been Monique's fifteenth birthday, the family released 15 pigeons. (10RT 2399.)

Monique's mother visited appellant in jail before Monique's body had been found. Appellant never asked about Monique; he was only concerned with being released from custody. When asked, appellant said he did not know anything about Monique's disappearance. (10RT 2403-2404, 2407.)

b. Prior Rape Incident

Ramona's sister, Gloria, was with Ramona when they met appellant in a park in San Fernando in 1975. Ramona and Gloria, who were with their younger sister and two friends, had stopped at the park to use the restroom after "cruising" in a local mall. While Ramona and Gloria talked to appellant and two of his friends, their sister and two friends left to go "cruising" again. When their friends did not return to the park, Ramona and Gloria agreed to go cruising with appellant and his friends. However, instead of driving to the mall, appellant drove Ramona and Gloria and his friends to a dark mountaintop.

Appellant got out of the car to talk to his friends and told Ramona and Gloria to stay in the car. Shortly thereafter, appellant and his friends rejoined Ramona and Gloria in the car, drove to the freeway, and traveled to a house on "L" Street. En route, Ramona kept saying, "'Let me out. I want to go home.'" (10RT 2433-2435, 2443-2444.)

Upon arriving at a house, the men asked Ramona and Gloria to enter the house. Gloria was led to a bedroom, and Ramona went to another part of the house with appellant. When Gloria inquired about Ramona's whereabouts, one of the men told her that she had left with appellant because one of the men in the front room had a gun. Gloria stayed in the bedroom and waited for Ramona to return. When Ramona did not return, Gloria left the house. The men in the front room were all asleep when she left. (10RT 2435-2437.)

Gloria, who was unfamiliar with area, walked around. She knew she was near the beach and she tried to find Sepulveda Boulevard because she knew that Sepulveda would take her back to the San Fernando Valley. As she walked, appellant drove up in a white car. He was alone. Appellant asked Gloria to get into the car, and she declined. Appellant then ordered her to get in or she would never see her sister again. Gloria then got into the car. After Gloria was in the car, appellant laughed and said that Ramona was fine and that he had left her at a party at his sister's house while he went out to find Gloria. As appellant said this, Gloria noticed that he had a large, bloody cut on his face. Gloria moved toward the door in fear and gripped the door handle. Appellant drove Gloria to a large field and told her that she was never going to see her sister again because he had killed her. He stopped the car, turned toward Gloria, and tried to touch her legs, arms, and chest. As he grabbed her shirt, which ripped, Gloria opened the door, "rolled out of the car," and "hit the ground." (10RT 2437-2442, 2453.) She got up and ran away. Appellant called out to her, saying he "'was just kidding'" and he was "sorry." (10RT 2441-

2442.) He then started the car and drove toward her. Gloria stumbled twice before she reached a street and saw a car driving down the road. She ran in front of the car to get the attention of the driver, an elderly Mexican man, saying, "'Please, help me, help me.'" (10RT 2442.) The man slowed down, and Gloria jumped into the back seat of his car. He drove her to a donut shop, and the police were called. When the police arrived, Gloria saw Ramona in the back seat of the police car. (10RT 2442-2443.)

2. Defense Evidence

a. Appellant's Childhood And History Of Incarceration

Appellant's older brother, Leonard, his older sister, Betty, and his younger sister, Angela Hernandez, described appellant's childhood and discussed some of the adversities that appellant faced while growing up. Appellant was born on July 27, 1951. He was the ninth of ten children, and the youngest boy in the family. Appellant's family moved from New Mexico to Wilmington, California when appellant was approximately one year old. Appellant's father, a moderate drinker, worked in a lumberyard, and his mother stayed at home with the children. Appellant was very close to his mother. When appellant was seven years old, his mother died. After appellant's mother's death, appellant's father began to drink more heavily, and Leonard and two of appellant's older sisters, including Monique's mother, performed the household chores and tried to "keep peace at home." (11RT 2491-2495, 2518-2519, 2521-2523, 2569-2570.)

The family subsequently moved into a housing project in Wilmington. After the move, appellant and his older brother, Joe, began to get into trouble. On one occasion, when appellant was nine years old, Leonard discovered that appellant and Joe were sniffing glue. As time went on, appellant and Joe became "more and more out of control." Along with missing school, appellant

was involved in other mischief. (11RT 2495-2498, 2520, 2522.) A counselor finally recommended that appellant and Joe be placed in juvenile hall because appellant's father had "no control over them."[4/] (11RT 2494.) Appellant was nine years old. (11RT 2494-2495.)

Appellant spent the next few years in and out of juvenile hall. (11RT 2497.) During this period, one of his brothers died. (11RT 2519-2520.) On one occasion when appellant was approximately 10 years old, after he and his younger sister Angela had gone to a liquor store, appellant climbed up an "old-fashioned" oil well and rocked back and forth for hours. He told Angela that he felt closer to his mother when he did so because it felt like she was rocking him. (11RT 2571-2572.)

After being released from juvenile hall on one occasion when he was 15 years old, appellant moved to Lompoc to live with his 19-year-old sister, Betty, and her husband and baby. Appellant attended school, and Betty never had problems with him. When authorities learned that Betty's husband was going to be sent to a different military base and that appellant was going to stay with Betty and her baby, they took appellant away and placed him in a boys camp in Santa Barbara. He was later removed from the camp, and Betty was not told where he went. (11RT 2523-2526.)

Appellant also lived "on and off" with Angela when he was a teenager. He protected Angela and tried to help her with her two daughters that she had given birth to as a teenager. (11RT 2571-2574, 2577.) Appellant's father would sometimes give money to appellant and Angela. Appellant always shared the money he got with Angela because she needed "more money." (11RT 2575-2576.)

When appellant became an adult, he served time in jail for his offenses.

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4. At the time of trial, Joe was incarcerated at Corcoran State Prison. (11RT 2495.)

(11RT 2498.) He lived at home or at Leonard's house each time he was released from custody, and he always showed respect to Leonard and his father. Leonard opined that appellant was a "gentle, kind person." (11RT 2498.)

Leonard always visited and wrote to appellant, whether it was in juvenile hall, jail, or prison. (11RT 2498-2499.) At times, appellant's father would accompany Leonard to prison to visit appellant. Appellant's father loved appellant, and appellant spent a lot of time with his father while he was growing up. When appellant's father died in 1985, appellant was unable to attend the funeral because he was in prison. Appellant was in prison throughout the 1980's and 1990's. (11RT 2499-2500, 2520-2521-2522, 2577.)

Betty also wrote to appellant while he was in prison. When he was moved to a prison closer to Southern California, Betty visited him twice. (11RT 2526.)

Appellant was last released from prison on July 5, 1995. He lived with Leonard upon his release and performed odd jobs for family members and neighbors to earn money. One of his jobs was to help replant the lawn at Monique's house. (11RT 2500-2503.) Monique's mother helped appellant by buying him clothes and a car and loaning him money. (11RT 2508.)

The day after his release from prison in 1995, appellant saw his 28-year-old niece, Crita Stiles, at a family gathering at Leonard's house. When he saw Stiles, he was overcome with emotion. With watery eyes, he hugged her and told her that he was happy to see her. (11RT 2562, 2564.) Appellant had never touched Stiles or her sister inappropriately. (11RT 2563.)

In February 1996, appellant lived with Monique's family for between one and two months. Monique's mother ultimately "kicked" him out because he was having parties late at night on the back porch, and the noise was keeping Monique's father up at night. Appellant then returned to Leonard's house. (11RT 2502, 2508-2509.)

Appellant was a "kind and loving" person and had always been loving and respectful to family members. (11RT 2503-2504; see 11RT 2526-2527, 2529, 2570-2571, 2576.) Leonard never observed appellant being violent with family members, but on one occasion, appellant's sister-in-law told Leonard that appellant had beaten her. (11RT 2503, 2516.) For Christmas 1995, appellant bought a gift for each family member, including Monique, because he was so happy to be out of prison. (11RT 2504, 2574-2575.)

Leonard stated that he did not know what happened to appellant while he was in prison. (11RT 2504.) After being sentenced to prison, appellant started committing more violent crimes. (11RT 2510.) With regard to the 1975 rape of Ramona, appellant told Leonard that "[Ramona] wanted it." (11RT 2515.)

In the event appellant was sent to prison for the rest of his life, Leonard and Betty both said that they would write to him and, when possible, they would visit him in prison. (11RT 2506, 2527.) Although, based on the limited testimony that she heard, Betty did not believe that appellant had killed Monique, she believed that he was capable of committing such an offense. (11RT 2535-2536.)

b. Appellant's Conduct On The Night Of The Offense

On May 8, appellant went to visit Yolanda Cabrera at her apartment. Cabrera was a woman appellant had befriended in a sandwich shop a couple of months prior to Monique's murder, and, though they were not romantically involved, appellant and Cabrera spent a lot of time together because Cabrera wanted to share with appellant her "personal relationship with Christ." (11RT 2551-2553, 2560.)

Appellant arrived at Cabrera's house at approximately 11:30 p.m., over three hours late for a date he had previously scheduled with Cabrera. Cabrera

was asleep when appellant knocked at the door. (11RT 2554, 2556.) She answered the door, and appellant, who had a beer in his hand and appeared to have had "a little to drink," asked Cabrera whether he and his nephew could come in. (11RT 2555.) Cabrera objected, saying it was too late and that she did not approve of his drinking in front of her children. Appellant was very apologetic and left peacefully. He called Cabrera half an hour later to apologize again for his transgression. Cabrera told him that she was not angry and told him to go to bed because he had to go to work the next morning. (11RT 2555-2556.)

Cabrera visited appellant in jail after he was arrested in this case. They spoke about God, and appellant spoke fondly of his family members. (11RT 2557-2558.)

c. Appellant's Conduct While In Prison

Anthony Casas, a criminal justice consultant and private investigator, testified as an expert on the prison system. He had worked for the California Department of Corrections in various capacities for many years and was the founder of the State Prison Gang Task Force. (11RT 2597-2602, 2605.) In approximately 1976, while working as an associate warden at the California Men's Colony in San Luis Obispo, Casas received a grant to make a film that discouraged prisoners from joining prison gangs. In order to make the film, called "Bosta," which was targeted against the Mexican Mafia and Nuestra Familia, Casas needed inmate volunteers to act in the film. Despite the dangers associated with acting in the film, appellant voluntarily took the lead role, knowing there was no reward for doing so and that he would not be credited in the movie. The only potential benefit was that the Board of Prison Terms would be advised of his participation in the project. (11RT 2601, 2606-2618; 12RT 2641.) Appellant and the other inmate actors were also told that, because

of their involvement in the film, they would be sent to the Men's Colony if they ever violated parole or reoffended. At the time, the Men's Colony was considered one of the safest prisons because the prison gangs, for no apparent reason, had designated the Men's Colony "neutral territory." (12RT 2642.)

During the filming of the movie, the inmate actors, including appellant, were commended for their behavior and teamwork. (11RT 2617.) The film was a success and, at the time of trial, was still being used by schools and law enforcement agencies throughout the country. (11RT 2527-2528, 2618-2619.)

With regard to the prison system in general, Casas explained that there were different classification levels -- levels 1 through 4. Level 1 was a minimum security setting, and level 4 was a maximum security facility. A security housing unit within a prison was a "super maximum security" facility. (11RT 2602-2603; 12RT 2639-2640.) Level 4 facilities had armed gun coverage, both inside and outside the prison, and concrete construction of cells. (11RT 2603-2604.) Level 3 facilities had a security perimeter, such as lethal electrified fences, and armed coverage. (12RT 2643-2644.)

Casas also explained how inmates were classified. In assigning a custody level to an inmate, various factors were considered, such as the commitment offense or offenses; the inmate's behavior while incarcerated for any prior offenses, including whether the inmate had ever assaulted a staff member; whether the inmate was a gang member; whether the inmate was an escape risk; and the inmate's overall prison record, including work records and psychiatric and psychological evaluations. (12RT 2640-2641, 2646-2647.) When appellant was previously in custody, he was classified as a Level 3 inmate. (12RT 2643.) He was an "average" prisoner, meaning his work habits were "acceptable" and he was not in a gang, but he had some infractions, such as fighting. (12RT 2645-2646.) Casas did not consider appellant to be a danger to staff members. (12RT 2648, 2652.) Based on his current offense,

special-circumstance murder, appellant would be classified a Level 4 inmate and placed in a Level 4 prison under the "most restrictive manners possible" if he was sentenced to life without the possibility of parole. (12RT 2644, 2646, 2648-2649, 2652, 2669.) He would never have any conjugal visits. (12RT 2651, 2669.)

When appellant was incarcerated in the 1980's, one of appellant's family members contacted Casas and asked if appellant could be transferred to the Men's Colony in San Luis Obispo because there was fear that his life would be in danger at another institution due to his participation in "Bosta." (12RT 2641-2642.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE CONCERNING APPELLANT'S PRIOR SEXUAL OFFENSES UNDER EVIDENCE CODE SECTION 1108

Appellant claims that it was error for the trial court to admit evidence of his two prior sexual assault convictions under Evidence Code section 1108 (hereinafter "section 1108") because the prosecution's case against him was weak. (AOB 59-81.) He further challenges the constitutionality of section 1108 and asks this Court to reconsider its decision in *People v. Falsetta* (1999) 21 Cal.4th 903, which rejected such a challenge. These claims must be rejected. The court properly admitted the evidence under Evidence Code sections 352 and 1108; appellant has presented no new authority to support his request to reconsider *Falsetta*; and any error in admitting the evidence of appellant's prior sexual offenses was harmless in light of the overwhelming evidence of appellant's guilt.

A. Relevant Proceedings

On February 25, 1998, the prosecutor filed a Notice of Intent to Introduce Evidence of Another Sexual Offense by Defendant pursuant to section 1108. The prosecutor specifically identified appellant's prior sexual assaults of Ramona M. and Lilian S.[5/] as evidence she intended to introduce in her case-in-chief. (2CT 314.) Appellant opposed the introduction of such evidence on the following grounds: (1) he was not accused of a sexual offense; (2) it was inadmissible under Evidence Code section 352 (hereinafter "section

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5. Lillian S. was also known as Lillian B. (2CT 314; 7RT 1466-1468.)

352"); and (3) section 1108 was unconstitutional. (2CT 409-413.) The prosecutor filed a written response to appellant's objections, in which she noted that, subject to section 352, there was a presumption in favor of admitting evidence of other sexual offenses under section 1108. (2CT 457-461; see 2CT 489-493 [duplicate copy of People's response that contains handwritten notes].) She noted that the charged offense was not "fundamentally different" than the prior crimes evidence, i.e., that appellant disrobed the victim, raped her, and suffocated her to death. (2CT 460.) She further noted that, under section 352, the prior crimes evidence was not as likely to inflame the jurors emotionally as the facts of the charged offense, which involved a twelve-year-old girl who was sexually assaulted, suffocated, and left to decompose in a vacant lot by her uncle. (2CT 460-461.) The prosecutor added that the defense had made intent an issue by putting "the cause and motive of death into question." (2CT 460.)

