IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TOMMY JESSE MARTINEZ,

Defendant and Appellant.

S074624

CAPITAL CASE

Automatic Appeal from the Superior Court of the State of California
Santa Barbara County Superior Court Nos. SM 103236 & SM 101161
The Honorable Rodney S. Melville, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

A three-count grand jury indictment charged appellant Tommy Jesse Martinez, Jr. with murder, in violation of Penal Code section 187, subdivision (a)[1/] (count 1); rape, in violation of section 261, subdivision (a)(2) (count 2); and robbery, in violation of section 211 (count 3). It was further alleged as to counts 1 through 3 that appellant personally used a knife, within the meaning of section 12022, subdivision (b). Two special circumstances rendering appellant eligible for the death penalty – that the murder was committed during the commission of rape (§ 190.2, subd. (a)(17)(C)), and that the murder was committed during the commission of robbery (§ 190.2, subd. (a)(17)(A)) – were also alleged. (1CT 2-4.)

On July 7, 1997, the prosecution moved to consolidate a separate case (SM101161) initially charging appellant with eight counts. (1CT 86-87, 306-319; see also 8CT 2343-2349, 9CT 2410-2416.) The trial court granted the motion to consolidate. (2CT 342.) The information of that separate case was later amended to charge appellant with the following nine counts: two counts

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

of assault with a deadly weapon, in violation of section 245, subdivision (a)(1) (counts 1 and 9); kidnapping with intent to commit rape and oral copulation, in violation of section 208, subdivision (d) (count 2); kidnapping for robbery, in violation of section 209(b) (count 3); three counts of assault with intent to commit rape, in violation of section 220 (counts 4, 5 and 8); attempted kidnapping with intent to commit rape and oral copulation, in violation of sections 664 and 208, subdivision (d) (count 6); and attempted kidnapping for robbery, in violation of sections 664 and 209, subdivision (b). It was further alleged as to counts 2 through 4 and 6 through 8 that appellant personally used a knife, within the meaning of section 12022, subdivision (b). (9CT 2682-2689.)

Appellant pleaded not guilty and denied the special allegations. (9CT 2690.) Trial was by jury. (4CT 1126-1127.) With the exception of the attempted kidnapping for robbery alleged in count 7 of the amended information, appellant was found guilty as charged, and the knife enhancement and special circumstances were found to be true, rendering him death-eligible. (5CT 1284-1296.)

Following the penalty phase trial, the jury fixed the penalty at death. (6CT 1757.) The trial court denied appellant's new trial motion and his automatic motion for reduction of the penalty. The trial court entered judgment and signed the death warrant. (7CT 1841-1839, 1841-1855, 1912-1918, 1931.) The trial court also imposed a sentence of death as to the murder count, but imposed and stayed punishment on counts 2 and 3 of the grand jury indictment. As to the consolidated case, the trial court sentenced appellant as follows: an indeterminate term of seven years to life on count 3; a consecutive upper term of six years on count 4, plus an additional one year for the knife-use enhancement; a consecutive one-third the middle term of four years, or one year and four months, on count 8, plus an additional one year for the knife-use

enhancement. The trial court imposed but stayed concurrent terms as to all other counts. In total, for the counts in case number SM101161, the trial court imposed an indeterminate sentence of seven years to life, plus a determinate sentence of nine years, four months. (7CT 1912-1918, 1924-1926.)

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

STATEMENT OF FACTS

I. GUILT PHASE EVIDENCE

A. Prosecution Evidence

1. Crimes Against Maria Morales (Information Counts 1-4)

In November of 1996, Maria Morales, who was 18 years old at the time of trial, lived at 121 North Western, apartment F4, and worked at the nearby Discount Mall. (14RT 1536-1537.) Maria had been working as cashier in a children's clothing store in the mall for about seven months, and was also attending Santa Maria High School. Maria worked on Sundays, and the store opened at 10 a.m. The store was about a ten-minute walk from her home. (14RT 1537.)

On Sunday, November 3, 1996, Maria was walking along the alley at the rear of La Joya Plaza (the mall) when she felt someone "hugging" her from behind with one hand, and holding a "blade" in the other. The person, appellant, said that she should go with him and not do anything. Maria was afraid and tried to slip away, but appellant held onto her tighter, telling her not to say anything and to "come with me." (14RT 1538, 1541-1542.) Maria tried to scream, but her voice "wouldn't come out." (14RT 1543.) Appellant grabbed her by the hair and said that she had to go with him. Appellant took Maria to a place where they were all alone; meanwhile, Maria asked what he wanted, since she was wearing bracelets and rings, and also had a pager. Maria

offered the rings, but appellant did not say anything and continued walking. (14RT 1539.)

Appellant then threw Maria against a wall, tried to take off her belt, and untied her blouse. Maria kept asking what appellant wanted, and appellant replied, "I want you." Maria struggled to break free, but appellant tried kissing her so she kept moving. Appellant's breath smelled like "[c]hocolate with peanuts, like a Snickers bar." (14RT 1543.) Appellant said he would "mark up" her face, and that she should not do anything. (14RT 1539.)

Maria heard noises and someone coming, and appellant grabbed her and moved her to the middle of the alley. A young man was on the side of the fence and approached Maria; Maria could hear noises resembling a cellular phone or a beeper. Appellant moved Maria in front of him, then hit her very hard in the face, causing her to drop everything that she was carrying, including a small backpack containing a purse with $30, a folder, and school books. (14RT 1540, 1542.) Appellant ran away. (14RT 1550.) The young man came to help Maria and took her to the Discount Mall. He asked if appellant was her boyfriend, and when Maria said that he was not, the young man called the police. (14RT 1540.) The total distance Maria Morales was moved by appellant, from the point she was first contacted to where she was moved into the alley, was 181 feet. (16RT 1909-1911.)

The police arrived a short time later, and Maria spoke with a female officer while Maria's co-worker at the Discount Mall, Hortencia Garcia, interpreted for her. (14RT 1550-1551.) The police took Maria to the police station to look at some pictures, as well as to take a photograph of her injuries. Maria could not identify the person who attacked her from the photographs she was shown.[2/] (14RT 1551.)

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2. Later, in December, a police officer brought her out of school and showed her a set of photographs, after which Maria identified a photograph of

On November 3, 1996, at about 10:19 a.m., Santa Maria Police Officer Kellene Brooks was working patrol when she received a call and responded to the Discount Mall on Blosser Road. (14RT 1577-1578.) Officer Brooks contacted Maria, and noticed she was visibly shaken and upset, and that her eyes were red and puffy. Maria's hair was "disarrayed," her blouse looked as if it had been pulled away from her body and the bottom part of it was untied, and her pants were unbuttoned. (14RT 1579.) There was also swelling to her cheek area. (14RT 1580.)

Officer Brooks spoke with Maria with the assistance of her friend. (14RT 1579.) After speaking with her, the police took Maria to the station, where they photographed her injuries and also showed her approximately 120 photos based on the description Maria had provided her – a male Hispanic, 18 to 20 years old, with a mustache. Maria picked out one photo and stated that the person in the photo was not the same suspect who had attacked her, but that he was very similar to her attacker. (14RT 1580-1581.)

In November and December of 1996, Santa Maria Police Detective Jose Martinez was aware that Maria Morales had been assaulted; he was also aware that appellant had been arrested in connection with another incident, and that there was an ongoing investigation into the death of Sophia Torres (the victim of counts 1 through 4 in the indictment). (14RT 1591-1592.) On December 5, 1996, Detective Martinez went to Santa Maria High School and contacted Maria in order to show her some photographs. Detective Martinez spoke to Maria in Spanish. (14RT 1592-1593.) Prior to showing Maria the six-pack photographic lineup, Detective Martinez advised her that they had put together some photos and that the person who assaulted her may or may not be in the pictures, but that they just wanted her to take a look and see if there was

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appellant. (14RT 1551-1553.) Sometime prior to the attack, Maria had seen appellant at the Discount Mall. (14RT 1549.)

anybody she could identify. (14RT 1593.) Detective Martinez also told her that if she made an identification, he "needed her to be a hundred percent sure." (14RT 1593-1594.) After handing Maria the photographic lineup, she looked at it, then looked away and said, "That's him." Detective Martinez then asked, "Which one?," after which Maria pointed to photograph number three, a photograph of appellant. When Detective Martinez asked Maria if she was a hundred percent certain, she replied, "Yes. Every time I close my eyes, I see his face." (14RT 1594.) As Maria handed the photographic lineup back to Detective Martinez, she said, "I'm certain that's him." (14RT 1595.)

2. Special Circumstance Murder Of Sophia Torres (Indictment Counts 1-3)

On November 15, 1996, Marsha Martinez was working as a police dispatcher for the Santa Maria Police Department. (14RT 1607-1608.) At about 11:07 p.m., she received a 911 call from a location on Main Street. (14RT 1608.) A tape of that 911 call was played for the jury. (11CT 3112; 14RT 1611; Peo. Exh. 12.) The caller claimed to be witnessing a lady being attacked with baseball bats by two Black women near the snack bar of Oakley Park. (11CT 3112.)

Shortly after 11 p.m., Santa Maria Police Department Officer Louis Murillo was dispatched to Oakley School, near the Oakley Park area, in response to a call that there were two Black females beating a Hispanic female with bats. (14RT 1615-1616.) When Officer Murillo responded to the location, the lighting conditions were very poor, and he was not able to see into the park. Officer Murillo was looking either for an in-progress fight, or a victim. (14RT 1617.) It was too dark to see the playground area of the park or the baseball diamond and concession stand from the street. (14RT 1617-1618.)

Officer Murillo initially drove by the park with his side alley light on, but then turned his car around, jumped the curb and drove into the south end of the park to see if he could look further. (14RT 1618-1619.) Officer Murillo utilized all the available lights on his patrol car in an attempt to illuminate the park. (14RT 1619-1620.) As he drove in a northwest direction, he noticed a female, subsequently identified as Sophia Torres, lying on the ground near the snack bar area. (14RT 1620.) Officer Murillo exited his car and called out, "Ma'am, ma'am," and "Senora, senora," but received no response. (14RT 1621.) He immediately noticed that there was blood all around the woman. Officer Murillo called for an ambulance. (14RT 1620.)

Officer Murillo checked the body for any vital signs by checking the carotid artery in the neck, but did not find any. (14RT 1621.) The blood appeared to be fresh, since it was not dry and was very red. (14RT 1621-1622.) Officer Murillo noticed that the woman had a cut to her face which appeared to have been made from some type of sharp tool, some discoloration to her ear, and that a portion of her face was indented or sunk in – it appeared that she had been hit with some type of object. (14RT 1622.) Other police officers arrived and began searching the initial area. Officer Murillo turned control of the crime scene over to his supervisor, Sergeant Macagni. (14RT 1622.) That night, the grass of the park was very wet, so a person could see the tracks left in the grass from other vehicles. (14RT 1623.)

Douglas Coleman, an identification technician at the Santa Maria Police Department Crime Lab who had attended specialized classes and received training as a crime scene technician, in particular the analysis of blood splatter patterns, and responded to the crime scene at Oakley Park off of North Western in the early morning of November 16th. (15RT 1642-1643.) Coleman took a series of photographs depicting the crime scene as it existed when he arrived, documenting the position of the body in relation to the bleachers, the snack bar,

and the baseball diamond area. (15RT 1645.)

When Coleman arrived at the scene and was first shown the victim, he noticed that some of the larger areas of blood were still wet, indicating that the scene was not very old – perhaps an hour or so, give or take 20 or 30 minutes. Without the lighting provided by fire trucks, the park was "very, very dark." There were no lights in the park. (15RT 1652.) On and below the bleachers, Coleman recovered what appeared to be the contents of a woman's purse, including a fingernail file and a perfume vial or plunger. There was also some hair on the bleachers. (15RT 1655.) Coleman also recovered a fingernail in a walkway between home base and the snack bar. There were also a number of blood swabs and samples taken from the scene. The victim's clothing – a jacket and a skirt – were bagged and taken from the scene on a white piece of paper to preserve any evidence that might fall off the clothing, then wrapped in the paper, taken back to the lab, and individually packaged into individual evidence bags. (15RT 1656.)

Coleman found quite a few blood splatters on the cement walkway between home base and the snack bar, which he measured and charted. Where the victim lay, there was a large quantity of blood, on the bleachers and on the snack bar. (15RT 1657.) Several blood splatters flowed down and across, the majority of "those that were up," and a few also went across the wall at the same time, indicating that the center area was the approximate area that the blow struck, causing some of the blood to splatter upward, and the rest to go downward. (15RT 1662-1663.) The height of one of the blows was about two-and-a-half to three feet, meaning that the victim was not standing up at that point. (15RT 1663.)

In the area of the bleachers on the first base side of the diamond, there was quite a bit of blood on and below the bleachers. On the bleacher seats, the blood splatters had relatively high velocity, as if someone had been running

down the hallway behind home base and ran into the bleachers, since the blood had gone directly across the bleacher seats. (15RT 1664-1665.) As for the blood underneath the bleachers, that blood had dropped straight down and had no velocity to it at all, as if someone was sitting on the bleachers or resting against the bleachers at that point. (15RT 1665.)

In the area where the victim was found, the large quantity of blood indicated that the victim had laid at that particular position for a while and bled. (15RT 1668-1669.) Three partial palm prints were recovered from the scene – two adjacent and close to the bleachers, and one next to the large pool of blood. (15RT 1669.)

Coleman noticed bicycle tire tracks at the crime scene which traveled across the grass between the snack bar all the way to the sidewalk on Western, although he could not tell which direction the bike was headed. (15RT 1676-1678.) Coleman also noticed two blood spots away from the central crime scene, one on the sidewalk and also one on the asphalt just off the sidewalk on the north end of Western parallel with the trees in the north end of the park. (15RT 1678-1679.)

At about 4 a.m., Coleman made a trip to La Joya Shopping Plaza to look at a public payphone, because the 911 call had been made from that particular phone and the police were concerned that fingerprints may have been left behind. (15RT 1681-1682.) Coleman dusted the phone for fingerprints. (15RT 1684.) Two latent fingerprints were recovered – one off of the phone receiver, and the other off of the side of the small booth. (15RT 1685.) The prints were sufficient for comparison. (RT 1686.) At some point, appellant's fingerprints were obtained and compared to the prints recovered from the phone booth and phone. The prints from the phone booth were palm prints and were not made by appellant. (15RT 1688.) The bloody palm prints at the crime scene were not sufficient for comparison. (15RT 1689.) No fingerprints were

lifted from the purse recovered at the crime scene. (15RT 1690-1691.)

Coleman was present at the autopsy of Sophia Torres. (15RT 1694.) A rape kit specimen was collected and sent by Coleman to the Department of Justice Crime Lab in Goleta. (15RT 1694-1695.) The coroner's representative, Sergeant Prescott, also had taken earlier rape kit specimens from the victim on the morning in which the body was removed from the scene. Those specimens were given to Coleman on November 22, and Coleman took them to the Crime Lab in Goleta on November 26th. (15RT 1695.) On November 5, 1996, appellant's blood specimen and other samples were taken pursuant to a search warrant, booked into evidence at the Santa Maria Police Department, and later also delivered to the Department of Justice Crime Lab in Goleta on December 6th. The victim's clothes were also taken to the Department of Justice Crime Lab on December 20, 1996. (15RT 1696.) A knife, bicycle, hair samples, and fingernail scrapings were also delivered to the Crime Lab. (15RT 1696-1699.)

On December 5, 1996, Coleman was present when a search warrant was executed at appellant's home. (15RT 1699.) Coleman photographed a bottle of "Fabulous" spot stain upholstery cleaner. The backside of the bottle gave directions for its use and claimed it removed blood stains, grass stains, rust, and other types of stains. (15RT 1699-1700.)

In November of 1996, Sonny Garcellano lived in a corner house at 1002 Gunner. (15RT 1716-1717.) The backyard of his home was adjacent to Oakley Park and Western. (15RT 1717.) Sometime one morning in November, Garcellano found a big black bag in his backyard, near the Western-side of the street. (15RT 1718, 1721.) Garcellano opened the bag and saw an "alien card" as well as an identification card and a few coins. Garcellano told his wife what he had found and immediately called the police. (15RT 1719.) At the time he found the purse, Garcellano was unaware that he had found Sophia Torres's bag, but he became aware of this after the police arrived. (15RT 1720.)

a. Sophia's Background

In 1996, Diana Bagood worked as a cook at the Salvation Army on the corner of Cook and Miller in Santa Maria. (15RT 1727.) The Salvation Army is an organization which helps the homeless and people in need. (15RT 1728.) Diana Bagood recognized Sophia Torres as a person who regularly came in for lunch at the Salvation Army. (15RT 1729.) The sign-in lists for November 14th and 15th, 1996, indicated that Sophia Torres ate lunch at the Salvation Army on those days. (15RT 1730-1732.) Sophia always appeared very quiet and did not talk to anybody – she would come in, sign her name, take her plate of food, and sit by herself. Sophia always wore a long blue jacket and carried a black purse with her. (15RT 1732.) Bagood never noticed Sophia using alcohol or drugs. (15RT 1733.)

In 1996, Armida Ojeda worked as a community outreach worker for Good Samaritan Shelter located at 406 South Pine in Santa Maria. As part of her duties, she interviewed people that were seeking shelter. (15RT 1736-1737.) Sophia came to the shelter seeking a place to stay, and lived at the shelter from approximately the middle of May through June of 1996. Ojeda also saw Sophia in the street, usually walking, but always alone. (15RT 1738-1739.) In her conversations with Sophia, Ojeda found her to be a very quiet, timid, shy introvert. She stayed by herself, and was a very neat and clean person. (15RT 1739.) Ojeda spoke to Sophia in Spanish only; she was under the impression that Sophia did not speak English, since she never heard Sophia speak English. (15RT 1739-1740.) Sophia mentioned to Ojeda that she was from Arizona, and that she had family in Guadalupe, Mexico. (15RT 1743.) Sophia did not appear to consume alcohol or drugs. (15RT 1740.) The times that Ojeda saw Sophia walking, Sophia always seemed to be walking from west to east, "like from Blosser down maybe to Pine, always walking, going east." (15RT 1741.) Ojeda never saw Sophia with a man. (15RT 1741.) While she

stayed at the shelter, Sophia worked picking strawberries and also worked for Raynaware selling pots and pans. (15RT 1744-1745.)

Ofelia Francisco lived with her children at 1733 North Alison Avenue in Santa Maria. (15RT 1746.) Francisco knew Sophia through Sophia's sisters, whom she had known for many years. Francisco considered Sophia a friend. (15RT 1746-1747.) Around the time of her death, Sophia had been staying with Francisco for about a week. (15RT 1747-1748.) Francisco initially met Sophia when she came by selling pots and pans. Eventually, Sophia told Francisco that she needed a place to stay because she did not know where else to go. (15RT 1748.)

During the week that Sophia stayed with Francisco, she would leave around 9 a.m. to go to the Salvation Army, and return just before dark. On November 15, 1996, Sophia left around 9 a.m. wearing a long blue coat and a long black dress. (15RT 1749.) She also carried a black purse with her. When Sophia did not return home later that evening, Francisco became concerned, but thought Sophia had decided to stay at a friend's house. The following day, Francisco talked to one of Sophia's sisters, wondering why she had not returned home. (15RT 1750.)

During the time Sophia stayed with Francisco, she never consumed any alcohol or used any drugs. (15RT 1750.) Francisco did not know Sophia to have any relationships with men. Sophia was quiet, would watch television, and stare a lot as if she was really thinking about something. (15RT 1751.)

Maria Leon, Sophia's eldest sister, had lived in Santa Maria for 17 years at the time of trial. (15RT 1755-1756.) Leon had 13 brothers and sisters – two lived in Santa Maria, and a brother, Hilberto Torres, lived in Arizona. (15RT 1756.) Sophia was born in Mexico and raised in San Luis Sonora. She came to the United States when she was 23 years old. Sophia lived in an apartment in Arizona for about 10 years. (15RT 1757.) Sophia came to live in Santa

Maria in 1994 and stayed for about eight months, after which she moved back to Arizona for 10 months. Sophia returned to Santa Maria in October of 1995, where she lived until her death. (15RT 1758.)

When Sophia returned to Santa Maria in 1995, she was "very different." (15RT 1758.) Sophia was very independent, creative, and hard-working. But when Sophia returned to Santa Maria, she did not want to talk; she kept thinking, acted depressed, and liked to go walking. Sophia's boyfriend had been killed in Arizona, and she had lost everything, including her apartment and belongings. (15RT 1759.)

Leon was concerned about Sophia, and tried to help her, but was unable to do so. At the time of her death, Sophia lived with Ofelia Francisco, a friend of Leon's. Sophia worked in the strawberry fields, and also sold pans and Mary Kay cosmetics. She also worked temporarily at a bar called Tres Amigos. (15RT 1759-1760.)

Leon found out that her sister had been killed by watching the news on television – she saw a body lying on the ground with a blue coat, and recognized the coat as belonging to Sophia. (15RT 1761.) Leon did not know Sophia to consume alcohol or to use drugs. Sophia did not socialize in bars, and, apart from her boyfriend who was killed, did not have any relationships with men. (15RT 1761-1762.) Sophia carried a purse with her all the time. (15RT 1762.)

In November of 1996, Abel Contreras was working as a bar manager at the Tres Amigos bar, located on West Main on the corner of Blosser. (17RT 1990-1991.) Contreras recalled that back in November 1996, police officers came into the bar and showed him a picture of a woman killed in a park. (17RT 1993.) Contreras did not recognize the person in the photograph as having been in the Tres Amigos bar that evening. (17RT 1994.) When shown a photograph of Sophia Torres, Contreras recognized her as someone who had

worked at the bar for two weekends. (17RT 1994-1995.) Contreras did not use her for more than two weekends because she appeared to be "very meek, quiet . . . [and] too inhibited." (17RT 1995-1996.) Contreras did not believe Sophia was using drugs, she did not seem like that type of person. Contreras never saw Sophia consume alcohol. (17RT 1996.) Sophia came into the bar an additional time to show Contreras a catalog of household products she was selling, but never came back as a patron of the bar. (17RT 1996.) When shown a photograph of appellant, Contreras did not recognize him and had never seen him in Los Tres Amigos. (17RT 1996-1997.)

Gloria Diaz and Carlos Murguia, two other employees of Los Tres Amigos bar, were shown a photograph of Sophia Torres by police and did not recognize the person depicted in the picture, nor had they seen Sophia in Los Tres Amigos bar on the night the police officers came and showed them the picture. (17RT 1999-2005.)

b. The Investigation

Santa Maria Police Detective Gregory Carroll was assigned the investigation into the death of Sophia Torres along with his partner, Detective Mike Aguillon. (14RT 1598.) Detective Carroll arrived at the crime scene just after midnight. (16RT 1897.) After being briefed by Detective Aguillon on the status of the investigation up to that point, Detective Carroll looked at the victim's body. (16RT 1898.) In observing the injuries to the body, Detective Carroll believed that some sort of weapon, almost the same diameter of a metal police flashlight, had caused the visible indentation to the victim's skull. (16RT 1899.) Detective Carroll then searched the park for a weapon. During the search for a weapon, Detective Carroll noticed tire and bicycle tracks, and discovered a broken-off fingernail in between the backstop fence and the snack bar. (16RT 1900-1904.)

Detective Carroll was familiar with Oakley Park, as well as La Joya Plaza, and the Los Tres Amigos bar which was in part of that plaza. (16RT 1905-1906.) Detective Carroll timed the walk from Oakley Park to appellant's residence, which took 7 minutes, 30 seconds. (16RT 1906-1907.) The walk from appellant's residence to the payphone at La Joya Plaza from which the 911 call was made took 4 minutes, 25 seconds. (16RT 1907-1908.) By bicycle, the trip from Oakley Park to appellant's residence took 2 minutes, 50 seconds, and the trip from appellant's residence to the payphone at La Joya Plaza took about 2 minutes. (16RT 1908-1909.)

Detective Carroll examined the purse recovered from Sonny Garcellano's house and noticed that there was change in the purse, but no bill currency. Sophia's Arizona identification card, which had her birthdate of August 1, 1961, was also in the purse. (16RT 1911-1912.) Pursuant to a court order, Detectives Carroll and Aguillon transported appellant from the Santa Barbara County Jail to Valley Community Hospital to draw appellant's blood and take hair samples. (16RT 1912-1914.)

When Detective Carroll removed Sophia's clothes from the crime scene, he noticed a clear, dried fluid on her right inner thigh area a few inches below the pubic area, as well as some blood. (16RT 1916-1917.)

Dennis Prescott, a Santa Maria Police Sergeant working in the Coroner's Unit at the time of Sophia's death, received a dispatch call late in the evening on November 15, 1996, regarding a homicide investigation at Oakley Park. (15RT 1780-1782.) Sergeant Prescott responded to the scene at about 1 a.m. (15RT 1787.) Once at the scene, Sergeant Prescott contacted Doug Coleman, who briefed him on what had taken place and asked if he could examine the body to determine the approximate time of death. (15RT 1783.) Sergeant Prescott approached the body and grabbed Sophia's arm to determine whether rigor mortis had set in. The arm was not stiff, indicating that it had not been

"too long" since Sophia had died. (15RT 1784.) The police detectives asked permission to remove the victim's clothing to process it for trace evidence, so Sergeant Prescott watched as they lifted the body, removed her clothing, and placed it on a clean sheet. Sergeant Prescott then drew a sample of fluid, vitreous humor, from each of the victim's two eyes. By drawing vitreous humor and sending it to the lab for analysis and determining the amount of potassium present in the fluid, one can obtain a rough estimate on the time of death. (15RT 1785-1786.)

