

SUPREME COURT COPY
In the Supreme Court of the State of California

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**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

JUAN SANCHEZ,

Defendant and Appellant.

CAPITAL CASE

Case No. S087569

Tulare County Superior Court Case No.

VCF040863-98

Honorable Gerald Sevier, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY



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STATEMENT OF THE CASE

Sanchez was sentenced to death after being convicted of two counts of first-degree murder with a multiple-murder and a rape-by-instrument special circumstance. The proceedings took place over a three year period starting in August 1997, when Sanchez murdered Ermanda Reyes and her daughter Lorena Reyes, and then confessed. He was tried on all these charges in three separate trials, two ending in hung juries, before a jury convicted him of both murders and their respective special circumstance in the third trial.

Throughout all three trials, Sanchez challenged the competence and capacity of Oscar Hernandez, Ermanda Reyes's five-year-old son and the only surviving witness to the events of the murders. He sought to exclude Oscar's statements to police that he made on the day of his mother's murder, including Oscar's identifications of him. Finally, pivotal to Sanchez's defense that he gave a false confession, Sanchez claimed that his confession two days after the murders was a result of coercive police conduct.

A. The Charging Document and Pretrial Motions

On May 26, 1998, the Tulare County District Attorney filed an information charging appellant, Juan Ramon Sanchez, with two counts of

murder, in violation of Penal Code section 187. (1 CT 252-254.)¹ Both murder counts included an allegation that Sanchez personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a). The first murder count (Ermanda Reyes) included a multiple-murder special circumstance under Penal Code section 190.2, subdivision (a)(3), and the second murder count (Lorena Martinez) included a rape-by-instrument special circumstance under Penal Code section 190.2, subdivision (a)(17). (1 CT 253-254.)

On May 27, 1998, Sanchez pled not guilty to all counts and denied all allegations, including the special circumstances. Also on that day, the Tulare County Public Defender was appointed as counsel. (1 CT 255.) On July 8, 1998, the People, represented by prosecutor Juliet Boccone, filed a notice of intention to seek the death penalty and introduce aggravating evidence. (1 CT 268-269.)

On September 30, 1998, Sanchez filed a motion to preclude the testimony of Oscar Hernandez because he was not competent and lacked the capacity to testify. (2 CT 482-531; 4 CT 961-966, 978-981.) On February 18, 1999, the court heard argument on the issue. (8 RT 1609,

¹ “CT” refers to the Clerk’s Transcript; “SCT” refers to the Supplemental Clerk’s Transcript; “RT” refers to the Reporter’s Transcript; and “AOB” refers to Appellant’s Opening Brief.

1691-1704.) On February 19, 1999, the court issued a written ruling denying Sanchez's motion. (5 CT 1194-1195.)

On November 20, 1998, Sanchez filed a motion to suppress the pretrial identifications of Sanchez by Oscar Hernandez. (3 CT 759-765; 4 CT 941-944.) On March 11, 1999, the court heard Sanchez's motion. (5 CT 1240.) On March 29, 1999, the court issued a written order denying the motion in part. (6 CT 1345.) The court found that the live lineup and six-person photo lineup were impermissibly suggestive, and it excluded evidence of identifications made at those lineups. However, the court ruled that Oscar's description of Sanchez, and his identification during a single-photo lineup were admissible. (6 CT 1345.)

Also on November 20, 1998, Sanchez filed a motion to exclude evidence of uncharged prior acts pursuant to Evidence Code² section 1101, subdivision (b). (3 CT 766-778.) These acts included the homosexual relationship between Sanchez and prosecution witness Hector Hernandez. (3 CT 768.) On December 11, 1998, the court granted Sanchez's motion under section 352. (4 CT 985; 2 RT 264-274.)

Also on November 20, 1998, Sanchez filed a motion to exclude his statements to police officers on three grounds: that the statements were

² All further statutory references are to the Evidence Code, unless otherwise indicated.

made in violation of *Miranda*³; that the statements were made in violation of the Vienna Convention; and that the statements were not voluntary.

(3 CT 779-796; 4 CT 954-960, 967-970; 5 CT 1243-1267, 1300-1305.)

Over the course of several days in December and January, the court held a section 402 hearing to determine whether Sanchez's statements should be suppressed on these grounds. (4 CT 985; 5 CT 1182-1193, 1234-1236, 1239-1242; 2 RT 316.) On March 11 and 12, 1999, the court heard argument. (10 RT 1978, 2072.) On March 29, 1999, the court issued a written order denying the motion. (6 CT 1341-1344.)

On December 28, 1998, Sanchez filed a motion to exclude Oscar Hernandez's testimony because he lacked personal knowledge. (4 CT 1041-1094, 1100-1131; 5 CT 1133-1162.) Over the course of several days in January, the court held a section 402 hearing and heard argument on the motion. (5 CT 1163-1170.) On February 19, 1999, the court denied Sanchez's motion. (5 CT 1197-1198.)

B. Sanchez's First Two Trials

On March 15, 1999, Sanchez's first trial began.⁴ (5 CT 1314-1315.)

On April 5, 1999, the court clarified its previous ruling and ruled that Oscar's identification following the single-photo lineup was inadmissible,

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁴ It appears the minute order from the first day of trial lists the wrong date of March 18, 1999. The subsequent page accurately reflects that the first day of trial was on March 15, 1999 (5 CT 1313-1314.)

along with his identification following the six-person photo lineup and the live lineup. (16 RT 3318-3319.) On April 14, 1999, the court clarified its previous ruling and ruled that portions of Sanchez's recorded interview were inadmissible because he had invoked his right to silence. (22 RT 4591-4595.) On April 27, 1999, the jury retired to begin deliberations. (6 CT 1449.) On April 30, 1999, the jury informed the court that it was deadlocked and the court declared a mistrial. (6 CT 1585-1587.)

On June 7, 1999, Sanchez's second trial began. (7 CT 1883.) On June 17, 1999, the court issued a written order adopting its previous ruling concerning Oscar Hernandez's capacity to testify and his personal knowledge of the events leading to crime. (8 CT 1940-1941.) The court also issued a written order adopting its previous rulings as to Sanchez's motion to suppress his statements and to exclude Oscar Hernandez's pretrial identification of Sanchez; however the court ruled that Oscar's identification following the single-photo lineup was admissible. (8 CT 1945-1946.) On July 15, 1999, the jury retired to begin deliberations. (8 CT 2193.) On July 19, 1999, the jury informed the court that it was deadlocked, and the court again declared a mistrial. (9 CT 2218-2219.)

C. Sanchez's Third Trial

On August 2, 1999, Sanchez renoticed his motions in limine. (9 CT 2224-2254.) The People, now represented by prosecutor David Alavezos, refiled its oppositions on August 9, 1999. (9 CT 2261-2281.) On

September 1, 1999, the court issued a written ruling adopting all prior rulings and subsequent modifications as to the renoticed motions. (9 CT 2313, 2316.)

On September 13, 1999, the first panel of prospective jurors was sworn in, and jury selection began. (9 CT 2418-2420.)

On September 16, 1999, Sanchez filed a motion to exclude testimony of Alonzo Perez relating to generic gun evidence. (9 CT 2439-2440, 2478-2479.) On September 28, 1999, the court heard and denied Sanchez's motion. (55 RT 11140-A.)

On September 23, 1999, the jury and three alternate jurors were sworn in. On the same day, the prosecution and defense gave their opening statements, and the prosecution began presenting evidence. (9 CT 2469-2470.) On October 5, 1999, Alternate Juror Number 15 was dismissed due to hardship. (10 CT 2506; 60 RT 12254-12258.) On October 14 and 15, 1999, the court ruled that Oscar's identification following the single-photo lineup was admissible, as was Oscar's identification following the six-person photo lineup. (64 RT 13039-13040, 13148-13150.) On October 18, 1999, the prosecution rested its case-in-chief, and the defense began presenting evidence. (10 CT 2551.)

On October 29, 1999, the defense rested, and the prosecution began presenting its rebuttal case. (10 CT 2610.) On the same day, Sanchez moved for a mistrial based on prosecutorial misconduct, and the court

denied the motion. (10 CT 2611; 74 RT 14856-14857.) The court also admonished the jury and polled it as to its understanding of the admonition. (10 CT 2611.)

On November 1, 1999, Juror Number 10 was excused due to hardship and replaced by an alternate juror. (10 CT 2612.) The prosecution later rested its rebuttal case. (10 CT 2614.) Sanchez again moved for a mistrial based on prosecutorial misconduct, and the court again denied the motion. (10 CT 2614; 75 RT 15036-15039.)

On November 2, 1999, the prosecution delivered its closing argument. (10 CT 2617-2618.) On the same day, the defense began presenting its closing argument, which it concluded the following day. (10 CT 2618, 2766.) The prosecution then gave a rebuttal argument, during which defense counsel objected based on prosecutorial misconduct. (10 CT 2766; 76 RT 15203-15204.) Following the prosecution's rebuttal argument, the jury began deliberating. (10 CT 2766-2797.)

On November 4, 1999, the jury found Sanchez guilty as charged. Sanchez was thus convicted of first-degree murder of Ermanda Reyes (count 1) and Lorena Martinez (count 2). In addition, the jury found the multiple-murder and the rape-by-instrument special circumstances true, along with both gun enhancements. (10 CT 2768-2769, 2772.)

On November 8, 1999, the penalty phase began, and the prosecution and defense gave their opening statements. (10 CT 2788.) The prosecution

then began presenting evidence, and completed its case-in-chief the following day. (10 CT 2788-2791.) The defense immediately presented its case in mitigation. (10 CT 2791.) On November 10, 1999, the defense rested. (11 CT 2879.) The prosecution then presented its rebuttal case and gave its closing argument. (11 CT 2879-2881.) The defense immediately gave its closing argument, and the jury retired to deliberate. (11 CT 2881.) On November 12, 1999, the jury returned a verdict of death on both counts. (11 CT 2883-2884.)

On February 29, 2000, Sanchez filed a motion for a new trial and a motion to reduce the sentence to life without the possibility of parole (LWOP). (11 CT 2939-3040.) On March 17, 2000, the court denied both motions. (11 CT 3067-3068.)

On March 31, 2000, the court sentenced Sanchez to death. (12 CT 3106-3108, 3111-3114, 3143-3146.) In addition, the court sentenced, and then stayed, a total term of 13 and 1/3 years for the gun enhancements. (12 CT 3109, 3145.) On April 5, 2000, Sanchez filed a notice of appeal from the judgment of death. (12 CT 3148-3149.)

STATEMENT OF FACTS

On August 4, 1997, at approximately 5:00 a.m., appellant Juan Sanchez sexually assaulted 17-year-old Lorena Martinez in her bedroom. During the assault, Lorena's mother, Ermanda Reyes, came to Lorena's

bedroom door and stood outside the door in the hallway. Sanchez then shot Lorena twice and Ermanda once, killing them both. Before she died, however, Ermanda walked the length of the hallway to her bedroom where her five-year-old son, Oscar Hernandez, slept. Oscar, who was awoken by the gunshots, saw his mother walk into the bedroom and grab the phone receiver before she fell unconscious to the floor. Oscar then saw "the man who brought him ice cream" walk into the room and then leave. Once Sanchez was gone, Oscar tried to wake his mother and sister. When his efforts proved unsuccessful, he walked to the house of his aunt and neighbor, Rosa Chandi, to alert her to what had happened.

Sanchez confessed to the murders, and said that he was motivated because Ermanda owed him money and had been saying bad things about him in the community. Although he later recanted his confession and claimed not to have known Ermanda well, witnesses refuted that claim. Ermanda's neighbor, Myrna Feliciano, saw Sanchez arguing in Ermanda's garage around 1:30 a.m. on the morning of the murders. She also saw Sanchez drive by Ermanda's house "real slow" multiple times in his yellow and white truck in the weeks before the murders. Lorena's friend, Felicita Mata, also saw an upset Sanchez in Ermanda's front yard two or three weeks before the murders. Ermanda's niece, Mary Torres, also saw an upset Sanchez talking with Ermanda in her front yard, two days before the murders. Other witnesses saw Sanchez at Ermanda's house multiple times

in the weeks prior to the murders, causing some to believe Sanchez was Ermanda's boyfriend.

During his confession, Sanchez claimed to have disposed of the murder weapon in a field after he fled from Ermanda's house. Sanchez thought the gun was a .22-caliber handgun, but claimed that he did not know much about guns. Prior to the murders, Sanchez bragged to multiple people that he owned a gun. Raul Madrid also told Camareno Reyes that he returned a nine-millimeter handgun to Sanchez that Sanchez had left in his truck a week before the murders. No gun was ever found, either in the field or at Sanchez's house.

Sanchez claimed during testimony to have been home and asleep at the time of the murders, however, his alibi was not substantiated. Sanchez's wife, Mary Lucio, went to bed around 4:30 the morning of the murders. She saw Sanchez in bed, but thought he was awake. Mary's nephew, Michael Stephens, then heard Sanchez's truck outside approximately 30 minutes after Mary went to bed. Although Mary was not disturbed during the night by Sanchez's comings and goings, she slept soundly and Sanchez was known to sneak out of the house and back without her knowing. Also, Sanchez's friend and sexual partner, Hector Hernandez, told a friend that Sanchez was at his house at 5:00 on the morning of the murders.

Sanchez's behavior after the murders also pointed towards his guilt. Later in the morning of August 4, Mary thought Sanchez was acting weird because he was quiet and withdrawn. He also asked Mary if he could park his truck in the back yard, which was unusual. When confronted with a picture of a knife found at his home that was similar to a smaller knife found at the scene of the murders, Sanchez became alarmed and denied any knowledge of the knife in the picture. When he saw that the knife was the knife from his own home, Sanchez admitted owning the knife. However, he was unable to account for a smaller knife Mary told officers that the couple had owned prior to the murders. Sanchez also repeatedly lied to police officers concerning his criminal history, his relationship with Hector Hernandez, his actions before the murders, and his friendship with Ermanda before confessing to the crimes.

A. Prosecution Evidence at the Guilt Phase

1. Discovery of the bodies

At the time of her murder, Ermanda Reyes lived at 650 North Wellington Street in Porterville with her daughter Lorena Martinez, and sons Victor Martinez and Oscar Hernandez.⁵ (56 RT 11597; 64 RT

⁵ Because multiple people have the last names Reyes, Martinez, Hernandez, and Sanchez, all will be referred to by their first name, except for appellants, who the People will refer to as Sanchez.

13167.) On Sunday, August 3, 1997,⁶ Victor, who was 13 years old, stayed the night at his father's house. (62 RT 12532; 64 RT 13095, 13097-13098.) Lorena, who was 17 years old, and Oscar, who was five years old, were at the house on North Wellington Street with their mother. (13 CT 3508; 52 RT 11059; 59 RT 11982-11983.) That night, Oscar went to sleep in his mother's bed. (59 RT 11982, 11998.)

That morning, August 4, at approximately 5:30 a.m., Rosa Chandi was outside of her home at 680 North Wellington Street to see her boyfriend off to work. (62 RT 12512-12513.) Rosa's⁷ house was two doors down from Ermanda's house. (62 RT 12514.) After Rosa's boyfriend drove away, she turned to go back into the house and noticed Oscar walking towards her on the sidewalk wearing a t-shirt and shorts. (59 RT 11979; 60 RT 12189; 62 RT 12513.) Oscar said to Rosa, "mommy and Lorena are sleeping, tia. They're bleeding – they're bleeding tia, they're cut. I can't wake 'em up." (59 RT 11984; 62 RT 12513-12514.) Rosa then took Oscar by the hand and went with him back to his house. (59 RT 11984; 62 RT 12514.)

⁶ All further dates refer to the year 1997, unless otherwise indicated.

⁷ Rosa was the sister of Ermanda's ex-husband, Efrain Martinez, who was the father of Lorena and Victor. (62 RT 12530; 64 RT 13096; 68 14003-14004, 14008.)

When Rosa and Oscar got back to his house, Rosa saw that the front door was open. (62 RT 12514-12515.) Rosa entered the house and saw Ermanda in the master bedroom laying flat on her back with her face looking towards the ceiling. (62 RT 12514-12515, 12522.) Rosa then saw Lorena in her room, sitting against the bed. (59 RT 11983; 62 RT 12516.) A bloodied white sheet lay across Lorena, leaving her left side bare. Lorena's underwear was pulled down to the middle of her thigh. (62 RT 12516.)

Rosa became upset, and Oscar calmly told her to call 911. Rosa went to the phone in the kitchen, but the call would not go through. (62 RT 12517.) She and Oscar left the house and went to the neighbor between her and Ermanda's house to call for help. Nobody answered the door when Rosa knocked, so the two went back to Rosa's house. (62 RT 12517-12518.)

Rosa returned to her house at approximately 5:40 a.m. and called 911. (59 RT 11984; 62 RT 12518, 12520.) Everyone in the house woke up because Rosa was very upset and loud. (62 RT 12518-12519, 12557-12558; 63 RT 12916.) Rosa's son, Michael Martinez, was the first person to come to her side and heard her on the phone with the 911 operator. (62 RT 12519; 63 RT 12916.) Rosa told the operator that there "had been an incident at Lorena's house," but gave no other information. (62 RT 12518-12519.) During the phone call, Rosa's daughter Michelle Chandi took

Oscar into the master bedroom and stayed with him for a while watching a movie. (62 RT 12519, 12728-12730.)

While Rosa was on the phone, her son Michael, his girlfriend Areli Orosco, and Rosa's nephew Benny Martinez, went to Ermanda's house. (62 RT 12520; 63 RT 12918-12919.) Michael went into the house, while Orosco and Benny stayed outside. (63 RT 12919, 12959.) Less than a minute after entering, Michael left the house. (63 RT 12921.) As he walked out, Porterville Police Sergeant Larry Rodriguez arrived and went inside. (62 RT 12521; 63 RT 12924-12925, 12925, 13005-13007.) After a few minutes, Sergeant Rodriguez came out of the house and told the group that both women were dead. (62 RT 12521.)

2. The murder scene

a. The bodies

Porterville Police Sergeant Eric Kroutil went inside of Ermanda's house and saw a blood trail leading from the entrance to the living room and then to the dining/kitchen area. (55 RT 11169-A-11170-A, 11266-A.) Down the hall from the dining/kitchen area, there was a large amount of blood on the linoleum and blood splatter on the wall directly outside of Lorena's room. (55 RT 11179-A, 11190-A-11191-A.) A blood trail led from the linoleum outside of Lorena's room into the master bedroom. (55 RT 11202-A.)

In Lorena's room, Sergeant Kroutil saw Lorena's body in a seated positioned with her head and upper body against the bed and the rest of her body on the floor. (55 RT 11181-A.) Under her body was a black-handled, silver-bladed, kitchen steak knife that had no traces of blood. (55 RT 11188-A; 58 RT 11907-11908; 59 RT 12051; 61 RT 12348-12350.) Lorena wore a white night shirt that had been pulled up to expose her stomach and chest, and was covered in blood. (55 RT 11185-A-11186-A.) She also wore a bra that had been pushed up on one side, exposing her breast. (55 RT 11294-A-11295-A.) Lorena's bra had a one-inch-wide cut towards the center that was consistent with a knife. (58 RT 11851-11852, 11854.) Lorena's torn panties had blood on them and had been pulled down to her knees. The overhead lighting in Lorena's room was on. (55 RT 11184-A-11185-A.)

Lorena had eight gunshot wounds in the trunk of her body as the result of two bullets entering and exiting multiple times. (52 RT 11059, 11064-11070.) Lorena bled to death due to these gunshot wounds. (52 RT 11083-11084.)

Lorena had recent bruising in her vagina, which was caused by blunt force trauma resulting from rubbing with a finger, penis, or something like a gun barrel. (52 RT 11111-11112, 11136; 61 RT 12429, 12439-12440.) There was also a recent tear or abrasion to her cervix, consistent with blunt force trauma by a finger or gun barrel, but not a penis. (52 RT 11078,

11136; 61 RT 12438-12439, 12451.) Lorena had tears around her anus, and her anus was dilated, indicating that she had been penetrated. (52 RT 11079; 61 RT 12433-12435.) No seminal fluid was found on Lorena's clothing or bed spread, or on the swabs taken as part of a sexual assault investigation. (61 RT 12333-12338.)

Sergeant Kroutil saw Ermanda laying next to the bed in the master bedroom. (55 RT 11182-A.) The base of a phone was on the night stand, and the handle to the phone was laying on the floor at the base of the stand. (55 RT 11189-A.) A vanity light was turned on in Ermanda's room illuminating the master bedroom. (55 RT 11186-A-11187-A.)

Ermanda had two gunshot wounds, caused by a bullet that entered her upper chest and exiting through her lower back. (52 RT 11088-11089.) She also had a grazing wound on the left side of her chin. (52 RT 11090.) Ermanda was in the hall in front of the wall outside of Lorena's room when Sanchez shot her, most likely in a squatting position with her hands extended out towards the firing weapon. (58 RT 11869-11873, 11882, 11922-11926, 11928-11929.) Ermanda then traveled from there to her bedroom, where she died from internal bleeding. (52 RT 11093; 58 RT 11897-11898, 11901-11902.) All the blood found in the living room, kitchen, and by the front door matched Ermanda. (61 RT 12339-12341.)

b. DNA and fingerprint evidence

Sanchez's DNA and fingerprints were inconsistent with all samples taken from the house. (61 RT 12308-12310, 12339-12340, 12347.)

Sanchez did not have blood or tissue under his fingernail, only small particles of dirt. (61 RT 12347-12348.) Unidentified fingerprints were found on Victor's bedroom window. (60 RT 12282.) One of the unidentified fingerprints found on the window had a similar "pattern type" to one of the unidentified fingerprints found on the knife. (61 RT 12298, 12302.) Three unidentified fingerprints were located on the knife found by Lorena's body. (60 RT 12283, 12286.)

c. Gun evidence discovered in the house

A nine-millimeter semi-automatic handgun was most likely used in the murders. (58 RT 11831-11832.) Three nine-millimeter Luger slugs were found in and around Lorena's room, plus two unspent rounds. (55 RT 11205-A; 58 RT 11828-11829.) One bullet lodged in the entertainment unit after traveling through the wall of Lorena's room. Another was found in Lorena's mattress and a third in her clothing. (55 RT 11205-A-11206-A, 11212-A.) The two cartridges were found at Lorena's feet under a sheet; these bullets had not been fired, but instead had been ejected from the same gun that fired the other bullets. (55 RT 11206-A; 58 RT 11837-11838.)

3. Interviews leading to Sanchez's arrest

Porterville Police Detective Ty Lewis interviewed Oscar at approximately 6:00 the morning of the murders, Oscar told Detective Lewis that he had been sleeping on the floor of his mother's room when he was awoken by a man's loud voice. (61 RT 12368-12369, 12375.) Oscar saw a man standing in his mother's room. At this point in the interview, Oscar became very quiet and nonresponsive. (61 RT 12375.)

Sergeant Chris Dempsie interviewed Oscar between 6:50 and 7:00 that morning. (64 RT 13200-13201, 13203.) Oscar said that he was sleeping in his mother's bed and woke up because he heard firecrackers. He saw his mother come in the room and walk towards the phone, which was near her bed. A man was also in the bedroom. His mother grabbed the phone and then fell backwards. (64 RT 13204-13205.) She was bleeding, and Oscar tried to wake her up by opening her eyes, but he was unable to wake her. (64 RT 13205-13207.) He then ran to his Aunt Rosa's house. On his way out, he saw blood on the walls and heard his sister screaming. He also saw his sister bleeding. (64 RT 13207.) When asked to describe the man he saw, Oscar said that it was the man who brought him ice cream and that the man had a "wisp" on his chin. (64 RT 13205-13206.)

Sergeant Dempsie spoke with Oscar's brother, Victor, immediately after speaking with Oscar. He asked Victor if he knew of anybody who had brought Oscar ice cream. (64 RT 13208.) Victor remembered that two

days before the murders, Sanchez had given Oscar ice cream. (64 RT 13116.) Victor also knew where Sanchez lived, because Sanchez had been their neighbor before they moved to North Wellington Street. (64 RT 13104, 13117.) Victor also described Sanchez's truck as a white and yellow GMC pickup truck. (64 RT 13106-13107, 13178-13179.)

Following these interviews, Sergeant Kroutil obtained a photo of Sanchez to show to Oscar. Oscar identified the photo as "Juan." (64 RT 13220-13221, 13225.) Oscar was sure that "Juan" was the person in the house when his mother was bleeding. (64 RT 13222-13223.)

4. Sanchez's arrest and the evidence collected from his home

Sanchez was arrested a few hours later at his house on Putnam Street, one to two miles from Ermanda's house. (52 RT 11142-11144; 55 RT 11213-A.) After Sanchez's arrest, Porterville Police Officer Steve Ward searched his home. (55 RT 11375-A-11376-A.) In Sanchez's kitchen, Officer Ward found a black handled knife similar to the knife found at the murder scene. (55 RT 11377-A.) Sanchez's wife, Mary Lucio,⁸ bought the knife the previous February at the 99-Cent Store, along with a similar but smaller knife. (56 RT 11494-11496, 11510-11512.) Both knives had the same shaped handle and blade. (56 RT 11494.) Mary believed that the

⁸ Because multiple witnesses have the last name Lucio, the People will refer to them by their first names.

smaller knife had been lost or was thrown away the same month that she purchased it. (56 RT 11495-11496, 11512.)

The knife that the police had removed from Lorena's bed was eight and a half inches long, with a four-inch blade. (59 RT 12063.) A knife expert, Dr. Michael Smith, examined the knife found with Lorena and the knife seized from Sanchez's home. (63 RT 12822, 12826.) In his opinion, the knives were visually similar, especially in the handle styles. (63 RT 12830-12832, 12839.) Their blades were different, but that could be due to their differing intended uses. (63 RT 12834.) Both blades had markings indicating that they were stainless steel and made in China. The markings were in different directions, but that happens "from time to time" in items such as these. (63 RT 12836.) Because of the relative thinness of the blades, both blades could bend, which was unusual. (63 RT 12839.) An x-ray of the tangs (the part of the blade that goes into the handle) showed that the knives were put together differently. (63 RT 12842-12843.) However, it was common to have these variations within a single product line. (63 RT 12859-12861.) Different sized knives usually have different anchoring mechanisms to hold the blade together with the handle. (63 RT 12872-12873.) In Dr. Smith's opinion, the design characteristics of the knives suggest a common manufacturer. (63 RT 12863.)

5. Interviews following Sanchez's arrest

a. Oscar's police interview

Sergeant Dempsie interviewed Oscar at the Porterville Police Station following Sanchez's arrest. (64 RT 13235, 13278.) Oscar identified Sanchez out of a photo lineup as the person who had brought him ice cream and was in his house when his mother and sister died. (65 RT 13232-13233.)

b. Sanchez's police interviews

Sergeant Kroutil interviewed Sanchez at the Porterville Police Station several hours after his arrest at approximately 1:00 the afternoon of the murders. At first, Sanchez was cooperative. (55 RT 11213-A-11214-A, 11226-A.) Sanchez told Sergeant Kroutil that he had not seen Ermanda from the time she had moved two years earlier until two days before the murders, when he saw her in an auto-parts store. (55 RT 11215-A-11216-A.) Ermanda invited him to her house for beer, which he accepted and stayed for three hours. Sanchez also bought ice cream for her son Oscar. (55 RT 11216-A-11217-A.) When asked whether he saw Ermanda after that, Sanchez first told Sergeant Kroutil that he went to Ermanda's house the morning before the murders to fix her car. (55 RT 11217-A.) He then said he went to give her a watch, and then said he went to give her money. When confronted with these differing accounts, Sanchez said that he went

to her house to do all three things. (55 RT 11218-A-11219-A.) Sanchez also claimed that he never went inside Ermanda's house. (55 RT 11298-A.)

Later, Sergeant Kroutil showed Sanchez a photograph of a large knife. When Sanchez saw the photograph, his demeanor changed "immediately." (55 RT 11225-A-11226-A.) Sanchez sat up in his chair and loudly denied ever having seen the knife in the picture. (55 RT 11226-A-11227-A.) After a short time, Sanchez paused and said, "wait, is that my house?" Sergeant Kroutil said that it was, and Sanchez stated that the knife in the picture was a knife his wife had bought at the 99-Cent Store. (55 RT 11227-A.) Sergeant Kroutil asked Sanchez whether any other knives were purchased with the knife in the photograph. Sanchez responded, "[N]o, absolutely not, that was the only knife she bought." (55 RT 11228-A.)

The day after the murders, Visalia Police Detective Steven Shear interviewed Sanchez and caught him in many lies. (54 RT 11297-11298.) Sanchez admitted that he went to Ermanda's house the morning before the murders to give her a watch, but then later stated it was to give her money so she could fix her car. (54 RT 11326-11329.) He then said that he went to the house of his friend, Hector Hernandez,⁹ at 9:00 or 10:00 that night and left an hour later. (54 RT 11329-11331.) Sanchez then admitted that he left Hector's house for a "period of time" to go to a convenience store,

⁹ Hector is not related to Oscar.

an auto parts store, and his own home before returned to Hector's house.

(54 RT 11331-11332, 11388-11389.) Sanchez also said he had never been arrested, but later said he had been arrested, and eventually admitted that he had been arrested for a narcotics violation. (54 RT 11323-11324.)

