In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JERROLD ELWIN JOHNSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S093235

Lake County Superior Court Case No. CR4797
The Honorable Robert L. Crone, Jr., Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In the morning of December 19, 1998, appellant beat 68-year-old Ellen Salling to death in her home using his boots, a branch, and a piece of her furniture. He had been on the run from the police for a parole violation. Upon escaping from pursuing officers in a high speed automobile chase, appellant entered Salling's home, killed her, burglarized her house, and escaped using her car. A few hours later, he picked up the woman whom he was dating at the time and drove to a casino. He used Salling's credit card to purchase gas and various other items and attempted to sell her jewelry for drug money. He was apprehended after leading officers on a second high speed chase.

During the penalty phase of the trial, Salling's daughter testified about her suffering after her mother's death. The prosecution introduced evidence of appellant's prior assault on a former girlfriend and his connection to two killings of other women. Appellant testified and presented evidence about his drug dependency and about his emotional distress and suicide attempt following Salling's murder.

STATEMENT OF THE CASE

On October 25, 1999, the Lake County District Attorney filed an information charging appellant in count one with the murder of Ellen Salling (Pen. Code, § 187),[1] in count two with burglary of an inhabited dwelling (§ 459), in count three with robbery of an inhabited dwelling house (§ 211), and in count four with carjacking (§ 215, subd. (a).) (1 CT 104-110.)

The information alleged three special circumstances as to count one: murder during commission or attempted commission of robbery (§ 190.2,

[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

subd. (a)(17)(A), murder during the commission or attempted commission of burglary (§ 190.2, subd. (a)(17)(G), and murder during the commission or attempted commission of carjacking (§ 190.2, subd. (a)(17)(L)). (1 CT 104-106.) The information alleged as to all counts that appellant personally inflicted great bodily injury (§ 1203.075, subd. (a)), personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), and was ineligible for probation (§§ 462, subd. (a), 1203.085, subds. (a) & (b)). The information alleged as to counts two, three, and four that the victim was 65 years of age or older (§ 667.9, subd. (a)). Finally the information alleged one prior serious or violent felony conviction (§ 667, subd. (a)(1), (b)-(i)/1170.12, subds. (a)-(d)), and one prior prison term (§ 667.5, subd. (a)). (1 CT 104-111.)

On November 5, 1999, appellant was arraigned and pleaded not guilty to all counts and denied all special allegations. (1 CT 118.)

On May 30, 2000, appellant moved for a change of venue. (1 CT 182-207.) After holding hearings on the motion, the court denied the motion on July 6, 2000. (2 CT 377; 16 RT 628-641.)

The court conducted jury selection proceedings between July 11, 2000, and August 22, 2000. (2 CT 386-426.) The jury was sworn in on August 22, 2000. (2 CT 425.)

Also on August 22, 2000, appellant waived his right to jury trial on certain issues, admitted the prior allegations pursuant to section 1203.085, subdivisions (a) and (b) in counts one through four, admitted the prior serious felony conviction of November 8, 1993, admitted the prior serious or violent felony conviction of November 8, 1993, and admitted the prior prison term allegation. (2 CT 426.) On August 23, 2000, the parties presented their opening statements and the evidentiary portion of the guilt trial commenced. (2 CT 426.)

On August 29, 2000, appellant filed a *Marsden* motion, which was heard and denied by the court on the same date. (2 CT 428.)

The prosecution rested on September 19, 2000. Appellant moved for acquittal on the special circumstances alleged in counts one through four. The court denied appellant's motion. (2 CT 432.)

Also on September 19, 2000, appellant read a statement to the court about his reasons not to testify, and the defense rested. (2 CT 432.)

On September 21, 2000, the jury found appellant guilty of all counts and special circumstances. (2 CT 433; 3 CT 720-727.)

The penalty phase commenced on September 27, 2000. (3 CT 768.) On October 20, 2000, the jury returned a verdict of death. (3 CT 779; 4 CT 1048.)

On November 9, 2000, the court denied appellant's motion to modify the verdict of death. (4 CT 1078.) The court sentenced appellant to death and imposed a concurrent term of 25 years. (4 CT 1078-1079.)

Also on November 9, 2000, the Superior Court Clerk of Lake County filed with this Court a notice of automatic appeal of the death judgment. (4 CT 1079.)

STATEMENT OF FACTS

I. GUILT PHASE

A. Early December, 1998

In early December, appellant moved in with Starlene Parenteau, a long-time friend, at her house at 398 Schindler Street. (36B RT 4525, 4528.)[2] At the time, they were involved in a brief sexual relationship, and

[2] The reporter's transcripts of court proceedings in this case are at times divided into morning and afternoon sessions. Morning sessions are designated as the A portion of each day's transcript and afternoon sessions are designated as the B portion.

appellant stayed in the master bedroom with Parenteau. (34B RT 4095; 36B RT 4526, 4531.) Appellant usually spent evenings with Parenteau at her residence. Parenteau's 13-year-old son Richard lived with them. (34B RT 4092; 36B RT 4530.) Also staying with them was Charles Farmer, a mutual friend. (34B RT 4091; 36B RT 4530.)

B. December 18, 1998

1. Morning: Appellant Disappears from a Mechanic Job

Parenteau testified that, on December 18, 1998, appellant and Farmer got up at 7:30 a.m. and left Parenteau's house at 8:30 a.m. (36B 4533, 4536.) Appellant and Farmer were scheduled to work on a car together for a customer named Donna. (36B RT 4534.) Parenteau planned on attending her mother's Christmas party that evening. (36B 4532.)

Donna recalled that appellant was wearing a pair of Levis and a "corduroy or a terry shirt." (36B RT 4539.) He was also wearing a plaid Pendleton coat or shirt. (36B RT 4540, 4542; People's Exh. 102A.) Appellant was wearing black steel toed boots with a sole like a waffle. (34B RT 4103-4104; 36B 4538-4539; 37A RT 4603.)

Farmer biked and appellant drove his van to Donna's house. (34B RT 4096-4097.) Farmer testified that they met at Donna's at noon. (34B RT 4097.) They initially needed to get parts for the car, so they drove together to get the parts. (34B RT 4099.)

When appellant and Farmer returned to Donna's, they saw a police car, and Farmer said "there must be some drug bust going on." Appellant agreed but ten minutes later stated that he needed vise grips to break a master cylinder loose and left in his van to pick up the vise grips. (34B RT 4100, 4102.) Farmer did not see appellant again after he left to get the vise grips. (34B RT 4108.)

2. Afternoon: Police Attempt to Apprehend Appellant for a Parole Violation

At 2:45 p.m., deputy Mike Morshed was in the Clearlake Oaks area of Lake County to arrest appellant because appellant's parole officer indicated that he had violated parole. (34A RT 4041, 4046.) Deputy Morshed had a color photograph of appellant. He was part of a sheriff's team that was looking for appellant on that day. Deputy Morshed was in uniform and driving a marked patrol unit. (34A RT 4046.) He had a canine with him. (34A RT 4047.) Deputy Morshed was assigned to the special enforcement unit and the canine unit. His canine was trained to detect the odor of narcotics and also to find persons. (34A RT 4041.)

At 2:56 p.m., Deputy Morshed parked on the shoulder of Highway 20 facing eastbound between Catholic Church Road and Sulphur Bank Road. (34A RT 4048-4049.) He saw a brown van driving westbound toward him. It was driving normally at the time. (34A RT 4050.) Deputy Morshed saw the driver at a distance of 10 feet and identified him as appellant, the person for whom he was searching. (34A RT 4051.) Appellant was wearing a baseball cap and sunglasses and had a brown mustache, shoulder length brown hair, and wearing "some sort of a multi-colored button-up shirt." (34A RT 4051.)

Deputy Morshed began driving behind him. Appellant turned off from Highway 20 to High Valley Road. (34A RT 4053.) At this time, appellant was maintaining the speed limit and driving normally. (34A RT 4054.)

Deputy Morshed ran the van's license plate and confirmed that the van was registered to appellant's parents. (34A RT 4055.) He tried to reach detectives to let them know that he had a subject and to convey his location. (34A RT 4056.) He transmitted the van's position to Deputy Hall

and Sergeant McMahon. (34A RT 4056.) Hall got in position behind Deputy Morshed. Hall was also in a marked vehicle. (34A RT 4056.)

The road was very mountainous and narrow. There were many curves, and it was easy to lose control. (34A RT 4057.) Finally, they descended to a flat area, and Morshed, Hall, and McMahon decided to effect a traffic stop in the flat portion of High Valley Road before entering the national forest area. (34A RT 4057-4058.)

Deputy Morshed turned on his vehicle's emergency lighting system and siren. He saw appellant look back and notice him. (34A RT 4058.)

Two miles later, the roadway turned to dirt. (34B RT 4069-4070.) Deputy Morshed turned the siren off but kept the lights on. His lights were on for 12 miles or so. During a portion of the chase, they were driving on a dirt road. Deputy Morshed was driving in the dust and kept losing appellant. (34B RT 4070.)

At about 3:20 or 3:25 p.m., 20 or 25 minutes after the pursuit began, Deputy Morshed lost appellant. (34B RT 4075.) When he realized that he lost him, he radioed the other two officers and told them he thought appellant had veered off and crashed. (34B RT 4072.) Deputy Morshed drove to the next big intersection (M-12 and High Valley Road). (34B RT 4072.)

Hall located the van on the west hide of the hill leading down to the lake, 40 yards off the roadway in thick vegetation. (34B RT 4074.) They saw no one around the vehicle. (34B RT 4076.) They retrieved Morshed's canine Orrie and proceeded to the front door of the van. The dog picked up a track. They searched the brush but were unable to locate appellant because the brush was too thick. (34B RT 4076.)

Other sheriff's units and highway patrol arrived and helped search the area around the lake. (34B RT 4077.) They also used an infrared helicopter to look for appellant. (34B RT 4077-79.) At least 20 people

were involved in the search. (34B RT 4078.) The van was eventually towed and secured. (34B RT 4083.)

3. Evening: Ellen Salling Hosts William Ellis for Dinner

Ellen Salling lived at 7963 Richards Drive, five miles away from appellant's van crash site. (34B RT 4126, 4080.) She was thin and approximately 5 feet 4 inches tall. (34B RT 4124.)

Salling's neighbor William Ellis lived five doors away, at 7921 Richard Drive. (34B RT 4125-4126.) He had known Salling since 1978. (34B RT 4125.) They had been very close friends and companions. (34B RT 4126.) They spent most evenings having dinner together. (34B RT 4129.)

Ellis last saw Salling on Friday, December 18th, at her home. (34B RT 4128-4129.) He had picked up some parts for the repair of the ramp to her dock and stopped by to drop them off. (34B RT 4129.) Ellis had a remote control operator for her garage and used it to open the garage door. He also had access to a key to her residence. (34B RT 4129.) There was a key that hung on a nail at the right side of the back garage, which permitted entry into a laundry room of the house. (34B RT 4130.)

Ellis usually had dinner at Salling's home from 5:30 to 10 p.m. He spent many hours with her. She usually kept her purse and keys on the counter between the kitchen and the dining room. (34B RT 4132-4133.) She kept her wallet in her purse. (34B RT 4133.)

On December 18, Ellis was at her house between 5:30 p.m. and 9:30 or 10 p.m. Salling had no injuries when he left. (34B RT 4135.)

Ellis had plans to come over in the morning to do some work on Salling's dock. (34B RT 4136.) He and Salling also had plans to attend a local holiday party from approximately 5:30 p.m. until 8:00 or 8:30 p.m. the next day. (34B RT 4136.)

C. December 19, 1998

1. Early Morning: Salling Last Seen Alive

Parenteau attended her mother's Christmas party as planned, and left her mother's house at 3 a.m. on December 19th. (37A RT 4555.) Early in the morning of December 19th, officers came to Parenteau's house looking for appellant. (37A RT 4557-4558.) Appellant was not there. (37A RT 4559.)

Robert Woolworth was a sometime neighbor of Salling's who generally spent his weekends and holidays in Kono Tayee Estates. (35A RT 4185.) At 7 a.m. on December 19, 1998, he saw Salling at the intersection of Cora Drive and Richard Drive. (35A RT 4186.) He was driving in his van and Salling was walking from Richard to Cora streets. She was wearing gray pants and a multi-colored top. (35A RT 4188.) She was not injured and there was nothing unusual about her appearance. (35A RT 4189.) Woolworth did not see her again. (35A RT 4190.)

Between 8:00 and 8:30 a.m., Salling's neighbor, Maureen Viel, saw Salling's new red Mercury being driven out of her garage. (34B RT 4117-4118.) Viel looked out of her window, saw the vehicle, and noticed that a man in a plaid jacket or shirt was driving the car. (34B RT 4120, 4122.) Viel paid attention to this event because Salling rarely drove in front of Viel's house; she usually drove in the other direction. The car was driving so fast that it hit the drain in the middle of the street and bounced up high. Viel did not think Salling would have driven so recklessly. (34B RT 4119.)

2. Late Morning and Afternoon: William Ellis Searches for—and Finds—Salling

Ellis arrived at Salling's house on at 9:15 a.m. on December 19. (34B RT 4136.) He drove his truck over because he needed to carry some tools and materials for the deck. He opened the garage door with his opener, saw

that there was no car in the garage, and assumed that Salling had gone shopping because she was preparing for her daughter and son-in-law's Christmas visit. (34B RT 4137.)

Ellis picked up the parts that he needed to fix the dock, took them to the other side of the house near the dock, and worked on them. He left at 10:30 a.m. (34B RT 4139.) He did not see Salling while he was at the house between 9:15 a.m. and 10:30 a.m. that morning. (34B RT 4139.) He never entered the house. (34B RT 4139.) When he left, he closed and locked the garage door with the remote. (34B RT 4139.)

Ellis went home, read the paper, had breakfast at the senior center until approximately noon, did some yard work and watched some football. (34B RT 4140.) At 4:00 p.m., he thought "I better call her and see what time she wanted to go to that open house." (34B RT 4141.) Ellis called Salling three times between 4:00 and 4:30 p.m., with no answer. He assumed she was in the shower preparing for the party and got ready himself. (34B RT 4141.)

Ellis went to Salling's house at 5:20 p.m. The house was dark, the door was locked, and the car was still gone from the garage. This was unusual. Ellis called a relative, and looked for Salling elsewhere. (34B RT 4141.) When he failed to find her, he went back to her house at 5:35 or 5:40 p.m. He came in through the back door using a key. (34B RT 4142.)

He turned on the light in the laundry room. Immediately to the left of the laundry room was the door leading into the kitchen. The kitchen was dark, so he turned on the light there as well. He saw a food mixer on the counter with cookie dough. (34B RT 4143.)

Ellis went to the entryway door and turned on the light. (34B RT 4143.) He looked in the direction of the living room and saw Salling's legs lying across the hallway entryway. (34B RT 4144.) He touched Salling's body to see if she was alive. It was obvious that she was not alive. There

was a large amount of blood around her. (34B RT 4144, 4149.) Ellis saw a cordless phone on the counter and dialed 911. (34B RT 4144.) He did not think the phone call was completed, so he hung up, but the phone called back again. He went to the regular phone in the den and answered it. The police department was on the phone. He told the dispatcher that he was sure he had come upon a murder situation. He did not know how long it took for the officers to get there because he was so distraught. (34B RT 4145.)

D. Crime Scene Investigation

After calling the police, Ellis went outside using the same path he used to come in, through the entryway into the kitchen and out through the laundry room to the garage. (34B RT 4146.) He did not disturb anything in the house. (34B RT 4148.) He met police officers in the driveway and told them everything he knew. (34B RT 4149.) Ellis recognized the glasses that were on the floor near the body as Salling's. (34B RT 4152, 4154-4155.) Salling was wearing those glasses on Friday, December 18. (34B RT 4154.) There was a tree limb found in her house that he did not recognize. (34B RT 4153.) He recognized the small ottoman that was lying next to her body. (34B RT 4155.)

David Garzoli, a supervising investigator at the Lake County Sheriff's Department, was on duty on December 19, 1998. He received a call at about 5:45 p.m. to go to 7963 Richards Drive in Lucerne in Lake County. (35A RT 4168-4169.) He arrived at 6:00 p.m. and saw Mr. Ellis in the driveway. (35A RT 4170.) Other deputies were present. (35A RT 4169.)

Officer Garzoli directed Deputy Maloney to accompany him as they did a sweep of the residence to make sure that no suspects were there and to check on the body. (35A RT 4173.) They went through the garage, through the breezeway, and entered the laundry area. They proceeded to the kitchen, where they noticed blood and other evidence. As the officers

came around the next corner, they located the victim. She was lying face down on the floor. (35A RT 4174-4175.) Officer Garzoli noticed bloody footprints and a wooden object by the victim's head. (35A RT 4177.) He also noticed blood smears on the kitchen counter and bloody footprints in the area around the kitchen. Officer Garzoli checked the house for suspects or any other individuals, but did not find anyone. (35A RT 4178.)

Officer Garzoli stayed in the residence just a few minutes, long enough to make sure that the victim did not require medical attention and check for the suspect. (35A RT 4179.) They made sure not to step on any evidence. (35A RT 4179.) They went outside, established a perimeter around the crime scene and notified investigators. (35A RT 4180-4181.) Garzoli contacted Detective Chris Carlisle at 6:33 p.m., Detective Chris Rivera at 6:36 p.m., Sergeant Russ Perdock at 6:50 p.m., and Detective Tom Andrews at 6:52 p.m. (35A RT 4181.) Garzoli left the scene after the detectives arrived.

E. December 20: Appellant Goes to the Casinos with Salling's Possessions

1. Night to Early Morning: Salling's Daughter

Henni Ray, Salling's daughter, lived in Needles, California at the time. (36A RT 4363-4365.)

On December 19, 1998, Ray and her husband were driving to her mother's house to spend Christmas together with her. (36A RT 4367.) They stopped at a motel on the way. Ray was contacted at 1:00 a.m. on December 20 and informed that her mother died. She and her husband left immediately and got to Kono Tayee at 5:00 a.m. (36A RT 4368.)

There was a Christmas wreath on her mother's door. (36A RT 4369.) Some church members cleaned up the house before Ray entered it. (36A RT 4369.) Ray eventually discovered $13,600 worth of jewelry missing, including a gold watch. (36A RT 4381.)

Her mother kept a stool in front of her nightstand. (36A RT 4384.) Ray last saw it in November 1998. (36A RT 4385.)

Her mother kept her purse, wallet, and car keys on the counter. (36A RT 4387.) Ray recognized the wallet and purse, car keys, Salling's driver's license and various credit cards, and jewelry. (36A RT 4388-4392, 4395, 4398.)

Salling's mother in law was Agnos Salling (nee Dahl). In December 1998, she was staying at Betty Romans's Williams Family Care Home in Nice. (36A RT 4373-4374.)

2. Night to Early Morning: Starlene Parenteau and Appellant

Parenteau had left her house at 8:00 a.m. on December 19 and returned on December 20 between midnight and 2:00 a.m. (37A RT 4565.) Parenteau spent December 19 hanging around town. (37A RT 4562.) She went to a bar, left at midnight and returned to the bar to get her purse. (37A RT 4564.) When Parenteau returned home on December 20, she saw that appellant's shirt and hairbrush were missing from where she last saw them. (37A RT 4566.) Parenteau also saw a bracelet (People's Exh. 104-A), a brooch and a necklace (People's Exh. 105-A) on the table that were not there before. (37A RT 4566-4567.)

Appellant called Parenteau from a pay phone at 3:00 a.m. on December 20, and said he wanted to meet her at the creek behind her house. (37A RT 4572.) He came to meet her in a bright red new car that Parenteau identified as Salling's. (37A RT 4573.)

Appellant explained to Parenteau that he borrowed the car from some friends. (37A RT 4600.) He had scratches on his face that were not there the last time she saw him. Appellant told her he got them from running through the brush as he was evading the police. (37A RT 4601.) He said a

helicopter was looking for him and he had to hide in the mountains. (37A RT 4602.)

Parenteau got in the car and they drove to a motel in Middletown, California. (36B 4476-4477; 37A RT 4573.) Norman Myers, the motel clerk, recalled checking them in. (36B RT 4479-4480, 4486.) Myers recalled appellant driving a red car that looked like Salling's car shown to Myers as Exhibit 90. (36B RT 4485.)

Parenteau identified the motel receipt officers subsequently obtained from the motel owner. (36B RT 4478; 37A RT 4574; 38A RT 4780; People's Exh. 117.) Appellant paid cash for the motel. (37A RT 4575.) Appellant used pliers to turn off something under the hood of the car. (37A RT 4577.)

Appellant brought a cardboard box from the car with some rings, including gold wedding bands. (37A RT 4578-9.) Then they went to the casino. Appellant was not out of control; he was driving and acting normally. (37A RT 4580.) Appellant told Parenteau that he got the jewelry from a guy that owed him money. He said that the man's mother gave appellant the jewelry because she did not want to see her son get hurt. (37A RT 4581.)

At the casino they ran into Charlie Piper and went to another person's house to attempt to sell Salling's rings for methamphetamine and money. (37A RT 4582.) Everyone returned to the casino and then went to the motel room to smoke methamphetamine together. (37A RT 4583, 4586.) At one point, appellant unsuccessfully attempted to cash a check. (37A RT 4584.)

F. December 21

1. Morning: Appellant and Parenteau Continue Driving Around in Salling's Car

Appellant and Parenteau woke up and drove to Wal-Mart in Clearlake using Salling's car. (36B RT 4476; 37A RT 4588.) There, appellant bought all new clothes and boots. (37A RT 4589.) Appellant also bought Parenteau a faucet, which she eventually gave to the police. (37A RT 4591.) The assistant manager from Wal-Mart identified the receipt. (38B RT 4884; 136-A.)

After the Wal-Mart trip, appellant and Parenteau drove around trying to sell the rings for methamphetamine. (37A RT 4593.) At one point, appellant bought some gasoline with Salling's credit card. (37A RT 4594.) The Clear Lake Super Cheaper store manager recognized People's Exhibit number 81 as a receipt from his gas pump. (38B RT 4877.)

They ended up at Galaxy Resort, a trailer park, at 11:00 a.m. at the trailer of a couple named Shiree Hardman and Jeff Biddle. (36B RT 4496, 4500-4502.) They unsuccessfully attempted to sell jewelry to Hardman. 4503.)

Appellant and Parenteau stayed at the trailer for 8 to 10 hours, during which time Parenteau took a shower and fell asleep. Then Biddle left and came back with methamphetamine. (36B RT 4505-4506; 37A RT 4596.) Hardman and appellant smoked some methamphetamine using appellant's glass pipe. (36B RT 4507-4508.)

Hardman made a Christmas card for appellant and Parenteau while they were there. (36B RT 4499; People's Exh. 105-D.) Appellant watched television and was quiet and calm. (36B RT 4509.)

Appellant gave Biddle a piece of paper and said that appellant and Parenteau were going to the casino. Appellant asked Biddle to use the information on the paper to verify a credit card if someone called for that

purpose. (36B RT 4512; 37A RT 4597; 38A RT 4782; People's Exh. 115.) The note contained Salling's full name, address, date of birth, age, description, height, weight, and the words "I approve 250.00." (People's Exh. No. 115, 5 Supp. CT 74.)

Appellant offered them $50 for saying that it was Hardman's card. (36B RT 4515.) Hardman testified that she did not agree to do this. (36B RT 4513.) She found the piece of paper the next day in the kitchen and kept it. When Detective Carlisle came by the trailer two weeks later, Hardman gave it to him. (36B RT 4513-4514.)

Appellant drove to Parenteau's house to drop her off. However, he saw some police and an ambulance down the street and told Parenteau he did not want to drop her off there because he did not want to be stopped by the police. (37 A RT 4600.)

According to Parenteau, appellant was behaving normally during this time. (37A RT 4606-4607.)

2. Afternoon: Appellant Is Involved in Another Chase

Lake County Deputy Sheriff Robert Zehrung pursued appellant who was driving Salling's Mercury around the Keys in Clearlake Oaks. (37A RT 4625-4626.) Officer Zehrung saw the Mercury in an opposite lane and remembered that there was an investigation of a homicide that occurred the previous day in which a red Mercury had been taken. Officer Zehrung thought the car looked similar and decided to take a better look. (37A RT 4627.) He looked at the driver and realized the driver matched the description of a possible suspect that had been distributed to patrol units. (37A RT 4628.) Officer Zehrung turned around, turned on his sirens, and pursued the driver for 13 miles. (37A RT 4628, 4630-4631, 4636.) The Mercury was traveling at 90 to 110 miles per hour and Zehrung apprised central dispatch of its description. (37A RT 4629-4632.) Zehrung briefly

lost the Mercury when the terrain became rough. (37A RT 4639.) Eventually, the Mercury crashed. Zehrung advised dispatch and waited for cover. (37B RT 4653.)