The body was then placed into a body bag and put in the coroner's van. (15RT 1787-1788.) Once the body was transported to the coroner's facility in Santa Barbara, Sergeant Prescott took samples from Sophia's vaginal area for a sexual assault kit. (15RT 1788.) Sophia's pubic area was also combed. (15RT 1789.) The "core temperature" of the body was also taken at the thickest part of the body in order to determine an approximate time of death. (15RT 1790.) Based on the lack of rigor, the vitreous sample, and the core temperature sample, Sergeant Prescott approximated that the time of death was somewhere around 10:30 or 11 p.m. on November 15th. Sergeant Prescott also attended the autopsy of Sophia's body. During the course of the autopsy, Sergeant Prescott withdrew vials of blood from Sophia's body to determine what chemical compounds were present within the blood. (15RT 1791.) Several vials of blood were drawn, some for testing by the Sheriff's laboratory, and one for blood typing by the Department of Justice laboratory. (15RT 1792-1793.) During the autopsy, additional swabs from the vaginal area were taken by Dr. Failing, who handed the samples to Sergeant Prescott. Sergeant Prescott then prepared the slides and packaged them in a small container. (15RT 1793.)

c. The Autopsy

Dr. Robert Failing performed the autopsy on Sophia's body on November 18, 1996, at Cottage Hospital in Santa Barbara. (16RT 1802-1804.) Also present during the autopsy were Sergeant Prescott, Douglas Coleman, Detectives Carroll and Cruz, and an assistant, Larry Disharoon. (16RT 1804-1805.) The body was 5'2" tall, and the weight was approximately 135 pounds. The body was covered with several areas of dried and smeared blood from head to feet. The left side of the face and head was markedly swollen and bruised, and had a purple-blue appearance. The nose was fractured, and there were bits of bone protruding through the skin from the fractured nose. (16RT 1806.) There was marked swelling of the right eye, and the eyelid was lacerated, a crush-type laceration as opposed to a cutting laceration. (16RT 1806-1807.) The lips were swollen, bruised and lacerated by crush-like lacerations. (16RT 1807.) On the right cheek extending from the hairline of the temple to the cheek was a very deep and sharp cutting laceration measuring three-and-a-half or four inches long, three-quarters of an inch wide, and almost that deep. The laceration went down through the skin, deep into the fat of the cheek, and Dr. Failing opined that it was caused by a sharp instrument like a knife. (16RT 1807, 1819.) The right ear was bruised, with a small crush-like laceration. The left hand had a very small flap-like laceration, and there was a laceration to the right elbow resembling one which would result if a person fell down and hit her arm at a right angle. (16RT 1807-1808.) The ring and little finger of the right hand were swollen and bruised. There was a large bruise to the left breast area, and a large bruise over the left hip area. There were abrasions to both knees. There were also blood smears on both upper thighs of the body. (16RT 1808.)

The brain had extensive subarachnoid subdural hemorrhage, cerebral contusions and swelling, although there was no fracture of the skull. (16RT 1809.) The brain was markedly swollen to the point where it "just flattened against the inside of the skull, as opposed to having little grooves and hillocks like a brain normally has." (16RT 1810.) The cause of death was subarachnoid subdural hemorrhage, brain contusions, "with the swelling that forces the brain down into this hole, and that swelling causes marked depression to obliteration of the normal physiological functions such as respiration and heartbeat." (16RT 1810-1811.) Based on the injuries to the brain, Dr. Failing opined that Sophia had been hit in the head with a flat or rounded structure on the left side of her head at least once, if not more times, with a "great deal of force." (16RT 1811-1812.)

The bruise to the upper left chest area of the body was about five inches by two-and-a-half or three inches, and the fresh hemorrhage to the fatty and breast tissue beneath the skin down to the muscle indicated that a very forceful blow made with the same type of object which struck Sophia's head struck that area. (16RT 1812-1813.) The bruise to the left hip also appeared to have been administered by a separate blow. (16RT 1814.) The bruises and swelling of the fourth and fifth fingers of the right hand appeared to have been the product of a separate blow which occurred in one of two ways – either putting one's hand up to defend oneself against a blow, or falling very hard on a flat surface. In Dr. Failing's opinion, the injuries to the hand were caused by a blow to it, rather than hitting something. (16RT 1815.)

The laceration to the elbow, which had an irregular margin as opposed to the sharp margin caused by a cutting instrument, appeared to have been caused by falling down or hitting a right-angle object, and could have been caused by a bleacher in a baseball diamond, if it had a relatively acute right-angle edge. (16RT 1816.)

The injury to the upper eyelid appeared to have been caused by "a good deal of force," a forceful enough blunt force to rapidly crush the tissue over the underlying bony eyebrow and cause it to split. (16RT 1820-1821.) The injury to Sophia's lip also appeared to have been caused by blunt-force injury due to its irregular margins. (16RT 1822.) The injury to the ear appeared to have been caused by a superficial crush-type blow. (16RT 1823.) Dr. Failing opined that if a long, round, smooth-surface structure like a baseball bat hit the victim, it could have split the skin, fracture the nose, and split the lip, but Dr. Failing thought that those injuries were caused by separate blows. (16RT 1823-1824.)

The injury to the nose was caused by a blunt-force blow to the bridge of the nose. Great force would be required to cause such a fracture, since it broke and split the skin and was forceful enough to fracture the bone beneath it. (16RT 1825-1826.) The right side of the head and face was very swollen and bruised, and underneath the skin of the scalp there was edema, i.e., the scalp lay fairly close to the bone. There were also palpable fluctuations over the left side of the head, caused by swelling of the underlying tissues, and directly related to the amount of force applied to the area by the instrument which caused the injury. (16RT 1826-1827.) The force injures the tissue "and then there's this outpouring into the area of injury of hemorrhage and fluid." (16RT 1827.)

It was stipulated that on November 15, 1996, the victim was not wearing undergarments. (17RT 1955.)

During the autopsy, Detective Carroll noticed that the victim had one fingernail that was torn, but not completely off, as well as a pinky fingernail which was missing. (17RT 1954.) The victim had fingernail polish on, and the fingernail that was recovered from the crime scene was the same color as that on her fingers. Inside the victim's purse, in addition to the identification card and few coins, were a toothbrush, some makeup, lipstick, papers, miscellaneous papers, and possibly a brush or comb. (17RT 1955.)

d. Lighting Conditions On The Night Of The Murder

David Kary, the Astronomy Program Director at the Santa Barbara Museum of Natural History, testified that on November 15, 1996, the moon was four days past the new phase, so it was a crescent moon which set a few hours after the sun sets. (17RT 1968-1969, 1973.) On November 15th, the moon set at 9:38 p.m., and after that time, there was no light from the moon. (17RT 1973.)

On March 26, 1998, when the moon was not visible, a brief experiment was conducted where Kary and the arresting officer waited on Western Avenue while two other people, prosecutor Sneddon and Miss Grossman, went into Oakley Park and walked around the playground area, then over towards the concession stand area. Kary and the arresting officer tried to observe them. (17RT 1976.) Kary determined that not only was it difficult to determine who the people were, but in many parts of the park it was difficult to determine that there were people in the park, since it was very dark. (17RT 1977.) When Sneddon and Grossman walked around the play area, Kary could see them only briefly in silhouette. (17RT 1977-1978.) When Sneddon and Grossman moved towards the concession stand and the baseball diamond, Kary was not able to see them moving in that direction. (17RT 1978.)

e. Search Of Appellant's Residence

Santa Maria Police Department Detective Michael Aguillon worked with Detective Carroll on the present case. (17RT 2006-2007.) On December 5, 1996, Detective Aguillon participated in the execution of a search warrant at appellant's residence located at 1114 West Rosewood. (17RT 2008, 2223.) Detective Aguillon searched appellant's bedroom (see Peo. Exh. 37) and found a can of cleaning fluid called "Fabulous" in the closet on the floor, which he had Coleman photograph. (17RT 2009, 2223.) Detective Aguillon also

removed from the room any clothing which appeared to be soiled. (17RT 2010-2011.) The clothing Detective Aguillon removed did not include any white pants, t-shirts, or a white baseball hat, nor did Detective Aguillon find any such items in appellant's room.[3/] (17RT 2011-2012.) Detective Aguillon did not find any briefs or mens underwear in the room, which he found unusual. (17RT 2012.) Later on, when appellant was undressing at the hospital, Detective Aguillon noticed that he was not wearing any briefs. When Detective Aguillon asked him about it, appellant said that he felt more comfortable without them. (17RT 2013.)

f. Scientific Evidence

Charlene Marie, a senior criminalist at the Department of Justice's Crime Lab, examined the vaginal swabs of the victim and observed sperm heads. She rated the amount of sperm as a "plus two," indicating that she found a scattered few. (16RT 1834-1841.) Marie also ran a presumptive test for semen, which tested positive. (16RT 1841-1842.) The presence of intact sperm indicated that the sample was collected "more recent to the event," or within 20 hours of sexual activity. (16RT 1842-1843.) Marie also examined the pubic hair samples and determined that they were the victim's. (16RT 1844-1845.) A swab of the victim's right thigh tested positive for blood, but not semen. (16RT 1846.) Marie tested blood samples from both the victim and appellant; Sophia had ABO type A blood, whereas appellant had ABO type O blood. (16RT 1849-1852.) Both Sophia and appellant were "secretors," meaning that they secreted their blood types in other bodily fluids such as saliva. (16RT 1853.)

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3. Appellant had claimed that he wore white clothing the night that Sophia Torres was killed. (RT 2012.)

Marie then performed genetic testing called PGM, which is an enzyme present in the human body. (16RT 1853-1854.) She used electrophoresis to determine the PGM types. The victim had two bands and was a "PGM two plus, one minus," meaning the band pattern was that she had "a band at the top and a band at the bottom, two plus, one minus." (16RT 1854-1855.) Appellant was a "two minus, one plus," meaning his bands would show up as the two middle rungs. (16RT 1855.) PGM testing performed on the semen sample revealed that they were the same type as appellant's. (16RT 1855-1856.) After conducting that PGM test, Marie was asked to prepare a packet of materials to be forwarded to a crime lab in Berkeley which performs DNA testing, which she did on January 23, 1997. (16RT 1856-1857.) Hair samples examined by Marie were consistent with those of the victim. (16RT 1858-1873.) Marie also tested a knife and a bicycle, both of which she did not detect any blood on. (RT 1873-1875.) Laser testing of Sophia's black dress revealed the presence of semen on the inside of the back of the skirt of the dress, down low, starting at the hem, up about 18 inches, and from about the center of the back over to the right side seam. (16RT 1876-1888.)

Matthew Piucci, a case work analyst for the Department of Justice DNA Laboratory in Berkeley, performed Restriction Fragment Length Polymorphism ("RFLP") and Polymerase Chain Reaction ("PCR") tests and compared the DNA of the vaginal swab from Sophia Torres with blood from appellant. Piucci concluded that the sperm fraction of the vaginal swab and reference bloodstain of appellant were the same. (18RT 2121, 2129, 2135-2136.) The frequency of the occurrence of the sperm sample extracted and the match with appellant's blood was one in 2.2 million, or, one in 3.75 million Hispanics. (18RT 2141.) That ratio gave great confidence that the sperm sample came from appellant. (18RT 2142.)

Mr. Kish, an expert in toxicology, analyzed Sophia Torres's blood samples and detected no alcohol, barbiturates, hypnotic drugs, cannabis, or any other drugs in her system. (17RT 2019.)

Sippa Pardo, an expert in PCR DNA analysis, examined a shoe which had a very small blood spot on it, or a spot that was determined to be blood, and that the blood did not match that of either appellant or the victim. (18RT 2221-2222.)

g. Appellant's Interviews With The Police

On December 5, 1996, Detective Carroll became aware that appellant had been arrested in connection with the attempted abduction of Sabrina Perea (count 6 of the information) which had occurred the night before. (14RT 1598.) Detective Carroll spoke with appellant at the Santa Barbara County Jail, as well as at another location, on December 5th. He spoke with appellant at the Santa Barbara County Jail in the morning, and was also present when Detective Aguillon took appellant to the hospital for a sexual assault kit. Later that same day, Detective Carroll spoke with appellant at the Santa Maria Police Department. (14RT 1598-1599.)

On December 5, 1996, at about 10 a.m., Detective Carroll went with Detective Aguillon to the county jail in Santa Maria. Detective Carroll had listened to the 911 call made on the night Sophia Torres was killed, and had asked people familiar with appellant to listen to that tape.[4/] (16RT 1919.) The detectives planned to tape record a portion of their interview with appellant, bring the tape recorder out in the hallway, and play the tape to see if the voice

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4. People familiar with appellant indicated that they thought the voice on the taped 911 call was appellant's, although that evidence was introduced only to explain what the officers did next in their investigation, not for the truth of the matter asserted. (16RT 1919-1920.)

sounded similar to the voice on the 911 tape. (16RT 1920.)

The detectives then had a conversation with appellant, took a break, and compared the taped portion of the conversation with the 911 tape. (16RT 1921-1922.) Then they returned to the interview room and tape-recorded the remainder of the interview with appellant. (16RT 1922.) During the interview, appellant indicated the direction which he traveled towards the park to supposedly meet Sophia to buy some "crank" from her. (17RT 1936-1938, 1940-1941.) Appellant then indicated that he saw some "activities" near the playground area. (17RT 1938-1939.) Detective Carroll responded by saying, "You're over here. She's over here. How are you going to see her?" (17RT 1940.)

During the ride to the hospital, Detectives Carroll and Aguillon had a conversation with appellant. Detective Carroll asked appellant if he "had been thinking about what we'd talked about earlier." Appellant responded, "Not really." Detective Carroll asked appellant to tell them what happened again. Appellant described how he had gone to the park to buy some "crank" from Sophia, and then saw two Black girls "beating on" Sophia. (17RT 1940-1941.) Detective Aguillon asked, "Were they hitting her with their fists? With bats? What?," and appellant replied, "Well, one was hitting her. The other one was just kind of holding a bat." (17RT 1941.) Appellant said that the woman was hitting Sophia with her fist. Appellant described Sophia's assailants as being about 5'6" or 5'7" and "chunky." Appellant said that if he saw the two Black girls again, he thought he would be able to identify them. (17RT 1942.)

After the hospital, appellant was transported back to the Santa Maria Police Department, where he was interviewed again at about 7 p.m. The conversation was tape-recorded. (17RT 1943.) During this interview, appellant changed the route he took to the park, and also described one of the Black females as slapping Sophia as opposed to hitting her with a fist. (17RT 1951.)

After the interview, Detective Carroll drove appellant back to the county jail. (17RT 1952.)

The following morning, on December 6, 1996, Detectives Carroll and Aguillon again interviewed appellant. They went down to the holding facility of the courthouse and asked appellant if he minded speaking with him. Appellant shrugged his shoulders and said, "No." The detectives then confronted him with the discrepancies in his statements and asked him what had happened. (17RT 1952.) Appellant gave basically the same story about two Black females beating the victim at the park. When Detective Aguillon confronted appellant with the fact that the other female assault victims (counts charged in the information) had identified him, appellant admitted to those incidents, but said he was only going to rob them, not rape them. (17RT 1952-1953.)

3. Incident Involving Laura Zimmerman (Information Count 5)

On December 2, 1997, Laura Zimmerman was working at Gottsschalk's, a department store in the mall. (17RT 2020-2021.) At about 6:15 p.m., Zimmerman was leaving work with a friend; after she said goodbye to her friend, she proceeded towards her car, which was parked in the second level of the mall parking structure. (17RT 2021.) As she walked to her car, Zimmerman noticed appellant standing on the side of the ramp leaning against the wall. (17RT 2022, 2026.)

Zimmerman opened the door to her truck and sat down. As she sat down, Zimmerman noticed appellant was running behind her, so she immediately locked the door. As soon as she locked it, appellant lifted the door handle to the car, and looked from side to side, as if he was shocked that the door was locked. (17RT 2024.) Appellant then pointed to his wrist and asked Zimmerman what time it was. Zimmerman replied, "I don't know." Appellant

then looked around again and ran away. (17RT 2024, 2026.) Zimmerman felt that appellant planned to do something "bad or evil," and was scared and nervous. (17RT 2029, 2043.) She drove home and told her husband about the incident, who called the police. (17RT 2030.)

A few days later, the police came to Zimmerman's home and showed her a series of photographs. Zimmerman picked appellant's photograph out of a photographic lineup. (17RT 2029-2031, 2045-2048.) When asked by Santa Maria Police Department Officer James Hammond how certain she would rate her identification of appellant on a scale of one through ten, Zimmerman said a "ten." The distance from the ramp to where Zimmerman's car was parked was 120 feet. (17RT 2048.)

4. Incident Involving Sabrina Perea (Information Counts 6–9)

Sabrina Perea, who was 21 years old at the time of trial, worked as a salesperson at Miller's Outpost in the mall in December of 1996. (18RT 2196-2197.) After getting off work at about 9 or 9:30 p.m. on December 4, 1996, Sabrina called her mom and asked her to pick her up. Then Sabrina went outside, sat on a bench, and waited. Sabrina was wearing a black skirt, a red knitted sweater, and a knee-length beige jacket. (18RT 2198.) She also had a black wallet in her jacket pocket. (18RT 2199.)

Sabrina had barely sat down when appellant came from behind a cement wall of the parking lot and started walking towards her while looking from right to left. Sabrina thought the way appellant looked around was "weird," but also thought that like her, he could be waiting for a ride. (18RT 2201, 2205.) Appellant sat down right next to Sabrina with his shoulder touching hers. (18RT 2202.) At this point, Sabrina felt that something was not right. Appellant then pulled a knife from under a sweater with his left hand and stuck it in Sabrina's right side, saying, "Don't move, don't scream and I won't have

to stab you." (18RT 2202-2203.) Appellant then said, "Just come with me." (18RT 2202.) Sabrina replied that she was not going anywhere because she had just called her mom, who would be arriving any second. After repeating his demand that she come with him, appellant said, "Get your hand off my knife." Sabrina then noticed that she was holding onto the handle of appellant's knife. (18RT 2203.) Appellant asked Sabrina again to let go of his knife, but she refused because she felt that if she did, he might stab her. (18RT 2204.) The two pulled on the knife, eventually standing up. As they wrestled over the knife, appellant grabbed Sabrina's other wrist with his free hand. (18RT 2204-2205.)

By this point, Sabrina had screamed for help about three times, and a person on a motorcycle had passed by, but appeared not to hear her. Appellant said, "Okay, I'll leave. Just give me my knife. Just let go of my knife and I'll leave." (18RT 2205.) After struggling over the knife a bit longer, appellant let go of the knife and walked away calmly as if nothing had happened. Sabrina watched appellant and made a mental note of what he wore and what he looked like. (18RT 2206.) She told appellant that he was not going to "get away with it" about three times. While he was walking away, appellant turned around, smirked, and continued walking calmly. (18RT 2207.)

Sabrina then went to King's Table, pounded on the door, and asked the woman inside to call 911.[5/] (18RT 2207-2208.) After a few minutes on the phone, the woman let Sabrina inside and Sabrina told the person what had happened and provided a description of appellant. The police arrived as she was on the phone. Sabrina had the knife in her hand at the time. (18RT 2208.)

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5. Camille Robles, a 911 dispatcher for the Santa Maria Police Department, authenticated a 911 call that came in on December 4, 1996, at 9:51 p.m. (18RT 2150-2154.) A tape recording of that call was played to the jury. (18RT 2153; Peo. Exh. 78.)

After the police arrived, they informed her that they had picked someone (appellant) up down the street, but were not sure whether it was her attacker. The police took her to the location and shined the lights on appellant. Sabrina identified him "without a doubt or a second guess." (18RT 2209.)

On December 4, 1996, Santa Maria Police Department Officer Jeff Lopez was working the graveyard shift when he was dispatched to a call at about 9:51 p.m. (18RT 2154-2156.) Officer Lopez responded to the King's Table, located at the mall structure on the east side, regarding a possible attempted kidnaping. (18RT 2156.) When he responded to the location, Officer Lopez did not see anyone, although he had been given a description of the suspect – a male Hispanic wearing a black-hooded sweatshirt. (18RT 2156-2157.)

As Officer Lopez drove eastbound through the mall parking lot structure and turned southbound onto Miller, he saw a person matching the description riding a bicycle. That person was appellant. (18RT 2157-2159.) Officer Lopez drove southbound on Miller and illuminated appellant with his driver's side spotlight, and also radioed that he had spotted a person matching the description of the suspect. (18RT 2158.) Appellant appeared to look over his shoulder and make eye contact with Officer Lopez, then leaned forward and pedaled faster. (18RT 2162.) Although Officer Lopez wanted to stop appellant, he was unable to do so because there was an island preventing him from crossing Miller. (18RT 2158-2159.)

Officer Lopez next saw appellant when he was detained in the 200 block of South School. Appellant wore blue jeans and a black-hooded sweatshirt, and appeared to be nervous. (18RT 2159, 2166.) When Officer Lopez asked appellant where he was coming from, appellant said he was coming from the mall. Officer Lopez also asked appellant his name and birthdate. (18RT 2166.) When Officer Lopez asked appellant where he was going, appellant said he was

going home to 1114 West Rosewood. Officer Lopez then asked appellant why he was heading eastbound when Rosewood was on the west side of town. (18RT 2167.) Appellant then said that he was going to his cousin's place on Boone Street first, although he was unable to give Officer Lopez a specific address. Officer Lopez then advised appellant that Boone was south of appellant's location, and that when appellant was stopped, he was heading northbound. Appellant responded that he might have gotten lost. Officer Lopez then asked appellant to sit down on the curb. (18RT 2168-2169.)

While appellant was being questioned, another officer, Al Torres, brought Sabrina Perea to the location, after which she positively identified appellant. Officer Lopez then placed appellant under arrest. (18RT 2170.) While Officer Lopez transported appellant to the police station, Officer Torres radioed over the air that he had the "item used" in his possession. (18RT 2171.) Although no mention had been made of a knife, appellant then asked if an officer had found a knife. Officer Torres then asked appellant, "Who said anything about a knife?" Appellant replied that he thought he heard one of the officers say that there was a knife found. (18RT 2172.)

Once at the police station, appellant was taken to an interview room and interviewed after he was advised of and waived his *Miranda*[6] rights. (18RT 2172-2173.) Appellant did not appear to be under the influence of any controlled substance – his eyes were not dilated or constricted, nor did he have rapid speech. (18RT 2182, 2186, 2189.) Appellant said he had parked his bike on the bike racks outside King's Table, then went inside to visit a cousin named Amy Guzman. (18RT 2175-2176.) According to appellant, Amy worked at two locations, so after checking both and not being able to find her, he exited the mall, got on his bike and was going to go to Jack-In-The-Box, but changed

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

his mind and rode away, after which the police stopped him. When asked about using a knife to assault Sabrina, appellant adamantly denied having talked to or assaulted anyone that evening. (18RT 2176.) Appellant denied having spoken with a security guard, but said that he saw a security guard while he was on the third level of the parking structure. Appellant said he was in the mall parking structure looking for his cousins's car prior to entering the mall, although he had not told Officer Perez this previously. (18RT 2177.) Appellant seemed nervous at times and was quiet and hesitant when answering questions. (18RT 2178.)

When asked why Sabrina identified him, appellant said she might have mistaken him for somebody else. Appellant's bicycle, which Officer Perez believed was red, was booked into evidence. (18RT 2178.) Appellant initially told Officer Perez that he started pedaling softer when he saw the lights of the police car because he was nervous, but later said he did not see the police car. (18RT 2179.)

On December 4, 1996, at about 9:45 or 9:50 p.m., Santa Maria Police Officer Al Torres went to the area of King's Table and contacted Sabrina Perea inside. (18RT 2190-2191.) Sabrina gave Officer Torres a small black knife, which he later booked into evidence. (18RT 2193.) After speaking with her, Officer Torres took Sabrina to the area of Church and School, where she identified appellant as the person who attacked her. (18RT 2192.)

On the morning of December 6, when Detective Carroll contacted appellant in the holding facility of the courthouse, the Maria Morales (counts 1-4) and Sabrina Perea (counts 6-9) incidents were discussed. At the time, both Detectives Carroll and Aguillon were present, and asked if appellant minded speaking with them. Appellant shrugged his shoulders and said, "No." (14RT 1600.) When Detective Aguillon confronted appellant and said, "So these other gals [victims in the other counts] are lying?," or, "These other incidents didn't

occur either then?," appellant admitted, "*I did those.*" Appellant was told that Maria Morales had identified him out of a photographic lineup, and that Sabrina Perea had identified him at the scene. (14RT 1601, italics added.) Appellant admitted that he "did those," but said he was only going to rob the women. Detective Carroll then said that the girl at the mall had said that appellant had told her to come with him. Appellant denied having said that. (14RT 1602.) Detective Carroll told appellant that in the Maria Morales incident on Blosser, Maria told them that appellant had undone the buckle of her pants and had untied her blouse. Appellant denied having done such things; he said he was just going through her pockets because he was going to rob her. (14RT 1602-1603.) When asked about the incident involving Laura Zimmerman, appellant denied involvement in that incident. (14RT 1603-1604.) When Detective Aguillon asked appellant why he had hit Maria, appellant said he did not know. (14RT 1603.)

B. Defense Evidence

On November 15, 1996, at about midnight, Keith Gorman, a Santa Maria paramedic, was dispatched to Oakley Park in connection with the attack on Sophia Torres. (19RT 2235-2236.) When he arrived, he noticed police cars by the baseball diamond, so he drove his car up over the curb in the direction of the police cars. (19RT 2236.) As he drove, Gorman noticed what he thought was a bicycle track in the wet grass.[7/] (19RT 2237.) Gorman and his partner, Michael Rivera, then approached Sophia's body, cut off her dress with scissors, then attached their "EKG" electrodes in order to confirm that she was

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7. On cross-examination, Gorman indicated that he could not tell whether the bicycle track was "coming or going." (RT 2242.)

dead. (19RT 2238-2239.) Sophia lay prone on her belly.[8] (19RT 2238.) Gorman saw about six police officers in the vicinity – a few stood in the general area, while others were "looking off on the sidelines." (19RT 2239-2240.) Gorman placed three electrodes on Sophia's back, one at either shoulder blade and another at the right rib cage. (19RT 2240.) The scissors used to cut Sophia's dress off had a serrated blade on one edge and a razor-type blade on the other which left a pattern on the clothing. (19RT 2241.)

Mario Martinez, appellant's brother who was 16 years old at the time of trial and being held at the Los Prietos Boys Camp, testified that back in November of 1996, appellant lived at home and that he (Mario) sometimes shared a room with him. (19RT 2250-2251.) Sometime in November of 1996, appellant came home with a pager, which he gave to Mario. (19RT 2251.) Appellant told Mario that he had gotten the pager in the Discount Mall – he was walking by a girl and snatched it off of her pocket, which the pager was clipped to. (19RT 2252.) The pager kept going off, and appellant told Mario to answer the page. Mario answered the page, and a girl claimed that the pager was hers and gave her the pager number. Mario told the girl that she had paged the wrong person and hung up. The rest of the night, the girl kept paging the pager. (19RT 2251.) Mario kept the pager for a few weeks, then threw it away. (19RT 2252.)

On cross-examination, Mario admitted that at the time the search warrant was executed, he was not sharing a bedroom with appellant; rather, he was sharing a bedroom with his younger brother, Angel.[9] (19RT 2257-2258.)

