

OFFICE COPY  
ATTORNEY GENERAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Date Filed	
<b>DOCKET</b>	
Case No.	SDM998X50004
Entered by	MR
Date Filed	8-17-05

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

Plaintiff and Respondent,

v.

**MARTIN MENDOZA,**

Defendant and Appellant.

**CAPITAL CASE**  
S067678

San Bernardino County Superior Court No. FMB01787  
The Honorable James A. Edwards, Judge

**SUPREME COURT  
FILED**

**AUG 1 2 2005**

**Frederick K. Ohlrich Clerk**

DEPUTY

**RESPONDENT'S BRIEF**

**BILL LOCKYER**  
Attorney General of the State of California

**ROBERT R. ANDERSON**  
Chief Assistant Attorney General

**GARY W. SCHONS**  
Senior Assistant Attorney General

**WILLIAM M. WOOD**  
Supervising Deputy Attorney General

✓ **DAVID DELGADO-RUCCI**  
Deputy Attorney General  
State Bar No. 149090

110 West "A" Street, Suite 1100  
San Diego, CA 92101  
P.O. Box 85266  
San Diego, CA 92186-5266  
Telephone: (619) 645-2223  
Fax: (619) 645-2191  
Email: David.DelgadoRucci@doj.ca.gov

Attorneys for Respondent

**DEATH PENALTY**

## TABLE OF CONTENTS

	<b>Page</b>
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
Guilt Phase	2
Synopsis	3
Facts	3
Defense	8
Penalty Phase	11
Defense	13
Stipulations	15
ARGUMENT	16
<b>I. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY SANDRA THAT APPELLANT HAD MOLESTED HER SINCE THESE STATEMENTS WERE NOT TESTIMONIAL; APPELLANT FORFEITED HIS RIGHT TO CONFRONT THE VICTIM BY KILLING HER; AND THE STATEMENTS CONSTITUTED AN EXCEPTION TO THE HEARSAY RULE AND WERE NOT PREJUDICIAL</b>	16
A. Facts	16
B. Analysis	19
1. No Error Under <i>Crawford</i>	20
a. Law	20

## TABLE OF CONTENTS (continued)

	Page
b. Statements by Sandra Were Not Testimonial	23
c. Waiver by Killing Sandra	25
C. Sandra's Statements Were Not Hearsay	27
D. The Evidence Was Properly Admitted Under Evidence Code Section 352	28
1. Prejudice Analysis at Guilt Phase	31
E. Prejudice Analysis at Penalty Phase	31
Conclusion	34
<b>II. REVERSAL BASED ON PROSECUTORIAL ERROR IS UNWARRANTED</b>	<b>34</b>
A. Law	34
B. Analysis	36
1. Guilt Phase	36
2. Penalty Phase	50
Conclusion	52
<b>III. NO REVERSAL IS WARRANTED BASED ON A VIOLATION OF THE VIENNA CONVENTION</b>	<b>52</b>
A. Facts	52
B. Analysis	53

**TABLE OF CONTENTS (continued)**

	<b>Page</b>
<b>IV. LACK OF INTERCASE PROPORTIONALITY DOES NOT VIOLATE THE CONSTITUTION</b>	60
<b>V. THE DEATH PENALTY STATUTE AND INSTRUCTIONS ARE CONSTITUTIONAL</b>	61
<b>VI. THE JURY INSTRUCTION IN THE PENALTY PHASE REGARDING THE JURY'S SENTENCE DISCRETION IS CONSTITUTIONAL</b>	66
<b>VII. THE INSTRUCTIONS IN THE PENALTY PHASE REGARDING AGGRAVATING AND MITIGATING CIRCUMSTANCES IS CONSTITUTIONAL</b>	68
A. Use of Factor (a) By Prosecutors	68
B. Inapplicability of Factors	70
C. Failure to Instruct That Mitigating Factors Are Relevant Solely As Mitigators	70
D. Use of Restrictive Adjectives	70
E. Failure to Require The Jury to Base Its Sentence on Written Findings	71
Conclusion	72
<b>VIII. THE SENTENCE IMPOSED DOES NOT VIOLATE INTERNATIONAL LAW</b>	72
<b>IX. THERE IS NO BASIS FOR REVERSAL ON A CLAIM OF CUMULATIVE ERROR</b>	72

**TABLE OF CONTENTS (continued)**

	<b>Page</b>
<b>X. THERE IS NO NEED TO REVERSE EITHER THE JURY'S VERDICT IN THE GUILT PHASE OR THE JURY'S RECOMMENDATION IN THE PENALTY PHASE</b>	73
<b>CONCLUSION</b>	75

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Apprendi v. New Jersey</i> (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]	62
<i>Bacigalupo v. California</i> (1992) 506 U.S. 802	61, 66
<i>Black Clawson Co., Inc. v. Kroenert Corp.</i> (8th Cir. 2001) 245 F.3d 759	57
<i>Blakely v. Washington</i> (2004) 542 U.S. ____ [124 S.Ct. 2531, 159 L.Ed.2d 403]	62
<i>Blystone v. Pennsylvania</i> (1990) 494 U.S. 299 [110 S.Ct. 1078, 108 L.Ed.2d 255]	69
<i>Bockting v. Bayer</i> (9th Cir. 2005) 399 F.3d 1010	26
<i>Boyde v. California</i> (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316]	45
<i>Buell v. Mitchell</i> (6th Cir. 2001) 274 F.3d 337	72
<i>Cameroon v. Nigeria</i> 1998 I.C.J No. 94, 275, at p. 292	57
<i>Chapman v. California</i> (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]	30, 74
<i>Clemons v. Mississippi</i> (1990) 494 U.S. 738 [110 S.Ct. 1441, 108 L.Ed.2d 725]	74
<i>Crawford v. Washington</i> (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]	16, 21-23, 25

**TABLE OF AUTHORITIES (continued)**

	<b>Page</b>
<i>Darden v. Wainwright</i> (1986) 477 U.S. 168 [106 S.Ct. 2464, 91 L.Ed.2d 144]	34
<i>Darr v. Burford</i> (1950) 339 U.S. 200 [70 S.Ct. 587, 94 L.Ed. 761]	56
<i>Demons v. State</i> (Ga. 2004) __ S.E.2d __, 2004 WL 601751	23
<i>Donnelly v. DeChristoforo</i> (1974) 416 U.S. 637 [94 S.Ct. 1868, 40 L.Ed.2d 431]	35
<i>Gregg v. Georgia</i> (1976) 428 U.S. 153 [96 S.Ct. 2909, 49 L.Ed.2d 859]	60
<i>Hammond v. United States</i> (9th Cir. 1966) 356 F.2d 931	73
<i>Harris v. Pulley</i> (9th Cir. 1982) 692 F.2d 1189	71
<i>Harris v. United States</i> (2002) 536 U.S. 545 [122 S.Ct. 2406, 153 L.Ed.2d 524]	62
<i>Hilton v. Guyot</i> (1895) 159 U.S. 113 [16 S.Ct. 139, 40 L.Ed. 95]	56, 57
<i>Horton v. Allen</i> (1st Cir. May 26, 2004) __ F.3d __, 2004 WL 1171383	24
<i>Lilly v. Virginia</i> (1999) 527 U.S. 116 [119 S.Ct. 1887, 144 L.Ed.2d 117]	20
<i>Medellin v. Dretke</i> (2005) 544 U.S. __ [__ S.Ct. __, __ L.Ed.2d __ 2005 WL 1200824]	54, 55
<i>Mexico v. United States</i> 2004 I.C.J. No. 128 at ¶ 12, p. 10	53-55, 58, 59

## TABLE OF AUTHORITIES (continued)

	Page
<i>Miranda v. Arizona</i> (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]	21
<i>Ohio v. Roberts</i> (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597]	20
<i>People v. Adcox</i> (1988) 47 Cal.3d 207	71
<i>People v. Alvarez</i> (1996) 14 Cal.4th 155	28
<i>People v. Anderson</i> (2001) 25 Cal.4th 543	65
<i>People v. Arias</i> (1996) 13 Cal.4th 92	49, 66, 67
<i>People v. Ayala</i> (2000) 23 Cal.4th 225	35, 37
<i>People v. Bacigalupo</i> (1991) 1 Cal.4th 103	61, 66
<i>People v. Barragan</i> (2004) 32 Cal.4th 236	54
<i>People v. Bean</i> (1988) 46 Cal.3d 919	61
<i>People v. Beeler</i> (1995) 9 Cal.4th 953	73
<i>People v. Bell</i> (1989) 49 Cal.3d 502	45, 61
<i>People v. Bloom</i> (1989) 48 Cal.3d 1194	73

**TABLE OF AUTHORITIES (continued)**

	<b>Page</b>
<i>People v. Boyette</i> (2002) 29 Cal.4th 381	31
<i>People v. Brown</i> (1993) 17 Cal.App.4th 1389	29
<i>People v. Brown</i> (2004) 33 Cal.4th 382	72
<i>People v. Bunyard</i> (1988) 45 Cal.3d 1189	72
<i>People v. Carpenter</i> (1997) 15 Cal.4th 312	68
<i>People v. Carpenter</i> (1997) 15 Cal.4th 312, cert. denied, <i>Carpenter v. California</i> (2000) 531 U.S. 838 [121 S.Ct. 99, 148 L.Ed.2d 58]	64, 70
<i>People v. Carpenter</i> (1999) 21 Cal.4th 1016	70
<i>People v. Carter</i> (2003) 30 Cal.4th 1166	35
<i>People v. Crew</i> (2003) 31 Cal.4th 822	35, 60, 62, 67
<i>People v. Davenport</i> (1995) 11 Cal.4th 1171	67, 71
<i>People v. Duncan</i> (1991) 53 Cal.3d 955	67
<i>People v. Duran</i> (1976) 16 Cal.3d 282	27

## TABLE OF AUTHORITIES (continued)

	Page
<i>People v. Earp</i> (1999) 20 Cal.4th 826	34, 39, 44, 47, 49
<i>People v. Edwards</i> (1991) 54 Cal.3d 787	60
<i>People v. Espinoza</i> (1992) 3 Cal.4th 806	35
<i>People v. Frierson</i> (1979) 25 Cal.3d 142	60
<i>People v. Frye</i> (1998) 18 Cal.4th 894	35, 39, 70
<i>People v. Ghent</i> (1987) 43 Cal.3d 739	71, 72
<i>People v. Gionis</i> (1995) 9 Cal.4th 1196	35
<i>People v. Green</i> (1980) 27 Cal.3d 1	30, 52
<i>People v. Gurule</i> (2002) 28 Cal.4th 557	31, 67
<i>People v. Hardy</i> (1992) 2 Cal.4th 86, cert. denied, <i>Hardy v. California</i> (1992) 506 U.S. 987 [113 S.Ct. 498, 121 L.Ed.2d 435]	65
<i>People v. Hayes</i> (1990) 52 Cal.3d 577	65
<i>People v. Hess</i> (1970) 10 Cal.App.3d 1071	30

## TABLE OF AUTHORITIES (continued)

	Page
<i>People v. Hill</i> (1992) 3 Cal.4th 959	27, 28, 35
<i>People v. Hillhouse</i> (2002) 27 Cal.4th 469	72
<i>People v. Holt</i> (1984) 37 Cal.3d 436	72
<i>People v. Holt</i> (1997) 15 Cal.4th 619	68, 73
<i>People v. Jackson</i> (1980) 28 Cal.3d 264	60
<i>People v. Jaspal</i> (1991) 234 Cal.App.3d 1446	28
<i>People v. Jennings</i> (2000) 81 Cal.App.4th 1301	29
<i>People v. Jones</i> (2003) 29 Cal.4th at 1229	32
<i>People v. Jones</i> (1997) 17 Cal.4th 119	37, 44, 51, 71
<i>People v. Kipp</i> (1998) 18 Cal.4th 349	69
<i>People v. Kronemyer</i> (1987) 189 Cal.App.3d 314	72
<i>People v. Lucas</i> (1995) 12 Cal.4th 415	29
<i>People v. Maury</i> (2003) 30 Cal.4th 342	60, 62

**TABLE OF AUTHORITIES (continued)**

	<b>Page</b>
<i>People v. Medina</i> (1995) 11 Cal.4th 694	34, 66, 67, 70, 71
<i>People v. Meredith</i> (1993) 11 Cal.App.4th 1548	55, 56
<i>People v. Michaels</i> (2002) 28 Cal.4th 486	60, 62
<i>People v. Mincey</i> (1992) 2 Cal.4th 408	61
<i>People v. Morales</i> (1989) 48 Cal.3d 527	71
<i>People v. Morrison</i> (2004) 34 Cal.4th 698	60, 62
<i>People v. Musselwhite</i> (1998) 17 Cal.4th 1216	70
<i>People v. Nicolaus</i> (1991) 54 Cal.3d 551	67
<i>People v. Ochoa</i> (1998) 19 Cal.4th 353	35
<i>People v. Ochoa</i> (2001) 26 Cal.4th 398, cert. denied, <i>Ochoa v. California</i> (2002) 535 U.S. 1040 [122 S.Ct. 1803, 152 L.Ed.2d 660]	62
<i>People v. Ortiz</i> (1995) 38 Cal.App.4th 377	28
<i>People v. Price</i> (1991) 1 Cal.4th 324	36, 47

**TABLE OF AUTHORITIES (continued)**

	<b>Page</b>
<i>People v. Pride</i> (1992) 3 Cal.4th 195, cert. denied, <i>Pride v. California</i> (1993) 507 U.S. 935 [113 S.Ct. 1323, 122 L.Ed.2d 709]	65
<i>People v. Prieto</i> (2003) 30 Cal.4th 226, cert denied, <i>Prieto v. California</i> (2003) 540 U.S. 1008 [124 S.Ct. 542, 157 L.Ed.2d 416]	62
<i>People v. Putty</i> (1967) 251 Cal.App.2d 991	27
<i>People v. Roberson</i> (1959) 167 Cal.App.2d 429	27
<i>People v. Rodrigues</i> (1994) 8 Cal.4th 1060	29
<i>People v. Rodriguez</i> (1986) 42 Cal.3d 730	65
<i>People v. Samayao</i> (1997) 15 Cal.4th 795	35
<i>People v. Samayoa</i> (1997) 15 Cal.4th 795	35
<i>People v. Sanchez</i> (1995) 12 Cal.4th 1	45
<i>People v. Seaton</i> (2001) 26 Cal.4th 598	45
<i>People v. Sisvath</i> (2004) 118 Cal.App.4th 1396	26
<i>People v. Smithey</i> (1999) 20 Cal.4th 936	35

## TABLE OF AUTHORITIES (continued)

	Page
<i>People v. Snow</i> (2003) 30 Cal.4th 43	60, 62, 72
<i>People v. Stansbury</i> (1993) 4 Cal.4th 1017	49
<i>People v. Stitely</i> (2005) 35 Cal.4th 514	60, 62
<i>People v. Turner</i> (1994) 8 Cal.4th 137	70, 71
<i>People v. Visciotti</i> (1992) 2 Cal.4th 1	71
<i>People v. Wader</i> (1993) 5 Cal.4th 610	67
<i>People v. Watson</i> (1956) 46 Cal.2d 818	31
<i>People v. Williams</i> (1997) 16 Cal.4th 153	29
<i>People v. Wright</i> (1990) 52 Cal.3d 367	60, 71
<i>Pulley v. Harris</i> (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29]	61, 71
<i>Reynolds v. United States</i> (1879) 98 U.S. 145	25
<i>Ring v. Arizona</i> (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]	62, 64, 65
<i>Rockwell v. Superior Court</i> (1976) 18 Cal.3d 420	60

## TABLE OF AUTHORITIES (continued)

	Page
<i>Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa</i> (1987) 482 U.S. 522 [107 S.Ct. 2542, 96 L.Ed.2d 461]	56
<i>Stansbury v. California</i> (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed. 2d 293]	49
<i>State v. Fields</i> (Minn. May 20, 2004) ___ N.W.2d ___, 2004 WL 1118334	26
<i>Stephens v. Attorney General of California</i> (9th Cir. 1994) 23 F.3d 248	55, 56
<i>Stringer v. Black</i> (1992) 503 U.S. 222 [112 S.Ct. 1130, 117 L.Ed.2d 367]	74
<i>Tuilaepa v. California</i> (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]	63, 69
<i>United States v. Cherry</i> (10th Cir. 2000) 217 F.3d 811	26
<i>United States v. Haili</i> (9th Cir. 1971) 443 F.2d 1295	73
<i>Weeks v. Angelone</i> (2000) 528 U.S. 225 [120 S.Ct. 727, 145 L.Ed.2d 727]	30, 52
<i>White v. Illinois</i> (1992) 502 U.S. 346 [112 S.Ct. 736, 116 L.Ed.2d 848]	20, 23
<b>Constitutional Provisions</b>	
California Constitution art. I, § 27	61

## TABLE OF AUTHORITIES (continued)

	<b>Page</b>
United States Constitution	
Sixth Amendment	20-22
Eighth Amendment	60
Fourteenth Amendment	60
<b>Statutes</b>	
Evidence Code	
§ 1101	17
§ 1200	28
§ 1370	17
§ 352	17, 29
Penal Code	
§ 12022.5, subd. (a)	1
§ 12022.5, subd. (b)(2)	1
§ 12022.5, subd. (d)	1
§ 187, subd. (a)	1
§ 190.1	32
§ 190.2, subd. (a)(3)	1
§ 190.3	63, 64
§ 190.3, subd. (a)	32, 68, 69
§ 245, subd. (b)	1
§ 664	1
<b>Court Rules</b>	
Cal. Rules of Court	
rule 39.50	1
CALJIC	
No. 8.88	66, 67
No. 8.84.1(d)	71
No. 8.85	70

## TABLE OF AUTHORITIES (continued)

	Page
<b>Other Authorities</b>	
Article 36, paragraph 1(b) of the Vienna Convention	54
Restatement (Third) of Foreign Relations Law of the United States (1986) § 482, page 604	57
Statute of International Court of Justice, Article 59	57

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**THE PEOPLE OF THE STATE OF CALIFORNIA,**  
Plaintiff and Respondent,  
  
v.  
**MARTIN MENDOZA,**  
Defendant and Appellant.