Deputy Chwialkowski arrived, and they approached the car with weapons drawn. Appellant had escaped. (37B RT 4654.) They waited until daybreak to begin a thorough search. (37B RT 4657.) Over 100 officers assisted in the search. (37B RT 4658.)

Corey Paulich, a Lake County detective arrived at the area at approximately 4:00 or 5:00 a.m. (37B RT 4703-4704.) He was part of the SWAT team that secured the scene. (37B RT 4705.) Around 9:00 a.m., the SWAT team found and apprehended appellant. (37B RT 4659.) Paulich found a black leather wallet containing appellant's indicia and a yellow piece of paper. (37B RT 4707; People's Exh. 75-A.)

Brian Tripp, a Sergeant with Colusa County Sheriff's Office, assisted with the manhunt along with six or seven other people in his group. When he arrested appellant, he saw a wallet lying above appellant's head on a hill slope. A yellow folded piece of paper fell from appellant. (37B RT 4674.)

The yellow piece of paper was introduced into evidence as Exhibit 75-A, and contained the following note "I Ellen Salling give Jerry Johnson my nephew permission to use my visa for 250.00 if any questions you can call me at 995 1608[.] I am bedridden and unable to do it myself. Thank you Ellen Salling Lic # D0490168." Hardman testified that "995 1608" was her and Biddle's phone number at the Galaxy resort. (36B RT 4498; 38A RT 4778.)

Document examiner Bill Connor, later examined the various documents and concluded that appellant was probably the writer of the yellow piece of paper (People's Exh. 75-A) and of the note contained in exhibit 115 (which contained Salling's name, address, date of birth, age,

description, height, weight, and the words "I approve 250.00"). (38B RT 4860, 4866; 5 Supp. CT 74.)

The Mercury was towed. (37B RT 4714.) In the Mercury, the officers found cigarettes, two glass meth pipes, a gold brooch pin, and a personal check from Shiree Hardman. (37B RT 4662.) Detective Paulich testified that there was blood in the interior of the console and trunk on a portion of the carpet of the Mercury. (38A 4753-4755.) Appellant's prints were found inside the car and on the hood. (38B RT 4841-4842.) Criminalist Potts testified that blood and human tissue were found in the Mercury's trunk. (39A RT 4936.)

Appellant was hypothermic, so they took him to a hospital. (37B RT 4661.)

G. Subsequent Investigation

1. Investigation at Salling's Home

Chris Carlisle, a Lake County police officer, responded to Salling's house and was assigned as lead investigator. (35B RT 4260-4262.) After Detective Rivera secured a search warrant for the residence, the search team went inside. (35B RT 4280-4283.)

Detective Carlisle observed blood spatter in the entryway. (35B RT 4325.) On the master bedroom door, he found a circle around the doorknob and blood on the doorjamb. (35B RT 4289.) The nightstand in the bedroom had a drawer pulled out and contents that had been inside were lying on the carpet. (35B RT 4289.) The nightstand in the guest bedroom also had a drawer pulled out. (35B RT 4289.)

There were numerous bloody shoe prints and smears on the linoleum floor and on the white throw rug which appeared to lead toward the sink. There was some hair in the sink area and a blood smear on the handle of a water jug. Detective Carlisle found Salling's damaged eyeglasses. He

found a piece of broken tree limb which was in the corner, between the cabinet and the wall, in the front entryway. A piece of raw wood and a piece of finished wood, similar to that of the furniture in the residence, were lying near the entrance to the living room. (35B RT 4292-4293, 4307.) There were some wood chips near Salling's body similar to firewood, which Carlisle believed came from an ottoman. (35B RT 4306, 4313.)

There were blood drop marks on the counter and carpet area. (35B RT 4292-4293.) The laundry room door that led into the breezeway had a blood mark on it. (35B RT 4296.) There were bloody shoe prints. (35B RT 4297.) A beer mug had hair on the handle. (35B RT 4297.) Paneling on the wall was 3 to 4 feet high and it had some blood spatter. (35B RT 4300-4302.) The power cord to the phone was not connected. (35B RT 4312.)

Criminalist Potts testified that a blunt object caused a dent in the wall wainscoting after blood had been smeared there. (39A RT 4966.) Potts also opined that the blood spatter on the wall was caused by an object being wielded and swung by a hand and originated from the location of the victim's head. (39A RT 4970, 4974.) He opined that multiple blows had been inflicted given the state of the evidence. (39A RT 4976.)

On December 19, 1998, Galen Nickey, a latent print analyst, processed Salling's residence. (38B RT 4823, 4828.) Appellant's prints did not match those found at the scene. (38B RT 4833.) Nickey testified that it is possible for someone to handle items, touch them, and not leave any latent fingerprints. (38B RT 4835-4836.)

Carlisle found a tree branch in Salling's house. (38A RT 4766.) Criminalist Potts tested the branch and determined that Salling's blood was on the branch. (39A RT 4980.)

2. Salling's Body

Salling's face was bruised and there was damage to her scalp. Her scalp had peeled back. (35B RT 4314.) She had a swollen hand and a broken fingernail. (35B RT 4316.) Potts testified that hair under Salling's nails was her own. (39A RT 4927.)

Forensic pathologist Thomas Gill examined Salling's body. (39B RT 5034.) Salling was 5 feet and 5 and one-half inches tall and weighed 129 pounds. (39B RT 5046.) Salling suffered blunt force injury from some type of instrument. (39B RT 5048.) Dr. Gill opined that the injury could have originated from "anything from the handle of a gardening tool, a two-by-four or, you know, some sort of a piece of wood that is long, rectangular, cylindrical, something of this sort." (39B RT 5048.)

Dr. Gill continued:

> And then there are other injuries that suggest the end of a tool. In other words, a very circumscribed, actually have a semi-circular pattern, suggesting some sort of a cylindrical instrument with the end being the striking surface.
>
> And then there are some other injuries to the scalp which are fairly unique and requiring a certain amount of force, an extreme amount of force to be exact, which could only fit a certain category of instrument.
>
> Something that could produce a shearing, a lateral at an angle to the skin surface, sufficient amount of force to undermine the human scalp, which is very, very thick and is very resistant to tearing. It has a lot of connective tissue that attaches your scalp to the surface—outer surface of the skull. And there is a necessity then for this to be something which has a sufficient amount of mass behind it to produce the kind of kinetic energy, the force, to accomplish this kind of a traumatic injury.

(39B RT 5048.) Dr. Gill opined it was something like the sole or heel of a boot. (39B RT 5049.)

There were injuries consistent with having been caused by the leg of a piece of furniture and injuries that could have been caused by a tree limb. (39B RT 5049.)

Salling had defensive wounds on her hands. (39B RT 5051-5052.) She suffered several blows, at least three. (39B RT 5060.) The blows were delivered with enough force that injuries to the left side of the head caused damage to the right side of the brain. (39B RT 5063-5064.) Salling suffered a skull fracture. (40 RT 5078.) She also suffered injuries to the inside of her lip, above her eyebrow, her lower jaw, and her cheek produced by some instrument. (40 RT 5071.) Her injuries were consistent with being inflicted by boots, a blunt object, and a fist. (40 RT 5074.)

Dr. Gill concluded that the cause of death was blunt force trauma to the head. (40 RT 5090.) The two severe injuries to the left side of Salling's head that caused the ripping of the scalp and brain injuries could have been the fatal injury. (40 RT 5086.)

3. Items Found by John Jones

John William Jones was walking in the hills behind his house in Clearlake Oaks, when he saw a purse and an ottoman in a brush pile off the side of the road. (35A RT 4195, 4212-4213; People's Exh. 134A.)

In the purse were miscellaneous papers, Salling's driver's license, an empty wallet, checkbook, keys, and a remote keyless entry device. (35A RT 4198, 4214, 4218.) Jones took the items but left the ottoman on the hill. (35A RT 4214.)

Jones gave the wallet to his mother, Faye Bilbrey. (35A RT 4196-4197, 4210, 4225.) Faye Bilbrey gave the wallet to Virginia Harding, her mother-in-law. (35A RT 4195, 4199.)

Jones had collected keys since he was eight years old. He kept his collection of hundreds of keys in a bucket at home. (35A RT 4200, 4210-4211.)

A few days later, Jones showed the purse and contents to Ronald Oxnam, someone he had known for a few years. (35A RT 4222; 36A RT 4416-4418.) Oxnam recognized the name of the person to whom the purse belonged. (36A RT 4418.) Oxnam's mother, Betty Romans, ran a residential care facility for women. (36B RT 4464.) She knew Salling because Salling's mother-in-law had been at the facility for five to seven years. (36B RT 4464.) Romans and Salling became very good friends. (36B RT 4465.)

Oxnam told Jones that his mother could get the items back to the family to whom they belonged. (35A RT 4226.) Jones gave Oxnam the purse and its contents except for the keys and wallet. (35A RT 4226.) Oxnam gave the purse to his mother. (36A RT 4420.) Romans was emotional because Salling visited the rest home every day or every other day. (36A RT 4422.) When Oxnam gave Romans the purse, she knew it was Salling's because she saw the driver's license. (36B RT 4466.) She put the purse in a chest and locked it. Two weeks later, Detective Carl Stein contacted her. (36B RT 4467-4468, 4471.) Romans told Stein the purse was at her house and gave him the purse. (36B RT 4468.)

4. Detectives Stein and Carlisle Obtain the Evidentiary Items from Jones

Sometime later, Jones saw Detective Carl Stein and told him about the ottoman. (35A RT 4227-4228.) They went to the top of the hill and Jones pointed out the location where he found the items. (35A RT 4228.)

Detective Stein first contacted Jones at his residence, 12497 Plaza Street in Clearlake Oaks at 10:15 or 10:20 a.m. on February 10, 1999. He had obtained information that Jones was in possession of a black purse and made his contact with him as a result. (35A RT 4237-4238.)

Detective Stein asked him about the black purse, and Jones said that he did find a purse on top of a hill in Clearlake Oaks but that he did not

have the purse anymore. (35A RT 4238.) Stein eventually recovered the purse from Betty Romans. (35A RT 4238, 4246.)

Jones took Detective Stein to the location where he found the purse and ottoman. The ottoman was still there. (35A RT 4240.) It appeared to have a broken leg or a leg missing. Stein could see "hair, a reddish material that I presumed was blood, and white spatters that appeared to be tissue or flesh of some kind." (35A RT 4242.) He found more pieces of ottoman around the same area. (35A RT 4245.) The ottoman had three undamaged legs and one damaged leg. (35B RT 4321; People's Exh. 127-B.) Detective Stein photographed the footstool and then transported it secured in evidence bags so that no evidence was lost. (35A RT 4243.)

On February 12, 1999, a search team composed of high school students found two other pieces of the ottoman. The pieces had what appeared to be blood and hair on them. (38A RT 4793-4795.)

Department of Justice criminalist Michael Potts testified that the found ottoman matched the missing leg. (39A RT 4917; Exhs. 176-A, 125-B, 124-B, 122-B, 123-B, and 188.) The ottoman parts had human hairs and blood on them. (39A RT 4925.)

Latent print analyst, Galen Nickey, discovered a partial print on the ottoman but was unable to match it. (38B RT 4845-4846.)

On March 25, 1999, Detective Carlisle retrieved the keyless entry device, and the spare ignition key for Salling's car from John Jones. (35A RT 4228; 38A RT 4800-4802.) Jones also took Detective Carlisle to see Virginia Harding, his grandmother. His grandmother returned Salling's wallet to Detective Carlisle. (35A RT 4193, 4229; 38A RT 4801.)

5. Other Investigation

On December 21, 1998, Patrick McMahon, a Sergeant with Lake County, went to appellant's residence along with Deputies Morshed and Hall. (37B RT 4680.) William and Sandra Cramer and Parenteau were

there. (37B RT 4683.) Tripp went into the residence to do a sweep, and then explained to Parenteau about the investigation and jewelry. (37B RT 4685.) Parenteau cried and tried to get rid of the jewelry that she was wearing. Tripp seized the jewelry she took off. (37B RT 4685.)

Detective Paulich found bloody clothes, including a long sleeve corduroy shirt and black or blue plaid shirt behind the master bedroom door at appellant's residence. He also found light colored jeans in the laundry room. The clothes had fleshy material and blood stains on them. (37B RT 4717; 38A RT 4770, 4777.) Paulich and the other officers found a white envelope outside the residence with "Johnson" written on it. (37B RT 4725.) Criminalist Michael Potts testified that Salling could be the source of blood on the jeans and appellant's shirt. (39A RT 4941-4943, 4962-4963.)

Various items of Salling's jewelry were found at appellant's residence, including a daisy brooch. (38A RT 4773.) Detective Carlisle found a notepad. (38A RT 4790.) Carlisle found a visa gold card in Salling's name and a driver's license. (38A RT 4789.)

Also on December 21, 1998, Deputy Christopher Rivera assisted with the investigation. (37B RT 4688.) He went to Redbud Community Hospital and requested that blood samples be taken from appellant. (37B RT 4691.) He received the jewelry that Sergeant McMahon seized at appellant's residence. (37B RT 4693.)

On December 30, 1998, Rivera met with Parenteau who gave him other items including jewelry. (37B RT 4693.)

6. Appellant's Past Job

Emmett Smith, the Lake County distributor of the Press Democrat newspaper, hired appellant as a carrier of newspapers for the time period from June 1, 1996 to July 18, 1997. (36A RT 4404-4406.) Appellant's route included Kono Tayee and Salling's house. (36A RT 4407-4408.)

II. PENALTY PHASE

A. Evidence in Aggravation

1. Arizona Burglary Conviction

The parties stipulated that appellant had a prior felony burglary conviction from Arizona. (49B RT 6240.)

2. Pamela Martin Braden Assault in 1988

Pamela (Martin) Braden testified that she lived with appellant in 1988. (46A RT 5702.) At some point in their relationship, appellant became violent, and Braden told him their relationship was over. (46A RT 5703.) One day, while she was in the shower, appellant came in and started beating on the shower doors and calling her names and then broke the shower doors down on top of her. Braden tried to call the police, but appellant ripped the phone out of the wall. He grabbed her neck, dragged her back into the bathroom and beat her against the wall, punched her in the chest, and repeatedly told her he was going to kill her. Appellant's father finally got him out of the bathroom and took him away. (46A RT 5703.) Braden had multiple injuries from this altercation. (46A RT 5705.) Her ankle was damaged, she was bloody, her neck was swollen, and her chest was bruised. (46A RT 5705.) Appellant also had ripped both phones in the apartment out of the wall. (46A RT 5706.)

Lake deputy sheriff Steven Jones testified he arrested appellant on August 28, 1988, for a violation of section 273.5. (49A RT 6199.) He read the statement appellant made at the time. (49A RT 6203.) In the statement, appellant admitted to being upset at seeing Braden walking around in "nothing on but a towel wrapped around her in front of" three guys, and calling her a slut. He admitted to ripping the phone out of the wall when she attempted to call the police and to following her into the bathroom, and pushing her against the shower doors, which fell into the bathtub. Braden

went into the bedroom to use the phone and appellant admitted following her there and ripping it out of the wall as well. He grabbed her "by the throat with both hands and turned her around," but then realized he was unable to hurt her and let her go. (49A RT 6203-6205.)

3. Jennifer VonSeggern Killing

In October 1992, Jennifer VonSeggern had two children, one and one-half and 3 years old. (46A RT 5718.) She previously lived in a trailer park first with her husband and then with appellant. (46B RT 5727.) Eventually she moved out of the trailer park and into an apartment. (46B RT 5729.) Appellant did not live with VonSeggern at the apartment. (46B RT 5728.)

Kathleen Frank was an old childhood friend of VonSeggern's. They were very close. (46A RT 5717.) They spoke on the phone the Friday before VonSeggern was killed. (46A RT 5719.) A few weeks before her disappearance, VonSeggern out of the blue told Frank that she would never kill herself and that if she were to die, she wanted to be cremated and her ashes taken to the ocean and for her husband and children to be there. All this was unexpected and had something to do with an incident with appellant. (46B RT 5733.) VonSeggern said she was scared to death of him. (46B RT 5734.)

On October 14, 1992, VonSeggern told her boss, Diane Pintane, that she would work on October 17 and attend a work party later that day. (46A RT 5713.) She did not make it to either. (46A RT 5714.) On October 16, VonSeggern told Frank that she was going to come over and visit. But she never came by. (46B RT 5730.)

On October 16, 1992, appellant met a man named James Vaughn and a woman named Desiree in a Rohnert Park motel. (46B RT 5791.) Vaughn told appellant that he knew how to make methamphetamine and that they needed a place to stay. (46B RT 5792-5793.) Appellant told Vaughn that

they could stay in his condo and they left the motel. (46B RT 5794; 47A 5852-5853.)

Appellant brought Vaughn and Desiree to VonSeggern's place in his truck, and made them wait for a very long time in the parking lot while he went up to the apartment. (46B RT 5798.) When he returned one and one-half to two hours later, he had changed his clothes and said he had to make sure his girlfriend was not at the apartment, and that he had gotten rid of his girlfriend. (46B RT 5800; 47A RT 5843.) When they went upstairs, the apartment was empty. (46B RT 5801.) It was a two-bedroom apartment and one of the bedrooms was locked. Appellant said that it was his girlfriend's kids' room. Appellant told Vaughn to sleep on the couch, and Desiree had to sleep in appellant's room. (46B RT 5802.) Appellant gave some women's clothes and jewelry to Desiree. (46B RT 5803.)

The first night they were there, appellant left for several hours. (46B RT 5806.) Later they talked and appellant told Vaughn that VonSeggern was dead and that she was going to be put in a ditch. (47A RT 5844.) Vaughn thought VonSeggern was at that point in the trunk of her car. (47A RT 5844.)

Vaughn moved out a few days later, but Desiree stayed. (46B RT 5804.)

Vaughn returned a week later and stole a stereo from VonSeggern's apartment. (46B RT 5805.) Appellant was going to sell him VonSeggern's car. (46B RT 5806.) He said that she left with her kids. (46B RT 5808.) Vaughn told appellant that he needed $900, so appellant was going to sell the car and give him money. (46B RT 5808.)

Paul Sundquist lived in Windsor and dated VonSeggern for a while. (46B RT 5737.) Early on October 17, 1992, Sundquist came by her apartment building, saw her car in the carport, and went up to her apartment. A man named Jerry answered to door and said that VonSeggern did not live

here. Sundquist saw another man sitting in front of a coffee table. (46B RT 5742.) Sundquist left. (46B RT 5739.) He identified appellant as similar to the man that answered the door. (46B RT 5742.)

At trial, Vaughn recalled someone coming to the door at some point while he sat on the couch after appellant brought him and Desiree to the condo. (46B RT 5804.)

Frank Molles knew appellant in 1992. Appellant owned a green pick-up truck. Appellant told Molles that his girlfriend took off, but kept changing his story. (46B RT 5753.) He asked Molles whether he wanted to buy VonSeggern's car. Molles was troubled by the girlfriend disappearance stories. (46B RT 5755.) He saw a suitcase in the car. (46B RT 5755.)

Don Daley owns the A & B Auto Sales used car lot in Santa Rosa. (47A RT 5825.) On October 19, appellant tried to sell him VonSeggern's car. (47A RT 5826-5827.) Appellant had to leave the lot to get the paperwork. (47A RT 5828.) Daley tried to pay appellant with a check but he insisted on cash. (47A RT 5838.) A documents examiner that later reviewed the signed car documents testified that VonSeggern's signature was an imitation. (47A RT 5877, 5878, 5880.)

After appellant sold VonSeggern's car to A & B, Daley brought it to Rodney Wright, an auto detailer, to get cleaned up. Wright noticed that there was a blood stain on the floorboard behind the back seat. Every time he shampooed the carpets, the stain kept coming back. It smelled foul. (47A RT 5832-5833.) Wright also told Daley that the car looked like it had been taken through brush. (47A RT 5839.)

Santa Rosa Officer Francis Keith Thomas investigated VonSeggern's disappearance. (47A RT 5836.) On October 26, Officer Thomas went to VonSeggern's apartment and came across appellant. (47A RT 5845.) Appellant told him that he last saw VonSeggern on Friday night and she

was going to leave him and desperately needed money. So he said he would loan her $500 if she signed over her car as collateral. VonSeggern left. (47A RT 5846.) Appellant did not hear from VonSeggern so he sold her car. (47A RT 5847.) Thomas interviewed appellant again on October 30. (47A RT 5848.)

Harry Pinola was a Lieutenant with the Sheriff's Department in Santa Rosa. (46B RT 5759.) On January 12, 1993, he received a call about a body found by the side of the road. He drove out to Geraki Road, a dirt road in an isolated area in Sonoma County. (46B RT 5761.) The body was 20 feet from the road inside a creek area in a grove of eucalyptus. (46B RT 5762.)

Some men had been doing maintenance on the road, saw a red sleeping bag off the road, and found a body inside. (46B RT 5764.) Pinola thought someone may have rolled or thrown the body into the creek. (46B RT 5765.) Upon closer examination, he saw it was bound by Christmas tree lighting and video cable. The legs of the victim were pulled up behind the buttocks. (46B RT 5765.) The head and torso were still in the sleeping bag and covered. (46B RT 5765.) "And the body also had a bag around the head with a two conductor electrical cord going around the neck going down the back and tied to the victim's ankles, which again were drawn up to her buttocks area." (46B RT 5768.) It was raining, so they decided to move the body, which was badly decomposed. (46B RT 5766.) They took x-rays, and, after comparing them to missing person reports, identified her as VonSeggern. (46B RT 5767.)

Pathologist Ervin Jindrich autopsied VonSeggern's body. (47A RT 5889-5890.) He could not establish a cause of death due to decomposition of the body. (47A RT 5891.) There were ligature indentations on her neck. (47A RT 5892.) She had had a plastic bag knotted tightly over her head and knotted at the neck. (47A RT 5893.)

Jean Uyeda was a field tech with the San Rafael Police Department that was present at VonSeggern's autopsy. (47A RT 5856-5857.) Electrical cords were removed from her body, ankles, feet, and throat. An electrical plug was attached to one end of the cords. (47A RT 5859.)

Richard Arlo "Mike" Waller, a Department of Justice criminalist, testified that the two sets of cords were a match. (47A RT 5882, 5885-5887.)

Detective Daniel Lujan also investigated VonSeggern's disappearance. (47A RT 5866.) The cords on VonSeggern's body were related to a sewing machine found in the apartment closet and elsewhere in the apartment. (47A RT 5872-5874.) There was also a box with Christmas decorations similar to the ones found on her. (47A RT 5874.) There was also a strap cut from a bag in the apartment that was found on VonSeggern's body. (47A RT 5875.)

Gerald Ohman was Jennifer Lisa VonSeggern's father. (48B RT 6099.) VonSeggern was the oldest of three children and the only girl. (48B RT 6100.) VonSeggern had two children, Christopher and Nicholas. After VonSeggern separated from her husband, he retained custody of the boys. (48B RT 6103.) Ohman kept in touch with VonSeggern at least two or three times a week and had the boys every weekend. (48B RT 6104.)

In October, Ohman became concerned when he had not heard from VonSeggern for a week and she missed a custody hearing for the children, which was unusual. (48B RT 6104.) He called her apartment and some man answered the phone and said VonSeggern was not there. Ohman did not know who the man was. The man told Ohman that someone rented VonSeggern's apartment to him. (48B RT 6105.)

At this time, Ohman filed a missing persons report. (48B RT 6106.)

In January, officers Thomas and Lujan came to Ohman's house late at night to tell them they found VonSeggern's body. (48B RT 6106.)

After VonSeggern went missing, her mother was "[v]ery distraught, nervous, withdrawn from people." Beforehand, she was very happy and outgoing and participated in a number of organizations. After the body was found, she was only involved with VonSeggern's death and trying to find some way to make sure that other people did not suffer the same way. (48B RT 6107.) She joined an organization for families of murder victims. (48B RT 6108.) Talking about VonSeggern's death was the only thing she could ever talk about. (48B RT 6108.)

VonSeggern's mother passed away in September 1997. Ohman thought VonSeggern's murder contributed to her mother's death because her mother was reluctant to seek medical help and gave up on her life. (48B RT 6108.)