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8. On cross-examination, Gorman indicated that he did not remember whether the victim was lying on her back or her front, but said that he never moved the body in any way. (RT 2244.)

9. Mario was impeached with his admissions that in prior criminal proceedings, he admitted receiving stolen property and being involved in a robbery. (RT 2258-2259.)

On November 3, 1996, Francisco Lopez was sitting in his truck sometime between 9 and 10 a.m. at the Discount Mall parking lot. (19RT 2260-2261.) While sitting in his truck, Lopez was able to see a fence separating the parking lot from the alley behind the building. (19RT 2262.) Lopez saw what looked like a boyfriend and girlfriend fighting, but then thought otherwise when he saw the male prevent the woman from going in through the entryway. (19RT 2263.) The man and the woman continued quarreling, and when they were almost out of sight, the woman looked at Lopez and realized that he was watching. Lopez recognized Maria Morales and knew that she worked in the mall. (19RT 2263.)

Attempting to help her, Lopez activated his truck's car alarm, which sounded like a police alarm. (19RT 2264.) The man appeared to be surprised, looked in Lopez's direction, and quickly pulled the woman before disappearing in a northerly direction. (19RT 2265.) The man had Maria close to him as if he were pulling her or squeezing her against him, and he appeared to have something in his hand. (19RT 2269.) The man appeared to be clean-shaven Hispanic and between 18 to 20 years old, wearing light-colored baggy pants and a white t-shirt. (19RT 2276-2278.)

Lopez then took his flashlight and phone and went to the alley. Lopez saw the man and Maria about halfway down the alley, at which point Lopez tried to call the police. The man then hit Maria, knocking her down to the ground, and then away. (19RT 2266-2267.) Lopez recalled yelling something as well, but did not remember exactly what. (19RT 2267.)

Lopez ran to Maria to help her and asked her if she was all right. Maria said she was okay, so Lopez then attempted to chase after the man, but when he got to the corner, he no longer saw him. (19RT 2268.) The police arrived a few minutes later, and Lopez gave them a statement in English. (19RT 2268-2269.)

C. Prosecution Rebuttal

Roxanne Medley, an employee for MobileComm, a pager company, testified that a pager is assigned a seven-digit phone number. (19RT 2293-2294.) If a pager was lost and the person who owned it called and asked to discontinue the service, MobileComm would have records of this indicating the date the pager was taken out of service. (19RT 2294-2295.) Once a pager is taken out of service, it is not possible for that pager to be used again with the number that was originally assigned to it. (19RT 2295-2296.) A computer printout of Maria Morales's pager record showed that it was deactivated on November 4, 1996. (19RT 2299-2300.)

Maria Morales testified that she had written the pager number on the back of the pager, but that it was not very visible. (19RT 2304-2305.) After the incident at the Discount Mall, Maria called her pager once that same day and entered her work number as the call back number. (19RT 2305-2306.) A young man returned the call,[10/] after which Maria called the pager company to have the pager disconnected. (19RT 2306.) Because Maria had called on a Sunday, the company said the pager could not be deactivated until the following day, Monday. (19RT 2306.)

Detective Gregory Carroll testified that the distance from where the Discount Mall building meets the second building to the point where the alley is was about 120 feet. (19RT 2313.) The distance from the corner of the Discount Mall where the dumpster was located to the point where the building ended and Maria was taken into the alley was about 171 feet, or an additional 43 feet from the opening where Maria said she was first grabbed to where the dumpster was located. (19RT 2313-2314, 2317.)

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10. The young man sounded like he was 14 or 15 years old, and talked "like a gang member." (RT 2307.)

II. PENALTY PHASE EVIDENCE

A. Aggravating Evidence

1. Incident Involving Willy Alejandre

Josephina Alejandre lived at 1110 North Oakley in Santa Maria with her husband, her mother, Maria Abarca, and four children, Willy, Lori, Rogelio, Jr., and Josie. (25RT 2855-2856.) On the evening of April 2, 1996, Josephina was in the living room with her mother, a cousin, her husband, and her smallest daughter playing dominoes on the floor. The television was on. At some point, Josephina's husband went to bed, and the cousin went outside to the back of the house. (25RT 2857-2858.) As Josephina got up to fix her son Rogelio something to eat, Willy came running in, closed the door and locked it. Willy, who appeared to be frightened, told Josephina to call the police, because someone was going to kill him. (25RT 2858.)

Josephina then heard a very loud banging on the door. Willy told her not to open the door. Josephina yelled to Lori to call the police. The door was then kicked in and appellant angrily told Josephina to "hand over Willy." (25RT 2858-2860.) Appellant was with two other young men, who stood behind him. (25RT 2861.) Appellant and the other young men threw a flower pot through the window, and appellant also threw a beer can. Two windows in the home ended up broken. (25RT 2862.)

Josephina's mother came and stood behind her, and Josephina heard Josie crying and yelling in the living room. Josephina was afraid, and looked for something to defend herself with. At some point, Josephina's husband heard noises and came close to the door holding a hammer, but was not really bold enough to go out. (25RT 2862-2863.) One of the men holding a plant threw it down on the floor. (25RT 2863-2864.) Josephina's next door neighbor, Gabriel Resendez, came out to see what was going on, and appellant

and his companions started throwing things towards him as well. When the police arrived, appellant and his companions began running; there were more young people in the street who also began running. (25RT 2864.)

Willy Alejandre testified that on April 2, 1996, he was at his older friend Moy's house, where a group of people were, some of whom were drinking beer. Willy was there less than five minutes when some big older man "hit him up" and asked if he was "Flaco." Willy said that he was, and then the person started a fight with him because Willy had fought his cousin. (25RT 2873-2874.) The person fighting with Willy called out to get a gun, so Willy started running, with people in pursuit. (25RT 2874-2875.) Willy ran straight home and into his house, and told his mother to call the police because "some guys" were after him. (25RT 2875-2876.)

Gabriel Resendez's testimony from a prior hearing was read into evidence. Resendez lived directly adjacent to the Alejandres. (25RT 2877.) On April 2, 1996, Resendez heard a lot of noise, and his wife screamed that something was happening out front. Resendez went to the front door, looked, and saw some people outside. He also saw a pot "flying" in front of Josephina's mother's feet. (25RT 2878.) Resendez saw three people outside. (25RT 2879.) Resendez went inside to call 911, then came back outside, but walked slowly since he could only use one leg. (25RT 2879-2880.) Resendez walked over to the planter area a few feet further from the wall of his home; by this time, Josephina's husband had come out with a hammer in his hand and was chasing everybody out of the yard. (25RT 2880.) The people began running away, and someone came at Resendez with a broom stick, saying, "Come on, come on." After Resendez backed away, the person swung and hit his truck, so Resendez went back inside. (25RT 2881-2882.) Resendez went back inside and grabbed a baseball bat, which he handed to his neighbor. At this point, Resendez's son, who was "pretty large," would not let Resendez go

through the doorway because he knew Resendez had a bad leg. Resendez eventually told him, "You have to move. They're going to destroy our cars." Resendez then went back outside, across the street, and the person with the stick was no longer there. (25RT 2882.)

The person who Resendez saw throwing the flower pot, and who confronted him with the broomstick was appellant. (25RT 2883-2885.) The police brought appellant back about 20 minutes later. It was stipulated that the person in the back seat of the car was appellant, who was then identified by Resendez. (25RT 2885.)

On April 2, 1996, shortly after 8 p.m., Santa Maria Police Department Officer Jorge Lievanos received a dispatch to go to a disturbance call at 1110 North Oakley in Santa Maria. (25RT 2888-2889.) Officer Lievanos drove up behind another officer, Officer Vales. (25RT 2890.) Officer Lievanos observed a crowd of people standing in front of 1110 and 1114 North Oakley – about 15 or 20 people were yelling and running around. Officer Lievanos contacted Rogelio Alejandre, who identified himself as a victim of vandalism and pointed out several people who were walking away from him. (25RT 2891.)

Officers Lievanos and Vales then attempted to stop the people Alejandre had identified, but the people began running northbound. (25RT 2891.) Officer Lievanos picked one person to follow, who wore a baggy white t-shirt with a logo on the back, baggy blue jeans, and black shoes. (25RT 2892.) Officer Lievanos eventually came upon appellant and Isaac Estrada and detained them. (25RT 2892-2893.) Appellant was the person Officer Lievanos had been chasing. When Officer Lievanos advised appellant what he was investigating, and that he (Officer Lievanos) had identified him as one of the people he was chasing, appellant denied being involved and said he was meeting with Estrada. (25RT 2894.) Appellant was eventually transported

back to 1110 Oakley. (25RT 2894.) Josephina and Rogelia Alejandre, Josephina's mother, and Resendez each identified appellant. Appellant was then arrested. (25RT 2895.)

After being advised of and waiving his *Miranda* rights, appellant repeatedly stated that he had not been involved, and denied being the individual that Officer Lievanos had chased from the Alejandre residence. (25RT 2895-2896.) Appellant gave conflicting statements during his conversation, and at times would correct himself and say that Officer Lievanos was "probably right." Towards the end of the interview, appellant said he had nothing further to state. (25RT 2896-2897.)

2. Incident Involving Pepe's Liquors

On February 23, 1994, at about 9:30 p.m., Francisco Chavez was working alone at Pepe's Liquors in Santa Maria when two teenagers came to the door. One of the teenagers stood outside the door, while the other came in and demanded money. (25RT 2913-2914.) Chavez said, "No," after which the person pulled out a knife. Chavez told the person, "Better leave before the cops come. You're on camera and everything." (25RT 2914-2915.) Chavez activated the silent alarm and received a phone call a few seconds later. The teenagers were still there, so Chavez indicated that he had pressed the alarm, that he was being robbed, and that the people were still there. At that point, the two teenagers took off running. (25RT 2915.)

On February 23, 1994, at about 9:30 or 9:40 p.m., Santa Maria Police Department Officer Larry Ralston received a call regarding a robbery in progress at Tio Pepe's Liquor Store at the corner of Blosser and Main Street. (25RT 2918-2919.) Officer Ralston could see the front door of the liquor store and did not notice anything unusual. (25RT 2919-2920.) After radioing to dispatch, he learned that the suspects had run out the back door. (25RT 2920.)

Officer Ralston and another officer, Mike Schroeder, then started searching the area for the suspects. Eventually, Officer Ralston came upon two people, one on bicycle and one on foot. The person on the bicycle, Refugio Raymond Martinez, jumped off and started to run, then turned around and said, "I give up, I give up." (25RT 2920-2921, 2924.) After arresting that person, Officers Ralston and Schroeder eventually located the person on foot, appellant, who "popped up" from behind a bush or a building and took off running. (25RT 2921.) A field showup was then conducted, and Chavez identified appellant and Martinez – Chavez said that appellant was the person that came inside and pulled out a knife. (25RT 2916, 2922.)

After appellant was advised of and waived his *Miranda* rights, he said that the robbery was a joke, and that his cousin, who was the person standing in the doorway, was not involved. Appellant said he never intended to get anything from Chavez, and kept repeating that it was a joke. (25RT 2923.) Appellant was searched for a weapon, but no knife was recovered. (25RT 2923-2924.)

3. Appellant's Knife Possession At The Strawberry Festival

On April 22, 1995, Officer Ralston was working as a detective with the Gang Suppression Team at the Strawberry Festival fairgrounds along with an employee of the probation department named Richard Diaz, monitoring any gang activity or problems that might arise. (25RT 2924-2925.) Sometime during the evening, Diaz contacted appellant, who was 13 or 14 years old at the time, and searched him as part of a routine probation search, recovering a hunting knife stuffed in appellant's waistband. (25RT 2925, 2927.) The knife was seized and appellant was arrested. The knife was eventually destroyed. (25RT 2926.)

4. The Bread Store Incident

On September 1, 1993, at about 8 a.m., Santa Maria Police Department Officer Paul Flores was dispatched to 222 North Blosser, a bread store, regarding a possible commercial burglary in progress. (25RT 2929-2930.) Officer Flores parked and approached the area on foot with Officer Fulton. Officer Flores saw appellant walk out from between some buildings. (25RT 2930.) The description of the suspect which Officer Flores had been provided was that the suspect was wearing a white t-shirt and dark pants. Appellant was wearing a black watch cap, a sweatshirt, a white t-shirt, and black pants. Officer Flores called to appellant, who jogged over with a "stiff-legged run." As Officer Flores spoke with appellant, he noticed that his right pants pocket was sagging as if it contained something heavy. Officer Flores patted appellant down and discovered a dagger in his pocket.[11/] (25RT 2931.) The weather that morning was damp and misty, and the dagger did not appear to be damp or wet in any way which would lead Officer Flores to believe that it had been laying around outside. (25RT 2930, 2932.) Appellant identified himself as "Isaac Martinez" and provided a birth date, both of which Officer Flores later determined to be false. (25RT 2932.)

5. Ice Cream Shop Incident

On April 24, 1992, sometime in the afternoon, Alicia Anaya was working at Delicias de Mexico, an ice cream shop at La Joya Plaza. (25RT 2934-2935.) A teenager, about 14 or 15 years old, who had been in the store earlier that day, came in and demanded money. (25RT 2936.) Anaya told the teenager that she could not give him money unless she made a sale and opened

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11. Officer Flores defined a dagger as a fixed blade with both edges sharpened. (RT 2933.)

the register, so he told her to ring up something. (25RT 2938.) Anaya then gave the teenager the money and he walked out of the store. Before he walked out, the phone rang a few times; each time it rang, the teenager picked up the phone and hung it up. (25RT 2940-2941.) The teenager also told Anaya that she was "pretty" and reached out towards her, but she blocked his hand. (25RT 2941.)

Some days later, Anaya was working with her boss when she saw the teenager and another person walking by. Anaya pointed the teenager out to her boss, and her boss then grabbed the person who was walking with the teenager, brought him inside the store, and called the police. (25RT 2942.) Shortly thereafter, Anaya was taken to a house, where she identified the teenager as the person who robbed her. (25RT 2942-2943.)

On May 2, 1992, Santa Maria Police Department Officer Kendall Greene received a call to respond to La Joya Plaza. (25RT 2952.) Once at the Plaza, Officer Greene contacted a female employee who had information regarding a robbery which had occurred a week earlier. In connection with responding to the call, Officer Greene came in contact with appellant at the Santa Maria Police Department. (25RT 2953.) After being advised of and waiving his *Miranda* rights, appellant initially denied being involved in the robbery, but after being advised that the employee had positively identified him at a field show-up, appellant admitted his involvement. (25RT 2954.)

6. Appellant's Possession Of A Handmade Knife While In Custody

On March 21, 1998, Genaro Gomez, Jr., a correctional officer at the Santa Barbara County Sheriff's Office Main Jail in Goleta, found a handmade knife under some clothing on the upper bunk of appellant's cell. (26RT 2988-2990.) Officer Gomez described the handmade knife as a combination plastic

fork and spoon, or "spork," about three and five-eighths inches long, which had the eating part of it broken off, and one edge sharpened. (26RT 2991.) When Officer Gomez advised appellant that he would have to write him up, appellant said, "Come on, it hasn't been sharpened enough to be a knife," or something to that effect. (26RT 2992.) The edge of the blade felt fairly sharp, and in Officer Gomez's opinion was sharp enough to slice an apple. (26RT 2992.) Possession of a knife is considered "critical" contraband and a safety hazard to both inmates and officers. (26RT 2992-2993.)

7. Victim Impact Testimony

a. Sophia's Murder

Victoria Francisco, Sophia Torres's older sister, testified about the impact of her sister's murder. It was like a "dream" to Francisco – what hurt her the most was that Sophia did not die a natural death, and thinking about the suffering Sophia went through hurt her a lot. Sophia would never harm anybody. (25RT 2958.)

Gilberto Torres, Sophia's oldest brother, thought about Sophia every day and the brutal way in which she died. (26RT3002.) When Gilberto opened the casket, he did not recognize Sophia's face. Sophia had problems and was a shy person who acted like a little girl, but Gilberto was hoping that she would return to an independent, hard-working person. However, because she was murdered, she would not be able to accomplish any of those things. (26RT 3003.)

Angel Torres, Sophia's father, felt her death very deeply. Sophia was not a bad person and never harmed anyone. Angel often thought of Sophia. (26RT 3004-3005.)

b. Maria's Assault

Maria Morales was frightened when men came near her, and she feared going out alone. Even if she went out with someone she was afraid, and when she saw young men who looked like appellant she was very afraid of them. Maria's mother was also very afraid, and worried very much about her. Maria used to love chocolates and Snickers bars, but she cannot eat or smell them anymore because it brought back memories of the attack. (26RT 2996-2997.)

c. Sabrina's Assault

Sabrina Perea gets very nervous around men. If they come close to her, she thinks that someone is going to pull out a knife and try to hurt her in some way. A week after appellant's assault, Sabrina was working at Miller's Outpost in the mall late at night when a Mexican man came in wearing gloves. Nobody else was in the store, and Sabrina was working with another girl. Sabrina thought it was odd that the man had gloves on. (26RT 2998.) Sabrina's heart started beating "really fast" when the man came up to her and asked her if she could help him find a pair of jeans for his girlfriend. Eventually, Sabrina went to show him some jeans, and since the man was getting really close to her, she thought that he wanted to hurt her. (26RT 2999.) Sabrina became very nervous and called the other store employee over to help the man. (26RT 2999-3000.) The man eventually said, "Never mind, I'll just have to bring her in myself, because I don't know what she wants." Sabrina was very afraid. (26RT 3000.) Sabrina does not feel safe anymore if anyone comes really close to her. (26RT 3000.) Sabrina also is more aware of her surroundings and who is around her – she now checks the backseat of her car when she gets in. (26RT 3000-3001.)

B. Mitigating Evidence

Dr. Peter Russell, a neuropsychologist, conducted a neuropsychological evaluation of appellant on April 17, 1998, in order to determine if there was any indication of any neurological or organic brain syndrome symptoms, given a history of prolonged substance abuse. (26RT 3011-3016.) Dr. Russell was provided with appellant's arrest records and past legal history, including contacts with probation, his medical records, which included mainly emergency room treatment at a local hospital, and extensive school records and a prior evaluation by an educational psychologist who had done some prior testing in March 1998. (26RT 3016.)

Dr. Russell administered a series of standardized tests on appellant. (26RT 3016-3017.) On the Wechsler Adult Intelligence Scale, appellant's overall IQ score was 107, which was within the normal range. (26RT 3018-3019.) However, there was a significant discrepancy between his verbally mediated cognitive abilities, which were at the 45th percentile, while his nonverbal ability was at the 90th percentile. This discrepancy could indicate that the person has a problem with the language itself, or that they may have some difficulty with language-related reasoning ability or auditory processing problems. (26RT 3019-3020.) Also, someone who had not done well in secondary level education would not do as well on the verbal test. Appellant began having school problems during middle school and had the equivalent of an eighth or ninth grade education. (26RT 3020.)

Appellant scored very well (at the 85th percentile) on the Hooper Visual Organization Test, so there was nothing about that test which concerned Dr. Russell. (26RT 3020-3021.) The Lateral Dominance Exam revealed that appellant was right-hand, right-eye, and right-foot dominant. (26RT 3021.) The Finger Oscillation Test indicated appellant had a difference between his dominant right hand and his dominant left hand, although on a percent scale

basis he was still in the low normal range. (26RT 3021.) However, given that appellant was right-hand dominant, he was only at the 18th percentile of the dominant hand, while he actually did better with the nondominant left hand, indicating possible neurological problems or possible orthopedic problems in the upper extremities. (26RT 3021.) Appellant scored well on the Wechsler Memory Scale-Revised – 75 percentile in immediate verbal memory and 98 percentile in immediate visual memory, both of which were within normal limits. (26RT 3022.)

On the Trail Making Test, a measure of immediate and sustained visual attention, appellant had an abnormal performance for part A, as well as part B, which could be sign of a neurological problem. (26RT 3022-3023.) On the Rennick Repeatable Cognitive Perceptual Motor Battery test, appellant had definitely abnormal or impaired pattern results. His right hand was "quite poor" and only at the fifth percentile, and he actually scored higher – at the 10th percentile – with his nondominant left hand. (26RT 3023.) Dr. Russell also administered the Wisconsin Card Sort Test, a measure of frontal lobe of the brain functions and the patient's ability to exhibit flexibility of thought and to also exhibit the ability to shift attention. (26RT 3023.)

The frontal lobe of the brain is essentially the executor of the other brain functions and is important for initiating responses, continuing responses, and mediating responses. It is also highly important for abstract reasoning ability, ability to categorize stimuli, and also to basically interpret information from other sensory pathways. (26RT 3025-3026.) People with frontal lobe damage can have an inability to control impulses. (26RT 3027.)

In examining appellant's medical records, the only thing Dr. Russell found which may have had any correlation with neurological impairment were some notes from a hospital emergency room noting that appellant may have suffered a head strike while being detained by the police. (26RT 3027.)

Trauma to the brain can produce damage of various degrees, but Dr. Russell was unable to determine if there was any brain damage by reviewing the records. (26RT 3027-3028.) In reviewing appellant's school records, Dr. Russell noted that appellant stopped going to school when he was 13 or 14 years old. (26RT 3028.) Appellant described poly substance abuse to Dr. Russell, including marijuana, inhalants, solvents, alcohol, and use of speed and amphetamines. (26RT 3028-3029.) Depending on the degree of the length of time and the amount of solvents used, it could have a deleterious effect on the brain. (26RT 3029-3030.) Dr. Russell noticed that appellant's use of solvents and the time he quit going to school coincided fairly closely. (26RT 3030.) Marijuana use does not cause neurological brain damage, although it may result in physiological changes and hormonal levels and neurotransmitter changes. (26RT 3030.) Methamphetamines can destroy not only neurons themselves, but also the white matter connections in the brain. (26RT 3031.)

Based on his examination of appellant, it appeared to Dr. Russell that appellant may have some specific deficits associated with the interior frontal lobes, especially the right frontal lobe. (26RT 3033.) When Dr. Russell finished his testing, interpreted the results and reviewed all the records, he concluded that appellant had a pattern which could be suggestive of a number of differential diagnoses, including possible neurological impairment commonly seen with the anterior frontal lobe. Appellant's verbal problems could be related to his poor school performance. Since appellant had a history of an upper extremity problem resulting from dislocating his shoulder, that could possibly cause nerve impingement syndrome and possible account for his motor deficits. (26RT 3034.) However, all of those factors would not explain appellant's higher order reasoning and applied numerical operations deficits. Therefore, Dr. Russell ordered a positive emission tomography scan, or PET scan, which is essentially an x-ray imaging of the brain. (26RT 3034-3035.)

Dr. Russell reviewed the report of Dr. Wu of the University of California at Irvine brain imaging center following the PET scan, and drew some opinions regarding possible brain damage and the location of brain damage with regards to appellant. (26RT 3035-3036.)

Dr. Joseph Wu, Clinical Director of the Brain Imaging Center and an associate professor in the College of Medicine at University of California at Irvine, performed a PET scan on appellant on April 29, 1998. (28RT 3244-3255.) The PET scan revealed an unusual degree of low activity in the parietal lobe area, or Brodmann Area 7, which is an abnormality reported in patients who have had solvent toxicity or solvent exposures. It is a reflection of damage to the brain from using solvent too much. (28RT 3259, 3262.) There was an unusual increase of activity in the back of the brain, which sometimes occurs if one part of the brain is not working, since the other parts of the brain will try to compensate for this by increasing their activity. This is a fairly common pattern seen where one part of the brain is injured. (28RT 3260.) Appellant's brain has a reversal of a normal functioning pattern – instead of having the frontal lobes being more active than the occipital lobes or the back part, the back part of his brain is more active than the front part of his brain. This unusual pattern is a typical pattern seen in brain injury cases. (28RT 3263-3264.)

Appellant's brain also showed abnormalities seen in other solvent injury cases, which would result in certain kinds of impairment and ability to think, and would result in certain kinds of emotional abnormalities, which would be neurological injury or neurological damage. (28RT 3264-3265.) Appellant's brain showed damage to areas of the brain that control or regulate emotions or aggression as well. (28RT 3266-3267.) His brain showed very little activity in his orbital frontal cortex as well. When people have damage or injury, they can get frontal lobe syndrome, which manifests itself as displaying poor judgment,

acting inappropriately, and they will have problems with failure to inhibit inappropriate aggressive impulses. (28RT 3267.)

Appellant's brain also exhibited some abnormalities in the areas of the brain that are involved with emotions. (28RT 3268.) Based on the PET scan results, as well as Dr. Wu's review of some of appellant's neuropsychological abnormalities, Dr. Wu had a greater degree of confidence that appellant in fact showed some kind of brain injury or abnormalities, since his findings of brain damage correlated with Dr. Russell's neuropsychological evaluation. (28RT 3269-3270.)

People with damage to their frontal lobe exhibit poor judgment and focus on the immediate without thinking about long-term implications or consequences of their behavior. (28RT 3271.) People with damaged frontal lobes are often very impulsive, and are oftentimes temperamental or aggressive, and have a much poorer threshold for tolerating frustrations. (28RT 3272.) If a person started using solvents such as paint and glue at the age of 12 or 13, that use would have a very drastic effect in terms of proper maturing of brain function. Hypothetically, if a person was doing well in school and functioning well in his environment, and then, at the time he started using solvents, his life "took a different turn," that would be consistent with the impairments that solvent abuse would cause. (28RT 3272-3273.)

The brain damage to appellant would have an effect on his ability to maintain a disciplined schedule, but would not diminish his IQ or intelligence level. (28RT 3274-3275.) A person with the type of brain damage appellant had could still think logically. (28RT 3275.) If a person with appellant's brain damage used drugs such as marijuana, alcohol, and methamphetamines, that would diminish a person's inhibitions and behavioral control. (28RT 3276-3277.)

Appellant has the ability to control his behavior in spite of his brain defects in a very highly structured setting. (28RT 3292-3293.) Dr. Wu believed that appellant had the ability to conform his behavior to a strict regimen, such as the environment of a state prison. (28RT 3293.) Even though a person has brain damage, they can still have emotions and feelings of being able to bond with other human beings. (28RT 3294.)

James Esten, a retired correctional consultant from the California Department of Corrections, testified that all correctional facilities are based on classification – classification takes and quantifies, as best as possible, all of the characteristics of the various inmates and applies certain criteria, such as the commitment offense, background factors, and history, to place inmates in the appropriate level of institution based on their needs. (29RT 3500-3503.) Esten typically testifies on behalf of the defense at the penalty phase of death penalty hearings, as well as Three Strikes cases and cases where the penalty phase has been overturned by the California Supreme Court. (29RT 3508.) In the present case, the defense asked Esten to review the circumstances of the offense, speak with appellant, and draw a conclusion as to appellant's amenability for placement in a life without possibility of parole setting. (29RT 3509.)