**CAPITAL  
CASE  
S067678**

**STATEMENT OF THE CASE**

This is an automatic appeal after the finding of guilt of three murders with special circumstances resulting in a judgment of death. (See Rule 39.50, Cal. Rules of Court.)

On July 11, 1997, in San Bernardino County, appellant was charged in an Amended Information with the murders of Sandra Resendes, Wendy Cervantes, and Eric Resendes (Pen. Code, § 187, subd. (a)); the attempted murders of Martin Mendoza, Jr., Julio Cervantes, Antonio Cervantes, Deputy Mark Kane, and Deputy Stan Gordon (Pen. Code, § 187, subd. (a), 664); and assault with a semiautomatic firearm upon Rocio Mendoza Cervantes. (Pen. Code, § 245, subd. (b), 12022.5; subds. (a), (d).) In each offense, it was alleged appellant personally used a semiautomatic firearm. (Pen. Code, § 12022.5, subd. (b)(2).) (CT 551-556.)

On August 28, 1997, the jury found appellant guilty of all the offenses except the attempted murder of Martin Mendoza, Jr. (CT 830, 894-901.) The jury found the firearm allegations to be true. (CT 902-913.) The jury found the special circumstance of multiple murder to be true. (CT 914; Pen. Code, § 190.2, subd. (a)(3).)

On September 23, 1997, following the penalty phase, the jury returned

a verdict of death. (CT 893.) On December 23, 1997, the trial court imposed the death penalty. (CT 1137-1139.) The sentences for the remaining counts and the firearm enhancements were stayed. (CT 1142-1144.)

On automatic appeal, appellant claims: 1) the trial court erred in permitting evidence of Sandra Resende's accusation of sexual misconduct by him; 2) there was prosecutorial error in both the guilt and penalty phases of the trial; 3) the judgment of death was obtained in violation of the Vienna Convention; 4) the failure to provide intercase proportionality review is unconstitutional; 5) the death penalty statute and instructions fail to set out the appropriate burden of proof; 6) the jury instruction defining the scope of the jury's sentencing discretion and the nature of the deliberative process is unconstitutional; 7) The jury instructions regarding aggravating and mitigating circumstances are unconstitutional; 8) the imposition of the death sentence violates international law; 9) the cumulative effect of the errors requires reversal; and 10) the penalty of death must be vacated if the conviction for any count is reversed.

There is no basis for reversal of either the guilt or penalty phases of the trial. This Court should therefore affirm the judgment and conviction.

## STATEMENT OF FACTS

### Guilt Phase

The facts are presented in the light most favorable to the judgment. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) On appeal, all inferences favor the verdict. Since it is the province of the trier of fact to determine the credibility of the witnesses and the truth or falsity of the facts upon which that determination depends, any contradictions in the testimony must be presumed to have been resolved by the jury. Accordingly, due deference must be given to the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, citing

*People v. Jones* (1990) 51 Cal.3d 294, 314.

### **Synopsis**

Appellant executed three children in full view of police officers, adults, and other children. He also attempted to kill other children, adults and police officers.

### **Facts**

Appellant lived with Rocio Cervantes, his wife, in Carson City, Nevada. Rocio's two older children, Sandra, age 13, and Eric, were from a previous relationship. Appellant and Rocio had three other children together; Sergio, Martin Jr., and Edwardo, an infant. On January 5, 1996, appellant disciplined Sandra for failing to help him wash the truck. He hit her with a belt but was told to stop by Rocio. Appellant said that he would not let Sandra sleep that night and she would have to stand up all night long as punishment. Rocio left Sandra and appellant alone. (RT 2014-2017.)

Rocio returned and heard Sandra tell appellant, "No." She saw appellant pulling Sandra by the hand. Appellant warned Rocio not to interfere. He again said Sandra was not going to go to sleep that night. Eventually, appellant fell asleep on the couch. Rocio believed something else was going on. She called officers. Appellant awoke to officers in the house. Sandra told the officer appellant had hit her seven times with a belt. Appellant was arrested. (RT 1709-1711, 2017-2022, 2073-2077.)

Appellant was charged with battery to which he ultimately pled guilty to misdemeanor battery and spent some time in county jail. After appellant was taken to jail that night, Sandra told Rocio that appellant had been "bothering" her for seven to eight months. That evening, appellant had gone to Sandra and told her she was not going to have a boyfriend and that he liked her. He hugged her and gave her a kiss. Appellant told Sandra not to say anything to Rocio.

(RT 2022-2023.)

Rocio confronted appellant about the molestation. He denied molesting Sandra. Rocio, upset with appellant, took the children and moved to the home of her brother, Antonio Cervantes, in Landers, California. (RT 862, 907, 949-950.)

After getting out of jail in Carson City, appellant made a number of attempts to reconcile with Rocio. He denied molesting Sandra, although he admitted hitting her. Rocio continued talking to appellant and eventually met with him. (RT 1575-1576, 1579, 2033.) Rocio returned to Carson City with three of her children, leaving Sandra and Eric in Landers. Three days later, Rocio took the children and returned to Landers. She left appellant a note. (RT 2033-2037, 2068.)

The fact that Rocio was not willing to reconcile with him, disturbed appellant a great deal. Five days before the killings, appellant stopped working. He gathered together a number of items. On January 20, 1996, he bought some extra ammunition for a nine-millimeter weapon from a Walmart store. He also brought duct tape and a knife. (RT 1576-1584, 1626-1627.)

On January 24, 1996, appellant borrowed a car from his brother, Hector. He asked his nephew, Delgado-Soria<sup>1/</sup>, to go with him from Carson City to Landers. On the way down, Delgado-Soria heard appellant say he was going to kill some people. (RT 1603-1604, 1614-1615.) Appellant also said he would use the knife in case the gun did not work. (RT 1629-1630.) Appellant's plan was to then have Delgado-Soria drive him to an airport where he would fly to Mexico, while Delgado-Soria returned the car to his brother.

---

1. Delgado-Soria was tried separately for this offense. The jury found him not guilty. (RT 1534-1536.)

(RT 1039.)<sup>2</sup>

Appellant and Delgado-Soria arrived in Landers during the night of the 24<sup>th</sup>. Appellant parked the car across the street from Rocio's residence. (RT 991, 1116-1117.) At approximately 8:00 a.m., appellant went to the front porch of the house and banged on the door. Rocio came outside. According to Antonio, appellant did not appear drunk, although appellant had a beer in his hand. (RT 867, 869, 911-912.) Appellant asked to speak to Rocio, who went onto the porch and talked to appellant. Rocio, who had been holding baby Edwardo, gave the baby to appellant to hold. Appellant said to Edwardo that he was so little and that he, Edwardo, was not involved in what was going to happen. Rocio asked appellant what he meant by that statement. He smiled, and then told Rocio to wait and she would soon find out. (RT 2040.) Rocio gave the baby to Angelica, one of Antonio's daughters, who took the baby inside. (RT 2040.) Rocio told appellant she was cold. Appellant did not want to come into the house. Rocio went inside and hurried the children for school. Appellant started banging on the door. Rocio went back outside. (RT 2040-2041.)

Appellant asked Rocio if she was afraid of him. She answered no. He asked her again. Rocio's nephew, Julio, arrived at the house. (RT 2041-2042.) Appellant told her he wanted to take the children. Rocio told him that the children were going to go to school. Appellant then pulled out a pistol. (RT 866, 870-871, 912-913, 961-962, 1993-1994, 2042-2043.)

At that point, appellant grabbed Rocio around the neck and threatened everybody, telling them to do as he said or he would shoot Rocio. (RT 1998,

---

2. Testimony was given that appellant only intended on going to San Diego to visit relatives and then fly to Mexico to visit his mother and other family members. (RT 1036.) In an interview with officers, Delgado-Soria said that appellant intended on going to Los Angeles not San Diego and then fly to Mexico. (RT 1562.)

2003, 2043-2044.) Rocio asked appellant if he wanted her and the children to return with him. He said it was too late. (RT 2045, 2051.) Antonio told appellant to put the gun away because he was scaring the children. (RT 890, 913, 915, 964-965, 2046.) Julio stood next to little Martin, Jr., and told appellant that he was scaring the boy. Appellant fired two shots at Julio. (RT 915-916, 966, 1995.) Antonio tried to take the gun away. Appellant fired at Antonio. (RT 872-874, 916, 967.) Julio and Antonio fled. (RT 917-918, 969.)<sup>3/</sup> Other people inside the house called the police. (RT 971.)

Appellant, still holding onto Rocio, walked off the porch and went next to the car. He ordered the children into the car. (RT 889, 916, 921.) Appellant let go of Rocio and then grabbed Sandra around the neck, pointing a gun at her head. (RT 875, 921, 2047.) Appellant told Sandra not to cry or he was going to shoot her. (RT 1999, 2048.) Appellant ordered Rocio to turn the car around so that it was facing the street. The children were inside the car. Rocio complied. She then got out of the car. Appellant ordered the children to get into the front seat of the car. (RT 875-876, 895, 922, 2048-2049.)

Officers were informed by persons at the house not to activate their sirens so as not to alert appellant that they were on the way. However, sirens could be heard in the distance. Appellant ordered Rocio to go inside and tell the others not to call the police or he would kill the children. Rocio complied. (RT 877, 923, 2000, 2004, 2050, 2052.) At some point, the sirens were turned off. (RT 1071-1072, 1237-1238.)

Officers arrived and took positions outside the house. (RT 983, 1245.) As they did so, they saw appellant holding Sandra around the neck with the gun pointed at her head. Appellant said, "This is all your fault." He then killed

---

3. According to the statements Delgado-Soria gave to officers after the incident, Julio and Antonio were attempting to talk to appellant in a "nice way." It was when they realized they could not calm appellant down that they fled. (RT 1595.)

Sandra. (RT 924, 979, 1247, 1280, 1380-1382, 1716.)<sup>4</sup> Appellant turned to the car which was a few feet away from him. One of the children, Sergio, who was 10 years old, managed to get out of the car. Appellant turned, reached into the vehicle and killed two other children with the gun by shooting them in the head. One of the children was Antonio's daughter, Wendy. Seven year old Martin Jr., was shot in the head but survived. (RT 924-925, 1280, 1318-1319, 1387, 2001-2002.)

Appellant turned his weapon on the officers and shot at them. The officers returned fire. (RT 924-926, 983-985, 1247-1248, 1263-1267, 1281, 1295, 1388-1389, 2002.) Appellant was wounded. (RT 1051, 1393.) He ran around the back of the house. Julio engaged him in a fight in the yard. Antonio ran outside to pull his son off appellant so the police would not shoot Julio. Appellant was then subdued. (RT 880, 926-927, 1011-1012, 1101, 1394.)

In appellant's vehicle was a letter. On the letter appellant had written "Sandra." Also on the letter was a Nazi sign and the words, "Mexican power kill." In the letter, appellant stated that Delgado-Soria had nothing to do with what appellant was up to. Appellant wrote in the letter that he simply asked Delgado-Soria to give him a ride. Appellant also wrote, "I beg of you that if it's anyone's fault, it's mine. Do with me what you want." He also wrote, "Good-bye, everyone." A map showing how to get to Rocio's location in Landers was also found in the vehicle. (RT 1551-1553.)

In an interview with police, Delgado-Soria said that appellant had told him he was going to visit his mother in Colima, Mexico, but wanted to say good-bye first to his children. He asked Delgado-Soria to go with him to Landers so he could return his brother's car. (RT 1563-1565.) They arrived

---

4. Testimony from an expert witness indicated that appellant felt there was no basis for Sandra making the claim of sexual misconduct. Appellant believed Sandra said this to take revenge for him hitting her with a belt. (RT 1716.)

after midnight and slept in the car. In the morning, Delgado-Soria saw appellant talk to Rocio "in a nice manner." He then saw appellant grab her and pull out a weapon. (RT 1565.) Delgado-Soria left when appellant began shooting down toward the ground. (RT 1566.)

### **Defense**

Appellant relied upon the cross examination of witnesses and the testimony of several experts. Appellant's basic defense was that he did not have the mental state required for the crimes. His version of events tracked those of the prosecution with the exception of blaming the responding officers for instigating the shooting by driving with sirens on, and then drawing their weapons. (RT 1780-1824.)<sup>5/</sup>

While with Rocio, appellant would visit Rocio's family in Landers. He would bring his family from Carson City to Landers for family get-togethers. Four months prior to the murders, appellant bought a gun because he was fearful of gangs where he lived. Appellant carried the gun with him and had done so for at least five months prior to the shooting. (RT 1719.)

On January 7, 1996, at approximately 3:20 in the morning, Carson City officers received a telephone call. The caller hung up. Officers were able to trace the call to appellant's residence. They arrived and talked to Sandra. She told them that appellant, who was passed out asleep on the couch, had struck her in the leg seven times with a belt. She showed officers the marks. The police officers asked her if she had been sexually molested in any way. Sandra said she had not. (RT 1710, 2016-2020, 2073.) Rocio told an officer that appellant had a gun. The officers took the gun, and arrested appellant for

---

5. As the trial court noted, both sides had spent an inordinate amount of time on whether the officers acted reasonably in the situation. (RT 1953-1954.)

misdemeanor battery on the child.<sup>6</sup>

While appellant was in county jail, Rocio left with the children. (RT 1710-1711, 2020.) The next morning, appellant and his brother went back to the house and found it empty. Rocio was appellant's "love of his life." Appellant felt abandoned. He managed to track Rocio down to Landers. He talked to Rocio and denied ever molesting Sandra. Appellant became very upset and believed that the molestation charge was fabricated by both Rocio and Sandra. (RT 1715-1716.)

Rocio spoke to appellant's brother, Hector, and told him that Sandra had told her that appellant had tried to touch Sandra on the leg. Hector asked appellant whether this occurred. Appellant denied it, although he had admitted hitting Sandra and having problems with both Sandra and Eric. (RT 2031-2033.)

Rocio went back to Carson City to see if they could work things out. (RT 909, 20234.) Rocio stayed a few days. (RT 909, 2035.) One day, appellant returned home and found a note from Rocio. She had left. (RT 1711-1712, 2035-2036.)