At a hearing conducted outside the presence of the jury, appellant's trial counsel argued the proposed section 1108 evidence should be excluded because it was "extremely prejudicial" in light of the weak evidence connecting him to the murder, and, if admitted, it would be a violation of his due process rights. (1RT 400-401.) Counsel claimed that there was nothing that placed appellant with the victim the night of the murder and noted the physical evidence consisted of "some fiber evidence that was found on the blanket" and one "very small drop of blood that [wa]s found inside the trunk lid." (1RT 400.) He further claimed that there was no evidence regarding when the blood was shed and noted that the victim "had been around," and her brother had been in, appellant's car the day of the murder. (*Ibid.*) Counsel attacked the prosecution's version of how the crime occurred, claiming it was based on conjecture because "there [was] no evidence to show that [Monique] had her clothes taken off in her room; that she was raped or killed in that room; that she was taken out of the house by [appellant]; [or] that she was stuffed in the

trunk." (1RT 400-401.) Counsel also disputed the prosecution's claim that intent was an issue. He argued that, due to decomposition, there was no evidence of sexual contact. Since the prosecution could not prove that a sexual assault occurred, counsel concluded that intent was not an issue, (1RT 402-403.) With regard to the other crimes evidence, counsel argued that the evidence was "highly prejudicial" because neither of appellant's prior sexual assault convictions involved child molestation. (1RT 401-402.)

The prosecution countered that this was "exactly the type of situation that [section] 1108 [was] geared for," i.e., to show appellant's propensity to commit the crime. (1RT 403.) She argued that the prior crimes were "tame" compared to the crime committed in this case. (*Ibid.*) She also disputed counsel's argument that intent was not an issue because this was a case of felony murder where the underlying felony was "rape." (*Ibid.*) She further disputed counsel's characterization of the prosecution's case, noting that: (1) Monique was found naked, which suggested there had been a sexual assault; (2) fibers from Monique's bedding material were found in appellant's car; (3) there was no evidence of forced entry into Monique's house, and appellant was familiar with Monique's house; (4) Monique's clothes that she had worn to bed the night she disappeared were found in her room, which suggested that she was disrobed inside her room; (5) appellant was not home when his alarm sounded the next morning; and (6) appellant was engaged in "bizarre activities" at 2:30 a.m. on the night Monique disappeared. (1RT 403-404.)

Appellant's counsel ended the discussion by asking the court to exclude the prior crimes evidence because it would do nothing more than cause the jury to "hate" appellant and, as a consequence, lower the prosecution's burden of proof. (1RT 405.)

The court, noting that it had extensively studied this area of law, admitted the evidence under section 1108. (1RT 405; see 2CT 462, 487.)

Before issuing its ruling, the court reviewed the text of sections 1108 and 352. It then concluded that the prior crimes evidence would not mislead the jury, confuse the issues, or necessitate undue consumption of time. (1RT 405-406.) In ruling, the court explained:

> [Appellant's counsel's] best argument is that he claims [the evidence] will create substantial danger of undue prejudice. Of course in every case evidence that will make it more difficult for the defendant to defend is going to be prejudicial to his cause. The question is, on balance, with everything considered, should the court exclude either or both of these items of evidence or developments of an area of evidence concerning two other cases on the language substantial danger of undue prejudice when I balance everything out.
>
> In this case, certainly, I have to -- I don't say certainly, I do agree with [appellant's counsel] that when he takes on [the prosecutor's] comment that [the evidence] is calm or tame, that it is not calm or tame by comparison to the facts of this case if the jury were to conclude that the defendant is responsible for the charge which is leveled against him by the District Attorney filing of an information after the magistrate's decision. Certainly is just not as emotional, not as difficult to deal with as the facts of this case if they are proved.
>
> My ruling is subject, obviously, to further argument, because it is a 402 ruling of necessity and I'm saying my 402 ruling at this time is that that evidence would be ruled admissible based upon what I have before me at this time.

(1RT 406-407.)

At trial, prior to Ramona M.'s testimony, the court stated that it was going to give CALJIC No. 2.50.01 on its own motion. (6RT 1404-1405.) After renewing his objection to the section 1108 evidence, which the court

noted, appellant's counsel agreed that, since the court was going to admit the section 1108 evidence, CALJIC No. 2.50.01 was "something that ha[d] to be given." (6RT 1406.) The court then instructed the jury with a modified version of CALJIC No. 2.50.01 (6th ed. 1996) as follows:

> Evidence is going to be introduced at this time for the purpose of showing that [appellant] engaged in a sexual offense other than that charged in the case.
>
> Sexual offense insofar as the way I'm using it at this time for your instructions means a crime under the laws of the State of California that would involve something that would be a felony crime in the State of California.
>
> And at the end of the case, I'll give you elements of any crime that's discussed, in addition to the crime that is part of the information that you're making a decision on after all the evidence is in this case.
>
> If you were to find that the defendant did commit a prior sexual offense, you may, as jurors, but are not required to, infer that [appellant] had a disposition to commit the same or similar type of sexual offense. If you were to find that [appellant] had this disposition, you may, but are not required to infer he was likely to commit and did commit the crime for which he's accused in this case. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.
>
> So, in effect, what I've told you about with the language I told you, some evidence is allowed for a limited purpose in a case but not for all purposes. I've given you the limited purpose, and you'll get more instruction on this issue and maybe elements of the crime or crimes at the end of the case.

(6RT 1411-1412.)

Appellant renewed his objection to the section 1108 evidence again prior

to the testimony of Lillian S., another woman who was raped by appellant. (7RT 1467-1468.) The court overruled the objection. (7RT 1468.)

B. The Trial Court Did Not Abuse Its Discretion By Admitting Highly Probative Evidence Of Appellant's Prior Sexual Offenses

Section 1108 establishes an exception to the general rule prohibiting the admission of evidence of uncharged misconduct to prove a defendant's propensity to commit crimes. (*People v. Falsetta, supra*, 21 Cal.4th at p. 911; *People v. Soto* (1998) 64 Cal.App.4th 966, 983.) That section provides that where a defendant is charged with a sexual offense, evidence that the defendant committed uncharged sexual offenses is admissible, provided it is not inadmissible under section 352, which provides for exclusion only when the probative value of the evidence is substantially outweighed by its prejudicial effect. (§ 1108; *People v. Falsetta, supra*, 21 Cal.4th at pp. 916-917.) The presumption is that evidence of other sexual offenses to prove disposition is admissible. (*People v. Soto, supra,* 64 Cal.App.4th at p. 984.)

In determining the admissibility of a defendant's prior sexual offenses, "trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352." (*People v. Falsetta, supra*, 21 Cal.4th at pp. 916-917.) This Court has explained:

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

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

(*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.)

A trial court's decision to admit evidence pursuant to section 352 is reviewed for abuse of discretion. (*People v. Falsetta, supra,* 21 Cal.4th at p. 919; *People v. Frazier* (2001) 89 Cal.App.4th 30, 42.) A reviewing court will not disturb a trial court's exercise of discretion under section 352 unless it is shown that the trial court exercised it "in an arbitrary, capricious or patently absurd manner." (*People v. Frye* (1998) 18 Cal.4th 894, 948; accord, *People v. Sanders* (1995) 11 Cal.4th 475, 512.)

In this case, the trial court properly admitted evidence of appellant's prior sexual assault convictions under section 1108. Before ruling, the court reviewed sections 1108 and 352. It then expressly balanced the prejudicial nature of the evidence with its probative value and concluded that its admission would not mislead the jury, confuse the issues, or necessitate undue consumption of time. (1RT 405-406.) As will be shown below, the court acted well within its discretion in admitting the evidence.

First, the way in which appellant carried out the prior offenses was similar to the way he killed Monique. Appellant raped and sodomized 16-year-old Ramona M. one night in March 1975, and, to minimize her resistance during the assault, he hit, kicked, and choked her. (6RT 1413, 1418-1424.) In 1980, a year after his release from prison for his convictions involving Ramona, appellant raped and sodomized Lillian S. During the attack, appellant punched, kicked, and choked Lillian to the point of unconsciousness. (7RT 1468-1477.) In May 1996, less than a year after being released from prison for his crimes against Lillian (7RT 1555), it was the prosecution's theory, supported by the facts and circumstances, that appellant murdered Monique by choking her to death during a sexual assault. That appellant choked each of his victims to

maintain control over them while he sexually assaulted them supported the trial court's admission of the evidence of appellant's prior sexual offenses because it showed the similarity between appellant's prior and current offenses.[6/]

Second, appellant's prior offenses were not remote considering that he was incarcerated for most of the time that elapsed between each of the offenses. In 1975, appellant pled guilty to the offenses against Ramona and was sentenced to state prison. He was released in 1979. (2CT 501; 7RT 1646-1651; 8RT 1860-1861; Peo. Exh. 49.) A year later, appellant sexually assaulted Lillian and was sentenced to state prison for a term of 28 years. (2CT 501; 7RT 1646-1651; 8RT 1860-1861; Peo. Exh. 50.) He was released from prison in July 1995 (7RT 1555) and, ten months later, he murdered Monique. Because appellant spent four of five years in prison between the time he sexually assaulted Ramona and Lillian, and he spent 15 years in prison between the time he was convicted of sexually assaulting Lillian in 1980, and the time he killed Monique in 1996, very little time elapsed between appellant's offenses for purposes of evaluating remoteness because he had no opportunity to commit any offenses while he was incarcerated. (Cf. *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [12 years not too remote]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284-285 [no bright line test; 30 years not too remote].)

Third, there was no issue as to the certainty of the commission of appellant's prior offenses. Appellant pled guilty to the 1975 offenses involving Ramona, and a jury convicted him of the 1980 offenses involving Lillian. (Peo. Exhs. 49-50.)

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6. One appellate court has observed: "The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise [] section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People v. Frazier*, *supra*, 89 Cal.App.4th at pp. 40-41.)

Fourth, the evidence of appellant's prior sexual offenses was presented quickly and concisely. Other than court records showing the convictions (Peo. Exhs. 49-50; 2CT 501; 8RT 1859-1861), the prosecution presented only the testimony of the two victims, Ramona and Lillian (6RT 1413; 7RT 1467). No other witnesses were called in the prosecution's case-in-chief to testify regarding the circumstances of the offenses. Thus, it is unlikely the jurors were confused, misled, or distracted from their main inquiry. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) Later, during the penalty phase, the jurors heard evidence that, after assaulting Ramona, appellant drove Ramona's sister, Gloria, to an isolated location and fondled her legs, arms, and chest before she escaped from his car. By admitting only evidence relating to the offenses against Ramona during the guilt phase and reserving for the penalty phase the unadjudicated evidence relating to Gloria, the court limited "inflammatory details surrounding the offense[s]." (*Ibid.*)

Fifth, as the trial court noted (1RT 406-407), nothing about the prior crimes involving Ramona or Lillian would have evoked a stronger emotional reaction than appellant's crime against Monique, his 12-year-old niece. Hence, it is unlikely the jury was unduly prejudiced by the evidence of appellant's prior sexual offenses -- offenses that were committed against strangers. The trial court, in so concluding, did not act arbitrarily or capriciously in finding that the probative value of the evidence substantially outweighed any danger of undue prejudice. (§ 352.)

Appellant claims that his prior offenses "bore no similarity to the capital case." (AOB 64-67.) This claim overlooks the fact that the offenses were similar in the way they were carried out, i.e., appellant choked them as he sexually assaulted them. Instead of acknowledging the similarity in the way each of the crimes was committed, appellant argues that the crimes were dissimilar because he had never sexually assaulted a preteen girl. (AOB 64-66.)

To support his argument, he cites the trial court's exclusion of evidence showing that appellant was "'sexually interested'" in girls who were "'30 or so years younger than him.'" (6RT 1226; see AOB 65.) That the trial court excluded under section 352 evidence that Monique's brother, Gabriel, had seen appellant flirt with teenage girls who had visited Monique's house does not change the fact that appellant's actual sex crimes were all similar in the way they were committed. Plainly, flirting with underage girls is less probative to Monique's murder than appellant's violent sexual assaults on Ramona and Lillian.

Appellant's reliance on *People v. Abilez* (2007) 41 Cal.4th 472 for his claim that the prior crimes bore no similarity to the capital offense (AOB 66), is misplaced. In *Abilez*, a capital case, the defendant and a codefendant sodomized, robbed, and murdered the defendant's 68-year-old mother. (*Id.* at pp. 481-485.) At trial, the defendant moved to admit evidence that his codefendant had several prior contacts with law enforcement, including several sexual offenses. (*Id.* at p. 498.) The trial court found that the codefendant had only one prior conviction for a sexual offense: a 1973 juvenile adjudication for attempted unlawful intercourse with a minor. However, there was no indication in the record that the offense involved force. (*Id.* at pp. 498-499.) The trial court excluded the prior conviction on grounds of remoteness (Evid. Code, § 1101, subd. (b)) and under section 352 because the prior offense "bore little resemblance" to the charged crimes. (*Id.* at p. 499.) This Court upheld the trial court's ruling under Evidence Code section 1101, subdivision (b), and "reach[ed] a similar conclusion with regard to Evidence Code section 1108." (*Id.* at p. 501.) The Court reasoned that "the lack of similarity between [the codefendant's] 1973 adjudication and the present crimes," the remoteness of the adjudication, and the fact that the trial court permitted the codefendant to be impeached with two other prior crimes involving moral turpitude" justified

exclusion of the evidence[.]" (*Id.* at p. 502.)

Abilez does not support appellant's argument that the trial court abused its discretion in admitting evidence of appellant's prior sexual offenses. Unlike *Abilez*, appellant's crimes were similar in that they were all sex crimes that involved the use of force against his female victims. Indeed, in all three cases, appellant choked his victims during the sexual assault. Moreover, as discussed above, the prior crimes were not remote because appellant was incarcerated for most of the time that elapsed between each assault. Appellant claims there was no similarity because there was no evidence of sodomy, oral copulation, or other sexual violence in the instant case. (AOB 66.) Contrary to appellant's claim, and despite Monique's advanced state of decomposition, there was evidence of sexual violence because blood was found in Monique's vaginal tissues. (6RT 1255-1256, 1271-1275, 1278-1281, 1287-1288.) Appellant contrasts the "hotly disputed" evidence of Monique's physical trauma with the testimony of Ramona and Lillian in which they described their "hours-long sexual assaults in great detail." (AOB 67.) By this, appellant seems to suggest that, since he made it more difficult for the prosecution to prove that he sexually assaulted Monique by killing her and dumping her body in a vacant lot to decompose, he should have been rewarded with exclusion of the evidence related to his prior sexual offenses because the victims were still alive to testify against him. This Court should reject such a specious argument.

Appellant claims that *People v. Harris* (1998) 60 Cal.App.4th 727, an appellate court decision, "compels" reversal of the judgment in this case. (AOB 67-68.) *Harris* is distinguishable. In *Harris*, the Third District Court of Appeal held the trial court abused its discretion in admitting evidence of a prior sex offense under section 1108 in the prosecution of a mental health nurse for sex offenses involving patients. (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 730.) The charged offenses involved "breach of trust" offenses by a caregiver,

and the prior offense involved a "vicious" sexual attack on an apparent stranger. (*Id.* at p. 738.) The court of appeal found that the following factors militated against admission of the prior offense: "The evidence was remote, inflammatory and nearly irrelevant and likely to confuse the jury and distract it from the consideration of the charged offenses." (*Id.* at p. 742.) In finding the evidence was inflammatory, the appellate court noted the charged offenses were "of a significantly different nature and quality than the violent and perverse attack on a stranger[,]" which was presented in an "incomplete and distorted" way. (*Id.* at p. 738.)

Here, in contrast, the evidence of appellant's prior sexual offenses was brief and straightforward and was not inflammatory compared to the instant capital offense. Further, the evidence was not remote, considering appellant had not "led a blameless life in the interim," and the prior offenses were very similar to the charged crime in the way they were carried out. (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 739.) Thus, unlike *Harris*, the "safeguard" of section 352 did not fail in this case.