State prisons are classified as one of four levels – one being the lowest level, or minimum security, and four being the highest level, or maximum security. (29RT 3509.) "Level four" is the most restrictive and structured environment available. (29RT 3510.) A person convicted of first-degree murder with special circumstances and sentenced to life without the possibility of parole would be assigned to a maximum security "level four" prison. (29RT 3509-3510.)

Esten reviewed appellant's records from Los Prietos Camp, including interviews of staff at that camp, as well as the county jail and juvenile hall, and also reviewed the commitment offense. (29RT 3512.) Esten also spoke with

appellant face-to-face on four separate occasions. (29RT 3513.) The purpose of the interviews was to get a feel for appellant's maturity level so that Esten could make an assessment as to his ability to function within a maximum security prison setting. (29RT 3514.) Prior prison behavior is the best indicator of future prison behavior, but jail is not a direct parallel to the kinds of behavior and expectations set in prison, nor is Juvenile Hall. (29RT 3514-3515.) A "level four" institution would be a maximum security general population life without possibility of parole institution. (29RT 3515-3516.)

Based on Esten's review of appellant's prior incarceration records and interviews, Esten opined that appellant could be placed in a "level four" maximum security prison as a life without possibility of parole prisoner. (29RT 3516.) In making this determination, Esten weighed the negativity of reports of appellant's misbehavior at Los Prietos Boys Camp, county jail, and Juvenile Hall, against reports that were either neutral or positive. (29RT 3517.) With respect to the inmate disciplinary report regarding appellant possessing a modified "spork" eating utensil, Esten testified that the modification of the spork from a prison standpoint was not sufficient to warrant it being charged as a weapon – it would have been charged as contraband because it had been modified from its original state, but it was not a weapon. (29RT 3518-3519.) If appellant had a piece of sharpened steel, that would qualify as a weapon. (29RT 3519.)

Esten also reviewed a report by Probation Officer Rick Diaz, which indicated that appellant's drug of choice was methamphetamine. The fact that appellant used methamphetamine could explain his behavior and some of the elements of the crime. Methamphetamine was far less available inside the prison than it is on the street; no one maintains a methamphetamine habit or ongoing methamphetamine use while in state prison. (29RT 3520-3521.)

Esten also reviewed a report written by Los Prietos Boys Camp counselor Kim Herman, which referred to appellant "mad-dogging" her (i.e., an intimidating stare). Esten attributed appellant's behavior to a lack of maturity and the need to impress a peer group, but testified that that kind of behavior was far less prevalent in the prison system because inmates tend to warn each other about this type of behavior. (29RT 3521-3522.) Herman's report also indicated that appellant drew and presented an inappropriate picture to her of a dog attacking a woman in a sexual manner. (29RT 3522, 3537.) Other reports indicated that the interviewee could not remember who appellant was, which means that he blended in and did not stand out either in a positive or negative way. (29RT 3523.)

If a young inmate entered a "level four" state prison with a belligerent or hostile attitude, he would fare very badly, since the majority of inmates in "level four" are "lifers" who do not want the status quo of their home disrupted by a youngster coming in and changing the policies and procedures. (29RT 3523-3524.)

When Esten initially interviewed appellant, he did not believe a long-term prison commitment was possible; however, appellant's attitude changed and he was "eager to get over with and get on with his program." (29RT 3524.) Appellant saw that he was going to have to make some changes in his own manner of behavior to adjust to life in prison. Esten believed appellant was mature enough, having gone through a trial and conviction by jury, to make those changes. Esten opined that appellant would not enter prison with a belligerent attitude. (29RT 3525.)

Based on appellant's relatively young age, Esten opined that once in a "level four" institution, appellant would be "scared to death." (29RT 3525-3526.) Appellant would not have a special status in prison, since everybody in a "level four" institution is a lifer who has killed someone. (29RT 3526-3527.)

The fact that appellant had been convicted of rape and other sexual-related crimes would put an "r" for "restricted" on him once in custody. Inmates do not like sex offenders, so the fact that appellant had been convicted of rape would put pressure on him. (29RT 3527.) Esten opined that appellant would enter prison as a youngster looking over his shoulder not knowing who to trust, and fearful from day one. (29RT 3527-3528.)

Assuming appellant was sentenced to life without the possibility of parole, he could do productive things in prison, such as completing his high school education, and he could aspire to be a teacher's aide or clerical assistant. (29RT 3528-3529.) Although there are prison gangs and disruptive groups in prison, appellant did not express any interest in joining any of those groups – he told Esten that he believed he had the strength to resist. (29RT 3530-3531.) Esten noticed that appellant had "significant artistic skills" and that he might be able to avail himself of an arts and correction program. (29RT 3532.)

Lifers, or inmates serving life sentences, have a stabilizing influence on other inmates because they do not want any disruption to their routine. Lifers can also have a positive influence on other prisoners or young inmates by taking them under their wing and showing them the way to serve their sentences. (29RT 3533.) Esten could see appellant being a mentor for younger people like himself 12 years in the future, since he has the ability to be level-headed when he wants to be and is intelligent. (29RT 3534.) Esten believed that appellant needed the greatest amount of control in prison as possible. (29RT 3535.) He had no reservations whatsoever that appellant could, given a willingness on his part, be a successful life without possibility of parole inmate in a "level four" maximum security prison. (29RT 3536.)

Danny Castillo, an Operator I for the City of Santa Maria, gunnery sergeant for the Army National Guard, as well as a volunteer youth leader/pastor for the Foursquare Church in Santa Maria, testified that he was

familiar with Rick Martinez, and that through Rick, he came to know appellant. (29RT 3573-3574.) Appellant was 13 or 14 years old when he first started coming to the church, and Castillo saw him for a period of two or three years. (29RT 3575.) Castillo came to realize that appellant was having some problems with the law, so Castillo would speak with Rick Martinez and also encourage appellant to stay out of trouble and attend church youth group activities. (29RT 3576.)

When appellant would participate in church activities, he related very well to other kids. (29RT 3577.) Appellant was a quiet young man who kept to himself a lot. (29RT 3578.) Castillo believed that appellant was upright, honest, and if a person were to ask him a question, he could give a direct answer. (29RT 3579-3580.)

Eva Martinez (appellant's mother), Tommy Martinez (appellant's father), Rick Martinez (appellant's uncle), Debbie Martinez (appellant's aunt), Jennifer Martinez (appellant's cousin), Roy Martinez (appellant's younger cousin), Angel Martinez (appellant's younger brother), Matilda Munguia (appellant's aunt), and former girlfriends Lisa Esquivel, Elizabeth Fuentes, Veronica San Augustine, Veronica Hernandez, all testified to, inter alia, appellant's childhood growing up, including his use of inhalants as a teenager (see 27RT 3124-3126), family background, as well as their positive experiences with appellant, his girlfriends and positive treatment of women, and the fact that they loved and missed him. (27RT 3089-3161 [Eva Martinez], 3163-3195 [Tommy Martinez], 28RT 3209-3221, 3226-3236 [Debbie Martinez], 3238-3243 [Jennifer Martinez], 3386-3397 [Roy Martinez], 3403-3406 [Lisa Esquivel], 3407-3414, 3421-3425, [Elizabeth Fuentes], 28RT 3427-29RT 3432 [Veronica San Augustine], 29RT 3433-3444 [Veronica Hernandez], 3449-3455 [Angel Martinez], 3455-3466 [Matilda Munguia].)

C. Rebuttal Aggravating Evidence

Peter Leyva, Jr., a supervisor at the Tri-County Boot Camp for the Santa Barbara Probation Department, supervised appellant at the camp. (29RT 3581-3583.) Leyva recalled a few incidents where he wrote up appellant for disciplinary problems, repetitious acts of misconduct, and failure to follow instructions from staff. Appellant had a "nonconcerning attitude" towards authority. (29RT 3583.) With other minors, appellant was disruptive, and at times influenced the group situation because of his defiance. Several times, because of his poor attitude, appellant went from a warning to "three checks" where he lost a few weeks in the program. (29RT 3584.) Although given repeated opportunities to conform, appellant did not. (29RT 3584-3585.) Appellant was involved in a gang, and his disruptive behavior as a ringleader influenced other minors. Appellant openly made note of his gang and his gang moniker. (29RT 3585.) Appellant did not follow directions after warnings, and did not show concern for the type of disciplinary actions that he received. (29RT 3586.)

Jim Reyes, a probation officer with the Santa Barbara County Probation Department, had contact with appellant from 1992 to 1994 at Los Prietos Boys Camp, where he worked as a juvenile institution officer at the time. (29RT 3588.) Reyes recalled continuous behavioral problems with appellant – he was written up on several occasions for disrupting the entire group and the program at the camp; he ran away from camp a few times, and associated with West Park gang members at the camp; and, on occasion, appellant and other gang members escaped from the camp's baseball field. (29RT 3589.) Reyes's opinion of appellant was that he was "absolutely not trustworthy," because he was sophisticated enough to have people start fights with other people in order to get to someone else that he wanted to start a problem with. Several times, appellant was removed from the camp for outright name-calling to the staff,

including racial terms for some of the Black staff members. (29RT 3591.) Appellant had a hard time taking direction from female staff members, and possessed pornography, which was "outright disrespectful." (29RT 3592.)

Kim Herman, an employee of the probation department of Santa Barbara Juvenile Hall, and a former supervisor in charge of safety and security and welfare of the minors at Los Prietos Boys Camp, testified that when she supervised appellant, she found him "[o]ften defiant, argumentative, noncompliant with simple directions." (30RT 3683.) Appellant caused Herman problems as a supervisor – on several occasions, appellant would not follow the simplest of instructions, and would disregard directions from female staff members, or "slowly" comply. (30RT 3683-3684.) In Herman's opinion, appellant was not trustworthy. (30RT 3684.) Appellant was a member of the Santa Maria West Park gang, and was involved in that gang the entire time Herman dealt with him. (30RT 3684-3685.)

On one occasion, Herman gave appellant a simple direction to line up. Instead, appellant did the opposite and went to his bunk area. When Herman placed him on a disciplinary list, appellant responded by "giving her the middle finger." On another occasion, appellant drew a "grotesque drawing" of Herman and her pet dog, Jack. (30RT 3685-3686.) The drawing was of a naked woman on her hands and knees with a dog standing behind her attempting sexual intercourse. The note on the top of the picture read, "Bitch, no wonder you can't get a man. It's cause you are into doggie style and when I say it I mean it. I would give you dick but I will probably catch Jack disease." (30RT 3687.) Underneath the picture was more writing by appellant: "Mrs. Herman, also known as Broadzilla." (30RT 3687-3688.) The picture was anonymously placed on the staff counter, but eventually, after threatening people to come forward, appellant came forward. After disciplining appellant, appellant stared at Herman intimidatingly, or "mad-dogged" her, on more than one occasion.

(30RT 3688.)

Appellant got along with a few other juveniles and played sports activities with them during free time. However, appellant would intimidate or "peer-pressure" weaker individuals and instigate. Appellant was eventually removed from the camp. (30RT 3689.)

Robert Read, a correctional officer with the Santa Barbara County Sheriff's Department who worked in the main jail in Goleta, had dealings with appellant in the northwest area of the jail on more than one occasion. (30RT 3671-3673.) The first time Read saw appellant, appellant gave him a "cold, hard stare." Read asked appellant if he had a problem, and appellant said, "No," and turned his head. (30RT 3673.) When asked to do certain things, appellant responded very nonchalantly and would take his time doing what he was asked to, or do it when he felt like doing it. (30RT 3674.) Appellant was told to follow the rules, but would follow the rules only if he wanted to. In Read's opinion, appellant was in defiance of the rules. (30RT 3674-3675.)

For example, on one occasion, appellant was in the shower and Read told appellant to go back to his cell because he had another group which he needed to watch in the day room area of their housing location. Appellant showered without responding back to his cell, delaying the other people who needed to go into the day room area and wasting their time. On another occasion, when told about following the rules, appellant mumbled, "I got no place to go, I'm here for life." (30RT 3675.) Also, Read once saw appellant in the law library playing cards with a group of other people, which was the first time Read had seen anybody doing anything other than working on their cases. One must have permission to use the law library, and law library use is a privilege. (30RT 3676-3677.) Read wrote appellant up for the law library incident. (30RT 3677.)

Richard Diaz, a Santa Barbara County Probation Department employee who worked as a probation officer at the time he supervised appellant for two and a half years, testified that he would contact appellant in the field or at his home, sometimes in Diaz's office, sometimes at school. The purpose of Diaz's contacts were to make sure that he abided by the terms and conditions of his probation. (30RT 3693.) In supervising appellant, Diaz reviewed appellant's file and spoke with him regarding the use of illegal substances. Diaz never saw appellant under the influence of toluene or other solvents, and never had any indication that he had used such a substance. (30RT 3694-3696.) Diaz also spoke with appellant's family, and there was no indication from family members that he used toluene. (30RT 3696-3697.) When Diaz stopped by appellant's home unannounced, he never found anything in appellant's room or otherwise which would indicate that he was using toluene. Diaz reviewed appellant's "medical intakes" when he was admitted to Juvenile Hall, and none of those forms indicated toluene use. (30RT 3697.) Appellant did mention using other substances and stated that alcohol and marijuana were his primary drugs of choice along with methamphetamine. (30RT 3697-3698.) Diaz never saw appellant under the influence of methamphetamine, but had seen appellant on two occasions after he had been drinking alcohol. (30RT 3698.)

Appellant is a West Park gang member. (30RT 3698.) In 1995, Diaz and another officer contacted appellant at the Strawberry Festival and found a knife in his possession, which was a violation of his probation terms. (30RT 3698-3699.) Appellant was also associating with other West Park gang members, another violation of his probation terms. According to probation records, appellant became involved in the West Park gang when he was 14 or 15 years old. To Diaz's knowledge, appellant never ceased his involvement in that gang. (30RT 3699.) In one photograph, appellant had both of his arms crossed in front of his chest, signifying an "X," or a 10. Appellant's brother,

Isaac, had both arms held up with his fists closed, signifying "one one." Another individual had only one arm up, therefore collectively signifying the number 13, a symbol that Southern Californian gangs use to identify themselves. (30RT 3700-3701.)

In 1992, appellant spent 47 days in custody; in 1993, 33 days; and in 1994, 184 days. In 1994, there were also times there were arrest warrants out for appellant. (30RT 3702.) Warrants were issued on two occasions, after appellant escaped from Los Prietos Boys Camp on April 6, 1994, and was apprehended on April 23, 1994, and after a second escape from Los Prietos Boys Camp in June of 1994, until he was arrested on September 28, 1994. In 1995, appellant spent approximately 28 days in custody; in 1996, excluding the current offense, appellant spent 128 days in Santa Barbara County Jail, beginning on April 2, 1996 and running through July 24, 1996. (30RT 3703.) Most of the time Diaz had contacts with appellant, he was very quiet, "flat," and showed no emotions. (30RT 3704.)

Appellant was also subject to house arrest and electronic monitoring, but was unsuccessful at completing either of those forms of detention. (30RT 3706.) Appellant violated his terms and conditions on several occasions – sometimes when he was not at his residence or he absconded from the residence. Appellant violated his curfew as well. Sometime in 1993, appellant went to live with his father in Simi Valley. Appellant needed permission to live with his father, which he did for a short time, but then returned without permission and without letting the probation department know that he was back in the area. (30RT 3707.)

At Los Prietos, Diaz attempted to get appellant into counseling, but he showed no interest. Appellant never completed counseling because he never completed the Los Prietos program. (30RT 3732.) Appellant was also required to complete the Counseling and Education Center program – a school for

probationers having difficulty in school or not attending school. Appellant did not complete that program due to his truancy. (30RT 3733.) When appellant was 17 years old and terminated from Los Prietos, he received Juvenile Hall time. (30RT 3734-3735.)

Victor Coronel, a correctional officer for the Sheriff's Department at the main jail in Santa Barbara, had dealings with appellant in the northwest section of the jail. (29RT 3598-3599.) The northwest section of the jail houses between 75 to 100 high security inmates, the majority having been involved in violent crimes or assaults against officers within the facility, out in the street, or against inmates inside the facility. (29RT 3599-3600.) There is more supervision in that area of the jail as opposed to other areas. (29RT 3600.)

The few times Coronel dealt with appellant, appellant did not appear to want to do what he was told, or did it very slowly, as if he wanted to do it on his own time. (29RT 3600.) On one occasion, Coronel and a sergeant were inspecting a cell appellant and a cellmate were housed in. (RT 3600.) When Coronel asked appellant to sit down, he refused to do so, and said he could not do it because his cellmate would not allow him to sit on his bunk. (29RT 3601.) The sergeant with Coronel said, "Why don't you just do it," and appellant then sat down because his cellmate looked at him and told him, "Go ahead." While looking through the cell, appellant and his cellmate told Coronel that he did not have the right to look through "their stuff," which was untrue. (29RT 3601-3602.)

On another occasion, when appellant was going to court, Coronel noticed the tooth of a comb stuck on his eyebrow, which he had appellant put on the floor. After appellant was searched and put on his shoes, he picked up his court papers and the piece of the comb which Coronel had told him to leave on the floor. Appellant then walked away, but Coronel noticed that the piece of comb was missing. Coronel walked back over to appellant and asked him

if he had picked it up. Appellant said, "Yes," pulled it out of his pocket, and gave it to Coronel after Coronel requested him to do so. (29RT 3602-3603.) It appeared to Coronel that appellant did not want to do the things he was told to do, and did not want to follow directions. Coronel opined that appellant could not be trusted. (29RT 3603.)

Dr. David Frecker, a neurologist in Santa Barbara, examined the images provided by the defense and a copy of Dr. Wu's report, and also reviewed Dr. Wu's penalty phase testimony, as well as some background materials. (30RT 3629-3637.) Dr. Frecker testified that Dr. Wu's finding of abnormality in the front orbital area of appellant's brain was not possible, because the area of abnormality was not actually in the brain. (30RT 3638-3639.) Also untrue was Dr. Wu's global statement that there were significant abnormalities in the frontal lobe. (30RT 3643.) There were no abnormalities to appellant's frontal lobes exhibited in any of the three slices depicted in People's Exhibit O. (30RT 3648.)

Dr. Frecker found Dr. Wu's theory regarding brain damage having been caused by solvent abuse "baffling," and did not agree with it. Solvents are volatile chemicals which enter from the lungs into the bloodstream, and then chemically alter the membranes or things that surround cells. Solvents work similar to the way anesthetics work. (30RT 3652.) The solvent itself does not actually get in large quantities into the brain. Solvents go into the brain and change the membranes of the brain so the electrical circuits do not work right, which is how people get "high" off of it – it changes the way the chemistry and electricity in the brain work. (30RT 3653.) Damage only occurs after long-term usage, i.e., on a daily basis for months and months and possibly years, and the damage typically occurs in the parts of the brain that are most sensitive to lack of oxygen which are in the brain's temporal lobe. (30RT 3653-3654.) Dr. Wu did not indicate that he saw anything abnormal about the temporal area of

appellant's brain. (30RT 3654.)

Typically, people who chronically use solvents become docile and withdrawn – they do not interact as much with society and seem to become less functional. (30RT 3655-3656.) Based on Dr. Frecker's review of the PET scans of appellant's brain, appellant's brain appeared to be normal. (30RT 3656-3657.) Contrary to Dr. Wu's testimony, one cannot look at a spot on the brain in a PET scan and make a cause-and-effect relationship between the behavior a person demonstrates. (30RT 3661.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO QUESTION JUROR NO. 12

Appellant contends that the trial court violated both state law and his federal constitutional rights in declining to question Juror No. 12 per his request. (AOB 97-115.) On the contrary, the trial court properly exercised its discretion in declining to question Juror No. 12 under the circumstances of this case.

A. Factual Background

In her jury questionnaire, Juror No. 12 indicated that she had been employed as the lead clerk in Santa Maria Juvenile Hall as part of the Santa Barbara Probation Department for 20 years. (14CT 4187-4188.) She recognized appellant's name from the news media and because he had been at Santa Maria Juvenile Hall, and based on information she had received about this case, she believed it was a "very serious case." (14CT 4187, 4198-4199.)

At defense counsel's request, the trial court conducted confidential questioning of Juror No. 12 based on her personal knowledge of appellant. (See 11RT 1154-1155, 1157.) During the questioning, Juror No. 12 indicated that she knew appellant from having had contact with him at Juvenile Hall, and that she was aware that "he had an extensive juvenile record, and I think that he's had a lot of choices to make in his lifetime, and I don't see that he's made any better choices." (11RT 1159.) The trial court then questioned Juror No. 12 as follows:

> Q: Having those feelings, does that mean – well, the question is, whenever we know somebody that's involved in a trial – for example,

when the Court, myself, when I know someone, I have to decide, is what I know about that person or how well I knew that person going to affect my judgment? And if I think it is, then I don't sit as a judge. I call another judge and ask them to handle the case. Because these cases can only be decided by what comes to us from the witness stand, the evidence in court.

A: Right.

Q: Now, there's a lot of people in this community I know who come into my courtroom and I decide their cases, so it's not just knowing someone.

A: Right.

Q: Because in a community this small, we run into each other all the time. So it's – so the question gets back to, is this a person that you know so much about, or what you know about is such that it would affect your ability to be impartial in the case?

A: No.

(11RT 1159-1160.)

Defense counsel then questioned Juror No. 12 further, and she reiterated that she did not think that appellant had made "real good choices." (11RT 1160.) Juror No. 12 did not know anything about appellant's family background other than the fact that he had been at Juvenile Hall, and her interaction with appellant had been simply in the performance of her job – handling the intakes and releases, and supervising the children when they were waiting to be interviewed awaiting court – which was primarily clerical. As to specific interaction with appellant, Juror No. 12 indicated that she was sure she had interaction with him, but did not remember anything specific. (11RT 1161.)

Later, defense counsel challenged Juror No. 12 for cause as follows:

> [Juror No. 12] is the lady that knows [appellant] from Juvenile Hall, and I think that on guilt or innocence, someone who's been in a – that kind of custodial setting and been a supervisor over [appellant] and gotten to know a little bit about him should be disqualified from deciding his guilt or innocence, because, for one thing, she knows, at the guilt or innocence stage, that [appellant] has committed prior offenses that are not otherwise admissible on the guilt phase of the trial.
>
> She may not remember or may not even have known at the time what they were, but she knows that they exist. She knows that he did something to get put in juvenile hall, and that's not knowledge that a juror should properly have.

(11RT 1181.)

The prosecutor responded as follows:

> Judge, she made it pretty clear that she's actually just a clerk, processes intake, and she made it clear that whatever it was she heard wouldn't influence her in this particular case. I don't think that's any different than somebody who reads in the newspaper an account of an offense and says they'll put it aside, just wait till they hear the testimony, the evidence in the trial.

(11RT 1181.)

The trial court denied the challenge for cause. (11RT 1182.) Juror No. 12 ended up as a sitting juror on the present case. (See 4CT 1125-1127.)

On May 19, 1998, prior to trial, the trial court conducted an in camera hearing regarding two reports regarding two separate jurors – Juror Nos. 6 and 12 – which had been brought to its attention. Juror No. 6 had apparently received an annoying phone call which she believed might be intimidation relating to the present trial. Juror No. 12 had a telephonic conversation with

Investigator Tom Barnes of the Santa Barbara District Attorney's Office which was summarized in a memo to the prosecutor dated May 15, 1998, as follows:

> Pursuant to your (via Tracy Grossman) request to obtain any disciplinary reports that may exist in [appellant's] Juvenile Hall file, at about 11:30 a.m., date, I phoned Juvenile Hall in Santa Maria and spoke with "Dana." After explaining what I needed, Dana spoke with her supervisor (name unknown) and said that I would need a court order in order to access the juvenile file.
>
> Over the next 30 or so minutes, in coordinating the matter with Tracy Grossman and Juvenile Hall, I spoke with Dana two or three additional times. During one of these subsequent calls, Dana informed me that she was "on the jury panel" for [appellant's] case, to which I responded that I found it unusual that one side or the other hadn't excused her. I then asked Dana her last name and she stated "[W]." Dana, somewhat jokingly, then asked f [*sic*] I could get her off the jury, and I responded that I could not, and I terminated the call.
>
> On my next call back to Juvenile Hall, I explained to Dana that it would be improper for her to be involved in this matter any further and I asked for her supervisor. I was then put in contact with Sandi Davis for any further assistance.
>
> At about 12:15, date, I spoke with Tracy Grossman and informed her of my contact with Dana [W]. Tracy advised me not to involve Dana any further, to which I said that I had already taken that action.

(A/C[12] CT 516.)

The trial court questioned Juror No. 6 in camera about the phone call she had received. Juror No. 6 advised the trial court that it was either a "prankster call" or "somebody looking for a donation." Before Juror No. 6 hung up, the

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12. "A/C" refers to the "Accuracy/Correction" Clerk's Transcript.

caller whispered, "I know who you are." The trial court then asked whether what had occurred would affect her decision in the case, and she replied, "No," and indicated that she would not hold it against either the prosecution or the defense. (CRT[13] 1453-1454.) The trial court then allowed both counsels for the prosecution and the defense to question Juror No. 6 (CRT 1454), and cautioned her not to discuss the incident with any of the other jurors (CRT 1455).

Regarding the contact between Juror No. 12 and the District Attorney's Office Investigator, the trial court asked whether defense counsel wanted to question Juror No. 12 (see CRT 1456-1457), and the following colloquy ensued:

> [DEFENSE COUNSEL]: *I guess I'm a little more concerned about the apparent attitude expressed by* [Juror No. 12]. The report mentions that she asked Mr. Barnes if he could get her off the jury. And he stresses that that was half joking, but it still disturbs me a little that she would ask such a question. *I'm not concerned about the substance of the contact*, and I know Mr. Barnes, and I know that was innocent on his part, but it might be advisable to inquire of [Juror No. 12] if she's willing and able and fit for further duty *in light of the comment.*
>
> THE COURT: I'm not willing to do that, counsel. Every one of these jurors would like to not be on this jury . You know, when they were sworn . . . I swear, at least half of them sort of went into shock. I don't think any of them thought they were going to be there to be sworn in. You know, here we are going along kicking people off, and all of a sudden – in fact, I kind of went into shock –

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13. "CRT" refers to the single volume "Corrected Transcript Pages To The Reporter's Transcript On Appeal As Per The Trial Court's 12-10-98 Order."