Appellant began drinking and missing work. (RT 1758.) He stayed with his brother and Delgado-Soria. Appellant called Rocio. He came to believe that her relatives, Julio and Antonio were meddling in his relationship with Rocio. Appellant decided to go to Landers in a last attempt to reconcile. (RT 1714, 2037.) Appellant took the gun with him because he felt at some point he would end up slapping Rocio. He told his expert witness that if he did hit Rocio, then her family, which had a gun, would probably use the firearm against him. (RT 1719-1720.)

---

6. According to appellant, Rocio had been investigated by Child Protective Services (C.P.S.) for hitting her children. Appellant claimed that Rocio had a history of hitting her children. (RT 2082-2083, 2011-2014.)

According to appellant, he was emotionally drained. This explained the letter in his car. Appellant knew there would be trouble and did not want Delgado-Soria to be blamed for anything. The two men arrived on the night of January 24. They spent a few hours sitting in the car, drinking and sleeping. (RT 991, 1116-1117.)

Before 7:00 in the morning, appellant walked up to Rocio's porch and knocked on the door. Appellant said he wanted to talk to Rocio. Rocio told Angelica, Antonio's daughter, that appellant was drunk. (RT 1722, 2037-2038.)

Rocio told appellant she was cold and went inside the house. Rocio came back out and told appellant she had to get the children ready for school. She left him standing on the porch. Appellant felt he was being ignored. He banged on the door, and told Rocio to come outside so they could talk. Rocio came outside and again told appellant the children needed to go to school. Appellant told Rocio the children were not going to go to school. (RT 1721-1722.) Rocio finally agreed that the children would not go to school that day. (RT 1723.)

Julio and Antonio came outside. They told appellant he was acting like a fool and that the children were going to school. (RT 1761-1762.) Antonio told the children to get into the car. Appellant told them no. The children listened to Antonio and got into the car. (RT 1723.)

Appellant felt humiliated. (RT 1724, 1730.) He grabbed Rocio around the neck and put a gun to her head. Julio then said he knew appellant was drunk. Appellant fumbled with the gun. Appellant claimed he pulled out the gun and put it to Rocio's head to ensure that neither Antonio or Julio would shoot him.<sup>7</sup> Julio told appellant to put the gun away. Appellant claimed that

---

7. Angelica testified that neither Antonio or Julio had a weapon that day. (RT 872-873.)

Julio told him even the children thought he was a fool. Appellant then shot at Julio three times, missing him. Julio ran around the house. Appellant began following him, still holding Rocio around the head. It was at this point that appellant realized Delgado-Soria left with the car. (RT 867, 927-928.)

Julio ran into the house. Angelica, who was inside the house, dialed emergency services. A copy of the tape was played for the jury. Appellant told Rocio he wanted her to move the car that was in the driveway. He told Rocio to go into the house and tell Julio not to call the police or the children would be dead. Inside the car was Wendy, the daughter of Antonio. Appellant believed Antonio would not do anything knowing his daughter was in the car. Appellant then swapped Sandra for Rocio. He shot Sandra and then shot the children in the car. (RT 922-924, 1749-1750.)

After appellant had been arrested, two blood draws were completed. Appellant had a blood/alcohol level of between .039 to .0583 at the time of the draws. (RT 1453.) A search of the vehicle that Delgado-Soria was driving did not turn up any empty beer cans. There was, however, an empty pineapple drink can and sunflower seeds. (RT 1525-1526.)<sup>8/</sup>

### **Penalty Phase**

Sergio testified about seeing appellant shoot Sandra, Eric and Wendy. Sergio said he was very sad. He was seeing a counselor. (RT 2387-2391.)

Rocio testified that she kept the children's toys even after moving to another city. She felt sad because these were her only children and the manner in which they died was cruel. (RT 2393-2394.) She dreams of her dead son

---

8. Delgado-Soria told officers in an interview that appellant had stopped and bought beer in the early morning hours upon arriving in Landers. According to Delgado-Soria, appellant drank three Bud Lights. (RT 1588-1589.) While there were two other beer cans recovered, they were full. (RT 1659-1660.)

Eric. In her dreams she asks him for forgiveness because she feels it was somehow her fault. Rocio also dreams of Sandra. In her dreams, Rocio asks Sandra why she didn't tell her what appellant had been doing to her. (RT 2395-2397.)

Martin Jr., had trouble in the beginning. He would cry often and ask why his father had killed his siblings. Martin Jr., did not want to eat and was very depressed. He too was receiving therapy. Martin Jr., would put letters inside balloons and send them into the air. The letters were for his siblings in Heaven. (RT 2397.)

Antonio Cervantes testified about the death of his daughter Wendy. Antonio felt helpless when appellant shot the children. Wendy was described as being the "noblest" of Antonio's four children, bringing him and his wife breakfast in bed and making them coffee. Wendy's room is kept the way she had it, including her clothes and toys. No one goes into that room. (RT 2407-2409.)

Antonio did not tell the grandparents of Wendy's death because Wendy had stayed with them in Mexico for a long time and the news would devastate them. Antonio has been unable to hold down a job, resulting in him owing money to people. (RT 2409-2410.) For six months after the murders, Antonio stayed home because both his wife and Rocio wanted to die and he feared they might hurt themselves. (RT 2410-2411.) Sometimes in the early morning hours, either Rocio or Antonio's wife would go outside to the spot where the children had been killed and faint. Antonio would have to go outside and take them back to the house. (RT 2411.)

Antonio's relationship with his wife changed. She used to love to dance. Now, she no longer goes out. She used to cook for Antonio, but when he arrives home, she does not even realize he has come home. They do not talk much. (RT 2412-2413.) There is talk of divorce because Antonio's wife

blames Antonio for not doing more. (RT 2413.)

Antonia Cervantes, wife of Antonio, testified that her brother had come to her that day while she was at work and told her only that there had been an accident at home. Her brother did tell her that Rocio's children were dead and that Wendy was at the hospital. When she arrived home and was not allowed to go into the house, she passed out. Antonia still lights candles on her daughter's birthday. At night, she goes outside to the spot where Wendy had been shot and talks to Wendy. She asks Wendy to forgive her not being there at the moment and that she could not embrace her at the last moment. (RT 2417-2419.)

### **Defense**

Psychologist Joseph Lantz testified he had performed examinations on appellant. (RT 2434-2436.) Lantz opined that appellant had low-average intellectual ability, and his problem solving, ability to make judgments, decisions and planning ability were consistent with his intellectual level. There was no significant discrepancy, such as what one would see in a person with brain injury, a fall, or toxic exposure. (RT 2436.)

Appellant's score on the Test of Nonverbal Intelligence (TONI) was in the 12<sup>th</sup> percentile, meaning 88 people out of 100 would have scored better than appellant. (RT 2438.) A second test several months later indicated appellant was in the 18<sup>th</sup> percentile, meaning 82 people would have scored better than appellant. (RT 2438-2439.)

Appellant's intelligence on another test was 103. The mean would be 100. Since this test over-estimated intelligence, Lantz took off eight points for a score of 95. (RT 2440.) Appellant's memory function was good in terms of learning simple worth. Once appellant learned something his memory functioning was good and his ability to recall things was within the average range for the general population. (RT 2442-2443.)

Lantz opined that appellant's intellectual abilities were below the average range. However, this did not mean appellant could not learn. It simply meant that appellant had a bit more challenge and had to work harder and longer. (RT 2443-2444.) In a crisis situation, a person with lower intelligence would be more challenged. (RT 2445.) Appellant was characterized as having a closed personality. (RT 2446-2447.) In a crisis situation, he would be overwhelmed and shut down. (RT 2447-2448.) Lantz opined that from the first shot onwards, appellant was functioning automatically more than anything else. (RT 2449.)

Lantz testified that appellant was angry and knew there would be trouble. Appellant had admitted he wanted to slap Rocio and knew there would be problems. This was not an excuse for appellant's behavior. Appellant himself knew there was no excuse for what happened. (RT 2452-2453.)

While explaining that the map appellant had was merely to help appellant find his way back from Landers, Lantz could not explain the word "Sandra" written on the map. (RT 2455-2456.) On cross examination, Lantz stated that appellant's I.Q. was 103 which was in the middle limit of average intelligence. (RT 2471, 2474.)

Aside from Lantz, the prosecution did not cross examine appellant's witnesses. These witnesses provided the following testimony:

Evelia Garcia-Delgado, appellant's half brother, testified he and appellant grew up in Mexico. Appellant had a third grade education. Appellant went to work after finishing his third grade schooling. He also looked out for his younger brother, who was not mentally well. (RT 2488-2491, 2504.) Appellant came to the United States at age 17 to work. Appellant returned to Mexico to visit. He bought land so that his family could build a house to live in. Appellant was always responsible. (RT 2491-2492.)

Jesus Ramirez lived next door to appellant when appellant lived in

Mexico. Ramirez described appellant as a hard worker. (RT 2507-2510.)

Appellant's father testified that he had left the family when appellant was very young. (RT 2513-2514.)

Adrian Hernandez described appellant as one of his best friends. Hernandez lived in Reno, Nevada. Hernandez knew appellant for nine years and described him as a nice and friendly person. Appellant treated all his children, including Sergio and Sandra, the same. Hernandez and appellant worked at the same company. Appellant had a reputation for being the best worker. (RT 2515-2517.)

Ramona Garcia, appellant's mother, testified her family had grown up poor. Appellant would run errands and work in the fields to help the family. Appellant helped his siblings. He went to the United States to work and send money back to his family in Mexico. Appellant returned to Mexico and bought land for the family. (RT 2519-2520.)

### **Stipulations**

By way of stipulation, the jury was informed that the prosecution had requested appellant be examined by the prosecutor's mental health expert and that, pursuant to appellant's counsel, appellant declined. (RT 2531.)

## ARGUMENT

### I.

**THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY SANDRA THAT APPELLANT HAD MOLESTED HER SINCE THESE STATEMENTS WERE NOT TESTIMONIAL; APPELLANT FORFEITED HIS RIGHT TO CONFRONT THE VICTIM BY KILLING HER; AND THE STATEMENTS CONSTITUTED AN EXCEPTION TO THE HEARSAY RULE AND WERE NOT PREJUDICIAL**

Appellant claims the trial court erred in permitting evidence that Sandra had accused him of sexual misconduct. According to appellant, this testimony violated *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], because it was testimonial evidence and he did not have the ability to cross examine Sandra on this point. Appellant also claims the evidence was inadmissible hearsay and was prejudicial. (AOB 27-45.) This claim should be rejected. The statements were not testimonial under *Crawford*. Further, having killed the very person he claims he could not cross examine, appellant forfeited any constitutional right. Moreover, the evidence was admissible to show why appellant decided to travel to California and kill the children. Whether the accusation was true or not, it was the effect the accusation had on appellant that was the point of the introduction of the evidence.

#### A. Facts

On June 10, 1997, during jury selection, trial counsel stated that the prosecution intended to introduce evidence of a sexual molestation by appellant as a circumstance under factor (a) for the penalty. (RT 144-145.) Counsel objected on the basis of hearsay and prejudice. (RT 145.) The prosecution stated its position was not that a molestation had occurred but to prove that

Sandra had made the statement and that motivated appellant to do what he did. (RT 146-147.)

In a motion *in limine*, trial counsel wished to exclude statements concerning the alleged sexual molestation. (RT 556.) The prosecution again stated that it was not being offered for the truth of the matter asserted, but to establish appellant's motive, intent, and premeditation. This evidence helped to explain to the jury the reason why appellant was angry and came to Landers, California from Nevada. The prosecution argued the evidence was admissible under Evidence Code section 1101. (RT 557.)

Trial counsel objected that under Evidence Code section 1370, regarding physical abuse, the requirements had not been met. (RT 558-559.) The prosecution responded that it was not seeking to show appellant actually molested Sandra, but that there were three witnesses, Rocio, Delgado-Soria and appellant's brother, all of whom had informed appellant of the allegations which upset appellant. (RT 561.) The trial court indicated the evidence would be admissible. (RT 562.)

Trial counsel also objected that under Evidence Code section 352, the evidence was unduly prejudicial. The court indicated it would admit the evidence and instruct the jury with an instruction on the limited purpose of the evidence. (RT 562-564.)

In opening statements, the prosecution made it very clear to the jury that Sandra made a claim of sexual molestation but that the jury was not to take that as being true. The prosecutor specifically stated:

Now, let me make something very clear to you. She's dead. We cannot and will not even try to prove that he did, in fact, molest her. That's not why we're bringing this to your attention. You must not assume that he did, okay? It's only fair that you just disregard the, the horrific, negative aspects of that, because we cannot and will not even try to prove that he, in fact, molested her, okay, but she told her mother that she had, Rocio.

She turned him into the police officers, who arrested him for battery

charges, and ultimately he pled guilty to a misdemeanor battery and spent some time in jail. But he denied molesting her, even she -- even little Sandra, when she was interviewed by the police officers, denied that, in fact, he had molested her. So that's, it's not the point of the case that he molested her, okay? I want to make that real clear. So don't hold it against him because that claim was made.

But the claim was made, and Rocio was furious about it, and she took the kids while he was in jail and left.

(RT 755-756.)<sup>9/</sup>

Trial counsel also emphasized in opening statements that the allegation was not being offered for its truth. (RT 771-772.)

During examination of the forensic pathologist who did an autopsy of Sandra, the prosecution inquired if there were signs of molestation. There was no such evidence. (RT 1431-1432.)<sup>10/</sup> The prosecution examined Rocio who testified that Sandra had told her that appellant had been molesting her since Edwardo, her younger brother, had been born. (RT 2022.)

After describing one instance of molestation (RT 2023), a sidebar conference was held. At the sidebar, the trial court stated the prosecution was getting details of the allegations out and that it had to be made clear that appellant was actually confronted with these details before the jury would hear of them. (RT 20225-2026.) After taking testimony from Officer Wolf about the interview with Rocio, it was ascertained that Rocio had confronted appellant with the specifics of the allegations and that appellant became angry. (RT 2027-2028.)

---

9. Appellant claims the prosecution emphasized the molestation in opening statements. (AOB 29.) The record shows otherwise. The prosecution was intent on informing the jury not to consider the truth of the matter, only that appellant had been informed of the allegation.

10. No objection was made to the prosecution's questions.

Trial counsel suggested that rather than allow the prosecution to lead the witness, "I would request that the question simply be, what did you tell your husband regarding Sandra's allegations, and just let her say whatever she's going to say." (RT 2028.) The prosecutor continued examining Rocio who recalled that she had asked appellant about kissing Sandra, hugging her, telling her he liked her and that when she was older, she would belong to him. (RT 2032.)

Later, Rocio testified that on the night appellant had hit Sandra with the belt, Sandra had told her that appellant had been molesting her. (RT 2074-2075, 2084-2085.)

In closing argument, trial counsel made mention of the molest allegation. (RT 2252-2253.) Afterwards, the prosecution noted that it did not matter what day appellant found out about the molestation allegation, it was still prior to him coming to Landers and killing Sandra and the others. The prosecution again stated it did not matter if the allegations were true or not, the jury was not to consider that. The prosecution again reminded the jury that appellant was not being tried for molestation. The evidence was only presented to show why appellant was angry with Sandra. The prosecution referred the jury to the police report in which Rocio said she had confronted appellant about the molestation on the same night he had been arrested. (RT 2269-2270.)

## **B. Analysis**

Three issues are presented here. The first one deals with confronting an unavailable witness. The second deals with whether the evidence constituted inadmissible hearsay. The third deals with probative value and prejudice effect. These claims should be rejected.

## 1. No Error Under *Crawford*

Appellant's first claim is that he was denied the right to confront Sandra about these allegations. This, he argues, violated the right to Confrontation under *Crawford*. (AOB 35-39.) This claim should be rejected because the statements were not testimonial. Additionally, appellant forfeited that right by killing Sandra.