Appellant also claims that evidence of his prior sexual offenses should have been excluded because the evidence strengthened an otherwise weak case against him on the issue of identity. (AOB 70-73.) This claim is unavailing. In *People v. Britt* (2002) 104 Cal.App.4th 500, a case of indecent exposure, the Third Appellate District held that a defendant's prior uncharged sexual misconduct could be used to prove identity. (*Id.* at p. 506.) On appeal, the defendant argued that the prior crimes evidence should have been excluded "because the jury could too easily have used other crimes evidence to prove identity." (*Id.* at p. 504.) The court rejected the defendant's argument because it was "based on an incorrect characterization of the effect of section 1108 on the admission of uncharged sexual misconduct in a sex offense case." (*Ibid.*) The court, citing this Court's opinion in *People v. Falsetta*, *supra*, 21 Cal.4th

903, noted that section 1108 evidence can be used """"as evidence of the defendant's disposition to commit [sex offense] crimes, *and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.*"" [Citations omitted.]" (*Id.* at p. 506, italics in original.) The court then concluded:

> Sex crime trials inevitably turn on whether the defendant has been falsely accused. The central issue in these cases commonly involves not just whether the conduct took place as the victim described it, but whether the defendant was the one who perpetrated it. Section 1108 assists the jury's task by allowing the accused's sexual misconduct history to be considered for whatever light it might shed on these issues, including a defendant's claim of mistaken identity.

(*Ibid.*)

In this case, as will be discussed below, the evidence connecting appellant to Monique's special-circumstance murder was strong. However, even if the strength of the evidence is questioned, the evidence of appellant's prior sexual offenses was nevertheless admissible under section 1108 on the issue of identity. (See *People v. Britt*, *supra*, 104 Cal.App.4th at p. 506.)

C. Section 1108 Is Constitutional

Acknowledging that this Court found in *People v. Falsetta, supra,* 21 Cal.4th 903, that section 1108 does not violate due process, appellant nevertheless requests that the Court reconsider its ruling. (AOB 76-81.) Appellant has offered no new legal authority to cast doubt upon this Court's decision in *Falsetta*. Since *Falsetta* was decided, this Court has approved its holding (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009), and the Ninth Circuit has found that the federal equivalent of section 1108 is constitutional (*United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1022). Accordingly,

no reconsideration of the issue is necessary.

D. Any Error In Admitting The 1108 Evidence Was Harmless

Even if the section 1108 evidence should have been excluded, it is not reasonably probable that, absent the evidence of appellant's prior sexual offenses, the jury would have acquitted appellant. (See *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Despite appellant's claims to the contrary (AOB 68-73), there was substantial evidence to support his conviction without the section 1108 testimony. Not only was there scientific evidence that linked appellant to the murder, there was evidence that he had access to Monique and was acting strangely the night she disappeared. The evidence further showed that appellant had expressed a desire to "get" Monique when he spoke to his sister-in-law approximately one month before the murder.

First, contrary to appellant's claim, there was solid scientific evidence linking him to the murder. DNA tests showed that Monique's blood was predominately on the comforter on which she was discovered. However, in the area underneath Monique's genitalia, where it appeared fluid had leaked from her vagina and rectum, there was a small mixture of DNA found. The DNA had "faint" markers that were consistent with appellant's DNA. (7RT 1595-1602, 1674-1675.) This supported the theory that appellant raped Monique because it was consistent with his bodily fluids being mixed with Monique's during the course of the rape.

Additionally, Dr. Scheinin, the deputy medical examiner who performed the autopsy on Monique, found microscopic evidence of vaginal bleeding, which was consistent with sexual penetration before death. (6RT 1271-1281, 1286-1287, 1369-1370.) Dr. Ribe, a senior deputy medical examiner, who reviewed Dr. Scheinin's findings, concluded that there was "definite tissue

hemorrhage" in the vaginal area. (9RT 2137.) He showed the jury "clearly recognizable red blood cells" in the vaginal tissue that were "highly characteristic of tissue hemorrhage." (9RT 2138.) This evidence, coupled with the following facts, established that appellant sexually assaulted Monique before he killed her: (1) Monique was found naked in the vacant lot (6RT 1436-1440), which suggested there had been a sexual assault; (2) when Monique was found, fluids that had leaked from her vagina and/or rectum contained "faint markers" consistent with appellant's DNA (7RT 15995-1602, 1674-1675); and (3) the clothes that Monique had worn to bed the night she was killed were found under a pile of clothes in her closet (5RT 1109-1110, 1149-1150), which suggested Monique was disrobed inside her room.

In addition, carpet fibers found on the comforter were consistent with fibers on the front floorboard of appellant's car. (7RT 1588-1589; 8RT 1734-1740.) The condition of the carpet fibers were unique to appellant's car, which was an older-model Cadillac with faded red carpet. (7RT 1583-1585, 1588-1589; 8RT 1736-1737, 1878, 1883-1884.) This evidence supported the theory that, after he killed Monique, appellant put her body, which was wrapped in a comforter from her bedroom, on the front floorboard of his car. He then drove to the vacant lot and disposed of her body.

Moreover, Monique's DNA was consistent with DNA from the blood stain found on the interior lid of appellant's car trunk. (7RT 1599-1600, 1676-1679.) The presence of Monique's blood in the trunk of the car supported the theory that appellant was the perpetrator. William Moore, a forensic toxicologist, opined that the bright red color of the blood stain suggested that it had been shed while the person was alive. (7RT 1679.) Since there was no evidence that Monique had been in or near the trunk of appellant's car while she was still alive, the only reasonable inference was that Monique bled on appellant during the attack, and appellant transferred the blood to the trunk as

he worked to dispose of her body and clean up after the attack.

Appellant's left palm print, which was found on the doorframe of Monique's bedroom (7RT 1651-1654), also supports the theory that appellant was the perpetrator. The palm print was positioned in a way that suggested appellant was leaning on the door frame in an attempt to ensure that the door to Monique's room opened quietly. (7RT 1653-1654.) It also pointed to appellant's guilt because he was not permitted to be upstairs without an escort, and there was no evidence he was ever given permission to go to Monique's room. (5RT 1105, 1177; 6RT 1214-1215; 7RT 1506, 1551-1552.)

Appellant disputes this scientific evidence, claiming that the *absence* of certain items, such as appellant's fingerprints in Monique's bedroom, his head or pubic hair on the comforter found at the scene, or his semen on the sheet found in the driveway, demonstrated the weakness of the prosecution's theory that appellant snuck into Monique's room and sexually assaulted her. (AOB 69-70.) He further claims that the presence of other trace evidence not belonging to him, such as head hair and pubic hair on the comforter, blanket, bed sheet, and beds in Monique's room, undermined the prosecution's case. (AOB 70.) These claims must be rejected. The absence of fingerprints inside Monique's room did not weaken the prosecution's theory that he entered Monique's bedroom, sexually assaulted her, hid her clothes under a pile in the closet, and removed her from the room. It merely suggested appellant: (1) did not touch anything from which a print could be lifted while he was in Monique's room; (2) did not leave any fingerprints (see 7RT 1659), or (3) wiped surfaces that he touched with Monique's bed sheet or other cloth item. Likewise, the absence of appellant's hair on the comforter and the absence of his hair and bodily fluids on the blanket and bed sheet did not undercut the prosecution's theory of the case because, as Moore noted, appellant could have been wearing a condom during the assault, or he may not have ejaculated.

(7RT 1668-1676.) Further, the presence of hair that did not belong to appellant on the aforementioned bedding (8RT 1751-1754) was not surprising given that Monique shared a room with her sister, and six people lived in the house.

In addition to the scientific evidence, there was evidence that appellant had access to Monique and that he acted strangely the night she disappeared. Appellant had access to Monique because he was inside the house after everyone in the house had gone to bed. After returning to Monique's house with Joey earlier that night, appellant tried to coax Joey, who was intoxicated, out of his car, explaining that he (appellant) needed to go to work the next day. (5RT 1092-1093.) Joey would not get out of the car, so appellant sat with him until nearly 11:45 p.m. Joey then got out of the car, and appellant accompanied him upstairs to his room. Gabriel was inside the room when they arrived. After telling appellant and Gabriel to leave the room because he wanted to go to sleep, Joey locked his door and "passed out." Gabriel went to the restroom before going downstairs to his room. On the way to his room, Gabriel saw appellant's car parked outside, near the side door of the house. Gabriel never heard or saw appellant descend the stairs or leave the house that night. (5RT 1093-1094, 1154; 6RT 1210-1213; 7RT 1491.) Since appellant's car was still at the house when Gabriel went to bed (6RT 1211, 1213), there were no signs of forced entry into the house (5RT 1115-1116), and Gabriel was the last person to retire for the evening (6RT 1212-1213), it meant that appellant had remained inside the house after everyone went to bed. Thus, he had effortless access to Monique the night she disappeared.

Other than the footsteps on the creaky stairs that awoke Monique's mother at approximately 1:00 a.m., there were no other noises in the house the night Monique was killed. It is no surprise that Monique's family members did not hear any other noises. Josette testified that Monique was a heavy sleeper and, following an argument with Josette, had stopped locking the bedroom door

approximately a week and a half before her murder. (5RT 1109, 1181-1183; 7RT 1490.) Since Monique slept so heavily, it is not likely that she would have awakened and screamed when appellant entered her room. Additionally, appellant had lived at Monique's house for a while earlier that Spring. (5RT 1105, 1176-1177; 7RT 1505-1506.) Therefore he knew the layout of the house. He also knew exactly where Monique's room was located, and he knew that Monique's sister, Josette, was not home that night. (5RT 1169.) A random intruder would not have been so stealthy or known so much.

Moreover, the next morning, Monique's father found the side door of the house open, and the security screen unlocked. The door, which was adjacent to where appellant parked the night before, had been closed when Gabriel went to bed. (6RT 1208-1209, 1212-1213; 7RT 1541-1542, 1547.)

Appellant's odd behavior the night of Monique's disappearance, and his early-morning lie, also supported his conviction. At 2:30 a.m., Leonard Loy's neighbor, Howard Wilson, saw appellant slowly drive down the street. Wilson recognized appellant because appellant was living with Leonard at the time. Appellant circled the area three times and appeared to be looking for something. He then parked his car in a place that could not be seen from the house and, instead of entering Leonard's house and going to bed, he walked down the street, away from the house. (7RT 1563-1564, 1570, 1638-1642.) This strange behavior was consistent with someone who was trying to hide out for a while, and inconsistent with someone who was worried about being at work three and one-half hours later. (5RT 1092.)

Appellant also lied about his whereabouts when Josette called Leonard's house at approximately 7:30 a.m., looking for Monique. Appellant told Josette that he had returned to Leonard's house immediately after he dropped Joey off the night before. (5RT 1183-1184; 7RT 1555-1556.) However, appellant was not at Leonard's at 5:35 a.m., when Leonard's wife, Maria, was awakened by

the sound of appellant's alarm clock. (7RT 1569-1570.) He was, however, home and asleep on the couch when Maria got up at approximately 6:45 a.m. (7RT 1570-1571.) This lie demonstrated consciousness of guilt.

There was also evidence that appellant was upset with Monique, which likely motivated him to sexually assault and kill her. Approximately one month before Monique was killed, appellant told his sister-in-law, Maria, that he was angry because Monique had been telling his girlfriends about his past. During the conversation, appellant said, "you just wait and see. That little brat, I'll get to her. I don't know how, but I'll get to her." (7RT 1575-1576.) This evidence supported the jury's finding of guilt. (See *People v. Estep* (1996) 42 Cal.App.4th 733, 738 ["[M]otive is a circumstance that may tend to establish guilt."].)

Additionally, Monique's complaint to her friend Sara the week before she was murdered that appellant touched her chest and "crotch" (7RT 1723-1726) supported the theory that appellant was the perpetrator. Appellant's sexual touching of Monique manifested his intent to sexually molest her and supported the inference that he intended to molest her the night he killed her.

Appellant's claim that reversal is required because the evidence of his prior sexual offenses was "the centerpiece of the prosecutor's guilt phase case" (AOB 75) is unfounded. As discussed above, the evidence of appellant's prior sex crimes was presently quickly and discreetly. Only the victims testified, and the testimony was brief in the context of the entire trial. (See 6RT 1412-1435 [testimony of Ramona M.]; 7RT 1466-1482 [testimony of Lillian S.].) Moreover, although the prosecutor touched on the prior crimes evidence in closing argument, she in no way made it central to her case. (See 10RT 2200-2201, 2206-2207, 2294.) Her focus was on the scientific evidence (10RT 2198-2200, 2207-2214, 2274-2277, 2282-2284, 2288-2292), evidence showing appellant had access to Monique (10RT 2203-2206, 2278-2279, 2282),

evidence of appellant's consciousness of guilt (10RT 2201-2203, 2206, 2285), and evidence of motive (10RT 2207, 2214).

Appellant claims that he was prejudiced by introduction of the prior crimes evidence because the jury deliberations showed that this was a "close case." (AOB 75.) This claim is unavailing. The jurors began guilt-phase deliberations at 4:05 p.m. on December 1, 1998 (2CT 513), and they deliberated for 20 minutes -- until 4:25 p.m. (2CT 514). The jurors resumed deliberations the next day at 9:35 a.m., and they deliberated for a total of 4 hours, 10 minutes throughout the day. They also submitted three requests for readback -- one for readback of the DNA expert's testimony, another for readback of testimony regarding time-of-death calculations, and one for testimony relating to defense counsel's argument that Monique had been in appellant's car. (2CT 518-521.) The following day, December 3, 1998, the jury submitted an additional request for readback of the DNA expert's testimony. Excluding the time taken for the readback of testimony, the jurors deliberated for a total of 3 hours, 45 minutes on day three of deliberations. (2CT 522-523.) The fourth and final day, the jurors deliberated for only 37 minutes before rendering their verdict. (2CT 534.)

Given the length of the trial (12 days), the amount of complex scientific evidence presented, and the large number of witnesses who testified at trial, the overall length of the jury's deliberations (8 hours, 47 minutes) did not signify that this was a close case. As one appellate court has stated:

> The jury's deliberation of this mass of information over the course of [several] days speaks only for its diligence. . . . to conclude that this was a "close case" in light of the jury's actions "in the absence of more concrete evidence would amount to sheer speculation on our part. Instead, we find that the length of the deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty,

rather than its difficulty in reaching a decision." [Citation omitted.] (*People v. Houston* (2005) 130 Cal.App.4th 279, 301.)

Based on the foregoing, it is not reasonably probable that, absent the evidence of appellant's prior sexual offenses, the jury would have reached a different result in this case. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) For the same reasons, and to the extent appellant's Sixth, Eighth, or Fourteenth Amendments were violated by admission of the evidence, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

II.

THE COURT PROPERLY INSTRUCTED THE JURY ON HOW TO CONSIDER THE SECTION 1108 EVIDENCE

Appellant next claims that the "predisposition instruction" given in this case violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights because it permitted the jury to find him guilty by a preponderance of the evidence, not based on proof beyond a reasonable doubt. (AOB 82-101.) This claim must be rejected. The instructions regarding appellant's prior sexual offenses did not confuse or mislead the jury, nor did they unconstitutionally reduce the prosecution's burden of proof.