VonSeggern's ex-husband and paternal grandparents were raising VonSeggern's boys, and Ohman still had them every weekend. (48B RT 6109.) It was very difficult to answer their questions when they asked "where is Mommy?" (48B RT 6109.) Then, after about a year, they stopped asking. (48B RT 6110.)

Ohman went to VonSeggern's apartment to clean up but it was so totally trashed that there was nothing left except a few photos. (48B RT 6110.)

VonSeggern's death had turned his life upside down. (48B RT 6111.)

The parties stipulated that appellant had a manslaughter conviction as a result of the VonSeggern killing. (49B RT 6240.) Correctional case record supervisor with the Department of Corrections, Sharon Daughters, testified that appellant was received into prison on November 18, 1993, and remained in custody until May 16, 1996. (49B RT 6236, 6238.) Then appellant was released on parole. (49B RT 6238.)

4. Margaret Johnson Death

Mary Ann Marsh knew Margaret Johnson, and they became close friends. (47A RT 5899, 5900.) Marsh saw Johnson on December 4, 1998, the night before the fire. (47A RT 5901.) They played bingo until 10:30 p.m. and then went home. (47A RT 5903.) Johnson promised to call Marsh when she got home, like she always did. (47A RT 5903.) Johnson called her at 11:10 p.m. and said she was cold and was going to turn on the heat. (47B RT 5900.)

Paulette Lent also knew Johnson. (47B RT 5914, 5916.) On December 5, 1998, Johnson's boss at the post office called Lent because Johnson did not show up for work. (47B RT 5917.) Sunol Markle Grayhorse testified that Johnson worked at Glenhaven Post Office and Grayhorse was her boss. (47B RT 5932.) Johnson had keys to the Post Office. (47B RT 5933.) Johnson also owned a hand-held police scanner and took it with her everywhere. (47B RT 5922.)

Lent walked two blocks to Johnson's, saw her house on fire, and called 911. (47B RT 5918.) There was loose change on the ground. (47B RT 5921, 5928.) Elizabeth Childers testified that the fire was concentrated in the northern part of the trailer. (47B RT 5931.)

Raymond Jones was a Clearlake fire engineer. (47B RT 5969.) He responded to the fire in Johnson's trailer on December 5, 1998. (47B RT 5971.) He found the doors of the mobile home to be locked. (47B RT 5974.) It took the rescue team 40 minutes to locate the body. (47B RT 5976.) The fire originated in the bedroom. (47B RT 5972, 5980.)

The parties stipulated that the body found in the trailer was Margaret Johnson's. (49A RT 6210.) Jones testified that the body was already on the floor before the fire started. There was a broken mirror under Johnson's body. (47B RT 5983.) Jones believed the phone had been ripped out of the

wall prior to the fire. (47B RT 5985.) He could not find an electrical or accidental fire source. (47B RT 5989.)

Laboratory technician Michael Potts found accelerant on Johnson's shirt and carpeting. (48A RT 6067.) There was more accelerant on the shirt than on the carpeting. (48A RT 6073-6074.) It was possibly lighter fluid. (48A RT 6069.) He confirmed his findings with another laboratory. (48A RT 6072, 6077, 6081.)

Arson investigator Greg Smith testified that the most significant fire damage was in the master bedroom and that the fire originated in that room. (48A RT 6031, 6050-6051.) Smith opined that the fire had been intentionally set using an open flame. (48A RT 6056.)

a. Margaret Johnson's Medical History and Cause of Death

Cardiologist Whie Oh was Johnson's doctor. (49B RT 6241-6243.) Johnson had coronary heart disease. (49B RT 6243.) She had an angioplasty in November 1998. It would have been very unusual for her to die of heart issues in December 1998, but she could have died of sudden stress. (49B RT 6252.)

Pathologist Jason Trent examined Johnson's body on December 7 and December 14. (49B RT 6257-6258, 6262.) She was severely burned. Her abdominal surface was disrupted and her bowels were out. (49B RT 6263.) She did not inhale any fire. (49B RT 6273.) She had pulmonary edema which occurs in cardiac failure. (49B RT 6268.) Her cause of death was sudden death due to ischemic heart disease. (49B RT 6274.) Stress in a person with coronary artery disease can lead to death. (49B RT 6275.)

Cardiologist Samuel Sobol also reviewed Johnson's record. (49B RT 6303, 6305-6310.) He was surprised she passed away so soon after her second angioplasty. (49B RT 6311.) Assuming she got home and found a

thief, Dr. Sobol concluded that such a sudden event caused ischemia. (49B RT 6312.) She was not breathing when the fire began. (49B RT 6315.)

b. Margaret Johnson's Credit Cards, Cell phone, and Jewelry

Sandra Cramer testified that when appellant and Parenteau were at her trailer after their casino trip, Parenteau asked her whether Cramer would get money from Western Union using a card that had "Margaret" on it. (48A RT 6016, 6018, 6021.) Appellant told Cramer that the card was from a friend and not stolen. (48A RT 6016.) Cramer placed an order for $250. (48A RT 6017; 48B RT 6134.)

Parties stipulated that Mr. Koji Fukumoto was the vice-president of audit and security for Patelco Credit Union and that he provided the following use dates of Margaret Johnson's Patelco debit card:

> December 5th, 1998, at Clearlake Oaks Shell Station for six dollars; December 5th, 1998, at Clearlake Oaks Shell Station for thirty dollars and ninety-three cents; December 12th, 1998, at Clearlake Oaks Shell Station for twenty dollars and ninety-five cents; December 12th, 1998, at Clearlake Oaks Shell Station for forty-six dollars and twelve cents; December 12th, 1998, at Clearlake Oaks Shell Station for sixteen dollars and fifty-nine cents; December 13th, 1998, at 5:57 p.m. at First Counties Bank, Clearlake Oaks for one hundred and one dollars and fifty cents; December 13th, 1998, at 6:00 p.m. at Clearlake Oaks Shell Station for one dollar; December 14th, 1998, at 8:24 a.m. at Twin Pines Casino, Middletown, for one hundred and six dollars and ninety-nine cents; on December 14th, 1998, at 10:49 a.m. at Cheaper Customer Company, Lower Lake, for one dollar; December 15th, 1998, at 10:47 a.m. at Twin Pines Casino, Middletown, for one hundred and six dollars; December 15th, 1998, at 11:44 a.m. at Cheaper Customer Company, Lower Lake, for twenty-five dollars and seventy-nine cents; December 15th, 1998, at 1:01 p.m. at Western Union Call Cash, (800) 225-5227 for three hundred and seventy dollars and sixty-six cents; on December 15th, 1998, at 2:03 p.m. at Western Union Call Cash, (800) 225-5227 for two hundred and ninety dollars.

(49A RT 6213-6214.)

The parties stipulated that Amy Davis was a fraud investigator with Capital One and that she provided the following dates, locations, and amounts of Margaret Johnson's Capital One Visa card:

> December 5th, 1998, at 2:22 a.m. at the Bank of the West, Clearlake, for two hundred dollars; December 5th, 1998, at 2:22 a.m. at Bank of the West, Clearlake, for one hundred dollars; December 5th, 1998, at 2:23 a.m. at Bank of the West, Clearlake, for twenty dollars; December 5th, 1998, at 2:34 a.m. at Clearlake Oaks Shell Station for one dollar; December 6th, 1998, at 8:53 a.m. at 13300 East Highway 20, Clearlake Oaks, for one hundred and one dollars and fifty cents; December 6th, 1998, at 8:35 p.m. at Clearlake Oaks Shell Station for nine dollars and eighty-three cents; December 8th, 1998, at 5:19 p.m. at Clearlake Oaks Shell Station for eleven dollars and fifty-eight cents; December 10th, 1998, at 3:52 p.m. at Clearlake Oaks Shell Station for nineteen dollars and eighty-two cents; December 13th, 1998, at 6:15 p.m. at Cheaper Customer Company, Lower Lake, for twenty-five dollars and eighteen cents; December 14th, 1998, at 6:01 a.m. at Cheaper Customer Company, Lower Lake, for four dollars and ninety cents; December 18th, 1998, at 12:53 p.m. at Cheaper Customer Company, Lower Lake, for one dollar; December 18th, 1998, at 4:54 p.m. at Cheaper Customer Company, Lower Lake, for one dollar.

(49A RT 6215-6216.) The parties stipulated that a slip of paper with Margaret Johnson's Visa card identification number was seized from appellant's arrest location. (49A RT 6217.)

The parties stipulated that Gloria Valencia was a supervisor of the branch research unit with Bank of the West in Walnut Creek and that she authenticated various videos of ATM machines where the card was used. (49A RT 6226-6227.)

The parties also stipulated that over 40 calls were made on Margaret Johnson's cell phone between December 5, 1998 and December 11, 1998. (49A RT 6211.)

Appellant gave Parenteau some of Margaret Johnson's jewelry. (48B RT 6133.) Detective Carlisle conducted a search at appellant's residence and located a jewelry box there engraved with the name "Margie." (49A RT 6208.)

Luther Gene Weathers lived in a house that was previously occupied by his sister, Parenteau. (48B RT 6115, 6118.) Appellant gave him a scanner, cell phone, and stereo. Appellant said these items were not stolen. (48B RT 6119-6120.) Weathers eventually gave these items to deputy Carl Stein. (48B RT 6121; 6138-6140.) Weathers once talked to appellant about Johnson's death and appellant denied responsibility. (48B RT 6123.) Weathers testified that appellant treated Parenteau very well and was a kind person who fixed cars for people. He was not a cheater or murderer. (48B RT 6127.)

5. Appellant's Admission on a Job Application

Homer Montgomery is the owner of Sentry Market in Lake County. (46B RT 5745.) He hired appellant in October of 1998. (46B RT 5745.) Prior to beginning work, appellant had to complete an application and checked off that had been convicted of a felony. He said the felony was a manslaughter because he got drunk and killed someone. (46B RT 5749.)

6. Evidence Related to Ellen Salling Killing

Carl Stein tried to interview appellant many times. (48B RT 6146.) On December 21, 1998, he transported appellant from Redbud Hospital to the sheriff's office. (48B RT 6146.) Appellant initially said that he was too tired, cold, and sleepy to talk. (48B RT 6146.) He said the same thing on December 22. (48B RT 6146.) On December 23, appellant decided he wanted to talk. (48B RT 6147, 6151; People's Exh. No. Z-59.) He admitted burglarizing Johnson's trailer but denied responsibility for her murder and was shocked that police wanted him for murder. He admitted

running from police but claimed he went directly to his mother's house after crashing the van. (48B RT 6153-6155.)

Salling's daughter, Henni Ray, testified that she and her mother were very close and that she was devastated by her death. (50A RT 6346, 6347.) Ray's father, mother, and husband were very close. Her father died in 1990. (50A RT 6347.) They became even closer after he died. (50A RT 6348.) After he died, Salling began bowling, square dancing, became involved with the SPCA, volunteered at a senior center and enjoyed friends and entertaining. (50A RT 6348.)

Salling and Bill Ellis spent Thanksgiving with Ray and her husband. Ray and her husband always came to celebrate Christmas with Salling. (50A RT 6349.) They had a tradition of having a three-way hug in the hallway: Ray, her husband, and her mom. She also spoke to her mother by phone regularly. (50A RT 6350.)

Ray and her husband had a car dealership in Needles, California, which they sold in 1994 and reinvested the proceeds in Fort Bragg, California, to be closer to Salling. They intended to move to Lake County. (50A RT 6351.)

They have not celebrated Christmas since her mother's death. (50A RT 6351-6352.) Ray testified:

> Part of the fun of Christmas was since my husband and I lived in a remote area that wasn't convenient for shopping, we would buy things mail order. And since we have to hide it from each other, what we bought the other, we would have these items shipped to my mother's home. So she was kind of the Santa's helper in keeping straight what I had sent to give to Ron and what he had sent to give to me. And she always took a great deal of pleasure in being the one who knew what everybody was getting and having to keep the secret.

(50A RT 6352.)

Ray last spoke to her mother on December 18, 1998. She felt that there was so much left unsaid. She was traveling to Lake County at the time. (50A RT 6352.) They were three hours south of Lake County in Santa Nella for the night. (50A RT 6353.) A sheriff pounded on their door at 2:00 a.m. to open the door, saying there had been a death in Lake County and Ray's mother was dead. (50A RT 6353.) Ray was in total shock. They immediately drove to Salling's house, arriving at 4:00 or 5:00 a.m. When they arrived, it was dark, snowing, and the house was covered with yellow crime tape. (50A RT 6354.) Ray reviewed the inventory of the house for missing items. She eventually sold the house. (50A RT 6354.)

Her mother was very active and healthy, and Ray thought of her as a fifty-year-old. (50A RT 6355.)

Ray's paternal grandmother was 99 years old and in frail health. She lived in a care facility in Lake County. Ray did not know how to tell her that Salling was dead, so she implied that Salling was on vacation and would be back soon. In January, her grandmother quit eating and talking, and refused to open her eyes. (50A RT 6357-6358.)

Ray read a statement regarding the impact of Salling's death on her.

> The impact on us when we walked into the house and saw it beautifully decorated for Christmas and knowing that there would be no Christmas. The—being informed the way we were informed by the Los Banos Sheriff and then drive, the three hours. And I just remember going over Highway 20, and it was snowing. And we were just—the car was just parting the snow, and it was—and then hoping it was a mistake when we got to Lake County.
>
> . . . [¶]. . .
>
> My mother always whistled when she was cleaning house or cooking or making cookies. I know she was always whistling, happily whistling. And I know when she opened the door that morning she was whistling.

(50A RT 6358-6359.) Ray stated the following about her awareness that Salling's body was lying undiscovered for hours:

> My mother was a very dignified woman with a lot of pride. She wasn't a stuffy woman. She just had natural grace and poise and dignity. She always—she always had a fear of being—of dying alone and not having her body discovered. And it happened to her sister. Previously her sister had had a heart attack, and her body hadn't been discovered for a day or two. And my mother just thought that was the most horrible thing that could happen to anybody, to be just lying there dead and nobody knows it. It was just one of the things that bothered her a lot, and that's what happened to her.

(50A RT 6359.)

Ray testified that Salling's death also devastated other people, including William Ellis, Ray's husband, and other relatives. (50A RT 6359-6360.)

B. Evidence in Mitigation

1. Appellant's Stepfather's Testimony

Appellant's stepfather Bryant Johnson offered testimony in mitigation. (47B RT 5941, 5942.) When appellant was growing up, he was good to older people and children. (47B RT 5959.) Bryant has never seen appellant be violent. He admitted that appellant had gotten in trouble with drugs. (47B RT 5959.)

2. Appellant's Testimony

Appellant testified at the penalty phase. (50A RT 6367.) He was born and raised in Los Angeles until he was approximately 15 or 16 years old, when he moved up to Lake County. It was a difficult transition for him. He had a severe lisp when he was growing up. He had a difficult time when he first moved to Lake County because he felt that he was not accepted. (50A RT 6368.) When he was 16 and one-half or 17 years old, he started doing methamphetamine to fit in with other people. Indeed "to

fit in [he] felt like [he] had to be the supplier," so he stole from his parents and their business to get the money. (50A RT 6369.) His drug use intensified after he graduated from high school. (50A RT 6371.)

Appellant discussed his 1981 Arizona burglary conviction. He was living in north Tucson. One night he and some other people went to a corner store, stole some beer, eggs, and other things, and then drove away in a truck. (50A RT 6373.) They were chased by a car that turned out to be driven by a police officer. (50A RT 6374.) While the car was chasing them, they started throwing things from the truck at the car, including eggs, full cans of beer that they had just shoplifted, and a tire. (50B RT 6476-6477.) Appellant described violating own recognizance probation, leaving the state, then returning to court and serving a weekend in jail and two years' summary probation. (50A RT 6376.) Appellant continued doing drugs. (50A RT 6376.)

Around 1985, appellant moved to Los Angeles where his uncle got him a job as a delivery person. However, he began using crack cocaine there and hit "rock bottom." With the help of his family, he returned to Lake County in 1987 and attended a rehabilitation program. (50A RT 6378-6379.) While attending this program he met Pamela Martin Braden. (50A RT 6379.) Appellant left the program, got a job, and stayed away from drugs. (50A RT 6380.)

Appellant testified that at some point in 1988, Braden wanted to end their relationship. One day, he was on his way to a company picnic, when he looked back into the house and saw that Braden was wearing only a towel in front of three men. She then went into a shower. Appellant confronted her, called her a slut, and hit the shower doors which fell and broke. He believes Braden cut her ankle and forearm from the shower door glass. Braden attempted to use the kitchen phone and appellant ripped the phone out of the wall and also ripped the phone in the bedroom out of the

wall. Braden started laughing at appellant and he grabbed her by the throat but released her immediately after realizing that he could not hurt her. Even though Braden started swinging at him, he never hit her. (50A RT 6381-6382.)

Appellant began doing drugs again in 1989. He was using a lot of methamphetamine and cocaine; about a gram per day. (50A RT 6386.) In 1990, he attended a rehabilitation treatment program run by the Salvation Army. (50A RT 6387.) He got another job, but ended up taking speed again at a mobile home where Jennifer VonSeggern lived. She was a supplier. And she invited him to come live in her mobile home. They were both using heavily. It was a love-hate relationship. They would argue, appellant would try to leave, and she would beg him to stay. This went on for maybe three or four months. Eventually appellant moved out. His drug abuse got really bad at this point. At some point, he crashed his truck from lack of sleep. (50A RT 6390.)

Appellant ran into VonSeggern and moved back in with her at her new apartment. (50A RT 6391.) At some point, he met James Vaughn whom he knew as Red, who said he could cook drugs. Appellant invited him over to VonSeggern's place to see if Vaughn could stay. (50A RT 6392.) Appellant described VonSeggern's death as follows:

> At the time I got up in there, she was slamming dope. I walked in, and I started to tell her about the people in the parking lot I wanted to come stay in here, or I don't know if I said they were going to stay here. And she started screaming at me. She was hyperventilating, and we got into a hassle, very severe one. She fell down, and she stopped breathing. I knocked her down. She—
>
> Q. You knocked her down?
>
> A. Yes. I knocked her down. She fell down, and she hit a table, and she stopped breathing. I don't know if it was from—I don't know. I didn't call 911. I panicked. I proceeded to—I

> proceeded to put her in a sleeping bag. I tied her up, put her in a car, and I took her out, and I dumped her. It was callous. I wish I could take it back.

(50A RT 6393.)

On cross examination, appellant admitted that he did not attempt to administer mouth-to-mouth resuscitation. He testified that after she fell and stopped breathing, VonSeggern was bleeding profusely out of her nose, so he put a sleeping bag over her and wrapped her up with cords and other things from around the house. He did not know why he also hog tied her. (50B RT 6460-6461.)

Appellant testified that he had sex with Desiree the night after killing VonSeggern. He was not bothered or disturbed by VonSeggern's killing at the time. (50B RT 6456-6457.) He also testified that he never told Vaughn that he killed VonSeggern or that she had died. (50B RT 6461.)

Appellant did not feel remorse for what he had done to VonSeggern at the time he forged her signature and sold her car. (50A RT 6470.)

Appellant was released on parole in 1996. His father lined up a mechanic job for him. (50A RT 6395.) He then got a job as a paper carrier. (50A RT 6396.) Then in May or June of 1997, he started doing drugs again and drove his car off the road and wrecked it. (50A RT 6396.) He continued working for his father until he was pulled over and the officers found methamphetamine in his car, resulting in a parole violation. He was in prison as a result of the parole violation until September 21, 1998. (50A RT 6397, 6401.)

After getting out of prison, appellant found a job with Sentry Market. He felt he was doing a very good job. He was not using methamphetamine at this time. (50A RT 6397.) However, just after Thanksgiving, he met Parenteau at a friend's house, and she had a lot of speed on her, so he shot up. He loved speed, so he could not control himself around it. Despite all

that drugs had done to his life, he went back to using drugs. (50A RT 6398-6399.)

Appellant denied setting the fire in his step-grandmother's home. (50A RT 6407.) Appellant had a good relationship with her. He assumed that he could steal from her and that she would not call the police because she's enabled him in the past, giving him money for drugs when she saw him experiencing withdrawal symptoms. (50A RT 6406.) At 12:30 a.m., on either December 4 or 5, 1998, appellant went to his step-grandmother's house. He knew where she kept the key, so he entered her residence. He stole her police scanner, cell phone, and went through her purse and stole her bank card. He claimed that her bedroom door was closed the entire time and he did not see her. (50A RT 6403, 6407.) This was not the same bedroom in which she was found after the fire. (50A RT 6407.) Immediately after the burglary, he went to the Bank of America to withdraw money from her bank account. (50A RT 6404.) He found out about the fire a couple of days later. (50A RT 6408.) Appellant continued using his step-grandmother's credit card even after he knew she had died. (50A RT 6470.)

Appellant continued doing speed after this. (50A RT 6409.) Appellant testified that prior to Salling's murder, he did a lot of methamphetamine and hardly slept, that taking a lot of methamphetamine made him really edgy, easily set off, angry. (50B RT 6429-6430.) He was doing it constantly and not sleeping before December 18th. (50A RT 6410.)

The morning of December 18, he and Farmer went to Donna's place to work on her car. They made a list of things they needed and went to buy them. They bought and took more drugs and worked on the car. Appellant had trouble with his motor skills and was unable to get the cylinder bolts off. He felt very paranoid and suspicious of cars driving by, especially when he saw police officers. Farmer was paranoid too. Appellant told him

he needed some vice grips and got in his van and attempted to confuse the police officers as to the direction he would drive. (50A RT 6411-6412.) Appellant did some more drugs in the car. He noticed many police cars and became increasingly paranoid because he knew he had not properly reported for parole. (50A RT 6412.) He eventually led the police on a chase around various dirt roads and then ran the van into some bushes, got out of the van, and ran away down the hill. (50A RT 6413-6414.) The chase ended around 2:30 or 3:00 p.m. (50A RT 6414.) Appellant slid under some bushes, covered himself with dirt, and stayed there. (50A RT 6415.) He heard a police dog and helicopter but he stayed there until it became dark outside. (50A RT 6414-6415.)

Then appellant started walking, and when it became very cold at night, he ended up lying down in the wet ground. He was very cold. When it got light out, he continued to walk down the hill through the brush. His legs became very weak, so he picked up a branch to use as a walking stick. (50A RT 6416.)

Appellant reached Kono Tayee Estates, and at one point he saw Salling in the window of a house, so he walked up to knock on the door.

> When she opened the door, she said, yes? And I said I wrecked my vehicle, and can I use the phone? She said, well, come on in. And I started walking in her house. She turned around . . . [¶] . . . She turned around, and I don't know what I looked like, but I believe a mess. She—she turned around, and she—I could see her eyes get really big, and she says get out of my house.

(50A RT 6418.)

When Salling said that, appellant didn't know exactly what happened, testifying:

> I know I started violently shaking, trembling, uncontrollable. And I attacked her. . . . [¶] . . . I have nightmares to this day of it. Because I don't remember the initial—the actual attack, even though it was vicious. I don't know if my mind is blocking it

> out, but I do have nightmares about it, and I—I have nightmares of her screaming. It was terrible.

(50A RT 6419.) Appellant was unable to explain why he did not turn around and try to make a phone call from another house. (50B RT 6479.) Once he realized he had killed her, he washed his hands in the kitchen, saying "oh, my God, oh, my God, what have I done." (50A RT 6419.) Then appellant panicked and ran around the house, going through her drawers, taking her jewelry, picking up the footstool that he used to kill her. Appellant went into the garage, saw the car, and left in the car. (50A RT 6419.) He took the walking stick he used to hit her, the ottoman, and purse, and dumped them all in the hills after first taking out her driver's license. (50A RT 6467.)

Afterwards, appellant's mind was like in a dream. Appellant was unable to explain why he went to casinos, other than maybe to shut out the murder. (50A RT 6420.) During other portions of his testimony, he stated that he was not thinking about what he had done to Salling while at the casinos or while driving her car. (50A RT 6471, 6474-6475.) Appellant testified that the subsequent police chase "was like a dream, like I said. It was almost fun to me." (50B RT 6440.)

After the murder, appellant had trouble sleeping because of nightmares and felt horrible about the attack. Some time before the trial, he tried to end his life, not wanting the nightmares to continue. (50A RT 6430.)