Detective Shear also questioned Sanchez about his relationship with Hector. (62 RT 12593.) Sanchez initially said that he was close friends with Hector before admitting that he "had a sexual episode with Hector on only one occasion." (62 RT 12594-12595.)

Sanchez also lied about his knowledge regarding the knife his wife had bought. Sanchez stated that he did not recognize the knife officers found at his home before he admitted that his wife bought the knife at the 99-Cent Store. (54 RT 11332-11334.) After Detective Shear showed Sanchez a picture of the knife found at the crime scene, Sanchez said that he did not know if the knife at the crime scene was his. (54 RT 11335-11336.) He said he had not touched the smaller of the knives that his wife bought "until about a week ago." (54 RT 11337-11338.) Sanchez then stated that the small knife his wife bought had been left in his backyard when he had cut watermelon a week before. (54 RT 11339-11340.) Sanchez did not know where the knife was and thought he may have thrown it in the trash. (54 RT 11341.)

c. Sanchez's confession

Two days after the murders, Porterville Police Lieutenant Ernie Garay interviewed Sanchez at the Porterville Police Department. (52 RT 11145-11146.) At first, Sanchez claimed that he did not do anything, but eventually said that he had been at Ermanda's house drinking with her the night before the murder and a couple of other days that week. (53 RT 11167-11168.) He twice denied shooting the victims. (54 RT 11252.) He then said he was upset with Ermanda for things she had said about him and because she owed him money. (53 RT 11168, 11173-11174.) Sanchez then admitted to going to Ermanda's house with a gun and shooting both her and Lorena. (53 RT 11163-11164, 11174.)

Sanchez admitted that he walked into Ermanda's house through the unlocked front door and shot Ermanda two or three times. (13 CT 3531.) He then saw another person and shot at them more than one time before leaving the house. Sanchez claimed he had not known who the second person was. (13 CT 3532.) After he left, he got in his truck and drove away, throwing the gun into a field on Olive Street. (13 CT 3536-3537.)

Sanchez denied having sexually assaulted Lorena. (13 CT 3543-3544, 3556-3558.) He denied bringing a knife to the house, but claimed that he saw Lorena with a knife and thought she was going to kill him. (13 CT 3541, 3543-3544, 3550-3552.) He claimed to have been "blacked out," and he just shot her. (13 CT 3558-3559.) Sanchez believed he used a .22-

caliber gun, but claimed that he did not know much about guns and was uncertain. (13 CT 3538.)

6. Neighborhood sightings of Sanchez prior to the murders

Victor Reyes first saw Sanchez at his mother's house on Friday, August 1. Sanchez came back the next afternoon. (64 RT 13122, 13201, 13171.) He left at some point and came back with beer. Sanchez finally left the house at night, but returned the morning before the murders. (64 RT 13171-13172.)

Rosa Chandi told Detective Lewis that Ermanda had a boyfriend, but she did not know the man's name. (61 RT 12476-12477; 62 RT 12528.) The man was 40 years old and five feet eleven inches tall. He weighed 200 pounds and had brown hair, brown eyes, a beard, and a mustache. He drove a yellow full-sized truck. (61 RT 12477.) Rosa saw the truck at Ermanda's house the previous Friday, August 1, at approximately 4:00 or 4:30 p.m. She also saw the truck the previous Saturday, August 2, at approximately 2:15 p.m., and saw Ermanda outside talking to the man by a tree in her front yard. (62 RT 12526-12527, 12695.)

Myrna Feliciano lived on North Wellington Street, across the street from Ermanda. (56 RT 11542-11543.) In the weeks before the murders, Feliciano saw a yellow and white truck outside Ermanda's house. (56 RT 11545.) A few times, she saw the truck drive by "real slow." (56 RT

11546-11548.) She also saw Sanchez at Ermanda's house a few times over a two or three month period and thought that he was Ermanda's boyfriend. He was there without the yellow and white truck on many occasions. (56 RT 11596, 11598.)

Around the time of the murders, Feliciano was regularly in her front yard smoking cigarettes. (56 RT 11547-11549.) The day before the murders, at 3:00 in the afternoon, Feliciano saw Ermanda by the tree in her front yard with Sanchez standing on the sidewalk. (56 RT 11552-11554, 11559.) That night, at approximately 9:00 or 9:30, Feliciano saw Sanchez drive by "real, real slow" and look in the direction of Ermanda's house. (56 RT 11555-11557, 11582; 65 RT 13290.) At 1:30 a.m. on August 4, a few hours before the murders, Feliciano was outside smoking and saw Ermanda and Sanchez in Ermanda's garage. (56 RT 11558-11561.) Ermanda appeared agitated, and her hand was reaching for the door to go into the house. (56 RT 11561-11563.)

Daniel Fabela lived on North Wellington Street across the street from Ermanda. (56 RT 11602-11603.) The day before the murders, Fabela saw Sanchez's truck at Ermanda's house around noon. (56 RT 11606-11608.)

Felicita Mata saw Sanchez on a few different occasions at Ermanda's house before the murders. (57 RT 11683-11684.) About a month before the murders, Mata saw Sanchez at a barbeque in Ermanda's backyard. (57 RT 11684-11685.) Mata saw Sanchez again with Ermanda in her front

yard in the evening hours two to three weeks before the murders. (57 RT 11689-11691, 11750.) The two were loud and "boisterous," and Sanchez appeared upset. (57 RT 11698.) Around that same time, on another occasion, Mata saw Sanchez for a third time in the living room of Ermanda's house for about three minutes. (57 RT 11703-11705, 11712.)

Mary Torres went to Ermanda's house between 9:00 and 10:00 p.m. two days before the murders. (62 RT 12666-12667, 12673.) Sanchez was there talking with Ermanda, and Ermanda introduced him as a friend, but did not say his name. Sanchez said "hi" and then said he was leaving. (62 RT 12667-12668, 12676.) When he left, he looked upset and drove away fast. (62 RT 12668-12669.)

Michelle Chandi was Lorena's cousin and best friend. (62 RT 12719.) While at Lorena's house two days before the murders, Michelle saw Sanchez and his yellow truck. (62 RT 12720-12722.) Sanchez was sitting on the lawn talking with Ermanda. (62 RT 12723.)

Michael Martinez saw a truck parked outside of Ermanda's house two separate times in the days before the murders. Michael also saw Ermanda talking with a man outside of her home two days before the murders in the afternoon. (63 RT 12929-12931.)

7. Evidence of Sanchez's gun ownership

During a conversation before Ermanda's funeral, Raul Madrid¹⁰ told Ermanda's brother, Camareno Reyes, that Sanchez had been at a party Raul had thrown a week before the murders. (62 RT 12605-12606, 12612-12613.) After the party, Raul gave Sanchez a ride home. When Sanchez left the truck, Raul realized that Sanchez had left a nine-millimeter handgun in the truck. (62 RT 12606.) Raul gave the gun back to Sanchez the next day. (57 RT 11795-11797; 62 RT 12606.) The day before the murders, Sanchez told Alonzo Perez that he owned a gun. (57 RT 11659-11660.) In the summer of 1997, Sanchez mentioned to Catherine Barrera that he owned a gun. (62 RT 12645-12646.)

8. Sanchez's conduct on the day before the murders

The night before the murders, Sanchez arrived at Hector Hernandez's house at approximately 8:00 p.m. (55 RT 11306-A, 11309-A.) He left at 8:30 in his yellow truck and returned around 10:00 that same night. When he returned, Hector asked Sanchez for a ride to work the next morning. (55 RT 11310-A-11311-A.) Sanchez left Hector's house at 11:00 that same night. (55 RT 11311-A-11312-A, 11314-A.)

Hector awoke at 5:00 the next morning, which was his usual time. He had to be at work at 6:30 that morning, and he expected Sanchez to pick

¹⁰ Because multiple witnesses have the last name Madrid, the People will refer to them by their first names.

him up at 6:00 a.m. (55 RT 11316-A-11317-A.) However, Hector called his brother, Eddie, at 5:30 a.m. for a ride to work. (55 RT 11318-A-11319-A; 62 RT 12751.)

Hector and Sanchez had been in a sexual relationship for approximately five years and he was in love with Sanchez. (62 RT 12579-12580, 12582.) Hector had told Tulare County District Attorney investigator Wayne Spencer that it was possible that Sanchez stopped by his house the morning of the murders. (55 RT 11318-A, 11346-A-11347-A.) Margarita Ruiz talked to Hector on the phone the morning of the murders and Hector told her that Sanchez had been at his house at 5:00 that morning. (55 RT 11350-A-11351-A.) Two days later, Hector once again told Ruiz that Sanchez "went back to his house around five o'clock in the morning." (55 RT 11355-A.)

Sanchez's wife, Mary, got home around 10:00 p.m. with her son John Jr. the night before the murders. (56 RT 11519-11520.) Sanchez's truck was at the house. (56 RT 11523.) At midnight, she went into the master bedroom and saw Sanchez in bed. (56 RT 11521, 11524.) Mary then fell asleep in her daughter Tammy's room with her son John Jr. (56 RT 11466-11467, 11524.) Mary slept until about 3:00 a.m., when her daughter and her nephew, Michael Stephens, arrived home. (56 RT 11467, 11525.) Mary eventually went to bed at 4:30 a.m. (56 RT 11467-11468.) Sanchez was still in bed, but Mary thought he was pretending to be asleep. (56 RT

11468-11469, 11471.) After Mary went to bed, Stephens stayed awake for about 30 minutes and heard a noise he thought was Sanchez's truck. (64 RT 13056-13060, 13074-13075.)

The next morning, Mary woke up at 6:30 or 7:00 a.m. She was not disturbed during the night by Sanchez getting out of bed or starting his truck. (56 RT 11500-11501.) However, Mary slept very soundly that night, and Sanchez had left the house "a thousand times" in the past without Mary knowing. (56 RT 11472-11476; 64 RT 13079-13080.) That morning, Sanchez was acting weird, quiet, and withdrawn. (56 RT 11485-11486; 57 RT 11674.) He asked Mary if he could park his truck in the backyard. (56 RT 11498-11499; 57 RT 11673.)

B. Defense Evidence at the Guilt Phase

1. Oscar's credibility

a. Possible influences on Oscar

Throughout the morning and afternoon following the murders, family came to Rosa's house. Areli Orosco heard everybody talking about what had happened, but not about who could have done it. (69 RT 14124-14125.) Benny Martinez overheard police interviews taking place at 680 North Wellington. (65 RT 13344.) Neal Scott Smith saw Oscar wandering around the house and saw him talk to people, but only about whether he was hungry. (68 RT 13947-13949.)

b. Oscar's inconsistent statements

Jose Hernandez is Oscar's natural father. Oscar told Jose that his mother was going to come back for him and that his mother talked to him. (66 RT 13487-13488.) After two or three weeks of living with Jose, Oscar told him that he saw three people in his mother's house the night she died. (66 RT 13488-13489.) He also said that "Juan" and "Marcos" or "Michael" were in the house. (66 RT 13491.) Oscar said that he knew the person and that he had a beard. Jose and Oscar had trouble communicating with each other because Jose did not speak English and Oscar did not speak Spanish well. (66 RT 13493-13494.)

Oscar told Lola Ortiz that "Juan" was in his house the night of the murders with his mother's mechanic and Lorena's boyfriend, whom he called "Big Man." (70 RT 14275-14278.) Oscar also said that "Domingo" was there. (70 RT 14289.)

c. Oscar's therapy sessions and their influence on Oscar

Wanda Newton was a licensed professional counselor and treated Oscar from November 1997 until the time of her testimony at Sanchez's third trial. (74 RT 14759-14761, 14765-14766.) Her goal for Oscar was to help him sort through the recent losses in his life and "grow up with his memories." (74 RT 14763.) To do this, Newton and Oscar talked about Oscar's history, including the deaths of his mother and sister. (74 RT

14765-14766.) Her discussions with Oscar were focused on what was real, and they talked about Oscar's memories changing between sessions. Oscar would frequently tell Newton that he did not remember things about his mother's death and would express confusion about his memories of the day of the murders. (74 RT 14804-14805.)

Doctor Susan Streeter was a psychologist specializing in children and adolescent behavior. (71 RT 14334-14336.) Typically, a five-to-seven year-old child has fluid thought processes that "jump around" more frequently than those of an older child or adult, and children in that age range can easily confuse fantasy with reality. They may "confabulate," which is to fill in the blanks of their understanding with information from their own thoughts or their environment. (71 RT 14345-14346.)

The factors for assessing cognitive ability in a child include the child's language processing skills and the extent to which the child imitates something they have heard. (71 RT 14348-14349.) In a therapeutic setting, it may not be appropriate for a counselor to refresh a child's lost memories because when an adult challenges a child's memory, it tells the child that the adult does not believe him. This could lead the child to believe that what the adult is saying is more important than the child's memory, thus causing the child to adopt the content of the challenge over his or her own memory. (71 RT 14373-14375.)

2. Sanchez's testimony

a. Sanchez's actions prior to his arrest

Two days before the murders, Sanchez claimed he went to Ermanda's house around 4:30 in the afternoon after seeing her in Chief's Auto Parts earlier in the day. (66 RT 13558-13560.) He left to go to the store for beer and returned, before ultimately leaving at about 10:00 or 10:30 that night. While at the store, he also bought ice cream for Oscar. (66 RT 13560-13561.) Sanchez had never been to Ermanda's house on North Wellington Street before. (66 RT 13559.)

Sanchez went back to Ermanda's house the next day because she had said that she needed a waterproof watch, and Sanchez told her that he would bring her one. (66 RT 13562.) After giving Ermanda the watch, he went to his brother's house, arriving at approximately 11:45 a.m. After drinking a beer, Sanchez went back to his house and rested. (66 RT 13564-13565.) He then went to Ron Mena's house before going to Hector Hernandez's house between 7:30 and 8:30 that night. (66 RT 13566-13567.)

While at Hector's house, Hector asked Sanchez to get cigarettes for his mother and a light bulb for Sanchez's license plate. (66 RT 13567.) Sanchez picked up Mena and went to Chief's Auto Part, before dropping Mena off at his house and returning to Hector's house. (66 RT 13569-13570.) He stayed at Hector's house until 10:30 or 11:00 that night before

going home. (66 RT 13570-13571.) He denied telling Hector that he would give him a ride in the morning. (66 RT 13646.)

When Sanchez got home, he went straight to bed and watched television. (66 RT 13571-13572.) Sanchez's wife later came to bed and they both went to sleep. (66 RT 13573.) Sanchez claimed that he did not get up during the night. (66 RT 13574.)

Sanchez was arrested between 10:45 and 11:00 the morning of the murders. (66 RT 13576-13577.) At first, Sanchez testified that Lieutenant Garay threw him on the ground, but he later conceded that Lieutenant Garay asked him to get on the ground. (67 RT 13681-13684.)

Sanchez initially claimed that he had never used a gun before, but later admitted he had owned a gun, but he had never fired it. (67 RT 13763-13765.) He denied ever telling Barrera or Perez that he owned a gun. (67 RT 13771-13772.) He also denied asking Mary whether he could put his truck in the backyard the morning of the murders. (67 RT 13821-13822.) Sanchez testified that he had been in the United States for 13 years, however he later admitted that he had actually been in the United States for 19 or 20 years. (67 RT 13739.)

b. Sanchez's explanations for his misrepresentations during police interviews

Sanchez claimed that he was not advised of his rights, and that he requested an attorney multiple times during his interview with Sergeants

Kroutil and McMillan, but the two never wrote down his request. (67 RT 13697.) When Sergeant Kroutil showed Sanchez a picture of the knife at the police station, he did not recognize it. Eventually he realized that the knife had been photographed against his sofa, so he admitted that the knife was from his home. (66 RT 13580.)

During his interview with Detective Shear, Sanchez denied killing Ermanda and Lorena. (66 RT 13582-13583.) He claimed that he asked Detective Shear for an attorney, but could not explain why his request was not on the video recording of the interview. (66 RT 13607-13609; 67 RT 13698.) Sanchez told Detective Shear that he had never been in trouble before, but he was not given an opportunity to explain his answer, because Detective Shear asked him questions too quickly. (66 RT 13612-13613, 13622-13623.)

3. Sanchez's "false" confession

a. Sanchez's testimony

Sanchez testified that when he was interviewed by Officer Ward, he asked for a lawyer and an interpreter when he and Office Ward first went into the interrogation room, but Officer Ward ignored him. (66 RT 13599; 67 RT 13699.) Sanchez claimed that Officer Ward said that if he did not tell him what he did, then Officer Ward would put him in a jail cell with a crazy man so that the man would kill him. (66 RT 13597.) He also claimed Officer Ward told him that he was going to personally inject him

so that he could see him suffer and die “little by little” for what he had done. Sanchez was scared. (66 RT 13597-13598.)

Sanchez testified that at some point, Officer Ward ripped up his notes, threw them in the trash, and left the interrogation room. Lieutenant Garay walked into the room and asked Sanchez if he was going to tell the truth. (66 RT 13600-13601.) Sanchez said that he needed help and asked for an attorney, but was not given one. (67 RT 13601, 13701.) He later confessed to killing Ermanda and Lorena because he felt scared and pressured, and wanted to be left in peace. (66 RT 13604-13605; 68 RT 13906-13910.) Sanchez did not “recall too well” what Lieutenant Garay said that made him confess. Lieutenant Garay said he would help him and that they were little brothers or buddies of the same race. Lieutenant Garay also threatened to take his family away. (66 RT 13602.) Sanchez knew how to answer Lieutenant Garay’s questions because Lieutenant Garay guided him to what he wanted Sanchez to say. (66 RT 13605; 67 RT 13828; 68 RT 13909.)

b. Expert testimony

Martha Falcon is a certified interpreter of the Spanish language and would have translated a portion of Sanchez’s interview with Lieutenant Garay differently. (13 CT 3526; 66 RT 13584-13585.) The transcript read that Sanchez said he would talk to Lieutenant Garay, “About what I want to

say." Falcon, however, would have translated Sanchez's words to mean "I'll tell you what you want." (66 RT 13586.)

Dr. Richard Ofshe is an expert in interrogation tactics that lead to false confessions. (72 RT 14576-14577, 14581.) When evaluating a confession, Dr. Ofshe looks at seven categories to judge whether a confession is false: (1) statements consistent with a deal having been made; (2) whether the story is being volunteered by the suspect as a narrative; (3) whether the interrogator is formatting the story; (4) whether the suspect is able to supply verifiable factual information; (5) whether there are errors about facts the perpetrator should know; (6) whether the suspect expresses concern about displeasing the officer; and (7) whether the suspect issues periodic denials. (72 RT 14641-14644.)

4. Evidence corroborating Sanchez's actions the day before the murders

At 9:00 the night before the murders, Sanchez and his friend Ron Mena went to an auto parts store to pick up a light for Sanchez's truck. (57 RT 11678-11679.) However, Mena told Sergeant Kroutil that after going to the store, he went to Sanchez's home for an hour or an hour and a half that night. (70 RT 14309-14310.)

Lee Lewis lived near Sanchez on Putnam Street. (66 RT 13533-13534.) He was in his garage working on his lawn mower the night before the murders until 7:30 the next morning. (66 RT 13535-13537.) Lewis

heard Sanchez's truck at approximately 9:00 or 10:00 the night before the murders. (66 RT 13537, 13554.) He could not tell whether the truck was coming or going, but he did not hear the truck again the rest of the night. (66 RT 13537.)

Lewis went to Sanchez's house with his friend Mario at approximately 8:00 the morning of the murders. (66 RT 13539-13540.) The men talked in Sanchez's garage and Lewis told Sanchez that he saw police officers on Sanchez's street. Sanchez said that he was not worried and did not appear to be nervous. (66 RT 13542-13543, 13546.)

Tammy Lucio came home at midnight before the murders, left shortly afterward, and returned home at 2:30 a.m. that same morning. (69 RT 14097.) When she came home at midnight, she did not see Sanchez, but she did see his truck. (69 RT 14098.) When Tammy got home at 2:30 a.m., she saw her mother laying in Tammy's bed with her brother John Jr. (69 RT 14099.) Tammy talked with her mother and they ate tacos. After eating, Tammy went to bed. (69 RT 14100-14101.)

On the night before the murders, Henry Lucio heard Sanchez when he came home around 9:00 or 9:30 p.m. (70 RT 14299-14230.) Later that evening, Henry dropped his girlfriend off at her parents' house. He then went to Taco Bell and then back to the house. Henry and his mother sat on the porch and talked for a while before they both went to bed around 4:30 a.m. (70 RT 14231-14233.)

5. Evidence in conflict with the prosecution evidence

a. Hector Hernandez

Elisia Garcia was in a relationship with Eddie Hernandez, Hector's brother. (68 RT 13935-13936.) The day before the murders, Hector called Elisia asking for a ride to work the next morning. Hector also called the morning of the murders, as he usually did when getting a ride from Eddie, to make sure that Eddie was awake. (68 RT 13936-13937.)

Prosecution Investigator Wayne Spencer interviewed Hector Hernandez on September 21, 1999. Hector said that he arranged for his brother, Eddie, to take him to work the morning of the murders. (71 RT 14398-14399, 14404.) However, after being confronted with his brother's contrary statements, Hector changed his story to reflect that he had asked Sanchez to pick him up the morning of the murders. (71 RT 14399-14400.) Hector did tell Investigator Spencer that Sanchez could have stopped by Hector's house the morning of the murders, but Hector did not see him. (71 RT 14409.)

b. Raul Madrid

Camareno Reyes told Lola Ortiz that Raul had told him that he gave Sanchez a .357 hand gun, not a nine-millimeter, before the murders. (70 RT 14294-14296.)

c. Marcos Pena

Marcos Pena had a mustache and a goatee at the time of the murders. (68 RT 14028-14029, 14045.) Pena knew Ermanda and attended a barbeque at her house prior to her murder. (68 RT 14030.) Pena did not know Ermanda well and had only been to her house that day. (68 RT 14032.) He was introduced to Lorena, but he otherwise did not know her and never introduced himself as "Juan Sanchez." (68 RT 14031.) Pena never met Victor or Oscar. (68 RT 14036.)

Lola Ortiz was Ermanda's friend and was regularly at Ermanda's house. (70 RT 14271-14273.) A month before the murders, Lola was at a barbeque at Ermanda's house, and Pena was also in attendance. Lola also saw Lorena with Felicita Mata there. (70 RT 14273-14274.) Lola claimed that Sanchez was not at the barbeque. (70 RT 14274-14275.)

C. Prosecution Evidence at the Penalty Phase

1. Sanchez's prior criminal record

Tammy Lucio considered herself to have a "pretty good" relationship with Sanchez. (77 RT 15509.) When Sanchez would discipline Tammy, he would yell at her and hit her on her head. (77 RT 15513-15515.)

Sanchez's wife, Mary, went to the hospital as the result of Sanchez punching her in the eye. (77 RT 15519-15521.) Mary testified that that was the only time Sanchez had ever hit her, however, Sanchez's sister,

Martha Barajas Sanchez, testified that she had seen Sanchez hit Mary on other occasions. (77 RT 15523; 78 RT 15586-15589.)

On the first occasion, while at Sanchez's home, Martha saw Sanchez hit Mary two or three times. (78 RT 15586-15587.) A year later, Martha was at Sanchez's house again and saw Sanchez hit Mary with a closed fist to her face. On yet another occasion, Martha saw Mary with bruises on her face. (78 RT 15587, 15589.)

Sanchez was known to have a bad temper. (78 RT 15585-15586.) On one occasion, Sanchez and Mary were fighting in the street outside of their house. Mary picked up a bat and was going to hit Sanchez's truck with it. Sanchez struggled with Mary for the bat and then intentionally hit his truck once he had gained possession of the bat. (77 RT 15522-15523.) The police were called to their house on other occasions when Sanchez and Mary would argued. (77 RT 15508.)

In late July or early August 1997, Sanchez was at Solomon Bravo's house with Israel Ortega Orosco. (78 RT 15574.) Israel Orosco and Solomon Bravo got into an argument with Sanchez about Sanchez being fired from a job. (77 RT 15530-15531; 78 RT 15575.) During the argument, Sanchez picked up a chair and looked as though he was going to throw it at Israel Orosco. Israel Orosco stepped to the side, and Sanchez put the chair down. (78 RT 15575-15576.) Bravo asked Sanchez to leave his house, and Sanchez left looking very angry. (77 RT 15533-15535.)

Sanchez said that he would be back and that he was going to bring something with him, but Bravo did not know what. (77 RT 15535-15536.) Sanchez never returned to Bravo's house. (77 RT 15539.)

2. Victim impact testimony

a. Rosa Chandi

After Rosa Chandi saw Ermanda and Lorena's bodies, she could not go to sleep until 1:00 the next morning. (77 RT 15497-15498.) It was hard for Rosa to deal with what she saw; at the time of her testimony, she still had trouble sleeping. She occasionally sees the murder scene fresh in her mind and dreams of it. Rosa believed she would live with it all her life. (77 RT 15499.)

b. Michelle Chandi

Michelle Chandi knew Lorena her entire life, and Lorena was like a sister to her. They went shopping and out to various places together. (77 RT 15500-15501.) The two would talk about each other's lives and confide in one another about their problems. Michelle missed Lorena very much. (77 RT 15502.)

c. Victor Martinez

Lorena was a good sister to Victor Martinez and always helped him with his homework. Ermanda was Victor's "life." (77 RT 15502-15504.) Victor was saddened that his mother missed his graduation from junior high and would miss his high school and college graduations. (77 RT 15504.)

D. Defense Evidence at the Penalty Phase

1. Testimony regarding Sanchez's character

a. Tammy Lucio

Sanchez had been in Tammy's life for approximately 16 years and was the only person she knew as a father. He had always treated her with respect and showed her "how to be a lady." (77 RT 15510.) Sanchez showed Tammy how to treat people, so that she would be respected in return. He also showed her how to respect herself. Sanchez was overprotective of Tammy and would tell he did not want certain boys calling the house or coming over. (77 RT 15511.) Sanchez was a very good cook and cooked meals for the family. (77 RT 15553.) If Sanchez were granted life without the possibility of parole, Tammy would remain in contact with him by writing to him, accepting his calls, and visiting him. Tammy loved Sanchez and believed in him. (77 RT 15516-15517.)

b. Henry Lucio

Henry Lucio was Sanchez's stepson. (78 RT 15604.) When Henry was in first grade, Sanchez joined the family and Henry did not "really take to him." As Henry grew older, he started to talk to Sanchez more, and Sanchez began teaching him how to cook. Sanchez instilled values in Henry, including to treat his mother and family with respect, to stay in school, and to stay out of trouble. (78 RT 15605-15606.) Henry loved Sanchez like a father and believed in him. (78 RT 15608.) If Sanchez were

confined to prison for the rest of his life, Henry would still remain in contact with him. (78 RT 15611.)

c. Mary Lucio

Sanchez and Mary have been in a relationship since 1986. (78 RT 15617.) Mary had always worked full time and Sanchez had always been the primary caretaker of John Jr. (78 RT 15615.) When Sanchez wrote to Mary from jail, he told her to take care of John Jr., that he loved John Jr., and to make sure that John Jr. did not get hurt. (78 RT 15616.) John Jr. stayed connected with his father by writing to him, talking with him on the phone, and visiting him. John Jr. seemed more happy and content when he was able to see his father. (78 RT 15619.)

d. John Jr.

John Jr. was 10 years old at the time of his testimony. (78 RT 15625.) Before Sanchez was arrested, John Jr. saw him a lot. John Jr. missed his father and would visit him if he could not see him everyday. (78 RT 15626-15627.) He loved his father and would write to him, if his father were confined to prison. (78 RT 15631.)

e. Pearl Mascorro

Mary Lucio's daughter Pearl Mascorro had known Sanchez since she was 13 years old when her mother, Mary, introduced him to her. (78 RT 15631-15632.) Mascorro's son referred to Sanchez as "grandpa Juan." (78 RT 15633.) Sanchez was very loving towards Mascorro's son and always

wanted to be around him. (78 RT 15634.) Sanchez would check in to see how Mascorro was doing and make sure everything was okay. (78 RT 15635.) Once when Mascorro was pregnant, she got irritated with Sanchez and started pushing him. Sanchez kept telling her to calm down and that she was going to hurt herself. He ended up falling on his rear end, but he kept worrying about her and asking her what was wrong. (78 RT 15636.) Whenever Sanchez thought that the kids were being disrespectful, he would always tell Mary to talk with them. Sanchez never confronted them. Mascorro would feel the same about Sanchez if he were in prison and would still want her son to know him. (78 RT 15637-15638.)

f. Carlos Canales

Carlos Canales was 12 years old and was Sanchez's grandson. Carlos and Sanchez used to go for rides together to the lake and river. (78 RT 15645-15646.) Carlos and Sanchez used to pick walnuts together and eat shrimp cocktail. Carlos believed in his grandfather. (78 RT 15646.)

g. Jose Sanchez

Jose Sanchez was Sanchez's older brother. (78 RT 15648-15649.) Sanchez's father died in May 1973. (78 RT 15655.) Life was hard for the Sanchez family because the children were young and were working by picking cotton. (78 RT 15650.) Sanchez's mother would make food items for the children to sell, and an uncle would bring them fruit to sell as well.