A. Relevant Proceedings

Prior to the testimony of Ramona M., the trial court gave the jury a modified version of CALJIC No. 2.50.01 (6th Ed. 1996), as stated in Argument I.A, *ante*.[7] At the close of the evidence, the court and the parties discussed how

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7. The instruction read as follows:

Evidence is going to be introduced at this time for the purpose of showing that [appellant] engaged in a sexual offense

to instruct the jury on the evidence of appellant's prior sexual offenses. The prosecutor suggested combining CALJIC No. 2.50 (Evidence of Other Crimes) with CALJIC No. 2.50.01 (Evidence of Other Sexual Offenses). She explained that CALJIC No. 2.50 would cover the lewd acts appellant committed against Monique the week before her death, as testified to by Sara M., and CALJIC No. 2.50.01 would cover the prior sexual offenses against Lillian S. and Ramona M. that were introduced under section 1108. (9RT 2163-2165.) After further discussion, the prosecutor noted that Sara M.'s testimony was "in fact, 1108 evidence" and, therefore, fell under CALJIC No. 2.50.01. (9RT 2167.) Appellant's counsel objected to the idea of combining the instructions, stating:

> If you're going to give the CALJIC instruction dealing with 1108, I think you should read 2.50.01. If the court makes the determination that

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> other than that charged in the case.
>
> Sexual offense insofar as the way I'm using it at this time for your instructions means a crime under the laws of the State of California that would involve something that would be a felony crime in the State of California.
>
> And at the end of the case, I'll give you elements of any crime that's discussed, in addition to the crime that is part of the information that you're making a decision on after all the evidence is in this case.
>
> If you were to find that the defendant did commit a prior sexual offense, you may, as jurors, but are not required to, infer that [appellant] had a disposition to commit the same or similar type of sexual offense. If you were to find that [appellant] had this disposition, you may, but are not required to infer he was likely to commit and did commit the crime for which he's accused in this case. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.
>
> So, in effect, what I've told you about with the language I told you, some evidence is allowed for a limited purpose in a case but not for all purposes. I've given you the limited purpose, and you'll get more instruction on this issue and maybe elements of the crime or crimes at the end of the case.

(6RT 1411-1412.)

the evidence from Sara M[.] is part of that, then it should just be given as 2.50.01 and not trying to create something else where, specifically, 2.50 is made for something different.

(9RT 2168.)

The court agreed to combine the two instructions so as to avoid repetition. (9RT 2165-2166.) It explained:

Tentatively, because I do believe if I give both, then there is two different rules of law we're talking about here, both protections to the defendant as well as things that might be argued that are helpful to the prosecution, it can cut both ways, I think I should give the two different concepts of law, but I should try to do them in one instruction. And I will probably follow the general suggestions that [the prosecutor] gave.

(9RT 2169.)

The Court subsequently instructed the jury regarding the prior crimes evidence as follows:

Evidence has been introduced for the purpose of showing that the defendant committed another or other crimes other than for which he is on trial.

If you find the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused.

It may also be considered for the limited purpose of determining if it tends to show:

The existence of the intent which is a necessary element of the crime charged;

The identity of the person who committed the crime, if any, of which the defendant is accused; or

A motive for the commission of the crime charged.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purpose.

(3CT 565-566; 10RT 2305-2306.) The instruction was a combination of CALJIC No. 2.50 (1998 rev.) and CALJIC No. 2.50.01 (6th ed. 1996). The court deleted the first sentence of paragraph two of CALJIC No. 2.50,[8/] and

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8. CALJIC No. 2.50 (1998 rev.) reads as follows:

Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he] [she] is on trial.

This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:

[A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show [the existence of the intent which is a necessary element of the crime charged] [the identity of the person who committed the crime, if any, of which the defendant is accused] [a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if defendant committed the other offense[s] defendant also committed the crime[s] charged in this case];]

[The existence of the intent which is a necessary element of the crime charged;]

[The identity of the person who committed the crime, if any, of which the defendant is accused;]

[A motive for the commission of the crime charged;]

[The defendant had knowledge of the nature of things

replaced it with paragraph number eight of CALJIC No. 2.50.01, which is italicized above. (See 3CT 565.)

The court also instructed the jury that the other crimes evidence had to be proved by a preponderance of the evidence:

> [T]he prosecution has the burden of proving by a preponderance of the evidence that the defendant committed the crime or crimes or sexual offense or sexual offenses other than that for which he is on trial. Do not consider the evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other crime or crimes or sexual offense or sexual offenses.

(CALJIC No. 2.50.1 (6th ed. 1996); 3CT 576; 10RT 2311.) The court did not give CALJIC No. 2.50.2, an instruction defining "preponderance of the evidence."

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found in [his] [her] possession;]

[The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;]

[The defendant did not reasonably and actually believe that the person with whom [he] [she] engaged or attempted to engage in a sexual act consented to this conduct;]

[The crime charged is a part of a larger continuing plan, scheme or conspiracy;]

[The existence of a conspiracy].

For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider this evidence for any other purpose.

B. The Jury Instructions Did Not Confuse Or Mislead The Jury Regarding Its Duty To Find Appellant Guilty With Proof Beyond A Reasonable Doubt

"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 756; accord, *People v. Holt* (1997) 15 Cal.4th 619, 677.) A reviewing court must look to the instructions as a whole to see whether there is a "reasonable likelihood" that the jury misunderstood the instructions as an appellant contends. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct 475, 116 L.Ed.2d 385]; *People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. Raley* (1992) 2 Cal.4th 870, 899; *People v. Kelly* (1992) 1 Cal.4th 495, 525-526; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147.) ""The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole. [Citation omitted.]"" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) Further, "'[i]nstructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1112.)

The instructions in this case could not have misled the jury into convicting appellant of the current crime based on a preponderance of the evidence. "Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether [the] defendant committed a prior sexual offense." (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1016 [case that upheld the constitutional validity of the 1999 version of CALJIC No. 2.50.01].) Reading the jury instructions as a whole, it is clear the jury understood that the prosecution had the burden of proving every element of the charged offense

beyond a reasonable doubt and it could not convict appellant solely on proof of the other crimes. (See 3CT 579 [CALJIC No. 2.61 (Defendant May Rely on State of Evidence)], 584 [CALJIC No. 2.90 (Presumption of Innocence -- Reasonable Doubt -- Burden of Proof)], 593 [CALJIC No. 8.21 (First Degree Felony-Murder)], 596 [CALJIC No. 8.71 (Doubt Whether First or Second Degree Murder)], 597 [CALJIC No. 8.80.1 (Post June 5, 1990 Special Circumstances -- Introductory)], 607 [CALJIC No. 17.10 (Conviction of Lesser Included or Lesser Related Offense -- Implied Acquittal First)].)

In *People v. Reliford, supra*, 29 Cal.4th 1007, this Court found that the 1999 version of CALJIC No. 2.50.01 was constitutional.[9] (*Id.* at p. 1016.) The difference between the 1999 version of CALJIC No. 2.50.01 and the pre-1999 version of the instruction used in this case is that, in the 1999 version, the penultimate paragraph includes a provision that a finding by a jury by a preponderance of the evidence that the defendant had committed the prior acts was insufficient by itself to prove that the defendant committed the charged offenses beyond a reasonable doubt. (*Id.* at p. 1012.) As to the first part of the instruction, which is the same in both versions, this Court found that the inference permitting "jurors to infer the defendant has a disposition to commit sex crimes from evidence the defendant has committed other sex offenses[,]" was "a reasonable one." (*Ibid.*) Regarding the second part of the instruction, which is also the same in both versions, this Court found "legitimate" the inference that jurors "may -- but are not required to -- infer from this predisposition that the defendant was likely to commit and did commit the charged offense." (*Id.* at p. 1013.) In other words, "[a] jury may use 'the evidence of prior sex crimes to find that defendant had a propensity to commit such crimes, which in turn may show that he committed the charged offenses.'"

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9. CALJIC No. 2.50.01 has been revised twice since it went into effect in 1996 -- first in 1999, and again in 2002.

(*Ibid.*, quoting *People v. Falsetta*, *supra*, 21 Cal.4th at p. 923.) The question is whether the pre-1999 version of CALJIC No. 2.50.01 is deficient because it lacks language similar to the language contained in the penultimate paragraph of the 1999 version of the instruction.[10/] Respondent submits the answer is "no."

There is a split of authority regarding the constitutionality of the pre-1999 version of CALJIC No. 2.50.01. Several appellate courts have held that when the pre-1999 version of CALJIC No. 2.50.01 is considered together with instructions on reasonable doubt and the elements of the charged offense, there is no reasonable likelihood a jury would base a conviction on an unconstitutionally lenient standard of proof or solely on evidence of uncharged offenses. (See *People v. Jeffries* (2000) 83 Cal.App.4th 15, 24-25 [pre-1999 version of CALJIC No. 2.50.01 adequately conveyed the prosecution's burden of proof beyond a reasonable doubt, in light of other given jury instructions]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1396-1398 [in light of other given jury instructions, giving pre-1999 version of CALJIC No. 2.50.01 and CALJIC No. 2.50.1 did not permit jury to convict defendant of charged offenses on less than proof beyond a reasonable doubt]; *People v. O'Neal* (2000) 78 Cal.App.4th 1065, 1078-1079 [pre-1999 version of CALJIC No. 2.50.01 did not improperly allow jury to convict based solely on evidence of defendant's prior sexual offense]; *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1063-1064 [giving pre-1999 version of CALJIC No. 2.50.01 and

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10. The penultimate paragraph of the 1999 version of the instruction reads:

> However, if you find [by a preponderance of the evidence] that the defendant committed [a] prior sexual offense[s], that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged crime[s]. The weight and significance of the evidence, if any, are for you to decide.

CALJIC No. 2.50.1 did not violate due process when viewed in context of instructions as whole]; *People v. Van Winkle*, *supra*, 75 Cal.App.4th 133 [CALJIC Nos. 2.50.01 and 2.50.1 would not mislead a jury into convicting the accused of the current crime based on a preponderance of the evidence].)

Other cases have held that giving the pre-1999 version of CALJIC No. 2.50.01 constituted error. (See *People v. Frazier*, *supra*, 89 Cal.App.4th at pp. 34-38 [giving modified version of pre-1999 version of CALJIC No. 2.50.01 constituted error; error was not harmless beyond a reasonable doubt]; *People v. Orellano* (2000) 79 Cal.App.4th 179, 184-186 [giving pre-1999 version of 2.50.01 and CALJIC No. 2.50.1 was reversible error because court had no way of knowing whether jury had applied correct burden of proof]; *People v. Vichroy* (1999) 76 Cal.App.4th 92, 99-101 [giving pre-1999 version of CALJIC No. 2.50.01 was reversible error because it permitted jury to convict defendant based solely on finding that he had committed prior sexual offenses even though jury was instructed to determine prior offenses beyond a reasonable doubt]; cf. *People v. James* (2000) 81 Cal.App.4th 1343, 1349-1365 [although giving pre-1999 version of CALJIC No. 2.50.02 (instruction defining permissible use of evidence of prior offense involving domestic violence), along with CALJIC No. 2.50.1, reduced the prosecution's burden of proving each element of the charged offense, error was harmless beyond reasonable doubt].)[11/]

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11. In *Gibson v. Ortiz* (2004) 387 F.3d 812, a case relied upon by appellant (AOB 90-93), the Ninth Circuit Court of Appeals affirmed the grant of federal habeas relief to a defendant who received instructions similar to the ones given in this case. The Court held that the interplay of CALJIC Nos. 2.50.01 and 2.50.1 permitted the jury to find the defendant guilty by relying on facts found by a preponderance of the evidence and inferring that he had committed the charged acts based upon facts not found beyond a reasonable doubt. (*Id.* at pp. 822-823.) This Court is not bound by *Gibson*. (See *People v. Seaton* (2001) 26 Cal.4th 598, 653 [opinions of lower federal courts may be instructive or persuasive in the context of issues presented in those federal

Respondent submits this Court should adopt the position of the courts that have upheld the pre-1999 version of the instruction, especially on the facts of this case.[12/] Neither the modified version of CALJIC No. 2.50 (which included the "disposition" language from CALJIC No. 2.50.01), nor CALJIC No. 2.50.1 suggested that the current crime could have been proved by a preponderance of the evidence; the instructions expressly applied only to *prior* crimes. When CALJIC Nos. 2.50.01 and 2.50.1 are considered together with the instructions on reasonable doubt and the elements of the charged offense, there is no reasonable likelihood the jury based appellant's conviction on anything less than proof beyond a reasonable doubt. (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1016 [this Court looked to see whether it was "reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof"].)

In this case, there was only one charged offense: special-circumstance

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cases, but they are not binding on this Court]; *People v. Williams* (1997) 16 Cal.4th 153, 190; *People v. Bradford* (1997) 15 Cal.4th 1229, 1305.)

12. The cases holding that the pre-1999 version of CALJIC No. 2.50.01 constituted error are flawed because they examined CALJIC No. 2.50.01 in isolation, which is contrary to what the jury was instructed in this case. (See CALJIC No. 1.01; CT 556; see *People v. Frazier*, *supra*, 89 Cal.App.4th at p. 35 [the court found the pre-1999 version of CALJIC No. 2.50.01 "constitutionally infirm because it instructed the jurors they could convict defendant of the current charges based solely on their determination he had committed prior sexual offenses. No other instruction effectively countered this misstatement of law"]; *People v. Orellano*, *supra*, 79 Cal.App.4th at pp. 184 ["If the jury followed [CALJIC Nos. 2.50.01, 2.50.1, and 2.50.2] literally and arrived at a guilty verdict in that manner, appellant was denied his due process right to require proof beyond a reasonable doubt of every fact necessary to constitute the charged crimes."]; *People v. Vichroy*, *supra*, 76 Cal.App.4th at p. 99 ["The constitutional infirmity arises in this case because the jurors were instructed that they could convict appellant of the current charges based solely upon their determination that he had committed prior sexual offenses. CALJIC No. 2.50.01, as given, required no proof at all of the current charges"].)

murder (1CT 140-142), and the jury was instructed on the elements of the offense (3CT 591, 593, 599). If CALJIC No. 2.50.01 permitted the jury to "rest a conviction solely on evidence of prior offenses," as appellant suggests (AOB 94), it would have rendered CALJIC No. 2.90, which was also given (CT 584), "mere surplusage." (See *People v. Regalado*, *supra*, 78 Cal.App.4th at p. 1063.) Further, appellant's interpretation of the instructions (AOB 94) "would require every jury instruction addressing evidence or elements of a crime to refer to the reasonable doubt instruction. This would render superfluous the instruction given in this case [CT 556] requiring the jury to '[c]onsider the instructions as a whole' and not to 'single out any particular sentence or individual point or instruction and ignore the others.' (See CALJIC No. 1.01.)" (*People v. Waples*, *supra*, 79 Cal.App.4th at p. 1397.) The reasonable and logical meaning of the instructions here were to allow an inference that appellant committed the sexual assault as the prosecution contended, but the jury was still required to find appellant guilty beyond a reasonable doubt as to the elements of the crime as they were instructed.

Additionally, the trial court's instructions and the parties' arguments to the jury ensured that the jury understood that the prosecution had the burden of proving the charged offense beyond a reasonable doubt. During voir dire, the court read CALJIC No. 2.90 to the prospective jurors and then stated: "That's the instruction on reasonable doubt that you will be following when you gauge and judge the evidence, the proof in the case, make the determinations on what's proved and what's true in the case." (5RT 955.) The court also read CALJIC No. 2.02, the circumstantial evidence instruction, to the prospective jurors. This instruction restates the reasonable doubt standard. (See *People v. Reliford*, *supra*, 29 Cal.4th at p. 1016; *People v. Carpenter* (1997) 15 Cal.4th 312, 383.) At the close of evidence, the court again read CALJIC Nos. 2.90 and 2.02 to the jurors. (CT 562, 584; 10RT 2303-2304, 2315.) Further, as

noted above, many of the other jury instructions referred to the reasonable doubt standard. (See 3CT 579 [CALJIC No. 2.61 (Defendant May Rely on State of Evidence)], 593 [CALJIC No. 8.21 (First Degree Felony-Murder)], 596 [CALJIC No. 8.71 (Doubt Whether First or Second Degree Murder)], 597 [CALJIC No. 8.80.1 (Post June 5, 1990 Special Circumstances -- Introductory)], 607 [CALJIC No. 17.10 (Conviction of Lesser Included or Lesser Related Offense -- Implied Acquittal First)].)