. . .

that *you accepted the jury*. And, you know, I just think that what she's expressing there is not – doesn't relate to her qualifications. It just relates to, you know, a feeling we would all have if we sat there. "Is there any way I don't have to do this?"

And to then go back and give her an option, another option, not to serve is – is – you know, if we gave that to each juror, I'm sure they would take it. And I – you know, unless there's – that part of it is something I'm not willing to delve into. She'd just tell us she doesn't want to be here, you know, and so would the other 14, 13, if we could ask them.

So I think, *unless you have some reason to think that it's something other than just a normal desire not to be a juror*, I don't want to –

[DEFENSE COUNSEL]: *I don't have anything other than what's on the face of that report.*

(CRT 1458-1459, italics added.)

Defense counsel asked that the two reports be filed and made a permanent part of the record, which the trial court so ordered. (CRT 1459.)

B. Under The Circumstances, The Trial Court Properly Exercised Its Discretion In Not Questioning Juror No. 12 Regarding Her Half-Joking Question As To Whether The District Attorney Investigator Could Get Her Off The Jury

Section 1089 authorizes a trial court to dismiss a juror before the jury returns its verdict if the juror becomes ill or upon a showing of good cause that the juror is unable to perform his or her duty. (*People v. Daniels* (1991) 52 Cal.3d 815, 864.) A trial court's exercise of discretion will be upheld if supported by substantial evidence. (*People v. Johnson* (1993) 6 Cal.4th 1, 21.)

A juror's inability to perform his or her functions must appear as a "demonstrable reality" and will not be presumed. (*Id.* at p. 21; *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484.) This Court has recognized that a trial court has power to conduct "discreet and properly limited investigation" of possible jury misconduct, as well as the trial court's "broad discretion as to the mode of investigation." (*People v. Keenan* (1988) 46 Cal.3d 478, 533, 539.)

Here, the gist of appellant's claim is that Juror No. 12's prior knowledge of appellant, coupled with her half-joking question whether the District Attorney Investigator could get her off the jury, mandated that the trial court inquire whether Juror No. 12 was "biased, incompetent and/or otherwise able to serve as a juror." (AOB 104.) Appellant contends that there were a number of unanswered "obvious and important" questions, including:

> (1) Whether the motivation of Dana W. - Juror No. 12 (684037) to get off the jury, as expressed to the D.A. Investigator, stemmed from either: (a) her knowledge that Appellant Martinez had an "extensive juvenile record"; (b) her opinion that Appellant Martinez had not made "better choices" or "real good choices" in his lifetime; (c) her concern that this was a "very serious case" as reflected in the severity of the charges; and/or (d) all of the above.

(AOB 106.)

The problem for appellant, however, is that these supposedly unanswered questions were previously answered during prior questioning by both the trial court and defense counsel, when Juror No. 12 indicated she would follow the law and consider both penalties before reaching a verdict if the case reached a penalty phase, and that notwithstanding her knowledge of appellant and his juvenile record, she could be fair and impartial. (See 11RT 1088-1103, 1159-1161.)

Therefore, the real issue is whether the trial court was obligated to question Juror No. 12 regarding her "somewhat joking[]" question to Investigator Barnes regarding whether he could "get her off the jury."[14/] While appellant contends that the trial court refused to question Juror No. 12 (AOB 107-108), it is plain that the trial court gave defense counsel the opportunity to request that the trial court question Juror No. 12 further, but he simply declined to do so. (See CRT 1459 ["unless you have some reason to think that it's something other than just a normal desire not to be a juror. . . ."].) In other words, defense counsel was not foreclosed from making a showing as to why the trial court should question Juror No. 12 – i.e., for the same "unanswered questions" he raises here, including, inter alia, the fact that she was aware of appellant's extensive record, her opinion that he had not made good choices, and the like, as opposed to simply arguing that the trial court should question her because her question to the investigator was indicative of a possible "bad attitude." However, after the trial court indicated that Juror No. 12's question was simply a typical expression of reluctance to serve on a jury, defense counsel indicated that he did not "have anything [i.e., any other reason to question Juror No. 12] other than what's on the face of that report." Having failed to raise the points he now seeks to raise here, appellant can hardly fault the trial court for declining to question Juror No. 12.

Accordingly, under the circumstances, the trial court did not abuse its discretion in not questioning Juror No. 12 regarding her half-joking question to the District Attorney Investigator. The question was nothing more than a typical expression of reluctance to serve, and had nothing to do with Juror No. 12's prior knowledge of appellant, which had been discussed and dealt with

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14. Defense counsel made clear that he was not concerned about the "substance of the contact," but simply whether the trial court should inquire whether Juror No. 12 was "willing and able and fit for further duty" in light of her question to Investigator Barnes.

earlier during voir dire. And since Juror No. 12 had previously stated that she would be fair and impartial and there is no indication to the contrary, appellant was not deprived of a fair trial or due process.

In attempting to demonstrate that appellant was prejudiced, appellant points out that Juror No. 12 was aware of appellant's juvenile record (see AOB 111-113) – a point which was addressed *prior to* her joking comment to the District Attorney investigator. Upon questioning by the trial court, Juror No. 12 indicated that her knowledge of appellant would not affect her ability to be impartial in the case. (See 11RT 1159-1160.) Moreover, trial counsel could easily have exercised a peremptory challenge against Juror No. 12 following the denial of his challenge for cause -- he did not. (See 11RT 1183.) Additionally, the jury was instructed to "determine the facts from the evidence received in the trial and not from any other source," to "not be influenced by pity for a defendant or by prejudice against him," and "to not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (CALJIC No. 1.00; 4CT 1188-1189.) Jurors are presumed to adhere to the trial court's instructions absent evidence to the contrary. (*People v. Thomas*, *supra*, 218 Cal.App.3d at p. 1487, citing *People v. Collins* (1976) 17 Cal.3d 687, 694, fn. omitted; *People v. Hill* (1992) 3 Cal.4th 959, 1011; *People v. Pinholster* (1992) 1 Cal.4th 865, 925; *People v. Bonin* (1988) 46 Cal.3d 659, 699.) No contrary evidence has been presented here.

As for the penalty phase, appellant attempts to demonstrate prejudice (assuming there was error in the first place) by noting that Juror No. 12 mentioned during voir dire that she did not believe appellant had made "real good choices" (see 11RT 1160), and that during his penalty phase closing argument, the prosecutor used the words "choose," "choice" and "choices" 42 times. (See 32RT 3977-4024.) Therefore, according to appellant, "[i]t takes no imagination to appreciate that D.A. Sneddon was directing his argument to

[Juror No. 12]. . . ." (AOB 114.) Appellant's argument is premised on sheer speculation – that the prosecutor remembered Juror No. 12's comment made weeks earlier during voir dire and deliberately crafted a penalty phase argument around appellant's "choices"which was aimed specifically at Juror No. 12 and therefore repeatedly used the words "choose," "choice,"and "choices" in an effort to secure a death verdict. This Court should reject such rank speculation here. There being no evidence that Juror No. 12 was either biased against appellant, incompetent, or disobeyed the trial court's instructions, appellant's claim must be rejected.

II.

THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENTS; NO *MIRANDA* VIOLATIONS OCCURRED, AND ANY ERROR WAS HARMLESS

Appellant contends that the trial court erred in failing to exclude statements from him obtained in violation of *Miranda* and his Fifth, Sixth, and Fourteenth Amendment rights. Specifically, he contends that his statement, "That's all I have to say," or "That's all I have to talk about," made at the conclusion of his interview with Officer Lopez, constituted an invocation of his right to remain silent. (AOB 153.) Appellant then contends that his right to cut off questioning was not "scrupulously honored" when he was reinterrogated by Detectives Carroll and Aguillon. (AOB 159-164.) Appellant further contends that, when interviewed by Detectives Carroll and Aguillon, his statement "I don't want to talk about it anymore right now," constituted a second invocation of his right to remain silent. (AOB 166-173.) Lastly, appellant contends that he invoked his right to counsel during a separate interview by Detectives Carroll and Aguillon, in which he stated, "I think I need to talk to my lawyer before I take the polygraph." (AOB 173-178.) Respondent disagrees. Because appellant's statements were either equivocal or conditional, the police were entitled to continue questioning him, and no *Miranda* violation(s) occurred.

A. Factual Background

1. Interview By Officer Lopez

Following appellant's arrest for the assault of Sabrina Perea on December 4, 1996, the police transported him to the Santa Maria Police Department, where he was interviewed by Officer Jeff Lopez. Officer Lopez advised appellant of his *Miranda* rights, which appellant indicated he

understood and waived. Officer Lopez then questioned appellant regarding the incident involving Sabrina Perea. (8RT 656-667.) Officer Lopez concluded the interview when appellant said something to the effect of, "That's all I can tell you." (See 8RT 669, 691-692.)

2. First Interview By Detectives Carroll And Aguillon

On December 5, 1996, Detective Gregory Carroll, who was investigating the death of Sophia Torres in Oakley Park, became aware that appellant had been taken into custody in connection with the Perea assault. Based on his review of the initial reports completed by Officers Lopez and Torres, Detective Carroll was aware that appellant had been advised of and waived his *Miranda* rights the night before. (8RT 694-696.)

Therefore, at about 10 a.m. on December 5th, Detectives Carroll and Aguillon interviewed appellant at the Santa Barbara County Jail, Santa Maria Substation. The interview was tape recorded. (8RT 695-697.) At the beginning of the interview, Detective Carroll asked appellant if he remembered "the officer who read you your rights last night," and appellant indicated that he did. Detective Carroll then asked if appellant remembered "those rights and do you still understand them and everything?" Appellant replied, "Yeah." Detective Carroll asked, "OK, um, do you still want to talk to us?," and appellant answered, "Yeah." The detectives then questioned appellant about the Perea incident, as well as Sophia Torres's death. (11CT 3069-3083; 8RT 707, 710.)

Towards the end of the interview, Detective Aguillon advised appellant to "think about it" and indicated that they would be taking a break. (8RT 726.) As everyone prepared to leave, appellant said, "I don't want to talk anymore right now." (See 8RT 712, 727-728.) Detective Carroll said that that was fine, that they were going to take a break, suggested that appellant "think about it,"

and that they would "come back and talk with" him. (RT 712.) Appellant replied, "Okay." (8RT 712-713.)

Later that afternoon, at about 5 p.m., when Detectives Carroll and Aguillon transported appellant to Valley Community Hospital for the S.A.R.T. exam, Detective Carroll asked appellant if he had "thought it over." Appellant replied, "No, no really." (8RT 714-716, 731.) Detective Carroll then asked appellant to tell him his version of what transpired on the night that Sophia Torres was killed. (8RT 716, 731.)

3. Third Interview With Detectives Carroll And Aguillon[15/]

After returning from the hospital to the Santa Maria Police Department, appellant was interviewed again by Detectives Carroll and Aguillon. Towards the end of the interview, Detective Carroll told appellant to "continue to think about it." As the detectives were walking out of the room, Detective Aguillon asked appellant, who was standing up and handcuffed, whether he would take a polygraph examination. Detective Aguillon said that he could have someone there to administer the examination in five minutes. Appellant replied, "I think I should talk to a lawyer before I decide to take a polygraph." (See 8RT 716-720, 732-735.)

The detectives interviewed appellant once more the following day, on December 6, 1996, at about 9 a.m. The detectives asked if appellant would mind if they talked to him, and appellant replied, "No," and kind of shrugged his shoulders. (8RT 720-722.) Towards the end of the interview, appellant denied involvement in the Zimmerman incident, but as to the other two victims,

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15. Although this was appellant's second formal station-house interview with the detectives, since appellant refers to the questioning while being transported to the hospital as constituting the second interview, respondent will refer to this interview as the third interview to avoid confusion.

he stated he was just going to rob them, not rape them. (8RT 721-722.)

B. The Trial Court's Rulings

Following a hearing and argument from counsel on the matter, the trial court concluded that, inter alia, appellant's statement, "That's all I have to say," or, "That's all I have to talk about,"

> I don't believe [it] is an unequivocal or a clear assertion of any constitutional right. I think he was saying at that point, "This is" – as you both used the words, "This is my story and I'm sticking to it," and that's pretty much what he's saying there. And that's how I view it, so I don't believe that he did claim a right to stop talking at that point.
>
> The next one is, "I don't want to talk about it anymore right now," and I cannot agree with Mr. Dullea that the "right now" is surplusage. I think it's – it modifies the immediate sentence before it. "I don't want to talk about it anymore right now."
>
> I'm reminded of the surrender of Geronimo after fighting and fighting the soldiers all of those years, and winning and winning. They finally coerced him out of the hills by threatening his – you know, the children in the tribe, and he came down and he said, "I will fight no more forever." That's unequivocal.
>
> "Right now" means just that. "Right now, I don't want to talk about it."
>
> On the last one, where he said, "I think I used to" – "I think I need to talk to my lawyer before I take the polygraph," I find that was strictly as it says, a desire to talk to a lawyer before he would take the polygraph, not before he would talk any further.
>
> So the Court finds all the statements are admissible, that there was not a violation of the defendant's rights under *Miranda* in those cases.

(8RT 754-755.)

C. Applicable Law

A suspect may not be subjected to a custodial interrogation unless he or she voluntarily, knowingly, and intelligently waived his or her right to: (1) remain silent; (2) the presence of an attorney; and (3) appointed counsel if he or she is indigent. (*Miranda v. Arizona, supra,* 384 U.S. at p. 449; *People v. Sims* (1993) 5 Cal.4th 405, 439.) Statements obtained in violation of the requirements of *Miranda* are generally inadmissible in a criminal trial. (*Miranda v. Arizona, supra*, 384 U.S. at pp. 478-479; *People v. Mayfield* (1997) 14 Cal.4th 668, 732.)

If, at any point during an interrogation, a suspect invokes his rights, the questioning must cease. (*Miranda v. Arizona, supra*, 384 U.S. at pp. 444-445, 473-474.) Questioning may resume where the request for counsel is granted or where the suspect restarts the interview. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 6 L.Ed.2d 378]; *People v. Stitely* (2005) 35 Cal.4th 514, 535.)

> In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect "must *unambiguously*" assert his right to silence or counsel. (*Davis v. United States* (1994) 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (*Davis*), italics added.) It is not enough for a reasonable police officer to understand that the suspect *might* be invoking his rights. (*Ibid.*) Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda* . . . either to ask clarifying questions or to cease questioning altogether. (*Davis, supra*, 512 U.S. at pp. 459-462, 114 S. Ct. 2350.)

(*People v. Stitely, supra*, 35 Cal.4th at p. 535; *People v. Lopez* (2005) 129

Cal.App.4th 1508, 1526.)

On appeal, this Court must:

> accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. [The reviewing court] independently determine[s] from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.

(*People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

1. Officer Lopez Interview

Appellant asserts that his statement, "That's all I can tell you" or "That's all I have to say," was a clear and unambiguous request for counsel that should have halted police questioning. (AOB 157-158.) Not so. A reasonable officer in Officer Lopez's position could conclude that appellant was simply, as the trial court noted, saying, "That's my story and I'm sticking to it," as opposed to invoking his right to remain silent. Indeed, the statement was made at the conclusion of the interview. In other words, appellant was simply ending the conversation, as opposed to invoking his right to remain silent.

Appellant points to the fact that Officer Lopez stopped talking to him after he said, "That's all I have to say" (8RT 699), as evidence that Officer Lopez supposedly understood that appellant was invoking his right to remain silent. (AOB 157-158.) Respondent disagrees. Officer Lopez could simply have ended the interview because appellant said he did not want to talk about the incident for the time being, as opposed to terminating questioning because he believed appellant had invoked his right to remain silent.

In fact, the record demonstrates that appellant did not intend to invoke his right to remain silent. Appellant continued speaking with Detectives Carroll and Aguillon when interviewed the following day. (Cf. *People v. Stitely, supra*,

35 Cal.4th at p. 536 ["instead of exercising the right to silence that Detective Coffey purposefully 'reinforced,' defendant protested his innocence and continued talking about the crime."].) At no time did appellant say anything like, "Hey, I told the other officer I wasn't going to talk to you guys anymore," or, "I'm not talking anymore." Instead, appellant indicated he understood the *Miranda* warnings given to him the previous day by Officer Lopez, and willingly continued answering questions.

Thus, appellant "did not clarify his ambiguous remarks or clearly invoke his constitutional privilege." (*People v. Stitely, supra*, 35 Cal.4th at p. 536.) Therefore, appellant's argument that he was not properly "readvised" of his *Miranda* rights prior to "reinterrogation" is inapplicable here. (See AOB 159-164, citing *Michigan v. Mosely* (1975) 423 U.S. 96 [96 S.Ct. 321, 46 L.Ed.2d 313].) Appellant's statement was more akin to an indication of "an unwillingness to discuss certain subjects without manifesting a desire to terminate an interrogation already in progress.'" (*People v. Silva* (1988) 45 Cal.3d 604, 629-930.)

But even assuming arguendo appellant could somehow be deemed to have invoked his right to remain silent at the conclusion of his interview by Officer Lopez, his "reinterrogation" complied with *Mosely*. As appellant concedes (AOB 157-159), Officer Lopez simply ended the interview when appellant said he had nothing more to say, and did not attempt to wear appellant down or make him change his mind. (See *Michigan v. Mosely, supra*, 423 U.S. at pp. 105-106 [not a case where police failed to honor suspect's decision to cut off questioning either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind].) The questioning by Detectives Carroll and Aguillon, albeit pertaining partially to the same Perea incident, occurred less than 24 hours later after his questioning by Officer Lopez. (See AOB 163 ["[a]s to the third factor

regarding the passage of time between the interrogations, this factor appears to have been satisfied in this instance"].) More importantly, although appellant was not readvised verbatim of his *Miranda* rights, Detective Carroll asked him if he remembered having been read his rights by Officer Lopez, whether he understood them, and whether he still wanted to talk to the police. Appellant indicated that he did, and continued answering questions. (See CT 3069-3083.) Therefore, appellant's "reinterrogation" by Detectives Carroll and Aguillon was constitutionally valid.

2. First Interview By Detectives Carroll And Aguillon

Next, appellant contends that his statement, "I don't want to talk about it anymore right now," made during his interview with Detectives Carroll and Aguillon, constituted an invocation of his right to remain silent. (AOB 166-170.) Again, he is mistaken. It was reasonable for the detectives to interpret his statement as the trial court did – that appellant would continue to speak with the police, just not "right now." In other words, as the trial court found, the words "right now" meant exactly that. At best, appellant's statement was similar to the defendant in *Stitely*'s statement, "I think it's about time for me to stop talking," which this Court held was an expression of apparent frustration, but did not end the interview. And, as previously noted, "[f]aced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda, supra*, 384 U.S. 436, either to ask clarifying questions or to cease questioning altogether." (*People v. Stitely, supra*, 35 Cal.4th at p. 535, citation omitted.) Again, it appears that appellant simply indicated "an unwillingness to discuss certain subjects without manifesting a desire to terminate 'an interrogation already in progress.'" (*People v. Silva, supra*, 45 Cal.3d at pp. 620-630.) Therefore, since appellant's statement did not constitute an *unambiguous and unequivocal* invocation of his right to remain

silent, no *Miranda* violation occurred when appellant continued answering questions later on.

3. Third Interview With Detectives Carroll And Aguillon

Appellant claims that his statement, "I think I need to talk to my lawyer before I take a polygraph," made during his third interview with Detectives Carroll and Aguillon, constituted an unambiguous and unequivocal invocation of his right to counsel. (AOB 173-178.) Respondent disagrees. First, appellant's words, "I think" renders his statement equivocal and ambiguous, and the phrase "before I take a polygraph" renders any request conditional. Several other reviewing courts have found similar statements regarding counsel to be ambiguous. (See *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1119, 1122-1127 ["[I]f for anything you guys are going to charge me I want to talk to a public defender too, for any little thing" found to be equivocal and ambiguous]; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 25 ["[C]an I call my lawyer or my mom to talk to you?" not an unequivocal request for counsel]; *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1070-1072 [statement, "I think I would like to talk to a lawyer," not an unequivocal request for counsel]; *Soffar v. Cockrell* (5th Cir. 2002) 300 F.3d 588, 593-596 [defendant's questions "whether he should get an attorney; how he could get one; and how long it would take to have an attorney appointed" equivocal]; *Burket v. Angelone* (4th Cir. 2000) 208 F.3d 172, 196-198 ["I think I need a lawyer" equivocal]; *Diaz v. Senkowski* (2nd Cir. 1996) 76 F.3d 61, 63-65 ["Do you think I need a lawyer?" held to be equivocal]; *Connecticut v. Anonymous* (1997) 240 Conn. 708, 694 A.2d 766, 770-775 ["Do I still have a right to an attorney?"]; *Lord v. Duckworth* (7th Cir. 1994) 29 F.3d 1216, 1219-1221 ["I can't afford a lawyer but is there anyway I can get one?"].) Moreover, as the trial court concluded, appellant's reference to a lawyer was made solely in connection with having to

take a polygraph test, not before speaking to the police any further. Moreover, the fact that appellant willingly agreed to answer questions the following day without mentioning a lawyer or returning to the subject demonstrates that appellant did not invoke his right to counsel during his third interview. (See *People v. Stitely, supra*, 35 Cal.4th at pp. 535-536.)

D. Any Error Was Harmless

However, even assuming arguendo the trial court erroneously denied appellant's motion to suppress based on *Miranda*, any error was harmless. The admission of a defendant's statements in violation of *Miranda* is subject to the *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] harmless-beyond-a-reasonable-doubt standard (*People v. Sims, supra*, 5 Cal.4th at p. 447; *People v. Cunningham, supra,* 25 Cal.4th at p. 994.) Here, to say the evidence of appellant's guilt was overwhelming regarding Sophia's murder would be an understatement. Not only did his semen match that found on the victim, only he could have possibly made the 911 call from a location far from the crime scene. Even based on his own version of events, appellant established that he had gone to the park to meet Sophia. Thus, the evidence established that appellant had been at the park, knew that Torres was a Hispanic female and that she had been brutally attacked, and knew the area of the park where she had been attacked. (11CT 3112; 14RT 1608, 18RT 2121, 2129, 2135-2136.) As for the noncapital offenses, appellant's guilt was similarly overwhelming, as he was positively identified by each and every victim. (14RT 1538-1542, 1551-1553 [Maria Morales]; 17RT 2022, 2026, 2029-2031, 2045-2048 [Laura Zimmerman]; 18RT 2170, 2201, 2205, 2209 [Sabrina Perea].) Accordingly, any error in admitting appellant's statements was harmless beyond a reasonable doubt.

III.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE CRIME OF RAPE

Appellant contends the trial court's refusal to instruct the jury on the issue of consent as to the crime of rape violated his state and federal constitutional rights to due process, trial by jury, and to present a defense. (AOB 180-193.) He is mistaken, since there was no evidence to support instruction on consent under the circumstances.

Appellant was charged with murdering Sophia Torres during the commission of rape and robbery. Therefore, as to the rape charge, trial counsel proposed two instructions on the issue of consent: CALJIC Nos. 1.23.1[16] ["Consent" – Defined in Rape, Sodomy, Unlawful Penetration and Oral Copulation], and 10.65[17] [Belief as to Consent – Forcible Rape – Unlawful

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16. CALJIC No. 1.23.1 states as follows:

> In [prosecutions under] Penal Code section 261, the word "consent" means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

17. CALJIC No. 10.65 states as follows:

> In the crime of [unlawful] [forcible rape] by force, [violence] [fear] [or] [threats to retaliate]], criminal intent must exist at the time of the commission of the rape. There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse] of [*sic*]
>
> Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge.
>
> [However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief.]
>
> If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the

Oral Copulation, Sodomy or Penetration by Foreign Object]. (6CT 1629-1630, 1645.) The trial court refused to instruct on CALJIC No. 10.65 after the following discussion:

The Court: 10.65.

[PROSECUTOR]: What is it? Oh, we oppose that. There's no evidence to even suggest that that's – this is the *Mayberry* case, where there's some issue as to whether they knew reasonably – reasonably were mistaken about the age or about whether the person actually consented or not. This is not –

[TRIAL COUNSEL]: To begin with, the prosecution has the burden of demonstrating lack of consent. That's an element. There is some circumstantial evidence here, based on what Dr. Failing said, that from the physical autopsy evidence the sex could have been consensual or nonconsensual. The evidence of the victim's personality, I think, is sufficient to allow me to argue that she might have consented, or that, based on her behavior, [appellant] might have had a reasonable belief in consent.

THE COURT: Mr. Sneddon, do you wish to respond to that?

[PROSECUTOR]: According to the Use Notes, this is only to be given where there's some evidence to indicate that the mistaken belief, and good-faith mistaken belief, is appropriate. Now, whether – I don't have any – I mean, I think Mr. Dullea's entitled to argue, if he wants to, that they had consensual sex, but to base that argument on a good-faith belief or reasonable belief is not what – is a far cry from the other, on the facts of this case particularly.

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time of the [sexual intercourse] you must find [him] [her] not guilty of the crime.

THE COURT: All right. I'll refuse it. I don't find any evidence to support that instruction.

(20RT 2426-2427.)

As to CALJIC No. 1.23.1, the trial court rejected that instruction as well after the following discussion:

THE COURT: 1.23.1? Where is that? Okay. I wrote down we'll cover it later.

Here it is. In the prosecution – and what's your position on that now, Mr. Sneddon?

[PROSECUTOR]: Well, I was going to ask, why is it being offered?

[TRIAL COUNSEL]: Because it defines consent, and I don't believe we have defined consent elsewhere in these instructions. And consent, or lack thereof, is an element of rape. The book puts it in a funny place. It should be right after 10.00.

I've just realized that that instruction probably has meaning if you give 10.65, which the Court has refused.

THE COURT: Okay. So I'll refuse this one.

[TRIAL COUNSEL]: It's an accurate statement of the law, and I still want it, but that's because I still want 10.65.

THE COURT: Okay. Then I'll refuse that.

(20RT 2452-2453, italics added.)

Therefore, as to the crime of rape, the trial court instructed the jury with the standard jury instruction, CALJIC No. 10.00 [Rape – Spouse and Non-Spouse – Force or Threats], as follows:

Defendant is accused in Count II of the Indictment of having committed the crime of rape in violation of section 261, subdivision (a)(2).

Every person who engages in an act of sexual intercourse with another person who is not the spouse of the perpetrator accomplished against that person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury to that person or to another person, is guilty of the crime of rape in violation of Penal Code section 261, subdivision (a)(2).