(78 RT 15650-5651.) If Sanchez were sent to prison, Jose would still want a relationship with him and would visit him. (78 RT 15652-15653.)

h. Sandra Sanchez

Sandra Sanchez met Sanchez in Mexico when Sanchez was eight or nine years old. (78 RT 15658.) Sandra eventually married Jose Sanchez without knowing that Jose and Sanchez were brothers. Sanchez then came to live with them in Porterville when he was 13 or 15 years old. Sandra and her husband tried to get Sanchez to go to school, but he wanted to work. (78 RT 15662.) Sanchez treated Sandra's four daughters well and they loved him. (78 RT 15665.) He visited once or twice a week and always encouraged them to get an education. If sent to prison, Sandra would still remain in contact with Sanchez. (78 RT 15665-15666.)

i. Adriana Sanchez

Adriana Sanchez is the oldest daughter of Sandra and Jose. (78 RT 15667-15668.) Adriana has known Sanchez all of her life. Sanchez would tell Adriana to go to school and get an education. He also told her to strive for a better life than he and Jose had been brought up in. (78 RT 15668.) Sanchez was always there for Adriana and her siblings, and they would look forward to seeing him every weekend because he would always give them money for ice cream. Adriana had never seen Sanchez get angry or upset. (78 RT 15669-15671.) If sent to prison, Adriana would still contact Sanchez and rely on his advice. (78 RT 15669.)

j. Viviana Sanchez

Viviana Sanchez was also Sanchez's niece. Sanchez was an outgoing person and was always nice and never yelled. (78 RT 15671-15672.) He would always bring her something like ice cream, soda, or a dollar when he visited, and told her to stay in school and not to fight with her parents or her sisters. If Sanchez were in prison, he would still hold value to Viviana because she loved and believed in him. (78 RT 15673.)

k. Sonia Sanchez

Sonia Sanchez Gomez was Sanchez's niece. She had known Sanchez all of her life and loved him. (78 RT 15674.) Sanchez would always come to her house and buy her ice cream or give her a dollar. He would tell her to stay in school. If Sanchez were in prison, Sonia would still value their relationship. (78 RT 15675.)

l. Raul Sanchez

Raul Sanchez is also an older brother of Sanchez's. (78 RT 15684-15685.) Raul lived in Mexico with Sanchez when their mother became a widow. Raul took over as head of the house when he was 15 and Sanchez was 9. Raul thought of Sanchez as a son. (78 RT 15685-15686.) Raul loved Sanchez and would continue to love him even if he went to prison. (78 RT 15686.)

2. Expert testimony

Doctor Jose La Calle is a clinical psychologist who analyzed Sanchez based on interviews and psychological testing. (79 RT 15777-15778, 15780-15781.) Sanchez's intelligence quotient (IQ) was 84, which is at the lowest end of the dull normal intelligent level. Normal is 100 and 79 is borderline mentally retarded. (79 RT 15783.) The test has a standard deviation of 5, meaning that Sanchez's IQ could be as high as 89 or as low as 79. (79 RT 15804-15805.) Sanchez's IQ was consistent with a person who could perform manual work and has natural abilities such as hand-eye coordination. It also reflected a low educational background and low ability to understand complicated concepts. A low IQ score shows that a person's short term recollection is deficient. (79 RT 15784.)

Sanchez's Spanish vocabulary was at about a third or fourth grade level, which made it impossible to administer some of the common verbal tests. Sanchez attended three years of elementary school, although his attendance was sporadic. (79 RT 15785-15786.) He exhibited a problem with his short-term attention span and would give up easily if an answer to a question did not come to him. (79 RT 15786-15787.) Dr. La Calle also found that Sanchez had a "short fuse" or low tolerance threshold to stress but did not become violent. (79 RT 15787, 15790.) He also did not have any disciplinary actions or write-ups while in custody. (79 RT 15789, 15812.)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY ALLOWING OSCAR HERNANDEZ TO TESTIFY BECAUSE HE UNDERSTOOD HIS DUTY TO TELL THE TRUTH

Sanchez contends that the trial court erred by “abdicating its non-delegable duty to ensure that the jury hear only competent evidence” when it permitted Oscar to testify even though he did not understand his duty to tell the truth. (AOB 27-28.) The People disagree. Oscar established during multiple voir dire testimony and a section 402 hearing that he understood he had a duty to tell the truth while sitting as a witness. To the extent Sanchez claims that Oscar made inconsistent or fantastical statements, those statements were irrelevant when considering whether he understood he had a duty to tell the truth. Thus, the trial court did not err by ruling that Oscar was competent to testify.

A. Background

1. In limine motion and section 402 hearing

On September 30, 1998, Sanchez filed a motion in limine to preclude Oscar from testifying because he lacked competency pursuant to section 701, subdivision (a). (2 CT 482-536.) Sanchez argued that Oscar could not tell the difference between a truth and a lie, and was “not able to perceive, recollect, or communicate accurately the event in question, and [could not] testify coherently.” (2 CT 485-489.) The People opposed Sanchez’s motion, arguing that Oscar met the requirements of the statute, and that the

statute did not require Oscar to be consistent with his prior statements as Sanchez contended. (4 CT 961-963.) The court held a section 402 hearing over the course of several days to determine Oscar's competency. (5 CT 1163-1169.)

a. Oscar's testimony

The People asked Oscar several questions about what it meant to tell the truth:

PEOPLE: Now, Oscar, I know in the past people have talked to you about the difference between telling a truth and telling a lie. Do you know what that difference is?

OSCAR: No

PEOPLE: You don't know the difference between the two?

OSCAR: No

PEOPLE: If I asked you – let me put it this way: If I told you that this is a car. Can you see what I'm holding up?

OSCAR: A pen.

PEOPLE: If I told you this is a car?

OSCAR: That would be a lie.

PEOPLE: Okay, that wouldn't be the truth, would it?

OSCAR: No.

PEOPLE: Now, when you sit in that chair and you talk on that microphone, what are you supposed to do when you talk; are you gonna tell us lies or are you gonna tell us the truth?

OSCAR: The truth.

...

PEOPLE: You're always going to tell the truth when you sit in that chair.

OSCAR: Yes.

PEOPLE: And you know that's very important?

OSCAR: Yes.

PEOPLE: Okay. And you wouldn't tell a lie while you're sitting there, would you?

OSCAR: No.

(4 RT 524-526.)

Defense counsel then questioned Oscar. (4 RT 526-527.) Oscar explained that the truth was "not telling a lie." When asked how he knew when he was telling the truth, he responded that that was hard to understand. But he then elaborated that he would only testify to things he saw and heard himself. (4 RT 527-528.) Oscar also told defense counsel that he talked to his counselor, Wanda Newton, about the difference between a truth and a lie. (4 RT 530-531.) He again testified that a truth was "not a lie." In Idaho, where Oscar lived at the time, he went to a courtroom and talked to a woman about the difference between a truth and a lie. (4 RT 531-532.)

Upon further questioning by the People, Oscar testified that he knew what the truth was and he knew when he was not telling the truth. (4 RT 533.) Oscar testified that when he sat as a witness, he knew he had to tell the truth and if he did not, he would get into trouble. (4 RT 534.)

b. Dr. Susan Streeter's testimony

Sanchez called Susan Streeter, Ph.D., an expert in child psychology who had previously testified as an expert on child competency and reliability in the area of reporting sex offenses. (4 RT 538-540.) Dr. Streeter testified that the definition of competency in the psychological field was

That the person is able to understand the information presented to them and the questions asked of them and the person is able to respond to those questions and the person is able to process that information, in other words, to make sense of it and be able to respond.

...

It has to do with their ability to accurately represent reality.
(4 RT 546.)

In Dr. Streeter's opinion, Oscar was not competent because he was confused about his duty to tell the truth and did not understand what telling the truth meant. Her opinion was based on Oscar's hesitancy and inability to define the concept of truth without a concrete example. (4 RT 552-553.) Dr. Streeter also believed that Oscar did not understand the concept of truth because of the differing accounts of his mother's and sister's deaths he gave to Newton, family members, and law enforcement officers. For example, Oscar told Newton he thought his mother cut herself and was not shot (4 RT 556-557, 561), he also told Newton that "Juan" took him to ice cream the night before the murders (4 RT 592-593). He also changed what kind

of ice cream Sanchez brought him from chocolate to “white.” (4 RT 652-653.) Oscar forgot his sister’s name during a therapy session (4 RT 593-594), and changed his story about whether Victor was present during the murders (4 RT 599-600). Further, during Oscar’s interview with Sergeant Dempsie, he told Sergeant Dempsie that he was 14 years old (4 RT 647-648), and that two people were in his mother’s room when she died (4 RT 658). Oscar later told investigators that four people were in his mother’s room when she died. (4 RT 668.) Oscar initially said that his mother stayed home the night of her murder and then said she went out with a “boy.” (4 RT 654-655.) Finally, Oscar told investigators that Sanchez choked him, tied him up, and hit him in the stomach with a hammer. He also claimed that Sanchez hit his sister in the head with a hammer; and that other men broke things in his house. (4 RT 673-677.)

c. Andrea Culver’s testimony

Sanchez also called Andrea Culver, who was Oscar’s kindergarten teacher in August 1997. (4 RT 572-573.) Culver remembered Oscar as a silent and primarily Spanish speaking child who would need his cousin Gilberto to translate for him and help him with skilled tasks. (4 RT 574-575.) Oscar was a visual learner, and Culver was concerned about his ability to sit down and follow through with tasks, although she did not believe he had attention deficit disorder. (4 RT 575-576, 578.) Oscar was able to recall events and communicate them accurately to Culver. In fact,

Culver never found Oscar to be a liar, and thought Oscar truthful and his recollections “valid.” (4 RT 579-581.)

d. Wanda Newton’s testimony

Wanda Newton testified that she had been Oscar’s therapist for a total of 48 sessions, starting November 6, 1997 until the time of her testimony at the section 402 hearing. (5 RT 954; 6 RT 1029.) Her treatment goals for Oscar included: (1) identifying and accepting his emotions; (2) clarify his memories of the past; and (3) establishing a positive self-identity. (5 RT 960-961, 964-965.) To do this, Newton would emphasize that it was important to talk about what was “real” and “the truth.” (5 RT 968.) When Newton talked about the truth with Oscar, she did not only talk about events that happened in his life, but the truth of his feeling and how events affected him. This included events that happened on the playground, in his new home, or at his natural father’s home. (5 RT 973-974.) Newton focused on the meaning of truth because in her experience, when a person “allow[s] themselves to rearrange the reality of th[e] trauma, they will then set a pattern for themselves the rest [of] their lives; that anytime they’re in a stressful or frightening or very sad situation, that they will simply rearrange the reality for themselves rather than coping with reality.” It was important for Oscar to deal with his own true perceptions rather than make the situation easier for himself. (5 RT 971.)

Oscar frequently fantasized and made up stories. Sometimes he did so because it was a fun thing to do and sometimes because he was uncomfortable with the topic of conversation. However, Oscar would acknowledge that he knew the stories were not real. (5 RT 974.) Newton believed that one of Oscar's avoidance techniques would be to talk in a disjointed and confused manner. When Newton would express confusion, Oscar would look "pleased with himself," which led Newton to believe he acted intentionally. (5 RT 978-979.) Oscar, however, had not done this in the recent past. (5 RT 980.)

On one occasion in January 1998, after drawing a picture of Sanchez, Oscar talked about the night of his mother's death. (6 RT 1112-1113.) He told Newton that he did not believe Sanchez shot his mother or sister, and that his mother just bled from her chest and died. Oscar did say that his mother walked in the room to get the phone and Sanchez took it from her and then fell down. (6 RT 1114.) Oscar was emphatic about the comment, "Juan didn't shoot her. She just bled and died, sister, too." (6 RT 1114-1115.)

On another occasion in March 1998, Oscar was having a good experience, so Newton asked him about his mother's and sister's deaths and whether he was scared that Sanchez would shoot him too. Oscar said yes, but then said, "wait a minute, I told you last time he didn't shoot my mom; remember? She just died and Juan was just there." (6 RT 1002.) He then

said it was not scary to talk about that night because Sanchez did not shoot his mother. Oscar then “talked” to his mother under the couch and then told Newton that his “mom said she didn’t get shot.” (6 RT 1003.) In Newton’s opinion, Oscar was uncomfortable with the conversation. (6 RT 1005-1007.)

On yet another occasion in April 1998, Oscar talked about his difficulty talking about the night his mother and sister died and why his stories kept changing. Oscar said that it was a sad night to remember and that he was scared that Sanchez would kill him too. (6 RT 1012-1013.)

Oscar visited a courtroom on two occasions. (6 RT 1130-1131.) He was able to walk around the room and sit in the judge’s chair, the jury box, and the witness stand. Denise Himes¹¹ talked to him about “truth, lies, right, wrong, guessing, pretending, faking, real, not real, promises, teasing.” (6 RT 1131.) Himes went over examples with Oscar and asked him if they represented truths or lies, and he did the same with her. In Newton’s opinion, “Oscar did well with these concepts but wanted to play part of the time.” (6 RT 1131-1132.) Newton also did not believe that Oscar’s depressive episodes or his posttraumatic stress disorder impaired his ability to discuss his past perceptions. (6 RT 1133-1134.)

¹¹ Denise Himes is a victim witness coordinator. (6 RT 1131.)

e. Police testimony

Porterville Police Detective Ty Lewis interviewed Oscar in the early morning hours following his mother's death. (5 RT 868-869.) Detective Lewis found Oscar able to communicate, and it appeared that he understood Detective Lewis's questions. Before becoming quiet and unresponsive towards the end of the interview, Oscar told Detective Lewis that there was a man in his mother's bedroom. (5 RT 876-878.)

Sergeant Chris Dempsie first interviewed Oscar at 6:50 the morning of the murders. (6 RT 1193-1194.) Oscar was initially crying, but he was able to calm down and talk. (6 RT 1231-1232.) He told Sergeant Dempsie that he woke up to his sister screaming and the sound of firecrackers. (6 RT 1194-1196.) He then saw his mother run into the room, grab the phone, and fall to the floor. Oscar also saw a man in the room with his mother. The man had previously bought him ice cream and had a "wisp" on his chin. (6 RT 1195-1196.) After communicating this information, Oscar appeared visibly shaken and was crying. He could not talk anymore to Sergeant Dempsie. (6 RT 1243.)

Sergeant Eric Kroutil interviewed Oscar at approximately 9:00 the morning of the murders. (6 RT 1167-1168.) Oscar was able to communicate with Sergeant Kroutil and identify a picture of Sanchez as the man he saw that morning while "my mommy was bleeding." (6 RT 1173,

1187-1188.) Oscar "was very strong in his belief" that Sanchez was the man in his mother's room. (6 RT 1175.)

During a second interview with Sergeant Dempsie that took place at the Porterville Police Station at approximately noon that day, Oscar was not as shaken up as he was before. (6 RT 1199-1200.)¹² About ten minutes into the interview it was very difficult to keep Oscar's attention, and he appeared to be getting bored and wanted to play. (6 RT 1202, 1262.) Oscar was consistent in his identification of the man he saw and continued to say that "Juan" was in his mother's room. (6 RT 1200-1201.) Oscar also said that "Juan" had a mustache and whiskers and that he was the man who had brought him ice cream. (6 RT 1254-1255.) Oscar reiterated that he woke up because he heard screaming. He also saw his mother and sister bleeding. (6 RT 1257-1258.)

Oscar added details to what he had previously told Sergeant Dempsie. He said that he was home with Lorena before going to sleep, and his mother was out with another "boy," but he did not remember the boy's name. (6 RT 1256.) Further, he heard his sister screaming for everybody to wake up and saw her playing with a knife. (6 RT 1257-1258.) He told Sergeant Dempsie that Sanchez had a knife and a gun in his hand and drove away in his yellow truck, which is when he went to his aunt's house. (6 RT

¹² Sanchez attached the transcript of this interview to his motion. (2 CT 93-109.)

1252-1254, 1272.) He said that Sanchez left to go to his house to get a smaller gun. (6 RT 1252, 1254.) Oscar also stated that there were other people at his mother's house, including a man that looked like a girl who was named "Michael." (6 RT 1201-1202, 1260-1261.) He claimed that they were having a party and they all went to the park. (6 RT 1258.) Oscar also claimed that Sanchez chased him around the house and tried to catch him. (6 RT 1251-1252.) He said that Sanchez got him by the hand and that he hit Sanchez in the stomach and ran to his aunt's house. (6 RT 1252, 1254.) Also during the interview, Oscar identified Sanchez in a six-person photo lineup as the person he saw in his mother's room when she died. (6 RT 1228-1230.)

Attached to Sanchez's motion was an interview between Oscar and District Attorney Investigators Wayne Spencer and Michael Montejano, which took place three months after the murders and lasted approximately 43 minutes. (2 CT 511-530.) At the start of the interview, Oscar said that he woke up the morning of his mother's death because he heard his mother and sister screaming. Oscar told the investigators that his mother and sister fought and pushed each other because his sister talked on the phone a lot. (2 CT 512, 518.) His mother also threw his sister outside, and his sister got mad and did something to his mother that made her bleed. There were also worms in her body. The two were fighting when he was asleep, and he knew this because it was the fighting that woke him up. (2 CT 516.) He

saw his mother fall by the phone and lay on the ground bleeding. (2 CT 512.) A short time later, he said that his mother was laying on the bed and there was blood on the bed. (2 CT 517.) He did not see what had happened to her. (2 CT 512.) He saw his sister sitting with a pillow, which was covered in blood. (2 CT 516.) Oscar also saw Sanchez. (2 CT 517.) After Oscar left the house, he went to somebody's house before coming back with them. (2 CT 512, 518.) They saw a lot of blood and tried to call the police, but the phone did not work. (2 CT 512-513, 518.) Oscar then said that he, his mother, his sister, and Juan were the only people in the house at the time, and that his brother Victor was not there. (2 CT 515-516, 518.)

As the interview progressed, Oscar told the investigators that he saw Sanchez fighting with his sister in her room. Sanchez then went to his mother's room and did the same thing to her that he had done to his sister. (2 CT 517, 520.) Sanchez had a stick and tried to hit his mother in the head and stomach. (2 CT 517, 519.) Oscar also said that Sanchez hit his sister in the head and stomach, but with a hammer. (2 CT 520.) Sanchez was using bad words, which made his mother and sister go outside and walk away. (2 CT 517.) Sanchez then broke everything, including a clock, something from outside, his toys, and a window. Oscar knew that Sanchez had a gun and knife in his pocket, but did not see the gun because it was in Sanchez's pocket. (2 CT 519-520.) Sanchez followed Oscar wherever Oscar went and locked the door. (2 CT 521.) After Sanchez hurt Oscar's

mother, he told Oscar to wait outside, but Oscar did not listen and ran to somebody's house instead. (2 CT 520.) Sanchez then got in his yellow truck and left. (2 CT 521.)

Oscar also said that five of Sanchez's friends were at his house. (2 CT 521.) While Sanchez was hurting his mother and sister, his friends were breaking things. (2 CT 522.) After hurting his mother and sister, Sanchez told his friends to get Oscar because Sanchez was going to hurt him. (2 CT 521.) Oscar had seen Sanchez's friends before. They were older than Sanchez and bigger than Oscar. (2 CT 522, 525-526.) Oscar was hiding under the bed when Sanchez grabbed him and hurt him with his feet. Victor was standing behind Sanchez when Sanchez grabbed Oscar. (2 CT 527.) Sanchez hurt Oscar "everywhere." (2 CT 525.) He hit Oscar in the stomach and on the back and tied him up with a rope. Sanchez then locked the door and drove away by himself. (2 CT 525-526.) Oscar also said that Victor pulled Sanchez's hair and Oscar put water on the floor so Sanchez would slip and fall. Sanchez gave Oscar medicine to drink, but Oscar did not drink it. (2 CT 527-528.) After relating this, Oscar acknowledged that Victor was at his father's house when their mother and sister were killed. When confronted with the fact that Oscar said Sanchez was alone and also that Sanchez was with his friends, Oscar said that Sanchez's friends got lost and Sanchez left to find them. Oscar also claimed that Sanchez was wearing black cowboy boots, a white cowboy

hat, a button-up short sleeved blue shirt, and blue jeans at the time of the murders. (2 CT 528-529.)

f. Trial court's ruling

On February 18, 1999, the parties argued the issue of Oscar's competence. (8 RT 1609, 1691-1704.) On February 19, 1999, the trial court issued a written ruling denying Sanchez's motion. Citing section 701 and *People v. Dennis* (1998) 17 Cal.4th 468, the court ruled Oscar's testimony admissible because Oscar was able to express himself "so as to be understood and [he] understands his duty to tell the truth." The court rejected Sanchez's argument that Oscar had been tainted by his therapy sessions and reasoned that that was a matter of credibility left to the jury. (5 CT 1194.)

2. Oscar's voir dire and testimony at the first trial

At Sanchez's first trial, Oscar was asked the following questions about the concept of truth:

PEOPLE: Okay. Now, Oscar, do you understand that when you're here today what you're going to tell us?

OSCAR: Yes.

PEOPLE: Okay. When you're telling -- when you're sitting there in front of that microphone, what is it your job to do?

OSCAR: To tell the truth

PEOPLE: Okay. Now, you understand everything you tell us from that -- that -- that seat right there, it must be the truth; right?

OSCAR: Yes.

PEOPLE: Okay. Oscar, do you know the difference between a truth and telling a lie?

OSCAR: Yes.

PEOPLE: Okay.

OSCAR: I know.

PEOPLE: Now, if I told you that there was a dog sitting on Detective Kroutil's head, would that be a truth or would that be a lie?

OSCAR: A lie.

PEOPLE: Okay. Now, if I told you that this is a cup, would that be a truth or was that -- would that be a lie?

OSCAR: A truth.

PEOPLE: Okay. So you know that pretty well, don't you?

OSCAR: Yes.

(16 RT 3350-3351.)

Oscar then testified that he woke up because he heard shooting.

(16 RT 3351-3352.) He was laying in his mother's bed, which he also

used, and saw his mother walk into the room screaming. (16 RT 3355.)

She tried to call somebody on the telephone, but somebody else came into the room. Oscar could not initially identify the other person who came into his mother's room. (16 RT 3357-3358.)

After seeing his mother, Oscar went to his sister's room and then went to a neighbor's house. (16 RT 3356, 3361-3362.) He told the woman that his mother and sister were dead. They both went back to his house and the

woman tried to call the police, but the phone did not work. They then went back to the woman's house, and somebody took him to a bedroom, where he waited. (16 RT 3362-3364.)

Oscar remembered talking to police later in the day when it was light outside, but he did not remember going to the police station. (16 RT 3364-3366.) He remembered telling a police officer what he saw, but did not remember what he actually said. (16 RT 3365.) He did remember telling a police officer that there was a gun and a knife, and that the man had black hair and a little nose. (16 RT 3359.) He also remembered telling the officer that the man he saw had brought him ice cream and that he had heard firecrackers that morning. (16 RT 3394, 3396.)

On cross examination, Oscar testified that he had talked about coming to court and testifying with his counselor Wanda Newton. (16 RT 3403-3404.) When Oscar talked about what happened to his mother with Newton, Newton did not tell Oscar that she did not believe him or that she did not like what he said. Sometimes, however, Oscar joked or played with Newton. (16 RT 3404-3405.) He had trouble remembering everything that happened the night of the murders and was tired of people asking him questions. (16 RT 3407.) Oscar talked to Newton about the things he could not remember, and sometimes she helped him remember. (17 RT 3564.) He visited a courtroom with his parents and Newton in Idaho where he met Denise Himes. (17 RT 3555-3556.) He could not remember

everything that happened there, but did remember that they talked to him about the meaning of a truth and a lie. (17 RT 3556, 3559.) Defense counsel then asked:

DEFENSE: Okay. Well, what is a truth?

OSCAR: I can't remember.

DEFENSE: Okay. Well, that seems fair. Is the truth -- let me just give you another little question here. Is a truth something you actually see?

OSCAR: Yes.

DEFENSE: Is the truth something that somebody else tells you is true?

OSCAR: I don't understand that question.

DEFENSE: Okay. Well, say you heard -- say your brother told you something, like he told you that there was a ball outside; okay?

OSCAR: Okay.

DEFENSE: Now, would that be the truth if there was a ball outside and he said there was one?

OSCAR: That would be the truth.

DEFENSE: Okay. But what if you didn't see the ball outside and all he did was tell you there was one out there?

OSCAR: Urn, that would be a lie.

DEFENSE: How do you know?

OSCAR: Wait, wait, wait. Urn, I don't understand that question.

DEFENSE: Okay. I'll ask you again. If your brother came in and said there's a ball outside, and you heard him say it, would that be the truth or a lie?

OSCAR: I don't understand these questions.

(17 RT 3559-3560.)

When testifying about the night of his mother's and sister's deaths, Oscar said that before he fell asleep, a lot of people were at his house. (16 RT 3435.) He stayed awake until dark, when both he and his mother went to bed. (16 RT 3437-3438.) Later, he was under the covers of his mother's bed when he heard firecrackers. (16 RT 3409-3410.)

After he woke up, Oscar thought he saw only one person, but did not remember. (16 RT 3435.) He saw his mother on the floor and tried to wake her up by shaking her and telling her to wake up. (16 RT 3430.) He saw blood, but did not touch it. (16 RT 3430-3432.) Oscar then went to his sister's room and tried to wake her up, before going to the neighbor's house. (16 RT 3422-3423; 17 RT 3566.) He may have seen a knife on his sister's bed. Oscar remembered the kitchen light being on, along with a light in his sister's room and a light in his mother's room. (17 RT 3566-3567, 3584-3585.)

Oscar remembered a man named "Michael," who had long hair, in his mother's room. "Michael" ran out the front door. (16 RT 3438-3439.) He also remembered "Big Man" in his mother's room with "Michael," but does not remember "Big Man's" name or what he looked like. "Big Man" took the phone from his mother when she was trying to call somebody and then ran out the back door. (16 RT 3445-3446.) Oscar saw "Big Man" jump

over the back fence. (16 RT 3447.) Oscar did not make up "Big Man" being there, because he was not "joking" at the time of testimony. (16 RT 3448.) Oscar did not remember a "Domingo." (16 RT 3444.)

Oscar was not choked or tied up that night. He could not remember if he was under his mother's bed when he saw her come into the room. (17 RT 3563-3564.) However, he also testified that his mother's bed was too low for him to fit under, and that he never told anybody that his mother put him under the bed, because that did not happen. (17 RT 3581-3582.)

Oscar did not remember where his toys were, but they were not broken and he never poured water on the floor to make it slippery. Victor was also not in the house when their mother died. (17 RT 3568-3569.)

While at his Aunt Rosa's house, Oscar did not hear her talk on the phone with the police. He did see and hear people at the house talking about what happened to his mother and sister. He also heard them talking about who may have done it. Oscar also talked to Victor about what had happened. (16 RT 3455-3456.)

After relating the above testimony, defense counsel had Oscar relate the events again. Defense counsel asked:

DEFENSE: Now, you said that Big Man was in the room; right?

OSCAR: Yeah.

DEFENSE: And Victor was in the room?

OSCAR: Victor?

DEFENSE: Hm-hmm.

OSCAR: I said that?¹³

DEFENSE: Uh-huh.

OSCAR: Yeah, he was.

DEFENSE: Okay. And then Mike with the long hair was in the room, too right?

OSCAR: Yeah.

DEFENSE: And then they all left?

OSCAR: Yes.

DEFENSE: And you went to your aunt's house?

OSCAR: Yes.

DEFENSE: Okay. Now, you didn't – you didn't see anything else, did you?

OSCAR: No.

DEFENSE: You sure?

OSCAR: I'm sure.

(17 RT 3583.)

Oscar then testified that his mother woke him up when she came to bed, but then he went back to sleep. (17 RT 3587.) He later woke up because he heard firecrackers and saw his mother using the telephone. (17 RT 3622, 3625.) He also saw "Juan," "Michael," and "Big Man" and covered his head with the blankets. (17 RT 3626-3628.) Oscar identified

¹³ Although Oscar had stated in prior interviews that Victor was in his mother's room when she died, he had not testified so at this trial.

Sanchez as "Juan." He then went to his sister's room, but did not know what to do, so he went to his aunt's house. (17 RT 3626.)

Oscar's new mother (Nancy Fennell) told him that if he talked to the prosecutor about Juan, then he could go home. He wanted to "get this over with." (17 RT 3633-3634.) Oscar did not just say what the prosecutor wanted him to say, he just "feel[s] like zipping home." (17 RT 3634.)

3. Oscar's voir dire and testimony at the second trial

At the start of Oscar's testimony at the second trial, the People asked the following questions:

PEOPLE: Oscar, do you promise to tell us the truth today?

OSCAR: Yes.

PEOPLE: And you're not gonna tell us anything but the truth today?

OSCAR: Um, urn, I don't know that part.

...

PEOPLE: Oscar, are you gonna tell us the truth today when you talk to us?

OSCAR: Yes.

PEOPLE: And does that truth mean what you know?

DEFENSE: Your Honor, I object to leading.

COURT: Overruled.

OSCAR: Um, could you please skip that one?

PROSECUTOR: I will repeat it for you. When you say you're gonna tell us the truth, does that mean you're gonna tell us what you know?

OSCAR: Yes.

PROSECUTOR: Does that mean you're gonna tell us what you saw?