The parties also referred to the burden of proof in closing argument. Indeed, the prosecutor referred to CALJIC No. 2.90 as "[t]he most important instruction." (10 RT 2191.) She told the jurors:

> The instructions will tell you, beyond a reasonable doubt. The most important instruction, important for the defendant and important for the prosecution, as well, tells you that the presumption places on the People, the prosecution, the burden of proving beyond a reasonable doubt. As we talked about in voir dire, that is not beyond a shadow of a doubt. That is not beyond all possible doubt. [¶] . . . [¶] So when you are assessing the evidence, you are looking at it as a whole. If you have a doubt, if you have a question, look at it and say, does this lead to possible doubt? Is this important? Is this -- how does this look in terms of all the other evidence? [¶] If it's not important, if it's only a possible doubt, then you need to disregard that. But if it's a reasonable doubt, then you have to look at all the other evidence, and if there is reasonable doubt, then the defendant is not guilty.

(10RT 2191-2192.) Appellant's counsel echoed the reasonable doubt standard in his closing. (10RT 2215-2216.) The emphasis on the reasonable doubt instructions left no room for a mistake regarding the burden of proof in this case, especially since there was only one crime charged. In effect, the jury was given the penultimate paragraph of the 1999 version of CALJIC No. 2.50.01

through the instructions given and the arguments of the parties. Thus, it is not reasonably likely the jury convicted appellant on "a lowered standard of proof." (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1016.)

III.

THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF SARA M.

Appellant next contends the trial court erred in admitting the testimony of Monique's friend, Sara M. He claims that admission of the evidence violated his rights to confrontation, due process of law, a fundamentally fair trial, and a reliable determination of guilt and penalty. (AOB 102-119.) Sara testified that, during a telephone conversation she had with Monique a week before Monique disappeared, Monique told her that appellant had touched her inappropriately. (7RT 1722-1726.) The court admitted the evidence, and its ruling did not infringe on appellant's constitutional rights.

A. Factual Background

Immediately before Sara was called to the stand at trial, appellant objected to her proposed testimony on the ground that it was hearsay. (7RT 1704-1705, 1709-1710.) He noted that it was not clear when appellant allegedly groped Monique, nor was there evidence that Monique was referring to appellant when she complained to Sara about the conduct of her "uncle." (7RT 1710.) Appellant also asked the court to exclude the proposed testimony under section 352 in the event it overruled his hearsay objection. (*Ibid.*) The prosecutor argued that the testimony fell under the "spontaneous statement" exception to the hearsay rule (Evid. Code, § 1240) and was otherwise admissible under the "fresh complaint" doctrine. (7RT 1705-1706, 1710.) She said that, contrary to appellant's claim, the "when" and the "who" were not

issues because Sara would testify that the conduct occurred the day Monique talked to Sara and that Monique specifically identified appellant as the perpetrator. (7RT 1710-1711.) The prosecutor noted, on the issue of the fresh complaint doctrine, the statements by Monique showed a "continuing course of conduct by" appellant that were not subject to exclusion just because she was killed before she reported the assault. With regard to the "spontaneous" nature of Monique's statements, Monique sounded upset and cried and said that she was scared when she told Sara what appellant had done to her. (7RT 1712.)

The court admitted the evidence "based upon all the law [it had] read." It also performed a section 352 analysis and found that, "on balance, the evidence should and properly would be before the trier of fact." (7RT 1713.)

In light of the court's ruling, appellant's counsel asked that he be permitted to question Sara regarding other statements that Monique made about 18- and 19-year-old-boys "banging on her window" and "asking her to come out late at night." (7RT 1713-1716.) Sara was examined outside the jury's presence to help the court evaluate what evidence would be admitted. At the hearing, Sara testified that she spoke with Monique almost every day when she was alive and that, during a conversation she had with Monique approximately a week before Monique disappeared, Monique told her that she was uncomfortable around appellant because he would touch her "private parts." Monique was crying during the conversation. During a prior conversation, Monique told Sara that she was upset because "older guys" had banged on her window at night. (7RT 1717-1721.) Following the hearing, the court ruled that appellant would be able to question Sara about her earlier conversation with Monique, in which Monique told Sara about the "older boys" at her window. (7RT 1721.) Sara then testified as summarized in the Statement of Facts, *ante*.

B. Monique's Statements Were Admissible Under Evidence Code Section 1240

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Accord, *People v. Morrison* (2004) 34 Cal.4th 698, 718; *People v. Poggi* (1988) 45 Cal.3d 306, 318.) "For purposes of the exception, a statement may qualify as spontaneous if it is undertaken without deliberation or reflection." (*People v. Morrison, supra*, 34 Cal.4th at p. 718; *People v. Farmer* (1989) 47 Cal.3d 888, 903, disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724.)

The underlying rationale of this exception is that "in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief. [Citations.]" (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234.) As a result, the declarant need not be unavailable for this exception to apply. (*People v. Anthony O.* (1992) 5 Cal.App.4th 428, 436.)

Trial courts are given wide discretion in determining whether a statement qualifies as a spontaneous declaration under Evidence Code section 1240 because this determination is largely a question of fact. (*People v. Roybal* (1998) 19 Cal.4th 481, 516; *People v. Poggi, supra*, 45 Cal.3d at pp. 318-319.) On appeal, a trial court's finding on this issue will not be disturbed unless those facts upon which it relied are not supported by a preponderance of the evidence. (*People v. Trimble, supra*, 5 Cal.App.4th at p. 1234; accord, *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 177-178.)

Here, the trial court acted well within its discretion in admitting Monique's statement to Sara under Evidence Code section 1240. The statement

not only described an act that Monique perceived, it was also made under the immediate influence of stress caused by the event. (Evid. Code, § 1240; *People v. Morrison*, *supra*, 34 Cal.4th at p. 718.) Sara testified that she called Monique a week before Monique disappeared. When Monique answered the telephone, Sara sensed in Monique's voice that something was bothering her. Sara immediately asked Monique, "What's wrong?" (7RT 1723-1724.) Monique cried as she told Sara that appellant had touched her chest and grabbed her crotch before Sara had called. (7RT 1724-1725, 1729-1730.) Monique also said that she was afraid of appellant because he had been giving her "weird looks" and had been "sneak[ing] up to her room" to touch her. (7RT 1725-1726.) Thereafter, Monique made Sara promise not to tell anyone about appellant's conduct. (7RT 1726.)

Monique's statement qualified as a spontaneous declaration under Evidence Code section 1240. Monique was unquestionably under the stress of the event when she made the statement. She was crying and talking in a low tone, and Sara immediately sensed that something was wrong when Monique answered the telephone. (7RT 1718, 1724.) That Monique was so emotional when she received Sara's unexpected call showed that her statement was made "without deliberation or reflection." (*People v. Morrison*, *supra*, 34 Cal.4th at p. 718; *People v. Farmer*, *supra*, 47 Cal.3d at p. 903.) Monique's request that Sara not disclose her statements to anyone also suggested that she "blurted" out her statements about appellant while under the stress of the event. (See *People v. Farmer*, *supra*, 47 Cal.3d at p. 904.)

> The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . not the nature of the statement but the mental state of the speaker. The nature of the utterance – how long it was made after the startling incident and whether the speaker blurted it out, for example – may be

important, but solely as an indicator of the mental state of the declarant.

. . . .

(*People v. Farmer*, *supra*, 47 Cal.3d at pp. 903-904; accord, *People v. Williams* (2006) 40 Cal.4th 287, 318; *People v. Brown* (2003) 31 Cal.4th 518, 541; *People v. Roybal*, *supra*, 19 Cal.4th at p. 516.)

Appellant contends that Sara's testimony should have been excluded because there was no evidence to establish "when [appellant] had inappropriately touched Monique or that it occurred right before Monique made the [] statements." (AOB 105.) Although the record does not reflect how much time elapsed between when appellant touched Monique and when Monique spoke to Sara, the lapse of time is not dispositive because, as shown above, the statements "'" were made under the stress of excitement and while the reflective powers were still in abeyance."' [Citations.]" (*People v. Brown*, *supra*, 31 Cal.4th at p. 541.) Moreover, the fact that Monique was crying and speaking in a low voice raised a reasonable inference that the event had just occurred.

Additionally, although Monique's statements were in response to a question by Sara, the spontaneity of Monique's statements was not compromised. Answers to simple inquiries such as "What happened?" and "How did it happen?" have been held to be spontaneous. (See *People v. Morrison*, *supra*, 34 Cal.4th at p. 719 [shooting victim's response to officer's question "who did it" was admissible]; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [replying to questions does not necessarily negate spontaneity]; *People v. Poggi*, *supra*, 45 Cal.3d at pp. 319-320 [same].) "'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.'" (*People v. Raley*, *supra*, 2 Cal.4th at p. 893, quoting *People v. Washington* (1969) 71 Cal.2d 1170, 1176.)

Based upon the foregoing, it cannot be said that the trial court abused its discretion in admitting Sara's testimony under the spontaneous declaration exception to the hearsay rule.

C. Sara's Testimony Was Also Admissible Under The Fresh Complaint Doctrine

Under the common law fresh-complaint doctrine, evidence that the victim of a sexual offense reported the offense to another person shortly after its occurrence is admissible in the prosecution's case-in-chief. (*People v. Brown* (1994) 8 Cal.4th 746, 748.) Such statements are admissible only to show that a complaint was made by the victim and not for the truth of the matter stated in the complaint. (*Id.* at pp. 755-756; *People v. Burton* (1961) 55 Cal.2d 328, 351.) Thus, the evidence does not constitute hearsay because it is not offered for its truth. (*People v. Brown, supra*, 8 Cal.4th at p. 763 ["evidence of the fact of, and the circumstances surrounding, an alleged victim's disclosure of the offense may be admitted in a criminal trial for nonhearsay purposes"].)

In *People v. Brown, supra*, 8 Cal.4th 746, this Court declined to abolish the fresh-complaint doctrine and, instead, reaffirmed its viability. This Court held

> . . . proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose -- namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others -- whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred.

(*People v. Brown, supra*, 8 Cal.4th at pp. 749-750.) The "fact of the victim's disclosure" does not extend to details of the incident, but refers to the fact that

the complaint was made. (*People v. Brown, supra*, 8 Cal.4th at p. 756.) This Court reasoned that "[a]dmitting evidence of the complaint eliminates the risk that the jury might erroneously infer that the victim never made a complaint. In some cases, that inaccurate inference could cause a jury to reach the unwarranted conclusion that the offense did not take place." (*Id.* at p. 761.)

In this case, contrary to appellant's argument (AOB 109-110), evidence that Monique told Sara that appellant had "touched" her chest and crotch was admissible under the fresh complaint doctrine on the issue of whether the murder was committed during the commission of a lewd and lascivious act on a child under the age of 14 years. Sara's testimony was limited to the fact that Monique complained that appellant sexually touched her a week before the incident. No details of the incident were introduced, other than the fact that Monique complained of appellant's misconduct. Thus, admission of the evidence was proper because it was limited to that which was necessary to establish the fact of the complaint and the circumstances of its disclosure. (See *People v. Brown*, *supra*, 8 Cal.4th at p. 760.)

The fresh complaint doctrine has traditionally applied to cases where the complaint relates to the charged offense. Here, the complaint referred to an uncharged act. Since *Brown* focused on the relevance of the complaint in a case, respondent submits evidence of Monique's complaint to Sara was admissible here because it "eliminate[d] the risk that the jury might erroneously infer that the victim never made a complaint." (*People v. Brown, supra*, 8 Cal.4th at p. 761.)

D. Sara's Testimony Was Admissible Under Both Evidence Code Sections 1101 And 1108

The prosecution sought to introduce Monique's statements to Sara the week before she was killed to show appellant's intent to commit lewd and

lascivious acts against Monique. (7RT 1711.) The evidence was also relevant to the issue of identity. Appellant claims the evidence was inadmissible under both Evidence Code sections 1101 and 1108. (AOB 110-111.) Not only have these claims been forfeited, they lack merit.

1. Section 1108

First, Sara's testimony was admissible under section 1108, which permits, subject to section 352, the admission of evidence that the defendant committed uncharged sexual offenses where the defendant is charged with a sexual offense. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 916-917.) In this case, appellant was charged with special-circumstance murder, where the special circumstance was lewd and lascivious conduct on a child under the age of 14 years, a sexual offense. Since appellant was charged with an offense that involved a sexual offense, his prior uncharged sexual offense against Monique, the same minor victim, was admissible. (*Ibid.*; see *People v. Walker* (2006) 139 Cal.App.4th 782, 798 ["Although murder, standing alone (Pen. Code, § 187, subd. (a)), is not one of the offenses enumerated in section 1108, subdivision (d)(1), there can be no question certain murder charges would qualify as "sexual offenses" within the meaning of that provision -- for example, a charge of first degree murder alleging special circumstances under Penal Code section 190.2, subdivision (a)(17)(C), (D), (E), (F) and (K) (murder committed while the defendant was engaged in, or accomplice in, commission of, attempted commission of, or immediate flight after committing, or attempting to commit rape, sodomy or other specified sexual crimes)."].)[13/]

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13. The question whether felony murder, predicated on an underlying felony of rape, constitutes a "sexual offense" within the meaning of section 1108 is currently before this Court in *People v. Story*, review granted April 23, 2008, S161044.

Appellant disputes the admissibility of Sara's testimony on the ground the prosecution failed to provide notice that it intended to introduce Sara's testimony pursuant to section 1108. He does not claim that the evidence would have been otherwise inadmissible under section 1108. (AOB 110-111.) Appellant's claim must be rejected because he forfeited the claim by failing to object on that ground below. (See *People v. Raley*, *supra*, 2 Cal.4th at p. 892 ["'questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.' [Citations.]"]; *People v. Vichroy*, *supra*, 76 Cal.App.4th at p. 97.) In fact, during a discussion of jury instructions, appellant's counsel did not dispute the applicability of section 1108. (See 9RT 2168 ["If the court makes the determination that the evidence from Sara M[.] is part of [section 1108]," then CALJIC No. 2.50.01, not CALJIC No. 2.50, should be given"].) Since appellant failed to object to Sara's testimony on the ground that it violated the notice requirement of section 1108, he has forfeited his claim.[14/]

2. Evidence Code Section 1101, Subdivision (b)

Sara's testimony was also admissible under Evidence Code section 1101, subdivision (b), as it was relevant to the issues of intent and identity. Although evidence of a defendant's prior bad acts is inadmissible when it is offered to show that a defendant had the criminal propensity to commit the charged crime

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14. Imposition of state procedural bars advances important institutional goals in the state criminal justice system (see *In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 1) and precludes subsequent federal habeas review of the claim, except under a narrow class of exceptions. (*Coleman v. Thompson* (1991) 501 U.S. 722, 750 [111 S.Ct. 2546, 115 L.Ed.2d 640].) Accordingly, respondent requests that this Court explicitly rule on its waiver argument, *even if* this Court decides, alternatively, that appellant's contention fails on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10 [109 S.Ct. 1038, 103 L.Ed.2d 308].)

(Evid. Code, § 1101, subd. (a)), such evidence is admissible when "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [the defendant's] disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) Though relevant, evidence offered under Evidence Code section 1101, subdivision (b), must also satisfy the admissibility requirements of section 352. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404; accord, *People v. Carter* (2005) 36 Cal.4th 1114, 1147.)