On cross-examination, appellant admitted that during his sentencing proceedings for the VonSeggern killing, he lied when he wrote to the judge "Your honor, as God is my witness, I had nothing to do with Jennifer's disappearance." (50B RT 6432, 6434.) He also admitted writing, "I have a lot of deep sorrow for Mr. and Mrs. Ohman, and Christopher and Nicholas,

her sons, for the pain and suffering that they went through not knowing what happened, as I, myself, went through also." (50B RT 6432-6433.)

Appellant also admitted lying when he told an investigating officer that his burglary of Margaret Johnson's home was two weeks before the fire. (50B RT 6436-6437.) However, he continued denying having set her on fire. (50B RT 6448.) Finally, appellant admitted lying about having killed Salling. (50B RT 6437-6438.)

Appellant did not know why he bought new clothes and new boots at the Wal-Mart. He did not believe he was in a dream-like state at the Wal-Mart seven hours after killing Salling when he bought the kitchen faucet for Parenteau. (50B RT 6441-6443.) Appellant was "pretty spun out" but could remember writing and giving the note contained in Exhibit 115 to Jeff Biddle in hopes of persuading Shiree Hardman to participate in credit card fraud by pretending to be Salling. (50B RT 6445-6446.)

Appellant also admitted to attempting to elude police officers after Salling's murder. (50B RT 6450-6452.)

3. Addiction Testimony

Dr. Raymond Deutsch testified as an addiction consultant. (51A RT 6525.) He had been retained by the defense to examine appellant. Dr. Deutsch evaluated him and did a history of drug use. (51A RT 6528.) Appellant started his drug habit by snorting methamphetamine a couple times a week. Then he started smoking methamphetamine and eventually injecting it. (51A RT 6529.)

Dr. Deutsch also reviewed reports and transcripts. (51A RT 6530.) He authored a report that concluded that appellant was addicted to methamphetamine. (51A RT 6530.) Appellant was addicted to methamphetamine for approximately 29 years.

Dr. Deutsch testified that methamphetamine affects one's perception. (51A RT 6536.) Persons who use it may experience delusions. (51A RT

6536.) One-half gram to one gram of meth daily would cause toxicity. (51A RT 6538.) A "[c]ommon pattern of stimulant abuse is to have binges that last from days to weeks, followed by a crash." The period of use is characterized by not eating, weight loss, and repetitive behavior. (51A RT 6539.) A user may experience distortions of time, but impairment of memory is not one of the issues in amphetamine use. (51A RT 6539.)

Dr. Deutch testified that rote behaviors like being a mechanic are not affected by methamphetamine use, but there is a lower threshold for aggressive behavior. (51A RT 6537-6541.)

4. Other Penalty Phase Testimony

Robert Fogelstrom was a correctional officer at Lake County correctional facility. He testified that appellant was a model inmate. (51A RT 6514.) Mildred Mallory met appellant in jail when she went there to hold church services. Appellant was always very pleasant. (51A RT 6516-6517.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR CHANGE OF VENUE

In his first argument, appellant claims he was denied his constitutional rights to due process, a fair trial, and a reliable penalty determination as a result of the trial court's denial of his motion to transfer venue from Lake County. (AOB 90-118.) Appellant's claim fails. The trial court did not abuse its discretion by denying his change of venue motion.

A. General Legal Principles

Section 1033, subdivision (a) provides in pertinent part: "In a criminal action pending in the superior court, the court shall order a change of venue: [¶] [o]n motion of the defendant, to another county when it appears

that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county."

The test for granting a motion for change of venue or reviewing the order denying the motion is the same in capital cases as in other cases. (*People v. Massie* (1998) 19 Cal.4th 550, 577-578; *People v. Webb* (1993) 6 Cal.4th 494, 514; *People v. Cummings* (1993) 4 Cal.4th 1233, 1275-1278.)

A change of venue must be granted when the defendant shows a reasonable likelihood that a fair trial cannot be had, in light of the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and prominence of the victim. (*People v. Famalaro* (2011) 52 Cal.4th 1, 21.) The trial court must decide whether, on the unique facts of the particular case, there is a reasonable likelihood that jurors chosen for the trial have formed such fixed opinions because of pretrial publicity that they cannot make impartial determinations. (*People v. Bonin* (1988) 46 Cal.3d 659, 676, overruled on other grounds.) The defendant, as the moving party, has the burden of proof to make these showings. (*Id.* at p. 673.) In this context, "reasonably likely" means something less than "more probable than not" and something more than merely "possible." (*People v. Dennis* (1998) 17 Cal.4th 468, 523, quoting *People v. Proctor* (1992) 4 Cal.4th 499, 523.)

On appeal from a denial of a change of venue motion, a defendant seeking relief from the denial of the motion must show: (1) that it was reasonably likely a fair trial could not be had at the time the motion was made; and (2) that it was reasonably likely a fair trial was not, in fact, had. (*People v. Massie*, *supra*, 19 Cal.4th at p. 578; *People v. Jenkins* (2000) 22 Cal.4th 900, 943.)

The reviewing court conducts a de novo evaluation of the trial court's determination as to whether there was a reasonable likelihood of an unfair trial. The trial court's resolution of factual issues is reviewed under a deferential substantial evidence standard. (*People v. Sanders* (1995) 11 Cal.4th 475, 505-506.)

B. Factual Background

Appellant filed his motion for a change of venue from Lake County on May 30, 2000. He attached an expert declaration in support of the motion and public opinion surveys and summary of pretrial publicity. (1 CT 151-207.) The court conducted a hearing on appellant's venue motion. (13A RT 141-16 RT 641.) Appellant's expert concluded that results of a public opinion survey showed that a change of venue was necessary to preserve appellant's right to a fair trial. (1 CT 151-181.) The prosecution opposed the motion and presented its own expert who concluded that public opinion surveys were only one factor to consider in change of venue determinations and that pretrial publicity posed little trouble in selecting a fair jury for appellant. (15 RT 548-549.) The prosecutor argued that voir dire would be sufficient to weed out any jurors who may have already prejudged the outcome of either the guilt or penalty phase. (15 RT 608-610.)

The court denied appellant's motion for change of venue. (1 CT 377; 16 RT 630-641.)

1. Defense Expert Testimony

Stephen J. Schoenthaler, Ph.D, testified in support of the defense motion for change of venue. (13A RT 145.) He was a professor in the Sociology and Criminal Justice Department at the California State University, Stanislaus. (13A RT 145-146.) He had been active in issues

related to voir dire, change of venue, and fair trials since 1991. (13A RT 147.)

Schoenthaler had conducted surveys and analysis on whether venue changes should be warranted for approximately 20 defendants in the seven or eight years before his testimony in this case. He had also worked on voir dire and survey development and analysis. He indicated that the research is "all associated with how do you get a good voir dire in order to get a fair trial when you're saturated with publicity." (13A RT 152.) He had been designated a venue change expert approximately half a dozen times. (13A RT 153.)

Schoenthaler reviewed the pretrial publicity information in this case provided to him by defense counsel. (13A RT 162.) He had reviewed the People's motion in opposition. (13A RT 164.) He also designed and conducted what he considered to be a representative random sampling survey. (13A RT 171.)

Schoenthaler concluded: 70 percent of the potential jurors claimed to recognize the case; 42 percent claimed that appellant was "definitely guilty" or "probably guilty;" 46 percent of the potential jurors claimed they recognized the case before participating in the survey and formed an opinion that appellant was guilty "and/or deserved to be sentenced to death." (1 CT 189-192; 13B RT 236.)

Schoenthaler testified that 49 percent of the 112 people he surveyed had prejudged guilt, penalty, or both. (14 RT 339.) He opined that there was no way to eliminate prejudgment from the jury pool during voir dire procedures. (14 RT 340-342, 344.) He concluded in his report that "there is a reasonable likelihood that the defendant could not receive a fair trial in Lake County with Lake County jurors due to the magnitude of prejudgment reaching 46 [percent]." He also concluded that "there is no way at voir dire to separate the acceptable and prejudiced jurors." (1 CT 192-193.)

On cross-examination, however, Schoenthaler conceded that there could be a way to word questions to locate and filter out potentially prejudiced jurors without contaminating the remainder of the pool. (14 RT 345-346.) Schoenthaler conceded that it would be difficult to duplicate his findings with respect to the jury pool and that he did not double-check the data to ensure that any particular locale was not overrepresented in his data. (14 RT 350-351.) In fact, Schoenthaler disapproved of the methods utilized by the National Jury Project, which was a project put together to obtain input from criminal defense lawyers, sociologists and other experts to better select fair jurors for criminal defendants. (14 RT 352-353.)

Schoenthaler admitted that out of the 112 participants in his survey, only one admitted to being intimately familiar with the case. (14 RT 356.) Schoenthaler further testified that he had not personally seen any evidence that the crime or trial was being talked about by people outside the courtroom. (14 RT 386.) Schoenthaler also testified that only 13 percent of the survey participants knew who appellant was. (14 RT 412.) Finally, Schoenthaler clarified that 68 to 70 percent of the sample had not formed a guilt opinion prior to participation in the survey, which he admitted was twice the rate of the jury pool in *Irvin v. Dowd*.[3] (14 RT 413.) Nonetheless, he testified that he was not aware of any procedures for voir dire to uncover the depth of knowledge among prospective jurors without contaminating them in this particular case. (14 RT 392.)

2. Prosecution Expert Testimony

Ebbe Ebbesen, Ph.D., a Psychology professor at the University of California, San Diego, provided expert testimony for the prosecution.[4] (14

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[3] (1961) 366 U.S. 717, 723.

[4] Appellant appears to raise a novel claim for the first time in this Court that Professor Ebbesen was biased by claiming he was "[t]horoughly (continued...)

RT 440.) Ebbesen reviewed the data and calculations provided by Dr. Schoenthaler. (14 RT 450-453.) Ebbesen believed the survey design was problematic, Schoenthaler's analysis was inadequate and incomplete, and Schoenthaler's conclusions were not supported by the data. (14 RT 454-455; 2 CT 302-332.)

Ebbesen's specific concerns with the survey design included first, that Schoenthaler did not include any false questions to test the veracity of the subjects. This was an important consideration because Ebbesen had previously found that as much as 20 percent of participants will say yes to

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(...continued)
pro-prosecution," having "regularly and repeatedly tesified as a prosecution witness opposing change of venue motions in other cases." (AOB 91, see also fn. 12.) Appellant had not raised such a claim below and it must be dismissed as forfeited.

Furthermore, to properly raise an issue for appellate review, appellant must clearly articulate a claim and support it with argument, legal authority, and citations to the record. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 367-368.) If an appellant fails to raise an issue, or fails to adequately support an issue raised, the appellate court may deem the issue forfeited. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Appellant fails to provide any argument, legal authority, or citations to the record, supporting his apparent claim that the prosecution expert was generally "pro-prosecution" or biased in any way. Therefore, his argument has been forfeited on appeal.

Finally, it must be rejected on the merits. The trial trial court made a credibility determination as to the experts by weighing their testimony and findings based on the evidence before it. The determination of whether a witness qualifies as an expert under Evidence Code section 720, subdivision (a), comes within the trial court's discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1062-1063.) Appellant has not cited any evidence from the record that Ebbesen was in fact biased in favor of the prosecution or that the trial court abused its discretion to rely on his objectivity and expertise. Appellant's attempt to impugn Ebbesen's credibility is forfeited and unsupported by any evidence in the record.

false items. (14 RT 461.) Second, Ebbesen faulted the limited nature of the response options in that subjects were not permitted to respond in detail sufficient to illustrate the extent of their knowledge about the question's subject matter. (15A RT 468-472.) Ebbesen suggested that a more accurate measure of the participants' knowledge about the facts of the case could have been obtained with open ended recall questions. (15A RT 472-474.) Ebbesen also criticized the survey for not attempting to determine the extent of prejudgment and whether subjects were open to changing their opinion. (15A RT 475-476.) Ebbesen faulted the survey for not asking any questions about the participants' personal involvement to test the embeddedness of the information in the community. (15A RT 476-477.) Ebbesen believed the order of the questions made the answers potentially unreliable. (15A RT 478-483.) He concluded that the survey did not adequately assess general death penalty opinion and that its assessment of guilt prejudgment was less than ideal as well. (15A RT 484-485.) Ebbesen opined that the survey did not appropriately measure demographic information. (15A RT 488-490.) He opined that the record keeping was inadequate and made it impossible to double-check the survey. (15A RT 492.) Ebbesen noted that at least two of the survey participants would not have been eligible to serve on a jury. (15A RT 498.) Finally, Ebbesen noted that not all questions were asked of all participants, thus confusing the results further. (15A RT 500-503.)

Ebbesen testified that Schoenthaler's analysis was inadequate. Schoenthaler failed to properly measure and analyze general attitudes and how they affected prejudgment. (15A RT 493.) He also did not measure the depth of participants' knowledge. Furthermore, participants' general attitudes strongly affected their opinions expressed in the survey without regard to any information related to this particular case, including appellant's name. (15A RT 504-512.)

Ebbesen did not believe that the survey data supported Schoenthaler's conclusions. (15A RT 487.) Conversely, Ebbesen analyzed the data and concluded that at least 91 of 112 respondents, or 81 percent of the entire sample, could be said to have open minds. (15A RT 513-514.) He also determined that only 10 people out of the entire sample recognized all three of the following: the case description, the victim's name, and appellant's name. (15A RT 514.) In Ebbesen's analysis, only 7 out of 112 individuals might have formed an opinion about appellant as an individual thinking that he was guilty before taking the survey. (15A RT 518.)

Ebbesen outlined ways of ferreting out prejudiced potential jurors without asking leading questions. (15A RT 529-548.) He testified that an adequate voir dire will result in a panel without any individuals on the jury panel who will be a problem. (15A RT 548.) With regard to the effects of pretrial publicity, Ebbesen read the survey results to suggest that "the court would have no problem selecting a fair and impartial jury from voir dire of potential jurors in Lake County." (2 CT 331.)

The prosecutor subsequently argued that voir dire would be sufficient to filter out potential jurors who have prejudged any relevant aspect of the case and to obtain a fair jury panel. (15B RT 608-610.)

3. The Court's Ruling

After the hearing, the court first pointed out that the survey standard presented by appellant differed significantly from the relevant legal standard. (16 RT 630 ["statistical possibility" versus "reasonable likelihood" that a fair and impartial trial can not be had in the venue].) The court noted that it considered all evidence presented and factors set out in *Maine v. Superior Court* (1968) 68 Cal.2d 375, and concluded that appellant had failed to meet his burden of showing a reasonable likelihood that a fair and impartial trial cannot be had in Lake county. The court denied the motion for change of venue, but noted that "[t]he denial is

without prejudice to renew the motion during the jury selection, should actual experience in trying to select a jury so justify." (16 RT 630.) Using *Maine*, *supra*, as a guide, the court set out its findings in detail.

First, the court considered the gravity and nature of the offense. The court found the gravity of the offense to be "as weighty as any criminal case can be, because the possible penalty here is one of death," and therefore weighed "more heavily towards the granting of a change of venue." However, the court recognized the case law explaining "that if the analysis were to end then at that point then every capital case would . . . necessitate a change of venue," and that the gravity of the offense "needs to be considered in light of all the other factors." (16 RT 630-631.) The court also considered the nature of the offense, as follows:

> Here the nature of the case is one that involves alleged murder of another individual, and obviously that type of case, it's a serious case. It's significant.
>
> But on the other hand, the death that's involved here, when looked and ranked against other types of murder cases—it's a single death.
>
> The court, in looking at the exhibits that were attached involving the newspaper articles that were submitted as an exhibit, couldn't find information in it that sensationalized the murder itself beyond that that would be given to any other such offense.
>
> For instance, it was not multiple victims, it was not torture, it wasn't—well anyway, here in the press it's not—you've seen some of these others: [m]utilation, sexual events, connected with the offense.
>
> So in looking at the nature of the case, certainly it's serious, it's murder, and every murder is serious, but there are other types of murders that one sees in the cases and one sees in court which have a—would seem to have a greater impact on people.

(16 RT 631-632.)

Next, the court considered the size of the community. It noted that the county had a population of 56,000, which was small compared to other counties but determined that it must consider that there are other small counties in California, with as few as 10,000 residents. The court noted that Lake county was not the smallest county. (16 RT 632-633.) The court made a further distinction:

> And I think that has a little bit of significance here too, because some counties, the population, maybe over in Colusa County, is centered around the county seat, of 15 thousand people, or 12 thousand people.
>
> Here it was indicated in the evidence that was submitted, the 56 thousand people in this county are somewhat spread out, and it indicated in the evidence there are various population centers, Lakeport, where we are, being one population center, being about 46 hundred, and from the location where the events occurred, as far as where the victim in this case lived, over in the Lucerne/Kono Tayee area, as the court understands it, from what was presented, that is probably anywhere from 12 to 14 miles from Lakeport.
>
> And the other population center's around 10 or 12 thousand, down in Clearlake, and it's about the same distance from the Lucerne Kono Tayee area to Clearlake.
>
> And then another population center that was referred to is in Kelseyville, which is a straight shot across the lake, basically, from Lucerne, but if you have to drive it, that's probably, you know, 15 miles, anyway.
>
> And then another large population center that wasn't mentioned is down in Middletown, Hidden Valley area, and that's probably, from Lucerne, oh, probably 30 miles, or 25 miles, anyway.
>
> And then there is the Cobb Mountain area too, which is behind Kelseyville.
>
> So here the 56 thousand people that are in the county aren't just centered in one area, and certainly they aren't centered over in Lucerne, on the—what's known as the North Shore.

And the North Shore consists of sort of a ribbon of small communities that run along the north shore of the Lake, the Nice, Lucerne/Kono Tayee area, Glenhaven and Clearlake Oaks.

(16 RT 633-634.)

The court distinguished cases cited by the defense involving smaller counties:

There was [*Corona*], [*Fane*], [*Frasier*], and really when you look at those cases, there's some very significant facts that are there in those cases. I mean—and some of those are the most notorious cases, quite frankly, in the State of California that have ever been tried.

Juan Corona, 25 murders, Frasier, down in Santa Cruz, a family was killed; I think five people, a doctor, prominent in the community. And there was all kinds of concern about some hippies or something that were going to—

Some of the other cases, there had already been one trial in the county, and the person had been found guilty and actually had been sentenced to death, and then it was reversed, came back, and trying to try the same case in the same county after that.

There were cases where in a small county—there was one, [*Tindel*], out of Lassen—I think it was Lassen. Where the people on the jury knew, were friends with the victims, that actually served on the jury. Everybody in the community knew the victims in the case.

And with public statements in some of these cases, like the autopsy surgeon saying, "This is the most horrible case I've ever seen in my 27 years," all kinds of mutilations and disfigurement.

And there was another case where the head of the—some motorcycle—some people belonged to a motorcycle gang, put the victim's head under a—one of those hoists you put a car up, and then brought it down, smashed the head.

You know, it was a situation where one of cases involved a peace officer—I believe that was down in Stanislaus County—and was well-liked, well-involved, I guess, in sports and

athletics in the community, and, you know, there were memorials, scholarship funds.

The funeral procession was—took, I don't know, a long time, even just to have all the people file by the casket at the funeral.

So certainly with that type of attention in a smaller county—certainly that would weigh—if you had a sensational case like that it would weigh, certainly, because of the size, towards going to another county, where you might be able to get a real large county, like Los Angeles or San Diego County, or Sacramento, to find jurors that were not impacted.

But here, because of the lack of the sensationalism—here size doesn't really play a factor here, a significant factor. And because of the distribution of the people the court concludes here really it's kind of a—it's a neutral—really neutral in this case.

(16 RT 634-636.)

Next, the court considered "the nature and extent of the pretrial publicity." (16 RT 636.) The court considered the pretrial publicity to have been moderate and non-sensational. The court felt that any publicity related to the VonSeggern killing and to appellant's step-grandmother, Margaret Johnson, could be "adequately addressed during the jury selection process." (16 RT 637.) The court addressed Professor Schoenthaler's pretrial survey as follows:

Now there was the survey of Dr. Schoenthaler. And the court paid great attention to that, and went over notes, and went back over a couple of times the survey as he presented it, and the court is aware what his bottom line conclusion was.

On the other hand, the court listened also attentively to the testimony of Dr. Ebbesen. And spent time reviewing his report.

And his report is basically critical of Dr. Schoenthaler's report in various aspects.

And of course the question here, as with any evidentiary issue, factually, that the court has to determine, what weight to give various items of evidence, and then going toward the ultimate conclusion that the court makes.

And the court found that the criticisms by Ebbesen—the court concluded that those criticisms had merit, and by reason of that it lessened the weight substantially that the court gave to Dr. Schoenthaler's survey, and certainly to his ultimate findings.

And this is particularly true—I'm just going to mention a couple of matters, but it's not to be inclusive—that the criticism that Ebbesen had of the—of Schoenthaler's survey, in that it didn't take into account preexisting tendencies of Lake County jurors that are unrelated and have not been influenced by any pretrial publicity involving this case. And that's basically found on—in Ebbesen's report on pages 6 through the top of 9.

Also the court was well influenced by the summary of analysis that was in table 3 on page 22 of his report.

The opinion surveys the court believes are important. The court has to give it weight.

The court has given it weight. And it's a lesser weight because of the criticisms.

But there again, that in itself is not determinative; the court has to view all the evidence in the case and apply all the factors.

(16 RT 637-639.)

The court next addressed appellant's status in the community. It was "mindful of the fact that there was certain publicity in the exhibits about a parolee and so on, and the involvement or possible involvement with the step-grandmother," but noted that appellant was not a member of any disfavored group so as to make this factor weigh toward venue change. (16 RT 639.)

Next, the court addressed Ellen Salling's status in the community:

[T]here was no indication that she had any prominence as such in the community. There was an indication that she was

active in a senior center, Alpine Senior Center, over in Lucerne, but nothing really beyond that.

And the court indicated before, the diversity of the population locations within the county, there wasn't anything to indicate that she had a prominence such that it would be recognized by anyone other than outside of the Lucerne community.

In reading these cases it seems that where the victim is a prominent individual, then you find a lot more extensive coverage, detailed coverage.

There's other things that happen in the community, scholarships, big funerals; and I guess people in the community may tend to relate more with somebody that they know either directly, or they perhaps feel they know because they are prominent in the community; they associate perhaps more with that person and—than somebody whom they didn't know.

So here the victim was not prominent, and it really didn't cause anything to be generated in the community as such, any big uproar or outcry because of her death.

So this factor obviously points in the direction of denial of a motion for a change of venue.

(16 RT 639-641.) The court concluded by reiterating its denial of the motion for change of venue.

C. Appellant Has Failed to Preserve the Issue for Appeal

When a trial court initially denies a change of venue motion without prejudice, a defendant must renew the motion after voir dire to preserve the issue for appeal. (*People v. Hart* (1999) 20 Cal.4th 546, 598; *People v. Williams* (1997) 16 Cal.4th 635, 654-655.)

Here, appellant moved the trial court for a change of venue only prior to voir dire. During the denial of appellant's motion, the trial court specifically noted that "[t]he denial is without prejudice to renew the motion during the jury selection, should actual experience in trying to select

a jury so justify." (16 RT 630.) Despite the court's invitation, appellant failed to renew his motion for change of venue after voir dire concluded and the jury was empanelled. Appellant has forfeited this claim.

D. The Trial Court Did Not Err in Denying Appellant's Motion for Change of Venue

A review of the five factors used by courts in venue determinations shows that it was not reasonably likely that a fair trial could not be had in Lake County at the time the motion was made. (See *People v. Massie*, *supra*, 19 Cal.4th at p. 578.)

1. Nature and Gravity of the Offense

The first factor—the nature and gravity of the offense—weighs in favor of a change of venue in most capital cases and is not a dispositive factor. The denial of a change of venue has been upheld on numerous occasions even in capital cases involving multiple murders. (*People v. Farley* (2009) 46 Cal.4th 1053, 1083, citing, e.g., *People v. Leonard* (2007) 40 Cal.4th 1370, 1395, 1397 [6 murder counts]; *People v. Ramirez* (2006) 39 Cal.4th 398, 407, 434-435 [13 murder counts]; *People v. Welch* (1999) 20 Cal.4th 701, 721, 744-745 [6 murder counts].) As the trial court noted, this case did not involve multiple murders or any other element that would particularly exacerbate the nature of the offense. (16 RT 632.) This factor does not compel a change of venue.