OSCAR: Yes.

PROSECUTOR: Does that mean you're gonna tell us what you heard?

OSCAR: Yes.

PROSECUTOR: Does that mean you're gonna tell us things that you don't know?

OSCAR: Um, yes.

PROSECUTOR: You're gonna tell us things you don't know?

OSCAR: Um, I can't -- I don't -- could we please skip that one?

PROSECUTOR: Well, I'll repeat it for you. Are you gonna tell us something if you don't know the answer?

OSCAR: Um, I don't know this one.

PROSECUTOR: Well, if I ask you if I ask you something you don't know, are you gonna tell me that you don't know it or are you gonna tell me something different?

...

PROSECUTOR: Are you gonna tell me anything you don't know?

OSCAR: I -- I don't know.

PROSECUTOR: Okay. When I ask you if you're gonna tell me the truth, I'm gonna ask you well, let me give you an example; okay?

OSCAR: All right.

PROSECUTOR: Okay. If I told you that Detective Kroutil right here --

OSCAR: I'm-hmm.

PROSECUTOR: -- if I told you that he had a dog on his head, would that be the truth?

OSCAR: No.

PROSECUTOR: Okay. If I told you that this is a cup, would that be the truth?

OSCAR: Yes.

PROSECUTOR: Okay. Now, if I ask you -- if I ask you how many fingers I'm pointing behind me, do you know that as you're sitting there?

OSCAR: No.

PROSECUTOR: So you're not gonna tell me, are you?

OSCAR: (Witness shakes head.)

(34 RT 7475-7478.)

Oscar then testified that when he lived in California, he lived with his mother, sister, and brother Victor. (34 RT 7479-7480.) The night his mother died, Oscar was in her room when he woke up to the sound of shooting. (34 RT 7483-7484.) Oscar saw a gun and saw "Juan" in his mother's room, but does not remember everything about it. (34 RT 7484-7485.) He remembered seeing the "rest of the guys" in his mother's room (34 RT 7489), his mother dead in her bedroom (34 RT 7482-7483), and his sister dead in a different room. (34 RT 7481-7482, 7487.) Oscar identified Sanchez as "Juan." (34 RT 7490-7491.)

After Oscar left his house, he went to his aunt's house nearby. (34 RT 7486-7488.) He laid down for a while in somebody's bed before talking to

the police. (34 RT 7488-7489.) He could not remember what he told the police. (34 RT 7486, 7489-7490.)

On cross examination, Oscar testified that he talked about the case with his counselor and that sometimes he forgot "Juan's" name, but his counselor helped him remember. (34 RT 7492-7493.) Oscar was positive that Sanchez was the man in his mother's room, and that Victor was not in his mother's room when she died. (34 RT 7519, 7574.) He did not remember the names "Michael," "Big Man," or "Domingo." (34 RT 7523-7524, 7548.) He also did not remember a man with long hair or seeing "Michael" run away. (34 RT 7535.) He did remember telling someone that "Big Man" ran into the backyard, but was not sure if that really happened. (34 RT 7549.) Oscar also did not know what a "wisp" was. (34 RT 7550-7551.) He did remember a man bringing him ice cream in "a little cup," and he ate it in front of his house, but did not remember when this happened. (34 RT 7565-7566, 7571.)

Later in cross examination, Oscar testified that he remembered seeing "guys" run through the front door after he found his mother. (34 RT 7587.) He did not remember their names or if they got into a car. (34 RT 7588.) He did remember hearing people talk in his mother's room, but did not know who they were or what they said. (34 RT 7595-7596.) Oscar thought he saw a total of three or four men, all carrying guns. (34 RT 7598-7602.) Each man also had a knife in his pocket. (34 RT 7603.)

Oscar's mother and sister were having a party the night that they died, and a lot of people were at his house. The people were drinking beer and they left late when the party ended. (34 RT 7558, 7564-7565.) His mother and sister had an argument before they died, and they "kind of pushed" each other. (34 RT 7558, 7561-7562.) Oscar did not remember being choked or tied up that night. (34 RT 7571.) After Oscar saw his mother dead, he left the house through the front door and ran to his aunt's house. He did not remember if anyone chased him. (34 RT 7586-7587.) After going to his aunt's house, he did not remember if he saw or heard people talking about what had happened before he talked to police. He testified that he wanted to "get this over with," and the court soon adjourned (34 RT 7552.)

Following a nearly day-long break, Oscar took the stand again and testified that when he woke up he first saw a gun and "Big Man," who had a beard. (35 RT 7674-7676.) When he saw his mother, she was walking towards the telephone and tried to pick it up. (35 RT 7677.) Four men with guns were in her room, one was "Big Man" and another was "Michael." Oscar was laying in the bed at the time and got out of bed once the men left. (35 RT 7678-7679.) While the men were in the room, Oscar was hiding under the covers and peaking out to see what they were doing. He did not want to jump out from under the covers. Once he was out of the bed, he saw his mother and then his sister. (35 RT 7679-7680.) He then

ran to Victor's room, but Victor was not there, so he ran to his aunt's house.
(35 RT 7680, 7685.)

The men chased Oscar, and two of them grabbed his arm. Oscar took their hands off of him and ran under the covers. The men did not follow him. (35 RT 7688-7689.) He did not hit them in the stomach. (35 RT 7689-7690.) Oscar remembered telling the investigators that his mother and sister were fighting the morning they died. He testified that while they were fighting, the men came in and beat them and killed them. (35 RT 7699-7700.) The men were named "Big Guy," "Michael," and "Juan," but Oscar did not remember the fourth man's name. (35 RT 7700-7701.) "Michael" had curly long hair. (35 RT 7694-7695.) Oscar then changed his testimony and said that there were five men with five guns shooting at his mother and sister. (35 RT 7703-7704.)

4. Testimony at the third trial concerning Oscar's competency

a. Oscar's trial testimony¹⁴

At Sanchez's third trial, Oscar was asked the following questions:

PEOPLE: Do you know the difference between telling the truth and telling a lie?

OSCAR: Hm - -

¹⁴ None of Oscar's testimony at the section 402 hearing or Sanchez's first two trials were admitted into evidence, nor were his statements to the prosecution's investigators.

PEOPLE: Let's put it this way. Let's ask it in a different way.
[¶] If I said I was wearing a blue shirt, would that be the truth or would that be a lie?

OSCAR: A lie.

PEOPLE: Okay. If I said I was wearing a tie with elephants on it, would that be a truth or would that be [a] lie?

OSCAR: The truth.

(59 RT 11969.)

Oscar testified that he did not remember much of what happened the day that his mother died. (59 RT 11978-11979; 60 RT 12194, 12208.) He remembered his mother lying on the floor and his sister "kind of sitting." He touched his mother before going to his Aunt Rosa's house. He saw blood on the kitchen floor, but did not remember if he touched it. (59 RT 11983.) He thought he went to his aunt's house and told her to see if his mother was dead. Then his aunt went to his house before returning to her own house. (59 RT 11984.)

Oscar remembered seeing Sanchez at his mother's house on the day she died, but he did not remember where. (60 RT 12216-12218, 12222-12224.) Sanchez had brought him ice cream, but he did not remember when. (60 RT 12219.) He saw Marcos Pena the night his mother died and did not know if Pena was the same man as Sanchez. (Def. Exh. Q; 1 SCT 33-34; 60 RT 12229-12230.)

During a recess, defense counsel refreshed Oscar's recollection with many of his prior statements. (60 RT 12187-12188.) Oscar did not

remember how many people were in his mother's room when she died, or what room he was in during the murders. (60 RT 12188-12189.) He did not remember if he got hurt or if anyone grabbed him. (60 RT 12196-12197.) He also did not remember if anyone named "Michael" was there or if anybody was there with a weapon. (60 RT 12197.) Finally, Oscar did not remember anybody being in the room with his mother when she died. (60 RT 12206-12207.) When asked about his therapy sessions, Oscar said that he did not see Newton that often anymore, and probably saw her every two weeks. (60 RT 12195-12196.)

b. Oscar's inconsistent statements

Jose Hernandez is Oscar's natural father. In late August, Oscar went to live with Jose in Idaho. (66 RT 13486-13487.) Oscar told Jose that his mother was going to come back for him and that his mother talked to him. (66 RT 13487-13488.) After two or three weeks of living with Jose, Jose asked Oscar what had happened at his mother's house. Oscar told him that he saw three people in his mother's house the night she died. (66 RT 13488-13489.) He said that "Juan" and "Marcos" or "Michael" were in the house. (66 RT 13491.) Oscar said that he knew the person and that he had a beard. Jose and Oscar had trouble communicating with each other because Jose did not speak English and Oscar did not speak Spanish well. (66 RT 13493-13494.)

Oscar told Lola Ortiz that "Juan" was in his house the night of the murders with his mother's mechanic and Lorena's boyfriend, whom he called "Big Man." (70 RT 14275-14278.) Oscar also said that "Domingo" was there. (70 RT 14289.)

c. Oscar's therapy sessions

Wanda Newton testified that she is a licensed professional counselor and treated Oscar from November 1997 until the time of testimony. (74 RT 14759-14761, 14765-14766.) At first, Oscar was "very frightened and withdrawn" with Newton and had several bald spots from pulling out his own hair. (74 RT 14761-14762.) Her goal for Oscar was to help him sort through the recent losses in his life and "grow up with his memories." (74 RT 14763.) To do this, Newton and Oscar talked about Oscar's history, including his mother and sister's deaths. (74 RT 14765-14766.)

On March 3, 1998, Newton and Oscar discussed Oscar's mother's death. (74 RT 14744.) Early in the session, Oscar told Newton that "Juan" did not shoot his mother. Later in the session, Oscar looked under the couch and said that he was "talking" to his mother. He said that his mother wanted him to tell Newton that she was not shot. (74 RT 14775-14776.)

During another session, Oscar told Newton that he did not think "Juan" shot his mother. He thought that she had cut herself with a knife, and that she just bled and died. (74 RT 14804-14805.) He did say, however, that "Juan" took the phone from his mother. (74 RT 14779-

14780.) Newton and Oscar had an ongoing discussion about what was real and talked about Oscar's memories changing between sessions. Oscar would frequently tell Newton that he did not remember things about his mother's death and would express confusion about his memories of the day of the murders. (74 RT 14804-14805.)

d. Expert testimony

Dr. Susan Streeter is a psychologist specializing in children and adolescent behavior. (71 RT 14334-14336.) Typically, a five-to-seven year-old child has fluid thought processes that jump around more frequently than an older child or adult. Five-to-seven year-old children use their imaginations more often and can easily confuse fantasy with reality. (71 RT 14345-14346.) However, once a child enters the eight-to-ten year range, they tend to rely on their imaginations a lot less and are reality oriented. (71 RT 14352.) Children of this age may "confabulate," which is to fill in the blanks of their understanding with information from their own thoughts, environment, or events that occurred over the course of several hours or days. (71 RT 14346, 14354.) They are also easily influenced by the adults around them. (71 RT 14346-14347.)

Five-to-seven year olds should be capable of remembering and reporting what they see. However, if a child is impaired in some way, then his or her cognitive ability may be affected. (71 RT 14347-14348.) To assess cognitive ability Dr. Streeter looks at a child's language processing

skills and the extent to which a child imitates he or she has heard. A child with impaired cognitive ability tends to parrot explanations he or she has heard without the ability to analyze them and does not understand questions with more than four words in them. (71 RT 14348-14349.) Further, a child in the five-to-seven age range does not have the ability to distinguish between something they know from their memory and something they have heard from another source. (71 RT 14349.)

If a child is able to report events, but later says he does not remember them, it could be because the child is tired of talking about the subject, or the child could have short or long term memory problems. It could also indicate that the child is confused about whether he even saw the events in the first place. (71 RT 14355-14356.)

B. The Trial Court Did Not Err By Allowing Oscar to Testify, Because Oscar Demonstrated that He Understood His Duty to Tell the Truth

Sanchez argues that the trial court erred by allowing Oscar to testify at the third trial because Oscar was incapable of understanding his duty to tell the truth. (AOB 27-52.) To support this argument, Sanchez points to Oscar's testimony at the section 402 hearing, his testimony at all three trials, and his inconsistent statements. (AOB 36-44.) The thrust of Sanchez's argument is that Oscar's testimony was so fantastical that he clearly did not understand "that telling the truth also meant not repeating or making up stories when he testified." (AOB 46.)

This argument fails. During the section 402 hearing and the voir dire testimony at Sanchez's trials, Oscar demonstrated that he knew he had a duty to tell the truth. To the extent Oscar made inconsistent or fantastical statements during his testimony, those statements were irrelevant when considering whether he understood his duty to tell the truth while testifying.

1. Applicable law

“As a general rule, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.” (*People v. Dennis* (1998) 17 Cal.4th 468, 524, citing § 700.) Pursuant to section 701, subdivision (a), a person is disqualified to testify if he is incapable of expressing himself as to be understood or is incapable of understanding his duty to tell the truth. Capacity to understand the duty of truthful testimony is a preliminary fact to be determined exclusively by the court. (*People v. Anderson* (2001) 25 Cal.4th 543, 573.) The burden of proof is on the party who challenges a witness's mental capacity to testify, and a trial court's determination on the matter will be upheld in the absence of a clear abuse of discretion. (*Ibid.*; see also *People v. Mincey* (1992) 2 Cal.4th 408, 444.) Additionally, “[t]he challenging party must establish a witness's incompetency by a preponderance of the evidence.” (*People v. Lewis* (2001) 26 Cal.4th 334, 360 (*Lewis*)). In reviewing the question of a witness's competency, the reviewing court may examine the entire record

made by the witness and is not restricted to voir dire examination. (*People v. Smith* (1958) 162 Cal.App.2d 66, 69.)

“Inconsistencies in testimony and a failure to remember aspects of the subject of the testimony, however, do not disqualify a witness. They present questions of credibility for resolution by the trier of fact” (*People v. Mincey, supra*, 2 Cal.4th at pp. 444-445.) “A witness’s uncertainty about his or her recollection of events does not preclude admitting his or her testimony.” (*People v. Lewis, supra*, 26 Cal.4th at pp. 356-357.)

“Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” (*Id.* at p. 361, quoting *People v. Jones* (1968) 268 Cal.App.2d 161, 165.) Thus, the test for competency is not whether the witness testified truthfully, but whether the witness had the capacity to understand his duty to testify truthfully. (*In re Crystal J.* (1990) 218 Cal.App.3d 596, 602.)

2. Oscar’s multiple voir dire testimony demonstrated that he was aware of his duty to tell the truth

The questioning during the section 402 hearing and the voir dire testimony at Sanchez’s trials demonstrated that Oscar understood and appreciated that he had to tell the truth while sitting as a witness. During the section 402 hearing, Oscar identified truths and lies when given

examples by the People. Oscar also testified that the truth was “not telling a lie,” and that he would only testify to things that he saw and heard himself. (4 RT 524, 527-528.) Oscar acknowledged that telling the truth as a witness was “very important” and that he would get into trouble if he told a lie. (4 RT 526, 534.) Most importantly, Oscar stated that he knew when he was not telling the truth. (4 RT 533.) Oscar also testified that he talked about the meaning of truth with his counselor Newton and went to a courtroom where a woman talked to him about the meaning of truth. (4 RT 530-532.) Oscar’s experience of learning the concept of truth, combined with his testimony concerning the concept of truth, showed that he knew that he had a duty to be truthful and not tell lies or stories about what occurred the night of his mother’s and sister’s deaths.

Further, the voir dire examinations at all of Sanchez trials supported the trial court’s ruling at the third trial that Oscar was competent to testify. At the first trial, when asked what his job was while sitting as a witness, Oscar said that he would “tell the truth.” (16 RT 3350.) He was not prompted to answer in such a way nor was he asked a leading question. Oscar also identified a truth and a lie when given examples by the People. (16 RT 3350-3351.) When asked questions by defense counsel, Oscar once again identified a truth when given an example. (17 RT 3559.)

Oscar did have difficulty when asked further questions by defense counsel about the meaning of truth, however, the questions were misleading

and confusing to a child of Oscar's age. Defense counsel asked whether it was a truth or a lie if somebody told him there was a ball outside. When given the scenario that a ball was actually outside, Oscar correctly identified that the statement would be true. When given the scenario that Oscar did not see the ball outside, Oscar responded that the statement would then be a lie. Although counsel asked him to respond whether the statement was a truth or a lie, she then went on to challenge him regarding his capacity to perceive. Counsel asked questions pertaining to personal knowledge, not truth as originally phrased. Although Oscar was confused, he accurately stated that a truth was something that he saw himself. (17 RT 3559-3560.) All of Oscar's answers during voir dire at the first trial showed he understood his duty to tell the truth.

At the second trial, Oscar again established that he was competent to testify. The prosecutor asked him a series of questions, and in responding, Oscar established that he would tell the truth while testifying and that the truth included the things he knew, saw, and heard. (34 RT 7675-7476.) Oscar was confused about whether he could testify to things he did not know, but when given an example, he demonstrated that he would not testify to the things he did not have knowledge of himself. (34 RT 7477-7478.) Given this uncontroverted testimony, Oscar established that he knew what the truth meant and understood his duty to tell the truth while testifying.

At the third trial, Oscar again demonstrated that he understood his duty to tell the truth by correctly identifying examples of a truth and lie given to him by the People. (59 RT 11969.) Defense counsel asked Oscar if it would be a truth or a lie if somebody told him something that happened, and Oscar responded that “[s]ometimes it’s a truth or a lie,” but he could not articulate why. (59 RT 11971-11972.) Given Oscar’s testimony and his response to defense counsel’s questions, he showed that he understood he was required to tell the truth and that he knew what it meant to tell the truth. Oscar’s slight confusion about why statements of others are sometimes truths and sometimes lies did not diminish the fact that he possessed the basic knowledge of the meaning of truth and knew when he himself was telling the truth.

The extensive voir dire regarding Oscar’s competence during the section 402 hearing and Sanchez’s three trials established that he understood the difference between truth and falsehood and appreciated his duty to tell the truth while sitting as a witness. Oscar’s ability to accurately state his duty as a witness and identify that duty by recognizing examples of truths and lies showed that he met the requirements of section 701. Therefore, the trial court did not abuse its discretion in determining Oscar was competent to testify.

3. Testimony from other witnesses regarding Oscar's character for truthfulness also demonstrated that he understood his duty to tell the truth

In addition to Oscar's own testimony, the testimony of other witnesses at the section 402 hearing confirmed that Oscar could distinguish between the truth and a story when relating events when truthfulness was required. Andrea Culver, Oscar's kindergarten teacher at the time of his mother's death, found Oscar to be a truthful person in their interactions. In Culver's experience, Oscar was always able to recall events and communicate them accurately and truthfully. (4 RT 579-581.)

Additionally, Oscar's therapist Wanda Newton found him to be truthful. Newton testified that, although Oscar fantasized and made up stories, he did so knowing that the stories were not true. (5 RT 974.) Oscar often made up stories because it was a fun thing to do or to avoid a particular conversation. (5 RT 978-979, 1005-1007.) Newton believed that Oscar purposefully lied to her on occasion because Oscar looked "pleased with himself" when Newton was confused about something Oscar told her. Thus, Oscar was aware when he related stories that were not true. (5 RT 979.)

Newton was with Oscar when he visited the courtroom in Idaho where Denise Himes talked to him about the concepts of truth and lies, as well as other concepts relating to a witness's duty to testify. Newton observed

Oscar go over examples with Himes about the difference between a truth and lie and thought that he did well with the concepts. (6 RT 1130-1131.)

Early in his therapy, Oscar did state that he thought his mother had cut herself and had not been shot. (6 RT 1002-1003, 1114-1115.) Newton attributed this statement to Oscar's lack of comfort with the topic of conversation. (5 RT 980.) Oscar had not made up stories in the recent past. (5 RT 1005-1007.)

Both Culver's and Newton's testimony concerning Oscar's character for truthfulness showed that he was generally truthful and knew when he was telling a lie or making up a story. In fact, the only person who testified that Oscar did not know the difference between a truth and a lie was Dr. Streeter, who never interviewed Oscar herself and based her opinion solely on Oscar's statements to the police and during counseling sessions she was not present for. (4 RT 545-546.) Further, Dr. Streeter analyzed Oscar's competence using the psychological definition of competency, which included the ability to understand and process the information being presented and to "accurately represent reality." (4 RT 546.) This is different than the legal definition of competence, which mandates only that a witness be able to communicate and understand the duty to tell the truth while testifying. (§ 701; *People v. Dennis, supra*, 17 Cal.4th at p. 525.)

Also, Dr. Streeter believed that Oscar did not know the meaning of truth, because he appeared confused and was hesitant when answering

questions about the concept of truth. Oscar could also not define truth without concrete examples. (4 RT 552-553) This testimony ignored the fact that Oscar did define truth as “not telling a lie” (4 RT 527) and testified that the truth was “not a lie” (4 RT 531). Further, Oscar’s hesitancy in answering questions and his confused appearance did not negate his substantive answer concerning his understanding of his duty as a witness. Oscar was seven years old at the time of testimony and was in an unfamiliar environment, away from his home and familiar surroundings. (4 RT 523.) He was also testifying about a traumatic event in his life in front of people he had never met. His hesitancy and confusion were reasonably attributed to many sources, not limited to the intellectual discussion on the meaning of truth he was subject to. Taken as a whole, Oscar’s testimony showed that he knew he had a duty to tell the truth.

4. Oscar’s testimony at the third trial demonstrated that he understood his duty to be truthful

Oscar’s testimony at the third trial further showed that he understood his duty to tell the truth. Oscar testified on October 4 and 5, 1999, nearly two years after his mother and sister were murdered. (59 RT 11966; 60 RT 12137.) He stated that he did not remember much about the night of their deaths and then responded to a number of questions by stating that he did not remember. (59 RT 11978-11979; 60 RT 12187, 12194, 12197, 12206-12208.)

Oscar's descriptions of the events he did remember; however, included details, "unlikely to be known by a person not present, that were corroborated by independent evidence." (*People v. Anderson, supra*, 25 Cal.4th at p. 574.) Oscar testified that he saw his mother lying on the floor (59 RT 11983; 62 RT 12515, 12522; 63 RT 13010), and his sister was "kind of sitting" (55 RT 11181-A; 59 RT 11983; 62 RT 12516). He also testified that he saw blood on the kitchen floor. (55 RT 11264-A; 58 RT 11862; 59 RT 11983.) Finally, Oscar said that he went to his aunt's house and they both went to his house, before ultimately returning to her house. (59 RT 11984, 11979; 60 RT 12189; 62 RT 12513-12514, 12517-12518.)

There is no evidence that Oscar was delusional at Sanchez's third trial, and his admitted inability to remember what happened before going to his aunt's house did not mean he was not competent to be a witness. (See, e.g., *People v. Lewis, supra*, 26 Cal.4th at p. 360.) Oscar's entire testimony was lucid and responsive, and nothing in his testimony revealed an inability to appreciate his obligation as a witness to tell the truth. (*People v. Cudjo* (1993) 6 Cal.4th 585, 622.)

5. Oscar's prior statements and testimony did not provide a basis to exclude his testimony at the third trial

Sanchez argues that Oscar's testimony at the various trials and his statements to the prosecution's investigators showed he did not know the difference between the truth and fantasy, but this argument is unavailing.

(AOB 37.) Oscar's statements to the prosecution's investigators and during his testimony at the first two trials did not mandate exclusion of his testimony. While Oscar's testimony and statements to the prosecution's investigators and other witnesses were at times inconsistent and contained facts that may not have actually occurred, Oscar still demonstrated that he knew his duty as a witness was to tell the truth.

People v. Lewis, supra, 26 Cal.4th at p. 361, demonstrates the proper inquiry into a witness's competence, and that a witness is still competent to testify despite testimony that includes instances of delusions and confabulations. In *Lewis*, the defendant produced evidence that the prosecution's "main witness" suffered from mental disorders, mild mental retardation, and substance abuse, and made up information to fill in gaps in his memory. (*Id.* at p. 349.) This Court noted that his testimony "may have consisted of inconsistencies, incoherent responses, and possible hallucinations, delusions and confabulations." (*Id.* at p. 357.) Still, this Court concluded that he was competent to testify, stating:

Mere difficulty in understanding a witness, however, does not disqualify that witness under ... section 701, subdivision (a). To the extent defendant contends [the witness's] responses were unbelievable-including his testimony that he 'heard' blood and knew how money 'sounds' – this was an issue of credibility for the jury and *not relevant* to the issue of [the witness's] competency.

(*Id.* at p. 361, italics added; see also *People v. Mincey, supra*, 2 Cal.4th at p. 444 ["Inconsistencies in testimony and a failure to remember aspects of

the subject of the testimony” do not disqualify a witness from testifying]; *People v. Burton* (1961) 55 Cal.2d 328, 342 [seven-year-old witness was competent to testify despite numerous failures to remember and apparent “coaching” of answers].)

The *Lewis* opinion is notable because this Court did not enter into a statement-by-statement credibility analysis to prove that the witness was competent to testify, as Sanchez currently does. In *Lewis*, this Court held that the witness understood his duty to tell the truth and could communicate, and it explained that the trier of fact could consider any inconsistencies, including confabulations and delusions, in determining the witness’s credibility. (*Lewis, supra*, 26 Cal.4th at pp. 360-361.)

In arguing that Oscar’s statements demonstrate his incompetence to testify because they included inconsistencies and fantastical accounts of the murders, Sanchez appears to rely on *People v. Lyons* (1992) 10 Cal.App.4th 837 (*Lyons*). (AOB 37, fn. 15.) But *Lyons* is not good authority, because it is inconsistent with this Court’s holding in *People v. Lewis*.

Lyons, cited in this Court’s decision of *People v. Anderson, supra*, 25 Cal.4th at p. 574, held that a witness was incompetent to testify based exclusively on the substance of the witness’s testimony. The court held that the witness was so delusional, and her testimony so contradictory and fantastic, that admitting it at trial was error. (*Lyons*, 10 Cal.App.4th at p. 844 .) The witness’s testimony included claims that the defendant had

sexually assaulted her in an imaginary third orifice and murdered two of her husbands – the second by blowing up the plane on which he was flying. At the preliminary hearing, the witness thought that defendant’s father had killed her first husband, and also admitted at a pretrial hearing that she was not certain at that time that the defendant had actually killed her second husband. It was also revealed that she suffered from multiple personality disorder and the trial court had been unable to determine which of the different personalities was testifying. (*Id.* at p. 843.)

Under this Court’s decision in *Lewis*, the *Lyons* court erred in determining that the witness was incompetent, because it based its holding on the substance of her testimony. As *Lewis* stated, the believability of a witness’s responses are “*not relevant* to the issue of [] competency.” (*Lewis, supra*, 26 Cal.4th at p. 361, italics added.) Accordingly, the appellate court should not have analyzed the credibility of the witness’s statements to determine her competence.

This is further supported by *People v. Gonzales* (2012) 54 Cal.4th 1234 (*Gonzales*), where this Court emphasized that accuracy of a witness’s recollections were not the focus of a competency analysis. In *Gonzales*, this Court adopted the findings of the trial court, which limited its analysis of the competence of a child witness to the witness’s “‘fundamental ability to distinguish truth from fiction.’” (*Id.* at pp. 1264-1265.) At a hearing on the child’s competence, an expert testified that the child “was not incapable

of understanding his duty to tell the truth,” “but that there was a ‘significant probability’ that his memory of the events ... was ‘not necessarily accurate,’ due to [his] chaotic [] household and [his] stage of development.” (*Id.* at p. 1264.) In ruling on the issue, the trial court noted that the expert’s testimony was more relevant to the child witness’s credibility, and testimony of other experts and the child’s therapist confirmed that he could distinguish between truth and falsehood and was competent to testify. (*Id.* at pp. 1264-1265.)

Similarly in *People v. Avila* (2006) 38 Cal.4th 491, 589-590, a witness who was obviously lying did not lack competence to testify. In *Avila*, it was difficult to understand the witness “because his statements were so contradictory from one moment to the next.” This Court held that “contradictory testimony does not suffice to show incapacity to understand the duty of truth.” (*Id.* at p. 589.) The trier of fact can evaluate these matters, when appropriate and otherwise permissible, in resolving the question of credibility. (*People v. Mincey, supra*, 2 Cal.4th at pp. 444-445.) Thus, respondent submits that *Lyons* was wrongly decided and does not provide a framework for finding a witness incompetent to testify.

Under the reasoning of *Lewis* and *Gonzales*, Oscar’s prior statements and testimony did not provide a basis to exclude his testimony at Sanchez’s third trial. Oscar proved during multiple voir dire testimony and at the section 402 hearing that he possessed the “fundamental ability to

distinguish truth from fiction.” (*People v. Gonzales, supra*, 54 Cal.4th at p. 1264.) Oscar demonstrated that he knew the difference between a truth and a lie and appreciated his duty to tell the truth while testifying. (See Arg. I, part B(2)-(4), *ante*.) To the extent Oscar’s prior testimony and statements “may have consisted of inconsistencies, incoherent responses, and possible hallucinations, delusions and confabulations,” “this was an issue of credibility for the jury and not relevant to the issue of [Oscar’s] competency.” (*People v. Lewis, supra*, 26 Cal.4th at pp. 357, 361.) Thus, the trial court did not abuse its discretion by allowing Oscar to testify.