Appellant's claim that the evidence was inadmissible under Evidence Code section 1101 has been forfeited because he failed to object on that ground below. (*People v. Thomas* (1992) 2 Cal.4th 489, 519-520.) Even if this Court considers the claim, it has no merit. Sara's testimony was admissible to show appellant's intent and identity in committing the charged lewd and lascivious special circumstance on Monique. To be admissible to show intent, "the [prior] misconduct and the charged offense [need only be] sufficiently similar to support the inference" that the defendant "'probably harbor[ed] the same intent in each instance. . . .'" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402, quoting *People v. Robbins* (1988) 45 Cal.3d 867, 879; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1244.) "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) "'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation omitted.]" (*Ibid*; accord, *People v. Abilez, supra*, 41 Cal.4th at p. 500.)

Here, appellant's acts of touching Monique's chest and "crotch" a week before her death showed that he had a sexual interest in Monique, consistent with an intent to molest her the night he killed her. The similar acts of sexual

molestation supported the inference that appellant "'probably harbor[ed] the same intent in each instance. . . .'" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) Appellant's conduct a week before the murder also corroborated his identity as the perpetrator, a disputed issue in the case (see 10RT 2269-2273). On both occasions, appellant slipped into Monique's room, a room that he was not permitted to enter (5RT 1105, 1177; 7RT 1506), and sexually touched Monique. This evidence supported the inference that appellant committed both acts. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.) In sum, Sara's testimony regarding appellant's prior molestation of Monique was admissible under Evidence Code section 1101, subdivision (b).[15/]

E. Appellant's Claim That The Admission of Sara's Testimony Violated His Federal Constitutional Rights Must Be Rejected

Appellant next claims that the admission of Sara's testimony violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 112-116.) However, appellant's argument relates only to the purported violation of his Confrontation Clause rights under the Sixth Amendment. (*Ibid.*) This Court need not address issues that are not supported with appropriate argument or citation to relevant authority. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1182; *People v. Hardy* (1992) 2 Cal.4th 86, 150.) Further, in the trial court, appellant objected to Sara's testimony on the ground that it violated state hearsay rules; he did not raise any federal objections below. (7RT 1709-1710.) Thus, other than the possibility of a narrow due process claim (*People v.*

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15. Appellant does not address the effect of section 352 in this context. (See AOB 110-112.) The evidence would not have been barred under section 352 because it was highly probative of appellant's intent to molest Monique and it showed he had access to her. Further, Sara's testimony was brief (it covered eight pages of transcript in a 12-day trial) and it was not inflammatory, especially when compared to the charged offense or other uncharged prior sexual offenses that were admitted at trial.

Partida (2005) 37 Cal.4th 428, 431), appellant's federal constitutional claims are forfeited by his failure to object on those grounds below. (See *People v. Partida*, *supra*, 37 Cal.4th at p. 435 ["A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct"]; *id.* at p. 431 [a party "may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process"]; *People v. Gurule* (2002) 28 Cal.4th 557, 592, fn. 4 [failure to object to witness's testimony on due process grounds forfeited claim on appeal].)

To the extent this Court entertains appellant's federal constitutional claim, it must be rejected. Citing *Winzer v. Hall* (9th Cir. 2007) 494 F.3d 1192, appellant claims that admission of Sara's testimony violated his Confrontation Clause rights. In *Winzer*, a case on federal habeas corpus, the Ninth Circuit Court of Appeals determined that, based on the facts of that case, the victim's statements to a police officer five hours after a domestic violence incident did not fall within the spontaneous declaration exception to the hearsay rule and admission of the statements violated the defendant's Sixth Amendment right to confront the victim. (*Id.* at pp. 1200-1201.) *Winzer* is neither controlling, nor persuasive here.[16/]

In *Winzer*, the victim told a 911 operator, several hours after the fact, and a police officer, five hours after the fact, that her boyfriend had threatened her with violence. (*Winzer v. Hall*, *supra*, 494 F.3d at p. 1195.) The trial court did not admit the 911 call under the spontaneous declaration exception to the hearsay rule on the ground the victim was not acting under the stress of the initial event when she made the call. The court noted that the victim was calm

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16. Again, the opinions of lower federal courts may be instructive or persuasive in the context of issues presented in those federal cases, but they are not binding on this Court. (See *People v. Seaton*, *supra*, 26 Cal.4th at p. 653; *People v. Williams*, *supra*, 16 Cal.4th at p. 190; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1305.)

during the call and she discussed matters unrelated to the alleged threat. (*Ibid.*) The court did, however, admit the victim's subsequent statements to a police officer as "spontaneous statements" because the victim and her daughter appeared to be "'visibly upset, emotionally upset, almost to the point of shaking, [and] fearful'" at the time the officer talked to them. (*Ibid.*)

On federal habeas, the United States District Court denied Winzer's habeas petition. The Ninth Circuit reversed, finding that the victim's statements to the police officer were admitted in violation of the Confrontation Clause because they were not spontaneous and they violated Winzer's right to confront the victim. (*Winzer v. Hall, supra*, 494 F.3d at pp. 1200-1201.) The court reasoned that "the mere fact that [the victim] was upset as she spoke would not make her utterance reliable" and that "[j]ust because a subject is or appears to be upset offers no guarantee that he has not taken time to consider the matter. The subject may be upset precisely because he's had time to reflect, or he may feign emotional distress in a calculated effort to appear more credible." (*Id.* at p. 1200.)

In this case, unlike *Winzer*, the evidence does not support an inference that Monique had "hours to reflect, to forget, to embellish, to be distracted, and to talk with . . . others" before she told Sara about how appellant touched her. (See *Winzer v. Hall, supra*, 494 F.3d at p. 1200.) Monique was obviously distressed when she answered Sara's telephone call because she was crying and talking in a low tone as she conveyed what appellant had done to her. (7RT 1718, 1724.) There was no evidence that Monique had "hours to reflect" on or "embellish" the incident (*Winzer v. Hall, supra*, 494 F.3d at p. 1200) before speaking with Sara, especially given the fact that Monique was not necessarily expecting Sara's call. Also, Monique made Sara promise not to tell anyone about the incident. (7RT 1726.) Since Monique did not intend to have the information disclosed to anyone, she had no reason to "feign emotional distress

in a calculated effort to appear more credible." (*Winzer v. Hall*, 494 F.3d at p. 1200.) In short, appellant's rights under the Confrontation Clause were not violated here.

F. Any Error In Admitting Sara's Testimony Was Harmless

In the event the trial court erred in admitting Sara's testimony, any error was harmless as it is not reasonably probable that a result more favorable to appellant would have been reached in the absence of error. (*People v. Geier* (2007) 41 Cal.4th 555, 588; *People v. Watson*, *supra*, 46 Cal.2d at p. 837.) Indeed, even without Sara's testimony, there was overwhelmingly evidence of appellant's guilt. (See Argument I.D, *ante*.) Further, the evidence was brief -- it occupied eight pages of transcript in a 12-day trial, it was not central to the prosecutor's closing argument (see 10RT 2200, 2214, 2287, 2294), and it was arguably helpful to the defense because Sara's testimony that Monique had told her that boys would visit her late at night (7RT 1727-1729) provided evidence that could have affected the identity issue in the minds of the jurors.

IV.

THE TRIAL COURT PROPERLY ADMITTED FAULKNER'S TESTIMONY REGARDING THE APPROXIMATE TIME MAGGOTS APPEARED ON MONIQUE'S BODY

Appellant claims the testimony of entomologist David Faulkner should not have been admitted because it was based on inadmissible hearsay and thus violated his Sixth Amendment right to confront and cross-examine witnesses against him. He also perfunctorily claims that admission of the evidence violated his rights to due process and a reliable penalty determination under the

Eighth and Fourteenth Amendments.[17] (AOB 120-127.) This claim is meritless, and any error was harmless.

A. Relevant Proceedings

At trial, David Faulkner, an entomologist, testified that, based on the stage of development of maggots recovered from Monique's body, the maggots would have been "associated with their host," i.e., on Monique's body, for 3.5 to 3.7 days before her body was discovered. (8RT 1769-1773.) This meant that the maggots would have appeared on Monique's body sometime between 10:00 a.m. and 2:00 p.m. on May 9, 1996. (8RT 1774-1775.) In reaching his opinion, Faulkner explained that he identified and examined the "developmental stages" of two maggot samples -- one collected on May 13, 1996, and the other collected on May 14, 1996. (8RT 1773-1774.) During direct examination, appellant's counsel objected to Faulkner's testimony on the ground that it lacked foundation:

> [THE PROSECUTOR]: Did you do some calculation to determine, in terms of when they were collected, when would be the time they could first be deposited or the host would be available to the insect?
>
> [FAULKNER]: What I did was to look at the time when the specimens were removed from the victim and actually preserved, which stops or terminates their development, and then went backwards to determine how long they would have been associated with the victim.
>
> [THE PROSECUTOR]: So the time that they were -- their development was terminated because of collection and preservation

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17. As mentioned previously, this Court need not address issues that are not supported with appropriate argument or citation to relevant authority. (See *People v. Barnett*, *supra*, 17 Cal.4th at p. 1182; *People v. Hardy*, *supra*, 2 Cal.4th at p. 150.)

would be what day?

[FAULKNER]: That, I believe, was on --

[DEFENSE COUNSEL]: Objection. No foundation.

THE COURT: Do you have sufficient information from what you've told us to answer that question?

[FAULKNER]: Yeah.

THE COURT: I'll allow it.

[FAULKNER]: I would have to see my report, but I believe they were preserved on the 13th and another sample on the 14th of, I believe May.

(8RT 1773-1774.)

On cross-examination, Faulkner testified that he was told through a letter from the medical examiner's office that the maggot samples were recovered from Monique's body on May 13 and 14, 1996. (8RT 1783, 1787, 1793, 1802.) Dr. Scheinen, the deputy medical examiner who performed the autopsy on Monique, testified that she collected the May 14 maggot sample from Monique's body during the autopsy -- sometime between 9:00 a.m. and 12:00 p.m. -- and sent the sample to Faulkner. (6RT 1342-1343; Peo. Exh. 10-A.) There was no testimony from the individual who collected the May 13 maggot sample at the scene. (Peo. Exh. 10-B; 9RT 2012, 2120.)

B. Faulkner's Testimony Was Not Based On Inadmissible Hearsay

Expert testimony may be premised on material that is not admitted into evidence if the material is of the type reasonably relied on by experts, and is reliable. (Evid. Code, § 801; *People v. Gardeley* (1996) 14 Cal.4th 605, 618.) So long as the threshold requirement of reliability is satisfied, an expert may rely on inadmissible matter, including hearsay, in forming his opinions. (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) Under Evidence Code section 802,

an expert witness may state on direct examination the basis for his opinion and the matter on which it is based. (Evid. Code, § 802; *People v. Gardeley, supra*, 14 Cal.4th at p. 618.) A trial court has considerable discretion to limit the manner in which expert testimony is admitted, or to weigh the probative value of the evidence relied on by the expert against the risk that the jury would consider the evidence relied on as independent proof of the facts recited. (*People v. Gardeley, supra*, 14 Cal.4th at p. 619.)

In this case, Faulkner properly relied on the time and date information provided on the maggot samples and in a letter from the medical examiner's office in rendering his opinion regarding when the maggots first appeared on Monique's body. With regard to the May 14 maggot sample, Dr. Scheinin testified that she collected the maggots on May 14, 1996, between 9:00 a.m. and 12:00 p.m. (6RT 1342-1343.) Since the May 14 maggot sample was properly authenticated, there was no foundational issue as to that sample.

Faulkner also properly relied on the maggot collection information listed on the label of the May 13 maggot sample, as well as the letter from the medical examiner's officer, in rendering his opinion because such information is of the type reasonably relied on by experts. (Evid. Code, § 801; *People v. Gardeley, supra*, 14 Cal.4th at p. 618.) Furthermore, there was no evidence the collection information was unreliable. Indeed, the maggots were collected as part of a routine investigation of a body at a crime scene where the criminalist would have had no incentive to fabricate the time and date the maggots were collected. (See *People v. Geier, supra*, 41 Cal.4th at pp. 602-607, and cases cited therein.)

Citing *People v. Dodd* (2005) 133 Cal.App.4th 1564, 1570, appellant claims Faulkner was not entitled to rely on the collection information because it was based on "nonspecific and conclusory hearsay that d[id] not set forth any factual details of an act necessary for the opinion." (AOB 121-122.) *Dodd*, which is not binding on this Court, is inapposite. In *Dodd*, a mentally

disordered offender proceeding, the appellate court held that the trial court abused its discretion in determining that an incident involving child molestation that was briefly mentioned in a parole report was sufficiently reliable to be considered by the expert witnesses in forming their opinions that the petitioner satisfied the criteria for commitment as a mentally disordered offender. (*People v. Dodd*, *supra*, 133 Cal.App.4th at pp. 1566-1569.) The court reasoned that the report: (1) provided no details about the alleged molestation, (2) did not indicate whether the information had been obtained from a reliable source, and (3) did not designate the incident "as a parole violation charge." (*Id.* at p. 1570.)

Here, in contrast, Gary Kellerman, a coroner's investigator at the scene, though not the person who collected the maggots from Monique's body, testified that the label found on People's Exhibit 10-B (the May 13 maggot sample) was a label routinely used by the Los Angeles County Coroner's Office. (9RT 2009, 2011-2014.) He further testified that the label was filled out according to "standard operating procedure." (9RT 2014.) Additionally, as mentioned above, the maggots were collected in the regular course of a murder investigation, and a letter sent to Faulkner from the medical examiner's officer related the collection information contained on the label of the jar of maggots collected at the scene. (8RT 1783.) Thus, unlike *Dodd*, Faulkner reasonably relied on the time and date information provided by the medical examiner's office regarding the May 13 maggot sample. (See *People v. Geier*, *supra*, 41 Cal.4th at pp. 602-607; *People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.)

To the extent appellant contends that Faulkner was permitted to express his opinion based on faulty information, ample opportunity was given to challenge and correct the assumption on which the Faulkner based his opinion. "Any erroneous factual assumptions by the expert[] could be [and was]

addressed through cross-examination . . . ." (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 54.) Further, "[a]dmission of expert opinion into evidence does not preclude the trier of fact from 'reject[ing] the expert's conclusions because of doubt as to the material upon which [they] were based.' [Citation.]" (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155.) Here, appellant's counsel clearly raised the issue that the collection information listed on the May 13 maggot sample, which Faulkner relied on, was not properly authenticated. (See 8RT 1774, 1783, 1793; 9RT 2120.) The jury was free to accept or reject this argument. (See *People v. Stoll*, *supra*, 49 Cal.3d at p. 1155; see *People v. Fulcher*, *supra*, 136 Cal.App.4th at p. 54 [a determination that an expert's testimony lacks a factual basis goes to the weight, not the admissibility, of the evidence].)

Additionally, the trial court properly instructed the jury on expert testimony (CALJIC No. 2.80 -- Expert Testimony -- Qualifications of Expert; 3CT 580). Thus, the jury was advised that Faulkner's opinion was only as good as the facts and reasons on which it was based, and that it should consider the proof of such facts in determining the value of the expert's opinion. It must be presumed the jury followed the court's instructions and accepted the portion of Faulkner's opinion that it found to be adequately supported. (See *People v. Smith* (2007) 40 Cal.4th 483, 517.)