Any sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. Proof of ejaculation is not required.

"Against that person's will" means without the consent of the alleged victim.

"Menace" means any threat, declaration, or act which shows an intention to inflict an injury upon another.

"Duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which [she] [he] would not otherwise h ave performed, or acquiesce in an act to which [she] [he] otherwise would not have submitted. The total circumstances, including the age of the alleged victim, and his or her relationship to the [perpetrator] [defendant], are factors to consider in appraising the existence of the duress.

The fear of immediate and unlawful bodily injury must be actual and reasonable under the circumstances.

In order to prove this crime, each of the following elements must be proved:

1. A male and female engaged in an act of sexual intercourse;

2. The two persons were not married to each other at the time of the act of sexual intercourse;

3. The act of intercourse was against the will of the alleged victim;

4. The act was accomplished by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the alleged victim or to another person.

(5CT 1262-1264.)

A. Applicable Law

It is well settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding with the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715-716; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

A trial court has the duty to instruct on all material issues presented by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) A trial court is not obligated to instruct on theories that lack substantial support in the evidence. (*People v. Breverman, supra*, 19 Cal.4th at p. 162.)

B. Under The Circumstances, The Trial Court Properly Refused To Instruct The Jury With CALJIC Nos. 1.23.1 And 10.65 Regarding Consent

Here, the trial court properly refused to instruct the jury with CALJIC No. 10.65. CALJIC No. 10.65 embodies the defense of mistaken belief as to consent recognized in *People v. Mayberry* (1975) 15 Cal.3d 143. A *Mayberry* defense cannot be raised "without some evidence that the victim acted in a

manner that reasonably could be misunderstood by the defendant." (*People v. Romero* (1985) 171 Cal.App.3d 1149, 1156.) Put differently,

> [t]he reasonable belief defense derived from *Mayberry* is founded upon evidence showing the defendant acted under a mistake of fact sufficient to harmonize his assertion of consent with the victim's story that consent was lacking. (*People v. Mayberry, supra*, 15 Cal.3d at pp. 156-160; *People v. Romero, supra*, 171 Cal.App.3d at pp. 1156-1157.) *Where there is no evidence putting into issue the nature and quality of the defendant's belief in consent, the trial court is under no duty to instruct the jury on its own motion about the mistake of fact defense.*

(*People v. Rhoades* (1987) 193 Cal.App.3d 1362, 1369, italics added.)

In the present case, there was absolutely no evidence putting into issue the nature and quality of appellant's belief in consent. Appellant's defense was that he went to the park to buy "crank" from victim Torres, then, upon arriving at the park, saw two Black females beating her. (17RT 1940-1941.) In other words, appellant denied having any physical contact with Torres, let alone raping or killing her. Accordingly, having effectively denied that he had sex with Torres, no instruction on CALJIC No. 10.65 was warranted.

As for CALJIC No. 1.23.1, at trial, trial counsel's request for CALJIC No. 1.23.1 was tied to his request for CALJIC No. 10.65 – as counsel himself stated, "I've just realized that that instruction probably only has meaning if you give 10.65, which the Court has refused." (20RT 2452.) There being no basis for instructing the jury with CALJIC No. 10.65, no instruction on CALJIC No. 1.23.1 was warranted, either. Nevertheless, appellant contends that "substantial" evidence supported the giving of CALJIC No. 1.23.1, based on Dr. Failing's testimony that there was no bruising, tearing, or trauma to Torres's vagina. (16RT 1829.) However, Dr. Failing also testified that the lack of such injuries does not mean that a victim was not sexually assaulted. (16RT 1830.)

In any event, as previously mentioned, appellant's trial defense was one of complete innocence and lack of any physical contact with Torres, as opposed to an admission that he had sex with Torres, but that the sex was consensual.[18/] "Substantial evidence" is evidence sufficient to "deserve consideration by the jury," or evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

In light of appellant's all-or-nothing defense, Dr. Failing's inconclusive medical testimony (i.e., that there were no injuries to Torres's vagina but that lack of injuries did not necessarily mean that she was not sexually assaulted) can hardly be said to constitute *substantial* evidence warranting an instruction on actual consent.

C. Any Error Was Harmless

However, even assuming arguendo substantial evidence warranted the giving of CALJIC Nos. 1.23.1 and/or 10.65, any error was harmless. (*People v. Breverman, supra,* 19 Cal.4th at p. 173 [*Watson* standard applies to all cases of "misdirection of the jury," which "logically includes every kind of instructional error"].) And even assuming there was error implicating appellant's federal constitutional rights, the error was harmless beyond a reasonable doubt as well. (*Chapman v. California, supra*, 386 U.S. at p. 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Here, the trial court instructed the jury with CALJIC No. 10.00, which informed the jury that rape occurs when a person engages in an act of sexual intercourse with another person against the person's will, i.e., without the other person's consent. There is no indication that the jury

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18. Although appellant claims on appeal that he could have met Torres at Oakley Park and eventually had consensual sex with her, after which things "turned sour" (AOB 187), he offered no such evidence of consensual sex with the victim at trial.

did not understand what "against a person's will" (i.e., without consent), a commonly understood term, meant, and if the jury believed trial counsel's argument that Torres willingly had sex with appellant as a means of comfort or pain relief, as trial counsel argued (see 22RT 2660-2661), then, under CALJIC No. 10.00, it would have found appellant not guilty of rape. It did not. Accordingly, assuming there was any instructional error, it was harmless under any standard.

IV.

NO PREJUDICIAL PROSECUTORIAL MISCONDUCT OCCURRED

Appellant contends that the trial court committed reversible misconduct during his guilt phase closing argument. (AOB 194-214.) On the contrary, no prejudicial prosecutorial misconduct occurred.

A. Applicable Law

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"'
(*People v. Hill* (1998) 17 Cal.4th 800, 819.)

A prosecutor is given "wide latitude" during argument, and the argument "may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill, supra*, 17 Cal.4th at p. 819, quoting *People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) It is also "clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." (*Id.*)

B. Alleged Appeals To Passion And Prejudice

Appellant contends the prosecutor improperly sought to arouse passion and prejudice in the jury during his initial guilt phase closing argument by, inter alia, referring to victim Torres as "that poor lady" (21RT 2566), referring to the injuries on "that poor woman's body and face" (21RT 2569), describing the encounter as a "savage beating" and expressing disbelief "that one human being could do that to another being" (21RT 2513). Appellant also takes issue with the prosecutor's comment, in addressing the Maria Morales incident, that appellant was "insulting [the jury's] intelligence" in suggesting that he did not intend to rape her. (21RT 2527.)

Appellant further complains about the following comments by the prosecutor:

1. "[I]t is clear from the psyche that the memory of each of the victims will always be scarred from their individual suffering and the terror created by the attacks of [appellant] in this case on them" (21RT 2515);

2. "Who can forget their looks of discomfort of just having to face [appellant] again? . . . [J]ust the uncomfortableness of having to come into court and sit here and be in the same room with their attacker" (21RT 2515-2516);

3. "But can any of you really deny the spontaneous and truthful nature of Maria Morales as she testified in this trial, as you saw the tears evoked as she was reliving what happened to her, the attack by [appellant]?" (21RT 2529);

4. "[W]hen you have cases like this particularly, you can't avoid the necessity of bringing those photographs [photographs of Torres] here. And, if anything, if it makes you uncomfortable, it's probably a measure of the true violent capabilities of [appellant] in this case and the true measure of the suffering of the victim in this case" (21RT 2560).

Appellant also takes exception to the prosecutor's characterization of victim Torres as a "very nice woman" and her family background and the tragic murder of her boyfriend, which left her depressed and contemplative. (See 21RT 2521-2525.)

Finally, appellant claims that in his final comments to the jury during his initial closing argument the prosecutor, "under the guise of rebutting the defense theory of consensual sex" (AOB 197), sought to arouse the jury's passion and prejudice via the following comments:

> Ladies and gentleman, in this case the victim, Sophia Torres, has been spared no indignity by [appellant] to escape responsibility for her brutal murder . . . .
>
> And I can't sit down without saying it to you, is there no dignity or fairness for Sophia Torres even in death? Well, you have the power, and knowledge is power. And the power isn't in the rhetoric of anybody speaking to you. The power is in the knowledge and the compelling force of the facts of this particular case. By the power of that knowledge and your responsibility, you 12 people have the ability in this case to tell everyone, you have the ability to tell everybody in this courtroom, you have the ability to tell everyone in this community, you have the ability to tell everybody on both sides of this lawsuit, everyone, by your verdict, that Sophie Torres was a kind person, that she was a nice person, that she was a gentle person, that she was a loner, and that the only thing that, at this point in her life, that she ever asked, the only thing she was ever asking was to be left alone so she could contemplate – depressed, contemplative – the loss of the person that she loved more than anybody else in her life, her boyfriend that was killed. All she ever asked.

You have the power, by your verdicts, to tell everybody that she was not a promiscuous woman, that she was not somebody who would engage in a one-night stand with [appellant]. Ladies and gentlemen of the jury, you have the power to tell everyone, and especially the person for those lies and for her death, . . . to tell . . . [appellant], that Sophia Torres was raped, Sophia Torres was robbed, and Sophia Torres was beaten to submission and left for dead by [appellant]. I and Miss Grossman are asking you to do that.

(21RT 2579-2581.)

1. Waiver

Notwithstanding his failure to object to *any* of the above-quoted comments, appellant now contends they constituted prejudicial misconduct. However, "'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.'" (*People v. Hill, supra*, 17 Cal.4th at p. 820.) Because appellant did not interpose any objections, let alone on the same federal constitutional grounds he urges here, or request that the jury be admonished as to any of the above-quoted comments, he has waived his current claims of misconduct.[19/] (See *People v. Roldan* (2005) 35 Cal.4th 646,

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19. Respondent requests that this Court rule on respondent's waiver argument. Appellant's failure to raise a specific and timely objection below means his claim is waived and is the subject of procedural default. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173.) A state procedural default bars subsequent federal habeas review of the claim, except under a narrow class of exceptions. (*Coleman v. Thompson* (1991) 501 U.S. 722, 750 [111 S.Ct. 2546, 115 L.Ed.2d 640].) Accordingly, respondent requests that this Court explicitly rule on the waiver argument, *even if* this Court decides, alternatively, that appellant's contention

720 ["Although many of the comments defendant now claims were misconduct were trivial, we need not reach the merits of the issue because he failed to object to any of them and thus failed to preserve the claims for appellate review"].)

Acknowledging that trial counsel failed to object to the allegedly improper comments by the prosecutor, appellant contends objections were not required because admonitions by the court would not have cured the harm. (AOB 200.) As proof, he notes that "the improper comments increased in both frequency and severity as the argument went on, reaching a crescendo during the prosecutor's closing comments regarding sending a message with respect to who Sophia Torres was," and also notes the "volume and variety of the comments." (*Id.* at pp. 200-201.) The problem for appellant is that, if, as he claims, the comments "worsened" as the prosecutor's argument went on, then obviously, an objection and request for an admonition at the outset could have "reined in" the prosecutor and prevented him from making additional purportedly inflammatory comments. None having been made, and since an admonition would have cured any harm caused by the prosecutor's remarks, appellant's claims of prosecutorial misconduct were waived on appeal. (See *People v. Benavides* (2005) 35 Cal.4th 69, 108 [claim that prosecutor improperly appealed to the passions and prejudices of the jury waived on appeal because defendant did not object and an admonition would have cured any harm].)

Additionally, an examination of trial counsel's closing argument reveals that he had a rational tactical basis for not objecting to the prosecutor's argument. Rather than object, trial counsel chose to address the prosecutor's argument at the outset of his (trial counsel's) argument as follows:

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fails on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10 [109 S.Ct. 1038, 103 L.Ed.2d 308].)

Now, normally, the way you make decisions like that is with your intellect, with your brain. You first observe, you pay close attention, and I know you did that, and then you try to understand the law, and you think about it, and then you all get together and you talk about it, and in that way, you try to arrive at a decision.

My job, and I think the job of lawyers, is to get up here at the end of the trial and explain how, in our view, the facts and the law come together to support our views of the case, our view of what the evidence shows. I was therefore a little bit dismayed and disappointed when Mr. Sneddon stood up this morning, and for the first ten minutes of his argument what we heard were words, words that appeal to a part of us that, although it may be important and it may be valid, don't help a jury make a decision in a case like this.

We heard – right from the beginning, we heard Mr. Sneddon on the subject of sorrow and pain, and he used adjectives like "savage" and "ugly," and he talked about the bloody face of the victim and the savagery of this particular crime, and how the rape was hostile and degrading and humiliating. He used a great number of those sorts of adjectives or epithets.

Now, a person listening to that – Mr. Sneddon's an accomplished orator, and that part of his remarks, and indeed his whole speech today, was very moving from an emotional point of view. And it was so, because the crimes that he was describing are awful crimes. No one denies that. But wasn't much of Mr. Sneddon's speech, especially this morning, directed to convicting [*sic*] the crimes of being bad crimes rather than showing us how the facts and the law supported [appellant's] guilt?

No one denies that these are awful crimes. Some of them have been proved; some of them haven't. No one denies the terror suffered by Maria Morales. No one denies the horror that Sophia Torres must have suffered. No one denies that Sabrina Perea was badly frightened, but how much of Mr. Sneddon's speech was directed to discussing the facts and the law, and how much of it was directed to the emotional issues?

It's perfectly all right, ladies and gentlemen, and it's perfectly natural to feel revulsion for these crimes. I'm sure we all do. And while that was a very nice speech, that isn't how the law expects you to make your decision, based on your – based on your gut, or based on your reaction, or based on your revulsion. [Appellant] is entitled to a fair trial, and the way he gets a fair trial is if you use your common sense, your intelligence, your analytical powers, and you put the facts together with the law.

If you feel emotions, feel them. Recognize them for what they are, set them aside. If you're angry at [appellant] for the things he did do, feel that. But convict him fairly for what he did, and acquit him for what he didn't do.

The Judge has already told you, and we've discussed this before, that a defendant in a criminal action is presumed innocent until the contrary is proved, and it's up to the prosecution to prove him guilty beyond a reasonable doubt. And if the prosecution can't prove him guilty beyond a reasonable doubt, he's entitled to a verdict of not guilty.

(21RT 2582-2594.)

2. In Any Event, No Prejudicial Prosecutorial Misconduct Occurred

However, even assuming arguendo appellant's claims of misconduct are cognizable on appeal, they still fail. Taken in proper context, the prosecutor's comments at the conclusion of his initial closing argument and his description of Torres's family background were simply an attempt to "humanize" Torres, who, at the time of her murder, was essentially a homeless and down-and-out loner, and to also demonstrate that Torres did not have consensual sex with appellant the night she was killed. (See 21RT 2520, 2523 ["Why is it so hard or why is it so easy to visualize – to conjure up this picture of Sophia Torres sitting over there all by herself in isolation, eating her lunch, just wanting to be left alone and so hard to reconcile that same vision with having consensual sex with [appellant] in this case?"], 2524 ["would having sex with a 19-year old stranger in a park be the way that she would honor her boyfriend's memory or her obviously deep love and affection for him? I think not."]; see also 21RT 2525 ["So you see, ladies and gentlemen, that the defense theory in this case . . . has no basis for foundation in fact or in evidence when you simply look to the victim herself"].) The prosecutor's argument was based on facts in evidence, and therefore was not improper. (*People v. Panah* (2005) 35 Cal.4th 395, 463; see 15RT 1732 [Sophia appeared very quiet and did not talk to anybody – she would come in, sign her name, take her plate of food, and sit by herself]; 15RT 1739 [Sophia was a very quiet, timid, shy, and introverted person]; 1751[Sophia was quiet, would watch television, and stare a lot as if she was thinking about something]; 1758-1759 [when Sophia returned to Santa Maria after her boyfriend had been killed in Mexico, she had lost everything, did not want to talk and acted depressed] .) "[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions

he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.)

Moreover, the prosecutor's characterization of the attack on Torres as a "savage beating" and reference to appellant's "violent capabilities" were warranted by the evidence. It is well established that a prosecutor may use appropriate epithets warranted by the evidence as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1251; *People v. Fosselman* (1983) 33 Cal.3d 572, 580.) Here, the evidence showed that Torres was attacked, chased, brutally beaten in the head with a blunt object and a knife, and raped while she fought for her life, after which she was left for dead. Accordingly, the prosecutor "was [not] . . . required to discuss his view of the case in clinical or detached detail. (*People v. Hill, supra*, 17 Cal.4th at p. 819 ["'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness'"'"], quoting *People v. Williams* (1997) 16 Cal.4th 153, 221.)

Also, appellant does not dispute the prosecutor's characterization that victim Morales cried while testifying to appellant's attack, or that the victims appeared uncomfortable in court having to face appellant – victims whom the jury observed and heard testimony from. (See 21RT 2529 ["And I hope that some of you were able to watch Maria Morales as she testified. As you noticed, she sort of sat sideways so she didn't have to look at [appellant] because it was probably uncomfortable to be in the same room with him"].) And in stating that the victims would not forget appellant's attacks, the prosecutor was simply stating the obvious – that anyone experiencing a traumatic experience is unlikely to forget it. (See *id.* ["And as she come out with the statement to you and she made a little movement with her body and her face where she described how close he had gotten when he was trying to kiss her, and said, "Chocolate, peanuts, Snickers," all of those things, all of the ways that she testified, I think,

are the kind of things that you, as a juror, would look at in saying this is the kind of person that can be believed, this is the kind of person who doesn't forget. And would any of you forget if this happened to you, about what happened to them?"].)

3. Any Error Was Harmless

Prosecutorial misconduct does not require reversal unless it reasonably probable that, but for the misconduct, the defendant would have received a better result. (*People v. Crew* (2003) 31 Cal.4th 822, 836; *People v. Gionis* (1995) 9 Cal.4th 1196, 1220; *People v. Espinoza* (1992) 3 Cal.4th 806, 821; *People v. Haskett* (1982) 30 Cal.3d 841, 866.) Here, the trial court instructed the jury that the statements made by attorneys were not evidence, and to decide the case based on the evidence adduced at trial and not from any other source. (CALJIC Nos. 1.00, 1.02; 4CT 1188, 1191.) More importantly, the trial court instructed the jury "not to be influenced by pity for or prejudice against [appellant]," and further advised it "not [to be] influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (4CT 1188-1189.) Presumably, the jury followed the trial court's instruction. (*People v. Hill*, *supra*, 3 Cal.4th at p. 1011; *People v. Pinholster, supra*, 1 Cal.4th at p. 925; *People v. Bonin*, *supra*, 46 Cal.3d at p. 699.) No contrary evidence has been presented here, and none of the prosecutor's comments could properly be characterized as prejudicial or so egregious as to deny appellant a fair trial. (*People v. Sanchez* (1995) 12 Cal.4th 1, 69.)

In any event, as previously noted (see Argument II, *ante*), the evidence of appellant's guilt was overwhelming. "Whatever the test of prejudice this court applies to the present case, it is certain that any reasonable jury would have reached the same verdict even in the absence of the prosecutor's remarks." (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) Appellant's sperm was found

on Torres, proving that he raped her, and his staged 911 call from a different location and inconsistent stories regarding his actions on the night of the murder (not to mention his additional attempts to kidnap and/or sexually assault other victims following Sophia's murder) established his identity as the person who raped, robbed and murdered Torres. In other words, the jury's verdict at the guilt phase was based on the strength of the evidence, not on any prejudice or negative feelings towards appellant aroused by the prosecutor's argument.

C. Alleged Injection Of Subject Of Penalty Or Punishment During Guilt Phase Closing Argument

Appellant contends three specific comments by the prosecutor during his guilt phase closing argument constituted misconduct by injecting the subject of penalty or punishment. First, he takes issue with the prosecutor's brief reference to "the second trial in this case":

> So as I told you, these are some simple truths in this case. And the simple truth is Sophia Torres was raped and the simple truth is that the evidence presented is overwhelming and virtually uncontested. The simple truth is this trial went quickly and it's a precursor to the second trial in this case.

(21RT 2547.)

Second, appellant claims that the following comment – in particular, the prosecutor's rhetorical question, "Are there no lessons learned in life?" – "clearly injects a punishment and/or penalty phase into the jury's guilt phase deliberations"(AOB 204):

> How about after the murder? Is there anything in [appellant's] conduct after the murder – and by the way, isn't that a scary thought, that we not only have somebody before, we have somebody who is killed and then we have somebody out there doing this again? Are there

no lessons learned in life?

(21RT 2543.)

Lastly, appellant contends that the following comments by the prosecutor injected the issue of victim impact with respect to the surviving victims:

> In observing the surviving victims in this case and their testimony . . ., it is clear from the psyche that the memory of each of the victims will always be scarred from their individual suffering and the terror created by the attacks of [appellant] on them.
>
> . . .
>
> Who can forget their looks of discomfort of just having to face [appellant] again? . . . [J]ust the uncomfortableness of having to come into court and sit here and be in the same room with their attacker.

(21RT 2515-2516.)

1. Waiver

Once again, appellant admits that he did not object to the above-cited instances of alleged prosecutorial misconduct. (See AOB 205.) Having failed to object and request an admonition, these claims of misconduct were waived on appeal. (*People v. Roldan*, supra, 35 Cal.4th at p. 720.) In a puzzling attempt to get around the waiver, appellant argues that an objection was not required because the trial court instructed the jury with CALJIC No. 17.42 as follows:

> In your deliberations, do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict.

(4CT 1275.)

Respondent fails to see how the giving of CALJIC No. 17.42 somehow excused trial counsel from objecting to the supposed misconduct. The waiver applies.

2. No Prejudicial Prosecutorial Misconduct Occurred

Even assuming arguendo appellant's claims of misconduct are cognizable on appeal, they still fail. Misconduct occurs only if there is a "reasonable likelihood" the jury will improperly misconstrue or misapply the prosecutor's statements. (*People v. Sanders* (1995) 11 Cal.4th 475, 526.) As to the prosecutor's brief mention of a "second trial" in passing, it is not reasonably likely that the jury understood what "second trial" he was referring to, or that it interpreted the prosecutor's comment to mean "that once they make a guilt determination that they will then be able to move forward with the penalty phase determination, that is, they will be able to proceed with the punishment of [a]ppellant." (AOB 203.) This is especially true since a penalty phase trial would only come into play if the jury first determined that appellant was guilty beyond a reasonable doubt of the charged crimes.

Regarding the prosecutor's comment that "we have somebody who is killed and then we have somebody out there doing this again? Are there no lessons learned in life?" (21RT 2543), as appellate counsel notes (AOB 204), the prosecutor was simply referring to the sequence of crimes – that is, that after raping and killing Torres, appellant did not "learn his lesson" and still continued his predatory ways, as evidenced by the Zimmerman and Perea incidents. Therefore, the sequence of crimes provided a basis for the prosecutor's comment, and he was entitled to ask, "Are there no lessons learned in life?" in exasperation. (See *People v. Hill, supra*, 17 Cal.4th at p. 819.) There is simply no reasonable likelihood that the jury interpreted the prosecutor's question, "Are there no lessons learned in life?," as meaning that since appellant has

failed to learn lessons in life, he must receive the death penalty as a lesson.

With respect to the prosecutor's comments regarding the victim's carrying the memories of appellant's attacks with them, and the looks of discomfort on their faces when they testified, appellant does not dispute the prosecutor's characterization that the victims appeared uncomfortable when testifying at trial against appellant. And, of course, the jury had in fact observed these witnesses' demeanors when they testified. Moreover, as previously noted, the prosecutor was simply observing that having suffered a traumatic event at the hands of appellant, the victims would be unlikely to forget it – a basic truism of human nature and memory. (Cf. *People v. Pride* (1992) 3 Cal.4th 195, 268 ["[t]he average juror undoubtedly worries that a dangerous inmate might escape"].) This was not improper.

3. Harmless Error

Even assuming arguendo the prosecutor's argument was somehow improper, appellant was not prejudiced. (*People v. Gionis, supra,* 9 Cal.4th at p. 1220.) As noted above, the trial court instructed the jury to not discuss or consider the subject or penalty or punishment, which it presumably followed. (See CALJIC No. 17.42; *People v. Hill, supra*, 3 Cal.4th at p. 1011.) Moreover, the evidence of appellant's guilt as to each of the charged offenses was overwhelming. (See Argument II, *ante*.) Accordingly, error, if any, was harmless.

D. Alleged Prosecutorial Vouching

Appellant contends the prosecutor committed misconduct by attempting to bolster victim Morales's credibility by reference to facts outside the record. (AOB 206-214.) Specifically, appellant takes issue with the prosecutor's following comments:

What Maria Morales said – which she has said, ladies and gentlemen, every time she's been asked. Every time. She's been consistent with police, in prior testimony, and here before you.

(22RT 2689.)

Trial counsel's objection on the basis that there was "no evidence of prior testimony before this jury" was overruled. (*Id.*) Thereafter, the prosecutor proceeded to read Morales's trial testimony regarding appellant's attack to the jury. (See 22RT 2689-2690.)

1. No Prejudicial Prosecutorial Misconduct Occurred

At the outset, respondent notes that the prosecutor's argument as to the consistency of Morales's testimony, followed by verbatim reading of her trial testimony as to the attack, was made in response to trial counsel's argument that her testimony was "bollixed up" and "muddled." (See, e.g., 21RT 2599, 2605-2606, 2609-2610.) In any event, it appears that the prosecutor may have been referring to Officer Kellene Brooks's testimony regarding Morales's disheveled appearance, which was consistent with what Morales described and corroborated her version of events, since trial counsel had argued that Morales would not have left her clothes disheveled until the police arrived. (See 14RT 1579, 21RT 2613 [trial counsel claims victim would have put herself back together and says, "Well, what else is wrong with what Officer Brooks told us? What really shows you what was wrong there?"]; *People v. Adcox* (1988) 47 Cal.3d 207, 235 [proper for prosecutor to comment on reasonable deductions or conclusions to be drawn from the evidence adduced at trial and to comment on credibility of witnesses in light of all the evidence presented]; *People v. Boyd* (1990) 222 Cal.App.3d 541, 571 [prosecutor has wide latitude to argue from reasonable deductions and inferences based on the evidence to bolster witnesses' credibility].) Or, in referencing Morales's consistent testimony "with

police, and in prior testimony" it is possible the prosecutor was referring to the fact that Morales had previously identified appellant as her attacker to police (see 14RT 1550, 1552-1553, 1572, 1594-1595), and/or Morales's conversation with Officer Brooks immediately after the attack. (See 14RT 1550, 1579.)