C. The Purported Error Was Harmless

Sanchez claims that he was harmed by the admission of Oscar’s testimony in two ways. First, Sanchez argues that he was harmed because the jury did not have an accurate picture of Oscar’s credibility. According to Sanchez, this was because of the trial court’s other rulings regarding Oscar’s prior statements and identifications, and the extent to which defense counsel could impeach Oscar and/or have an expert opine about his credibility.¹⁵ (AOB 50-52.) Sanchez argues that the admission of Oscar’s testimony severely compromised his ability to cross-examine Oscar, thus rendering the verdict unreliable. (AOB 52.) Second, Sanchez argues that a more favorable outcome would have resulted if Oscar had been excluded

¹⁵ Sanchez and the People address the merits of these claims in Arguments II through VI.

from testifying and his prior statements left inadmissible. (AOB 52-58.)

The People disagree because Sanchez was given an adequate opportunity to cross-examine Oscar and challenge his credibility. Further, regardless of whether Oscar's testimony and prior identifications of Sanchez were properly admitted into evidence, ample evidence existed outside of Oscar's testimony and prior statements to find Sanchez guilty beyond a reasonable and sentence him to death.

The erroneous admission of evidence does not require reversal unless "the error or errors complained of resulted in a miscarriage of justice." (§ 353, subd. (b).) A miscarriage of justice occurs when "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.) The admission of evidence in violation of state law violates the federal right to due process if the error "rendered the defendant's trial fundamentally unfair." (*People v. Merriman* (2014) 60 Cal.4th 1, 70.) Evidentiary error giving rise to a constitutional violation is subject to review under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18. Under that standard, an error does not constitute grounds for reversal if it is harmless beyond a reasonable doubt. (*Id.* at p. 24.)

1. Sanchez had a sufficient opportunity to cross-examine Oscar

Sanchez was not denied an opportunity to cross-examine Oscar and present to the jury an accurate view of his credibility. The evidence admitted regarding Oscar were his statements to the police on the day of his mother's murders and his testimony at trial. Oscar trial testimony included the events he remembered from the day his mother died, including seeing her and his sister laying on the floor in their respective rooms and blood on the walls. (59 RT 11983.) Oscar also described retrieving his aunt, returning to his house, and ultimately going back to his aunt's house. (59 RT 11984.) Oscar also described the environment at his aunt's house, including the people he talked to and conversations he overheard. (59 RT 11984-11988, 12028.) Oscar also testified about his therapy sessions with Wanda Newton. (60 RT 12195-12196.) Finally, Oscar identified Sanchez and Marcos Pena as being at his mother's house the day she died. (60 RT 12216-12219, 12222-12224, 12227-12229.)

Given Oscar's recollection of the events of his mother's death, Sanchez was able to adequately cross-examine him regarding the statements he made to police on the day his mother died and whether those statements had been contaminated by Oscar's interactions with other people. Defense counsel questioned Oscar about his interactions with people at his aunt's house, including his brother Victor. (59 RT 11985-

11988.) Counsel also elicited testimony from other witnesses who had been at Rosa's house on the morning of the murders to show the number of people present at the house and the content of the conversations going on around Oscar. (65 RT 13344; 68 RT 13949; 69 RT 14124-14125.) This evidence allowed the jury to consider all possible influences on Oscar's perceptions at the time he made statements to the police on the morning of the murders. The jurors also heard about the traumatic event Oscar had experienced, as well as evidence relevant to his state of mind immediately following the murders. (61 RT 12368; 64 RT 13207-13208.) They also heard evidence regarding every statement Oscar made to police on the day of the murders. (61 RT 12366-12368; 64 RT 13205, 13221, 13225.) This included Oscar's noon interview with Sergeant Dempsie, where he elaborated on his prior statements, but also said things that could not be corroborated by the evidence. (13 CT 3514-3522; 64 RT 13235.)

Sanchez called Dr. Streeter to testify about the ability of a child Oscar's age to perceive events around him and recall those perceptions accurately. (71 RT 14345-14357.) In Dr. Streeter's opinion, credibility and reliability of perceptions related by a child Oscar's age is best determined by looking at what the child said and determining whether it makes sense within an adult's reality. (71 RT 14348-14349, 14377.) The factors elaborated by Dr. Streeter, along with the testimony regarding possible contamination and influences on Oscar's perceptions, gave the jury

ample evidence to evaluate the credibility of the statements Oscar's made to police on the day his mother died.

Sanchez also received an adequate opportunity to cross-examine Oscar regarding the credibility of his trial testimony. Defense counsel cross-examined Oscar about his testimony placing Sanchez in his mother's room the day that she died by presenting him with a picture of Marcos Pena and asking whether he too was in Oscar's mother's room. In responding to this cross-examination, Oscar testified that Marcos Pena was at his home the day his mother died and that he did not know if Sanchez and Pena were the same person. (Def. Exh. Q; 1 SCT 33-34; 60 RT 12229-12230.)

Defense counsel also questioned Oscar about his therapy sessions with Wanda Newton and the general topics they would talk about, including specific things they would say regarding Sanchez and the murders. (60 RT 12195-12196.) Defense counsel also questioned Newton about her sessions with Oscar and inquired whether there was a risk that Oscar adopted Newton's version of events surrounding his mother's murder. (74 RT 14759-14778.) Finally, Jose Hernandez and Lola Ortiz testified about statements Oscar made, in which he said that other men were in his mother's room with Juan when she died. (66 RT 13489, 13491; 70 RT 14275-14278, 14289.) This evidence, combined with Dr. Streeter's testimony, gave the jury ample evidence to accurately judge Oscar's credibility while testifying.

In sum, there was abundant evidence allowing the jury to evaluate the credibility of Oscar's statements. For example, the jury could evaluate Oscar's statements by comparing their content to the evidence found at the scene of the crime, to the environment Oscar was in before making statements, and to the statements he made later that day. In making this evaluation, the jury could also consider evidence regarding the general development and reliability of children Oscar's age. Likewise, the jury could compare Oscar's testimony to his prior statements to police, as well as to Jose Hernandez and Ortiz. The jury could consider evidence regarding Oscar's therapy sessions, and other statements he made at the time of testimony when evaluating his credibility. In short, there was abundant evidence bearing on the credibility of Oscar's statements both in and outside of trial. Thus, Sanchez was given an adequate opportunity to cross-examine Oscar and present an accurate picture of his credibility.

2. Ample evidence apart from Oscar's statements and testimony, demonstrated Sanchez's guilt

Additionally, ample evidence existed outside of Oscar's testimony and prior identifications to convict Sanchez. The strongest piece of evidence proving Sanchez's guilt was his own confession to the crimes. (*In re Cox* (2003) 30 Cal.4th 974, 1032 ["as the United States Supreme Court has recognized, evidence of a confession has ... a 'profound impact on the jury'"].) In his confession, Sanchez admitted killing both Ermanda and

Lorena before fleeing Ermanda's home and disposing of the murder weapon in a field. (13 CT 3527-3528, 3532-3533, 3536-3537.)

Sanchez specifically confessed that he killed Ermanda because she owed him money. (13 CT 3528-3530.) This statement was corroborated by witnesses who saw Sanchez arguing with Ermanda in her front yard in the weeks before the murders. (57 RT 11689-11691, 11740, 11750; 62 RT 12676, 12668-12669.) Myrna Feliciano saw them together, with Ermanda looking agitated, in Ermanda's garage four hours before the murders. (56 RT 11558-11561, 11563, 11586; 65 RT 13290.) Sanchez was also seen driving by Ermanda's house "real, real slow" two nights before the murders. (56 RT 11550, 11555-11557, 11582.) He was also seen waiting outside Ermanda's house days before the murders, and he looked as though he was waiting for her to return home. (65 RT 13311-13313, 13316-13319, 13323-13324.)

The evidence showed Sanchez for the man he confessed to be – a man who was angry at a person who owed him money. Sanchez was seen arguing with Ermanda multiple times, driving by her home to see if she was there, and waiting for her to get home. These are the actions of a man who wants to get into contact with a particular person and is angry with that person. These actions corroborate Sanchez's confession, in which he claimed to have been angry at Ermanda because she owed him money.

The evidence also revealed that a nine-millimeter handgun was used to kill Ermanda and Lorena. (55 RT 11205-A; 58 RT 11828-11829.) Although Sanchez claimed to have used a .22-caliber gun, he also admitted to being unfamiliar with weapons. (13 CT 3538.) A reasonable inference from this evidence supports a finding that Sanchez did not know what type of weapon he possessed while killing Ermanda and Lorena. Moreover, other evidence showed that he in fact possessed a nine-millimeter handgun. For example, a week before the murders, Raul Madrid returned a nine-millimeter handgun to Sanchez, thus placing a gun matching the murder weapon in Sanchez's possession. (57 RT 11795-11797, 11808; 62 RT 12605-12606, 12612-12613.) Prior to the murders, including the day before, Sanchez claimed to have owned a gun. (57 RT 11660, 11668; 62 RT 12646.) Although the murder weapon Sanchez claimed to have disposed of in a field was never found, Sanchez did not own or possess any gun after the murders, let alone the one he claimed to have owned the day before. (55 RT 11386-A.)

The evidence also showed that Sanchez had owned two knives – one large, and one small – and that he was only in possession of the large knife after the murders. (55 RT 11377-A; 56 RT 11494-11496, 11510-11512.) A small knife, most likely made by the same manufacturer as Sanchez's large knife, was found near Lorena's body. (63 RT 12863-12864.) Sanchez was never able to account for the knife that was from his home.

Thus, again something Sanchez claimed to have owned before the murders was not in his possession after having been used to commit the murders.

Sanchez's confession was again corroborated by testimony that he was present in the town of Porterville and near Ermanda's house at the time of the murders. Sanchez went to Hector Hernandez's house around the time of the murders, disproving Sanchez's alibi that he was asleep in bed with his wife. Hector told a friend that Sanchez was at his house at 5:00 a.m., half an hour before the murders. (55 RT 11350-A, 11355-A.)

Sanchez was suppose to give Hector a ride to work by picking him up at 6:00 a.m. (55 RT 11316-A-11317-A.) However, Hector called his brother for a ride to work at 5:30 a.m. (55 RT 11318-A-11319-A), thus supporting an inference that Sanchez was in fact at Hector's house at 5:00 a.m. and communicated that he would not be able to give Hector a ride to work.

Hector lived two minutes and thirty seconds from Ermanda's home (60 RT 12242-12243), making it possible for Sanchez to have told Hector at 5:00 a.m. that he could not take him to work and then go to Ermanda's house, where he killed her and Lorena around 5:30 a.m.

Sanchez argues that his confession held little, if any, probative value. (AOB 55.) But again, a confession is powerful evidence providing "persuasive evidence of a defendant's guilt." (*People v Cahill* (1993) 5 Cal.4th 478, 503.). Further, as discussed above, Sanchez's guilt was supported by other evidence elicited at trial in addition to the confession he

supplied two days after the murders. Sanchez's confession, as the prosecution argued throughout trial, was probative because it revealed Sanchez's process of telling the truth. Sanchez initially denied killing Ermanda and Lorena, just as he initially denied having been arrested (54 RT 11322-11325; 66 RT 13623); denied knowing about the knife (13 CT 3541, 3550-3552; 54 RT 11339-11341; 55 RT 11226-A-11228-A); and denied having an affair with Hector Hernandez (62 RT 12594-12595). Each time, Sanchez was confronted with his inconsistencies, after which he slowly revealed the truth. Sanchez engaged in the same truth telling process during his testimony by claiming to have been in the United States for 13 years, but after being confronted, admitting to being in the country for 20 years. (67 RT 13739.) As it pertains to the murders, Sanchez was confronted with his inconsistencies, like the other examples found throughout his confession and testimony, until he ultimately confessed to the murders of Ermanda and Lorena. (13 CT 3528-3530; 54 RT 11328-11329; 55 RT 11218-A-11219-A; 66 RT 13582.)

Overall, the record reflects that the jury rejected Sanchez's trial testimony because it was not credible. Further, the evidence showed that Sanchez was angry at Ermanda because she owed him money, and that he had fought with her multiple times, including four hours before the murders. (13 CT 3528-3530; 56 RT 11558-11561, 11586; 57 RT 11689-11691, 11740; 62 RT 12668-12669; 65 RT 13290.) Sanchez owned a knife

similar to the knife found with Lorena, but had purportedly lost it and was not in possession of it after the murders. (54 RT 11339-11341; 55 RT 11227-A-11228-A.) Sanchez also owned a gun, which was most likely a nine-millimeter handgun returned to him after leaving it behind in a truck a week before the murders. (57 RT 11795-11797, 11808; 62 RT 12605-12606, 12612-12613.) Sanchez confessed to using a gun to kill Ermanda and Lorena and disposed of it in a field. (13 CT 3536-3538.) The gun was never found, however, Sanchez was no longer in possession of the gun he claimed to have owned the day before the murders. (55 RT 11282-A, 11292-A, 11386-A.) Finally Sanchez was seen in Porterville, near Ermanda's house, around the time of the murders. (55 RT 11350-A, 11355-A; 60 RT 12242-12243.) Accordingly, any error resulting from the admission of Oscar's testimony was harmless because of the weight of the evidence proving Sanchez's guilt.

II. THE TRIAL COURT PROPERLY FOUND THAT OSCAR HAD A PRESENT RECOLLECTION OF THE EVENTS HE TESTIFIED ABOUT BECAUSE HE DEMONSTRATED THAT HE HAD THE ABILITY TO PERCEIVE AND RECOLLECT

In addition to arguing that Oscar lacked the competence to testify, Sanchez also argues that Oscar lacked the capacity to testify because he lacked the "requisite present recollection based on personal knowledge." (AOB 59.) Respondent disagrees. The trial court did not err by allowing Oscar to testify to the events he saw and heard the day of his mother's and

sister's deaths, because a jury could reasonably find that he was in a position to perceive the events at issue and was capable of recollecting those events at trial.

A. Background¹⁶

1. In limine motion challenging Oscar's capacity to testify

On December 28, 1998, Sanchez filed a motion in limine to preclude Oscar from testifying because he lacked capacity. Specifically, Sanchez argued that Oscar did not have personal knowledge of the events he would be testifying about. (4 CT 1041.) According to Sanchez, Oscar's testimony was tainted by suggestive and improper interviews, which contaminated his personal knowledge of the event. (4 CT 1044, 1048.) The People opposed Sanchez's motion, arguing that Oscar's interviews were neither coerced nor suggestive and that Oscar provided information unknown to the officers. (4 CT 1100-1103.) The trial court held a section 402 hearing over the course of several days to determine Oscar's personal knowledge of the events he would be testifying about. (5 CT 1163, 1165, 1167, 1169.)

¹⁶ The trial court held a single section 402 hearing concerning both Oscar's competency and his capacity to testify. This section contains relevant testimony regarding Oscar's personal knowledge; however, should be read in conjunction with Argument I, part A.

a. Oscar's testimony at the 402 hearing

Oscar testified mostly about his ability to distinguish truth from lies, as described in depth in Argument I, part A. However, on cross examination, Oscar also testified that he would only testify to things he saw and heard himself, but stated that he did not remember what he saw or heard. (4 RT 527-529.)

b. Dr. Streeter's testimony concerning Oscar's personal knowledge

When reviewing notes of Oscar's therapy sessions written by his therapist Wanda Newton, Dr. Streeter became concerned about Oscar's changing recollections and Newton's responses. (4 RT 556-557, 563.) In Dr. Streeter's opinion, Newton deviated from a neutral stance by suggesting to Oscar versions of events she believed true when Oscar described a memory different than what Newton thought actually occurred. (4 RT 559-560, 567-569.) For example, in a March 3, 1998 note, Newton stated she believed one version of events over another and noted that Oscar could not admit he changed his memory. (4 RT 559-561.) In another note from March 24, 1998, Newton stated she talked to Oscar about the importance of telling the truth when he said his mother cut herself with a knife. (4 RT 561-562.) In a March 31, 1998 note, Newton said she talked to Oscar about the importance of accurate memories after he said that Juan killed his mother with a gun, and asked him why he was afraid of "Juan" when there

was no indication he was actually afraid. (4 RT 563-564, 569-570, 584-586.) Dr. Streeter was also concerned with a note reflecting Newton's talk with Oscar about good and bad touching when there was no indication that Oscar had ever been touched inappropriately. (4 RT 587-590.) Finally, Newton provided Oscar with the names of his sister and "Juan" when Oscar could not remember them. (4 RT 593-595.)

In Dr. Streeter's opinion, a lack of neutrality risked solidifying inaccurate information in a child's mind. (4 RT 560-562.) When a therapist loses neutrality, a child will respond in ways he or she knows are acceptable or pleasing to the therapist, thus shaping the child's behavior and what they may say in the future. (4 RT 567-569.) Dr. Streeter believed that Oscar was reinforced with an acceptable version of the truth, which included Sanchez as the person who killed his mother and sister. (4 RT 560-561.)

Dr. Streeter also believed that Oscar confabulated his memories, meaning he filled in the gaps of his memories with information he did not see or hear himself. (4 RT 625.) Dr. Streeter believed that Oscar overheard Rosa Chandi's 911 call, and may have overheard interviews between Rosa, Michael, or Orosco and the police, because there was no indication in the reports that they were interviewed in a room separate from Oscar. (4 RT 631-634.) She noted that Oscar was not able to supply the name of the man who had brought him ice cream, but then identified a picture of Sanchez as

“Juan” after Victor had arrived and supplied officers with the name. Dr. Streeter opined that Oscar’s memory had been contaminated by an interaction with Victor. (4 RT 641-644.)

c. Wanda Newton’s testimony concerning Oscar’s personal knowledge

Prior to meeting Oscar, Newton knew little about Oscar’s past. A school psychologist had told Newton that Oscar recently moved to Idaho to live with a father he had never known and a step-mother who was suspected of abusing him. The psychologist also told her that Oscar was present when his mother and sister were killed. (5 RT 955.) Newton knew that Oscar’s mother and sister died at the same time “and [the deaths] were the result of a shooting and that Oscar was in the home [when it happened].” (5 RT 972; 6 RT 1051-1052.) When Newton started treating Oscar, he was in the process of being adopted by the Fennel family. (6 RT 1008.) Newton believed it important for Oscar to have a clear and accurate memory of his mother’s and sister’s deaths because, in Newton’s experience, adopted children transition better when they had information about their past. (5 RT 962-964.)

From the start of Oscar’s therapy, he was inconsistent in the memories he related to Newton. Newton believed it was because Oscar was scared and uncomfortable with the topic of his mother’s and sister’s deaths. (5 RT 974.) The set of facts Newton eventually tried to focus Oscar on were facts

he related in a manner that seemed very honest. (6 RT 1052-1053.)

Newton once told Oscar that she believed a previous version of his memories, instead of the version he was currently telling her. She also challenged him once when he related facts of the murders she thought incorrect or that he had not related to her before. However, she did not consistently tell him that she believed one story over another. (6 RT 1053-1054.)

Oscar's statements changed when relating the events of his mother's murder. During their January 27, 1998 session, Oscar told Newton that "Juan" did not shoot his mother and sister, only that his mother bled from the chest and died. (6 RT 1112-1114.) He said that "Juan" was in his mother's room and took the phone from her before she fell to the ground. (6 RT 1114-1115.) At the next session, Oscar told Newton more about what happened that night. Oscar said that when he saw his sister, he knew she was dead. He then redirected the conversation and said that he woke up and heard "Juan" fighting with his mother and sister, and that "Juan" had a gun. He then saw his sister laying on the floor and saw blood on her face and neck, and it made him feel sad and scared. (6 RT 999.) On March 3, 1998, Oscar said it was not scary for him to talk about the night his mother died because "Juan" did not shoot his mother. Oscar "talked" to his mother under the couch and told Newton that his "mom said she didn't get shot." (6 RT 1003.)

During a March 24, 1998 session, Newton talked to Oscar about the difference between a truth and a lie and why it was important for him to remember accurately everything that happened to him. (6 RT 1011-1012.)

A week later, Newton asked Oscar why his stories about the night his mother died changed. Oscar responded that it was a sad night for him to remember and "because he's scared that Juan will kill him, too; scared of dying and bleeding that night and still is." (6 RT 1012-1013.)

On June 2, 1998, Oscar's adoptive mother, Nancy Fennell, told Newton that a lot of Oscar's conversations had sexual overtones. (6 RT 1022-1023.) For example, Oscar asked a family friend if that friend could help him (Oscar) become gay, and he also asked Fennell and Fennell's 20-year-old daughter when they would start breastfeeding him. (6 RT 1022-1024.) On June 16, 1998, Oscar made two comments about Juan trying to touch him, but was not specific about the type of touching. (6 RT 1025.) Oscar made the comments when he and Newton were reading a book about the different types of touching. A week later, Oscar again commented that "Juan" possibly touched him. (6 RT 1026-1027.) Newton told Oscar that it was okay that he did not remember, and when he did, they would talk about it. On June 30, 1998, Oscar again said that he did not remember whether "Juan" touched him. (6 RT 1028-1029.) Newton told Oscar that "maybe the reason he doesn't remember is because there's nothing to remember, and maybe he'll remember something later and maybe actually already

remembered but you're not ready to talk about it, and you'll let me know when you are ready." (6 RT 1029.) Out of the 48 sessions Newton and Oscar had, Oscar brought up the topic of touching five times. (6 RT 1029.) Newton brought up the concept of touching with all of her children patients. She did this to educate them for the future. (5 RT 933.)

d. Testimony regarding alleged contamination of Oscar's perceptions at Rosa Chandi's house

Rosa Chandi testified about her interactions with Oscar on the morning of the murders. She saw Oscar outside her home at approximately 5:30 a.m., when he told her that his mother and sister were bleeding. (6 RT 1040-1041, 1049.) After going back to Oscar's house, the two returned to Rosa's house, where Rosa called the police. (6 RT 1041-1043.) Before placing the 911 call, Rosa's daughter took Oscar to the back bedroom. (6 RT 1042-1043, 1070-1071.) The entire time Rosa was on the phone with the 911 operator, Oscar was in the bedroom. (6 RT 1064-1068, 1070-1071.) While on the phone with the operator, Rosa only said that there had been an "incident" at Lorena's house. (6 RT 1043, 1061.) Rosa did not discuss what she had seen with anybody. (6 RT 1044, 1074.) Police officers later came to Rosa's house to conduct interviews. (6 RT 1076-1077.) Oscar remained in the bedroom while an officer took Rosa's statement. (6 RT 1043-1044, 1077.) Oscar then came out of the bedroom, so the officer could take his statement. (6 RT 1044-1045.)

When Detective Lewis arrived at Rosa's house at approximately 6:20 on the morning of the murders, he saw four or five people sitting in the living room, all of whom were at least 15 years old. (5 RT 870, 874.) Detective Lewis first interviewed Rosa, followed by Michael, then Orosco, and finally Oscar in the kitchen. (5 RT 870-871, 872, 875.) He did not remember where Oscar was located during the previous interviews. (5 RT 870, 875.) Oscar told Detective Lewis that he saw a man in his mother's bedroom. (5 RT 876.) Oscar could not respond when asked to describe the man. (5 RT 877-878.)

Sergeant Dempsie interviewed Oscar at 6:50 the same morning at Rosa's house. (6 RT 1193-1194.) When Sergeant Dempsie asked for Oscar, somebody went to a back room and retrieved him. Sergeant Dempsie talked to Oscar in the living room after asking everyone to step out of the room. (6 RT 1194.) Oscar told Sergeant Dempsie that he woke up to his sister screaming and the sound of firecrackers. (6 RT 1194-1195.) He then saw his mother run into the room, grab the phone, and then fall to the floor (6 RT 1195-1196.) Oscar also saw a man in the room with his mother. The man had previously brought him ice cream and had a "wisp" on his chin. (6 RT 1195.) After communicating this information, Oscar could not continue talking. (6 RT 1243.)

Oscar's brother, Victor Martinez, testified that when he got to Rosa's house that morning, officers did not let him see Oscar because they were

talking to him. Sergeant Dempsie interviewed Victor outside the front door immediately after interviewing Oscar. (4 RT 796-797, 804-806; 6 RT 1197.) Victor told him that “Juan” had brought Oscar ice cream the day before and that “Juan” had a goatee. (5 RT 797-799; 6 RT 1197.) Victor also said that “Juan” drove a yellow and white pick up truck and lived by the drive-in theater. (6 RT 1198, 1271.) Victor then went inside of the house and saw Oscar eating at the table. (5 RT 800-801.) He asked Oscar what had happened, and Oscar said that “the man who brought me ice cream was in – was in the house.” (5 RT 803.) Oscar did not say anything else, and Victor did not talk to Oscar about a man named “Juan” until later the same day. (5 RT 803-804.)

Sergeant Dempsie requested that a family member take Oscar to the police department for a more in-depth interview. (6 RT 1198.) Before leaving the house, Sergeant Dempsie talked to a total of ten people besides Victor and Oscar. He did not know where Oscar was located when he was talking with these other people, but Oscar was outside the house when Sergeant Dempsie left. (6 RT 1244-1245.)

Victor’s father, Efrain Martinez, arrived at his sister Rosa’s house sometime between 6:50 and 8:00 a.m. (5 RT 775.) There were a lot of people in the front yard, and police officers were in the living room. (5 RT 778, 788.) The officers would not let Efrain see Oscar. Efrain did not see Oscar the entire time he was at Rosa’s house. (5 RT 784-785.) Efrain did

talk with people, but not about who had murdered his daughter or ex-wife. (5 RT 788-789.)

Sergeant Kroutil interviewed Oscar at Rosa's house at approximately 9:00 that morning. (6 RT 1167-1168.) He took Oscar to a bedroom to show him a picture of Sanchez. (6 RT 1175-1176.) When Sergeant Kroutil showed the picture, Oscar said that the picture was of "Juan." (6 RT 1172, 1185.) When asked if he had seen "Juan" lately, Oscar responded that he saw "Juan" that morning while "my mommy was bleeding." (6 RT 1173, 1187-1188.) When asked if he was sure, Oscar "was very strong in his belief that it was Juan." (6 RT 1175.) Sergeant Kroutil believed that Oscar got the name "Juan" from somebody else, possibly Victor. (6 RT 1173-1174.) At the time Sergeant Kroutil encountered Oscar at Rosa's house, there were between 12 and 20 teenagers and adults there, both inside and outside, talking among themselves. (6 RT 1176-1178.)

e. The trial court's ruling

On February 18, 1999, the parties argued the issue of Oscar's personal knowledge. (8 RT 1696-1720.) On February 19, 1999, the trial court issued a written ruling denying Sanchez motion. The court found that Oscar perceived the events surrounding his mother's murder and that he could presently recollect them. The court was mindful of Sanchez's argument "relating to 'contamination', 'shaping', 'confabulation', 'taint'

and related matters," however, the court left these matters to the jury for a credibility determination. (5 CT 1197-1198.)

2. Proceedings at the first trial regarding Oscar's personal knowledge

Oscar talked about his mother's death with Newton. (16 RT 3404-3405.) He had trouble remembering everything and was tired of people asking him questions. (16 RT 3407.) Oscar talked to Newton about the things he could not remember, and sometimes she helped him remember those things. (17 RT 3564.) Prosecutor Baccone taught Oscar how to say that he did not understand a question when he did not understand a question. Oscar also talked about his testimony with Baccone and investigator Spencer the day before testifying. (16 RT 3406-3408.)

On the day of the murders, Oscar did not hear what his Aunt Rosa said on the phone to the 911 operator. (16 RT 3452.) He heard people at Rosa's house talking about what had happened and who might have killed his mother and sister. (16 RT 3455-3456.) Oscar also talked to Victor about what had happened. (16 RT 3456.)

Defense counsel cross-examined Oscar as follows:

DEFENSE: ... Is the truth -- let me just give you another little question here. Is a truth something you actually see?

OSCAR: Yes.

DEFENSE: Is the truth something that somebody else tells you is true?

OSCAR: I don't understand that question.

DEFENSE: Okay. Well, say you heard – say your brother told you something, like he told you that there was a ball outside; okay?

OSCAR: Okay.

DEFENSE: Now, would that be the truth if there was a ball outside and he said there was one?

OSCAR: That would be the truth.

DEFENSE: Okay. But what if you didn't see the ball outside and all he did was tell you there was one out there?

OSCAR: Um, that would be a lie.

DEFENSE: How do you know?

OSCAR: Wait, wait, wait. Um, I don't understand that question.

(17 RT 3559-3560.)

Oscar testified that his new mother, Nancy Fennell, did not help him remember anything that happened at his mother's house. (17 RT 3564.)

Fennell told Oscar that if he talked about Juan, he could go home; however, Oscar did not just say what he thought the prosecutor wanted him to say so he could leave. (17 RT 3633-3634.)

Baccone told Oscar where "Juan" was sitting and where to point.

However, Oscar "just knew" where to point and he knew Sanchez was in his mother's bedroom because he saw him there. (17 RT 3635.)

3. Proceedings at the second trial regarding Oscar's personal knowledge

At the second trial, the People asked the following questions regarding Oscar's personal knowledge of the events he would testify to:

PROSECUTOR: When you say you're gonna tell us the truth, does that mean you're gonna tell us what you know?

OSCAR: Yes.

PROSECUTOR: Does that mean you're gonna tell us what you saw?