C. Admission Of Faulkner's Testimony Did Not Violate Appellant's Sixth Amendments Rights

As noted above, appellant objected to Faulkner's testimony on the ground that it lacked foundation. (8RT 1774.) Appellant did not object to the testimony on grounds the testimony violated his rights to due process, to confront witnesses, or to a reliable determination of guilt under the Sixth, Eighth, and Fourteenth Amendments. (See AOB 120, 127.) Respondent

submits that even assuming a narrow due process claim was preserved under *People v. Partida*, *supra*, 37 Cal.4th at p. 431, appellant's other federal constitutional claims are forfeited by his failure to object to the admission of Faulkner's testimony on those specific grounds at trial.

To the extent appellant's federal claims have been preserved, they lack merit. Appellant contends the admission of Faulkner's testimony violated his right to confront and cross-examine witnesses against him because it was based on testimonial hearsay. In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court overruled *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597], which allowed out-of-court statements to be admitted at trial upon a showing of sufficient indicia of reliability. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 60-67.) The Court held that the right to confrontation bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at pp. 53-54.) The Court, however, declined to offer a comprehensive definition of "testimonial," and stated that, at a minimum, the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.)

With regard to nontestimonial hearsay, the Supreme Court concluded that the approach in *Ohio v. Roberts*, *supra*, was acceptable; such statements remained subject to state hearsay law and could be exempted from Confrontation Clause scrutiny entirely. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68 ["Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law -- as does *Roberts* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."].) But where testimonial evidence is involved, "the Sixth Amendment demands what the

common law required: unavailability and a prior opportunity for cross-examination." (*Ibid.*)

The Supreme Court also recognized in *Crawford*, and reaffirmed more recently in *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224], the principle that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Crawford v. Washington, supra*, 541 U.S. at p. 51; accord, *Davis v. Washington, supra*, 547 U.S. at p. 822 [holding "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency"].)

In *People v. Geier, supra*, 41 Cal.4th 555, this Court recently addressed the issue whether laboratory reports are testimonial statements subject to *Crawford*. The Court held that a laboratory report containing DNA test results was not a testimonial statement under *Crawford*. (*Id.* at p. 607.) In so holding, this Court fashioned a three-part test for determining whether a statement is testimonial. "[A] statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." (*Id.* at p. 605.) "Conversely, a statement that does not meet all three criteria is not testimonial." (*Ibid.*) This Court concluded the DNA test at issue was not testimonial because it did not meet the second prong of the test, that is it did not describe a past fact related to criminal activity. Rather, "it constitute[d] a contemporaneous recordation of observable events." (*Id.* at p. 605.)

In this case, as in *Geier*, the evidence relating to when the May 13 maggot sample was collected was not testimonial because it did not document past events. Instead it was a "contemporaneous recordation of observable

events" because it was a notation regarding the time the maggots were collected from the body at the scene, at the time the maggots were being collected. It in no way "described a "past fact related to criminal activity." (*People v. Geier*, *supra*, 41 Cal.4th at p. 605.) Accordingly, there was no Confrontation Clause violation. (*Ibid.*)

Appellant argues that, in the event the evidence is not testimonial under *Geier* or *Crawford*, it should have still been excluded as unreliable. (AOB 126.) This claim must be rejected for the reasons stated in the previous section of this Argument.

D. Any Error Was Harmless

To the extent the trial court erred in admitting Faulkner's testimony because it was based on unreliable hearsay, any error was harmless. (*People v. Farnam* (2002) 28 Cal.4th 107, 158; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) First, Faulkner testified that he based his opinion regarding when the maggots first appeared on Monique's body on both maggot samples that were collected -- one at the scene on May 13, and one during the autopsy on May 14. (8RT 1783, 1790, 1829.) There was no foundational issue with regard to the maggots collected on May 14 because Dr. Scheinen, the person who collected the maggots, testified as to the time and date that she collected them. (6RT 1342-1343.) Thus, Faulkner's findings would not have been different had he not been permitted to rely on the May 13 maggot sample. Additionally, appellant could have called his own expert to dispute Faulkner's findings. He did not do so. (8RT 1807 [appellant's counsel states that he has retained an expert, but is not going to call him at trial].) Furthermore, the evidence of appellant's guilt was overwhelming, as discussed in Argument I.D., above. Thus, it is not reasonably probable appellant would have received a more favorable verdict had Faulkner not been permitted to base his opinion on the

May 13 maggot sample. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) To the extent there was a Confrontation Clause violation, the error was harmless beyond a reasonable doubt under *Chapman v. California*, *supra*, 386 U.S. at page 24. (*People v. Geier*, *supra*, 41 Cal.4th at p. 608.)

V.

THERE WAS NO *CALDWELL* ERROR

In *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329 [105 S.Ct. 2633, 86 L.Ed.2d 231], the United States Supreme Court held "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Appellant claims *Caldwell* error arose from remarks the trial court made to prospective jurors during voir dire. (AOB 128-134; see 2RT 458-463, 512-514.) A review of the court's remarks shows that the jurors were not misled regarding their sentencing responsibility in this case.

A. Relevant Proceedings

Prior to trial, the prosecutor requested that the court "explain" the penalty phase to the prospective jurors so they would not be confused by certain questions on the juror questionnaire. (1RT 412.) In response, the court asked the parties to agree on what the court should say to the jurors about death penalty procedure. (1RT 412-413.)

During jury selection, the trial court questioned two panels of prospective jurors. In its prefatory remarks to prospective jurors, the court read the charged offense and explained the significance of the special circumstance charged in this case. The court then gave a brief history of the death penalty to correct any "misconceptions" about it. (2RT 512.) To the first panel, the court

stated:

I'm going to tell you a little bit about the death penalty history of it just so you understand. Because some of you probably read a lot about it, talked about it, some of you haven't at all, and some of you may be a little of this here and there.

If and only if the defendant were found guilty of the charged crime of murder and, also, the jury found that the special circumstance alleged was true would we get to a second phase of the trial. There is two phases if that happens.

If that doesn't happen, there would be only one phase. That would be the jury either found the defendant not guilty, or the jury found the defendant guilty of murder but not that the special circumstance was true.

So only if the jury finds the defendant guilty of murder, special circumstance true, do we get to the second phase of the trial. That's another reason why sometimes it's a little hard to know exactly how much time will be needed for the trial.

So keep that in mind. Even though I'm going to be talking about the death penalty, you only get to that issue if the other things occur.

I want to give you a little background on it. Because some of you do have a history, and maybe it's right, maybe it's wrong in your mind insofar as the death penalty, and you might come to certain conclusions about what you know about the history.

That's why I want to take just a minute on that. The reason I'm giving you history is because of the possible confusion about what you believe is the history.

In about 1970 the death penalty law in California and a number of other states was found to be unconstitutional the way it was written for

various legal reasons. At that time then various states, including California, came up with new death penalty laws.

Our laws now have to do with what I've just talked about, a special circumstance. There are various special circumstances that can be alleged when the People decide they're going to seek the death penalty in a case if they get a conviction on the charge.

So there are a lot of people at the time back in 1970 that were on death row because jurors have made that decision, and this is the one area where jurors make that decision on sentence rather than the judge. Because the law was invalidated, a number of people then, including some people you probably remember, no longer had the death penalty.

Well, things happened, and it changed since that time. In 1978, California passed a new death penalty law. It was an initiative on the ballot, the People passed the law, and that's the law that had to do with special circumstances in the case.

The new law was tested, and it took a number of years for testing, to go up and down the appellate ladder, California Supreme Court, U.S. Supreme Court, and so forth, and found constitutional.

So a number of people have been convicted under that new law, and there are a number of people on death row in California right now, as well as other states in the United States.

So in this case, what you need to know is that if the defendant were found guilty of the first-degree murder charge and a special circumstance true, then you'd get to the second phase of the trial. Only if. That's when you get to the second phase of the trial.

If you got to the second phase of the trial, there are just two options for the jury to choose, death penalty or life without possibility of parole. You are instructed now that those two sentences and what I just said are

meaningful and that's what they mean. That's what the person would get.

The reason I said that is that some people have different ideas of what happens and when it happens. *It's true that sometimes people have their appeals going for a long period of time; but you also know that it's also true that after those appeals, certain things have happened in California and around the United States on this issue insofar as executions being carried out.*

So to summarize a little bit, initially, a jury would hear evidence and be asked to determine guilt or innocence of the defendant, just like any other criminal charge in the case. The defendant couldn't be convicted unless 12 jurors agreed unanimously that, under the standard of proof, he was guilty of the crime.

If the defendant was found guilty of murder but no special circumstances, that's the jury verdict. The case is over. If a special circumstance was found true, then we go on to the second phase. As opposed to if the jury verdict was not guilty.

So as I said before, in a capital case the difference between that and another case which isn't a capital case is that the jury decides death penalty or life without possibility of parole if the defendant is convicted.

You would be listening to evidence about the defendant's background, good information about him, bad information about him, if there is good and bad. That would be presented. You would be considering that evidence. It's called mitigation evidence, aggravation evidence.

You could consider everything that you are entitled to consider, and you would be told what you can consider at the end of the case. And then you would make your own decision based upon the additional

information that was submitted to you.

As I said before, we don't know whether we'll get to the penalty phase of the trial, but I have to talk about it. Because if we do, then you need to have a little information, which I'm giving you now.

(2RT 458-463, italics added.) The court made substantially similar comments to the second panel of prospective jurors.[18/] (2RT 512-514.)

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18. To the second panel, the court stated:

Now, the reason I'm talking now is that it's different than the typical average case in the sense that this is a case if you did reach the second phase of the trial to make that decision, life without possibility of parole or death, the juror does it, not the court. That's the one area of the law where the jury makes the decision, if you reach that in the case.

So I want to talk a little bit about that because some people have misconceptions from what they understand or know or think they know about the history of the death penalty generally in California and in general.

In 1970, as those of you who were around or were studying that might remember, the death penalty -- the law that we had in California was ruled improper or unconstitutional, and it was set aside. And people who had been given the death penalty then didn't have the death penalty anymore, and certain people who were on death row were no longer on death row.

Then the State passed a new law to see if it passed constitutional muster with the California Supreme Court and any appellate courts on the way up there, and it was passed by initiative in 1978 after the other one was tossed out.

The law, in effect, talked about what I'm talking about here, special circumstances, one of which is the one that is alleged in this case. There are a number of them that could have been alleged, depending upon what the facts are as the prosecution sees it and wants to find.

There have been a number of people convicted under that new law, of course, since 1978; and as you probably know, while many times many years of appeals go by before something happens, there have been executions in California, there have been executions here and there across the United States in various states in the United States.

Appellant contends the italicized portion of the trial court's remarks constituted prejudicial *Caldwell* error because it suggested that a death verdict was reviewable. (AOB 130-134.) Contrary to appellant's contention, no *Caldwell* error occurred because the court's comments did not minimize the jury's responsibility for its penalty determination.[19/]

B. The Jurors Were Not Misled Regarding Their Sentencing Responsibility

"*Caldwell* error occurs when the jury has been 'affirmatively misled . . . regarding its role in the sentencing process so as to diminish its sense of responsibility.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 694; see *Darden v. Wainwright* (1986) 477 U.S. 168, 184, fn. 15 [106 S.Ct. 2464, 91

> So the first finding of the jury is does the evidence prove beyond a reasonable doubt the defendant has committed a first-degree murder; and then if that's true, you go to the next question, the special circumstance, is it true or not?
>
> If he's acquitted, then, of course, you don't get to the second issue.
>
> Then if that's a finding, then there is a second phase to the trial.
>
> The second phase to the trial is called the penalty phase. That's when, in general, whatever evidence that the prosecution and the defense wants to offer, that is what you might call good evidence on behalf of the defendant, bad evidence against the defendant. And you get to judge that, as well as the evidence in the case that had to do with the conviction that you reached, if we reach that stage of the trial. And you will be making a decision on the penalty in the case.

(2RT 512-514.)

19. Appellant failed to object to the court's comments. However, since his trial was held before this Court's decision in *People v. Cleveland* (2004) 32 Cal.4th 704, 762, his failure to object does not preclude review of the issue. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1417; *People v. Moon* (2005) 37 Cal.4th 1, 17-18.)

L.Ed.2d 144] [*Caldwell* prohibits comments "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision."].) In determining if a statement violates *Caldwell*, a reviewing court must view it in context and "'consider the instructions of the court and the arguments of both prosecutor and defense counsel.' [Citation.]" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1238.) No error occurs if "there was no reasonable likelihood that the [statement] misled the jury to believe that the responsibility for determining the appropriateness of defendant's sentence lay elsewhere." (*Id.* at p. 1239; accord, *People v. Welch* (1999) 20 Cal.4th 701, 763 [no *Caldwell* error because "[n]o reasonable juror, after hearing . . . the prosecutor's argument, the defendant's argument, and the trial court's instructions, would have been mistaken as to the jury's role as the arbiter of defendant's fate"]; *People v. Fauber* (1992) 2 Cal.4th 792, 847 [court's comment to six prospective jurors in *Hovey*[20] voir dire about making sentencing "recommendation" did not violate *Caldwell* because other portions of voir dire "emphasized that the decision as to life or death was for the jury alone"].)

Taken in context, the court's remarks did not constitute *Caldwell* error. By its comments, the court unequivocally informed the prospective jurors that they would be responsible for fixing the penalty if they convicted appellant of special-circumstance murder. The court told the prospective jurors that, if they reached a penalty phase, there were only two sentencing options: death or life without the possibility of parole. (2RT 461; see also 2RT 462 [in a capital case, "they jury decides death penalty or life without possibility of parole if the defendant is convicted"]; 2RT 512 ["Now, the reason I'm talking now is that it's different than the typical average case in the sense that this is a case if you did reach the second phase of the trial to make that decision, life without

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20. *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

possibility of parole or death, the juror does it, not the court. That's the one area of the law where the jury makes that decision, if you reach that in the case."].)

The court also emphasized the gravity of the sentencing decision: "those two sentences and what I just said are meaningful and that's what they mean. That's what the person would get. . . . The reason I said that is that some people have different ideas of what happens and when it happens." (2RT 461.) By these remarks, the court wanted to ensure the prospective jurors understood that they would be responsible for determining the penalty in this case and that they should not consider what they had heard about other cases. (See *People v. Fauber*, *supra*, 2 Cal.4th at p. 847 [court's comments to prospective jurors did not convey "to the jurors the impression that their task was mediate rather than final"].)

Appellant takes particular issue with the italicized portion of court's comments above. (AOB 132-133.) Read in context, however, it is clear the court's comments were intended to stress the importance and gravity of the sentencing decision in this case. The court stated that "sometimes people have their appeals going for a long period of time" (2RT 461) to help prospective jurors understand that regardless of any delays, a death sentence, if imposed, would be carried out. Further, the court referred to "the appellate ladder" (1RT 460-461), including this Court and the United States Supreme Court, to explain how the current death penalty law was established, not to inform the prospective jurors what could happen in this case. This was permissible. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 186 [no *Caldwell* error where "passing reference to appellate review" was made "only in the context of legal and procedural mistakes"]; *People v. Fierro* (1991) 1 Cal.4th 173, 245 [prosecution's "passing reference" to defendant's right to appeal did not "'dilute' the jury's sense of responsibility"]; see also *People v. Moon*, *supra*, 37

Cal.4th at p. 18 ["Certainly the mere mention of the appellate process, while ill-advised, does not -- standing alone -- necessarily constitute reversible *Caldwell* error."]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1106 ["Arguably the mere mention of appeal is improper, since it rarely serves any constructive purpose and may lead the jury on its own to infer that their responsibility for penalty determination is diluted. But when the context does not suggest appellate correction of an erroneous death verdict, the danger that a jury will feel a lesser sense of responsibility for its verdict is minimal"].)