2. Nature and Extent of News Coverage

"When pretrial publicity is in issue it makes especially good sense to primarily rely on the judgment of the trial court because the judge sits in the locale and may base the evaluation based on the judge's own perception of the depth and extent of news stories that might influence a juror." (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 24, quoting *Skilling v. United States* (2010) ___ U.S. ___ [130 S.Ct. 2896, 2918], internal quotation marks

omitted.) Furthermore, it is well settled that pretrial publicity itself—even pervasive, adverse publicity—does not invariably lead to an unfair trial. (*People v. Prince* (2007) 40 Cal.4th 1179, 1216; see also *People v. Farley*, *supra*, 46 Cal.4th at p. 1084 [discussing "extraordinary cases" reviewed in *Prince* wherein high court presumed prejudice from pretrial publicity].) Appellant acknowledges this point. (AOB 95.)

In its pleadings below, the prosecution pointed out that the publicity pertaining to this case was not persistent and pervasive but rather consisted of 14 newspaper articles and two letters to the editor, spanning approximately 18 months, which averaged out to approximately less than one article per month. (1 CT 253.) According to the prosecution's pleading, most of the publicity occurred in 1998 and 1999, and only three publicity pieces appeared in the Lake County Record Bee in 2000: January 7, January 20, and April 29, 2000. (*Ibid.*) Furthermore, the April 29, 2000 publicity piece simply stated: "Trudjen is also defending accused murderer Jerrold Johnson, whose trial is scheduled to begin June 13. Johnson is accused of the Dec. 19, 1998 bludgeon murder of 76-year old Ellen Salling in her Kono Tayee home." (*Ibid.*)

The passage of time diminishes the potential prejudice from pretrial publicity. (*People v. Lewis* (2008) 43 Cal.4th 415, 449.) The 18-month time period between crime and trial also supports the court's decision. "'That time soothes and erases is a perfectly natural phenomenon, familiar to all.'" (*People v. Bonin*, *supra*, 46 Cal.3d at pp. 677-678, quoting *Patton v. Yount* (1984) 467 U.S. 1025, 1034.) The trial did not take place until one and a half years after Salling's murder. Accordingly, it is reasonable to infer memories of prospective jurors who read or watched reports would have been "dimmed by the passage of time." (See *People v. Famalaro*, *supra*, 52 Cal.4th at p. 22.)

At any rate, "[t]he ultimate question that the trial court must resolve . . . , is whether on the peculiar facts of the individual case [citation] there is a reasonable likelihood that the jurors who will be, or have been, chosen for the defendant's trial have formed such fixed opinions as a result of pretrial publicity that they cannot make the determinations required of them with impartiality." (*People v. Bonin*, *supra*, 46 Cal.3d at p. 672.)

This Court has explained:

> We have never required potential jurors to be ignorant of news accounts of the crime or free of "'any preconceived notion as to the guilt or innocence of an accused.'" [Citations.] The mere presence of such awareness on the jurors' part, without more, does not presumptively deny a defendant due process, because to hold otherwise "'would be to establish an impossible standard.'" [Citations.] In the absence of some reason to believe otherwise, it is only necessary that a potential juror be willing to set aside his or her "'impression or opinion and render a verdict based on the evidence presented in court.'" [Citations.]

(*People v. Davis* (2009) 46 Cal.4th 539, 575.)

Thus, there is no requirement that jurors be totally ignorant of the facts of a case, so long as they can lay aside their impressions and render an impartial verdict. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 450.) Courts may rely on jurors' assurances of impartiality, absent a showing that pretrial publicity was so persuasive and damaging that prejudice had to be presumed. (*Ibid.*)

Furthermore, the trial court must distinguish between mere familiarity with the defendant or the crime and an actual predisposition against the defendant. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1215.) Here, Ebbesen's testimony strongly suggested that Schoenthaler's high estimates of case familiarity and prejudgment were likely unreliable. (See 15A RT 478-485, 487, 493, 498, 500-512.) Furthermore, Ebbesen believed that the reported survey data did not support Schoenthaler's prejudgment conclusions. (15A RT 487.) Ebbesen's analysis of the survey data yielded

significantly lower prejudgment numbers: at least 91 of 112 respondents, or 81 percent of the entire sample, could be said to have open minds. (15A RT 513-514.) Crucially, Ebbesen determined that only 10 people out of the entire sample of 112 recognized all three of the following: the case description, the victim's name, and appellant's name. (15A RT 514.) In Ebbesen's analysis, only 7 out of 112 individuals might have formed prejudgment as to appellant's guilt prior to the survey. (15A RT 518.)

Ebbesen concluded that potential jurors did not report a high rate of prejudgment and that "the court would have no problem selecting a fair and impartial jury (with regard to the effects of pre-trial publicity) from voir dire of potential jurors in Lake County." (2 CT 331.) In its decision, the court specifically noted that it credited Ebbesen's criticism of Schoenthaler's survey results and ultimate findings. (16 RT 638.)

This degree of exposure to publicity is lower than that in reported cases in which a change of venue was denied. For instance, in *People v. Jennings* (1991) 53 Cal.3d 334, 359, 72 percent of the sample remembered the crime, and 31 percent believed the district attorney had a very strong case against the defendant. Similarly, in *People v. Coleman* (1989) 48 Cal.3d 112, 135, 46.3 percent of the public recalled the crime and 31 percent thought the defendant was definitely or probably guilty.

Finally, appellant claims the court "totally ignor[ed]" the claims of pretrial publicity related to Margaret Johnson. (AOB 93.) To the contrary, in considering the nature and extent of the pretrial publicity, the court specifically addressed this issue by noting that any publicity related to the VonSeggern killing and to Margaret Johnson, could be "adequately addressed during the jury selection process." (16 RT 637.)

Consideration of the nature and extent of the publicity as well as the potential juror pool survey and expert opinions about the survey supports the trial court's decision to deny appellant's motion to change venue.

3. Size of Community

"The larger the local population, the more likely it is that preconceptions about the case have not become imbedded in the public consciousness." (*People v. Balderas* (1985) 41 Cal.3d 144, 178.) However, the "size of the county is not alone determinative. [Citation.] . . . The key is whether it can be shown that the population is of such a size that it 'neutralizes or dilutes the impact of adverse publicity.' [Citation.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 363.) There is no magic number of people that must reside in a county in order for it to be deemed large enough to support a sufficiently diverse jury pool. Indeed, this Court has affirmed a denial of a change of venue in a capital case from a county with 36,555 residents. (*People v. Adcox* (1988) 47 Cal.3d 207, 233.)

The court below acknowledged that Lake County was a small county with approximately 56,000 to 60,000 people at the time of the trial. (16 RT 632.) However, the court stressed that the population is somewhat spread out over various population centers ranging between 15 to 30 miles from each other. (16 RT 633-634.) Furthermore, the trial was going to be held in an area that would be not at the locus of the crime but a substantial distance away. The court concluded that county size did not play a significant factor and, consequently, deemed the third factor in venue determination to be neutral. (16 RT 636.)

Appellant argues that the county was so small and media publicity so wide-ranging that some of the seated jurors were exposed to pretrial publicity or knew the victim or witnesses. (AOB 104-106.) However, "it is well-settled that pretrial publicity itself—even pervasive, adverse publicity—does not inevitably lead to an unfair trial. This prejudice is presumed only in extraordinary cases—not in every case in which pervasive publicity has reached most members of the venire." (*People v. Farley*, *supra*, 46 Cal.4th at p. 1086, citations and quotations omitted.)

Here, jurors about whom appellant specifically complains (AOB 105-106) all indicated to the court that they would be able to be fair, would follow the law, and would make their decision based only on evidence they heard in the courtroom. (22B RT 1887-1890 [juror no. 200002970]; 24B RT 2287-2293 [juror no. 200034886]; 31B RT 3778-3779, 3786 [juror no. 200019102]; 24B RT 2314, 2317 [juror no. 200012964]; 26B RT 2770-2776, [juror no. 200010689]; 30B RT 3583-3584 [juror no. 200002006]; 25A RT 2443-2444 [juror no. 200014476].)

"'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" (*People v. Harris* (1981) 28 Cal.3d 935, 950, quoting *Irvin v. Dowd*, *supra*, 366 U.S. at p. 723.) There is no reason to doubt the jurors' assertions that they could be fair. (*People v. Gallego* (1990) 52 Cal.3d 115, 168.) Although a juror's declaration of impartiality is not conclusive (*People v. Williams*, *supra*, 48 Cal.3d at p. 1129), the trial judge, who was present and best able to evaluate the jury, thoroughly examined the prospective jurors regarding their ability to be fair.

4. Appellant's Status in the Community

This factor does not weigh in favor of a change of venue. As the trial court found, appellant was neither well-known nor considered an outsider in the community. (16 RT 639.) Schoenthaler admitted that appellant was not a particularly prominent member of the community and this factor did not weigh heavily either in favor or against a change of venue. (13C RT 253.) There was no evidence that appellant or his family were well-known before his arrest for the murder. He was not associated with any group such as a disfavored racial minority or street gang towards which the community was "likely to be hostile." (See *People v. Famalaro*, *supra*, 52 Cal.4th at p. 23.) Nor was there any evidence to indicate that appellant was individually unpopular prior to his commission of the crime in this case.

5. Victim's Popularity or Prominence in the Community

This factor similarly does not weigh in favor of a change of venue. There is no evidence that Salling was particularly prominent in the community. "'Prospective jurors would [have] sympathize[d] with [her] fate' no matter where the trial was held and this sympathy stems from the nature of the crime, 'not the locale of the trial.'" (See *People v. Davis*, *supra*, 46 Cal.4th at p. 578.) A change of venue is not required merely because the death of the victim, such as an elderly woman who is loved and respected among her family and friends, evokes great sympathy within the community. (See *People v. Douglas* (1990) 50 Cal.3d 468, 495, abrogated on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

In sum, appellant has failed to demonstrate that his change of venue motion should have been granted. Appellant did not exhaust his peremptory challenges (33A RT 3889), a further indication that appellant believed the jury would be fair and impartial. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1252 & fn. 5; *People v. Daniels* (1991) 52 Cal.3d 815, 853-854.) The trial court's denial of the motion for change of venue is supported by substantial evidence. (See *People v. Cooper* (1991) 53 Cal.3d 771, 806; see also *People v. Coffman* (2004) 34 Cal.4th 1, 45 [upholding denial of motion to change venue despite polling showing that at least 70.9 percent of survey participants recognized the case, and over 80 percent of those believed defendants were guilty or probably guilty].) This case does not fall "within the limited class of cases in which prejudice would be presumed under the United States Constitution." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1217.)

E. Appellant Received a Fair Trial in Lake County

Appellant also claims that denial of his venue motion violated his constitutional rights to a fair trial, due process, and a reliable penalty

determination. (AOB 107-118.) Appellant's claim must fail as he has not shown that he was prejudiced by the trial court's denial of his motion to change venue. (See *People v. Massie*, *supra*, 19 Cal.4th at p. 578; *People v. Pride* (1992) 3 Cal.4th 195, 224.) Specifically, appellant has failed to show "both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it [is] reasonably likely that a fair trial was not *in fact* had." (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 943, citations and quotations omitted.)

Appellant was entitled to be tried by "a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd*, *supra*, 366 U.S. at p. 722.) A trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. (*Rideau v. Louisiana* (1963) 373 U.S. 726.)

Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial, and inflammatory media publicity about the crime. (*Rideau v. Louisiana*, *supra*, 373 U.S. at pp. 726-727; *Harris v. Pulley* (9th Cir. 1988) 885 F.2d 1354, 1361.) Under such circumstances, it is not necessary to demonstrate actual bias. However, the presumption of prejudice is "'rarely invoked and only in extreme situations.'" (*United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1181; *Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 554.) For the reasons detailed above, the publicity in appellant's case was not such as to support a presumption of prejudice. Indeed, the publicity had subsided before trial began and was unremarkable in comparison to other capital cases.

Professor Ebbesen testified at the venue motion hearing that an adequate voir dire will result in a panel without any jurors with prejudgment issues. (15A RT 548.) Ebbesen read the pretrial survey

results to suggest that "the court would have no problem selecting a fair and impartial jury from voir dire of potential jurors in Lake County." (2 CT 331.) Appellant has not shown that prejudice could be presumed based on pretrial publicity.

Appellant has also failed to demonstrate actual prejudice. Actual prejudice is shown where a sufficient number of the jury panel has such fixed opinions about the guilt of the defendant that they could not impartially judge the case, and a trial before that panel would be inherently prejudicial. (*Harris v. Pulley*, *supra*, 885 F.2d at p. 1364.) In deciding whether there was actual prejudice against a defendant, the reviewing court "must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside." (*Id.* at p. 1363.) Appellant has failed to demonstrate any such hostility by the empanelled jurors and instead relies on pretrial publicity and the small size of Lake County as proxies for showing actual prejudice. (AOB 114-118.)

However, as previously explained, a juror need not be "totally ignorant of the facts and issues involved." (*Murphy v. Florida* (1975) 421 U.S. 794, 799-800.) "'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in court.'" (*Id.* at p. 800, quoting *Irvin v. Dowd, supra,* 366 U.S. at p. 723.) Appellant relies on *Murphy* to argue that "juror assurances that they are equal to the task cannot be dispositive of an accused's rights to a fair trial by an impartial jury." (AOB 113.) *Murphy*, however, distinguished trials which

> . . . had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, *Sheppard* arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. The proceedings in these cases were entirely lacking in

> the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. *They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.* To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.

(*Murphy v. Florida*, *supra*, 421 U.S. at p. 799, italics added.) Even though in *Murphy*, during voir dire, a juror "conceded that his prior impression of petitioner would dispose him to convict," the court did not "attach great significance to this statement, . . . in light of the leading nature of counsel's questions and the juror's other testimony indicating that he had no deep impression of petitioner at all." (*Id.* at pp. 801-802.) Here, no jurors made any statements approaching a demonstration of prejudice against appellant.

As this Court has observed:

> [I]t should be emphasized that the controlling cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." (*Murphy v. Florida, supra*, 421 U.S. at p. 799 [44 L.Ed.2d at p. 594].) "It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion of the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*"

(*People v. Harris, supra*, 28 Cal.3d at pp. 949-950, italics added, quoting *Irvin v. Dowd, supra*, 366 U.S. at pp. 722-723; accord, *People v. Cooper, supra*, 53 Cal.3d at p. 883.)

"The defendant bears the burden of proof that the jurors chosen have such fixed opinions that they cannot be impartial." (*People v. Hayes, supra*, 21 Cal.4th at p. 1250, citing *People v. Sanders, supra*, 11 Cal.4th at p. 505.) The voir dire questioning of the jurors about whom appellant complains demonstrates the lack of taint of jurors by pretrial publicity. None of the jurors held a fixed opinion regarding appellant's guilt, let alone one they would not set aside so as to decide the case fairly on the evidence presented at trial. (See 22B RT 1887-1890; 24B RT 2287-2293; 24B RT 2314, 2317; 25A RT 2443-2444; 26B RT 2770-2776; 30B RT 3583-3584; 31B RT 3778-3779, 3786.)

Appellant has failed to demonstrate presumed or actual prejudice. He had a right to a fair trial and received no less.

II. THE TRIAL JUDGE WAS NOT REQUIRED TO DISQUALIFY HIMSELF

Appellant contends that the trial judge's relationship with the prosecutor required the judge to disqualify himself, and that the court's failure to do so deprived appellant of his rights to a fair trial, due process of law, and a reliable penalty determination. He further contends that the failure to disqualify was a structural error and reversible per se. (AOB 119-140.) Appellant's claim fails.

A. Factual Background

Prior to beginning the venue hearing, the judge in this case made the following statement:

> THE COURT: There's some matters that I need to advise everyone. There are provisions in the Code of Civil Procedure, 170, et seq. [h]aving to do with disqualification of judges for various causes and reasons.

And if a judge believes that there's something about a case where the parties—or something connected with the case which rises to a certain threshold that falls within one of the categories that's there, then the judge has the obligation to disqualify himself or herself.

On the other hand, there may be information that—in the judge's opinion that falls below that threshold for disqualification that's required, but nevertheless there has to be disclosure.

And it's on that basis now that I'm stating what I'm about to state to you.

And I'm stating that because Mr. Hedstrom is the prosecutor who's bringing the case, as I understand it, on behalf of the People. And so there are certain things that I wanted to disclose about my relationship with him over the past years.

I was the district attorney in this county from 1977 to 1984, the elected district attorney, and during that period of time Mr. Hedstrom was a deputy district attorney in that office.

He also, for a period of about the last year that I was in office—I was trying a change of venue case over in Butte County, and he—I put him in charge, in essence, of running the district attorney's office in my absence.

And we have basically been friends over a number of years. And there's never been a time, I have to say, when, after I went on the bench—obviously the relationship you have with people changes as to what you can do, what you can't do, what you can talk about, what you can't talk about. And there was never anything inappropriate about that whenever we met at social functions or whatever: Business was not the topic of conversation.

So then—I don't know, maybe a couple—a year ago or so, maybe a year and a half—I'm not sure anymore—but when—whether it was a year and a half ago or two years ago, when Mr. Hedstrom didn't run for his third term, then his status was a little different. He was no longer the district attorney.

It turned out that there was a judge, in department 4, who was not going to run again for election. And about that time I had

had discussions with Mr. Hedstrom about judging, about that position, and quite frankly and candidly, I urged him to run for that position. And in a non-public way, during the campaign I helped him, advising him on judicial ethics which apply to candidates during a campaign, various inner workings of the court, explained that to him, that—various areas of the law, et cetera, et cetera, and helped him in a non-public way with his campaign, as a judge could do in a judicial campaign. In fact a judge could publicly endorse or support or give money.

I gave no money, but I did give advice and time in that regard, in a non-public way, to his campaign, which was—well the election was, I guess, in March of this year.

And so we got on maybe an even closer basis as a result of that, and—but there again, there's always a separation and a distance from what I do as a judge.

He also was—well to give you an example:

My mother passed away in April, and he was one of the pallbearers at the funeral this past April.

And since his election we have had various conversations from time to time about the facilities down in department 4, things relating to types of judicial research material that would be available, things like that. I suspect he's had that conversation maybe with other judges as well.

And we recently, I think last week, talked more about judicial material and facilities and other things.

So anyway, I just wanted everyone to know what the relationship had been.

In my opinion it doesn't affect anything that I would do, but on the other hand, I feel compelled, as I understand the responsibilities of a judge in this position, to make this disclosure.

So with that, if there's—if this is new information, or information you haven't discussed with your client, whatever, I'd be happy to give you time, if you want a reasonable—

(13A RT 127-130.)

Defense counsel responded:

> Mr. Hedstrom and I had a conversation before your Honor took the bench about that very thing, and I talked to my client about it.
>
> As I explained to my client, I've practiced law in Fresno for 24 years; I've gone to law school with a couple of the judges; I've got a close personal relationship with a couple of the other judges, but I've never received a ruling from any of them that I didn't deserve, either for or against my position.
>
> And Mr. Hedstrom expects that the rulings from the bench will be fair and impartial for both of us.
>
> My client agrees[.]

(13A RT 131.) Appellant was present in court during these proceedings. (13A RT 127.)

B. Appellant Has Forfeited His Statutory Remedy

Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), provides "an explicit ground for judicial disqualification" based on "a public perception of partiality, that is, the appearance of bias." (*People v. Freeman* (2010) 47 Cal.4th 993; *People v. Cowan* (2010) 50 Cal.4th 401, 456.)

A party must seek the disqualification of a judge at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. The issue cannot be raised for the first time on appeal. (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 994; *People v. Guerra* (2006) 37 Cal.4th 1067, 1111, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151; Code Civ. Proc., § 170.3, subd. (d).) Nor can the defendant complain that the alleged bias affected subsequent rulings. (*Id.*)

Where the defendant had a statutory remedy to challenge the judge but forfeited that remedy by failing to pursue it, the defendant cannot then "fall back on the narrower due process protection without making the

heightened showing of a probability, rather than the mere appearance, of actual bias to prevail." (*People v. Freeman*, *supra*, 47 Cal.4th at p. 1006.)

Therefore, appellant has to show a probability of actual bias to prevail in his claim.

C. Appellant Did Not Receive Ineffective Assistance of Counsel

To preserve his claim, appellant contends that his counsel ineptly failed to "seek the judge's recusal or object at trial to judicial acts that could have been perceived and objected to as manifesting bias, presumed bias, or actual bias." (AOB 122.) There is no merit to this claim.

To demonstrate ineffectiveness of counsel, defendant must show that, "(1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "Reviewing courts defer to counsel's reasonable tactical decisions," and a conviction will be reversed only if there could be no conceivable reasons for counsel's acts or omissions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Tactical errors are generally not reversible and defense counsel's tactical decisions should be evaluated in the context of available facts, not in the "harsh light of hindsight." (*People v. Hinton* (2006) 37 Cal.4th 839, 876.)

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 688.) "Judicial scrutiny of counsel's performance must be highly deferential." (*Id.* at p. 689.) "It is all too tempting for a defendant to

second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.]" (*Ibid.*) "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Ibid.*)

The United States Supreme Court has recently reaffirmed the principles discussed in *Strickland*:

> A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. [Citation.] The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." [Citation.]
>
> . . . [¶] . . .
>
> "Surmounting *Strickland*'s high bar is never an easy task." [Citation.] An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." [Citations.] The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. [Citation.]

(*Harrington v. Richter* (2011) __ U.S. __ [131 S.Ct. 770].)

"To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, [courts] affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Maury* (2003) 30 Cal.4th 342, 389.) The reviewing court's inability to understand counsel's action or inaction is no basis for finding ineffective assistance, because the reasons, which may include the defendant's communications with counsel, may not appear on the record. (*People v. Jenkins* (1975) 13 Cal.3d 749, 755.) Here, defense counsel was invited to object or take further action after the trial judge explained on the record the nature of his relationship with the prosecutor. (13A RT 130.) Defense counsel made clear that in his experience, a close personal relationship does not result in differential treatment. He discussed the issue with the prosecutor and explained it to appellant. Defense counsel professed his belief and appellant's agreement that the court "will be fair and impartial for both of us." (13A RT 131.)

It was therefore reasonable for defense counsel to make the tactical decision not to challenge the judge.

Appellant's related contention that he was not personally advised about the relationship between the judge and the prosecutor (AOB 120) is counterfactual, as he was present in court during the discussion of their relationship. Additionally, defense counsel stated on the record that he explained the issue to appellant and appellant agreed with his evaluation. (13A RT 127, 131.)

Appellant fails to cite any authority to support his contention that his counsel's thoughtful waiver of a judicial bias claim constituted ineffective assistance of counsel. (AOB 122-127.) Counsel was not ineffective.

D. Appellant Has Failed to Show a Probability of Actual Bias

A defendant has a due process right under the state and federal Constitutions to an impartial trial judge. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *People v. Brown* (1993) 6 Cal.4th 322, 332.)

"'[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist "'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'"'" (*People v. Cowan*, *supra*, 50 Cal.4th at p. 456, quoting *Caperton v. A. T. Massey Coal Co.* (2009) 556 U.S. 868, 872.) A claim relating only to the appearance of bias is to be pursued under state disqualification statutes, with resort to the Constitution being a rarity. (*Ibid.*, citing *Caperton*, *supra*, 556 U.S. at p. 890.) The high court made clear that only the most "extreme facts" would support judicial qualification based on the due process clause. (*Cowan*, *supra*, at p. 457, citing *Caperton*, *supra*, 556 U.S. at p. 887.)

The United States Supreme Court has "made it abundantly clear that the due process clause should not be routinely invoked as a ground for judicial disqualification. Rather, it is the exceptional case presenting extreme facts where a due process violation will be found. [Citation.] Less extreme cases—including those that involve the mere appearance, but not the probability, of bias—should be resolved under more expansive disqualification statutes and codes of judicial conduct. (*Ibid.*)" (*People v. Freeman*, *supra*, 47 Cal.4th at p. 1005.) In *Freeman*, this Court found that due process was not denied where the defendant was tried before a judge who had previously disqualified himself based on an appearance of bias—his friendship with a judge whom the defendant was rumored to have been

stalking—but who later was reassigned to the defendant's case after the stalking rumors proved unfounded. (*Id.* at pp. 997, 1000-1006.)

This Court also declined to find that a defendant's federal due process right and statutory right (Code Civ. Proc., § 170.3, subd. (a)(1)) to an impartial judge were violated when the original trial judge continued to preside over a brief period of the trial after learning his close friends were both upcoming witnesses and relatives of one of the victims. (*People v. Cowan*, *supra*, 50 Cal.4th at pp. 456-457.)