OSCAR: Yes.

PROSECUTOR: Does that mean you're gonna tell us what you heard?

OSCAR: Yes.

PROSECUTOR: Does that mean you're gonna tell us things that you don't know?

OSCAR: Um, yes.

PROSECUTOR: You're gonna tell us things you don't know?

OSCAR: Um, I can't -- I don't -- could we please skip that one?

PROSECUTOR: Well, I'll repeat it for you. Are you gonna tell us something if you don't know the answer?

OSCAR: Um, I don't know this one.

...

PROSECUTOR: Okay. Now, if I ask you -- if I ask you how many fingers I'm pointing behind me, do you know that as you're sitting there?

OSCAR: No.

PROSECUTOR: So you're not gonna tell me, are you?

OSCAR: (Witness shakes head.)

(34 RT 7475-7478.)

On cross examination, Oscar testified that he talked about the case with his counselor and sometimes he forgot "Juan's" name, but his

counselor helped him remember. (34 RT 7492-7493.) Oscar was positive that Sanchez was the man he saw in his mother's room the night she died. (34 RT 7519.)

4. Proceedings at the third trial

a. Oscar's testimony

At Sanchez's third trial, the People asked the following questions related to Oscar's personal knowledge:

PROSECUTOR: Do you remember a day that you had your mommy and your sister were killed in Porterville a long time ago?

OSCAR: Um, not that well.

PROSECUTOR: Okay. But you do remember the day?

OSCAR: Kind of.

PROSECUTOR: Okay. Do you remember some police officers asking you questions about what happened.

OSCAR: No, I don't remember.

PROSECUTOR: Do you remember talking to some people about what happened?

OSCAR: I remember that I talked to them.

PROSECUTOR: Okay. And did you tell them the truth that day?

OSCAR: Yeah.

(59 RT 11970-11971.)

Oscar did not remember everything that happened the night his mother died, however, he thought he was asleep when she died. (59 RT

11978-11979; 60 RT 12197.) He remembered seeing his mother and sister lying in their respective rooms. He also remembered seeing blood in the kitchen. (59 RT 11983.) After waking up, he went to his aunt's house, and then back to his own house with his aunt. They ultimately went back to his aunt's house. (59 RT 11984.) Oscar remembered seeing Sanchez at his mother's house the day she died, but did not remember where. (60 RT 12216-12218, 12222-12224.) He also remembered that Sanchez brought him ice cream, but did not remember when. (60 RT 12219.) After defense counsel showed Oscar a picture of Marcos Pena, he identified him as the man he saw the night his mother died. (60 RT 12227-12229.) He did not know whether the man in the picture was the same person as Sanchez. (60 RT 12230.)

While at his aunt's house, Oscar saw her call 911, but did not see or hear her talk with the police. (59 RT 11984.) Oscar remembered seeing other people at his aunt's house later in the day and remembered seeing them talk to each other. Oscar did not talk with those people, but thought that he talked to Michael Martinez. (59 RT 11985-11987.) Oscar was positive that he did not hear people talking about what may have happened at his mother's house. (59 RT 12028.) He did talk to Victor, but did not remember Victor saying anything to him. He did remember Victor crying. (59 RT 11987-11988.) Oscar testified about his therapy sessions with Newton. They talked about things that happened at his mother's house.

Sometimes he remembered and sometimes he did not. (60 RT 12195-12196.)

b. Testimony regarding events at Rosa Chandi's house following the discovery of the bodies

Detective Lewis interviewed Rosa Chandi, Michael Martinez, Areli Orosco, and Oscar. (55 RT 11287-A; 61 RT 12365; 62 RT 12525.) He interviewed each person separately at the kitchen table, while the others sat quietly in the living room. (61 RT 12366.) Detective Lewis did not recall the whereabouts of Oscar during his interviews, but did recall that he interviewed Oscar last. (61 RT 12367-12368.)

Sergeant Chris Dempsie interviewed Oscar and Victor around 7:00 a.m. the morning of the murders. (64 RT 13200-13201, 13203.) He first talked to Oscar alone in the living room. Oscar said that he woke up to the sound of firecrackers and saw his mother come into the room and walk toward the phone near the bed. (64 RT 13204-13205, 1321.) A man was also in the room and grabbed the phone from Oscar's mother before she fell to the ground. His mother was bleeding, and Oscar tried to wake her up by opening her eyes, but was unable to. (64 RT 13205-13207.) He then ran to his Aunt Rosa's house. On his way out, he saw blood on the walls and heard his sister screaming. He also saw his sister bleeding. (64 RT 13207.) When asked to describe the man he had seen, Oscar said that the man had a "wisp" on his chin, and then Oscar brushed his chin with his hand. Oscar

also said that it was the man who brought him ice cream. (64 RT 13205-13206.)

Sergeant Dempsie spoke with Victor immediately after speaking Oscar. He asked Victor if he knew of anybody who had brought Oscar ice cream. (64 RT 13208.) Victor remembered that two days before the murders, Sanchez gave Oscar ice cream. (64 RT 13116.) At first, Victor could not remember Sanchez's name, but he eventually remembered that it was "Juan." (64 RT 13104, 13119-13120, 13193.) Victor also described Sanchez's truck as a white and yellow GMC pickup. (64 RT 13106-13107, 13178-13179.)

When Victor arrived at Rosa's house, there were "quite a number of people" congregated in Rosa's front yard. (59 RT 11985-11987; 62 RT 12529-12530, 12534.) When he entered the house, he saw Oscar at the kitchen table eating breakfast. (59 RT 11987-11988; 64 RT 13101.) Victor talked to Oscar for about 20 minutes. (59 RT 11988; 64 RT 13109-13110, 13176.)

Sergeant Kroutil obtained a photo of Sanchez and took Oscar into a bedroom alone with the photograph. (64 RT 13220.) Oscar was quiet and upset but not crying. (64 RT 13228.) Sergeant Kroutil showed Oscar the photo and asked him whether he recognized the person. As soon as Oscar saw the picture, he said that the person in the photo was "Juan." (64 RT 13220-13221, 13225.) Oscar said he was sure that "Juan" was the person

in the house when his mother was bleeding. (64 RT 13222-13223.)

Sergeant Kroutil believed that Oscar got the name "Juan" from Victor; however, he did not ask Oscar where he learned the name. (64 RT 13221-13222, 13227.)

Areli Orosco testified that family members came to Rosa's house and talked about what had happened, but not about who could have committed the murders. She remembered hearing someone talk about a truck, but did not remember who. (69 RT 14124-14125.) Benny Martinez overheard police interviews taking place in Rosa's house. (65 RT 13344.) Neal Scott Smith saw Oscar wandering around the house and saw him talk to people, but only about whether he was hungry. (68 RT 13949.)

c. Oscar's therapy sessions

Newton and Oscar talked about Sanchez during their therapy sessions, and when Oscar forgot Sanchez's name he would describe him as "the man that was in the house that night that my mom died." (74 RT 14766-14767.) Newton did not remind Oscar of Sanchez's name. (74 RT 14767.)

On March 3, 1998, Newton told Oscar that he needed to tell the truth in response to a story Oscar told that was different than previous stories he had related about his mother's death. Although telling a child that you do not believe them could cause them to reject one thought for another, Newton did not believe that this happened here. (74 RT 14774-14777.) Newton saw that Oscar was being playful to avoid talking about things that

happened, so she told him to tell the truth. (74 RT 14777-14778.) Newton had limited knowledge of the facts surrounding the murders. She and Oscar had an ongoing discussion about what was real and talked about Oscar's memories changing between sessions. (74 RT 14804-14805.)

d. Expert testimony

As summarized in detail in Argument I, Dr. Streeter testified that a five-to-seven-year-old child may "confabulate," which is to fill in the blanks of their understanding with information from their own thoughts or their environment. (See Arg. I, part A(4)(d), *ante*; 71 RT 14346, 14354.) They are also easily influenced by the adults around them and do not have the ability to distinguish between something they know from their memory and something they have heard from another source. (71 RT 14346-14347, 14349.)

Depending on the circumstances, it may not be appropriate for a counselor to refresh a child's lost memories. (71 RT 14373-14374.) When an adult challenges a child's memory, it tells the child that the adult does not believe him and could lead the child to believe that what the adult is saying is more important than the memory, thus causing the child to adopt the content of the challenge over his or her own memory. (71 RT 14374-14375.)

B. The Trial Court Did Not Err By Allowing Oscar to Testify, Because Oscar Was in a Position to Perceive the Events that He Was Later Able to Testify About

Sanchez contends that the trial court erred by allowing Oscar to testify because, although he was present in the home at the time of the murders, his exposure to suggestions and coaching made it impossible to determine whether he had personal knowledge of the events he testified about at the third trial. (AOB 63-75.) Sanchez's argument fails because, as the trial court found, Oscar was in a position to perceive the events of the murder (5 CT 1197-1198) and at the time of his testimony could recollect those events (59 RT 11970-11988; 60 RT 12195-12216).

- 1. The proper analysis under section 702 is to determine whether the witness was in a position to perceive the events and has the ability to recall them at the time of testimony**

“Under the Evidence Code, the capacity to perceive and recollect particular events is subsumed within the issue of personal knowledge and is determined ‘in a different manner’ from the capacity to communicate or to understand the duty of truth.” (*People v. Anderson, supra*, 25 Cal.4th at p. 573.)

Section 702 precludes even a competent witness's testimony “concerning a particular matter” if he lacks “personal knowledge” of the subject matter. Thus, even if a trial court declines to exclude a witness from testifying due to incompetence, the witness's testimony on that matter

may still be inadmissible if the witness lacks personal knowledge of the matter he or she testifies about. (*People v. Anderson, supra*, 25 Cal.4th at p. 573.) When a party objects, personal knowledge of the witness must be shown before that witness may testify concerning the matter. “The testimony must be excluded unless ‘there is evidence sufficient to sustain a finding’ that the witness has such personal knowledge.” (*Ibid.*, citing §§ 403, subd. (a)(2), 702, subd. (a).) The evidence is insufficient to sustain such a finding “only if no jury could reasonably find that [the witness] has such personal knowledge, meaning that ‘if there is evidence that a witness [can perceive and recollect the events at issue], the determination whether he [or she] in fact perceived and does recollect is left to the trier of fact.’” (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1140 (*Zambrano*), quoting *Anderson, supra*, at p. 573, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 23.)

In *Dennis supra*, 17 Cal.4th 468, the child witness was four years old when she observed her mother’s murder, and eight years old at the time of her testimony. (*Id.* at pp. 491-492, 524.) She “did not remember much about the traumatic attack on her mother.” (*Id.* at pp. 491-492.) The witness recalled her mother answering the door and making statements to the defendant. She also recalled the defendant saying “‘I’m going to kill you’” to her mother. (*Id.* at p. 492.) Her mother told her to get behind the couch, which the child did. The child testified that she could not see what

happened but could hear her mother and the defendant. She left her hiding place twice but did not remember what she saw. When the defendant left, the child came out from her hiding place and saw blood. She then went back behind the couch until her father came home. (*Ibid.*)

Before trial, the defendant challenged the child witness's competence, and the trial court held a pretrial evaluation of the child's competence. The trial court found the child competent. (*Dennis, supra*, 17 Cal.4th at p. 524.) On appeal, the defendant not only challenged the child witness's competence, but also her personal knowledge of the events to which she testified. (*Id.* at pp. 524-525.) This Court held that once "[t]he voir dire of [the child witness] showed that she could perceive and recollect" and that she understood her duty to tell the truth, then the trial court "had no basis for excluding her testimony for lack of personal knowledge." (*Id.* at p. 526.) The court noted:

The facts that [the child witness] received therapy to help her cope with her mother's death, that she discussed the events with the prosecutor and others, and that she had gaps in her memories of the evening the crimes occurred, do not disqualify her as a witness. (*People v. Mincey, supra*, 2 Cal.4th at pp. 444-445; see *People v. Cudjo* (1993) 6 Cal.4th 585, 621-622.) The trier of fact can evaluate these matters, when appropriate and otherwise permissible, in resolving the question of credibility. (*People v. Mincey, supra*, 2 Cal.4th at pp. 444-445.)

(*Id.* at p. 526.)

Sanchez contends that *Dennis* stated too narrow a rule for personal knowledge by only requiring the opportunity for a witness to observe the

events in question. (AOB 78-79.) Sanchez argues that such a rule is “surplusage” to the rule against hearsay, which require first-hand personal knowledge. (AOB 79.) Instead, Sanchez argues, the rule for personal knowledge should encompass four principles: “(1) sensory perception; (2) comprehension of perception; (3) present recollection of what was perceived; and (4) ability to accurately testify at trial as to what was perceived.” (AOB 79, citing 27 Wright & Gold, Fed. Prac. & Proc.; Evid. (1993) § 6021, pp. 204-205.) The People disagree.

While principles of personal knowledge and hearsay overlap in some circumstances, in that the witness is required to have first-hand knowledge about the content of his or her testimony, personal knowledge requires different criteria for admission than hearsay. For example, personal knowledge forbids a witness’s assumptions. Thus, a witness’s testimony that a victim had been stabbed would be excluded if the witness stated he came upon the injured victim after the perpetrator had fled the scene with the weapon. Under these facts, the witness lacks personal knowledge that a stabbing occurred because he did not see the actual stabbing. This witness’s testimony; however, is not hearsay because he did not hear second-hand that a stabbing occurred, but merely made an inference. Further, a witness who lacks recall of the testimonial events, does not violate the evidentiary bar against hearsay, but does lack personal knowledge.

Sanchez's proposed requirement that the witness have the "ability to accurately testify at trial as to what was perceived" encroaches on the duty of the jury. Sanchez proposes a rule in which the court analyzes the witness's therapeutic history and conversations with others to determine whether the witness's perceptions have been contaminated. (AOB 79, 81-82) This necessarily involves a credibility determination of a witness's statements, which the *Dennis* and other decisions have explicitly left to the jury. (*Lewis, supra*, 26 Cal.4th at p. 358; *Anderson, supra*, 25 Cal.4th at p. 574; *Dennis, supra*, 17 Cal.4th at pp. 525-526; *People v. Mincey, supra*, 2 Cal.4th at pp. 444-445; see *People v. Cudjo, supra*, 6 Cal.4th at pp. 621-622.)

The trial court can inquire into the witness's recollections themselves to determine whether the witness has the ability to accurately recall events. In *Anderson*, this Court determined whether evidence existed "*from which a rational trier of fact could find that the witness accurately perceived and recollected the testimonial events.*" (*Anderson*, at p. 574.) In doing so, this Court found that the witness described a plausible account of the crime, which included details unlikely to be known by someone who was not present and was corroborated by independent evidence. (*Ibid.*) This Court determined that the witness was able to accurately perceive and recollect despite the fact that she testified that her imaginary dead son was present during the crime. (*Id.* at pp. 563, 574-575.) Thus, the proper way to

determine the accuracy of a recollection for the purposes of section 702 is to examine the witness's recollections, not to analyze possible influences the witness may be under. (*Id.* at pp. 574-575.) Possible influences and their effect are questions of credibility left to the jury. (See *Dennis, supra*, at pp. 525-526.)

The People also disagree with Sanchez's assertion that section 702 was interpreted too narrowly by the *Dennis* court. According to Sanchez, to make a finding that the witness had personal knowledge, the *Dennis* court interpreted section 702 to exclusively require that the witness had an "opportunity" to observe the crime. (AOB 78-79.) The *Dennis* court did not make the sole requirement of section 702 the opportunity to perceive. In fact, there is an additional requirement that the witness recollect those events at the time of testimony. (*Dennis, supra*, 17 Cal.4th at pp. 525-526.) This requirement has the effect of excluding testimony that is speculative or the result of assumptions. These requirements are sufficient for a threshold reliability determination without inviting the judge to enter into the realm of the fact finder. To require the additional step of determining whether a witness's testimony is accurate by looking at possible influences, would invite the judge to rule on matters exclusively meant for jury. (*Id.* at p. 526 [the child witness's therapy sessions and discussions with others are for the trier of fact to consider in determining credibility].)

In *Zambrano, supra*, 41 Cal.4th at pp. 1140-1141, this Court analyzed the issue of a witness's personal knowledge by determining whether evidence existed to show that the witness could perceive and recollect the events at issue. (*Ibid.*) There, this Court rejected the appellant's claim that a witness lacked personal knowledge, because there was "no basis for a determination that [the witness] was fundamentally unable to perceive or recollect the testimonial events." (*Id.* at p. 1141; see also *Lewis, supra*, 26 Cal.4th at p. 356 ["In order to have personal knowledge, a witness must have the capacity to perceive and recollect."]; *Anderson, supra*, 25 Cal.4th at pp. 573-574 [A witness is allowed to testify if a rational trier of fact could find that the witness accurately perceived and recollected the testimonial evidence].)

In its analysis, the *Zambrano* Court examined the witness's testimony to determine whether a "rational jury could conclude that [the witness] did perceive and independently recollect the attacks and their surrounding circumstances." (*Zambrano, supra*, 41 Cal.4th at p. 1140.) The Court noted that the witness "gave a coherent and entirely plausible account of these events, which account was consistent with the physical evidence." (*Ibid.*) The witness admitted that he suffered from chronic bipolar disorder, posttraumatic amnesia, and other instances of forgetfulness. (*Id.* at p. 1141.) To the extent that the witness's accounts were inconsistent or that his testimony revealed a lapse in memory, the Court noted that such

considerations were, “*no basis* for a determination that he was fundamentally unable to perceive or recollect the testimonial events.” (*Ibid*, italics added, citing *People v. Lewis, supra*, 26 Cal.4th at p. 357, and *Anderson, supra*, 25 Cal.4th at p. 574.) Thus, the *Zambrano* Court limited its analysis to whether the witness was able to perceive and recollect the testimonial events by considering the witness’s statements and the witness’s opportunity to perceive. (*Id.* at p. 1141.) In sum, to determine whether a jury could conclude that a witness perceived and recalled the events testified about, a court must find that the witness was in a position to perceive and that his or her perceptions show the ability to “fundamentally” recollect. The accuracy of those perceptions is left to the trier of fact. (*Zambrano*, at p. 1140.)

2. Oscar perceived the events he was able to recollect during his testimony

Under the reasoning of *Dennis* and this Courts subsequent decisions of *Lewis, Anderson, and Zambrano*, Oscar had personal knowledge of the events he testified to at the third trial. There is no question that Oscar was present in the home when his mother and sister were murdered. At the third trial, Oscar testified, like the child witness in *Dennis*, that he did not remember much about the night of his mother’s and sister’s deaths. (59 RT 11978-11679, 11998; 60 RT 12197.) Throughout his testimony, Oscar only testified about the events he had personal knowledge about, and he stated

that he did not remember when asked questions that called for information that he did not remember. (59 RT 11978-11979; 60 RT 12187-12189, 12196-12197, 12206-12208.) As stated in Argument I, Oscar's descriptions of the events he did remember included detail, "unlikely to be known by a person not present, that were corroborated by independent evidence." (*People v. Anderson, supra*, 25 Cal.4th at p. 574.) Oscar testified that he saw his mother lying on the floor (59 RT 11983), and his sister was "kind of sitting" (59 RT 11983). He also testified that he saw blood on the kitchen floor. (59 RT 11983.) This evidence was corroborated by other witnesses who walked through Oscar's home and saw his mother lying on the floor, his sister sitting against her bed, and blood on the kitchen floor. (55 RT 11181-A, 11264-A; 58 RT 11862; 60 RT 12189; 62 RT 12513-12518, 12522; 63 RT 13010.) Oscar testified that he went to his aunt's house and they both went to his house, before ultimately returning to her house. (59 RT 11979, 11984.) This too, was corroborated by other witnesses. (62 RT 12513-12515, 12517-12518.) Oscar also testified that he did not hear his aunt's 911 call, which was corroborated by Rosa's testimony at trial and the section 402 hearing. (6 RT 1042-1043, 1070-1071; 59 RT 11984.)

From this testimony, a jury could reasonably find that Oscar could perceive and recollect the events he testified about. There is no evidence in the record to support a finding that Oscar speculated when answering

counsel's questions. Oscar firmly stated that he did not know or that he wanted to skip a question when he did not know the answer. The questions he did recall the answers to, were of events substantiated by other witnesses and the physical evidence. Whether Oscar actually did perceive and recollect those events or was influenced by outside factors was a question of credibility left to the jury. (*Zambrano, supra*, 41 Cal.4th at p. 1140.) Thus, the trial court properly found that Oscar had present recollection of the events he testified about at the third trial.

3. The evidence did not show that Oscar's recollections were shaped by others

In any event, contrary to Sanchez's contention, there is little, if any, evidence showing that Oscar's recollections were shaped by his therapist and/or other people present at his aunt's house on the morning of his mother's and sister's murders. Everyone who testified that was present at Rosa's house said that they did not talk to Oscar about the murders. (6 RT 1044, 1074; 62 RT 12728-12729; 69 RT 14119-14120, 14123.) Even, when they talked among themselves, they did not talk about who could have been the perpetrator, because nobody actually knew who was responsible. Also, not many people present at Rosa's house knew who Sanchez was, let alone that he was in some way connected to the crimes. (62 RT 12559, 12730-12732; 63 RT 12932-12933, 12941; 65 RT 13346, 13348; 68 RT 14010-14011; 69 RT 14123-14125.) Further, Newton

testified to the extent of her sessions with Oscar, showing that she did not shape Oscar's memory to isolate Sanchez as the murderer of Oscar's mother and sister.

a. Oscar's perceptions were not influenced by his interactions with people at Rosa's house

There is no evidence to show that Oscar overheard, let alone adopted, statements made by people present at his aunt's house. Oscar testified at trial that he did not overhear Rosa's 911 call, but initially did see her make the call. (59 RT 11984.) Oscar testified to the same facts at the first trial. (16 RT 3452.) This was further corroborated by Rosa at the 402 hearing (6 RT 1042-1043, 1070-1071), and at the third trial (62 RT 12519). However, even if Oscar had overheard Rosa's conversation with the 911 operator, he could not have adopted anything she said as his own memories because Rosa did not vocalize any information. All Rosa said to the operator and to the people around her was that there "had been an incident at Lorena's house." (6 RT 1043, 1061; 62 RT 12519.) After making the call, and until her time of testimony at the third trial, Rosa had not discussed anything that she saw in Ermanda's and Lorena's house with anyone except police officers and during testimony at various trials. (6 RT 1044, 1074; 62 RT 12559.) Rosa's testimony excluded her as a possible influence on Oscar's perceptions.

There is no evidence to show that Oscar adopted any of his memories from overhearing police interviews conducted at Rosa's house either. From the whole of the testimony, it appears that Rosa's daughter Michelle Chandi took Oscar to a back bedroom once he arrived, and he remained there until he was interviewed at 6:20 on the morning of the murders by Detective Lewis. (5 RT 870, 874; 6 RT 1042-1044, 1070-1071; 62 RT 12728-12729.) Michelle stayed with Oscar for a while and put a movie on for him to watch. She did not know what had happened and did not talk to Oscar about what had happened at his house. (62 RT 12728-12730.) Although at the time of the third trial, Detective Lewis could not remember Oscar's whereabouts when he interviewed Michael Martinez, Rosa, and Areli Orosco (61 RT 12367-12368), at the 402 hearing he recalled that there were only teenagers and adults present when he entered Rosa's house. (5 RT 870, 874.) Rosa testified at the 402 hearing that Oscar was in a back bedroom while she gave her statement and did not come out of the bedroom until the officer needed to take his statement. (6 RT 1043-1044, 1077.) From this evidence, it does not appear that Oscar was in a position to overhear Detective Lewis's interviews the morning of the murders. Regardless, Detective Lewis conducted the interviews in a way to insulate Oscar from overhearing if he were present by interviewing them in the kitchen, away from others. (5 RT 874; 61 RT 12366.)

At some point after Oscar's interview with Detective Lewis, he went back to a bedroom. Between 6:50 and 7:00 that morning, when Sergeant Dempsie arrived, Oscar came out of the bedroom to talk with him. (6 RT 1193-1194; 64 RT 13200-13201, 13203.) Between interviews, nobody talked about the murders in front of Oscar. (6 RT 1044, 1074 [Rosa did not talk to Oscar]; 62 RT 12728-12729 [Michelle Chandi did not talk to Oscar]; 69 RT 14119-14120 [Michael Martinez did not talk to Oscar], 14123 [Orosco did not talk to Oscar all morning].) Thus, before his interview with Sergeant Dempsie, Oscar had limited interactions with people at Rosa's house, and nobody talked to him about what had happened at his mother's house.

It also does not appear that Oscar's perceptions were influenced by conversations between other people talking at Rosa's house. Following his interview with Sergeant Dempsie, it does not appear that Oscar talked to anybody about the murders. Although Oscar was able to identify Sanchez to Sergeant Kroutil using Sanchez's name, it does not appear that Oscar got that name from any source besides his own memory. (6 RT 1167-1168; 64 RT 13221, 13225.) Sergeant Kroutil opined that Oscar may have heard Sanchez's name from his brother Victor, since Oscar was unable to remember Sanchez's name when initially interviewed by Sergeant Dempsie. (6 RT 1173-1174.) However, Victor testified that he did not talk to Oscar about a man named "Juan" until later that day. (5 RT 803-804.)

Victor asked Oscar what had happened that morning and Oscar responded that he had seen the man who had brought him ice cream in his house. (5 RT 803.) Oscar testified that he did not recall Victor saying anything to him, only that Victor was crying. (59 RT 11987-11988.) Further at the time in question, nobody besides Victor knew the name "Juan" or any connection a "Juan" may have to the murders. (62 RT 12559, 12730-12732 [Rosa did not know Sanchez]; 63 RT 12932-12933 [Michael Martinez did not know who Sanchez was prior to August 4], 12941; 65 RT 13346, 13348 [Benny Martinez did not know Sanchez]; 68 RT 14010-14011 [Efrain Martinez did not know Sanchez]; 69 RT 14123-14124 [Orosco did not know Sanchez].) Further, Orosco testified that while people were talking about the murders, nobody talked about who could have done it. (69 RT 14124-14125.) No one testified that they had a conversation with Oscar about the events of the morning, besides asking him whether he was hungry. When they did ask him what had happened, Oscar was unable to respond. (62 RT 12559, 12734, 12741; 63 RT 12916, 12941-12942; 65 RT 13340-13341, 13346; 69 RT 14119-14120, 14122-14125.)

Sanchez is unable to identify any statements Oscar may have heard and how those statements influenced his perceptions. In whole, there is no evidence that Oscar's perceptions were tainted by people present at Rosa's house, let alone manipulated to isolate Sanchez as the perpetrator. Because Sanchez cannot point to any evidence showing that Oscar's testimony was

tainted by influences, the reliability of Oscar's statements and testimony was a question for the jury. (*Zambrano, supra*, 41 Cal.4th at p. 1140.)

b. Oscar's perceptions were not influenced by his therapy sessions with Newton or his conversations with Nancy Fennell

Sanchez points to Oscar's previous testimony to argue that prosecutor Baccone, Newton, and Fennell all influenced and tainted Oscar's perceptions. (AOB 70-73.) Oscar talked with Newton about his mother's death during their sessions. Newton did not tell Oscar that she did not believe certain things he said and Oscar did not always believe everything Newton said to him. (16 RT 3404-3405; 17 RT 3565.) During his therapy sessions with Newton, Oscar sometimes remembered the events of his mother's death and sometimes did not. (60 RT 12196.) This testimony does not support Sanchez's contention that Newton exerted influence over Oscar and went over his testimony with him. (AOB 70.) There is no evidence to suggest that Newton told Oscar what to say, besides to tell the truth. The record reflects a therapeutic relationship with one of the focuses being to help Oscar work through and accept the events of his mother's and sister's deaths.

Newton testified at the 402 hearing that she did not know much about Oscar's past when she started treating him. (5 RT 955.) She knew that his mother and sister had been killed as the result of a shooting and that Oscar was present when this happened. (5 RT 972; 6 RT 1051-1052.) Newton

did not know the identity of their killer or particulars of the crime. Any particulars, besides the fact that they were shot, were told to her by Oscar. (6 RT 1052-1053.) She did not tell Oscar what to believe and did not tell him that he should believe one version of events over another. Although Oscar was inconsistent in his memories, Newton focused on the memories Oscar related to her in a manner that seemed honest and would challenge him when he related memories that he had never related before. (6 RT 1053-1054.)

At trial, Newton testified that she did not remind Oscar of Sanchez's name, and that when Oscar forgot Sanchez's name, he would commonly refer to him as "the man that was in the house that night that my mom died." (74 RT 14766-14767.) Although there is a risk of causing a child to reject certain memories when you tell them that you do not believe them, Newton did not believe that that happened in Oscar's case. (74 RT 14777.) As Newton detailed in both the section 402 hearing and at trial, she focused on Oscar accepting the truth and relating his memories accurately. (5 RT 933; 6 RT 1053-1054; 74 RT 14804-14805.)