Appellant takes issue with the court's reference to "executions being carried out." (AOB 133.) However, in context, it appears the court's comment was meant to remind the prospective jurors that, even though the appellate process can be lengthy, executions are "carried out." (See 2RT 461 ["[I]t's also true that after those appeals, certain things have happened in California and around the United States on this issue insofar as executions being carried out."] To the extent the comment is ambiguous, it was not prejudicial because it was "brief and isolated" and "made at the beginning of voir dire and not during the penalty phase where the death penalty and the jury's sentencing responsibility were the focus of the jury's attention." (*People v. Morris* (1991) 53 Cal.3d 152, 182, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Finally, it is not reasonably possible the jury was misled about the gravity of its sentencing responsibility because "the remainder of the record demonstrates that the trial court imposed and the jury accepted the full burden of responsibility for a death verdict." (*People v. Morris*, *supra*, 53 Cal.3d at p. 182 [no prejudice because "[b]oth the court's instructions and the arguments of counsel emphasized the awesome character of the jury's responsibility"]; accord, *People v. Harris* (2005) 37 Cal.4th 310, 356.) In her penalty argument, the prosecutor told the jurors it was time for them "to decide what punishment

[appellant] should get for the crimes he has committed." (12RT 2687-2688.) Defense counsel told the jury that it would decide whether appellant would be executed: "You, and each of you, are the ones that will make that decision. Every individual on this jury is the one that has the power to make that decision as to whether he will live the rest of his life in prison without the possibility of parole, without any hope of ever being outside of a prison, or whether he will be executed." (12RT 2714-2715.) The trial court further highlighted the significance of the jurors' decision by instructing that they had a "duty" to "determine" the appropriate penalty. (3CT 661; 12RT 2685; see *People v. Fauber, supra,* 2 Cal.4th at pp. 846-847 [instructing jurors to determine penalty conveys weightiness of their task because "determine" means "'to fix conclusively or authoritatively'"].) For the foregoing reasons, no reversible *Caldwell* error occurred.

Both the court's instructions and the arguments of counsel emphasized the awesome character of the jury's responsibility.

VI.

APPELLANT'S DEATH ELIGIBILITY DID NOT VIOLATE THE EIGHTH AMENDMENT OR INTERNATIONAL LAW

Appellant contends that his death sentence resulted solely from a felony-murder special circumstance rather than a finding he had a culpable state of mind and, therefore, is a disproportionate penalty under the Eighth Amendment and violates international law. (AOB 135-153.) He asks this Court to revisit its prior holdings rejecting his claim and "hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant had an intent to kill or acted with reckless indifference to human life." (AOB 145.) Appellant articulates no new or persuasive reason for this Court to revisit its prior repeated rejections of his Eighth Amendment claim. (See *People v. Smithey* (1999) 20

Cal.4th 936, 1016; *People v. Earp* (1999) 20 Cal.4th 826, 905, fn. 15; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1294.)

As for appellant's claim that California's use of the death penalty violates international law, particularly, the International Covenant on Civil and Political Rights ("ICCPR") (AOB 152-153), this Court has rejected the contention that the death penalty violates international law, evolving international norms of decency, or the ICCPR. (See *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Brown* (2004) 33 Cal.4th 382, 403-404; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1164 [international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements]; *People v. Smith* (2005) 35 Cal.4th 334, 375 [same]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511 [same].) Appellant's claim must therefore be rejected.

VII.

THERE ARE NO GUILT PHASE ERRORS TO ACCUMULATE

Appellant argues that even if no single guilt-phase error acted to deprive him of a fair trial, the cumulative effect of the guilt phase errors he identifies in Opening Brief arguments I, II, III, and IV require reversal. (AOB 154-166.)

Respondent, however, has shown that none of appellant's contentions have merit. Moreover, appellant has failed to establish prejudice as to any of the claims he raises. Accordingly, his claim of cumulative error must be rejected. (See *People v. Watson* (2008) 43 Cal.4th 652, 704; *People v. Tafoya* (2007) 42 Cal.4th 147, 199; *People v. Lewis* (2001) 25 Cal.4th 610, 635.)

VIII.

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

Finally, in an effort to preserve his claims for federal review (see AOB 167), appellant mounts a series of separate attacks on California's death penalty law and death sentencing process. (AOB 167-186.) Preliminarily, appellant failed to raise these claims in the trial court; therefore, they have been waived. (See *People v. Catlin* (2001) 26 Cal.4th 81, 179.) Moreover, and in any event, this Court has repeatedly rejected each of these claims. Appellant provides no new reason why this Court should reconsider its previous decisions. Thus, all of the claims are meritless.

A. Section 190.2 Is Not Overbroad

Appellant first contends that "California's sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty." (AOB 167-168.) However, this Court has repeatedly found that the death penalty law adequately narrows the class of death-eligible offenders. (See, e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Cook* (2006) 39 Cal.4th 566, 617; *People v. Hinton* (2006) 37 Cal.4th 839, 913; *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Kipp* (2001) 26 Cal.4th 1100, 1136.) Thus, appellant's contention must be rejected.

B. Section 190.3, Factor (a) Is Not Vague

Appellant claims the instruction that sets forth section 190.3, factor (a) "resulted in the arbitrary and capricious imposition of the death penalty" because the instruction was vague inasmuch as it "has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as 'aggravating.'" (AOB 168-169.)

This challenge based on vagueness has been repeatedly rejected by this Court. (*People v. Mendoza* (2007) 42 Cal.4th 686, 708; *People v. Guerra, supra*, 37 Cal.4th at p. 1165; *People v. Hinton, supra*, 37 Cal.4th at p. 912; *People v. Smith, supra*, 35 Cal.4th at p. 373; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750] [explaining that section 190.3, factor (a), was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]). As explained in *Tuilaepa*, a focus on the facts of the crime permits an individualized penalty determination. (*Tuilaepa v. California, supra*, 512 U.S. at p. 972; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 304, 307 [110 S.Ct. 1078, 108 L.Ed.2d 255].) Thus, possible randomness in the penalty determination disappears when the aggravating factor does not require a "yes" or "no" answer, but only points the sentencer to a relevant subject matter. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 975-976.)

Appellant points to no factors in his own case that were arbitrarily or capriciously applied. He merely states that the aggravating factors were applied in a "wanton and freakish manner." (AOB 169.) Appellant does not, and cannot, demonstrate that factor (a) was presented to the jury in his case in other than a constitutional manner. Noticeably missing from appellant's analysis is any showing that the facts of his crime or other relevant factors were improperly relied on by the jury as facts in aggravation. Accordingly, this subclaim should be rejected.

C. The Death Penalty Statute And Instructions Set Forth The Appropriate Burden Of Proof

Appellant also contends that the death penalty statute and accompanying jury instructions failed to set forth the appropriate burden of proof. (AOB 170-181.) Specifically, appellant raises the following subclaims: (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 (AOB 170-171); (2) the State was required to bear some burden of proof at the penalty phase and, if not, the jury should have been instructed there was no burden of proof at the penalty phase (AOB 172-173); (3) the instructions failed to required juror unanimity as to the aggravating factors and "unadjudicated criminal activity" (AOB 173-175); (4) the instructions were impermissibly broad by providing that the aggravating circumstances must be "so substantial" in comparison with the mitigating factors (AOB 175-176); (5) the instructions failed to inform the jurors that the central determination is whether death is the appropriate punishment (AOB 176); (6) the instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole (AOB 177-178); (7) the instructions failed to inform the jurors that even if they determined aggravation outweighed mitigation, they could still return a sentence of life without the possibility of parole (AOB 178-179); (8) the instructions failed to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances (AOB 179-180); and (9) the instructions failed to inform the jury on the presumption of life (AOB 180-181). As explained below, these claims have previously been rejected by this Court and are meritless.

First, 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* (2003) 29 Cal.4th 833, 885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) Thus, the penalty phase instructions were not deficient in failing to assign to the State the burden of proving beyond a reasonable doubt the existence of an aggravating factor. (See *People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.) Nothing in

Apprendi v. New Jersey (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], or *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], impacts what this Court has stated regarding the sentencing function at the penalty phase not being susceptible to a burden-of-proof quantification. In fact, this Court has expressly rejected the argument that *Apprendi, Ring,* and/or *Blakely* affect California's death penalty law or otherwise justify reconsideration of this Court's prior decisions on this point. (*People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Morrison, supra,* 34 Cal.4th at pp. 730-731; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.)

Second, there was no requirement that the penalty jury be instructed regarding the burden of proof for finding aggravating and mitigating circumstances in reaching a penalty determination, other than other crimes evidence, or that no burden of proof applied. (See *People v. Morgan, supra,* 42 Cal.4th at p. 626; *People v. Cornwell* (2005) 37 Cal.4th 50, 104; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Brown, supra,* 33 Cal.4th at p. 401.)

Third, there was no requirement that the penalty jury achieve unanimity as to the aggravating circumstances or any unadjudicated criminal activity. (*People v. Kelly* (2007) 42 Cal.4th 763, 800-801; *People v. Morrison, supra,* 34 Cal.4th at pp. 730-731.) Hence, the penalty phase instructions were not deficient by failing to so instruct.

Fourth, this Court has previously found that the "so substantial" language embodied in the penalty phase instructions was not impermissibly vague and ambiguous. (See *People v. Boyette* (2002) 29 Cal.4th 381, 464-465.) Thus, the instructions as they related to the comparison of aggravating and mitigating factors were not unconstitutionally vague or overbroad.

Fifth, this Court has found that the death penalty statute was not unconstitutional by virtue of its instruction that the jury can return a death verdict if the aggravating evidence "warrant[ed]" death, rather than requiring that the jury find death to be the "appropriate penalty." (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 707; *People v. Perry* (2006) 38 Cal.4th 302, 320.)

Sixth, no presumption existed in favor of either death or life imprisonment without the possibility of parole in determining the appropriate penalty. (*People v. Mendoza*, *supra*, 42 Cal.4th at pp. 707-708; *People v. Morgan*, *supra*, 42 Cal.4th at p. 625; *People v. Cornwell*, *supra*, 37 Cal.4th at p. 104.) Thus, an instruction informing the jury that it would be required to return a sentence of life without the possibility of parole if the mitigating factors outweighed the aggravating factors, would have been improper. (*Ibid.*)

Seventh, this Court has found that a defendant is "not entitled to a specific instruction that the jury may choose life without possibility of parole even if it finds the aggravating circumstances outweigh those in mitigation." (*People v. Morgan*, *supra*, 42 Cal.4th at pp. 625-626, citing *People v. Kipp* (1998) 18 Cal.4th 349, 381 and *People v. Medina* (1995) 11 Cal.4th 694, 781-782; see also *People v. Smith*, *supra*, 35 Cal.4th at p. 370 [jury is not free to return a life verdict regardless of the evidence; if aggravating circumstances are "so substantial in comparison with mitigation that death is warranted," then death is the appropriate penalty].) Hence, there was no requirement that the trial court give such an instruction.

Eighth, this Court has previously found that "[t]he trial court need not instruct that the beyond-a-reasonable-doubt standard and the requirement of jury unanimity do not apply to mitigating factors." (*People v. Rogers* (2006) 39 Cal.4th 826, 897; see also *People v. Cook* (2007) 40 Cal.4th 1334, 1365; *People v. Breaux* (1991) 1 Cal.4th 281, 314-315.) Thus, the instructions were not deficient by any failure to so instruct the jury.

Finally, this Court has held that the trial court need not "instruct the jury on the presumption of life." (*People v. Prieto* (2003) 30 Cal.4th 226, 271; see also *People v. Kelly*, *supra*, 42 Cal.4th at p. 800.) Hence, omission of such language from the instructions did not constitute error.

In sum, appellant's challenges to the death penalty statute and jury instructions pertaining to the death penalty regarding the burden of proof are meritless. Accordingly, the claim and all subclaims must be rejected.

D. Written Findings Pertaining To Aggravating Factors Were Not Required

Appellant next argues that the federal Constitution required that the jury make written findings regarding the aggravating factors. (AOB 181-182.) However, this Court has held on numerous occasions that a jury need not identify in writing which aggravating factors were relied on in imposing the death penalty. (*People v. Cook*, *supra*, 39 Cal.4th at p. 619; *People v. Snow, supra,* 30 Cal.4th at p. 127; *People v. Lucero* (2000) 23 Cal.4th 692, 741 *People v. Medina*, *supra*, 11 Cal.4th at p. 782.) Hence, appellant's argument regarding the alleged requirement of written findings should be rejected.

E. Instructions On Mitigating And Aggravating Factors Did Not Violate Appellant's Constitutional Rights

Appellant also claims that the instructions to the jury on mitigating and aggravating factors violated his constitutional rights because the instructions: (1) used "restrictive adjectives in the list of potential mitigating factors," (2) failed to "delete inapplicable sentencing factors," and (3) failed to indicate that "statutory mitigating factors were relevant solely as potential mitigators." (AOB 182-184.) As previously noted by this Court, the use of restrictive adjectives, such as "extreme" and "substantial" in the list of mitigating factors,

"does not act unconstitutionally as a barrier to the consideration of mitigation." (*People v. Hoyos* (2007) 41 Cal.4th 872, 927; see also *People v. Harris*, *supra*, 37 Cal.4th at p. 365; *People v. Brown*, *supra*, 33 Cal.4th at p. 402.) Similarly, this Court has found that the trial court is not required to delete inapplicable sentencing factors from CALJIC No. 8.85. (See, e.g., *People v. Mendoza*, *supra*, 42 Cal.4th at p. 708; *People v. Stitley* (2005) 35 Cal.4th 514, 574; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Riel* (2000) 22 Cal.4th 1153, 1225; *People v. Earp*, *supra*, 20 Cal.4th at p. 899.) Likewise, this Court has rejected appellant's claim that the failure to instruct that statutory mitigating factors are relevant solely as mitigators violated the Eighth and Fourteenth Amendments. (See *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.) Appellant has not presented this Court with any persuasive reason to reconsider its prior holdings on these issues, and his claims of instructional error must be rejected.

F. Appellant's Constitutional Rights Were Not Violated Based On An Absence Of Intercase Proportionality Review

Appellant also contends that the absence of intercase proportionality review from California's death penalty law violated his Eighth and Fourteenth Amendment right to be protected from the arbitrary and capricious imposition of the death penalty. (AOB 184.) This point is not well taken. Neither the federal or state Constitutions require intercase proportionality review. (*People v. Jablonski* (2006) 37 Cal.4th 774, 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 [104 S.Ct. 871, 79 L.Ed.2d 29]), and this Court has consistently declined

to undertake it as a constitutional requirement (see *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). Appellant's claim should thus be rejected.

G. The Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution

Appellant claims California 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 184-185.) However, this Court has held on numerous occasions 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 of an Equal Protection Clause violation is meritless and must be rejected.

H. California's Use Of The Death Penalty Does Not Fall Short Of International Norms

Finally, appellant claims that the use of the death penalty as a regular form of punishment falls short of international norms. (AOB 185-186.) This claim has been repeatedly rejected by this Court, which has stated that "'[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Morgan, supra,* 42 Cal.4th at p. 628, quoting *People v. Hillhouse, supra,* 27 Cal.4th at p. 511; see also *People v. Elliot* (2005) 37 Cal.4th 453, 488.) Appellant has not presented any significant or persuasive reason for this Court to reconsider its prior decisions, and the present claim must therefore be rejected.

CONCLUSION

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

Dated: June 23, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13- point Times New Roman font and contains 32,975 words.

Dated: June 23, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Eloy Loy**
Case No.: **S076175**

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 24, 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:

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The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 24, 2008, at Los Angeles, California.

K. Amioka
Declarant

Signature

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