### a. Law

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Prior to the decision in *Crawford, Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597], was the controlling precedent and provided the analytical framework for the application of the Sixth Amendment Confrontation Clause to the admission of evidence at trial. There, the Court held that the Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.'" (*Id.* at p. 66.) To meet that test, evidence must fall within either a "firmly rooted exception" or bear "particularized guarantees of trustworthiness." (*Id.*) Thus, under *Roberts*, the Sixth Amendment Confrontation Clause "exclusionary" effect was tied to firmly rooted hearsay exceptions and ad hoc "reliability" determinations by trial judges. As such, it lacked any categorical exclusionary effect, leaving it to the courts to determine on a case-by-case basis whether hearsay exceptions were "firmly rooted." (See, e.g., *Lilly v. Virginia* (1999) 527 U.S. 116 [119 S.Ct. 1887, 144 L.Ed.2d 117]; *White v. Illinois* (1992) 502 U.S. 346 [112 S.Ct. 736, 116 L.Ed.2d 848].)

In *Crawford*, the United States Supreme Court overruled *Roberts*, setting

forth a new approach for Confrontation Clause analysis. *Crawford* involved a defendant charged with stabbing a man who had attacked the defendant's wife. The police gave *Miranda*<sup>11</sup> warnings to both the defendant and the wife, who had been present during the stabbing, and then interrogated both of them as potential suspects. In his tape-recorded statement, the defendant claimed to have acted in self-defense. However, his wife's tape-recorded statement suggested the stabbing was not in self-defense. At trial, Washington state's marital privilege law prevented the defendant's wife from testifying. The trial court allowed the prosecution to introduce the wife's pre-trial statement against the defendant as a statement against penal interest. The trial court rejected the defendant's argument that the admission of the statement violated his rights under the Confrontation Clause, finding instead that the statement was sufficiently trustworthy.

The United States Supreme Court initially observed that history supports two inferences about the meaning of the Sixth Amendment. First, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." (*Crawford v. Washington, supra*, 541 U.S. at p. 50.) The High Court rejected the view that the Confrontation Clause is limited in its application to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." (*Id.* at p. 51.) This focus, the Court explained, also suggests that not all hearsay implicates the Sixth Amendment's core concerns. For example, an off-hand, overheard remark "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." (*Ibid.*) On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but

---

11. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

the Framers certainly would not have condoned them. Second, the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross examination. (*Ibid.*) The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. (*Ibid.*)

The Court explained that the *Roberts* test – admissibility grounded on whether the hearsay evidence falls under a “firmly rooted exception” or bears “particularized guarantees of trustworthiness” – departs from historical principles involving the Confrontation Clause in two respects: First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of ex parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. (*Crawford v. Washington, supra*, 541 U.S. at p. 60.) At the same time, however, the test is too narrow: It admits statements that do consist of ex parte testimony upon a mere finding of reliability. “This malleable standard often fails to protect against paradigmatic confrontation violations.” (*Ibid.*)

The Court noted that two proposals have been suggested as to how “to revise our doctrine to reflect more accurately the original understanding of the Clause”:

First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law -- thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine -- thus eliminating the excessive narrowness referred to above.

(*Crawford v. Washington, supra*, 541 U.S. at p. 61.)

The Court noted that in *White v. Illinois, supra*, 502 U.S. 346,<sup>12/</sup> it had considered the first proposal and rejected it. While the Court recognized that its present decision “casts doubt” on *White*, it concluded that it did not need to definitively resolve whether *White* survives since the statement at issue was testimonial under any definition. But the second proposal, said the Court, was squarely implicated. (*Crawford v. Washington, supra*, 541 U.S. at p. 61.) And adopting that proposal, the Court held:

Where testimonial evidence is at issue, [ ] the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

(*Crawford v. Washington, supra*, 541 U.S. at p. 68 (footnote omitted).)

**b. Statements by Sandra Were Not Testimonial**

Appellant’s claim must fail because Sandra’s statements to her mother regarding appellant molesting her were not testimonial. Under *Crawford*, the confrontation clause applies only to *testimonial* statements, which is defined, so far, as prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and during police interrogations. *Crawford* did not rule out statements made by one individual to another individual. (See *Demons v. State* (Ga. 2004) \_\_\_ S.E.2d \_\_\_, 2004 WL 601751 [In a murder trial, the court

---

12. *White* involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations. (*White v. Illinois, supra*, 502 U.S. at 349-51.) The only question presented in that case was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. The holding did not address the question whether certain of the statements, because they were “testimonial,” had to be excluded even if the witness was unavailable.

admitted a statement by the victim to a third-party that the defendant was going to kill him. The Georgia Supreme Court held that the statement by the victim to the third-party was not testimonial: “The victim’s hearsay statements were not remotely similar to such prior testimony or police interrogation, as they were made in a conversation with a friend, before the commission of any crime, and without any reasonable expectation that they would be used at a later trial.”]; *Horton v. Allen* (1st Cir. May 26, 2004) \_\_\_ F.3d \_\_\_, 2004 WL 1171383 [statement by accomplice to third-party not “testimonial”].)

These types of statements elicited by individuals other than government officers, or statements elicited by government officers for some purpose other than to advance a criminal investigation or prosecution, are not “testimonial” within the meaning of *Crawford*. Sandra’s statements to her mother were not the kind of memorialized, judicial process-created evidence of which *Crawford* speaks. The statements appellant contends were improperly admitted, were not testimonial in nature as a government official did not elicit them, the statements were not any type of “*ex parte* in-court testimony or its functional equivalent,” and the statements were not given with an eye toward trial.

For the same reason, when Rocio confronted appellant about the allegations, those statements would also not be considered testimonial. Neither would the evidence that Rocio had informed appellant’s brother and Delgado-Soria about the allegations be considered testimonial.

The statements contained in the police report which originated when Rocio told officers of the allegation may be considered testimonial in nature, but given the fact that Sandra had told Rocio and that Delgado-Soria also relayed this information, neither of which was testimonial under *Crawford*, there can be no conceivable prejudice. The information was properly admitted.

### c. Waiver by Killing Sandra

Appellant's position is also undermined by the fact he killed the very person who had made these accusations. Appellant cannot legitimately complain that he could not confront Sandra when it was his own wrongdoing that prevented the confrontation. The *Crawford* Court recognized this exception. *Crawford* criticized the *Roberts* test as allowing a jury "to hear evidence, untested, by the adversary process, based on a mere judicial determination of reliability" thus replacing "the constitutionally prescribed method of assessing reliability with a wholly foreign one." (*Crawford v. Washington, supra*, 541 U.S. at p. 62.) However, the Court emphasized that "[i]n this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See *Reynolds v. United States*, 98 U.S. 145, 158-159 (1879)." (*Ibid*, italics added.)

In *Reynolds*, the Supreme Court asserted:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; *but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.* The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful act. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

(*Reynolds v. United States, supra*, 95 U.S. 145, 158; italics added.)

The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not

been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony.

(*Id.* at p. 159; *see also United States v. Cherry* (10th Cir. 2000) 217 F.3d 811, 819-820 [a defendant may be deemed to have waived his or her confrontation clause rights if a preponderance of the evidence establishes, among other things, that he or she participated directly in planning or procuring the declarant's unavailability through wrongdoing].)

Having killed Sandra, as witnessed by several people, appellant has no right to complain that he cannot confront Sandra with the accusations made. (See *State v. Fields* (Minn. May 20, 2004) \_\_\_ N.W.2d \_\_\_, 2004 WL 1118334 [defendant forfeited his right of confrontation by threatening witness].)

Appellant's reliance upon *Bockting v. Bayer* (9th Cir. 2005) 399 F.3d 1010, 1022, is completely misplaced. In that case, the defendant was tried for sexual abuse. The six-year-old victim had accused the defendant of sexual abuse. At the preliminary hearing, the victim could not recall what happened. The prosecution had the child declared unavailable and her police interview was admitted into evidence. The defendant was then convicted. It was in this context that statements made by the child were utilized to prove the offense for which the defendant was on trial.

In the present matter, appellant was not charged with sexual molestation. He was charged with murder. The statements regarding sexual molestation were never admitted as truth but to show why appellant went to Landers and killed Sandra and the other children. *Bockting* is not on point.

Appellant's reliance upon *People v. Sisvath* (2004) 118 Cal.App.4th 1396, is also misplaced, since that case involved the use of statements made to a sexual abuse investigator in order to convict the defendant of sexual abuse; a wholly different situation than the present one.

In sum, the statements that Sandra made to her mother, which were

repeated by her mother, as well as by Delgado-Soria were not testimonial within the meaning of *Crawford*. As such, there was no violation of the right to confront a witness. Moreover, appellant's own killing of Sandra extinguished any right to confront that witness.

### **C. Sandra's Statements Were Not Hearsay**

Appellant also claims Sandra's statements were inadmissible hearsay. (AOB 39-41.) This claim should be rejected because the statements made by Sandra to Rocio, who then told appellant, and which was also known by Delgado-Soria, were not hearsay.

Sandra's statements, as acknowledged by all parties, was not being offered for the truth that appellant actually molested her. Rather, it was to show the effect the statements had on appellant. (See *People v. Putty* (1967) 251 Cal.App.2d 991, 996 [indicating that the hearsay rule excludes extra judicial utterances solely when they are offered for the truth of the matter asserted].) Instead, Sandra's statements made to her mother who then accused appellant was offered to prove its effect on appellant, the listener, to show why he decided to go from Carson City, Nevada, to Landers, California, where, while holding Sandra, he told her it was all her fault.

Evidence of a declarant's statement that is offered to prove its effect on the listener constitutes nonhearsay and is not rendered inadmissible on hearsay grounds. (*People v. Hill* (1992) 3 Cal.4th 959, 987; *People v. Duran* (1976) 16 Cal.3d 282, 295.) Such evidence can be introduced to show how the statement imparted certain information to the listener and that the listener, believing the truth of that information, acted in conformity with his belief. (*People v. Hill, supra*, 3 Cal.4th at p. 987; *People v. Roberson* (1959) 167 Cal.App.2d 429, 431.) In such cases, it is the listener's credibility that is important.

Here, while motive was not an element of the offense of murder, it was proper to admit this evidence since it tended to show that appellant killed

Sandra because of the accusation which led to the break up of the family and his desire to retaliate against Sandra. This was pertinent to show that appellant intended to commit the murders prior to leaving for Landers and went to premeditation. “‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing *and that is offered to prove the truth of the matter stated.*” (Evid. Code, § 1200; *People v. Alvarez* (1996) 14 Cal.4th 155, 185; emphasis added.) The statements here were not being admitted to prove that appellant had molested Sandra, but to show the effect they had on him and that he later acted in conformity with that belief, regardless of whether it was true or not. “Out-of-court statements not offered to prove the truth of the matter stated are not regarded as hearsay. Such statements are not within the hearsay rule at all. . . .” (*People v. Jaspal* (1991) 234 Cal.App.3d 1446, 1462.)

As the foregoing makes clear, because the evidence was expressly admitted for a non-hearsay purpose, its admission was not controlled by the hearsay rules.

Appellant’s reliance on *People v. Ortiz* (1995) 38 Cal.App.4th 377, misses the point. That case involves statements made being relevant to a determination of the declarant’s state of mind. The situation here is not based upon Sandra’s state of mind, but upon the effect her statements had on appellant who heard these accusations. *Hill* permits the evidence to be presented for such a purpose. (*People v. Hill, supra*, 3 Cal.4th at p. 987.)

In sum, the evidence regarding sexual molestation was not hearsay and was never admitted as such. There was no error.

#### **D. The Evidence Was Properly Admitted Under Evidence Code Section 352**

Appellant also claims the evidence was inadmissible because its prejudicial effect was greater than its probative value. (AOB 41-43.)

Considering this was a case of multiple murder, an allegation of sexual molestation, which the jury was informed was not to be taken as true, was not prejudicial.

Under Evidence Code section 352, a trial court may in its discretion exclude material evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading of the jury. The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

A reviewing court will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd. (*People v. Jennings, supra*, 81 Cal.App.4th at p. 1314; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) "The [trial] court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighed its probative value." (*People v. Jennings, supra*, 81 Cal.App.4th at pp. 1314-1315, quoting *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396.)

As the Supreme Court has repeatedly reaffirmed, when ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state that it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352.

(*People v. Williams* (1997) 16 Cal.4th 153, 213, citing *People v. Lucas* (1995) 12 Cal.4th 415, 448-449.)

Applying these rules, the trial court did not abuse its discretion by

permitting the evidence of the statements made by Sandra. The alleged sexual molestation was no more egregious than the murders committed by appellant in front of people and posed no danger of confusing the jury. The trial judge understood why the evidence was being admitted, and did so with certain limitations. Given the care with which the judge treated the evidence, there was no abuse of discretion in his conclusion the probative value of the evidence was not substantially outweighed by the danger of undue prejudice.

The statements were limited and the jury was informed at the time that the statements were not to be taken for the truth of the matter asserted. (RT 2015.) The jury was also instructed that certain evidence had been admitted for a limited purpose. (RT 2167.) It must be presumed, absent evidence to the contrary, that the jurors faithfully followed this instruction. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234 [120 S.Ct. 727, 145 L.Ed.2d 727]; *People v. Green* (1980) 27 Cal.3d 1, 29.) Any conceivable harm to appellant regarding the allegations of sexual molestation was cured by the court's concluding admonition to disregard its comments. (*People v. Hess* (1970) 10 Cal.App.3d 1071, 1081.)

Further, the evidence of appellant killing Sandra and the other children, and having the intent to do so, was overwhelming. Thus, the introduction of allegations of sexual molestation was clearly harmless. Naturally, appellant claims the evidence violated his constitutional rights and thus, the standard of harmless beyond a reasonable doubt, as stated in *Chapman v. California* (1967) 386 U.S. 18, 24, [87 S.Ct. 824, 17 L.Ed.2d 705], must be employed. (AOB 43.) Respondent disagrees. Appellant confuses the two parts of the trial in an effort to show error. The first portion must analyze whether there was error in the guilt phase. The second portion must analyze whether introduction of the evidence of alleged sexual molestation constituted error in the penalty phase. In his brief, appellant commences with the evidence in the guilt phase but

argues error in the penalty phase.

### **1. Prejudice Analysis at Guilt Phase**

There was no prejudicial error in the guilt phase by the introduction of the evidence that Sandra had told her mother that appellant had molested her.

‘As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.’ [Citation.]

(*People v. Gurule* (2002) 28 Cal.4th 557, 620; see also, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 427-428 [defendant’s “attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive. ‘As a general matter, the “[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant’s right to present a defense.”” ].)

The proper standard is one of whether there is a probability of a more favorable outcome. (*People v. Watson* (1956) 46 Cal.2d 818, 836). The introduction of the allegations of sexual misconduct did not deny appellant the right to present a defense. Here, the evidence was overwhelming. Appellant was seen by others pulling out a gun, grabbing Sandra, pointing the gun at her head, telling her this was all her fault, and then pulling the trigger, killing her. He was also seen walking to the vehicle where the other children were and pulling the trigger multiple times, thus killing the other children. It was clear to all that appellant committed the acts and had the intent at the time to kill people. This was not a “closely balanced case,” for it was clear to all who were there that appellant had a firearm and used it to kill children. There is no basis to claim a more favorable outcome.

### **E. Prejudice Analysis at Penalty Phase**

As to the penalty phase, again there was no prejudicial error. In this regard, the *Chapman* standard of prejudice is properly applied during penalty

phase review. (See *People v. Jones* (2003) 29 Cal.4th at 1229, 1264.) Appellant claims that although the jury was instructed not to consider the sexual molestation allegation under factor (b), no such admonition was given for factor (a). (AOB 43-44.)

Penal Code section 190.3, subdivision (a), defines the factor concerning the circumstances of the crime which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Penal Code section 190.1. The jury found the special circumstance of multiple murder to be true. (CT 914.)

As part of the instructions to the jury in the penalty phase, the trial court stated:

You have heard evidence in this case regarding hearsay statements involving the possible molest of Sandra Resendes which were not admitted for their truth, and the defendant's misdemeanor conviction for domestic battery in Carson City. You are instructed that you may not use either of these events as Factor (b) evidence;

(RT 2535.)