From Newton's detailed summary of her sessions with Oscar, the evidence does not support a finding that Newton forced upon Oscar memories that she thought were accurate. Newton was an experienced professional counselor who had dealt with children regularly. (5 RT 945-949, 953-954) The only person who testified that Newton improperly

influenced Oscar's perceptions was Dr. Streeter, who did not observe Newton's sessions with Oscar or personally meet with Oscar. Instead Dr. Streeter based her opinion on therapy notes, which did not provide the context of each interaction between Newton and Oscar, and police reports. (4 RT 545-546.) Dr. Streeter did not interview any person associated with the crime or any person involved in Oscar's life. Because of the limited scope of Dr. Streeter's review and the limited knowledge she could gain of Oscar's ability to perceive and recollect from police reports and therapy notes, Dr. Streeter's testimony did not provide a basis to exclude Oscar's testimony on the ground that Oscar lacked personal knowledge of the events he testified about.

Nancy Fennell did not influence Oscar's perceptions either. Oscar testified that Fennell told him that he could go home after he talked about "Juan." However, he also said that this did not motivate him to say the things he thought the prosecutor wanted to hear. (17 RT 3633-3634.) Further, Fennell did not help Oscar remember anything that happened at his mother's house. (17 RT 3564.) Following the section 402 hearing, the trial court admonished both Fennell and her husband not to communicate with Oscar about his testimony. (4 RT 536-537.) In Newton's therapy notes, the only times the Fennells were mentioned was when they related concerns about Oscar's behavior and easing Oscar through the adoption process. (5 RT 957-959; 6 RT 1000, 1008, 1028.) Thus, the record does not contain

any evidence to support the argument that Nancy Fennell influenced Oscar's perceptions in violation of the court's order.

Sanchez also points to Oscar's testimony that Baccone told him where to point when identifying Sanchez at the first trial as evidence that Oscar's perceptions were influenced by the prosecution. (AOB 71-72.) This bears little weight on the state of Oscar's recollection at the third trial. At the third trial, Oscar testified that he saw Sanchez at his mother's house the day she died, but did not remember where in the house. (60 RT 12216-12218.) Then, Oscar identified a picture of Marcos Pena as the man he saw on the night of his mother's murder. (60 RT 12227-12229.) It is unclear how Baccone telling Oscar where "Juan" was sitting during the first trial, approximately six months prior to his testimony at the third trial, affected his present recollection. It does not appear that any alleged influence prosecutor Baccone exerted on Oscar actually influenced his testimony at the third trial. Accordingly, because Sanchez cannot show that Oscar's testimony was actually influenced or contaminated, the accuracy of his testimony was a question for the jury. (*Zambrano, supra*, 41 Cal.4th at p. 1140.)

C. The Purported Error Was Harmless

Assuming Oscar's testimony should have been excluded based on lack of personal knowledge, the result would be the same as if his testimony had been excluded because he lacked competence. Thus, the

harmless-error analysis would be the same in either event. As discussed previously, there was ample evidence to convict Sanchez outside of Oscar's testimony; thus, the purported error was harmless under any standard. (See Arg. I, part C(2), *ante.*)

D. Sanchez's Due Process Rights Were Not Infringed

As described above in Argument I, part C(1), Sanchez had ample opportunity to confront Oscar at trial. Further, the jury heard abundant evidence pertaining to Oscar's credibility. Accordingly, Sanchez's due process rights were not violated and he had a fair trial. (See Arg. I, part C(1), *ante.*)

III. OSCAR'S IDENTIFICATIONS OF SANCHEZ, MADE BOTH BEFORE AND DURING TRIAL WERE NOT THE PRODUCT OF UNDULY SUGGESTIVE IDENTIFICATION PROCEDURES

Sanchez contends that the trial court erred by admitting Oscar's in-court and photo identifications of him because Oscar's initial identification following a single-photo lineup was suggestive, and all subsequent identifications were tainted as a result. (AOB 87-88.) The People disagree. Law enforcement conducted each identification process in a way that did not suggest any one person Oscar should identify as the man he saw in his mother's room. In any event, even if the procedures had some suggestible affect, the record demonstrates that Oscar identified Sanchez as the man he saw in his mother's room because of his own recollections. Further,

Oscar's identifications of Sanchez on the day of the murders and at trial were independent of the procedures utilized by the police.

A. Background

1. In limine motion and section 402 hearing

Before the first trial, Sanchez filed a motion to suppress the pretrial identifications and any in-court identification of Sanchez by Oscar because the pretrial identification procedures created a substantial likelihood that Oscar would misidentify Sanchez at trial. (3 CT 761-763.) The People opposed the motion and argued that Oscar identified Sanchez before any information was communicated to or near him about Sanchez. (4 CT 941-943.) Thus, the People argued, Sanchez's remedy was not to suppress Oscar's pretrial identifications or any future court identification, but to allow Sanchez to challenge the weight of Oscar's identifications. (4 CT 942.)

The trial court heard evidence over the course of several days as part of a section 402 hearing and heard argument on March 11, 1999. (5 CT 1163-1169, 1240; 10 RT 1986-1996.) At the hearing, Porterville Police Officers Lewis, Kroutil, and Dempsie testified regarding the circumstances of Oscar's identifications.

Oscar first identified a person in his mother's room during an interview with Detective Lewis at 6:20 on the morning of the murders. (5 RT 870, 874.) He told Detective Lewis that he saw a man in his

mother's bedroom, but he could not provide any other information. (5 RT 876-877.)

At 6:50 that morning, Oscar identified Sanchez to Sergeant Dempsie. (6 RT 1193-1194.) Oscar did not know Sanchez's name but told Sergeant Dempsie that he saw the man who had brought him ice cream in his mother's room, and that the man had a "wisp" on his chin. (6 RT 1195.) Sergeant Dempsie interviewed Victor after interviewing Oscar. (4 RT 796-797, 804-806; 6 RT 1197.) Victor had not talked to Oscar when he arrived at Rosa's house. (4 RT 796-797.) Victor told Sergeant Dempsie that "Juan" had brought Oscar ice cream the day before and that "Juan" had a goatee. (5 RT 797-799; 6 RT 1197.) Victor also described the truck Sanchez drove and the location of Sanchez's residence. (6 RT 1198, 1271.) Given the information obtained from Victor and Oscar, Sergeants Dempsie and Kroutil retrieved a prior booking photo of Sanchez. (1 SCT 1; 6 RT 1171-1172.)

When Victor talked to Oscar after their interviews, he asked Oscar what had happened. Oscar told him that "the man who brought me ice cream was in – was in the house." (5 RT 803.) Oscar did not say anything else and Victor did not talk to Oscar about a man named "Juan" until later the same day. (5 RT 803-804.)

At approximately 9:00 that morning, Sergeant Kroutil took the booking photo of Sanchez to Rosa's house to show Oscar. (6 RT 1167-

1168.) Sergeant Kroutil took Oscar into a bedroom alone to show him the photo. (6 RT 1175-1176.) Prior to showing Oscar the photo, Sergeant Kroutil believed he made small talk but did not talk about the case other than telling Oscar that he was going to show him a photograph. (6 RT 1185-1186.) When shown the picture, Oscar said it was of "Juan." (6 RT 1172, 1185.) When asked if he had seen "Juan" lately, Oscar responded that he had seen him that morning while "my mommy was bleeding." (6 RT 1173, 1187-1188.) When asked if he was sure, Oscar "was very strong in his belief that it was Juan." (6 RT 1175.) Sergeant Kroutil believed that Oscar heard the name "Juan" from Victor, because Oscar was previously unable to supply officers with the name of the man he had seen in his mother's room. (6 RT 1173-1174.) In the photo, Sanchez had only a mustache and no goatee. (1 SCT 1.)

Around noon, Sergeant Dempsie interviewed Oscar again, but this time at the Porterville Police Station. (6 RT 1199.) During the interview, Oscar examined a six-person photo lineup. (1 SCT 5; 6 RT 1228-1229.) Sanchez's picture showed him as he appeared the day of the murders. Oscar identified Sanchez as the person he had seen in his mother's room. (6 RT 1229-1230.) Sanchez had both a mustache and a goatee in the photo, as did every other man in the lineup. The mustaches and goatees were of varying thickness. (1 SCT 5.)

Two days after the murders, Sergeant Dempsie conducted a live six-person lineup with Oscar. (6 RT 1270, 1273.) Oscar had to stand on a milk crate to be able to see the six men on the other side of the two-way mirror. (8 RT 1576.) Sergeant Dempsie could see the lineup participants below the waist, but did not believe that Oscar could based on his height. (8 RT 1576-1578.) Sanchez wore an orange shirt and striped pants. The other participants wore orange shirts and whatever pants they had on at the time, which Sergeant Dempsie believed were blue jail pants. (1 SCT 9; 8 RT 1579.) Oscar identified Sanchez as the man he had seen in his mother's room the night she died. (6 RT 1273.)

On March 11, 1999, the trial court heard argument on the motion to suppress Oscar's pretrial identification of Sanchez and to exclude any possible identification at trial. (19 RT 1986.) The trial court ruled that Oscar's identification of Sanchez following the single-photo lineup "had an independent origin, and the procedure was not so suggestive as to give rise to a substantial likelihood of misidentification." (10 RT 1991.) The trial court also found the six-person photo lineup was not unduly suggestive, and separately found by clear and convincing evidence that Oscar's identification was of independent origin. (10 RT 1994.) The trial court did find Sanchez stood out from the other men during the live six-person lineup because he wore striped pants, while the others did not. (10 RT 1987.) The

People withdrew the lineup and stated that they would not seek its admission at trial. (10 RT 1995-1996.)¹⁷

On March 29, 1999, in a written order, the trial court clarified its ruling concerning Oscar's identifications of Sanchez. The court ruled that Oscar's identification that he saw the man who had brought him ice cream and had a wisp on his chin was not the product of suggestion and was independent of police procedures and any overheard conversations. The court found the procedure of the single-photo lineup to be impermissibly suggestive, but ruled the identification was admissible because it was independent of the police procedures and alleged overheard conversations. Finally, the court excluded Oscar's identification following the photo lineup and the live lineup because they were both impermissibly suggestive. (6 CT 1345.)

2. The trial court's ruling at Sanchez's third trial

At Sanchez's third trial, the court allowed the admission of Oscar's pretrial identification of Sanchez during the single-photo lineup and the six-person photo lineup. The court allowed Oscar's statements that there was a man in his mother's room, and that the man brought him ice cream and had a "wisp" on his chin. (64 RT 13026-13027, 13149-13150.) The trial court further found that the process in which Oscar identified Sanchez during the

¹⁷ The live six-person lineup was not admitted at any of Sanchez's trials.

single-photo lineup was not unduly suggestive because Oscar was asked “simple questions” that did not “suggest to him an answer.” (64 RT 13039.) The court also ruled that the six-person photo lineup was admissible and allowed the entirety of Oscar’s recorded interview to be admitted into evidence under section 356 to put Oscar’s identification into context. (64 RT 13148-13151.) Defense counsel reiterated Sanchez’s objection that the six-person photo lineup was impermissibly suggestive, and the trial court reiterated that its ruling that the identification was admissible. (64 RT 13151-13152.)

During testimony, Oscar identified Sanchez as follows:

PEOPLE: Do you see the man sitting over there in the white shirt?

OSCAR: Yeah.

PEOPLE: Did you see him at your mom’s house the day she was killed?

OSCAR: Yes.

(60 RT 12216.) Oscar testified that he did not remember where in his mother’s house he saw Sanchez. He did remember that Sanchez had brought him ice cream, although Oscar did not remember when. (60 RT 12218-12219.) Oscar also testified that he saw Marcos Pena the night his mother died. (Def. Exh. Q; 1 SCT 33; 60 RT 12227-12228.)

Sanchez’s counsel moved for a mistrial based on Oscar’s in-court identification, arguing that it was elicited through a leading question. The

trial court denied the motion, stating that the form of the identification is relevant to its weight. The court invited trial counsel to argue the matter to the jury. (60 RT 12217-12218.)

B. The Court Properly Admitted Oscar's Identifications of Sanchez

To determine if admission of identification evidence violates due process, an appellate court employs a two-part test. First, it determines if law enforcement used a procedure that was unduly suggestive and unnecessary. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1256 (*Virgil*)). “[A]n identification procedure is considered suggestive if it “caused [the] defendant to ‘stand out’ from the others in a way that would suggest the witness should select him.” (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) It is not enough that an identification procedure was suggestive, the procedure must be “undue” or excessive to result in suppression. (See *Neil v. Biggers* (1972) 409 U.S. 188, 198-199; *People v. Kennedy* (2005) 36 Cal.4th 595, 610.) If the process was not suggestive, the identification is admissible and the due process inquiry ends. If the procedure was unduly suggestive and unnecessary, then an appellate court determines whether, despite such suggestiveness, the witness’s identification of the defendant was reliable under the totality of the circumstances. (*Virgil, supra*, 51 Cal.4th at p. 1256.) In this context, the totality of the circumstances analysis takes into account the witness’s opportunity to view the suspect at

the time of the offense, the witness's degree of attention, the accuracy of the witness's prior identifications, the witness's degree of certainty, and the lapse of time between the offense and the identification. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) The court strives to prevent "a very substantial likelihood of irreparable misidentification." (*Neil v. Biggers, supra*, 409 U.S. at p. 198.)

Appellant bears the burden of demonstrating that the identification procedure was suggestive, unreliable, and so unfair it violated his due process rights. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) A due process violation occurs only if the identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States* (1968) 390 U.S. 377, 384; *People v. Cook* (2007) 40 Cal.4th 1334, 1355.) The Court's use of the phrase "to give rise to" suggests that the a defendant's due process interests are affected only when there is a causal relationship between the suggestive procedure and the identification. (*People v. Contreras* (1993) 17 Cal.App.4th 813, 821.) Thus, in cases in which the court found that the witness identified the defendant based on his or her independent recollection, the court has found no due process violation. (*Ibid.*, citing *People v. Hernandez* (1988) 204 Cal.App.3d 639; *People v. Edwards* (1981) 126 Cal.App.3d 447.)

The defendant must show “unfairness as a demonstrable reality, not just speculation.” (*People v. DeSantis, supra*, 2 Cal.4th at p. 1222.) If the defendant raised and preserved the issue, this Court independently reviews the trial court’s ruling that a pretrial identification procedure was not unduly suggestive. (*People v. Avila* (2009) 46 Cal.4th 680, 698.)

1. The admission of Oscar’s identification of Sanchez during the single-photo lineup did not violate due process

As Sanchez notes, the trial court’s ruling on whether the single-photo lineup shown to Oscar was unduly suggestive differed from trial to trial in its clarity. (AOB 88.) However, at the third trial, the court ruled the single-photo lineup neither unduly suggestive nor unreliable. (64 RT 13039.) Throughout the proceedings, the trial court maintained that Oscar’s identification was independent of the single-photo nature of the lineup. (6 CT 1345; 8 CT 1946; 64 RT 13039.) Additionally at the third trial, the court stated that it did not find the identification process suggestive and that Sergeant Kroutil’s questions did not suggest any specific answer to Oscar. (64 RT 13039.) Here, Sanchez cannot meet his burden of showing that Oscar’s identification of him during the single-photo lineup was unduly suggestive or unreliable.

a. The identification process was not unduly suggestive

Numerous cases have condemned the use of a single photo identification procedure. (See *Foster v. California* (1969) 394 U.S. 440, 443; *Stovall v. Denno* (1967) 388 U.S. 293, 302; *In re Hill* (1969) 71 Cal.2d 997, 1004.) However, this Court has held that “‘a single person showup’ is not inherently unfair.” (*People v. Floyd* (1970) 1 Cal.3d 964, 714.) In *People v. Ochoa* (1998) 19 Cal.4th 353, 412-413 (*Ochoa*), this Court analogized the practice of a “single person show up” to the practice of a single-photo lineup. This Court held the “procedure is unfair [when it] suggests in advance of identification by the witness the identity of the person suspected by the police.” (*Id.* at p. 413, quoting *People v. Slutts* (1968) 259 Cal.App.2d 886, 891.) “Showing the witnesses a single photo of the defendant is no more impermissibly suggestive than an in-court identification with the defendant personally sitting at the defense counsel table in the courtroom.” (*People v. Yonko* (1987) 196 Cal.App.3d 1005, 1008-1009.)

Although the single-suspect identification procedure generally is not the ideal or preferred method and “may pose a danger of suggestiveness,” it is not necessarily or inherently unfair. (*People v. Clark* (1992) 3 Cal.4th 41, 136.) Both a single person showup and a single-photo lineup have a valid purpose of exonerating the innocent and identifying the guilty close in

time to the offense. (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 38-39; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219.) Field identifications are encouraged because the inherent suggestiveness is offset by the reliability stemming from an immediate determination regarding whether the correct person has been apprehended when events are still fresh in the witness's mind. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 387; accord, *People v. Martinez, supra*, 207 Cal.App.3d at p. 1219.)

Here, the single-photo lineup was necessary to ensure an accurate identification from Oscar so that officers could determine whether to arrest Sanchez in a timely fashion. Oscar described Sanchez to Sergeant Dempsie at 6:50 on the morning of the murders as the man who had a "wisp" on his chin and who had brought him ice cream. (6 RT 1193-1195.) Sergeant Kroutil conducted the single-photo lineup a little over two hours later, at 9:00 that morning. (6 RT 1167-1168.) At that time, Sanchez had not yet been arrested, which ultimately occurred between 11:00 and 11:20 that morning. (52 RT 11142-11144; 55 RT 11213-A.) The single photo was prepared close in time to receiving descriptive information from Oscar, as opposed to at noon when the six-person lineup could be prepared. (6 RT 1199.) It was also prepared closer in time to the offense, as opposed to the noon hour, when details of the perpetrator were fresher in Oscar's mind. These steps ensured that a child Oscar's age would provide a more accurate identification than if officers waited until noon when a six-person photo

lineup could be prepaid. Thus the single-photo lineup was necessary to determine whether police should arrest Sanchez and was based on a valid need for law enforcement to discover the correct suspect. - (*People v. Martinez, supra*, 207 Cal.App.3d at p. 1219.)

Although the identification procedure consisted of a single photo, it was not attended with the same practices employed in a single person showup that can result in inherent suggestion. (See *In re Carlos M.* (1990) 220 Cal.App.3d 972, 386.) For example, Sanchez was not shown to Oscar near a police vehicle or in handcuffs. (See *Id.*; see also *People v. Craig* (1978) 86 Cal.App.3d 905, 914.) Instead, Oscar viewed a photo of Sanchez standing alone against a plain white wall holding a Porterville Police Department sign. The suggestiveness of the photo was minimal given Sanchez's surroundings in the photo and Oscar's age and inability to read the sign identifying Sanchez's photo as a booking photo. (1 SCT 1; 6 RT 1171-1172.)

Further, Sergeant Kroutil did not suggest to Oscar that the person in the single-photo lineup was the person that the police thought had killed his mother and sister. (6 RT 1185-1186.) Instead, Sergeant Kroutil simply told Oscar that he was going to show him a photograph. All other conversation was small talk and did not relate to the events surrounding the murders. When shown the photo, Oscar immediately identified the person as "Juan" without being prompted as to the identity of the person in the

photo. (6 RT 1172, 1185.) Oscar further stated that he saw “Juan” that morning when his mother “was bleeding.” (6 RT 1173, 1187-1188.) No part of Sergeant Kroutil’s identification procedure suggested to Oscar that Sanchez was the person Oscar should identify as the man who killed his mother and sister. Accordingly, the identification process was not unduly suggestive, and Oscar’s identification did not violate Sanchez’s right to due process.

b. Oscar’s identification resulting from the single photograph was reliable

Even if the procedure utilized by Sergeant Kroutil was unduly suggestive, Oscar’s identification, as the trial court found, was still reliable. (10 RT 1191; 64 RT 13039.) Oscar viewed Sanchez from his mother’s bed. (6 RT 1194-1196.) There was a single vanity light above a sink located in the bedroom illuminating the entire room. (55 RT 11186-A-11187-A.) The light “wasn’t overly bright, nor overly dim” and was “just an overhead bathroom light.” (70 RT 14305.) During the first trial, Oscar described the room as being lit but did not remember which light was on. (17 RT 3585.) From all accounts, it appeared that Sanchez was in the room for less than a minute. (6 RT 1194-1196.)

Despite Sanchez’s brief presence in the room, Oscar’s description shows that he paid a high degree of attention to Sanchez while he was able to view him. Oscar was able to describe Sanchez as having a “wisp” and

identified him as a man he knew because that man had brought him ice cream before. (6 RT 1195.) Oscar was also able to describe the actions that took place in his mother's room while he viewed the scene. He told Sergeant Dempsie that he saw Sanchez in the room after his mother walked in and grabbed the telephone by her bed. His mother then fell backwards on to the floor and Sanchez left the room. (64 RT 13204-13205.) This observation was corroborated by the evidence at the scene, which showed that Ermanda was lying next to the phone in her room with the phone receiver on the floor next to her. (55 RT 11189-A; 59 RT 12064.) From Oscar's descriptions of Sanchez and the actions that occurred during the relevant time, it appears that Oscar paid close attention from his vantage point in his mother's bed.

Further, Oscar did not perceive Sanchez for the first time when he saw him in his mother's room, but in fact recognized a familiar face, giving him a degree of certainty unlike that of a person viewing another for the first time. Oscar had seen and interacted with Sanchez prior to seeing him in his mother's room, because Sanchez had brought him ice cream and spent time with him at his home. (5 RT 797-799; 6 RT 1195, 1197.) These prior interactions led to Oscar being "very strong in his belief" that the photo was of the man who was in his mother's room when she "was bleeding." (6 RT 1175.)

Oscar's perceptions were also fresh in his mind at the time he identified Sanchez following the single-photo lineup. Oscar observed Sanchez around the time of his mother's death, some time before 5:30 a.m. and identified the photo of Sanchez at approximately 9:00 that same morning. (6 RT 1167-1168; 62 RT 12512-12513.) He had also identified Sanchez as the perpetrator an hour after his mother's death by describing him as the man who had brought him ice cream and had a wisp on his chin. (6 RT 1193-1194.)

This Court's decision in *People v. Kennedy, supra*, 36 Cal.4th 595, is instructive. In *Kennedy* an identification process was found to be reliable after weighing the totality of the circumstances. In that case, a witness to a murder described the perpetrator to police and attempted to aid in preparing a composite sketch of the man. She said the perpetrator had no facial hair. (*Id.* at p. 603.) When an arrest was made, the witness saw a newspaper photograph of the arrestee, the defendant, and expressed her concern to police because of the defendant's eyes and beard. (*Id.* at p. 605.) A detective showed her a picture of the defendant without a shirt, which revealed his tattoos of a swastika, a gun, and the name of his gang. The witness could not identify the defendant because his eyes were downcast in the picture. When shown a videotape of the arrest, however, the witness saw the defendant's eyes as he looked up and said: "Oh, my God, that's him, and I don't know how I missed that beard." (*Ibid.*)

The *Kennedy* court determined that the identification evidence “was admissible as reliable under the totality of circumstances.” (*Kennedy, supra*, 36 Cal.4th at p. 610.) The court applied the factors announced in *Neil v. Biggers, supra*, 409 U.S. p. 199, and found that the fact that the witness had inaccurately described the suspect to police and did not recognize him in the newspaper photograph was outweighed by her proximity to the perpetrator, the fact she had looked at him for 30 to 60 seconds, the passing of only three weeks between the crime and the identification, and the certainty of her later identifications upon seeing the video and in court. (*Kennedy, supra*, 36 Cal.4th at pp. 610-611.)

The factors present here are much stronger than the weight of the factors present in *Kennedy*. As described above, Oscar knew who Sanchez was prior to seeing him in his mother’s room and identified him to police as the man whom had brought him ice cream. (5 RT 797-799; 6 RT 1195, 1197.) He identified Sanchez hours after the crime and was strong in his belief that it was Sanchez who he had seen. (6 RT 1167-1168, 1172, 1175, 1193-1194; 62 RT 12512-12513.) Although Oscar viewed Sanchez for a short amount of time while in his mother’s room, it appears that he was paying a high degree of attention given his ability to describe not only Sanchez’s appearance, but also the activities going on in his mother’s room at the time he made his observations. (6 RT 1195; 55 RT 11198-A; 59 RT 12064; 64 RT 13204-13205.) Taken together, the totality of the

circumstances of Oscar's identification of Sanchez show that the identification was reliable and independent of any suggestion that may have resulted from the identification procedure.

c. Any suggestion on the part of Sergeant Kroutil did not cause Oscar to identify Sanchez

Oscar identified Sanchez as the perpetrator before Sergeant Kroutil showed him Sanchez's picture, showing that any alleged unduly suggestive procedure did not cause Oscar's ultimate identification. (*People v. Contreras, supra*, 17 Cal.App.4th at p. 821.) As stated above, "[a] procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police." (*Ochoa, supra*, 19 Cal.4th at p. 413.) In *Ochoa*, this Court cited *People v. Slutts, supra*, 259 Cal.App.2d 886, where two sisters, ages 11 and 14, saw the defendant commit multiple acts of indecent exposure. The younger of the sisters was shown a photo lineup of five beardless men and tentatively identified the defendant. The investigating officer drew a beard and moustache on the defendant's picture to match the child's original description of a bearded man. (*Id.* at pp. 889-890.) The appellate court found the procedure to be fair, stating:

[T]he method used by Officer Perkins to procure the identification of defendant was fair as to Peggy.... The officer did not draw a beard on defendant's photograph until Peggy had first selected it as most closely resembling the man she had seen in the park. Since none of the men in the photographs had

beards Peggy could not be positive that defendant was the man. Officer Perkins wanted to 'help' Peggy to make a more positive identification. To be completely fair she should have sketched beards on all of the photographs; instead she drew a beard only on defendant's picture. While this procedure was unfair to the extent that it tended to confirm the identification already made by Peggy, the unfairness did not produce the identification in the first instance, and so cannot be considered as grounds for a claim of denial of due process of law.

(*Id.* at pp. 891-892.)

Sanchez's case is much like *Slutts*. Like Peggy, Oscar tentatively identified the perpetrator before confirming his identification. Peggy was able to tentatively identify a photo of the person she thought to be the assailant, while at 6:50 the morning of the murders, Oscar identified the assailant as the man who had brought him ice cream. (6 RT 1193-1195.) In both scenarios, Peggy and Oscar pointed to an identifiable subject, which was later confirmed. In Peggy's case, she was able to confirm the identity of the subject when a police officer drew a beard on the defendant's picture, while Oscar was able to confirm his identification when viewing a photo of Sanchez. (6 RT 1172, 1175.) In both cases, the procedure of the identification did not suggest in advance the identity of the assailant. Oscar suggested the identity of the assailant when he told Sergeant Dempsie that the man who brought him ice cream was in his mother's room. (6 RT 1193-1195.) Because Oscar essentially identified Sanchez before being shown a picture, the alleged suggestiveness of the identification procedure did not lead to Oscar's confirmed identification of Sanchez as the man in

the room with his mother when she was murdered. (*People v. Slutts, supra*, 259 Cal.App.2d at pp. 891-892.)

Sanchez argues that Oscar's initial identification did not reflect his independent recollection, but was the result of conversations he overheard at Rosa's house, along with conversations with police officers and Victor. (AOB 113.) The People disagree. At the time Oscar identified Sanchez in the single-photo lineup, he had only communicated his belief during an interview with Sergeant Dempsie at 6:50 the morning of the murders that the man who had brought him ice cream was in his mother's room. (6 RT 1193-1195.) After that interview, he also told Victor that he saw the man who had brought him ice cream, but Victor never told Oscar that the man's name was "Juan" until later that day. (5 RT 803-804.) There is no evidence that, at the time of Oscar's identification, anyone had told him the name of a person they thought may have murdered his mother and sister, or even what that person may have looked like. (See Arg. II, part B(3)(a), *ante*.)

Further, even if Oscar had listened to conversations at Rosa's house, there is no evidence that the conversations included information identifying Sanchez. In fact, nobody interviewed at the house was able to identify Sanchez as a possible suspect. (62 RT 12559, 12730-12732; 63 RT 12932-12933, 12941; 65 RT 13346, 13348; 68 RT 14010-14011; 69 RT 14123-14124.) At approximately 6:00 on the morning of the murders, Rosa told

Detective Lewis that she thought Ermanda had a boyfriend with a beard and mustache, however, Detective Lewis interviewed Rosa while she was alone in the kitchen, where Oscar could not hear them. (61 RT 12366, 12476-12477.) Rosa did not indicate that she thought this man had murdered Ermanda or Lorena. There was also no evidence indicating that Oscar heard anything anybody else said indicating that Sanchez was a suspect. (See Arg. II, part B (3)(a), *ante.*) It was not until Oscar told Sergeant Dempsie that he saw the man who had brought him ice cream that an identifiable subject was brought to the attention of law enforcement. Thus, Sanchez's claims that Oscar's identification was tainted by conversations is purely speculative.

Consequently, the single-photo lineup did not create a substantial likelihood of irreparable misidentification. (*People v. Virgil, supra*, 51 Cal.4th at p. 1256.) Under the totality of the circumstances, Sanchez has not met his burden of demonstrating that the single-photo lineup identification procedure was unreliable and so unfair that it violated his due process rights. (*People v. DeSantis, supra*, 2 Cal.4th at p. 1222.)

2. The admission of Oscar's identification of Sanchez following the six-person photo lineup did not violate due process

Sanchez next contends that the six-person photo lineup conducted during Oscar's interview at the police station was unduly suggestive and unreliable. (AOB 115.) To support this contention, Sanchez argues that

the single-photo lineup tainted Oscar's subsequent identification at the police station, and the interview by Sergeant Dempsie led Oscar to pick Sanchez from the lineup. (AOB 115-121.) Respondent disagrees, because the procedure of the six-person lineup was not unduly suggestive, and Oscar's identification was reliable.