Appellant fails to present any legal or factual support for his claim that "Judge Crone was evidently biased and had a clearly manifested and pervasive unity of interest with the prosecutor" (AOB 131). Appellant unsuccessfully analogizes the trial judge's alleged bias to that in *Caperton*, *supra*, 556 U.S. 868. (AOB 133.) A closer discussion of *Caperton* is helpful in placing claims of bias in proper perspective.

Caperton made clear that judicial bias is largely left to regulation by statute and suggested that "[P]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.' [Citation.]" (*Caperton*, *supra*, 556 U.S. at p. 876.) Additionally, the court discussed the meaning of "probability of actual bias" as "circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' [Citation.]" The Court then discussed "two instances where the Court has required recusal." (*Caperton*, *supra*, 556 U.S. at p. 877.) The first was "where a judge had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law." (*Ibid.*) The Court discussed *Tumey v. State of Ohio* (1927) 273 U.S. 510, a case where a judge was disqualified in part because he received a salary supplement as a direct result of whether or not a defendant was convicted. It then turned to other

cases where the judges were deemed to have been biased because they held some financial stake in the outcome. (*Id.* at p. 878.) "The second instance requiring recusal" the *Caperton* Court continued, was a situation where a judge had "a conflict arising from his participation in an earlier proceeding." (*Id.* at p. 880.)

Therefore, *Caperton* does not support appellant's bias argument, as he does not assert that the judge below had either a pecuniary interest or participated in any earlier proceeding resulting in conflict.

Appellant's reliance on *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813 (AOB 134) is equally unavailing. In *Aetna*, too, the judge had a direct and personal pecuniary interest related to the claim he was charged with adjudicating. (*Id.* at pp. 822-824.) Indeed, the Supreme Court found the judge biased because his "opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case," which essentially made him "'a judge in his own case.'" (*Id.* at p. 824.)

Appellant fails to identify concrete examples where probability of actual bias was intolerably high. Instead, he suggests that the prosecutor's proper discharge of his duty to ensure a speedy trial was merely a subterfuge for his eagerness to assume the bench and further his own career. (AOB 135.) However, "[I]n a criminal case, the people of the State of California have the right . . . to a speedy . . . trial." (Cal. Const., Art. I, § 29.) "[T]he people, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and judicial officers and of all counsel, both for the prosecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice." (§ 1050, subdivision (a).) A speedy trial is generally considered to be both a fundamental right of the accused

and a policy of sound administration of the criminal law. (*In re Begerow* (1901) 133 Cal. 349, 352-354.)

Appellant similarly argues that the judge made various rulings "in order to benefit the prosecutor's interests" in speeding the trial along. (AOB 135-137.) Appellant is mistaken. The trial court has a duty to control the proceedings. (§ 1044). "[A] trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.) On appeal, a defendant's due process right to a an impartial judge under the state and federal Constitutions requires a showing of judicial misconduct or bias so prejudicial that it deprived defendant of a fair trial, as opposed to a perfect trial. (*Ibid.*) Indeed, the reviewing court presumes the honesty and integrity of those serving as judges. (*People v. Chatman* (2006) 38 Cal.4th 344, 364.)

In his nonstatutory due process claim, appellant has failed to present this Court with "extreme facts," which demonstrate a probability of actual bias. Accordingly, his state and federal constitutional rights to due process were not violated. Further, to the extent that appellant contends, in conclusory fashion, that his other state and federal constitutional rights were violated by the appearance of judicial bias (AOB 138-140), his contention is unsupported by the record and is without merit.

III. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION OF CARJACKING CHARGED IN COUNT FOUR AND MURDER COMMITTED DURING THE COMMISSION OR ATTEMPTED COMMISSION OF CARJACKING CHARGED IN COUNT ONE

Appellant claims that the evidence was insufficient to support a conviction of carjacking (§ 215, subd. (a)) in count four and felony-murder predicated on carjacking in count one. Appellant argues that there is

insufficient evidence that he harbored the intent to steal Salling's car before or during his use of force or fear against the victim, and that the more reasonable inference from the evidence is that he formed the intent to take the car after killing Salling. (AOB 141-150.) We disagree.

A. Standard of Review

When the sufficiency of the evidence to support a criminal conviction is challenged on appeal, the appellate court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Osband* (1996) 13 Cal.4th 622, 690; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318.) The court presumes in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Osband*, *supra*, 13 Cal.4th at p. 690.) The reviewing court cannot reweigh the evidence or evaluate the credibility of the witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) If the circumstances reasonably justify the trier of fact's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 421.)

B. Substantial Evidence Supports Appellant Carjacking Conviction

There is sufficient evidence that appellant intended to take the car from Salling prior to assaulting and killing her and that the car was in her immediate presence.

1. Substantial Evidence Supports the Inference that Appellant Harbored an Intent to Take Salling's Car Prior to Assaulting and Killing Her

"'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).)

Establishing a "carjacking" requires substantial evidence of "either an intent to permanently or temporarily" "take" a vehicle from a person possessing it, or from such a person's immediate presence, by means of force or fear. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1058-1059.) "The requisite intent—to deprive the possessor of possession—must exist before or during the use of force of fear. [Citations.]" (*People v. Gomez* (2011) 192 Cal.App.4th 609, 618.)

The jury may infer a defendant's specific intent to commit a crime from all of the facts and circumstances shown by the evidence. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1208 ["Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction"].)

Here, substantial evidence supports the conclusion that appellant formed an intent to permanently or temporarily deprive Salling of her vehicle prior to assaulting Salling.

First, appellant needed a car. He was on the run from the police, had crashed his own car during this pursuit, and needed a method of continuing his escape.

Second, there is substantial evidence to infer that appellant knew that Salling's car was in the garage when he came across her house. Salling's

housing development was located in a rural, mountainous area (34B RT 4080), a difficult one to access without a car. Appellant was familiar with the area having previously delivered newspapers to Kono Tayee, and specifically to Salling's house for an entire year. (36A RT 4404-4408.) He approached Salling's house as she was baking cookies in the kitchen. The kitchen was visible from the road. It was reasonable for the jury to infer that appellant knew that since Salling was at home, then there was also a car in the attached garage.

Third, appellant had already armed himself with a weapon—a tree branch—when he entered Salling's home. (34B RT 4153.) Therefore, there was substantial evidence to support the finding that appellant had already formed the intent to steal Salling's car when he assaulted and killed her.

2. Salling's Car Was in Her Immediate Presence for Purposes of the Carjacking Statute

Appellant further argues that Salling's car was not taken from her immediate person or presence. (AOB 150-154.) We disagree.

The evidence here showed that Salling's garage was attached to her main living quarters, separated from her by a door. (34B RT 4130.) Salling kept her purse and car keys on the countertop in the kitchen. (34B RT 4132-4133.) Were she not prevented by appellant's forceful assault from getting in her vehicle, she could have retained possession of it. As in *People v. Medina* (1995) 39 Cal.App.4th 643, Salling's car was in her "immediate presence" for the purpose of section 215.

"A vehicle is within a person's immediate presence for purposes of carjacking if it is sufficiently within his control so that he could retain possession of it if not prevented by force or fear. [Citations.] It is not necessary that the victim be physically present in the vehicle when the confrontation occurs. [Citation.]" (*People v. Gomez, supra*, 192

Cal.App.4th at p. 623.) Similarly, CALJIC No. 9.46 defined immediate presence as "an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subjected or subject property." (See also, *People v. Medina*, *supra*, 39 Cal.App.4th at p. 643 ["immediate presence" element does not require the victim to be in actual physical possession of the car when confrontation occurs; rather, immediate presence encompasses area in proximity to vehicle].)

Carjacking "is a direct offshoot of the crime of robbery." (*In re Travis W.* (2003) 107 Cal.App.4th 368, 374.) Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Property is considered to be in the person's "immediate presence" for purposes of robbery if it is "'"so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it."' [Citations.]" (*People v. Hayes* (1990) 52 Cal.3d 577, 627.) Thus, "immediate presence . . . must mean at least an area within which the victim could reasonably be expected to exercise some physical control over [her] property."' [Citation.] Under this definition, property may be found to be in the victim's immediate presence 'even though it is located in another room of the house, or in another building on [the] premises.' [Citations.]" (*Ibid.*) The later carjacking statute uses language identical to the earlier robbery statute, and no contrary intent appears, courts presume that the Legislature intended the phrase "immediate presence" to have the same meaning in both the robbery and carjacking statutes. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060.)

Therefore, Salling's car was within her "immediate presence" for the purpose of the carjacking special circumstance because it was "located in

another room of the house," specifically an attached garage, which was just down the hallway and within her eyesight. (*People v. Hayes*, *supra*, 52 Cal.3d at p. 627.) The case is analogous to *Medina* in which car keys were taken from the victim through force or fear while inside a building, and the car parked outside was then stolen. (*People v. Medina*, *supra*, 39 Cal.App.4th at pp. 651-652.)

Salling's proximity to the car at the time of her assault was quite unlike the facts of *People v. Coleman* (2007) 146 Cal.App.4th 1363, to which appellant analogizes this case (AOB 153-154). In that case, the defendant entered a store and forced a store employee to give him the keys to the store owner's personal vehicle which was not on the premises at the time. (*Id.* at p. 1366.) The appellate court concluded the requirements for a carjacking conviction had not been met because the store employee "was not within any physical proximity to the [vehicle], the keys she relinquished were not her own, and there was no evidence that she had ever been or would be a driver of or passenger in the [vehicle]." (*Id.* at p. 1373.) In other words, while the evidence showed the defendant took the vehicle from someone's immediate presence, it did not show the defendant took the vehicle from the immediate presence of a person who possessed it within the meaning of section 215, subdivision (a). Conversely, appellant took Salling's car from the immediate presence of its owner, Salling herself.

C. Substantial Evidence Supports the Felony-Murder Conviction Predicated on Carjacking

The felony-murder rule provides that "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, [or] train wrecking . . . is murder of the first degree." (§ 189.) The rule does not require "a strict causal or temporal relationship between the felony and the murder . . . what is required is proof beyond a reasonable doubt that the felony and murder

were part of one continuous transaction. [Citation.] This transaction may include a defendant's flight after the felony to a place of temporary safety." (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

The specific intent to commit the underlying felony must coexist with the act of killing before the felony could be used as a basis for felony murder. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1250.) The requisite carjacking intent, to deprive the possessor of possession, must exist before or during the use of force or fear. (*People v. Gomez*, *supra*, 192 Cal.App.4th at p. 609.)

"The specific intent with which an act is performed is a question of fact. [Citation.] If any substantial evidence supports the trier of fact's finding on this issue, [the appellate court] will not disturb it." (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1008.) A jury deciding the truth of a felony-murder special circumstance is not required to assign a hierarchy to the defendant's motives in order to determine which of multiple concurrent intents was "primary," but instead the jury need only determine whether the commission of the underlying felony was or was not merely incidental to the murder. (*People v. Dement* (2011) 53 Cal.4th 1, 47.) The court need not "discern various mental states in too fine of a fashion," as a concurrent intent to kill and commit an independent felony is sufficient to support a felony-murder special circumstance. (*People v. Abilez* (2007) 41 Cal.4th 472, 511.)

This Court has stated that "when one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery." (*People v. Turner* (1990) 50 Cal.3d 668, 688.) "If a person commits a murder, and after doing so takes the victim's wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money." (*People v. Marshall* (1997) 15

Cal.4th 1, 35.) Appellant acknowledges this authority, citing *People v. Hughes* (2002) 27 Cal.4th 825A. (AOB 147.)

In *Hughes*, this Court found that where after killing the victim the defendant cashed a check made out to the victim and hid her wallet, there is substantial evidence to suggest that the defendant entered the apartment with the intent to rob. (*People v. Hughes* (2002) 27 Cal.4th 287, 357-358.) "[O]n this record a jury reasonably could infer that defendant intended from the outset to steal the victim's possessions by force, or at least possessed that intent as he was engaged in inflicting force upon her." (*Id.* at p. 358.)

Similarly here, substantial evidence supports a finding of a first degree murder in the attempted commission of a carjacking. The fact that, after killing Salling, appellant took her car and used it as a getaway vehicle to continue his flight from the police, compels the conclusion that appellant entered her house with the intent to steal her car, among other things. Substantial evidence supports the conclusion that appellant killed Salling in furtherance of the carjacking. In sum, there was substantial evidence for the jury to have found beyond a reasonable doubt that appellant killed Salling in the commission of, and in furtherance of, a carjacking.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE SPECIAL CIRCUMSTANCE IN COUNT ONE

Appellant similarly argues that the carjacking special circumstance alleged in count one is unsupported by substantial evidence that the murder occurred while appellant was engaged in the commission or attempted commission of carjacking. (AOB 158-168.) Appellant's claim fails. Furthermore, appellant fails to demonstrate prejudice.

A. Standard of Review

A special circumstance finding must be supported by substantial evidence. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1022.) In reviewing the sufficiency of evidence of a special circumstance, the question is

whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt. (*People v. Mickey* (1991) 54 Cal.3d 612, 678.)

B. Substantial Evidence Supports the Carjacking Special Circumstance Finding

A felony-murder special circumstance is proven absent intent to kill, premeditation, or deliberation if there is proof beyond a reasonable doubt that appellant personally killed the victim in the commission of, and in furtherance of, one of the felonies enumerated in section 190.2, subdivision (a)(17). (*People v. Thornton* (2007) 41 Cal.4th 391, 436.)

In *People v. Green* (1980) 27 Cal.3d 1, 61-62, overruled on other grounds as stated in *People v. Dominguez* (2006) 39 Cal.4th 1141, 1155, fn. 8, this Court "held that the felony-murder special circumstance is 'inapplicable to cases in which the defendant intended to commit murder and only incidentally committed one of the specified felonies while doing so.'" (*People v. Raley* (1992) 2 Cal.4th 870, 902.) There is sufficient evidence to support a carjacking special circumstance based on evidence that the defendant killed another person and at the time of the killing took substantial property from the victim, as "a jury ordinarily may reasonably infer that the defendant killed the victim to accomplish the taking and thus committed the offense of robbery." (*People v. Nelson* (2011) 51 Cal.4th 198, 212.)

Here, there was substantial evidence for the jury to have reasonably found that appellant, having crashed his car and on the run from the police, was looking for another vehicle to complete his escape from the police. It was further reasonable for the jury to infer that appellant assaulted and killed Salling in the course of stealing her car (CALJIC No. 8.81.17) and

not that the carjacking was "merely incidental to the murder" (AOB 162, citing *People v. Green*, *supra*, 27 Cal.3d at pp. 59-61).

As set out in Part III, *supra*, appellant was familiar with Salling's house, having previously delivered newspapers to her housing development. It was reasonable to infer that appellant knew or assumed that many residents of that development had cars, given the remoteness of the area. He approached Salling's house already armed with a weapon—a tree limb—as she was baking cookies in the kitchen, which was visible from the road. The jury heard testimony that Salling sustained injuries consistent with having been caused by a tree limb. (39B RT 5049.) The jury may have made a reasonable inference that appellant knew that if the resident of the house was at home, then there was also a car in the attached garage. It was reasonable for the jury to accept the prosecution theory that appellant formed the intent to steal Salling's car before he assaulted and killed her. Thus, the carjacking was not merely incidental to the killing of Salling.

Lastly, appellant claims that the lack of substantial evidence supporting the special circumstance deprived him of his rights to a reliable penalty determination under the Eighth and Fourteenth Amendments. (AOB 167-168.) However, as discussed above, substantial evidence supported the carjacking special circumstance finding. Moreover, appellant's penalty is supported by two other special circumstances that appellant does not challenge.

C. Appellant Has Failed to Demonstrate Prejudice

Appellant was charged with felony-murder in count one based on three special circumstances: the killing was committed while appellant was engaged in committing burglary, robbery, and carjacking. (1 CT 104-105.) Assuming, *arguendo*, that the carjacking special circumstance finding is unsupported by substantial evidence, appellant's conviction for first degree

murder based on felony-murder remains supported by the two other special circumstance findings: burglary and robbery.

"[I]f one of the prosecution's alternative theories of criminal liability is found unsupported by the evidence, the judgment of conviction may rest on any legally sufficient theory unaffected by the error, unless the record affirmatively demonstrates that the jury relied on the unsupported ground." (*People v. Johnson* (1993) 6 Cal.4th 1, 42, overruled on another ground by *People v. Rogers* (2006) 39 Cal.4th 826, 879; see also *People v. Kelly* (2007) 42 Cal.4th 763, 789 [true findings of rape-murder and robbery-murder special circumstances make it unnecessary to decide whether the evidence was sufficient for the jury to also find premeditated murder].)

Appellant has failed to demonstrate prejudice.

V. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE USE OF VICTIM IMPACT EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL

Appellant contends for the first time on appeal that the trial court erred by not instructing the jury on the proper use of the victim impact evidence during the penalty phase of his trial. (AOB 169-182.) As an initial matter, appellant has forfeited his claim because he failed to either object to the instructions or request a clarification below. In any event, his contention fails because the trial court properly instructed the jury on how to consider the evidence presented during the penalty phase of the trial with standard CALJIC instructions.

A. Appellant's Claim Has Been Forfeited

Appellant did not raise this claim in the trial court. "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) When a defendant believes a jury instruction needs amplification,

clarification, or explanation, it is incumbent upon him or her to make such a request. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) A failure to object or request such clarifications at trial bars appellate review of the issue. (*People v. Johnson* (1993) 6 Cal.4th 1, 52-53.) In the instant matter, the jury was instructed, inter alia, pursuant to CALJIC Nos. 8.84.1 [Duty of Jury—Penalty Proceeding] (4 CT 927), 8.85 [Penalty Trial—Factors For Consideration] (4 CT 928-929), 8.86 [Penalty Trial—Conviction of Other Crimes—Proof Beyond a Reasonable Doubt] (4 CT 957-958), 8.87 [Penalty Trial—Other Criminal Activity—Proof Beyond a Reasonable Doubt] and 8.88 [Penalty Trial—Concluding Instruction] (4 CT 986-987).

As appellant did not object to these jury instructions before the trial court, nor request that the court instruct the jury with specific guidance regarding victim impact evidence, this claim has been forfeited.

B. General Principles of Admissibility of Victim Impact Evidence

The Eighth Amendment erects no per se bar prohibiting a capital jury from considering victim-impact evidence relating to a victim's personal characteristics and impact of the murder on the family, and does not preclude a prosecutor from arguing such evidence. (*Payne v. Tennessee* (1991) 501 U.S. 808.) Victim-impact evidence is admissible during the penalty phase of a capital trial because Eighth Amendment principles do not prevent the sentencing authority from considering evidence of the specific harm caused by the crime. The victim impact evidence cannot be cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Id.* at pp. 825, 829.)

The California Supreme Court found victim-impact evidence and related "victim character" evidence to be admissible as a "circumstance of the crime" under section 190.3, factor (a). (*People v. Robinson* (2005) 37 Cal.4th 592, 650.) Section 190.3, subdivision (a), permits the prosecution

to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." Factor (a) allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v. Edwards* (1991) 54 Cal.3d 787, 833-836.)

Furthermore, under section 190.3, subdivision (b), a jury may hear facts surrounding prior criminal activity involving force or violence. (*People v. Moore* (2011) 51 Cal.4th 1104, 1135; *People v. Jurado* (2006) 38 Cal.4th 72, 135.) Factor (b) embraces not only the existence of the activity, but the pertinent circumstances as well, including the results of the conduct and impact on victims. (*People v. Price* (1991) 1 Cal.4th 324, 479; *People v. Ashmus* (1991) 54 Cal.3d 932, 985.) Neither the state nor federal Constitution forbids admitting evidence of unadjudicated prior crimes for penalty determination, including the surrounding circumstances. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 76-77.)

C. The Court Properly Instructed the Jury During the Penalty Phase

As noted in subsection A, *supra*, the trial court instructed the jury with the requisite CALJIC instructions pertaining to proper consideration of penalty phase evidence. (4 CT 927-929, 957-958, 986-987). This Court has explained "that the standard CALJIC penalty phase instructions 'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Gurule* (2002) 28 Cal.4th 557, 659; see also *People v. Tate* (2010) 49 Cal.4th 635, 708.) Appellant now claims that the trial court neglected to sufficiently guide the jury regarding how to evaluate victim impact

evidence. (AOB 174.) Appellant acknowledges that this Court has consistently rejected such claims (AOB 176) but contends that the Court's reasoning in so doing "is unsound" (AOB 178). Appellant offers no persuasive reason for this Court to revisit its prior decisions.

The jury below was instructed: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." (CALJIC No. 8.84.1; 4 CT 927). CALJIC No. 8.84.1 is sufficient to guide the jury in considering the emotional impact of the penalty phase evidence. (*People v. Hartsch* (2010) 49 Cal.4th 472, 511; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 455, abrogated on other grounds as stated in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.) The trial court need not instruct a jury not to be influenced by emotion resulting from victim-impact evidence. It need not give duplicative instructions; an instruction that the jury may not impose the death penalty as a result of an irrational, subjective response to emotion evidence is duplicative of CALJIC No. 8.84.1. (*People v. Carey* (2007) 41 Cal.4th 109, 134.)

Appellant specifically complains about victim impact testimony surrounding appellant's killing of VonSeggern, which was introduced during the penalty phase pursuant to section 190.3, subdivision (b). VonSeggern's father, Gerald Ohman, testified about the impact of VonSeggern's death on the family. (48B RT 6107-6111.) As an initial matter, neither statute nor state or federal constitutional principles forbid admission of such evidence. (See *People v. Hawthorne*, *supra*, 4 Cal.4th at pp. 76-77.)

However, appellant contends that "[a]llowing victim impact evidence to be placed before the jury without proper instructions on the jury's use

and consideration of that evidence has the clear capacity to taint the jury's decision on whether to impose death." (AOB 177.) This claim is without merit. The jurors were told to consider all of the jury instructions given, and, in CALJIC No. 8.88, the trial court specifically told the jurors that in "weighing the aggravating and mitigating circumstances," they were to "determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." The trial court also instructed that each juror "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (4 CT 986.)

Appellant contends that "there was nothing in the instructions to dissuade the jury from incorporating . . . considerations into the sentencing calculus, including vengeance and the wishes or opinions of the victim's families." (AOB 180.) This Court has previously rejected this contention, noting that a specific instruction about how to evaluate victim impact evidence is not necessary, and that a suggestion "that a juror's 'emotional response' to the evidence may play no part in the decision to vote for the death penalty" is incorrect. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 73.) Furthermore, the trial court had no sua sponte duty to instruct the jury "not to consider the views of the victim's survivors, . . . because it is 'not necessary to the jury's understanding of this case.' [Citation.]" (*Ibid.*) Conversely, "jurors may in considering the impact of the defendant's crimes, 'exercise sympathy for the defendant's murder victims and . . . their bereaved family members.'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 369.)

In assessing whether the jury was adequately guided under the Eighth or Fourteenth Amendment, the court determines how it is reasonably likely

the jury understood the instruction, and whether the instruction, so understood, accurately reflects applicable law. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1161.) When instructed in the penalty phase that it "must neither be influenced by bias nor prejudice against the defendant," and to "follow the law" and "reach a just verdict," the jurors likely understood and followed those simple instructions. (See *People v. Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions"].) No reasonable juror would have misunderstood the jury instructions that were given as permitting an improper use of the victim impact testimony.

Since there is no reasonable likelihood that the jury misunderstood the proper use of victim impact evidence, the instructions given cannot be deemed erroneous. (See, *Boyde v. California* (1990) 494 U.S. 370; *People v. Benson* (1990) 52 Cal.3d 754, 801.) The jury was sufficiently instructed about how to consider penalty phase victim impact evidence.

In any event, any instructional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)[5] The United States Supreme Court has suggested that a death sentence is not rendered unconstitutional by an erroneous instruction when other aggravating facts and circumstances are sufficient to result in a death verdict. (See *Brown v. Sanders* (2006) 546 U.S. 212, 224.) A differently worded instruction to the jury would not have changed the outcome in the

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[5] Instructional error, even one which impermissibly shifts the burden of proof, or omits an element of the offense or a special circumstance, may be subjected to the *Chapman* harmless-error standard. (*Pope v. Illinois* (1987) 481 U.S. 497, 501-504; see also *Rose v. Clark* (1986) 478 U.S. 570, 579 [aside from errors affecting fundamental rights, "there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis"].)

penalty phase of this case given the substantial evidence in aggravation and moral considerations that supported the jury's penalty determination. Any instructional error was harmless beyond a reasonable doubt.