In closing argument the prosecution argued the following regarding factor (a):

And the reason for that is that the law is that even though we don't spell it out for you here, the law is that as part of Factor (a), the circumstances of the crimes, you may take into account the harm suffered by the victims, the impacts upon them and on their families as part of your sentencing decision. Remember, we talked a little bit about the fact that you are judges, and you are now the sentencing judges. And just like you've seen on T.V., it is okay for to you consider that kind of evidence in forming your decision as to what should happen to Mr. Mendoza. So, I've written that word in just to remind you. We'll talk more about the individual matters momentarily. But obviously, you want to consider all the evidence you've heard in the entire trial, not just these last few days. And everything that you heard, then, you must try to remember now. I know we've broken up the trial here and there a little bit, and we've had some short days here and there, but I know that you will not have forgotten the basic elements of the circumstances of the crimes. I will

highlight a few of those momentarily, but just keep in mind that this Factor (a) involves, not only the heinous nature of what he did here, as I've told you before, this sadistic reign of terror that he imposed upon, not only these children, but on their family members as they watched their children die. Those are considered to be circumstances of the crime of which the defendant has been convicted, and the existence of the multiple murder special circumstance. That's all been found true by you, and so you can take that into account. You can, under the law, put yourself in the shoes of the victims and try to understand the horror that they went through, especially the children, that they went through while this happened. Try to imagine what it was like. We're in a sterile courtroom here. We're in a very quiet, professional courtroom. Nobody's shouting. Nobody's yelling. I'm certainly not going to be pounding any tables. But try to imagine what it was like that day. Try to put yourselves there, 'cause you have to consider the circumstances of the crime. Try to imagine what it must have been like for the parents of these children to watch what Mr. Mendoza was doing to them. The things that he said. The threats that he made. Try to remember all of that as part of the circumstances of the crimes. And as part of Factor (a), you may consider the victim impact evidence that we've put on. A little bit about the glimpse of the life into each of the dead victims that you never got a chance to see. You may consider that short glimpse we gave you of their lives and the loss to, not only the community, but to their families that has been suffered. When a child is murdered, we all suffer.

....

Certainly we have the living victims who were shot at. We have the family members of the victims who were murdered and who were shot at, and we have all of that pain which was caused in the loss which was caused to those family members. You may consider all of that. And we're sorry that even the defendant's family has to go through all of this, but who caused this? It was the defendant that caused it. Nobody else. The man had nine hours, if not days ahead of time, to think about what he could do and would do. He had the availability of counseling to attend to seek help from, and he chose not to. He came down here knowing what he was going to do. Had plenty of time to think about it. Chose to do it. So, that's something you can consider about the circumstances of the crimes, and as I say, we'll get back to that in just a moment.

(RT 2543-2546.)

Appellant claims the prosecution used the molestation as part of factor (a). (AOB 44, citing to RT 2547.) Not true. The prosecution made no mention of the molestation allegation in connection to factor (a). The focus was upon victim impact, both the dead victims and their families who were left with dealing with their children having been killed. As to factor (b), the prosecution stated that the molest did not apply to that factor. (RT 2547.) Therefore, there was never any linkage between factor (a) and the sexual molestation allegation. There being no argument by the prosecution that the jury could consider the sexual molestation allegation under factor (a), it is unlikely that the jury did so. (See *People v. Medina* (1995) 11 Cal.4th 694, 779 [In the absence of prosecutorial argument to the contrary, it is unlikely the jury would give undue weight under factor (a) to evidence which proved the circumstances of the offense and also proved the special circumstance].)

### **Conclusion**

Based on the above, there was no violation of *Crawford*, no violation of the hearsay rule, and no prejudice in either the guilt or penalty phase

## **II.**

### **REVERSAL BASED ON PROSECUTORIAL ERROR IS UNWARRANTED**

Appellant claims prosecutorial error in both the guilt and penalty phases of the trial. (AOB 46-68.) This claim should be rejected since any error was not prejudicial.

#### **A. Law**

The standards regarding prosecutorial error under federal and state law are as follows: “Improper remarks by a prosecutor can “so infect [] the trial with unfairness as to make the resulting conviction a denial of due process.”” (*People v. Earp* (1999) 20 Cal.4th 826, 858, quoting *Darden v. Wainwright*

(1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431]; cf. *People v. Hill, supra*, 17 Cal.4th at p. 819; and citing *People v. Frye* (1998) 18 Cal.4th 894, 969; see also *People v. Smithey* (1999) 20 Cal.4th 936, 960.) The focus is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Carter* (2003) 30 Cal.4th 1166, 1207.)

Conduct by a prosecutor which does not render a criminal trial fundamentally unfair is prosecutorial error under state law only when it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” (*People v. Smithey, supra*, 20 Cal.4th at p. 960, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) A prosecutor's conduct violates a defendant's constitutional rights only when the behavior comprises a pattern of conduct so egregious as to infect the trial with such unfairness as to make the conviction a denial of due process. Conduct of the prosecutor that does not render the criminal trial itself fundamentally unfair may be prosecutorial misconduct only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. The burden of proof is on the defendant to show the existence of such misconduct. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427-432; *People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

When the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) The decision of whether such misconduct warrants granting a mistrial is within the sound

discretion of the trial court. (*People v. Price* (1991) 1 Cal.4th 324, 430.)

## **B. Analysis**

### **1. Guilt Phase**

As to the guilt phase, appellant bases his claim of prosecutorial error on disparaging comments about trial counsel and the evidence. The following incidents are cited by appellant:

While questioning Deputy Stan Gordon, the following occurred:

Q (BY MR. WHITNEY) Even when you testified in the prior trial, that had not been raised as an issue in that case?

A No, it was not.

Q In other words, that defense attorney didn't try to blame the cops for this?

A No, he did not.

Q So the issue didn't come up?

MR. KATZ: Excuse me, counsel has tried to disparage the defense a number of times. I would like an order that he knock it off.

MR. WHITNEY: It takes a big man to admit he's wrong.

THE COURT: All right. All right. Counsel, if your objection is to that comment or question, I will sustain the objection.

MR. KATZ: Yes, and I'd like the jury to be ordered to disregard his attempting to disparage the defense.

THE COURT: The jury is not to draw any inferences from the question or the comments of Mr. Whitney.

MR. WHITNEY: May I proceed, your honor?

THE COURT: You may.

Q (BY MR. WHITNEY) The issue in the previous trial never came up as to whether or not this guy shot in response to you guys arriving?

A No, it was never an issue.

(RT 1289-1290.)

Other than this incident itself, neither trial counsel at trial, nor appellant on appeal, cite to the “other instances of disparagement of trial counsel by the prosecution. In the citation above, the prosecution was attempting to show that in Delgado-Soria’s trial no mention had ever been made of officers arriving with their sirens blaring and thus causing appellant to open fire. While trial counsel took offense to the first question by the prosecution, the trial court quickly defused the matter by instructing the jury not to draw any inferences from the prosecution’s questions.

When the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Ayala, supra*, 23 Cal.4th at pp. 283-284.) Here, the jury was quickly instructed not to draw any inferences from the statement. The jury was also then apprized that what the prosecution sought to show was that the issue in the previous trial never came up as to appellant firing in response to officers arriving. Trial counsel attempted to show to this jury that this could have been avoided had the police not arrived. Where the trial court sustains the defense objections and admonishes the jury to disregard the improper comments, it is assumed the jury will follow the admonishment and any prejudice is avoided. (*People v. Jones* (1997) 17 Cal.4th 119, 168.) While the off-the-cuff comment of being “a big man” is certainly not the kind of statement one wishes to hear from a prosecutor, there was no prejudice or cause for reversal.

During the same examination of the witness, the following occurred:

Q When you compare what you told Bradford, and for that matter what you told the jury in the Soria trial, to that which you hear on the belt recording, which do you think is the more accurate recitation of what happened that day?

A The belt recording.

Q Why do you feel that way?

A It was a actual tape recording of the events as they unfolded.

Q So, when you arrived at that scene, you had the presence of mind to turn on your belt recorder?

A Yes.

Q And I'd like to play that for the witness right now, your honor, and ask him some questions about it.

THE COURT: Okay.

MR. WHITNEY: And does the jury have its transcripts? For the record, I think we're playing what Exhibit, Pat?

SERGEANT CAVENAUGH: 87.

MR. WHITNEY: And the transcripts I think are Exhibit 80.

MR. KATZ: Your honor, I don't know if there's something that this witness needs his memory refreshed by listening to the recorder. Perhaps Mr. Whitney could ask him the questions first, and if he doesn't remember, then he might have to refresh his recollection.

MR. WHITNEY: Clever objection, but it's not the point. He has to authenticate the voices on the tape, and he has to hear them before he can do that.

THE COURT: Overruled.

MR. WHITNEY: Go ahead.

(RT 1357-1358.)

The claim of prosecutorial error is waived by the failure to make a timely and specific objection on that ground. To preserve for appeal a claim of prosecutorial error, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct. (*People v. Earp* (1999) 20 Cal.4th 826, 858.) Here, the failure to request any admonition waives this issue.

Further, the prosecution's statement that a "clever objection" had been made was not prejudicial. In addressing a claim of misconduct that is based on the denigration of counsel, the reviewing court views the prosecution's comments in relation to the remarks of defense counsel, and inquires if the former constitutes a fair response to the latter. (*People v. Frye* (1998) 18 Cal.4th 894, 978.) In this context, trial counsel himself had made a speaking objection in front of the jury. The prosecution responded that there had to be authenticity of the voices on the tape recording. Nothing more was said on this point and the statement appellant objects to cannot be considered misconduct.

Later, during a break and at sidebar, the following occurred:

(The following proceedings were held in open court out of the presence of the jury.)

THE BAILIFF: Remain seated and come to order. Court is now in session.

MR. KATZ: Yes. I'd like to go on the record out of the presence of the jury, if I might? Thank you. Mr. Whitney perhaps misspoke when he was speaking to Deputy Kane, and I didn't want to interrupt at that point. He indicated something about when he saw the murders. Now, that's a fact for the jury to determine as to what level of culpability the killings were.

MR. WHITNEY: That's fair. I agree.

MR. KATZ: The second thing I'd like to talk about is, and I didn't, in the beginning, think Mr. Whitney would keep up with it, but the next

time he disparages the defense in the manner that he has been, I will be asking for a finding of prosecutorial misconduct and mistrial, and I just wanted to make it clear. I have not turned this into some kind of personal accusations against Mr. Whitney personally, and I really think that his statements and, you know, one off the cuff or offhanded statement so be it, but it has become a repetition now, and I just wanted to make it clear that I will intend to ask for a mistrial if it continues. Thank you.

MR. WHITNEY: Well, in the words of a famous bumper sticker, mistrials happen. The bottom line is, I don't know what he means by disparaging defense. If I ask an officer a question, he's certainly entitled to object to it, and I certainly intend to do my job professionally. If there's something that comes up, we can deal with it, but I don't know exactly what he's talking about.

THE COURT: Well –

MR. WHITNEY: Because of the issues raised, he has told this jury, and the nature of his cross-examination is such that he continually tries to disparage the police officers in this case, tries to make it turn it around as though it was their fault that these children died. Since he is making that argument in his opening statement, and in his cross-examination of witnesses, and intends to make it in his closing statement, it's only fair that we give these officers an opportunity to respond to that allegation. He's raised the issue, let them give their statements about whether –

THE COURT: Well, I don't know that Mr. Katz has taken the position that it's the officer's fault that these children were killed. I'm not going to speak for Mr. Katz. He can make whatever arguments he feels is appropriate to the jury based on the evidence. I'm assuming that he is objecting to any comments that you may have made, either in your questions or passing, that somehow it belittles, or I guess him personally, from making such an argument. I would agree that would not be a appropriate.

MR. WHITNEY: And that's not my intent.

THE COURT: So –

MR. WHITNEY: What else could he be doing by his statement to the jury, and in his cross-examination, his intent to call a so-called expert on

behalf of the defense, but for to say that it was the officer's fault. I guess I'm missing something. Maybe I'm just dense.

THE COURT: I'm not, I'm not privy to Mr. Katz' theory, and I'm not going to try to –

MR. WHITNEY: I guess until I hear something different from Mr. Katz, I have to assume that he intends to make that kind of an argument. And certainly while I mean no disrespect to my friend and colleague Mr. Katz, I think it's only fair to let these officers respond to that kind of allegation. It's only fair to let them have their day, too.

THE COURT: I have no problem with you asking them if they believe they were acting within the policy of the Department.

MR. WHITNEY: Okay.

THE COURT: Or if they would have done it differently. I mean, that's fine, and I've ruled that it's irrelevant to get into their personal feelings and the impact that this has had upon them, their mental processes and so forth, and the emotions that that brings out. I think that's not appropriate at this phase of the trial, if any phase of the trial for that matter. And another thing that I'm a little concerned with, too, is the objection has not been raised recently, but it was initially. Mr. Whitney, your leading manner in questioning the witness I think is getting to the point where it needs to be curtailed tremendously.

MR. WHITNEY: That's fair. I understand.

THE COURT: You're using these witnesses as sounding boards for your arguments.

MR. WHITNEY: As an old defense attorney, it's hard to break habits, but I understand, and I'll do the best I can. I would ask the Court to think about this problem. You said that at this point, although the phrase you used was at this phase, it's inappropriate for these officers to give testimony regarding their feelings. The reason I think it's relevant, and I just ask your guidance, is that he, Mr. Katz, has been attacking on cross-examination their testimony in the sense that they gave previous inconsistent statements at the time of the original interview through Bradford and later on. Do you not think it's relevant to the issue of credibility that when they gave their statements they were still

emotionally upset?

THE COURT: And I think I ruled the last time that objection was made.

MR. WHITNEY: Okay.

THE COURT: That for the purpose of showing their mental state at the time that they were interviewed that it's relevant.

MR. WHITNEY: Okay. I just wanted to make sure.

THE COURT: I think it was with Deputy Rossi, his breakdown on the stand. I understand that. I'm not critical of that, but I just don't know that there's a place for that in this trial.

MR. WHITNEY: Okay. That's fine, your honor.

THE COURT: All right. Anything further?

MR. WHITNEY: If it turns out that that arises again as an issue, I will address the Court first before I ask any such questions. I will bring it to the Court at the bench.

THE COURT: All right. Anything else we need to discuss out of the jury's presence?

MR. KATZ: No, your honor.

THE COURT: Let's bring them in.

(RT 1375-1379.)

It is unclear what is being shown in the cited portion of the transcript by appellant. The discussion, outside of the presence of the jury, commenced with trial counsel stating he was threatening to seek a mistrial due to his perception of prosecutorial misconduct. Trial counsel never made such a motion, nor did he request any admonition when the jury returned. Trial counsel's threat of seeking a mistrial shows more of a sensitivity on behalf of trial counsel that

every time the prosecution said something he did not agree with, it was viewed as an attack on trial counsel. The first cited example above is evidence of this. In that example, trial counsel objected because the prosecution was attempting to point out that in Delgado-Soria's trial, there had been no allegations that appellant had fired the gun because officers arrived on the scene. Indeed, as the witness stated, it was not an issue. Trial counsel took this to mean that the prosecution was, in effect, saying that he had made up the defense. This was not the point. The point of the matter was that appellant had no cause to shoot except that he wanted to kill Sandra.

Thus, in this discussion with the trial court, there is no revelation as to what exactly trial counsel was taking offense at. The discussion had by the prosecution and the trial court presumed, without accepting, that trial counsel was objecting to comments made in questions or in passing which trial counsel believed belittled him. This is not to say that the trial court believed such had happened, but that this was trial counsel's perspective. The remainder of the conversation concerned leading questions, not prosecutorial error. Indeed, this conversation ended amicably and the trial continued. There is nothing to respond to in this citation by appellant.

Later in the trial, the prosecution cross examined defense psychiatrist Jose Moral. Appellant claims prosecutorial error because the prosecution brought out information of appellant's prior criminal record without first seeking the trial court's permission. The prosecution, in examining the witness who had discussed appellant's anger issues and had stated that appellant did not believe he had an anger issue prior to the battery against Sandra (RT 1766), then asked Moral if he knew appellant had been arrested in 1986 for battery and in 1993 for discharging a firearm. (RT 1770.) This drew an objection and a sidebar discussion.

After discussing the matter, in which the prosecution believed it was in

compliance with the trial court's rulings on the issue (RT 1771-1775), the trial court stated that it would sustain the objection and instruct the jury to disregard the last questions and statements. (RT 1775-1776.) In the hopes of averting any further objections, the prosecution asked for guidance from the court as to whether a certain question could be asked. The trial court laid out its decision. Upon having the jury return, the trial court immediately instructed the jury to disregard the questions and statements of prior arrests. (RT 1776-1777.)