2. Any Error Was Harmless

However, even assuming arguendo the prosecutor's comment regarding the consistency of Morales's testimony was somehow improper, appellant was not prejudiced. The comment was brief, and was not so egregious as to render appellant's trial fundamentally unfair. (See *People v. Sanchez, supra*, 12 Cal.4th at p. 69.) As appellant himself notes, the testimony the prosecutor read to the jury as evidence of Morales's "consistency" was "in effect, verbatim from [her] trial testimony. . . ." (AOB 209.) And the jury had previously been instructed that statements made by the attorneys during the trial were not evidence. (CALJIC No. 1.02; 4CT 1191.)

In any event, appellant did not dispute his identity as the person who assaulted Morales (nor could he, since she positively identified him from a photographic lineup); he simply disputed the fact that he intended to sexually assault her. However, Morales testified that appellant tried to take her belt off, untied her blouse, tried kissing her, told her, "I want you" (14RT 1543), and then later hit her before fleeing (14RT 1540), testimony which was corroborated by Officer Brooks's observation of Morales's disheveled appearance, as well as the injury to her face. (14RT 1579-1581.) Moreover, appellant did not take any of Morales's personal items or jewelry, although he claimed that he only intended to rob her. In other words, there is simply no reasonable probability that absent the prosecutor's brief remarks, the jury would have acquitted appellant of assaulting Morales with intent to commit rape. (See *People v. Gionis*, *supra*, 9 Cal.4th at p. 1220.) In fact, in light of Morales's

identification of appellant, error, if any, was harmless beyond a reasonable doubt as well. (See *People v. Harris* (1989) 47 Cal.3d 1047, 1083 [where prosecutorial misconduct infringes upon a defendant's constitutional rights, reversal is required unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict], disapproved on another point in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10.) This claim fails.

V.

THERE WERE NO GUILT PHASE ERRORS TO ACCUMULATE

Appellant contends that even if no single error, standing alone, warrants reversal of the guilt phase judgment, the cumulative effect of multiple errors does. (AOB 215-216.) On the contrary, there were no errors to accumulate here.

Criminal defendants are guaranteed a fair trial by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636]; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

> Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." [Citation.]

(*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872 [102 S.Ct. 3440, 73 L.Ed.2d 1193].)

In assessing claims of cumulative error, the test is whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Holt* (1984) 37 Cal.3d 436, 458.) Such claims are ordinarily made in "close cases." (E.g., *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236; *People v. Holt, supra*, 37 Cal.3d at pp. 458-459.)

However, the present case was anything but close, and respondent has demonstrated that there were no errors to accumulate. Moreover, even if there were any errors at the guilt phase, they were plainly harmless even if viewed

cumulatively, since the evidence of appellant's guilt was overwhelming. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1215 ["[w]e have found no error that, even in cumulation, was prejudicial"]; *People v. Pride, supra*, 3 Cal.4th at p. 269 ["[a]ny errors that did occur, whether viewed singly or in combination, were inconsequential"].) Here, the forensic evidence demonstrated that appellant savagely attacked, raped, and left Torres for dead. Appellant's semen was found on the victim, and he made a fake 911 call in an attempt to deflect blame.

A defendant is entitled to a fair trial, not a perfect one. (*People v. Welch* (1999) 20 Cal.4th 701, 775.) Even assuming arguendo any error(s) occurred, appellant has at most shown that his "'"trial was not perfect – few are',"' especially few of the length and complexity of this trial. There was no prejudicial error either individually or collectively." (*People v. Cooper* (1991) 53 Cal.3d 771, 839, citation omitted.) Appellant received a fair trial; therefore, his claim of cumulative error at the guilt phase must be rejected.

VI.

APPELLANT'S CLAIM THAT THE GUILT PHASE ERRORS MUST BE DEEMED PREJUDICIAL TO THE PENALTY PHASE UNLESS THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT THE ERRORS DID NOT AFFECT THE PENALTY VERDICT MUST BE REJECTED

Appellant contends that, even assuming arguendo this Court determines that any guilt phase errors were harmless as to the guilt determination, it should nonetheless reverse his death sentence "because of the prejudice those errors caused Martinez at the penalty phase." (AOB 217-220.) Respondent disagrees.

At the outset, respondent notes that appellant's claim is predicated on this Court finding error in the "admissibility of statements, admissions, and confessions by [appellant]." (AOB 217.) Yet respondent has previously demonstrated that there were no errors in the admission of appellant's statements to police, or alternatively, that any errors were harmless. (See Argument II, *ante*.) Moreover, respondent is unaware of any case in which this Court has held that guilt phase errors had a prejudicial "spillover" effect at the penalty phase. In any event, since the prosecutor did not rely, let alone principally rely, on appellant's statements to police at the penalty phase, it could not have played any significant role in the penalty phase determination or had a harmful spillover effect, especially in light of the brutal nature of Sophia Torres's rape, robbery, and murder, the noncapital crimes, and uncharged evidence adduced at the penalty phase. Therefore, even under a "reasonable possibility" or *Chapman* harmless-beyond-a-reasonable-doubt standard, any guilt phase errors were nonprejudicial at the penalty phase.

In attempting to demonstrate that any guilt phase errors (whether state or federal, apparently) were not harmless at the penalty phase, appellant cites to the length of the jury's penalty phase deliberations – a relatively brief eight hours (see AOB 220), considering that the guilt phase trial lasted about 17 days,

and the penalty phase trial itself (i.e., the testimony) lasted about 10 days:

> While . . . in some cases our Supreme Court has inferred a close case from unduly lengthy deliberations we cannot do so under the facts of this case. [Citation.] To do so in the absence of more concrete evidence would amount to sheer speculation on our part. Instead, . . . the length of the deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision.

(*People v. Walker* (1995) 31 Cal.App.4th 432, 438-439 [six and one-half hours of jury deliberations following two and one-half hours of evidence].)

Presumably, the jury spent time reviewing the evidence, as well the court's instructions, and took their duty in deciding appellant's penalty seriously. Therefore, it cannot be reasonably inferred from the length (or, in this case, brevity) of the jury's deliberations that any guilt phase errors prejudiced appellant at the penalty phase. Appellant is simply speculating here. His claim lacks merit.

VII.

THE TRIAL COURT DID NOT PREJUDICIALLY ERR IN ADMITTING VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE

Appellant contends the trial court violated both state law and his federal constitutional rights to due process and a fair trial by admitting "prejudicial" victim impact evidence at the penalty phase. (AOB 221-243.) Respondent disagrees.

A. Factual Background

The prosecutor identified six Torres family members who it intended to call at the penalty phase, as well as victims Morales and Perea, who would testify as to the impact the crimes had on them. (5CT 1347-1355). Trial counsel filed a motion to limit victim-impact evidence; in particular, trial counsel, citing *Booth v. Maryland* and *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2609, 115 L.Ed.2d 720], requested that the trial court issue an order prohibiting the Torres family members from stating their opinions and/or making characterizations of the crime, appellant, and the appropriate sentence. (See 5CT 1329-1355.) Trial counsel also sought to exclude Morales's and Perea's testimony on the grounds that their testimony would be cumulative, repetitive, inflammatory, and prejudicial under Evidence Code section 352. (5CT 1349-1350.)

In his written response, the prosecutor indicated that he intended to elicit victim-impact evidence as follows:

> With respect to family members in the present case, we are seeking to introduce brief testimony regarding the relationship of the family member to Sophia Torres, the impact her death has had on them, and the facts of her life that relate to or have some bearing on the circumstances

of the crime. We do not intend to introduce any testimony regarding the witnesses' characterization or opinion of [appellant], his character, or what the appropriate sentence should be. With respect to Sabrina Perea and possibly Maria Morales we intend to introduce brief testimony with respect to the impact that the circumstances of the crimes has had upon them. [Footnote.]

(5CT 1392.)

Additionally, during a hearing on the victim-impact evidence, the prosecutor made the additional proffer:

We intend to call a few family members to talk about the impact that this has had on them, and basically the impact is this: That at the time this crime was committed, Sophia Torres was in a depressed isolated state. Because of that state, [appellant] took her life, and she will never have the opportunity to regain or become the person that she once was And the impact that the crime has had on the family, the way she died, the manner she died, has had a significant impact on these people. And under the law, they have the right to discuss the impact that this crime has had on them. They're not going to comment on [appellant] or what they think the penalty should be. They will be told they are not to go there. But they should, under the law, have the right to discuss the impact that this horrible crime has had on them.

(RT 2802.)

The trial court ruled that

with the limitations that you've expressed both here and in your points and authorities, I'll allow that testimony, subject to staying within the limits that you've sort of self-imposed here, including I would allow some evidence of the desire to – you know, that she was killed before they could help her.

(24RT 2802-2806.)

During the penalty phase trial, Sophia Torres's older sister, Victoria Francisco, testified as follows:

> And, you know, what hurts me the most is, you know, that she didn't die a natural death, you know. And, you know, thinking all that she went through, you know, that night, you know, it hurts me a lot. You know, all she suffered that night, you know And I know, you know, that she never do no harm to nobody, you know. You know, and – you know, now I always going to remember her, you know, as my little sister, you know, and – I'm sorry.

(25RT 2958.)

Sophia Torres's oldest brother, Gilberto Torres, testified to the impact Sophia's death had on him as follows:

> Well, I think of her every day, especially for the brutal way she died. We gather in Mexico every Christmas to celebrate Christmas and New Year's, and now it's been two years she hasn't attended. And every time, you know, especially when I opened the casket when – I'm the one who was waiting for her in Mexico. I don't recognize her. She was – you know, her face was all – I thought it wasn't her. And now, after all she got with these problems, you know, she was so shy. I mean, she acted like a little girl sometimes. And that really had a lot of impact on me.

(26RT 3002-3003.)

Victim Morales testified that as a result of appellant's attack, she became frightened when men came near her, and feared going out alone. Even if she went out with someone she was afraid, and when she saw young men who looked like appellant she was very afraid of them. Maria's mother was also very afraid, and worried very much about her. Maria used to love chocolates

and Snickers bars, but she cannot eat or smell them anymore because it brought back memories of the attack. (26RT 2996-2997.)

Victim Perea testified that as a result of appellant's assault, she gets very nervous around men; if they come close to her, she thinks that someone is going to pull out a knife and try to hurt her in some way. (26RT 2998.) Perea does not feel safe if anyone comes really close to her. (29RT 3000.) She is also more aware of her surroundings and who is around her – she now checks the backseat of her car when she gets in. (29RT 3000-3001.)

After Francisco's testimony but before Gilberto Torres's testimony, trial counsel objected to Francisco's testimony, claiming that it violated the trial court's earlier ruling on victim-impact testimony in that it involved a characterization of the nature of the crime, in violation of both *Booth* and *Payne,* and was inflammatory and an appeal to emotion. (26RT 2979-2981.)

The trial court and counsel then engaged in a discussion regarding whether Francisco's testimony was an expression of her feelings about what the impact of Sophia's death had been on her personally, or an improper characterization of the crime. (See 29RT 2983-2986.) The trial court concluded that Francisco's testimony was proper victim-impact evidence as follows:

> I don't find that to be prejudicial or beyond the area that they can go into. It's clear that they [Sophia's family members] can't talk about their view of the crime. We wouldn't allow them to get into a discussion that, you know, [appellant] hit her eight times with a heavy object, or six times, and hit her in the face with the object. We're not going to allow that. But for them to be allowed to say that one of the impacts is their reliving what she must have gone through is I don't think prejudicial, and I'll allow it.

(29RT 2985.)

B. Applicable Law

The Eighth Amendment to the federal Constitution permits the introduction of victim impact evidence, or evidence of the specific harm caused by the defendant, when admitted in order for the jury to assess meaningfully the defendant's moral culpability and blameworthiness. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].) Such evidence violates the Fourteenth Amendment's Due Process Clause when it is so unduly prejudicial that it renders the trial fundamentally unfair. (*Ibid.*) Under California law, victim impact evidence is generally admissible as a circumstance of the crime pursuant to section 190.3, factor (a). (*People v. Boyette* (2002) 29 Cal.4th 381, 443-444; *People v. Stanley* (1995) 10 Cal.4th 764, 832.) "'On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*People v. Edwards* (1991) 54 Cal.3d 787, 836, quoting *People v. Haskett, supra,* 30 Cal.3d at p. 864; *People v. Harris* (2005) 37 Cal.4th 310, 351.)

C. The Victim-Impact Testimony Was Properly Admitted

1. Victoria Francisco's And Gilberto Torres's Testimony

The simple response to appellant's claim that Victoria Francisco's and Gilberto Torres's victim-impact testimony was improper is that their testimony told the jury nothing that it was not already aware of. During the guilt phase trial, the jury had already seen photographs of the victim and heard testimony which, in essence, described the victim struggling for her life while enduring a brutal and bloody attack, beating, rape, and stabbing. Therefore, it was certainly not surprising that Ms. Francisco might think about the suffering her younger sister Sophia went through the night she was murdered, or that

Gilberto Torres might think about the brutal way in which his sister died. (See *People v. Dickey* (2005) 35 Cal.4th 884, 917 ["It would come as no surprise to a jury that a victim's family was anguished by her murder, relieved that part of the trial was over, and satisfied with the guilty verdicts"].) In fact, the comments were no different than those made in *People v. Pollack* (2004) 32 Cal.4th 1153, 1182, which this Court held were proper:

> In any event, the evidence was admissible. The witnesses did not testify merely to their personal opinions about the murders. Rather, their testimony was limited to how the crimes directly affected them. Goodbarn testified that she was intensely shocked not only by the fact of the Garcia's deaths, *but also by the brutal manner in which they died.* Donald Stephen Garcia testified that the circumstances of his parents' deaths made it impossible for him to remember his parents or his own childhood without in some manner *imagining the suffering of their final minutes. This was proper and admissible victim impact evidence.* As in *Payne v. Tennessee, supra*, 501 U.S 808, the testimony "illustrated quite poignantly some of the harm that [defendant's] killing[s] had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."

(*Id.* at p. 826, italics added.)

Accordingly, the brief remarks of Ms. Francisco and Mr. Torres were proper, and not "so inflammatory as to elicit from the jury an irrational or emotional response *untethered to the facts of the case.*" (*People v. Pollock, supra*, 32 Cal.4th at p.1180, italics added.) In fact, appellant himself cites a passage in *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063 (AOB 234), which notes that in *People v. Haskett, supra,* 30 Cal.3d at pp. 863-864, this Court held "the prosecution's invitation to the jurors to identify with the surviving victim

of an attempted murder, who also had witnessed the murder of her two sons, *and to imagine the suffering the defendant's act had inflicted upon her*, was appropriate at the penalty phase." (Italics added.)

Moreover, as in *People v. Boyette, supra,* 29 Cal.4th at page 444:

> In [his] argument, the prosecutor emphasized the victim impact evidence, but also spoke of the relevance of the facts of the crime itself, as well as other aspects about [appellant] that ([he] argued) demonstrated why the death penalty was appropriate for him and a life sentence was not. The evidence was relevant and the argument appropriate. We find no danger that the jury's rationality was overborne and thus find no constitutional violation.

Therefore, Francisco's and Torres's testimony at the penalty phase was not improper.

Even assuming arguendo the victim-impact testimony was somehow improper, the error was harmless under any standard. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1035 "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights"]; see also *People v. Smith* (2003) 30 Cal.4th 581, 622; *Chapman v. California, supra*, 386 U.S. at p. 24.) The testimony was very brief and consumed only a few lines of the transcript, and was not significant in light of the emphasis placed in the penalty phase on appellant's other criminal conduct, the obviously brutal nature of Sophia's murder and rape, and the lack of significant mitigating circumstances. Therefore, error, if any, was harmless.

2. Morales's And Perea's Testimony

As to Morales's and Perea's victim-impact testimony, appellant's claim that the testimony did not qualify as victim-impact testimony since it did not involve the circumstances of the capital crime (i.e., the rape, robbery and

murder of Sophia – see AOB 235-236), was waived on appeal since below, he only interposed an Evidence Code section 352-type objection. (Evid. Code, § 353; cf. *People v. Davenport* (1995) 11 Cal.4th 1171, 1205.) Appellant himself acknowledges as much. (See AOB 236 ["Although the issue that the subject testimony of Morales and Perea involved victim-impact testimony by victims pertaining to non-capital crimes was not asserted. . . ."].) The fact that "the court was clearly aware of the fact that both Morales and Perea were victims of the non-capital crimes as opposed to the capital crime" (AOB 236) does not excuse the waiver or somehow preserve the issue for appellate review here.

In any event, said testimony was not unduly inflammatory or prejudicial, since the jury had heard the underlying facts regarding the Morales and Perea offenses during the guilt phase of the trial, and convicted appellant of those crimes. The brief testimony of Morales and Perea regarding their lingering fear of men paled in comparison to the facts of the brutal rape, robbery, and murder of Sophia, as well as the victim-impact testimony pertaining to that capital crime. In other words, Morales's and Perea's testimony was certainly not "so inflammatory as to effect from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock, supra*, 32 Cal.4th at p. 1180; cf. *People v. Brown* (2003) 31 Cal.4th 518, 573 [trial court did not err by permitting witnesses to testify that, more than three years after the crime, they were still scared to go out at night].) Moreover, as in *Harris*:

> The testimony was very brief . . . , and was not significant in light of the emphasis laced in the penalty phase on the effect of the crime on the victim's family, the brutality of the murder[], and the paucity of significant mitigating circumstances.

(*People v. Harris, supra*, 37 Cal.4th at p. 352.)

Accordingly, even assuming arguendo the above-cited victim impact evidence may have been cumulative and or improperly admitted, it was nonprejudicial in light of the very strong evidence of aggravating factors and properly admitted victim impact testimony. (See *People v. Boyette, supra*, 29 Cal.4th at p. 445 [finding no prejudice in the admission of victim impact evidence]; see also *People v. Cox* (2003) 30 Cal.4th 916, 958 ["where evidence of fear is admitted in error but 'is cumulative of other properly admitted evidence to the same effect,' such error is not prejudicial."]; *People v. Hughes* (2002) 27 Cal.4th 287, 336 [assuming photograph was improperly admitted because it was cumulative, no prejudice in light of other properly admitted evidence and overwhelming evidence of appellant's guilt].)

D. Section 190.3, Factor (a), Is Constitutional

Appellant contends that because section 190.3, subdivision (a), may be interpreted to include a broad array of victim impact evidence, it is constitutionally vague and overbroad. (AOB 238-241.) Unfortunately for him, this Court rejected the same argument in *People v. Boyette, supra,* 29 Cal.4th at page 445, footnote 12:

> Both the high court (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750]) and this court (*People v. Kraft*, [*supra*, 23 Cal.4th at p.] 1078]) have concluded section 190.3, factor (a) is not unconstitutionally vague. Although those decisions were not in the context of permitting a broad array of victim impact evidence, we nevertheless find them applicable here, for the "circumstances of the crime" reasonably include how the victims' deaths affected surviving family members.

Respondent has demonstrated above that the complained-of victim impact evidence was properly admitted, and even assuming error, the error was nonprejudicial. Accordingly, appellant's claim must be rejected.

VIII.

THE TRIAL COURT PROPERLY LIMITED THE TESTIMONY OF CORRECTIONAL EXPERT JAMES ESTEN AT THE PENALTY PHASE

Appellant contends the trial court violated both state law and his federal constitutional rights to due process and a reliable penalty determination by limiting the testimony of his witness, correctional expert James Esten, at the penalty phase. (AOB 244-272.) He is mistaken.

A. Factual Background

Prior to Esten's defense penalty phase testimony, the prosecutor moved to limit his testimony. While acknowledging that appellant was entitled to call an expert to offer an opinion as to how he would adjust in a structured prison setting and that appellant could offer character evidence that he would be unlikely to commit future crimes and would be able to adjust to prison life, the prosecutor, citing *People v. Daniels, supra,* 52 Cal.3d at page 877, asserted that future conditions of confinement for a person sentenced to life without possibility of parole was irrelevant. (5CT 1319-1324.)

Trial counsel countered that Esten would testify that appellant had the potential to make a successful adjustment to life in prison without the possibility of parole; therefore, the jury should have a basic understanding of the circumstances that he would be required to adjust to. Also, trial counsel asserted that the evidence would be relevant to rebut "express or implied allegation [*sic*] of future dangerousness." (5CT 1420-1421.) Trial counsel detailed Esten's proposed testimony in his written response, which included, inter alia:

1. New prison architecture and construction techniques;
2. Electric fences surrounding Level IV institutions;

3. The direct observation of inmates at all times by armed officers;

4. The confinement of Level IV inmates to the most secure areas of the prisons; and

5. Other restrictions on activities, movement in the institution, and job assignments that are relevant to minimizing the risk of escape by inmates serving sentences of life in prison without the possibility of parole.

(5CT 1423-1424.)

Trial counsel also set forth Esten's proposed testimony focusing on prison security measures designed to prevent inmates from securing weapons and committing assaults upon staff and other inmates, including:

1. A description of modern prison construction techniques . . . [including] describ[ing] cell construction, and describ[ing] how fixtures such as toilets, sinks and beds consist of stainless steel units with few or no moving parts, which are set into concrete, thus eliminating the possibility for disassembly by inmates;

2. Mr. Esten will also describe the manner in which Level IV inmates are supervised and observed at all times by armed officers, with a view to deterring assaults by inmates upon one another and upon staff. Mr. Esten will also describe response measures that are in place in order to respond to such incidents as they may occur, and

3. Mr. Esten will also describe other measures designed to discourage inmate conflicts, such as cell assignments, inmate seating at meal time, transportation within the institution of different races, and other security measures designed to ensure safety of inmates and prison staff.

(5CT 1424-1425.)

Following a hearing on the motion, the trial court refused to allow Esten to testify regarding the details of the prison system as follows:

> THE COURT: The Court is going to rule that the expert may express his underlying opinion. I will not allow him to go into the details of the prison system as it relates to how all the prisoners are treated in Classification 4. I think we have to draw the line between the general descriptions of prison life and his specific opinion as to [appellant] as to his dangerousness. I wouldn't allow his opinion that he wouldn't harm other prisoners, if that's his opinion.

(28RT 3492-3493.)

Accordingly, during the penalty phase, Esten testified, inter alia, that Level 4 maximum security housing on death row is the most restrictive and structured environment available. (29RT 3510.) Esten opined that appellant could be placed in a Level 4 maximum security prison as a life-without-possibility-of-parole prisoner for the rest of his life. (29RT 3516.) According to Esten, maximum security provides the greatest amount of control over the inmate population within the California Department of Corrections. Also, the trend is that in the last 10 or 15 years, prison regulations have become far more restrictive. (29RT 3572.)

B. The Trial Court Properly Excluded Irrelevant Testimony On Conditions Of Confinement

Only relevant evidence is admissible. (Evid. Code, § 350.) A trial court has "wide discretion" in deciding the relevancy of evidence. (*People v. Kelly* (1992) 1 Cal.4th 495, 523; see *People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.) The exercise of that discretion will not be reversed absent a showing of abuse. (*People v. Green* (1980) 27 Cal.3d 1, 19; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 32; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 249.) In

order for a trial court's ruling on the admissibility of evidence pursuant to Evidence Code section 352 to be disturbed on appeal, it must be demonstrated that the trial court exercised its discretion "in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Sanders, supra,* 11 Cal.4th at p. 512; *People v. Jordan* (1986) 42 Cal.3d 308, 316.) Moreover, "When expert opinion is offered, much must be left to the trial court's discretion." (*People v. Carpenter* (1997) 15 Cal.4th 312, 403.)

Here, the trial court properly excluded detailed evidence on conditions of confinement as irrelevant. As this Court held in *People v. Jones* (2003) 29 Cal.4th 1229, 1261:

> "[E]vidence of the conditions of confinement that a defendant will experience if sentenced to life imprisonment without parole is irrelevant to the jury's penalty determination because it does not relate to the defendant's character, culpability, or the circumstances of the offense. (*People v. Daniels* (1991) 52 Cal.3d 815, 876-878; *People v. Thompson* (1988) 45 Cal.3d 86, 138-139.) Its admission is not required either by the federal Constitution or by Penal Code section 190.3. (*People v. Daniels, supra*, 52 Cal.3d at pp. 876-878; *People v. Thompson, supra*, 45 Cal.3d at pp. 138-139.)" (*People v. Quatermain* (1997) 16 Cal.4th 600, 632.) "Moreover, '[d]escribing future conditions for a person serving life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do. [Citation.]' (*People v. Thompson, supra*, 45 Cal.3d at p. 139.) Although defendant argues that 'this logic is incorrect and the matter should be revisited, at least as to the question of the admissibility of evidence about how a life without parole prisoner would live,' he advances no persuasive reason as to why this is so." (*People v. Majors* (1998) 18 Cal.4th 385, 416.) We have been given no reason to

reconsider our holdings in this regard. (See *People v. Ervin* (2000) 22 Cal.4th 48, 97.)

However, in an attempt to demonstrate the relevancy of Esten's testimony regarding conditions of prison confinement, appellant contends that Dr. Wu's opinion that appellant would have the ability to control his behavior in a highly-structured environment rendered Esten's testimony relevant. (AOB 255, 259.) The problem for appellant is that he never argued below that Dr. Wu's testimony rendered Esten's testimony relevant. Therefore, his claim was waived on appeal. (See Evid. Code, § 353.)

In any event, Esten testified that Level 4 maximum security housing on death row is the most restrictive and structured environment available (29RT 3510); therefore, the jury did hear "the background information necessary to establish the 'highly structured setting' referenced by Dr. Wu which would, in effect, act as a 'frontal lobe'" (AOB 255, 265-266). Therefore, appellant was not deprived of a meaningful opportunity to present a defense. (See *Crane v. Kentucky*, *supra*, 4767 U.S. at p. 690.)

Appellant asserts that Esten's testimony was also relevant to rebut express and implied claims by the prosecutor regarding his future dangerousness. (AOB 260-264, 266-270.) He is mistaken, since the prosecutor made no claim of future dangerousness. In noting appellant's use of a knife and referring to appellant's violent acts during his penalty phase closing argument (see AOB 268), the prosecutor was simply referring to undisputed facts in evidence, not asserting a claim of appellant's express or implied future dangerousness. And, although the prosecutor introduced evidence of five separate incidents involving crimes of violence or implied violence at the penalty phase, the thrust of the prosecutor's argument was that based on appellant's past criminal history, the death penalty would be appropriate, not that if appellant were sentenced to life without possibility of parole, he might

engage in violent conduct while in prison in the future. (See 31RT 3897 [prosecutor indicates that he does not intend to make any comment about the potential of appellant escaping from prison; instead, he intends to discuss his past juvenile conduct].)