Appellant's claim should be rejected.

VI. THE COURT PROPERLY ADMITTED EVIDENCE OF THE VONSEGGERN KILLING

Appellant contends that the trial court erred by purportedly permitting the prosecution to retry the VonSeggern killing by including the crime of murder in the relevant penalty phase instructions: CALJIC Nos. 8.00 through 8.21 and 8.87. (AOB 183-224.) As an initial matter, appellant has waived his claim. If not waived, appellant's claim fails because his no contest plea to the charge of voluntary manslaughter in the killing of VonSeggern did not constitute an implied acquittal of the murder charge. Accordingly, the principles of collateral estoppel, res judicata, and double jeopardy are inapplicable. Further, appellant's constitutional rights were not abridged. Finally, appellant has failed to show prejudice.

A. Appellant Has Waived His Claim

A defendant must object to introduction of factor (b) (other violent criminal conduct by the defendant) evidence to preserve the issue for appeal on either statutory or constitutional grounds. (*People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1052.) Similarly, if not raised in the trial court, claims of collateral estoppel (*People v. Neely* (1999) 70 Cal.App.4th 767, 782-783) and double jeopardy (*People v. Belcher* (1974) 11 Cal.3d 91, 96) are waived.

During the penalty phase of the trial, the prosecutor sought to introduce evidence of the circumstances underlying appellant's manslaughter conviction for VonSeggern's death. (45A RT 5598-5606.) The prosecutor made it clear that "the People obviously are intending to introduce evidence of conduct more serious than what the Defendant

admitted to in the prior case." (45A RT 5607.) Defense counsel noted on the record "Didn't I say earlier this morning—maybe I was not understood—we're not objecting to the evidence being offered in aggravation being presented by the Prosecution, to any aspect of it." (45A RT 5607.)

The prosecutor also asked "that the jury be instructed concerning the elements of murder with respect to his killing of [VonSeggern]." (45A RT 5607.) The court again asked defense counsel whether there was any objection, and defense counsel said "no." (45A RT 5609.) The court asked whether there was "any objection on the legal theory of which it's offered, that is, the crime of murder?" (45A RT 5609.) Defense counsel explained:

> Well, I don't have an objection to the legal theory. But, of course, we're going to point out to the jury that the ultimate conviction was voluntary manslaughter. And if the D.A. is seeking an instruction to the jury on murder, we'll certainly seek an instruction on voluntary manslaughter. But as far as the presentation of it is concerned and the theories, no, no objection.

(45A RT 5609.)

The court asked, with respect to factor (b) evidence, "will there be a request by either party to have the Court instruct on the basic crime or crimes to which such evidence is offered?" (45A RT 5610.) The prosecutor responded that he will make such a request. Defense counsel stated, "We don't have a problem with—if the D.A. wants to have an instruction, we don't have a problem with it." (45A RT 5610.)

After discussing other instructions, the court again returned to the matter of instructions related to the VonSeggern killing:

> The Court: [I]n looking again at instructional matters, on the VonSeggern factor B, the People intend to apparently ask for it to be instructed or at least ask for an instruction from which the jury could conclude that the factor in aggravation is one in essence that they should consider as murder rather than it's manslaughter; is that correct?

[Prosecutor]: Correct.

The Court: So on that matter, then, the instruction, as I think you said, [defense counsel], that your position at this time is that that evidence—it would be your position that that offense was no more than what the records show, that is, voluntary manslaughter?

[Defense Counsel]: That's correct.

The Court: So there would be a need then to have [them] instructed both ways

[Prosecutor]: That's correct

[Defense Counsel]: And that's my position.

(45A RT 5628-5629.)

After some further discussion of the meaning of appellant's no contest plea for manslaughter of VonSeggern, defense counsel noted, "Well, we certainly agree that no contest is considered by the Court the same as a guilty plea. And we have no problems dealing with the idea that voluntary manslaughter is a plea bargain from a murder charge. In fact, we'd like to have the opportunity to argue that to the jury ourselves." (45A RT 5629.)

Finally, during discussion of jury instructions, defense counsel was asked his views on whether a murder instruction should be given to the penalty jury and responded, "I think we ought to give it out of an abundance of caution to tell you the truth." (51B RT 6615.) The court asked, "So for [VonSeggern] you believe that both the voluntary, which there's the conviction, as well as what's contended is murder by the District Attorney, that the murder instruction ought to be given?" The defense counsel said that he did. (51B RT 6616.)

The above statements by defense counsel make clear that he considered and waived the evidentiary and instructional claim appellant now brings to this Court.

1. Appellant Did Not Receive Ineffective Assistance of Counsel

To preserve his claim, appellant contends that if he is deemed to have waived or forfeited his claim, he received ineffective assistance of counsel. (AOB 213-217.) Appellant's claim fails because the record discloses that his counsel's representation did not fall below an objective standard of reasonableness under prevailing professional norms, nor is there a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (See *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1058.)

The relevant legal standard for effectiveness of counsel is set out fully in Part II.C., *supra*. In short, to demonstrate that his counsel was ineffective, appellant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1058; *Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688.) Counsel's reasonable tactical decisions are entitled to deference, subject to the inquiry of whether counsel's assistance was reasonable considering all the circumstances. (*People v. Jones*, *supra*, 29 Cal.4th at p. 1254; *Strickland v. Washington*, *supra*, 466 U.S. at p. 688.) Courts considering ineffective assistance claims "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." (*Harrington v. Richter*, *supra*, __ U.S. at p. __ [131 S.Ct. at p. 787].) Appellant's "burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" (*Ibid.*)

> "Surmounting *Strickland*'s high bar is never an easy task." [Citation.] An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not

> presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." [Citations.] The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. [Citation.]

(*Harrington v. Richter*, *supra*, __ U.S. at p. __ [131 S.Ct. at p. 788].)

Here, defense counsel actively participated in the penalty phase of the trial. He lodged a motion objecting to the introduction of the evidence of Margaret Johnson's homicide and fire at her trailer and then withdrew it upon further consideration. (45A RT 5589.) When the prosecutor sought to introduce evidence of the underlying circumstances of appellant's manslaughter conviction related to VonSeggern's death (45A RT 5598-5606), defense counsel explicitly noted on the record that he was not objecting "to any aspect" of the evidence being offered in aggravation during the penalty phase. (45 RT 5607.) Defense counsel participated in a thorough discussion of potential penalty phase evidence of the VonSeggern killing, and made clear that he was not objecting to the murder instructions. (51B RT 6615-6616.)

Appellant has failed to show that there could be no conceivable reasons for defense counsel's tactical decision to allow the introduction of the evidence and the relevant CALJIC instructions. (See *People v. Jones*, *supra*, 29 Cal.4th at p. 1254.) Evaluated in the context of available facts, not in the "harsh light of hindsight," defense counsel's tactical decision is reasonable. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 876.) Considering

the evidence to be introduced in the penalty phase regarding VonSeggern's death, including evidence showing that appellant had sex with another woman on the night of VonSeggern's death and was not bothered by VonSeggern's death (46B RT 5802; 50B RT 6456-6457), that appellant sold VonSeggern's car and forged her signature (47A RT 5826, 5832-5833, 5877-5880), the postmortem manipulation of VonSeggern's body by appellant (50B RT 6460-6461), and painful victim impact testimony (48B RT 6107-6109), defense counsel may have reasonably made the tactical decision that it would be prudent both to allow sympathetic evidence of appellant's remorse (see e.g., 53A RT 6766-6768) and to advise the penalty phase jury on the relevant crimes attending this conduct including involuntary manslaughter—a lesser crime than that for which appellant was convicted (see 4 CT 959; 53B RT 6839). Defense counsel argued in closing that appellant acknowledged killing VonSeggern and took responsibility for that act. (53A RT 6761.) Counsel's assistance was reasonable considering all the circumstances. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 688.)

Our Supreme Court has warned that "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." (*Harrington v. Richter*, *supra*, __ U.S. at p. __ [131 S.Ct. 770, at p. 778].)[6] The Court focused the relevant inquiry on "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." (*Ibid.*) Here, defense counsel actively

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[6] Indeed, appellant's recognition that "a plea of once in jeopardy cannot be raised for the first time on appeal except in the context of a claim of ineffective assistance of counsel" (AOB 213, citing *People v. Scott* (1997) 15 Cal.4th 1188, 1201) may suggest he is raising an ineffective assistance of counsel claim precisely for this reason.

participated in the discussions related to evidence admissible in the penalty phase pursuant to section 190.3, factors (b) and (c) and related instructions. (45A RT 5607, 5609-5610, 5628-5629; 51B RT 6615-6616.) His participation evinced an understanding of the penalty phase proceedings and was a tactically considered approach to the evidence offered in aggravation and related instructions.

Appellant briefly notes that where double jeopardy applies as a bar, there could be "no legitimate tactical reason for failing to raise it." (AOB 216, citing *People v. Morales* (2003) 112 Cal.App.4th 1176, 1185.) However, as discussed below, here double jeopardy was not a bar to the factor (b) evidence introduced by the prosecution. It is established that counsel is not ineffective for failing to make frivolous or futile motions (*People v. Thompson* (2010) 49 Cal.4th 79, 122), so a failure to object on double jeopardy grounds does not constitute ineffective assistance of counsel.

The record makes clear that defense counsel's representation was not incompetent under prevailing professional norms and that appellant's ineffective assistance claim should not allow him to escape rules of waiver. Appellant did not receive ineffective assistance of counsel.

B. General Legal Principles for Factor (b) Evidence

Section 190.3 contemplates consideration of some aspects of a defendant's criminal history: (factor (b), prior violent criminal activity; factor (c), prior felony conviction). (*People v. Douglas* (1990) 50 Cal.3d 468, 525; see also *People v. Mattson* (1990) 50 Cal.3d 826, 877.) A defendant's criminal history is part of his or her background and can properly be considered in aggravation. (*People v. Carey* (2007) 41 Cal.4th 109, 135.)

Prior criminal activity may be admitted both as violent criminal activity under section 190.3, subdivision (b), and as a prior felony

conviction under section 190.3, subdivision (c). (*People v. Kelly* (1992) 1 Cal.4th 495, 549; *People v. Price*, *supra*, 1 Cal.4th at p. 472.) Factor (b) evidence must demonstrate the commission of an actual crime, specifically, a violation of the Penal Code. (*People v. Jurado* (2006) 38 Cal.4th 72, 136.)

"[A] defendant is not entitled to prevent admission of the '"sordid details"' of criminal conduct under section 190.3, factor (b) '"by stipulating to any resulting conviction or to a sanitized version of the facts surrounding the offense."'" (*People v. Clark* (2011) 52 Cal.4th 856, 1000, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 1017.) "The proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on [the defendant's] character, rather than on the labels to be assigned to those crimes." (*People v. Collins* (2010) 49 Cal.4th 175, 219, internal quotation marks omitted.) When evidence of other crimes is admissible under factor (b), then "'evidence of the surrounding circumstances is admissible to give context to the episode, even though the surrounding circumstances include other criminal activity that would not be admissible by itself.'" (*People v. Thomas* (2011) 51 Cal.4th 449, 505, quoting *People v. Wallace*, *supra*, 44 Cal.4th at p. 1081.)

C. Factual Background

During the penalty phase of the trial, the prosecutor sought to introduce evidence of the circumstances underlying appellant's manslaughter conviction of VonSeggern's death. (45A RT 5598-5606.) The prosecutor made it clear that "the People obviously are intending to introduce evidence of conduct more serious than what the Defendant admitted to in the prior case." (45 RT 5607.) At a later hearing, the prosecutor explained that he did not intend to "characterize the prior felony conviction other than a plea of no contest to voluntary manslaughter," but "that doesn't preclude the people from introducing evidence that shows that the killing of [VonSeggern] was something more than voluntary

manslaughter." (46A RT 5649-5650.) He also asked that the jury be given a murder instruction. (46A RT 5650.)

After penalty phase testimony, the court held another hearing to discuss instructions. At that hearing, the defense requested instructions for voluntary manslaughter, and the court asked what was the purpose of the instructions. Defense counsel responded:

> My client was convicted of voluntary manslaughter for Jennifer VonSeggern. The District Attorney wants to or—and has presented a case in an effort to argue it's really not manslaughter; it's really murder. And I think it's fair to have the jury understand what voluntary manslaughter is in relation to that set of facts.

(51B RT 6608.)

The prosecutor argued in the penalty phase closing argument that appellant admitted to having committed an involuntary manslaughter of VonSeggern, which can be considered in aggravation against him. The prosecutor urged the jury, however, that the crime really was a murder because of additional testimony appellant provided in the penalty phase of the Salling trial that was not available at the time of his plea. (53A RT 6719.)

> He had this motive of getting money to cook methamphetamine with James Vaughn; he had the near immediate sale of Jennifer's car; he needed a place for James and Desiree to stay; and obviously he had a romantic interest in Desiree. Jennifer was in the way. He removed her just like he removed Margaret, like he removed Ellen.

(53A RT 6719.)

Later in the argument, the prosecutor discussed the VonSeggern manslaughter as a prior conviction that must be proven beyond a reasonable doubt. (53A RT 6730.) He continued:

> [W]hether you decide beyond a reasonable doubt [VonSeggern's] case is a murder or an involuntary manslaughter, I submit to you,

> it doesn't really matter for this analysis. And I'll tell you why. We can't prove exactly how that crime occurred, but we can prove all sorts of things about what kind of person he is by the way he handled himself after the actual killing. So the law requires that you be given all these instructions, regardless of the label you put on it. And the minimum label is involuntary manslaughter. This is very, very weighty.

(53A RT 6733.)

The court instructed the jury that "[e]vidence has been introduced for the purpose of showing that the Defendant has committed the following criminal acts: . . . murder or voluntary manslaughter or involuntary manslaughter of Jennifer Lisa VonSeggern." (53B RT 6839.)

D. Appellant Was Not "Impliedly Acquitted" of Murdering VonSeggern

Section 190.3, subdivision (b), does not permit use of evidence of criminal activity of which the defendant has been acquitted. (*People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1052; *People v. Monterroso* (2004) 34 Cal.4th 743, 777.) Appellant argues that he was prosecuted and acquitted of VonSeggern's murder. (AOB 187-194.) Appellant is mistaken.

This Court has "strictly limited this statutory notion of an acquittal to a judicial determination on the merits of the truth or falsity of the charge. [Citations.] Thus, an acquittal after prosecution does not occur for purposes of section 190.3 where the trial court dismissed the case under section 995 for lack of probable cause as to guilt. [Citation.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 563.) *Stitely* clarified that the Court has "reached the same result even where a statutory bar prevents refiling of the dismissed charge. [Citation.]" (*Ibid.*)

Dismissal of charges, whether bargained for or otherwise, does not constitute an acquittal and thus does not dictate exclusion of evidence of the underlying incident. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1087; *People v. Bradford* (1997) 15 Cal.4th 1229, 1375.) Appellant recognizes

this authority. (AOB 190-192.) The fact that previous charges have been dismissed does not prevent their being proved at the penalty phase of a capital-murder charge. (*People v. Valencia* (2008) 43 Cal.4th 268, 294.) The use of dismissed charges as a circumstance in aggravation does not violate an implicit term of a plea bargain when used at a capital penalty hearing, and *People v. Harvey* (1979) 25 Cal.3d 754, does not preclude consideration by the jury of prior violent acts which underlay charges previously dismissed pursuant to a plea bargain. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1157; *People v. Garceau* (1993) 6 Cal.4th 140, 199.)

Appellant relies on a host of cases to support his general assertion that "a conviction of a lesser included crime or on a lesser degree of an offense is generally considered to be an implied acquittal of the greater crime." (AOB 189.) However, the cases on which appellant relies for this proposition are quite explicit that it is acquittal *by a jury* that is entitled to such treatment. (See *People v. Fields* (1996) 13 Cal.4th 289, 299 ["for double jeopardy purposes, an acquittal barring a second prosecution may be either express, or implied by a conviction on a lesser included offense when the jury was given the opportunity to return a verdict on the greater offense]; see also *Stone v. Superior Court* (1982) 31 Cal.3d 503, 511, fn. 5.)

The limitation in section 190.3 concerning criminal activity for which the defendant was prosecuted and "acquitted" is strictly construed to refer only to a determination on the merits. (*People v. Monterroso, supra*, 34 Cal.4th at p. 777.) Appellant acknowledges the Court's decision in *Monterroso*. (AOB 207.) In *Monterroso*, the defendant claimed that admission of conduct underlying his misdemeanor charge which was subsequently dismissed was error because it violated section 190.3's bar of "prosecuted and acquitted" activity. (*Ibid.*) The court found no error because courts "have strictly construed the limitation in section 190.3 concerning criminal activity for which the defendant was prosecuted and

"acquitted" to refer only to "a determination of the merits." [Citation.] Thus, a charge that was dismissed under section 995, which is not a determination on the merits, is admissible at the penalty phase." (*Ibid.*)

This Court has found that a trial court did not err in permitting the prosecution to introduce evidence from which the jury could conclude defendant committed a greater related offense (assault likely to cause great bodily injury) than that to which he pleaded guilty in a prior proceeding (battery). (*People v. Jones* (1998) 17 Cal.4th 279, 312.) In *Jones*, the Court found that the evidence of the conduct underlying the battery conviction was appropriately admitted pursuant to factor (b). (*Ibid.*) The Court also found that the trial court "did not err by permitting the prosecution to introduce evidence from which the jury could find the attack constituted an assault by means likely to inflict great bodily injury." (*Ibid.*)

This issue similarly presented itself in *People v. Rodrigues*, *supra*, 8 Cal.4th 1060. In *Rodrigues*, defendant was initially charged with murder committed in 1980 and eventually pleaded guilty to being an accessory under section 32. Other charges were dismissed. (*Id.* at p. 1148.) In the penalty phase of defendant's later capital trial, the prosecutor introduced evidence in aggravation of defendant's participation in the 1980 homicide pursuant to factor (b) *as well as* evidence of his conviction as an accessory pursuant to factor (c). (*Ibid.*)

Rodrigues relied on *People v. Harvey*, *supra*, 25 Cal.3d at p. 758 to contend that an implied term of his dismissal of the 1980 murder charges and other allegations was that he would suffer no adverse consequences by reason of the facts underlying the dismissed charges. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1157.) The Court rejected his argument as follows:

> As defendant acknowledges, we have squarely rejected the argument that the use of dismissed charges as a circumstance in aggravation violates an implicit term of a plea bargain when

used at a capital penalty hearing. [Citation.] We see no reason to revisit the issue.

(*Ibid.*)

Rodrigues also contended that "because his conviction of being an accessory constituted an acquittal of murder, relitigation of the dismissed murder charge during the penalty phase violated his federal due process rights and the state and federal constitutional guarantee against double jeopardy." (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1157.) The Court rejected that argument as well, because "'[a] bargained conviction or dismissal does not constitute an acquittal under section 190.3.' [Citations.]" (*Ibid.*) In a footnote, the Court rejected "any notion that defendant's plea to accessory meant that he had been prosecuted and acquitted of murder as a matter of law" in part because accessory to a felony was not necessarily a lesser included offense of murder. (*Ibid.*, fn. 57.) However, the converse of this statement is not necessarily also true—that is, a plea to a lesser included offense does not mean that a defendant had been acquitted of the greater offense.

Indeed, this Court has found that introducing the facts of a prior manslaughter conviction which tend to show malice does not violate the section 190.3 provision barring evidence when there is a prior acquittal, because defendant was never charged with or acquitted of murder during his prior manslaughter trial. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1240-1241; *People v. Danielson* (1992) 3 Cal.4th 691, 720, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.) Although appellant here was initially charged with VonSeggern's murder, he was never tried for it, and thus his manslaughter no contest plea cannot be held to equal an acquittal of VonSeggern's murder.

E. Collateral Estoppel and Res Judicata Did Not Bar Introduction of Detailed Evidence of VonSeggern's Killing

Appellant claims that principles of collateral estoppel and res judicata barred the prosecutor from "retrying" appellant's manslaughter conviction. (AOB 194-203.) "The doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.) This Court explained it thus:

> The doctrine "has a double aspect." (*Todhunter v. Smith* (1934) 219 Cal. 690, 695, 28 P.2d 916.) "In its primary aspect," commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" (*Clark v. Lesher* (1956) 46 Cal.2d 874, 880, 299 P.2d 865.) "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment . . . 'operates'" in "a second suit . . . based on a different cause of action . . . 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" (*Ibid.*)

(*People v. Barragan* (2004) 32 Cal.4th 236, 252-253.) In order to apply collateral estoppel to an issue, "(1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]" (*Id.* at p. 253.) Appellant claims that the principles of collateral estoppel and res judicata barred admission of the facts underlying appellant's killing of VonSeggern and instruction that permitted the jury to consider the facts in the context of the crime of murder. (AOB 194-203.) Appellant is mistaken.

This Court has rejected the notion that evidence of incidents underlying previously dismissed counts is barred under the doctrine of

collateral estoppel, preventing relitigation of an issue decided at a prior proceeding. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1375.)

Appellant's reliance on principles discussed in *People v. Wallace* (2004) 33 Cal.4th 738 (AOB 202) is unavailing. *Wallace* does not provide guidance on the issue appellant raises. In *Wallace*, this Court merely noted that the legal effect of a no contest plea is the same as of a guilty plea, that is, admission of every element of the charged crime (*id.* at p. 749) and that a defendant who had stipulated to the existence of a factual basis for his plea "could not have appealed from his ensuing conviction on the basis of insufficiency of the evidence" (*Id.* at p. 750). *Wallace* did not hold that a dismissal of charges is the same as acquittal on the merits. Appellant's claim must fail.

F. Appellant Was Not Subjected to Double Jeopardy

Appellant's related double jeopardy claim fails for similar reasons. This Court has made clear that use of prior crimes as an aggravating factor does not violate double jeopardy. (*People v. Garceau*, *supra*, 6 Cal.4th 140, 199-200; *People v. Wader* (1993) 5 Cal.4th 610, 656; *People v. Visciotti* (1992) 2 Cal.4th 1, 71.) The constitutional guarantee against double jeopardy "is inapplicable where evidence of prior criminal activity is introduced in a subsequent trial as an aggravating factor for consideration by a penalty phase jury. [Citations.]" (*People v. Garceau*, *supra*, 6 Cal.4th at pp. 199-200.) Presentation of facts and circumstances underlying prior violent felony conviction does not violate double jeopardy principles. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 820.)

The Court addressed such a claim in *Jones*, *supra*, noting that the double jeopardy guarantees "are inapplicable when 'evidence of prior criminal activity is introduced in a subsequent trial as an aggravating factor for consideration by a penalty phase jury.'" (*People v. Jones*, *supra*, 17

Cal.4th at p. 312, citing *People v. Garceau*, *supra*, 6 Cal.4th at pp. 199-200.) The Court continued:

> And because he has not been "subject for the same offense to be twice put in jeopardy of life or limb" (U.S. Const., Amend. V), his claim that the Fifth Amendment gives him "a right to be tried only on the grand jury's indictment" is without merit-he was not tried here for the prior offense at all, although evidence of its circumstances was introduced against him in his penalty trial for his current crime.

(*People v. Jones*, *supra*, 17 Cal.4th at p. 313.)

Courts have likewise rejected identical double jeopardy claims in earlier decisions. In *People v. Visciotti*, *supra*, 2 Cal.4th 1, at page 71, this Court found: "[t]he presentation of evidence of past criminal conduct at a sentencing hearing does not place the defendant in jeopardy with respect to the past offenses. He is not on trial for the past offense, is not subject to conviction or punishment for the past offense, and may not claim either speedy trial or double jeopardy protection against introduction of such evidence. [Citation.]" Appellant has not been subjected to double jeopardy.

G. Any Error Was Harmless

Appellant must establish that there is a reasonable possibility that, even if it was error for the court to have instructed the jury and to have permitted the prosecutor to argue the evidence in aggravation in relation to VonSeggern's killing prejudiced the jury's consideration of the appropriate penalty. (See *People v. Brown* (1988) 46 Cal.3d 432, 446-448; *People v. Monterroso*, *supra*, 34 Cal.4th at p. 777.) Appellant has failed to make such a showing for a number of reasons.

First, the penalty jury was instructed on murder, voluntary manslaughter, and involuntary manslaughter. These instructions clearly applied to the VonSeggern homicide evidence. (53B RT 6839.) In the face of these instructions, the jurors could reasonably infer that the evidence was

offered in aggravation as factor (b) and concerned the same conduct that was also offered as a prior conviction pursuant to factor (c). Furthermore, the involuntary manslaughter instruction (53B RT 6839) allowed the penalty jury to find appellant guilty of a lesser offense than the one of which he was convicted.