Appellant's objection was not based on prosecutorial error and there was no request for an admonition on that ground. This issue should therefore be deemed waived. (*People v. Earp, supra*, 20 Cal.4th at p. 858.)

Further, there is no basis for reversal. The trial court immediately admonished the jury to disregard the questions and answers. Thereafter, the jury was released for the day and Moral was not recalled as a witness until August 25, 1997. (RT 1777-1778.) Where the trial court sustains the defense objections and admonishes the jury to disregard the improper comments, it is assumed the jury will follow the admonishment and any prejudice is avoided. (*People v. Jones, supra*, 17 Cal.4th at p. 168.)

Appellant next moves to the closing argument of the prosecution. The prosecution argued to the jury concerning voluntary manslaughter. (RT 2218-2219.) The prosecution stated:

So, in this case, back to the manslaughter stuff. We certainly have some evidence from the various -- even the unlimited material, that at least from the defendant's point of view, there was an argument going on. Okay. Now, think about this. If we said in our system of justice that anytime you kill somebody in the course of an argument that makes it a manslaughter, can you imagine the consequences of that kind of theory? I mean, that would just be astonishing, wouldn't it? We don't have that as our law. That's not your law. The law is that it's not merely an argument. It has to be a provocation of a sufficient character and degree to affect a reasonable person in the same circumstances. A reasonable person. And let's look at the jury instruction on that. Look at some instructions, 842, for example, is a good one to look at. And you will

find throughout that instruction the notion of an ordinarily reasonable person is what we're talking about. And who is the ordinarily reasonable person? You folks are.

MR. KATZ: Your honor, I'm sorry. Forgive the interruption. But that is an incorrect statement of the law. The jury is not to put themselves in as a reasonable person. That's simply incorrect, and I'd like the jury to be admonished.

MR. WHITNEY: That's not correct. They're the conscience of the community.

THE COURT: The Court's instructions are what you are to follow in this case, not what counsel argues.

(RT 2220-2221.)

Although counsel have “broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law [citations].” (*People v. Bell* (1989) 49 Cal.3d 502, 538.) “[W]e presume the jury treated the court’s instructions as statements of law, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.” (*People v. Seaton* (2001) 26 Cal.4th 598, 646, quoting from *People v. Sanchez* (1995) 12 Cal.4th 1, 70.) Arguments of counsel “generally carry less weight with a jury than do instructions from the court, . . . are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates,” whereas the instructions from the court “are viewed as definitive and binding statements of the law.” (*Boyd v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

Here, even assuming that the prosecution made an improper argument as to what the law was, there was no prejudice. The jury knew this was argument. The trial court instructed the jury to follow the law as it was to be given by the court. There is nothing in the record to even remotely indicate the jury disregarded the trial court’s instruction and found appellant guilty based on

the above passage.

Appellant next complains that the prosecution interjected his own feelings while in closing argument. This is based on the following:

He knew exactly what he was going to do. He put those children in the front seat. He made them get in the front seat. He made the car turn around so he would have access to shooting them, and he did. He did. He showed deliberation and premeditation all the way through this thing.

Who can forget the very chilling testimony of little Sergio when he talks about how his father was holding the gun to people's head and saying he was gonna kill mom if he didn't -- if Sandra didn't stop crying. How outrageous is that? Is that the act of a reasonable person? Shut up, stop crying, or I'm gonna kill your mom. I don't know about you, I'm an old war horse. I've been through a lot of these. That choked me up when I saw that testimony.

MR. KATZ: May we approach?

THE COURT: All right.

(The following proceedings were held at the bench between the Court and counsel:)

MR. KATZ: I'm going to ask for a mistrial at this time. Mr. Whitney has injected his own personal opinion. He's constantly going beyond the bounds into prosecutorial misconduct. I object to his last statement, what chokes him up or what doesn't choke him up. He's, he's injecting his own opinion. I'd ask for the Court to, to find prosecutorial misconduct, and I'm asking for a mistrial. It's not just based on that one statement, starting from the very beginning of the statement there was argument talking about sadistic terrorism, asking the jury to interpose their own moral standard on a subjective basis when Mr. Whitney knows full well, and the Court instructed them, it is -- a reasonable person standard is an objective test, not a subjective one. They don't interpose their own moral standards, and Mr. Whitney is constantly going beyond the boundaries of the law in his closing argument, and I'm asking for a mistrial at this time.

THE COURT: All right. Well, I'm going to deny the motion. I will caution Mr. Whitney. I do agree this last comment was probably not

appropriate, your personal feelings about, about this. This is probably inappropriate, but I don't think it rises to the level of a mistrial. The other problem you mentioned with the standard, the Court admonished the jury, and has instructed them, and I think that problem is corrected. In any event, I will deny the motion but with that admonition to Mr. Whitney.

MR. WHITNEY: Thank you.

(The following proceedings were held in open court in the presence of the jury.)

MR. WHITNEY: If you'll look -- I'm sorry, may I proceed, your honor?

THE COURT: You may.

(RT 2229-2231.)

Appellant did not request an admonition and the issue should be considered waived. (*People v. Earp, supra*, 20 Cal.4th at p. 858.)

Further, reversal is unwarranted. While it was improper to interject personal feelings into closing argument, the trial court found that the statement did not warrant a mistrial. The decision of whether such misconduct warrants granting a mistrial is within the sound discretion of the trial court. (*People v. Price, supra*, 1 Cal.4th at p. 430.)<sup>13/</sup> The trial court's decision should be upheld, particularly where the prosecution did not return to that point in the remainder of closing argument and the jury was instructed that statements by the attorneys was argument. (CT 731, 734.)

Appellant next claims the prosecution again committed misconduct by asking the jury to place themselves into the shoes of the victims, based on the following:

---

13. The trial court's statements also found that there was no prejudice as to the argument regarding the standard to be utilized since the court had instructed the jury that it would be instructing them on the law.

Who can forget that testimony? That's chilling. I mean, that is amazing testimony, to what? What does that tell you? Premeditation. He's saying this is what's going to happen. He's already made his plans. She talks elsewhere in the transcript about, well, I asked him, do you want me to go back with you, you know. What's going on? You know, do you want us to get back together? No. He says, "It's too late for that." Here's a man, in Dr. Moral's words, who crossed the line between love and hate. Remember? I don't disagree with some of what Dr. Moral says. I disagree with a lot of other things he says. The bottom line, it's your decision, not either one of ours. But he certainly did make a good point, the fine line between love and hate can be crossed over.

And in this case, don't we have that? Don't we have a situation where this defendant was so angry, and so upset about losing his family that he crossed the line into hate? And he'd already made one attempt and a number of calls in trying to get back together, and it didn't work out. So he'd already decided that this was going to be a murder/suicide mission. He brought enough ammunition to kill everybody in that place, and he was gonna do it. And here's 65A which tells you, "Goodbye everybody. Mexican Power Kills. Whatever I'm going to do, don't blame Soria." That's premeditation, folks.

And that's on page, for the record, 2045 if you want to look at 2045 when he says it was too late to go back together and try to get things together. It was too late and so on.

Do you remember the thing he said to little Sandra just before he executed her with a gun at her head? Can you imagine the terror that this child is going through, and that all the people are going through? Certainly the children. Can you imagine that terror? It's not in the courtroom. We're not here doing some scientific experiment. Imagine yourselves at that scene. And what does he do?

MR. KATZ: Your honor I'd like to approach.

(The following proceedings were held at the bench between the Court and counsel:)

MR. KATZ: This argument is clearly inciting the passions of the jury. Mr. Whitney is asking them to place themselves at the scene, to imagine the terror the victims were going through. That has nothing to do with the elements of murder in this case. This is the second time Mr.

Whitney has mentioned the terror of the victims. Not only has it nothing to do and it's irrelevant, it's so highly prejudicial. It is prosecutorial –

THE COURT: I guess it's appropriate for the penalty phase if we have a penalty phase.

MR. WHITNEY: Except it affects the way he's thinking. It's an element as to how the defendant is thinking at the time and still chooses to kill.

MR. KATZ: Asking the jury to put themselves in the place of the victim is simply asking them to let passion control their verdict. It is prosecutorial misconduct. I'm asking for a finding of it. I'm asking for a mistrial.

MR. WHITNEY: I respectfully disagree with that.

THE COURT: Well, I will again deny that request, but let's move off that subject and move on with your argument.

MR. WHITNEY: That's fine.

THE COURT: As I say, that would be more appropriate in a different phase of the trial.

MR. WHITNEY: Okay.

(RT 2232-2234.)

Again, there was no request for an admonition. (*People v. Earp, supra*, 20 Cal.4th at p. 858.) Further, in the guilt phase of a trial, it is misconduct to appeal to the jury to view the crime through the eyes of the victim. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, vacated and remanded on different grounds, *Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed. 2d 293]; *People v. Arias* (1996) 13 Cal.4th 92, 160.) Asking the jury to imagine the victim's terror would be akin to the above mentioned rule. However, this momentary appeal to victim sympathy had little effect on the verdict. The evidence was clear that appellant had shot Sandra after blaming

her for the dissolution of the family. The evidence also showed that appellant went to the vehicle and shot the other children. This was not a close case and the prosecution's remark had little impact on the result. Additionally, the trial court's decision to deny the request for a mistrial is entitled to deference.

In sum, there is no basis for reversal in the guilt phase based on prosecutorial error.

## 2. Penalty Phase

Appellant also claims prosecutorial error in the penalty phase.

During closing argument, the prosecution stated:

And as part of Factor (a), you may consider the victim impact evidence that we've put on. A little bit about the glimpse of the life into each of the dead victims that you never got a chance to see. You may consider that short glimpse we gave you of their lives and the loss to, not only the community, but to their families that has been suffered.

When a child is murdered, we all suffer. We have all been made victims, haven't we? You are victims in the sense that you have to make a decision as to whether or not somebody lives or dies. Certainly the victim's family members in this case are victims. There are some who actually were literally living victims, like Antonio and Julio who were shot at.

MR. KATZ: Your honor, I'm sorry, we're going to have to approach.

(The following proceedings were held at the bench.)

MR. KATZ: I'm sorry to interrupt Mr. Whitney's argument, but he's asking the jurors to consider themselves victims of Martin Mendoza, and that is clearly inappropriate. It's clearly prosecutorial misconduct, and as to that phrase, I would ask the Judge to decide that that is prosecutorial misconduct, and I would ask for the curative instruction that I submitted to the Court regarding that phrase inviting them to consider themselves victims of Martin Mendoza because they've had to be here to decide this case.

MR. WHITNEY: There is no law that says that. That is simply inaccurate. There is nothing saying that.

THE COURT: I'm not sure I agree. I don't think, I don't think that's a legitimate argument that the jurors are victims.

MR. WHITNEY: I can withdraw that.

THE COURT: I will admonish the jury to disregard that.

MR. KATZ: I would ask the Judge to read the, the instruction that I have previously given the Court regarding prosecutorial misconduct in an attempt to cure that.

MR. WHITNEY: No, that's going too far.

THE COURT: The Court will make it's own admonition.

(The following proceedings were held in open court.)

THE COURT: All right. Ladies and gentlemen, the Court advises you that it was not proper for the district attorney to refer to you as victims in this case, and you are to disregard that statement. It's not to enter into your consideration in any way.

MR. WHITNEY: Certainly we have the living victims who were shot at. We have the family members of the victims who were murdered and who were shot at, and we have all of that pain which was caused in the loss which was caused to those family members. You may consider all of that. And we're sorry that even the defendant's family has to go through all of this, but who caused this? It was the defendant that caused it. Nobody else.

(RT 2544-2547.)

As the trial court informed the jury, it was improper to have the prosecution to refer to the jurors as victims. The trial court immediately admonished the jury to disregard the statement and chastised the prosecution in front of the jury. If anyone suffered embarrassment, it was the prosecution. Where the trial court sustains the defense objections and admonishes the jury to disregard the improper comments, it is assumed the jury will follow the admonishment and any prejudice is avoided. (*People v. Jones, supra*, 17

Cal.4th at p. 168.) There is nothing to show that the jury disregarded the trial court's admonition.

### **Conclusion**

Based on the above, the instances cited by appellant do not compel reversal. In most instances, the trial court admonished the jury to disregard the statements. The jury was also instructed that statements by counsel were not law and the jury was to decide the case on the evidence and the law as given by the trial court. It must be presumed, absent evidence to the contrary, that the jurors faithfully followed this instruction. (*Weeks v. Angelone, supra*, 528 U.S. at p. 234; *People v. Green, supra*, 27 Cal.3d at p. 29.) The judgment should therefore be affirmed.

### **III.**

#### **NO REVERSAL IS WARRANTED BASED ON A VIOLATION OF THE VIENNA CONVENTION**

Appellant claims his conviction was obtained in violation of the Vienna Convention, in particular the failure to notify Mexican officials of his detention and the right to assistance. (AOB 69-84.) This claim must be rejected because there were insufficient circumstances to have officers even believe appellant was not a U.S. citizen. Further, appellant makes no showing of prejudice.

#### **A. Facts**

Officer Gary Rossi of the San Bernardino County Sheriff's Department testified that he had gone to the house in Landers three weeks prior to the murder due to a call about a possible kidnaping by appellant of the children. At that time, he determined no crime had occurred. He spoke to Rocio through a Spanish interpreter and informed her that she could obtain a restraining order against appellant while he was in custody in Nevada. (RT 1316-1317.) At that time, Rocio told Officer Rossi that appellant was in custody for abuse and that

she was afraid he might take the children and might flee to Mexico. (RT 1317-1318, 1325.)

Appellant points out that the officers, even at the time of trial, did not know whether appellant spoke English at all; that Delgado-Soria's interview with officers was conducted in Spanish; and that Delgado-Soria told an officer appellant had told him he was going to see his mother in Mexico. (AOB 76; RT 12731 CT 382-467, 391.)<sup>14/</sup>

## B. Analysis

Appellant claims that given the fact people only spoke Spanish, appellant's mother lived in Mexico, and Rocio believed appellant would take the children to Mexico, officers should have known appellant was not a U.S. citizen and should have informed him at the time of his detention of the right to contact Mexican officials. (AOB 76.) This claim should be rejected.

In 2003, Mexico instituted proceedings before the International Court of Justice (ICJ), alleging that the United States violated its legal obligations to Mexico under the Vienna Convention in the cases of 54 Mexican nationals who were sentenced to death in the United States without timely notification to the Mexican Consulate. (Case Concerning Avena and other Mexican Nationals (*Mexico v. United States*), 2004 I.C.J. No. 128 at ¶ 12, p. 10 ("Avena").) Mexico argued, among other things, that the United States was required to restore the status quo ante in the 54 cases, and provide a meaningful remedy at law for violations of the treaty, including the barring of any procedural defect for failure to raise a timely claim. (*Mexico v. United States, supra*, ICJ No. 128 at ¶ 12, p. 11.)

The ICJ found that the United States violated its treaty obligations by

---

14. At the time of the motion to modify the judgment, appellant asserted there was a violation of the Vienna Convention. (CT 1116-1129.)

failing to notify a number of the Mexican nationals of their rights under Article 36, paragraph 1(b) of the Vienna Convention, and prevented Mexico from rendering assistance to, communicating with, and arranging assistance for those individuals. (*Id.* at ¶ 153, pp. 59-60.) As for a remedy, the ICJ rejected Mexico's claim that the United States was required to return the Mexican nationals to the status quo ante by overturning their convictions. (*Id.* at ¶¶ 117-125, pp. 47-49.) Instead, the ICJ ruled that the United States was obligated to permit review and reconsideration of the nationals' cases with a view to ascertaining whether the violation of the Vienna Convention caused actual prejudice. (*Id.* at ¶ 121, p. 48.)

On February 28, 2005, after the ICJ ruling in *Avena*, President George W. Bush issued a Memorandum to the United States Attorney General, stating that the United States would discharge its obligations under that decision "by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."<sup>15/</sup>

As a general matter, issues adjudicated in a separate proceeding will not be given preclusive effect unless:

- (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 judgement 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.

(*People v. Barragan* (2004) 32 Cal.4th 236, 253.)