But to the extent the prosecutor may have implied that based on appellant's past conduct, he might not behave well in prison if sentenced to life without possibility of parole, Esten's testimony was still irrelevant. The prosecutor did not argue that appellant should be executed because he would be violent in prison. Rather, "the prosecutor's argument properly focused on [appellant's] character and record." (*People v. Quatermain* (1997) 16 Cal.4th 600, 634.) The prosecutor did *not* argue:

> that the prison system would be incapable of restraining or controlling any violence by [appellant]. The proper rebuttal to this argument was other evidence and argument directed to [appellant's] character and record, not evidence concerning the conditions of confinement if he were sentenced to life without parole.

(*Ibid.*)

Accordingly, appellant's claim fails.

IX.

APPELLANT'S CLAIMS REGARDING PROSECUTORIAL MISCONDUCT AT THE PENALTY PHASE WERE WAIVED, AND, IN ANY EVENT, LACK MERIT

Appellant contends that the prosecutor's cross-examination of defense expert witnesses and his closing argument at the penalty phase "so appealed to the passion and prejudice of the jury" as to deny him due process and a fair and reliable penalty trial. (AOB 273.) Not so.

A. Applicable Law

When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) "To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown, supra,* 31 Cal.4th at p. 553.) There are two exceptions to this forfeiture: (1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct. Forfeiture for failure to request an admonition will also apply where the trial court immediately overruled the objection to the alleged misconduct, leaving defendant without an opportunity to request an admonition. A defendant claiming that one of these exceptions applies must find support for his or her claim in the record. (*People v. Boyette, supra*, 29 Cal.4th at p. 432.) The ritual

incantation that an exception applies is not enough. (*People v. Panah, supra,* 35 Cal.4th at p. 462.)

B. Waiver

Appellant concedes that trial counsel failed to object to the prosecutor's cross-examination of Dr. Wu and Esten, the prosecutor's questions regarding prison gang initiation, and the issue of potential future change in corrections regulations which would permit life prisoners to get married and have conjugal visits. (See AOB 279 ["Notwithstanding defense counsel's failure to object at trial. . . ."].) Having failed to object and/or request an admonition as to these purported instances of misconduct, they have been waived on appeal. (*People v. Panah, supra*, 35 Cal.4th at p. 462, citing *People v. Brown, supra,* 31 Cal.4th at p. 533.) Appellant's simple assertion that the claims are preserved nonetheless "because the misconduct constituted plain error involving a serious miscarriage of justice" is precisely the type of "ritual incantation that an exception applies" which this Court stated in *Panah* is insufficient. Accordingly, the waiver applies.

C. No Prejudicial Prosecutorial Misconduct Occurred During The Prosecutor's Cross-Examination Of Dr. Wu And Esten

First, appellant contends that the prosecutor attempted to curry favor with the jury and suggest that defense witnesses were not being truthful in making the following comments in cross-examining Dr. Wu and Esten:

1. "All right. So just to bring it back so we have it clear for the jury, . . ." (28RT 3324);

2. "Okay. So – and that's another thing I think this jury needs to know . . . ." (28RT 3340);

3. "It's your testimony to the ladies and gentlemen of this jury . . ."

(28RT 3343);

4. "You told the ladies and gentlemen of the jury . . ." (28RT 3354);

5. "[J]ust so the jury knows, . . ." (28RT 3358);

6. "I'm not going to sit here with the jury, eyeball to eyeball, while I read these articles" (28RT 3367);

7. "Okay. It's a very simple point I want to make. Just so the jury doesn't have a misimpression about what went on here . . ." (29RT 3557);

8. "[J]ust so you don't confuse the jury . . . ."

(29RT 3560).

There was nothing deceptive or reprehensible about the prosecutor's mere (and polite) references to the trier of fact (the jury) in cross examining Dr. Wu and Esten. The prosecutor did nothing more than be polite and acknowledge the jury in his questions in order to directing the witness's testimony toward the trier of fact. Nor was the prosecutor's mention of "the jury" an attempt to curry favor with it – trial counsel referred to "the jury" in questioning the witnesses as well. (See, e.g., 29RT 3245 ["Could you explain to the jury what those initials stand for . . ."]; 29RT 3255 ["What I'd like you to do, if I could, Doctor, is step down so I could set this up, and perhaps we can explain to the jury what these are"].) Appellant cites no case to support his claim that the prosecutor's reference to "the jury" in questioning the witnesses, or the questions themselves, were somehow improper, and respondent is unaware of any.

Appellant next contends that the prosecutor's questioning of Esten regarding prison gangs and the fact that a killing is an initiation rite into a prison gang was an "obvious" appeal to the passion and prejudice of the jury. (AOB 277-278.) However, it was *trial counsel* who first broached the issue of prison gangs and "disruptive groups" in questioning Esten. (See 29RT 3530.)

In fact, trial counsel went so far as to ask Esten to "[t]ell us a little bit more about that. What is a prison gang?" (*Ibid.*) Trial counsel also elicited that if appellant joined a prison gang or disruptive group, it would result in him being placed in a security housing unit cell identified as a prison gang member, and that Esten had advised appellant of this. (29RT 3531.) Esten also testified that although there was pressure within the prison to join prison gangs, appellant had told him that he had the strength to resist. (29RT 3531-3532.)

The prosecutor's question regarding the initiation rite into a prison gang was proper. Having asked Esten to tell the jury what a prison gang was on direct examination, the prosecutor was certainly entitled to elicit on cross examination that it is common for people to progress from street gangs to prison gangs, and that the initiation rite into a prison gang was a killing. (See 29RT 3564.) This is especially true since the jury heard that appellant was a West Park gang member. (See, e.g., 29RT 3585, 3589, 30RT3684-3685, 3698-3701.) Moreover, the gist of Esten's testimony was that appellant would perform well in the structured environment of a Level 4 security setting, and he sought to minimize appellant's past conduct – for example, the incident involving the "spork."

> "While the prosecution is prohibited from offering expert testimony predicting future dangerousness in its case-in-chief ([*People v.*] *Adcox* [(1988)] 47 Cal.3d [207,] 257), it may explore the issue on cross-examination or in rebuttal if defendant offers expert testimony predicting good prison behavior in the future. (*People v. Gates* [1987] 43 Cal.3d [1168], 1211; *People v. Coleman* (1989) 48 Cal.3d 112, 150.) As we said in *Gates*. 'If the defense chooses to raise the subject, it cannot expect immunity from cross-examination on it.' ([*Gates, supra*,] 43 Cal.3d at p. 1211.)" (*People v. Morris* (1991) 53 Cal.3d 152, 219, overruled on another point in *People v. Stansbury* (1995) 9 Cal.4th 824,

830, fn. 1; see *People v. Seaton* (2001) 26 Cal.4th 598, 679.) (*People v. Jones, supra,* 29 Cal.4th at pp. 1260-1261.) This is exactly what occurred here.

Appellant further complains that the prosecutor's questions of Esten regarding the potential change in prison regulations which could allow prisoners to have conjugal visits and to marry was outside the scope of trial counsel's questions on direct and also amounted to an improper elicitation of conditions of confinement. (AOB 278-279; 29RT 3562-3564.) Not only did trial counsel fail to object to the question, thereby waiving any claim of error, he followed up on it during re-direct examination as follows:

Q: Okay. Now, Mr. Sneddon pointed out that there was a change within the last year prohibiting inmates serving life in prison without the possibility of parole from having conjugal visits. That's true?

A: That's true.

Q: All right. And his point was, you could – that could be changed back?

A: I don't see how the public would stand for it, but conceivably it could be changed back.

Q: Let me ask you this: In the last 10 or 15 years that you've been associated with the prison system, have you noticed a trend in regulations as to whether they're becoming more or less restrictive?

A: Things have become far more restrictive in the last ten years than in the previous 20. They are now where I was when I started in 1973.

Q: Okay. And in your opinion, has that trend been supported by public opinion?

A: Public pressure.

Q: That's stronger than public opinion?

A: Yes.

(29RT 3571-3572.)

In other words, trial counsel sought to use the prosecutor's questions to make the point that, if anything, regulations would only become more, rather than less, restrictive for inmates. And although the prosecutor did touch on the fact that regulations regarding marriage and conjugal visits could change for the benefit of appellant during closing argument, pointing them out as examples of things appellant had deprived Sophia Torres of by killing her (32RT 4001), trial counsel argued to the contrary based on Esten's opinion. (See 32RT 4071 ["Esten gave you a hint . . . of the bleak reality of life in state prison forever. There's not going to be any conjugal visits"].) In any event, at most, the prosecutor's comments were similar to those held nonprejudicial in *People v. Mitcham, supra*, 1 Cal.4th at p. 1077, and *People v. Hovey* (1988) 44 Cal.3d 543, 581 [prosecutor's comments that "Laws can change, people can escape and the crime is too awful" held nonprejudicial characterizations of matters of common knowledge likely to be appreciated by every juror making the penalty determination.

D. No Prejudicial Prosecutorial Misconduct Occurred During Closing Argument

Prior to the prosecutor's closing argument and in response to written pleadings and argument by both the prosecutor and the defense, the trial court agreed to limit the prosecutor's closing argument regarding death as a message to the community, as set forth in the following colloquy:

> THE COURT: Okay. The next one is the death verdict as a message to the community. Are you going to send a message to the community, Mr. Sneddon?
>
> MR. SNEDDON: Well, I think this is – this a matter of – this is I think one of those things that you're going to have to see as you go

along. I think, you know, this – this thing that the quoted here in the Brooks case, I can clearly see where, you know, this "We're in a war, and this is Vietnam," and everything else like that, is one thing, but I don't see any cases that say that you can't talk about the implications of the decision for the community.

THE COURT: Well, the thing that I'm thinking of is in terms that you're not allowed to argue deterrence.

MR. SNEDDON: Correct.

THE COURT: And that's where I was coming from. To the extent that you start talking about a message to the community of deterrence, you've crossed that line. That's where I was thinking.

MR. SNEDDON: Yes, I understand the deterrence context of the remarks, Your Honor. On the other hand, there are – there are things where you can talk about society in general and where somebody may go beyond a certain point that – in conduct. And I understand the deterrence, and I understand you have to stay away from that, and I will stay away from that.

MR. DULLEA: May I make a comment?

MR. SNEDDON: But I –

THE COURT: Go ahead.

MR. SNEDDON: But I just don't think that a general prohibition – I mean, being limited in my ability to point out some of the implications of this to society, or the implications of the death penalty in general in the context of the kind of crimes we have here is limited by any case that I've ever seen. That's all I'm suggesting.

MR. DULLEA: Can I comment?

THE COURT: Yes.

MR. DULLEA: There are two other objections besides deterrence.

One is that such remarks, at the least, can be inflammatory. They can be an appeal to passion in an attempt to arouse the jury or an appeal to public opinion.

And secondly, an appeal to the jury to send a message to the community really has nothing to do with factors in aggravation, with the defendant's character, with circumstances of the crime, or with any traditional concept of justice that I can think of.

MR. SNEDDON: Well, we're not –

THE COURT: I'm going to grant your request insofar as it enters the arena of deterrence. That's as far as I'm going. I can see comments about society or community that don't do that that I don't want to prohibit. But, once again, subject to what happens during argument, you can be free to object.

(31RT 3899-3901.)

The prosecutor concluded his opening penalty phase closing argument as follows:

In this case, if you give [appellant] life without possibility of parole under the facts and circumstances of this case, what you are saying to [appellant] is that, "You have not crossed that line."

Now on the other hand, when you take all of the evidence and the testimony that we've presented throughout this case on both sides – on both sides – and you look at the patterns, and you look at the totality, there is one inescapable conclusion, one inescapable conclusion that cannot be argued with. And that is that if you decide that this is an appropriate case for the death penalty and that [appellant] should die for what he has done, and he should be given his due, and it is just and it is appropriate, based on the total review of everything, the reality is you're giving [appellant] a death which is imminently more humane, less brutal,

less terrifying, less violent than the death he gave Sophie Torres.

And I also submit to you, after that same review of everything, that what the death penalty will do in this case is that it certainly will restore the confidence and the trust in the system's ability to deal with people that transgress it and that do it in situations that are so aggravated and without sufficient justifying or mitigating circumstances that the public can see justice is done. They can see and the families can see that justice means more than sympathy, and mercy, and warehousing, and rehabilitation, and that it takes into account [appellant's] conduct and the method and manner of his crimes and the impacts that it's had on the ones who suffered.

Ladies and gentlemen, it gives me no joy, it really doesn't, and it gives me no happiness or sense of accomplishment in any way, shape or form to say to you here this afternoon that because of [appellant's] bad choices, that the appropriate choice for you in this case is that [appellant] should be sentenced to die for the crimes that he's committed.

(32RT 4022-4024, italics added.)

Appellant complains that the italicized portion of the above argument circumvented the trial court's order precluding argument on the issues of deterrence and the cost of imprisonment. (AOB 285-286.) Not so. First of all, the issue was waived, since the trial court specifically advised trial counsel that if he felt the prosecutor's argument was improper, he could object. He did not. (*People v. Panah, supra*, 35 Cal.4th at p. 462.) In any event, even assuming arguendo the claim was preserved on appeal, it still fails. The test is whether it is reasonably likely that the jury understood the prosecutor's brief societal remarks as a request to "'send a message' on the issue of deterrence as well as . . . the issue of the cost of imprisonment." (AOB 285; see *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Respondent submits there is no such

likelihood. In referring to "the system's ability to deal with people that transgress it," the prosecutor was simply referring to the appropriate punishment he felt the jury should impose on appellant – the death penalty, not to the concept of deterrence. And the prosecutor's reference to "warehousing" and "rehabilitation" was simply a reference to the alternative punishment the jury could impose on appellant – life in prison without the possibility of parole. In no way did the prosecutor refer to or imply by reference the cost of imprisonment.

However, even assuming arguendo the prosecutor's comments were somehow erroneous and could be construed by the jury in the manner appellant contends, the error was harmless. The prosecutor's comments were extremely brief, made during a lengthy closing argument. (See 32RT 3954-4024.) Moreover, as appellant himself notes, the trial court instructed the jury, per his request, not to consider the deterrent effect of the death penalty or the cost of life imprisonment. (AOB 286; see 6CT 1537 [Defendant's Proposed Special Jury Instruction Number 5].) Presumably, the jury adhered to the trial court's instructions. (*People v. Hill, supra*, 3 Cal.4th at p. 1011; *People v. Pinholster, supra*, 1 Cal.4th at p. 925; *People v. Bonin, supra*, 46 Cal.3d at p. 699.)

Appellant also contends the prosecutor improperly engaged in speculation concerning future conditions of confinement during his penalty phase closing argument in arguing as follows:

> Mr. Esten's testimony, the jail prison expert, okay, if you think I'm going to stand up here and tell you that I don't think that [appellant] could conform to prison life, you are wrong. It's structured enough. Sure he could. I'm not – I probably would have a matter of disagreement with Mr. Esten as to how much trouble he's going to get in, but sure. So give it what worth you think he's entitled to.

Do you think he could lead a productive life in prison? I'm not going to speculate whether he can or can't. There's certainly some evidence that he probably could. But what are those evidences based upon? They are based upon the same talents he's had his entire life. Has he ever done anything up to this point in his life? No, not a single thing. It's one lost opportunity after another lost opportunity.

So, in essence, what you have is two things you are asked to consider in mitigation that are based on his choice. Now, to this point in his life, that's not a very firm cushion to rely on as to what will happen.

. . .

And you know what, I think the last thing you consider when you assess – when you weigh Mr. Esten's testimony about whether [appellant] can conform, whether he can have a good life in prison, is whether life without possibility of parole is a just punishment in this particular case.

After all, ladies and gentlemen, it is life. It is life with visitations, it's life with friends, it's life with girlfriends, it's life with family, *it's life potentially, if they change the regulations, to have a wife and family.* It's a life. Everyday life.

Aren't those the very things that he deprived Sophia Torres of? Where's the fairness in that? Where's the fairness in her inability to find another love in her life? Where's the fairness in her inability to come to grips with her problems and turn herself back into the person she really was? Where [*sic*] the fairness she will never be able to visit her father again or her sisters or her brothers? Where is the fairness in all that? There isn't any. That's reality.

So life without possibility of parole really isn't very fair based upon the totality of the circumstances of this particular case and it didn't relate

to justice. . . .

(32RT 3999-4001, italics added.)

Appellant objects to the italicized portion of the above argument, claiming that the prosecutor improperly commented on conditions of confinement. However, trial counsel did not object to the prosecutor's questioning of Esten regarding a possible change in regulations regarding marriage and conjugal visits, therefore forfeiting the claim. (See *People v. Mitcham, supra*, 1 Cal.4th at p. 1077.) In any event, trial counsel himself followed up on the prosecutor's questions and sought to use the evidence to his advantage. That being the case, the prosecutor's argument was based on the evidence adduced during the penalty phase trial, and was proper. Moreover, the prosecutor's argument was anything but "deceptive and fallacious," as appellant contends. (See AOB 288.) Rather, the prosecutor's comments were "too indefinite . . . to have prejudiced appellant," and referred to "matters of common knowledge likely to be appreciated by every juror making the penalty determination." (*People v. Mitcham, supra*, 1 Cal.4th at p. 1077.)

In any event, even assuming arguendo the prosecutor's argument (and therefore, his questioning of Esten regarding potential future changes in prison regulations) was somehow improper, appellant was not prejudiced. (*People v. Crew, supra*, 31 Cal.4th at p. 836; *People v. Mitcham, supra,* 1 Cal.4th at p. 1077; *People v. Warren* (1988) 45 Cal.3d 471, 480.) The point the prosecutor was trying to make was simply that if appellant was sentenced to life without possibility of parole, he would still "have a life" and contact with family, friends, and girlfriends, in contrast to Torres, who, because of appellant, would never be able to put her life back together and see her family again. Viewed in this context, it is not reasonably probable that the prosecutor's brief reference while making this point to a potential change in regulations which might allow appellant to "have a wife and family" somehow tipped the scales

in the eyes of the jury in favor of the death penalty, especially since trial counsel argued that life in prison for appellant would mean exactly the opposite – no conjugal visits. (See 32RT 4071 ["Esten gave you a hint . . . of the bleak reality of life in state prison forever. There's not going to be any conjugal visits"].)

Moreover, the jury was instructed to determine the facts from the evidence received during the trial (as opposed to speculation), and the prosecutor's penalty phase argument focused on the crimes appellant had been convicted of as well as the instances of his prior misconduct, as well as critiquing and downplaying appellant's mitigating evidence. (See 6CT 1533; 32 RT 3977-4024.) Accordingly, error, if any, was harmless. This claim fails.

X.

THERE WERE NO ERRORS TO ACCUMULATE AT THE PENALTY PHASE

Appellant contends, as he did with respect to the guilt phase, that even if no single penalty phase error, standing alone, warrants reversal of the penalty phase judgment, the cumulative effect of a number of errors does. (AOB 290-292.) On the contrary, there were no errors to accumulate here.

As previously noted, the present case was not a close one, and respondent has demonstrated that there were no errors at the penalty phase to accumulate. Moreover, if there were any errors, they were plainly harmless even if viewed cumulatively. (See *People v. Riel, supra*, 22 Cal.4th at p. 1215 ["[w]e have found no error that, even in cumulation, was prejudicial"]; *People v . Pride, supra,* 3 Cal.4th at p. 269 ["[a]ny errors that did occur, whether viewed singly or in combination, were inconsequential"]; see also *People v. Welch, supra,* 20 Cal.4th at p. 775 [no cumulative error with respect to guilt and penalty phases].) Appellant received a fair penalty phase trial. Accordingly, his claim of cumulative error at the penalty phase must be rejected.

A defendant is entitled to a fair trial, not a perfect one. (*People v. Welch, supra,* 20 Cal.4th at p. 775.) Even assuming arguendo any error(s) existed, appellant has at most shown that his ""'trial was not perfect – few are,"' especially few of the length and complexity of this trial. There was no prejudicial error either individually or collectively." (*People v. Cooper, supra,* 53 Cal.3d at p. 839, citation omitted.) Appellant received a fair trial. His claim fails.

XI.

THE ROBBERY AND RAPE SPECIAL CIRCUMSTANCE ALLEGATIONS, AS APPLIED IN THIS CASE, DO NOT VIOLATE THE EIGHTH AMENDMENT

Appellant contends that, as applied in the present case, the robbery and rape special circumstances allegations violated the Eighth Amendment because they permitted the jury to impose death for an accidental or unforeseeable killing. (AOB 295-303.) He is wrong.

This Court has

> consistently rejected the claim that the statutory special circumstances, including the felony-murder special circumstance, do not adequately narrow the class of persons subject to the death penalty. (*People v. Gurule, supra*, 28 Cal.4th at p. 663; *People v. Kraft, supra*, 23 Cal.4th at p. 1078; *People v. Frye, supra*, 18 Cal.4th at pp. 1028-1029; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265.)

(*People v. Pollock, supra*, 32 Cal.4th at p. 1195.)

Nevertheless, appellant contends that under California law, the jury could have convicted appellant of murder during the commission of rape and robbery even if the killing was negligent, accidental, or wholly unforeseeable. (AOB 295.) The problem for appellant is that the present killing was anything but negligent, accidental, or wholly unforeseeable. In fact, the only basis on which the jury could have found the killing of Torres was negligent, accidental, or wholly unforeseeable would be an unexplainable rejection of the prosecution's evidence. The evidence showed that appellant chased, subdued, raped, and then savagely beat and stabbed Torres to death. The 911 call, made later in time and some distance away from the park, does *not* "indicate[] that the sexual encounter was consensual, but that it turned sour, and further, that [appellant] wanted to help Sophia Torres, reflecting remorse and second thoughts regarding the encounter which resulted in her death." (AOB 303.)

Even assuming the 911 call was a post-attack attempt to "help" Torres or a reflection of remorse, this does not somehow render the killing during the course of robbery and rape itself accidental or negligent. There being absolutely no evidence that the killing was accidental, negligent, or wholly unforeseeable, appellant's claim must be rejected.

XII.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

In his final claim, appellant raises a "laundry list" of stock challenges to California's death penalty statute, all of which this Court has repeatedly rejected in the past. (See AOB 304-368.) As appellant raises no persuasive reasons why this Court should revisit the claims, they should be rejected here, as they were in *People v. Panah, supra,* 35 Cal.4th at page 499:

> We again conclude therefore that: (1) the statute adequately narrows the class of death-eligible offenders (*People v. Griffin* (2004) 33 Cal.4th 536, 596; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Barnett, supra*, 17 Cal.4th at p. 1179); (2) section 190.3, factor (a) is not impermissibly overbroad facially or as applied (*People v. Brown, supra*, 33 Cal.4th at p. 401; see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [114 S.Ct. 2630, 129 L.Ed.2d 750]); (3) the statute is not unconstitutional because it does not contain a requirement that the jury be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination, other than other crimes evidence, and specifically that all aggravating factors must be proved beyond a reasonable doubt, or that such factors must outweigh factors in mitigating beyond a reasonable doubt, or that death must be found to be an appropriate penalty beyond a reasonable doubt (*People v. Welch, supra*, 20 Cal.4th at pp. 767-768); (4) neither federal nor state Constitution requires the jury to unanimously agree as to aggravating factors, nor have our conclusions in this respect been altered by recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and *Ring v. Arizona* (2002) 536 U.S. 584 [122

S.Ct. 2428, 153 L.Ed.2d 556] (*People v. Ochoa, supra*, 26 Cal.4th at pp. 452-454]; (5) the jury need not make written findings disclosing the reasons for its penalty determination (*People v. Jenkins, supra*, 22 Cal.4th at p. 1053); (6) the jury may properly consider evidence of unadjudicated criminal activity involving violence or force under factor (b) of section 190.3 (*People v. Brown, supra*, 33 Cal.4th at p. 402) . . .; (7) because the statute does not allocate the burden of proof (*People v. Medina* (1995) 11 Cal.4th 694, 782) and a burden of proof instruction need not, and should not be given (*People v. Welch, supra*, 20 Cal.4th at pp. 767-768), neither the failure of the trial court to instruct the jury that the reasonable doubt standard does not apply to mitigating factors, nor its failure to instruct the jury it need not unanimously agree on such factors, violated [appellant's] constitutional rights, nor was it likely the jury would have imported the reasonable doubt standard from the guilt phase into its penalty phase deliberations; . . . (9) nor is the trial court constitutionally required to instruct the jury that certain sentencing factors are relevant only to mitigation (*People v. Kraft* (2000) 23 Cal.4th 978, 1078-1079). . . ; (10) the use of certain adjectives in the list of mitigating factors, here, "substantial," "reasonably believed," and "moral," are not so vague as to erect a barrier to the jury's consideration of mitigating facts and render the statute unconstitutional (see *People v. Prieto, supra*, 30 Cal.4th at p. 726 ["extreme," "substantial"]); . . . (12) neither the federal nor state Constitution requires intercase proportionality review (*People v. Brown, supra*, 33 Cal.4th at p. 402); (13) the statute does not deny equal protection because the statutory scheme does not contain disparate sentence review (*People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288), nor does it deny equal protection on any other ground (*People v. Boyette, supra*, 29 Cal.4th at pp. 465-

467); and (14) the statute is not constitutionally deficient because prosecutors retain discretion whether to seek the death penalty (*People v. Ochoa, supra*, 26 Cal.4th at p. 461).

Similarly, as to appellant's claim that California's use of the death penalty violates international norms of humanity and decency:

> We have . . . repeatedly rejected this claim. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.)

(*People v. Panah, supra*, 35 Cal.4th at pp. 500-501.)

CONCLUSION

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

Dated: May 3, 2006

Respectfully submitted,

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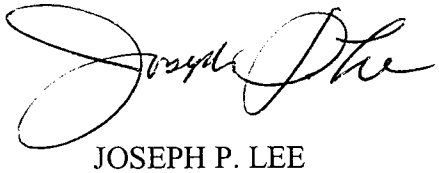

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 41,858 words.

Dated: May 3, 2006

Respectfully submitted,

BILL LOCKYER
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Tommy Jesse Martinez**
No.: **S074624**

I declare:

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

On MAY 3 2006, I served the attached **RESPONDENT'S BRIEF (CAPITAL CASE)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on MAY 3 2006, at Los Angeles, California.

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Signature

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