Second, the penalty jury heard an overwhelming amount of evidence in aggravation which would have been presented regardless of whether the VonSeggern acts were deemed murder or manslaughter.

There was evidence that appellant assaulted a past girlfriend, Pamela Martin Braden, as early as 1988. (46A RT 5705-5706.)

There was evidence that after killing VonSeggern in 1992, appellant had sex with—and gave some of VonSeggern's clothes and jewelry to—Desiree, a young woman he picked up at a motel. (46B RT 5802-5803, 5791; 47A 5852-5853.) There was evidence that appellant bound VonSeggern's body with various cords from her own apartment and dumped it in a ditch where it decomposed grotesquely. (46B RT 5765-5769; 47A RT 5872-5875, 5844, 5859, 5882, 5885-5887.) There was evidence that appellant sold VonSeggern's car after her killing, lied about her whereabouts, and forged her signature. (47A RT 5826-5827, 5877-5880.)

There was evidence that appellant burglarized and then burned his own step-grandmother in her trailer (47B RT 5971, 5974, 5980; 48A RT 6056, 6067, 6073-6074; 49A RT 6208; 49B RT 6312; 6315), used her credit cards, debit cards, and cell phone after her death (48A RT 6016, 6018, 6021; 49A RT 6211, 6213-6217; 6226-6227), and gifted to Parenteau some of his step-grandmother's jewelry after her death (48B RT 6133).

There was evidence that appellant stole Salling's wallet, purse, car, driver's license, credit cards, and $13,600 worth of jewelry (36A RT 4381, 4388-4392, 4395, 4398; 37A RT 4566-4567) from Salling after her death.

Appellant drove Parenteau around in Salling's car (36B 4476-4477, 4485; 37A RT 4573), tried selling Salling's jewelry for drug money (36B RT 4503; 37A RT 4578-4579, 4581-4582, 4593), used Salling's money to purchase clothes for himself and a faucet for Parenteau (36B RT 4476; 37A RT 4588-4589, 4591; 38B RT 4884), used Salling's credit card to purchase gasoline (37A RT 4594; 38B RT 4877), and attempted to use Salling's credit card to gamble (36B RT 4512-4515; 37A RT 4597; 38A RT 4782).

This evidence painted a picture of a man who abuses women and treats them as disposable objects, to rob and kill. As the prosecutor argued at the penalty phase, whether the jury deemed VonSeggern's killing to be a murder or an involuntary manslaughter, "it [did not] really matter for this analysis. . . . We can't prove exactly how that crime occurred, but we can prove all sorts of things about what kind of person he is by the way he handled himself after the actual killing." (53A RT 6733.)

In sum, evidence presented in aggravation was especially compelling such that it was not reasonably possible the jury was influenced by the distinction of whether the VonSeggern killing was classified as a murder or manslaughter.

VII. JURY INSTRUCTIONS ON MITIGATING AND AGGRAVATING FACTORS IN SECTION 190.3 AND APPLICATION OF THE SAME DID NOT VIOLATE THE CONSTITUTION

Appellant claims that the jury instructions on the mitigating and aggravating factors in section 190.3, and the jurors' application of the factors rendered his death sentence capricious and arbitrary in violation of the federal constitution. (AOB 225-254.) The court instructed the jury on the sentencing factors listed in section 190.3 pursuant to CALJIC Nos. 8.85 and 8.88. (53 RT 6820-6822, 6858-6860.) Appellant claims that the statute, the implementing instructions, and the jurors' application of the sentencing factors violate the narrowing requirement because they "make virtually

every murderer death-eligible." (AOB 226.) Appellant acknowledges that this Court has consistently rejected this claim but urges the Court to reconsider. (AOB 227.) Appellant's claim fails.

A. Appellant Has Forfeited His Claim

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

B. Section 190.3, Subdivision (a) and CALJIC NO. 8.85 Adequately Narrow the Death-Eligible Class

Appellant claims that because it is permissible to rely upon the circumstances of the crime under section 190.3, factor (a), therefore factor (a) and CALJIC No. 8.85 are overbroad. (AOB 228-237.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding.

"California's death penalty statute does not fail to narrow the class of offenders as is required by the Eighth Amendment, nor has the statute been expanded 'beyond consistency with' the Fifth and Fourteenth Amendments." (*People v. Salcido* (2008) 44 Cal.4th 93, 166; see also *People v. Hoyos* (2007) 41 Cal.4th 872, 926, overruled on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643; *People v. Demetrulias* (2006) 39 Cal.4th 1, 434.)

The California Supreme Court has found that factor (a) "does not foster arbitrary and capricious penalty determinations" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1248) and rejected the argument that section 190.3 or CALJIC No. 8.85 "are unconstitutionally vague, arbitrary, or render the sentencing process unconstitutionally unreliable under the Eighth and

Fourteenth Amendments . . . " (*People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Kipp* (1998) 18 Cal.4th 349, 381.)

"California's death penalty statute 'does not fail to perform constitutionally required narrowing function by virtue of the number of special circumstances it provides or the manner in which they have been construed.'" (*People v. Beames* (2007) 40 Cal.4th 907, 933.)

Because the factors in section 190.3 do not perform a narrowing function, they are not subject to the Eighth Amendment standard used to define death-eligibility criteria. They violate the Eighth Amendment only if they are insufficiently specific or if they direct the jury to facts not relevant to the penalty evaluation. California's factors suffer no such deficiencies. (*People v. Thomas* (2011) 52 Cal.4th 336, 365; *People v. Lee* (2011) 51 Cal.4th 620, 653; *People v. Hartsch*, *supra*, 49 Cal.4th at p. 516; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228; *People v. Harris* (2005) 37 Cal.4th 310, 365; *People v. Hughes*, *supra*, 27 Cal.4th at pp. 404-405; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 478-479.)

Similar claims have repeatedly been rejected by this Court as this Court has found that California's death penalty law sufficiently narrows the class of death eligible defendants so that it is neither arbitrary nor capricious. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 884; *People v. Lewis* (2001) 25 Cal.4th 610, 676.) Accordingly, this claim must fail.

C. The Instruction on Section 190.3, Subdivision (b) and the Jurors' Application Thereof Did Not Violate Appellant's Constitutional Rights

Appellant claims that section 190.3, subdivision (b), and CALJIC No. 8.87 violate appellant's constitutional rights by permitting the jury to sentence him to death by relying on evidence on which it did not necessarily unanimously agree. (AOB 237-239.) Appellant further contends that the use of unadjudicated criminal activity in aggravation

renders his death sentence unconstitutional. (AOB 239-240.) Appellant also claims that a failure to require a unanimous jury finding on the unadjudicated acts of violence denied him his right to a jury trial and requires reversal. (AOB 240-244.) Appellant argues that absent a unanimity requirement, the instructions on section 190.3, subdivision (b) allowed the jurors to impose the death penalty on him based on unreliable factual findings. (AOB 244-248.)

This Court has consistently rejected such claims. There is no requirement that a jury unanimously agree as to each instance of unadjudicated criminal activity before considering it. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 308.) "The jury may properly consider unadjudicated criminal activity at the penalty phase and need not make a unanimous finding on each instance of such activity. [Citations.]" (*People v. Nelson*, *supra*, 51 Cal.4th at p. 226.) The jury's consideration of unadjudicated criminal activity in the penalty phase is not unconstitutional, and the jury need not make a unanimous finding the defendant was guilty of the unadjudicated crimes. (*People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Brown* (2004) 33 Cal.4th 382, 402; *People v. Lewis* (2001) 26 Cal.4th 334, 395.) Appellant offers no reasons why this Court should revisit its prior opinions.

D. The Constitution Does Not Require the Jury to Make Written Findings Regarding the Aggravating Factors

Appellant claims that his constitutional rights have been violated because CALJIC Nos. 8.85 and 8.88 failed to require the jury to make "written or other specific findings about the aggravating factors they found and considered in imposing a death sentence." (AOB 248.) Appellant again acknowledges that this Court has rejected such arguments but urges it to reevaluate its reasons. (AOB 249.)

This Court has held that the Eighth and Fourteenth Amendments do not require the jury unanimously find the existence of aggravating factors, or make written findings regarding aggravating factors. (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 926.) The jury is not required to make express findings on unadjudicated crimes. (*People v. Fauber* (1992) 2 Cal.4th 792, 848.) Appellant does not offer sufficient reasons to reevaluate these opinions.

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

Appellant also contends that the absence of various procedural safeguards in section 190.3 violates his right to equal protection because he was treated differently than non-capital defendants. (AOB 252-253.) This Court has repeatedly held that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton, supra*, 37 Cal.4th at p. 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Morrison* (2004) 34 Cal.4th 698; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Boyette* (2002) 29 Cal.4th 381, 465-467; and *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) Accordingly, appellant's equal protection claim is without merit.

VIII. SECTION 190.3 AND IMPLEMENTING JURY INSTRUCTIONS ARE NOT UNCONSTITUTIONAL

Appellant claims that section 190.3 and CALJIC Nos. 8.84-8.88 are unconstitutional because they fail to assign a burden of proof with respect to the jury's penalty determination. (AOB 255-284.) Appellant complains that the CALJIC instructions do not require jury unanimity as to the existence of aggravating factors utilized by the jury as the basis for imposing a sentence of death, do not assign a burden of proving that the aggravating factors outweigh the mitigating factors, and that death is the

appropriate penalty. (AOB 255-256.) Appellant recognizes that this Court has consistently ruled that failure to require that a jury unanimously find aggravating circumstances true beyond a reasonable doubt, unanimously find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or unanimously find beyond a reasonable doubt that death is the appropriate penalty does not violate various constitutional protections. (AOB 257.)

A. Section 190.3 and Instructions Are Not Constitutionally Defective for Failing to Assign the State the Burden of Proving Beyond a Reasonable Doubt that an Aggravating Factor Exists, that the Aggravating Factors Outweigh the Mitigating Factors, and that Death is the Appropriate Penalty

"Neither the federal Constitution nor section 520 of the Evidence Code requires that the jury be instructed that the prosecution has the burden of proof with regard to the truth of aggravating circumstances or the appropriateness of the death penalty, and the trial court is not required to explicitly tell the jury that neither party bears the burden of proof." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1429.) "'The death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence.'" (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 926; *People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1066.) The California death-penalty law which does not specify the burden of proof for the penalty phase, but does require a beyond-a-reasonable-doubt standard for proving special circumstances, and then requires the jury to consider and take into account all mitigating and aggravating circumstances in determining whether to impose the death penalty, is constitutional. (*People v. Leonard*,

supra, 40 Cal.4th at p. 1429; *People v. Frierson* (1979) 25 Cal.3d 142, 180 [interpreting 1977 Law].)

Appellant contends that *Cunningham v. California* (2007) 549 U.S. 270 compels the conclusion that any determination made by a penalty jury to arrive at a sentence of death must be found beyond a reasonable doubt. (AOB 258-259.) In *Cunningham,* the United States Supreme Court held California's determinate sentencing law, by placing sentence-elevating fact-finding within the judge's province, violated a defendant' s right to trial by jury under the Sixth and Fourteenth Amendments. (*Cunningham v. California, supra,* 549 U.S. at p. 274.) The United States Supreme Court reasoned that its decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, and *United States v. Booker* (2005) 543 U.S. 220, instruct that "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham v. California*, *supra*, 549 U.S. at p. 275.) The United States Supreme Court clarified the relevant statutory maximum "'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.'" (*Ibid.*, quoting *Blakely v. Washington*, *supra*, 542 U.S. at pp. 303-304.)

However, this Court has rejected this claim:

> Finally, section 190.3 and the pattern instructions are not constitutionally defective for failing to assign the state the burden of proving beyond a reasonable doubt that an aggravating factor exists, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty. As defendant acknowledges, we have repeatedly rejected these arguments. [Citation.] The recent decisions of the United States Supreme Court interpreting the Sixth Amendment's jury trial

> guarantee [*Cunningham v. California* (2007) 549 U.S. 270; *United States v. Booker* (2005) 543 U.S. 220; *Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466] do not compel a different result. [Citation.]

(*People v. Bramit*, *supra*, 46 Cal.4th at p. 1250 & fn. 22.)

In *People v. Morrison, supra*, 34 Cal.4th at p. 698, this Court specified "the jury need not make written findings or achieve unanimity as to specific aggravating circumstances, or find beyond a reasonable doubt that an aggravating circumstance is proved (except for other crimes), that aggravating circumstances outweigh mitigating circumstances, or that death is the appropriate penalty." (*Id.* at p. 730.) This Court further specified the death penalty statute is not constitutionally infirm for failing to provide the jury with instructions regarding the burden of proof and standard of proof for finding aggravating and mitigating circumstances in reaching a penalty determination. (*Id.* at pp. 730-731.) The Court found that the death penalty statute withstood constitutional scrutiny.

The statutory factor that renders a defendant found guilty of first degree murder eligible for the death penalty is the special circumstance. The special circumstance thus operates as the functional equivalent of an element of the greater offense of capital murder. The jury's finding beyond a reasonable doubt of the truth of a special circumstance satisfies the requirement of the Sixth Amendment that a jury find facts that increase a penalty of a crime beyond the statutory minimum. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 521.)

B. There Is No Constitutional Requirement that the Jury Be Instructed that It May Impose the Death Penalty Only If It Is Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Outweigh the Mitigating Factors and Death Is the Appropriate Penalty

Appellant again acknowledges that this Court has previously rejected such claims, but urges the Court to reconsider and hold that the jury must be instructed that it may only impose a sentence of death if it finds beyond a reasonable doubt that aggravating factors outweigh the mitigating factors. (AOB 265-272.)

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

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

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

C. The State Is Not Constitutionally Compelled to Bear a Specified Burden of Persuasion

Appellant claims that the federal constitution requires the state to bear some burden of persuasion at the penalty phase. (AOB 272-276.) Appellant concedes that this Court has rejected such a claim, holding "that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made." (AOB 272, citing *People v. Gonzales* (2011) 51 Cal.4th 894, 956; *People v. Mendoza* (2007) 42 Cal.4th 686, 711.) Appellant urges this Court to reconsider.

This Court has long considered that "[u]nlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; see also *People v. Burgener* (2003) 29 Cal.4th 833, 884-885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Daniels*, *supra*, 52 Cal.3d at p. 890.) The Court has also repeatedly rejected any claims that focus on a burden of proof in the penalty phase. (*People v. Welch, supra*, 20 Cal.4th at pp. 767-768; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Box* (2000) 23 Cal.4th 1153, 1216; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418; *People v. Dennis, supra*, 17 Cal.4th at p. 552; *People v. Holt* (1997) 15 Cal.4th 619, 683- 684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Appellant fails to offer any valid reason why this Court should vary from its past decisions.

D. A Jury Unanimity Instruction on Aggravating Factors is Not Constitutionally Compelled

Appellant claims that the instructions violated his constitutional rights because the jury was not instructed that its findings on aggravating circumstances needed to be unanimous. (AOB 276-282.) Appellant

recognizes that this Court has held that the penalty jury is not constitutionally required to reach unanimous agreement on aggravating factors. (AOB 277, citing *People v. Taylor* (1990) 52 Cal.3d 719, 749.) He nevertheless asserts that the absence of a unanimity requirement is inconsistent with his constitutional protections. (AOB 277-278.)

Unanimous agreement beyond a reasonable doubt that aggravating circumstances outweigh mitigating is not required. (*People v. Bacon*, *supra*, 50 Cal.4th at p. 1129; *People v. Burney*, *supra*, 47 Cal.4th at p. 268; *People v. Alcala* (1992) 4 Cal.4th 742, 809.) This Court has consistently held that there is no requirement under state or federal law that the jury unanimously agree on the aggravating circumstances that support the death penalty, since aggravating circumstances are not elements of an offense. (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 956; *People v. Jackson* (2009) 45 Cal.4th 662, 701.) There is no requirement that a jury unanimously agree as to each instance of unadjudicated criminal activity before considering it. (*People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308.)

E. The Penalty Jury Need Not Be Instructed on Presumption of Life

Appellant claims that the penalty jury should have been instructed on the presumption of life. (AOB 282-284.) There is no requirement that the jury be instructed on a presumption of life in the penalty phase of a capital trial. (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 956.) This claim is also meritless. Appellant recognizes that the Court has rejected such claims but again urges that the claim should be reevaluated. (AOB 283.)

As this Court has explained,

> [N]either death nor life is presumptively appropriate or inappropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror.

(*People v. Samayoa* (1997) 15 Cal.4th 795, 853.)

Appellant offers no valid reason why this Court should revisit this issue. Accordingly, this claim too should be denied.

IX. THE USE OF CALJIC NO. 8.88 DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant claims that the use of CALJIC No. 8.88 to define the scope of the jury's sentencing discretion and the nature of the deliberative process violated his rights to a fair trial, due process, equal protection, and reliable determination of penalty. (AOB 285-298.) Appellant recognizes that this Court has consistently upheld the use of CALJIC No. 8.88, but contends that this Court's reasoning "is unsound and should be evaluated." (AOB 285-286.) Appellant's claim fails. CALJIC No. 8.88 is constitutionally sound.

A. CALJIC No. 8.88 Provides Adequate Guidance and Is Not Vague or Ambiguous

CALJIC No. 8.88 instructs the jury "to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on . . . defendant." "CALJIC No. 8.88 explains to the jury how it should arrive at the penalty determination." (*People v. Perry* (2006) 38 Cal.4th 302, 320.) CALJIC No. 8.88 "accurately describes how jurors are to weigh the aggravating and mitigating factors." (*People v. Elliot*, *supra*, 37 Cal.4th at p. 488.) This Court has held that CALJIC No. 8.88 does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendments. (*People v. Moon*, *supra*, 37 Cal.4th at pp. 41-42.)

"CALJIC No. 8.88 properly instructs the jury on its sentencing discretion and the nature of its deliberative process," and there is no need to elaborate how the jury should consider any particular type of penalty-phase evidence. (*People v. Valencia*, *supra*, 43 Cal.4th at p. 310.)

Death is considered to be a more severe punishment than life without possibility of parole, so the trial court does not err in instructing the jury with CALJIC No. 8.88 to the effect that each juror must be persuaded that "the aggravating circumstances are so substantial in comparison with mitigating circumstances that it warrants death instead of life without parole." (*People v. Harris*, *supra*, 37 Cal.4th at p. 361.) The requirement that the jury find the aggravating circumstances "so substantial" in comparison with the mitigating circumstances that it "warrants death" is not vague or directionless. (*People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Arias* (1996) 13 Cal.4th 92, 170.)

Appellant claims that CALJIC No. 8.88 is impermissibly vague and ambiguous because it permits the death penalty to be imposed whenever the jurors are "'persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.'" (AOB 286.) He argues that the phrase "'so substantial'" "creates a standard that is vague, directionless, and impossible to quantify." (AOB 286.) This claim has been repeatedly rejected by this Court and appellant provides no reason to revisit this holding. (See, e.g., *People v. McKinnon*, *supra*, 52 Cal.4th 610; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Parson* (2008) 44 Cal.4th 332, 371.)

B. CALJIC No. 8.88 Is Not Defective for Not Informing the Jurors that the Central Determination Is Whether Death Penalty Is the Appropriate Punishment, Not Merely an Authorized One

Appellant complains that "CALJIC No. 8.88 failed to inform the jurors that the central determination is whether the death penalty is the appropriate punishment, not simply an authorized penalty." (AOB 289.)

This Court has rejected this claim, finding that CALJIC No. 8.88 is not defective in requiring the jury to determine whether death is "warranted" as opposed to "appropriate." (*People v. Rogers*, *supra*, 46

Cal.4th at p. 1179; *People v. Watson* (2008) 43 Cal.4th 652, 702; *People v. Moon*, *supra*, 37 Cal.4th at p. 43, citing *People v. Boyette*, *supra*, 29 Cal.4th at p. 465.)

C. The Court Was Not Required to Instruct the Jury that It Was Required to Vote for Life Without Possibility of Parole if Mitigation Outweighed Aggravation

Appellant complains that "CALJIC No. 8.88 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 293.)

CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury there is a presumption of life." (*People v. Moon*, *supra*, 37 Cal.4th at p. 43, citing *People v. Maury* (2003) 30 Cal.4th 342, 440.) Conversely, failure to instruct the jury that it "shall" impose life without possibility of parole if mitigating evidence outweighs aggravating evidence does not create a presumption favoring death. (*People v. Medina* (1995) 11 Cal.4th 694, 781; *People v. Wader*, *supra*, 5 Cal.4th at p. 662.) As appellant recognizes, in *People v. Duncan* (1991) 53 Cal.3d 955, 978, this Court noted that CALJIC 8.88 "clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty)." (See AOB 294-295.) This Court reaffirmed this decision in *People v. Hughes*, *supra*, 27 Cal.4th at 357-358. Appellant cites a number of older cases to support his contention, but none of them stand for the proposition that the jurors should have been informed that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole. (AOB 295.)

CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without possibility of parole." (*People v. Rogers*, *supra*, 46 Cal.4th at p. 1179; *People v. Moon*, *supra*, 37 Cal.4th at p. 42, citing *People v. Dennis*, *supra*, 17 Cal.4th at p. 552.)

X. APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW OR THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Appellant contends that his death sentence under California's death penalty statute violates both the Eighth and Fourteenth Amendments to the U. S. Constitution as well as international law. (AOB 299-303.) We disagree.

California's death-penalty law does not violate the International Covenant of Civil and Political Rights which prohibits the "arbitrary" deprivation of life and bars "cruel, inhuman or degrading treatment or punishment." The covenant specifically permits the use of the death penalty "if imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime." (Art. VI, § 2.) When the United States ratified the treaty, it specifically reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under the laws permitting imposition of the death penalty. (See 138 Cong. Rec. S-4718-01, S4783 (1992); *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Perry*, *supra*, 38 Cal.4th at p. 322.)

The death penalty as applied in California is not rendered unconstitutional through operation of international law and treaties. (*People v. Nelson*, *supra*, 51 Cal.4th at p. 227; *People v. Mills* (2010) 48 Cal.4th 158, 215.) California's death penalty law does not violate international law, such as the International Covenant on Civil and Political

Rights, or the American Declaration of the Rights and Duties of Man. (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 958.) Nor do international norms require the application of the death penalty to only the most extraordinary crimes. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849.) California's death penalty does not violate international law, as international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Lewis*, *supra*, 43 Cal.4th at p. 539; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 925.)

This Court has repeatedly that a "[d]efendant's death sentence violates neither international law nor his rights under the Eighth and Fourteenth Amendments to the federal Constitution, as no authority 'prohibit[s] a sentence of death rendered in accordance with state and federal constitutional and statutory requirements'" and appellant provides no reason to revisit this holding. (*People v. McKinnon*, *supra*, 52 Cal.4th at pp. 670-671, citing *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511.)

XI. THERE IS NO CUMULATIVE ERROR

Appellant claims that the cumulative effect of the alleged errors requires reversal. (AOB 304-308.) This claim is meritless. As noted *supra*, the trial court did not commit any error. Therefore, appellant could not have been prejudiced by cumulative error. Moreover, assuming arguendo that multiple errors occurred, appellant fails to explain how, under the circumstances of this case, such errors, though individually harmless, are collectively prejudicial. The Court should therefore reject this conclusory assertion of cumulative error.

Appellant was "entitled to a fair trial but not a perfect one." (*Lutwak v. United States* (1952) 344 U.S. 604, 619-620; *People v. Miranda* (1987) 44 Cal.3d 57, 123, overruled on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) When a defendant invokes the

cumulative-prejudice doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Appellate courts review claims of cumulative prejudice by assessing the cumulative effect of any errors to see if "it is reasonably probable that the jury would not have convicted appellant of the charged offenses." (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.) Applying that analysis to the instant case, appellant's contention should be rejected.

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

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

CONCLUSION

Respondent respectfully requests that the judgment be affirmed.

Dated: May 28, 2013

Respectfully submitted,

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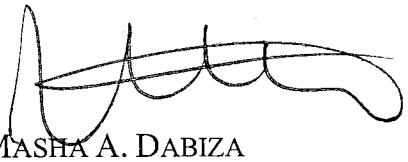
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 40,163 words.

Dated: May 28, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Johnson***
No.: **S093235**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 28, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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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 May 28, 2013, at San Francisco, California.

Tan Nguyen
Declarant

Signature

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