---

15. Prior to President Bush's Memorandum, the United States Supreme Court had granted certiorari in a case brought by another of the Mexican nationals included in the *Avena* decision, Jose Ernesto Medellin, who was on death row in Texas. After President Bush's order, the High Court dismissed certiorari as improvidently granted so as to enable the Texas state courts to rule on Medellin's state petition. (*Medellin v. Dretke* (2005) 544 U.S. \_\_\_ [\_\_\_ S.Ct. \_\_\_, \_\_\_ L.Ed.2d \_\_\_ 2005 WL 1200824].)

The determinations in *Avena* are not entitled to preclusive effect because the issues in the instant direct appeal are neither the same as those raised in *Avena*, nor was the State of California in privity with the United States for purposes of that litigation.

The issues in the instant case stand in a substantially different procedural posture from those in *Avena*, which involved a dispute between separate sovereign nations, in which, for whatever reasons, the United States chose to “accept[]” its burden of proof to demonstrate United States nationality, among other things. (*Avena* at ¶ 56, p. 31.) Because of these differences in procedure, the claims cannot be said to be identical.

Second, the United States and California were not in privity in the *Avena* matter. The State of California never made an appearance in that matter, nor does appellant allege that the state was ever afforded an opportunity to become a party. The People of the State cannot be collaterally estopped based on the actions of the United States as a separate sovereign. (See, e.g., *People v. Meredith* (1993) 11 Cal.App.4th 1548, 1557-1559 [state not collaterally estopped from relitigating suppression of evidence, when suppression issues were determined against United States Attorney in federal court]; *Stephens v. Attorney General of California* (9th Cir. 1994) 23 F.3d 248, 249 [state not in privity with federal prosecutors].) Consequently, appellant must show a violation of the Vienna Convention before this Court, and he may not simply rely on the findings in *Avena*.

President Bush’s Memorandum does not mandate a different conclusion.<sup>16/</sup> President Bush did not order state courts to execute the *Avena*

---

16. Respondent recognizes the United States Solicitor General has argued that in accordance with principles of comity, a state court would not be free to redetermine the facts or application of the Vienna Convention. (See *Medellin v. Dretke* (February 28, 2005) 2005 WL 504490 at \*46, Brief of United States as Amicus Curiae Supporting Respondent.) For the reasons

decision; instead, the President directed state courts to give effect to the ICJ decision in *Avena* “in accordance with general principles of comity.”<sup>17/</sup> These principles of comity are consistent with the legal principles discussed above.

The Supreme Court has defined “comity” as follows:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

(*Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa* (1987) 482 U.S. 522, 543, fn. 27 [107 S.Ct. 2542, 96 L.Ed.2d 461], quoting *Hilton v. Guyot* (1895) 159 U.S. 113, 163-164 [16 S.Ct. 139, 40 L.Ed. 95].)

General principles of comity do not require this Court to ignore the lack of privity between the United States and the State of California, or the procedural differences between the claim of nations brought before the ICJ and the present direct appeal. Notably, principles of comity also apply in the context of recognizing decisions rendered by other state or federal courts (see generally *Darr v. Burford* (1950) 339 U.S. 200, 204 [70 S.Ct. 587, 94 L.Ed. 761]); yet, as discussed above, notwithstanding such comity concerns, courts do not give preclusive effect to decisions rendered against the federal government when the State was not a party. (See, e.g., *People v. Meredith*, *supra*, 11 Cal.App.4th at pp. 1557-1559; *Stephens v. Attorney General of California*, *supra*, 23 F.3d at p. 249.)

---

discussed below, this Court may be entitled to reconsider the ICJ findings.

17. Based on the nature of the President’s Memorandum, respondent need not address the significant issues relating to the President’s ability to direct a state court to take action in a specific litigation.

In describing the requisites for affording comity to an international decision, the United States Supreme Court has specifically recognized the requirement of privity before a foreign judgment will bar relitigation in a court in the United States:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

*(Hilton v. Guyot, supra, 159 U.S. at 201-202, italics added.)*

At least one court has found that principles of international comity do not require giving an issue preclusive effect in a litigation brought in this country where there was insufficient privity between the parties in the foreign litigation. (*Black Clawson Co., Inc. v. Kroenert Corp.* (8th Cir. 2001) 245 F.3d 759, 763-765 [American licensee was not in privity with German licensor].) Likewise, the Restatement (Third) of Foreign Relations Law of the United States (1986) § 482, page 604, recognizes that jurisdiction over the defendant is an essential requisite to recognition of a foreign judgment.

The rules of the ICJ itself provide that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” (Statute of International Court of Justice, Article 59; see Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (*Cameroon v. Nigeria*), 1998 I.C.J. No. 94, 275, at p. 292.) Principles of comity do not require that this Court give the judgment of the ICJ greater effect than

the ICJ would give its own judgment.

Further, appellant did not inform any officer he was not a United States citizen. In fact, the probation report lists appellant as a U.S. citizen.<sup>18/</sup> Irrespective of whether appellant actually is a United States citizen, the duties of local officials to inform an arrestee of his rights under the Vienna Convention depend upon whether they have reason to believe a person is a foreign national. (See *Avena*, at ¶ 63, p. 33.)

Here, appellant presents certain facts and combines them to assert officers should have figured out that because everyone spoke Spanish, and the officers did not know if appellant spoke English, they should have assumed he was a Mexican national. It is not unusual in California that there are numerous persons of Hispanic descent. Nor is it unusual that persons do not speak English well. But this, in and of itself, is not a basis to substantiate the claim made here, otherwise, any person who does not have command of the English language would have to be informed of rights which may not even be applicable to them.

Appellant also claims that the *Avena* decision contemplates that an evidentiary hearing will be held in order to establish the facts and harm with respect to the Vienna Convention. (AOB 83-84.) President Bush's Memorandum does not even mention an evidentiary hearing; instead, the Memorandum states that State courts must give effect to the decision of the ICJ "in accordance with general principles of comity." Nothing requires an evidentiary hearing, let alone a hearing even when a petitioner has failed to make an adequate showing. Similarly, the *Avena* decision concluded that the United States has an obligation to permit review and reconsideration with a view toward ascertaining whether the violation caused actual prejudice. (*Avena*, at ¶¶ 121, 122, 138, pp. 48, 53.) Once again, there was no mention of

---

18. The probation report was sent under separate cover.

requiring an evidentiary hearing.

Appellant does not, and cannot, make a showing of prejudice. Petitioner was represented by competent trial counsel. There is no showing that contacting the Mexican Consulate would have resulted in a more favorable outcome either in the guilt or penalty phase. Indeed, a representative of the Mexican Consulate appeared at the hearing for motion to modify the verdict. Although noting the Vienna Convention, the representative made no attempt to argue what would have been done had contact been made with the Mexican Consulate. The representative only noted that appellant had close ties with his parents who were present at trial, and that the death penalty was not applied in Mexico because its effects were irreparable. (RT 2597-2598.) Having been given a chance to explain where the prejudice would have occurred, the representative did not do so. There must be a showing of prejudice. There is not. The *Avena* decision does not state that a violation of the Vienna Convention is sufficient in and of itself or that a petitioner need not demonstrate prejudice. Rather, the ICJ specifically rejected Mexico's assertions that no such prejudice need be shown. Instead, *Avena* requires an examination of whether the treaty violations "caused *actual prejudice* to the defendant in the process of administration of criminal justice." (*Avena*, at ¶ 121, p. 48, italics added.)

The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration.

(*Avena*, at ¶ 122, p. 48.)

Here, appellant has not demonstrated prejudice. This claim should be rejected.

#### IV.

### LACK OF INTERCASE PROPORTIONALITY DOES NOT VIOLATE THE CONSTITUTION

Appellant claims the failure to provide intercase proportionality violated his Eighth and Fourteenth Amendment rights. (AOB 85-88.) This claim has repeatedly been rejected by this Court in other death penalty cases and should be rejected in this one as well.

There are a number of issues long settled by this Court which are presented by appellants to preserve them for federal habeas. This Court has begun to group these challenges and dismiss them in a single sentence or paragraph. Included in these types of cases is intercase proportionality review. (See *People v. Michaels* (2002) 28 Cal.4th 486, 541-542; *People v. Snow* (2003) 30 Cal.4th 43, 125-127; *People v. Maury* (2003) 30 Cal.4th 342, 439-441; *People v. Crew* (2003) 31 Cal.4th 822, 860; *People v. Morrison* (2004) 34 Cal.4th 698, 729-730; *People v. Stitely* (2005) 35 Cal.4th 514, 573-574.) Given the repeated rejection of this claim, this Court should again reject the claim.

Proportionality review, such as the Georgia scheme approved in *Gregg v. Georgia* (1976) 428 U.S. 153 [96 S.Ct. 2909, 49 L.Ed.2d 859] is not constitutionally required. (See *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 432; *People v. Frierson* (1979) 25 Cal.3d 142, 181.) This Court made clear that long-standing proportionality principles embodied in California “cruel and unusual punishment” cases allowed appellate review of any alleged disproportionality between the offense and the punishment. This kind of proportionality is, of course, quite different than the “comparative” type which was being urged. (See *People v. Frierson* (1979) 25 Cal.3d 142, 181; *People v. Jackson* (1980) 28 Cal.3d 264, 317.) This Court does examine a case to determine if penalty is disproportionate to individual culpability. (*People v. Wright* (1990) 52 Cal.3d 367, 449; *People v. Edwards* (1991) 54 Cal.3d 787,

849; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 151-152, vacated and remanded *Bacigalupo v. California* (1992) 506 U.S. 802; *People v. Mincey* (1992) 2 Cal.4th 408, 476.) This is authorized by the California Constitution, article I, section 27. (*People v. Bean* (1988) 46 Cal.3d 919, 957.)

The United States Supreme Court has held that the United States Constitution does not require “comparative” (“cross-case”) proportionality review, when the other aspects of a state’s capital justice system adequately insure the even-handedness. The Court specifically held that the 1977 California statute passed constitutional muster without comparative proportionality review. In dicta, the court examined the 1978 law and reached the same conclusion. (*Pulley v. Harris* (1984) 465 U.S. 37 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Bell* (1989) 49 Cal.3d 502, 553.)

Given the above, this claim should be rejected. Appellant’s argument that the time has come for *Pulley* to be reevaluated (AOB 87) should be rejected.

## V.

### THE DEATH PENALTY STATUTE AND INSTRUCTIONS ARE CONSTITUTIONAL

Appellant claims the death penalty statute and instructions are unconstitutional because they fail to set out the burden of proof. Appellant asserts jurors are not required to make written findings; need not achieve unanimity as to aggravating circumstances; need not find the aggravating factors are proven beyond a reasonable doubt; need not find that the aggravating factors outweigh the mitigating factors; or that the penalty of death is appropriate. (AOB 89-119.) This claim should be rejected in this case as it has been rejected in other cases.

Again, among the issues repeatedly rejected by this Court are failure to require prosecution to prove aggravating circumstances beyond a reasonable

doubt, use of that standard to determine if death is appropriate, failure to require written jury findings, and unanimity of aggravation circumstances. (See *People v. Michaels, supra*, 28 Cal.4th at pp. 541-542; *People v. Snow, supra*, 30 Cal.4th at pp. 125-127; *People v. Maury, supra*, 30 Cal.4th at pp. 439-441; *People v. Crew, supra*, 31 Cal.4th at p. 860; *People v. Morrison, supra*, 34 Cal.4th at pp. 729-730; *People v. Stitely, supra*, 35 Cal.4th at pp. 573-574.)

Appellant's claim of requiring all facts in the penalty phase to be proven beyond a reasonable doubt rests primarily upon *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Blakely v. Washington* (2004) 542 U.S. \_\_\_ [124 S.Ct. 2531, 159 L.Ed.2d 403]. This claim should be rejected here. This Court rejected this claim *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, cert denied *Prieto v. California* (2003) 540 U.S. 1008 [124 S.Ct. 542, 157 L.Ed.2d 416]. There is no basis to revisit this claim.

*Apprendi* held that:

'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum,' whether the statute calls it an element or a sentencing factor, 'must be submitted to a jury, and proved beyond a reasonable doubt.'

(*Harris v. United States* (2002) 536 U.S. 545 [122 S.Ct. 2406, 153 L.Ed.2d 524], citing *Apprendi v. New Jersey, supra*, 530 U.S. at 490.)

*Apprendi* is inapplicable to California's death penalty scheme. Once a California jury convicts a Petitioner of first degree murder with a special circumstance "the Petitioner stands convicted of an offense whose maximum penalty is death." (*People v. Ochoa* (2001) 26 Cal.4th 398, 454, cert. denied, *Ochoa v. California* (2002) 535 U.S. 1040 [122 S.Ct. 1803, 152 L.Ed.2d 660].) The verdict of guilty of first degree murder and the true finding on the special circumstance are each based on unanimous determinations by the jury and on the jury's application of the beyond a reasonable doubt standard of proof.

Thus, the California scheme does not implicate *Apprendi's* holding. *Blakely*, as an extension of *Apprendi*, therefore also fails for the same reasons.

After approving California's scheme, the United States Supreme Court found "[a] Petitioner in California is eligible for the death penalty when the jury finds him guilty of first-degree murder and finds one of the [Cal. Penal Code] § 190.2 special circumstances true." (*Tuilaepa v. California* (1994) 512 U.S. 967, 975 [114 S.Ct. 2630, 129 L.Ed.2d 750].) The Court also recognized that a California jury at the penalty phase, must consider other factors listed in California Penal Code section 190.3 "in deciding whether to impose the death penalty on a particular Petitioner." (*Id.* at p. 975.) *Tuilaepa* expressly recognized the constitutional validity of California's capital instructional scheme and found it permissible for a jury to consider a single list of aggravating and mitigating factors. (*Id.* at p. 979.)

The United States Supreme Court has also rejected the proposition that California's capital punishment selection factors (i.e., aggravating factors) must meet the requirements for eligibility factors. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 977-978 [selection factors need not require answers to factual questions as eligibility factors do].)

Nothing in *Apprendi* requires a jury to find beyond a reasonable doubt the applicability of a specific aggravating factor from those listed in California Penal Code section 190.3. *Apprendi* has no application to California's death penalty scheme because a penalty phase verdict does not produce a sentence any greater than that already authorized by the jury's conviction with a unanimous finding beyond a reasonable doubt of at least one special circumstance. The penalty phase verdict merely represents a choice between two previously authorized sentences – death or life without the possibility of parole – but the sentence range is not, and cannot be, raised at the penalty phase.

*Ring* is inapposite for the same reasons *Apprendi* is inapplicable. *Ring*

invalidated Arizona's death capital sentencing scheme because death could be imposed only after the judge, sitting as sentencer without a jury, found at least one specifically enumerated aggravating factor to be true. Because death was not the maximum penalty that could be imposed based solely on the jury's conviction of first degree murder, the aggravating factors in Arizona "operate as the 'functional equivalent of an element of a greater offense.'" (*Ring v. Arizona, supra*, 122 S.Ct. at p. 2443.)

By contrast, under California's system all necessary facts to support imposition of the death penalty have already been determined by the jury beyond a reasonable doubt during the guilt phase. At the penalty phase, there are no specified factual determinations to make, only a normative, moral evaluation of the offense and the offender based on the considerations listed in California Penal Code section 190.3. California law already requires the jury to be convinced beyond a reasonable doubt of the only "factual" determinations -- those related to the Petitioner's prior criminality -- implicated by the listed penalty-phase factors.

The sentencing function is inherently moral and normative, not factual; the sentencer's power and discretion under [California's death penalty law] is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances. [Citation.] Because of this, instructions associated with the usual fact-finding process -- such as burden of proof -- are not necessary. [Citations.] Except for the other crimes, the court should not [] instruct[] at all on the burden of proving mitigating or aggravating circumstances. [Citations.]

(*People v. Carpenter* (1997) 15 Cal.4th 312, 417-418; cert. denied *Carpenter v. California* (2000) 531 U.S. 838 [121 S.Ct. 99, 148 L.Ed.2d 58].)

Unlike the Arizona capital scheme set forth in *Ring*, California's enumerated aggravating factors are determined by a jury, and do not "operate as the 'functional equivalent of an element of a greater offense.'" This is because none of the factors actually increase the punishment beyond that which

is authorized by the jury's verdict, as the case became death eligible with the special circumstance finding during the guilt phase of the trial. (*Ring v. Arizona, supra*, 112 S. Ct. at 2439-2440, and 2445, Kennedy, J., concurring.)

In sum, the sentencing factors considered by the California capital jury at sentencing do not increase the maximum potential sentence but merely provide a basis for determining which of the authorized sentences should be imposed. Once the defendant has been convicted of first degree murder and at least one special circumstance has been found to be true beyond a reasonable doubt, "death is no more than the prescribed statutory maximum for the offense" and the only alternative is life in prison without the possibility of parole. (*People v. Anderson* (2001) 25 Cal.4th 543, 589-590.) Accordingly, California's capital statute does not come within the ambit of *Apprendi*, *Blakely*, or *Ring*.

As to appellant's claim that the jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors before a death recommendation can be made (AOB 104-109), that issue has also been rejected by this Court. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779, 791; *People v. Pride* (1992) 3 Cal.4th 195, 268-269, cert. denied *Pride v. California* (1993) 507 U.S. 935 [113 S.Ct. 1323, 122 L.Ed.2d 709]; *People v. Hardy* (1992) 2 Cal.4th 86, 214, cert. denied, *Hardy v. California* (1992) 506 U.S. 987 [113 S.Ct. 498, 121 L.Ed.2d 435].) Petitioner presents no compelling reason for this Court to make a contrary decision.

The claim that there is a failure to impose a reasonable doubt standard on the prosecution (AOB 109-112) has been rejected by this Court. (*People v. Hayes* (1990) 52 Cal.3d 577, 643.) There is no basis for making a contrary decision.

Appellant's claim that the jury must unanimously agree upon the aggravating circumstances (AOB 113-118) has been rejected by this Court.

*(People v. Bacigalupo* (1991) 1 Cal.4th 103, 147, vacated and remanded  
*Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5];  
*People v. Medina* (1995) 11 Cal.4th 694, 782.)

Finally, appellant's claim that the jury should be instructed on the presumption of life (AOB 118-119) has been rejected by this Court. (*People v. Arias* (1996) 13 Cal.4th 92, 190.)

In sum, there is no basis for reversing the penalty of death.

## VI.

### **THE JURY INSTRUCTION IN THE PENALTY PHASE REGARDING THE JURY'S SENTENCE DISCRETION IS CONSTITUTIONAL**

Appellant claims that the instructions defining the scope of the jury's sentencing discretion and the nature of its deliberative process violated his constitutional rights. In particular, appellant objects to CALJIC No. 8.88. (AOB 120-132.) This claim should be rejected since the instruction is proper.

The trial court instructed the jury with CALJIC No. 8.88, as follows:

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but maybe considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to

consider. In weighing the various circumstances you 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. To return a judgment of death, each of you 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.

(CT 885-886.)

CALJIC No. 8.88 does not encourage the jury to consider non-statutory aggravating factors. The instruction adequately informs the jury of its role in weighing the circumstances of the case, and the “so substantial” language is not impermissibly vague. (*People v. Gurule* (2002) 28 Cal.4th 557, 661-662; *People v. Crew* (2003) 31 Cal.4th 822, 858.) The requirement that jury find aggravating circumstances “so substantial” in comparison with mitigating circumstances that it “warrants death” is not vague or directionless. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 591; *People v. Medina* (1995) 11 Cal.4th 694, 781; *People v. Davenport* (1995) 11 Cal.4th 1171, 1231; *People v. Arias, supra*, 13 Cal.4th at p. 17.) There is no reason to come to a contrary decision.

Appellant also claims the instructions failed to inform the jury that if the mitigating factors outweigh the aggravating factors they were required to return a verdict of life without the possibility of parole. (AOB 127-131.) The failure to instruct jury that it “shall” impose life without the possibility of parole if mitigating outweighs aggravating does not create a presumption favoring death. (*People v. Duncan* (1991) 53 Cal.3d 955, 978-979; *People v. Wader* (1993) 5 Cal.4th 610, 662; *People v. Medina* (1995) 11 Cal.4th 694, 781.)

Appellant further claims the instruction failed to inform the jury that appellant did not have to persuade them that the death penalty was inappropriate. (AOB 131-132.) Although it is permissible under the Federal Constitution to require a defendant to prove mitigating factors by a

preponderance of the evidence, the California statute does not specify any burden of proof and, except for other crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Carpenter* (1997) 15 Cal.4th 312, 417-418; see also *People v. Holt* (1997) 15 Cal.4th 619, 682-684.) That being the case, and here, the trial court followed the law as far as burdens of proof, there was no error.

In sum, this claim should be rejected.

## VII.

### **THE INSTRUCTIONS IN THE PENALTY PHASE REGARDING AGGRAVATING AND MITIGATING CIRCUMSTANCES IS CONSTITUTIONAL**

Appellant claims the instructions regarding aggravating and mitigating factors and their application rendered the death sentence unconstitutional. Specifically, appellant claims that: factor (a) resulted in arbitrary and capricious imposition of the death penalty; the failure to delete inapplicable sentencing factors violated the federal Constitution; the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable and evenhanded application of the death penalty; the restrictive adjectives used in the list of potential mitigating factors impeded the jury's consideration of mitigating evidence; and the failure of the instruction to require specific, written findings by the jury with regard to the aggravating factors found and considered violated meaningful appellate review. (AOB 133-146.) This claim, with its many sub-parts, should be rejected.

#### **A. Use of Factor (a) By Prosecutors**

Appellant attacks factor (a) of Penal Code section 190.3 as unconstitutional because a prosecutor can argue anything is an aggravating factor. (AOB 134-140.) This claim should be rejected. It is merely a facial attack on factor (a).

In *Tuilaepa v. California*, the court upheld the validity of section 190.3, subdivision (a), against a challenge that it was unconstitutionally vague. (*Tuilaepa v. California, supra*, 512 U.S. at p. 976.) Since then, this Court routinely has relied on *Tuilaepa* in rejecting similar challenges. (See, e.g., *People v. Kipp* (1998) 18 Cal.4th 349, 381.)

In this case, appellant's argument loses sight of what is required for a penalty determination to pass constitutional muster. The reason *Tuilaepa* upheld factor (a) against a vagueness challenge was that a focus on the facts of the crime permits an individualized penalty determination. (*Tuilaepa v. California, supra*, 512 U.S. at p. 972; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 304, 307 [110 S.Ct. 1078, 108 L.Ed.2d 255].) *Tuilaepa* held, expressly citing factor (a), that possible randomness in the penalty determination disappears when the aggravating factor does not require a yes or no answer, but only points the sentencer to a relevant subject matter. (*Tuilaepa v. California, supra*, 512 U.S. at p. 975.)

In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

Appellant points to no factors in his own case which were arbitrarily or capriciously applied. He merely states that prosecutors use “[t]his factor . . . to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits.” (AOB 140.) Appellant does not, and cannot, demonstrate that factor (a) was presented to the jury in his case in other than a constitutional manner. Noticeably missing from appellant's analysis is any showing that the facts of his crimes or other relevant factors were improperly

relied on by the jury as facts in aggravation. This sub-claim should be rejected.

### **B. Inapplicability of Factors**

Appellant claims that most of the factors listed in CALJIC No. 8.85 were inapplicable to his case and therefore violated his constitutional rights. (AOB 141-142.) Appellant does not state which factors read to the jury (CT 874-875) are inapplicable. Rather, he makes the broader claim that these factors are simply inapplicable. As he acknowledges, this Court has rejected such claims. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1064.) This case is no different.

### **C. Failure to Instruct That Mitigating Factors Are Relevant Solely As Mitigators**

Appellant again fails to show how any mitigating factor was utilized in other than a mitigating fashion. He merely makes a wholesale attack. (AOB 142-143.) Factors need not be labeled as exclusively aggravating or mitigating. (*People v. Turner* (1994) 8 Cal.4th 137, 208; *People v. Medina* (1995) 11 Cal.4th 694, 781; *People v. Davenport* (1995) 11 Cal.4th 1171, 1229; *People v. Carpenter* (1997) 15 Cal.4th 312, 420; *People v. Frye* (1998) 18 Cal.4th 894, 1026.) The aggravating or mitigating nature of the various factors should be self-evident to any reasonable person within the context of each particular case; thus, the trial court does not err in refusing to instruct the jury that particular factors could only be considered in mitigation. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268.) Therefore, this claim should be rejected.

### **D. Use of Restrictive Adjectives**

Appellant claims the use of words such as “extreme,” as stated in factor (d), and “substantial,” as stated in factor (g), acted as a barrier to the jury’s consideration of mitigation. (AOB 143.) This one paragraph argument makes no citation to the record nor presents any particular application to this case. It is, again, a facial attack.

CALJIC No. 8.84.1(d), which allows the jury to consider whether the crime was committed while defendant suffered “extreme mental or emotional disturbance” does not unconstitutionally preclude jury from considering mental or emotional disturbances which are not “extreme.” The “catch-all” provisions in factor (k) properly allow this. (*People v. Ghent* (1987) 43 Cal.3d 739, 776; *People v. Turner* (1994) 8 Cal.4th 137, 208-209; *People v. Davenport* (1995) 11 Cal.4th 1171, 1230; *People v. Jones* (1997) 15 Cal.4th 119, 190.) Instruction which speaks to “extreme” duress is not unconstitutionally vague, because it does not serve to narrow class of those eligible for death penalty. Since it is a factor in mitigation and the jury is not limited to statutory mitigation, it is not vague. (*People v. Visciotti* (1992) 2 Cal.4th 1, 73-75.)

Factor (g) which sets forth as a mitigating circumstance whether defendant acted under extreme duress or under substantial domination of another person includes lesser forms of duress and domination when read in conjunction with factor (k). (*People v. Adcox* (1988) 47 Cal.3d 207, 270; *People v. Morales* (1989) 48 Cal.3d 527, 568; *People v. Wright* (1990) 52 Cal.3d 367, 444.)

This sub-claim should therefore be rejected.

#### **E. Failure to Require The Jury to Base Its Sentence on Written Findings**

Appellant claims there is a requirement, or at least should be a requirement, that the jury make written findings as to the aggravating factors so that there can be meaningful review. (AOB 143-146.) The jury need not file written findings as to which aggravating factors were relied on in imposing the death penalty. (*Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195, reversed on different grounds in *Pulley v. Harris, supra*, 465 U.S. 37; *People v. Turner* (1994) 8 Cal.4th 137, 209; *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Davenport* (1995) 11 Cal.4th 1171, 1232.)

## **Conclusion**

This Court has repeatedly rejected the claims raised by appellant. Therefore, this Court should reject these claims.

### **VIII.**

#### **THE SENTENCE IMPOSED DOES NOT VIOLATE INTERNATIONAL LAW**

Appellant claims his sentence violates international law. (AOB 147-151.) This claim should be rejected. Capital punishment does not violate international law. (*People v. Ghent* (1987) 43 Cal.3d 739, 779, 781; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *See Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Brown* (2004) 33 Cal.4th 382, 403-404.)

### **IX.**

#### **THERE IS NO BASIS FOR REVERSAL ON A CLAIM OF CUMULATIVE ERROR**

Appellant claims reversal in both the guilt and penalty phases based on cumulative error. (AOB 152-153.) Reversal is not required.

In a close case, the cumulative effect of multiple errors may constitute a miscarriage of justice. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) Theoretically, the “cumulative errors doctrine” is always applicable in criminal cases. The litmus test is whether the defendant received due process and a fair trial. Generally speaking, an appellate court: (1) reviews each allegation; (2) assesses the cumulative effect of any error; and (3) determines whether it is reasonably probable the jury would have reached a result more favorable to the defendant in their absence. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 319.)

This was not a close case. Appellant shot the victims, who were all

children. He did not claim that it was someone else who did the shooting, or that he was merely someone else's accomplice. The evidence regarding allegations of sexual molestation were properly admitted. There is no reversible error in the claim of prosecutorial error. There is no error in the penalty phase.

As in *United States v. Haili* (9th Cir. 1971) 443 F.2d 1295, observed, "[a]ny number of 'almost errors,' if not 'errors,' cannot constitute error." (*Id.* at p. 1299, brackets in original, quoting *Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933.) Because the premise upon which appellant's argument rests (i.e., that *prejudicial* errors occurred) is false, his cumulative impact argument lacks merit. Simply put, four times zero still equals zero. (*People v. Beeler* (1995) 9 Cal.4th 953, 954 [where none of claimed errors constitute individual errors, they cannot constitute cumulative error]. Hence, his cumulative error claims should be rejected. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1232.)

## X.

### **THERE IS NO NEED TO REVERSE EITHER THE JURY'S VERDICT IN THE GUILT PHASE OR THE JURY'S RECOMMENDATION IN THE PENALTY PHASE**

Appellant claims that if any count is reversed or the findings of the special circumstances is vacated, the penalty of death must be reversed. (AOB 154-155.) Appellant makes the assumption that reversal will occur. There is no need to reverse any portion of the trial.

Appellant also confuses matters. The jury found true special circumstances. It is only a question of vacating the death sentence if the special circumstances are reversed, not merely if there is error. Harmless error standards may be applied to penalty phase error. (*People v. Holt* (1997) 15 Cal.4th 619, 693.)

The Federal Constitution does not prevent a state appellate court from

upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing the aggravating and mitigating evidence or by harmless error review. (*Clemons v. Mississippi* (1990) 494 U.S. 738 [110 S.Ct. 1441, 108 L.Ed.2d 725]; *Stringer v. Black* (1992) 503 U.S. 222 [112 S.Ct. 1130, 117 L.Ed.2d 367, 378-379].)

Error of federal constitutional dimension bearing on the penalty in a capital case is scrutinized under the “reasonable doubt” standard of *Chapman v. California* (1967) 386 U.S. 18, 24. This Court no doubt will review each aspect of the trial and come to a just conclusion.

## CONCLUSION

Based on the above, respondent respectfully requests this Court affirm the convictions the sentence imposed.

Dated: August 9, 2005

Respectfully submitted,

BILL LOCKYER  
Attorney General of the State of California

ROBERT R. ANDERSON  
Chief Assistant Attorney General

GARY W. SCHONS  
Senior Assistant Attorney General

WILLIAM M. WOOD  
Supervising Deputy Attorney General



DAVID DELGADO-RUCCI  
Deputy Attorney General

Attorneys for Respondent

DDR:cp  
SD1998XS0004

**CERTIFICATE OF COMPLIANCE**

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 22949 words.

Dated: August 9, 2005

Respectfully submitted,

**BILL LOCKYER**  
Attorney General of the State of California



**DAVID DELGADO-RUCCI**  
Deputy Attorney General  
Attorneys for Respondent

**DECLARATION OF SERVICE**

Case Name: People v. Martin Mendoza

Case No. S067678

I declare:

I am employed in the County of San Diego, California. I am 18 years of age or over and not a party to the within entitled cause. My business address is 110 West A Street, Suite 1100, P.O. Box 85266 San Diego, California 92186-5266.

On August 11, 2005, I served one copy of the attached

**RESPONDENT'S BRIEF**

I served a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General, for deposit in the United States Postal Service that same day in the ordinary course of business, addressed as follows:

**MICHAEL J. HERSEK**  
State Public Defender  
**MARIANNE D. BACHERS**  
Deputy State Public Defender  
221 Main Street, 10<sup>th</sup> Floor  
San Francisco ca 94105

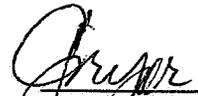
**MICHAEL A. RAMOS**  
District Attorney  
Appellate Services Unit  
412 W. Hospitality Lane, First Floor  
San Bernardino CA 92415-0042

**APPELLATE DEFENDERS, INC.**  
555 West Beech Street, Suite 300  
San Diego, CA 92101

**TRESSSA S. KENTNER**  
Court Executive Officer  
Appellate Division  
401 N. Arrowhead Avenue  
San Bernardino CA 92415-0063

I declare under penalty of perjury the foregoing is true and correct, and this declaration was executed at San Diego, California, on August 11, 2005.

C. PRYOR  
(Typed Name)

  
(Signature)

2005 AUG 17 AM 9:20  
ATTORNEY GENERAL  
SAN DIEGO