Although the trial court initially suppressed Oscar identification of Sanchez during the six-person photo lineup (6 CT 1345), it reconsidered its ruling at Sanchez's third trial and determined that the identification was admissible. (64 RT 13148-13151.) The trial court did not specify whether it believed that the identification was not unduly suggestive or whether it was basing its ruling on the reliability of Oscar's identification. (64 RT 13148-13152.) However, when Sanchez renewed his motion that the photo lineup was impermissibly suggestive, the court ruled that the identification was admissible. (64 RT 13151-13152.)

a. The six-person photo lineup was not unduly suggestive

Sanchez argues that the photo lineup was suggestive because he was the only person in a jail shirt and had the thickest mustache of all the men. (AOB 115, 118.) However, a photo lineup is not considered unconstitutional simply because the suspect is the only person wearing a particular item of clothing. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217-1218 [defendant was the only person in jail clothing]; *People v.*

DeSantis (1992) 2 Cal.4th 1198, 1222 [defendant was the only person in red shirt].) “Because human beings do not look exactly alike, differences are inevitable. The question is whether anything caused defendant to ‘stand out’ from the others in a way that would suggest the witness should select him.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 367; see also *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 557 [fact that the defendant was darker complected than other African-Americans in photo lineup did not render identification unduly suggestive].)

In the six-person photo lineup, Sanchez was the only person in a red shirt. (6 RT 1260.) However, there was another person in the lineup who was the only person wearing a white shirt. (1 SCT 5.) Thus, compared to the other photos in the lineup, Sanchez did not stand out as the only person wearing a shirt that was not like the others. Further, the fact that Sanchez was in a red shirt was not in and of itself suggestive. (*People v. Johnson, supra*, 3 Cal.4th at pp. 1217-1218.) Oscar told Sergeant Dempsie that the man he saw in his mother’s room was wearing a red shirt; however, Oscar told him this after he identified Sanchez in the photo lineup. Officers did not know that Oscar saw Sanchez in a red shirt when they prepared the photo lineup, and thus did not suggest to Oscar that Sanchez was the person in his mother’s room by putting him in a red shirt for the lineup. (6 RT 1260.)

Sanchez's mustache was similar to the mustache he wore in the single-photo lineup. However, the mustache of the men in placement 1272 and 1274 were also similar. (1 SCT 1, 5.) Further, Sanchez wore a goatee, as did all the other men, so Sanchez did not stand out because of his facial hair. (1 SCT 5.)

In *People v. Cunningham*, *supra*, 25 Cal.4th 926, an eyewitness described a robber to police as having glasses and a beard and wearing a suit. (*Id.* at p. 960.) This Court held that a photo lineup shown to that eyewitness was not unduly suggestive, even though in it, the defendant was the only person with glasses and a beard wearing a suit. This Court stated:

[A]ll six men are wearing glasses; at least one of the other men is dressed in a three-piece suit, and another is wearing a suit jacket. All of the men have a mustache and some have other facial hair. Several have a hairstyle similar to that of defendant. Defendant was not the tallest, shortest, oldest, or youngest of the participants. His photograph was similar to that of the others.

(*Id.* at p. 990.)

Sanchez's photo lineup is comparable to the lineup in *Cunningham*. Sanchez does not appear to be the tallest, shortest, oldest, or youngest person in the lineup. All the other men had similar hairstyles, complexion, and facial hair. Sanchez is also not wearing clothing that would make him seem dissimilar to the other men either – he is the only one wearing a red shirt, another man is the only one wearing a white shirt, while another is the only one wearing a jacket. (1 SCT 5.) In essence, there is nothing in the

lineup that makes Sanchez “stand out” from the other participants that would indicate to Oscar that he should pick Sanchez as the man he saw in his mother’s room. (*People v. Carpenter, supra*, 15 Cal.4th at p. 367.)

Further, the single-photo lineup did not taint Oscar’s identification during the six-person lineup. As explained above, the single-photo lineup was not unduly suggestive, and Oscar’s identification was independent of the identification procedure and came from his own recollections. (See Arg. III, part (B)(1), *ante.*) Accordingly, his identification of Sanchez following the six-person photo lineup was also based on his independent recollections and was not influenced by the single-photo lineup.

Also, because Sanchez looked different in the six-person photo lineup than he did in the single photo, it is unlikely that Oscar identified Sanchez because he looked like a prior photo he had seen. The six-person photo lineup depicted Sanchez as he looked the day of the murders, while the single photo was a prior booking photo from February of the previous year. (1 SCT 1; 64 RT 13229-13231.) While Sanchez does look similar in both photos, considering he is the person depicted in them, there are differences as well. Sanchez’s hair is not slicked back in the single photo, as it is in the six-person lineup, and he did not have a goatee like he did in the six-person photo lineup. (1 SCT 1, 5.) Additionally, Sanchez is wearing different clothing in each photo, and a larger portion of his body is shown in the single photo. (1 SCT 1, 5.) Thus, differences in the photos rendered it

unlikely that Oscar based his identification of Sanchez following the six-person photo lineup on the prior photo he had seen of Sanchez.

Finally, Sergeant Dempsie's interview did not suggest to Oscar that he should pick Sanchez as the person he saw in his mother's room the night she was murdered. Sanchez argues that Sergeant Dempsie was not a "non-blind' administrator," and could have "gain[ed] Oscar's trust and influence the outcome of the lineup process." (AOB 116.) In support of his argument, Sanchez points to an interaction between Oscar and Sergeant Dempsie in which Sergeant Dempsie reviewed the events of the murder and then asked Oscar to identify the man he saw in his mother's room and the man who brought him ice cream. (AOB 118-120.) Oscar had always referred to the man he saw in his mother's room as the man who had brought him ice cream. (6 RT 803, 1195.) Sergeant Dempsie did not create this association for Oscar, he merely referred to the man in Oscar's mother's room using Oscar's own words.

Sergeant Dempsie also did not "add[] the mustache" to Oscar's description of Sanchez as Sanchez suggests. (AOB 120.) Oscar originally identified Sanchez as having a "wisp" on his chin. (6 RT 1195.) He then identified Sanchez as having a mustache during the single-photo lineup that occurred hours before the six-person photo lineup. (6 RT 1172.) Further, during the interview at the police station with Sergeant Dempsie, it was Oscar who said that Sanchez had a mustache and a beard after Sergeant

Dempsie asked whether the man had “any hair on his face,” such as “a mustache or beard or anything like that?” (13 CT 3512.) Sergeant Dempsie did not suggest to Oscar that Sanchez had a mustache, and Oscar had already indicated to both Sergeants Kroutil and Dempsie that Sanchez had a mustache.

During the interview at the police station, Sergeant Dempsie reviewed the events of the murder with Oscar and had Oscar describe the man he saw in his mother’s room. (13 CT 3508-3513.) This part of the interview, however, did not suggest to Oscar that he should pick Sanchez out of a lineup or have the effect of making Sanchez “stand out” from the other men in the lineup. Instead, this part of the interview had the effect of recalling the events in Oscar’s mind so that he could make an accurate identification. Oscar described the man he saw as having a mustache, whiskers, and slicked back hair. (13 CT 3512-3513.) This description matched every man pictured in the six-person photo lineup and was not particular to Sanchez. (1 SCT 5.) Thus, the fact that Sergeant Dempsie briefly asked Oscar to describe the man in his mother’s room did not make the identification procedure unduly suggestive.

And the fact Sergeant Dempsie did not give Oscar an admonishment before asking him to identify the man he saw in his mother’s room did not make the identification procedure suggestive. Sanchez cites *Oliva v. Hedgepeth* (C.D. Cal. 2009) 600 F.Supp.2d 1067 (*Oliva*), for the contention

that the lack of an admonition made the identification procedure unduly suggestive. (AOB 121.) However, a more complete reading of *Oliva* shows that the court did not base its ruling on that circumstance alone, and other circumstances of the identification made the procedure in *Olivia* suggestive and distinguishable from the procedure employed with Oscar. In *Oliva*, a six-year-old girl identified the defendant from a six-person lineup. (*Oliva, supra*, 600 F.Supp.2d at p. 1080.) The officer did not tell her that the lineup may or may not contain a photograph of the suspect. Further, the officer asked the girl leading questions during their interaction leading her to identifying the suspect he had in mind. (*Id.* at pp. 1080-1081.) Finally, the officer signaled to the girl that she had identified the correct suspect, which led her to seek the officer's approval by affirming that the other men in the lineup were not the man she saw commit the crime. (*Id.* at p. 1081.)

Further, the officer in *Oliva* took the child witness one-by-one through the photographs in the lineup, starting with the first photo, and asked her leading questions about the circumstances of the crime. The officer suggested to the child witness that she had not seen the man in the first photo commit the crime by telling her that he was not the man on the bike, after she had expressed uncertainty. (*Oliva, supra*, 600 F.Supp.2d at pp. 1080-1081.) Conversely, Sergeant Dempsie first asked Oscar to describe what happened around the time of his mother's death and then to describe

the man he saw. Oscar did both of these things without Sergeant Dempsie prompting him to answer in any particular fashion. (13 CT 3508-3512.) Sergeant Dempsie then showed Oscar the six-person photo lineup and asked him if he could point out the man who had brought him ice cream and was in his mother's room. (13 CT 3512-3513.) Oscar pointed at Sanchez's picture and indicated that he was sure this was the man in his mother's room. (13 CT 3513; 6 RT 1229-1230.) Oscar then responded to Sergeant Dempsie's open-ended questions about the events of the evening. (13 RT 3513-3516.)

Additionally, the officer in *Oliva* signaled to the child witness that she had picked the correct subject before they had moved onto the remaining witnesses in the lineup. (*Oliva, supra*, 600 F.Supp.2d at 1081.) The officer told the child witness that "she 'did' (in the past tense) a 'great' and 'awesome' job and should feel 'real good' about herself." (*Ibid.*) The court stated that, "[i]n such circumstances, any person, much less a child of six, easily could have understood she was being told she had made the 'right' choice." (*Ibid.*) These circumstance did not occur here. After Oscar told Sergeant Dempsie that Sanchez was the man in his mother's room, the two went back to talking about the circumstances of the crime. Sergeant Dempsie did not indicate to Oscar that he had made a correct selection from the photo lineup. (13 CT 3513-3516.)

Thus, the circumstances of Oscar's identification are different than the circumstances in *Oliva*. Although in both situations neither officer admonished the child witness that the perpetrator may or may not be included in the photo lineup, the suggestive procedures employed in *Oliva* were not present when Oscar identified Sanchez. Because Sergeant Dempsie conducted the six-person photo lineup in a neutral manner that did not suggest to Oscar that he should select Sanchez, Oscar's identification of Sanchez did not violate Sanchez's due process rights and there is no need to determine whether Oscar's identification following the photo lineup was reliable. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 989.)

b. Oscar's identification of Sanchez following the six-person photo lineup was reliable

In any event, even if the photo lineup identification process was suggestive, Oscar's identification still was reliable. Many of the factors announce in *Neil v. Biggers*, 409 U.S. at 199-200 are discussed above, including Oscar's proximity to Sanchez while in his mother's room, his high degree of attention, and the fact that he knew what Sanchez looked like from a prior encounter. (See, *ante* Arg. III, part B(1).) Additionally, Oscar identified Sanchez as the perpetrator following the six-person lineup close in time to when he first observed him. Oscar was interviewed at the Porterville Police Station around noon and identified Sanchez near the beginning of the interview. (13 CT 3508-3513.) This was a little over six

hours after Oscar had observed Sanchez in his mother's room, a short time before 5:30 a.m.

Oscar was also confident that it was Sanchez he saw in his mother's room when he identified Sanchez to Sergeant Dempsie. Although Oscar identified Sanchez from the six-person lineup by saying that he thought Sanchez was the man, he then responded that he was sure that it was Sanchez when asked. (13 CT 3513.) Further, even though Sanchez's photo did not look identical to the photo used in the single-photo lineup, Oscar identified Sanchez during both identification procedures as the man he had seen in his mother's room. (13 CT 3513; 6 RT 1172, 1185.) The accuracy of Oscar's prior identification and the fact that he was able to identify the same person in the subsequent identification bolsters the reliability of Oscar's identification following the six-person lineup. (See *Neil v. Biggers*, *supra*, 409 U.S. at 199-200 [accuracy of a prior identification is a factor considered assessing the reliability of an identification under the totality of the circumstances].)

Consequently, Oscar's identification of Sanchez following the six-person photo lineup was reliable under the totality of the circumstances, thus, Sanchez's due process rights were not violated, and the trial court properly admitted the identification.

3. The admission of Oscar's identification of Sanchez at trial did not deprive Sanchez of due process

Finally, Sanchez argues that Oscar should not have been allowed to identify Sanchez at trial because the identification was not reliable or independent of the prior "suggestive" identification procedures. (AOB 121-125.) The People disagree. As discussed above, the pre-trial identification procedures were not unduly suggestive, and did not taint any future identification. (See Arg. III, part B(1)-(2), *ante.*) Regardless, under a totality of the circumstances, Oscar's in-trial identification was reliable and therefore did not violate Sanchez's due process rights.

As previously shown, Sergeants Kroutil and Dempsie did not suggest to Oscar that he should identify Sanchez as the man he saw in his mother's room the night she died. (See Arg. III, part B(1)-(2), *ante.*) The single-photo-lineup procedure utilized by Sergeant Kroutil was necessary to ascertain whether it was appropriate to arrest Sanchez for the murders. Sergeant Kroutil did not ask Oscar any leading questions, and Oscar identified Sanchez from his own recollections. (See Arg. III, part B(1), *ante.*) Likewise, the procedure Sergeant Dempsie used leading up to Oscar's identification of Sanchez was not suggestive. Sanchez appeared in a six-person photo lineup with men that looked like him, so he did not stand out from any person pictured in the group. Further, Sergeant Dempsie did not indicate to Oscar that he should pick Sanchez as the man he had seen in

his mother's room. (See Arg. III, part B(2), *ante*.) The fact that the prior identifications were not conducted in a suggestive manner makes it unnecessary to decide whether Oscar's in-court identification was reliable. (*People v. DeSantis, supra*, 2 Cal.4th at 1224, n.8.)

Even if this Court were to reach the reliability of Oscar's in-court identification, Sanchez's claim still fails. Under the factors announced in *Neil v. Biggers, supra*, 409 U.S. at pp. 199-200, Oscar identification was reliable. As previously stated, Oscar initially saw Sanchez after he was awoken by the sound of a gun fire, and he saw his mother walk into the room followed by Sanchez. It appears that Oscar paid a high degree of attention to the man that walked into the room because he was able to describe Sanchez's appearance and the actions he observed. (64 RT 13204-13205.) His perceptions were confirmed by the evidence, which tended to show that Ermanda picked up the phone and dropped it before falling to the ground. (55 RT 11189-A; 59 RT 12064.) There was also a light on in the bedroom, illuminating the room so that Oscar could see what happened. (55 RT 11186-A-11187-A; 70 RT 14305.)

Although it appeared Oscar did not have a long opportunity to view Sanchez in his mother's room, this was not the first time Oscar had seen Sanchez. (5 RT 797-799; 6 RT 1194-1196.) Accordingly, Oscar was not in a position where he had to remember all of Sanchez's features to later identify him to police. Oscar saw a familiar face in his mother's room and

recognized it as a man he had prior interactions with. This provides greater weight to Oscar's identification, especially when compared to a person identifying someone he or she had first seen during a brief encounter.

Further, following all of Oscar's previous identifications, neither Sergeant Kroutil nor Sergeant Dempsie ever confirmed to him that he had identified the correct suspect. (13 CT 3513-3516; 6 RT 1185-1186.) This is a distinguishing factor from *Oliva*, which Sanchez heavily relies upon in arguing that Oscar's identification of him violated due process. (AOB 121-125.) Of particular note to the *Oliva* court was that the officer confirmed the child witness's identification of a suspect and seemed to lead her into making that identification. (*Oliva, supra*, 600 F.Supp.2d at 1081.) That circumstance is absent from Oscar's identification of Sanchez. In fact, following the single-photo lineup and the six-person photo lineup, neither Sergeant Kroutil nor Sergeant Dempsie confirmed to Oscar that he had picked out the suspect they had in mind, meaning that each time Oscar identified Sanchez, he was not identifying him because of prior affirmation. (13 CT 3513-3516; 6 RT 1185-1186.)

Further, in *Oliva*, the child witness' observations were called into doubt by other witnesses. (*Oliva, supra*, 600 F.Supp.2d at 1082.) This is not the case here, because the only person to have seen Sanchez and later be able to communicate his observations was Oscar. No other witness was in the house or saw anything on the street. Although other residence of

Wellington were awake at the time of the crimes and testified to hearing gun shots, no person was looking outside and could testify to any observations made outside of Ermanda's and Lorena's home. (65 RT 13295-13297; 66 RT 13396-13397, 13399-13401, 13482, 13484.) However, the evidence showed that Hector Hernandez saw Sanchez near Ermanda's house around the time of the murders. (55 RT 11350-A, 11355-A; 60 RT 12242-12243.) This serves to corroborate Oscar's identification in the sense that it tended to make it more likely Sanchez was actually the person Oscar saw in his mother's room. Thus, this factor distinguished this case from *Olive* because there was no evidence to show Oscar was mistaken in his identification, and the consistency of his identifications of Sanchez in multiple photographs tend to show that Oscar was accurate.

As noted above, Oscar's prior identifications were accurate when compared to the information he had already communicated to law enforcement – that he saw a man with a mustache, whiskers, and slicked back hair. (13 CT 3512-3513; 6 RT 1195.) Oscar confirmed his identification that the man who brought him ice cream was in his mother's room when he identified Sanchez's image in the single-photo lineup. (6 RT 1173, 1175, 1187-1188, 1195.) Oscar also accurately identified Sanchez from the six-person lineup as the man who was in his mother's room; even though in that photo, Sanchez looked slightly different than he did in the photo used in the single-person lineup, and he looked similar to all other

men picture along side of him in the six-person lineup. (1 SCT 1, 5; 6 RT 1229-1230.) Although Oscar's story of the events surrounding his mother's and sister's deaths changed during the interview with Sergeant Dempsie, Oscar always maintained that the man who had brought him ice cream was in his mother's room when she died. (5 RT 803; 6 RT 1195.) These identifications and statements were also made close in time to Oscar's observations, weighing in favor of reliability. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 989.)

Most importantly, it does not appear that Oscar's testimony was tainted by his prior identifications. Multiple years had passed since Oscar had first identified Sanchez as the man who had brought him ice cream and whom he had seen in his mother's room when she died. If Oscar had been parroting the influences of law enforcement, it is likely he would have identified Sanchez without thought. Instead, Oscar relied upon his independent recollection and memory as it stood at the time of Sanchez's third trial and testified that he saw Sanchez the day of his mother's murder, but he did not remember where. (60 RT 12218-12219.) He also said that Sanchez had previously brought him ice cream, but did not remember when. (60 RT 12218-12219.) Oscar testified truthfully to the state of his memory at Sanchez's third trial and did not identify Sanchez in a way that would suggest he was tainted by his prior identification processes.

Sanchez focuses on Oscar's age as evidence that his identification was unreliable. (AOB 88, 112, 122.) But Oscar's age is only one factor.

Although he was a young boy at the time he witnessed his mother's and sister's deaths and saw Sanchez in his mother's room, the other factors weigh in favor of reliability of his trial identification. (60 RT 12216.)

Accordingly, Oscar's testimony identifying Sanchez was not influenced by his prior identification procedures and was reliable based on the totality of the circumstances.

C. The Purported Error Was Harmless

Assuming that Oscar's in-court identification and prior identifications were the product of impermissibly suggestive identification procedures, the erroneous admission of the identifications was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Sanchez claims that the only difference between his first two trials and the one here was the scope to which Oscar's identifications and testimony were impeached and shown to be not credible. (AOB 128-129.) However, along with Oscar's identifications, it came to light that Sanchez was not in fact asleep in bed with his wife at the time of the murders as he claimed. (55 RT 11221-A-11222-A.) Actually, Sanchez was seen near Ermanda's house around the time of the murders. (55 RT 11355-A; 60 RT 12242-12243.) Before this revelation, the prosecution had no evidence that so strongly contradicted Sanchez's alibi. And this new evidence, placing

Sanchez near the location of the murders at approximately the time of the murders buttressed Sanchez's own confession. Thus, the evidence outside of Oscar's identifications and testimony, amply proved Sanchez guilty of the murders and sexual assault. (See Arg. I, part C, *ante*.)

IV. THE TRIAL COURT PROPERLY ALLOWED POLICE OFFICERS TO TESTIFY ABOUT STATEMENTS OSCAR MADE THE MORNING OF THE MURDERS

Sanchez argues that the trial court erred by admitting statements made by Oscar to the police on the morning of his mother's death. More specifically, Sanchez attacks the statements Oscar made to Sergeant Dempsie at 6:50 the morning of the murders, when he identified the man who brought him ice cream as the man he saw in his mother's room, and to Sergeant Kroutil at 9:00 that morning, when he identified a photo of Sanchez as the man in his mother's room. (AOB 130-132.) The People disagree because the trial court properly relied upon numerous exceptions to the hearsay rule in ruling Oscar's statements admissible.

A. Background¹⁸

1. Oscar's interviews with the police on the morning of the murders

Oscar was first interviewed by Detective Lewis at approximately 6:20 the morning of the murders. (5 RT 870, 874.) Oscar appeared calm and was not crying. (5 RT 876-877; 61 RT 12368.) Oscar told Detective Lewis that he was sleeping on the floor of his mother's room and awoke because he heard a loud voice. He then saw a man standing in his mother's room. Oscar then became quiet and unresponsive. Detective Lewis may have asked Oscar to describe the man or tell him the man's name, but Oscar was unable to respond. (5 RT 877-878; 61 RT 12393, 12473-12475.)

Sergeant Dempsie testified that he first interviewed Oscar between 6:50 and 7:00 the morning of the murders in the living room of Rosa's house. (6 RT 1193-1194; 64 RT 13203-13204.) Oscar was emotional and crying. He would periodically stop crying and answer questions. Oscar cried at the beginning of the interview and again toward the end of the interview. Oscar was also shaking. (64 RT 13207-13208.)

During the interview, Oscar told Sergeant Dempsie that he was asleep in his mother's bed, and he woke up because he heard "firecrackers" and

¹⁸ Oscar's statements to police and his interactions with people at Rosa's house are discussed in depth in Argument II, part A(4)(b). For the purpose of clarity, respondent briefly summarizes Oscar's statements and other relevant evidence.

his sister screaming. (64 RT 13204, 13207.) He saw his mother come into the bedroom and walk toward the phone, which was near the bed. After his mother grabbed the phone, she fell backwards. She was bleeding. He also saw a man in the room with her. (64 RT 13204-13205.) Sergeant Dempsie asked Oscar to describe the man. Oscar described him as the man who had brought him ice cream and had a "wisp" on his chin. Oscar also brushed his chin with his hand. (64 RT 13205-13206.) After the man left the room, Oscar went to his mother and tried to wake her up, but was unable to. He then told Sergeant Dempsie that he ran outside to his aunt's house. On the way out of the house, he saw blood on the walls, and he saw his sister, who was also bleeding. (64 RT 13206-13207.)

Sergeant Dempsie talked to Victor after his interview with Oscar. He asked Victor if he knew anybody who had brought Oscar ice cream, and Victor told him that "Juan" had, and also told Sergeant Dempsie where "Juan" lived. (64 RT 13117, 13208-13209.)

After interviewing Oscar and Victor, Sergeant Dempsie interviewed Rosa Chandi, followed by Michael Martinez, Areli Orosco, Benny Martinez, Michele Chandi, and Efrain Martinez. (64 RT 13213.) He did not remember how long it took him to interview them, but he did remember that it took him over an hour and that he did it sequentially. (64 RT 13214.) Sergeant Dempsie did not recall where Oscar was during the interviews, but

he thought Oscar was with other family members in the house or in the front yard. (64 RT 13217.)

Sergeant Kroutil talked to Oscar at approximately 9:00 the same morning, after obtaining a prior booking photo of Sanchez. (6 RT 1167-1168.) When he arrived at Rosa's house, he took Oscar into a back bedroom. (6 RT 64 RT 13220.) As soon as Sergeant Kroutil showed Oscar the photo of Sanchez, Oscar said that the photo was of "Juan." (64 RT 13221, 13225.) Sergeant Kroutil asked Oscar when he had seen "Juan," and Oscar said he was sure that "Juan" was the person in the house when his mother was bleeding. (64 RT 13222-13223.) Oscar was quiet and appeared upset, but was not crying. (64 RT 13228.)

2. Oscar's interactions with people at Rosa's house When Rosa returned to her home with Oscar

following the discovery of Ermanda's and Lorena's bodies, she immediately gave him to her daughter to take to a back bedroom. Oscar may have heard Rosa tell her son, Michael Martinez, that an "incident" had occurred at Lorena's house. (62 RT 12518-12519.) Rosa did not tell anyone in the house what she had seen at Ermanda's house, and nobody asked questions. In fact Rosa and her family have still not talked about that day because it was "a very hard ordeal" (62 RT 12559.) Rosa did not remember where Oscar was located later when somebody called Rosa's brother, Efrain Martinez, to tell him about his daughter, Lorena. (62 RT 12541.) She did not know where Oscar was throughout the day and had no recollection of who he talked to. (62 RT 12538-12539.)

Michael Martinez, Rosa's son, testified that he woke up when his mother came into the house looking upset and said "something happened down the street." (63 RT 12916.) He saw his mother call 911 and heard her conversation. (63 RT 12916.) He heard his mother say that there was an "incident" at Ermanda's house and some blood. She did not say anything about what she had seen in the house. (63 RT 12942.) At the time of the murders, Michael did not know Sanchez or know that a man had bought Oscar ice cream. (63 RT 12932-12933.) Other than police officers, Michael did not talk to anybody about what he had seen in Ermanda's

house. (63 RT 12941.) Michael also never asked Oscar what he had seen or heard in his own house after his mother died. (69 RT 14119-14120.)

Areli Orosco testified that she woke up when Rosa came into the house and was acting hysterical. When Orosco asked Rosa what was wrong, Rosa did not respond. (69 RT 14121-14122.) Orosco did not talk to Oscar at all that morning, but remembered that Oscar was in the living room. (69 RT 14123-14124.) Family members came to the house that morning and talked about what had happened, but Orosco did not hear anyone talk about possible suspects. She did hear someone talk about a truck, but did not remember who. (69 RT 14124-14125.)

Benny Martinez woke up in the early morning on the day of the murder because he heard Rosa "going hysterical" by the front door. (65 RT 13339.) Rosa said something to the effect that "there was trouble down the street" but did not say what type of trouble. (65 RT 13340-13341.) Benny did not remember where Oscar was located at that time, but did remember that he was in the house. (65 RT 13340-13341.) Benny did not remember being interviewed that day, but was able to hear some of the interviews that took place in the living room (65 RT 13344.) He did not know of any possible suspects and did not talk about it with anyone. (65 RT 13346.) He also did not know who Sanchez was. (65 RT 13348.) He did remember a picture of a truck being shown during one the interviews. (65 RT 13346-13347.)

Michelle Chandi woke up when her mother, Rosa, came into the house and was acting hysterical. Michelle ran out of her bedroom and into the living room. (62 RT 12726-12728.) Rosa was on the phone and Oscar was with her looking confused. (62 RT 12728.) Rosa told Michelle that something had happened and to take Oscar to the back bedroom. (62 RT 12729.) Michelle immediately took Oscar to a back room, put on a movie for him to watch, and stayed with him for a while. (62 RT 12728-12730.) Michelle eventually went to the master bedroom without Oscar because she was upset. Michael met her there to calm her down but did not answer her when she asked him what had happened. (62 RT 12730-12732.) Michelle remembered Oscar eating at the kitchen table but did not remember where he was throughout the day. (62 RT 12734, 12741.)

Efrain Martinez stayed outside of Rosa's house most of the time that he was there. Officers never interviewed him, except to ask who he was. In the afternoon, Efrain went inside the house and saw Oscar in the living room. (68 RT 14009-14010.) He did not talk to Rosa about what had happened or to anybody else about who may have committed the murders. (68 RT 14010-14011.)

Neal Scott Smith saw Oscar inside of the house wandering around at 10:00 that morning, but did not see him at all times throughout the day. The only time Smith saw Oscar talk to family members was when they asked him whether he was hungry. (68 RT 13949.)

Dora Madrid was Rosa's sister and arrived at Rosa's house between 6:30 and 6:40 on the morning of the murders. (68 RT 13974-13975.) At some point, she saw Oscar sitting at the table eating a bowl of cereal. When she asked Rosa what had happened, Rosa responded that Ermanda and Lorena had been killed. (68 RT 13977, 13986.)

Oscar talked to Victor after he talked with Sergeant Dempsie. Oscar tried to get Victor to stop crying, but he did not remember Victor talking to him. (59 RT 11988.) Victor testified that when he arrived at Rosa's house, he saw Oscar eating breakfast at the kitchen table. (64 RT 13101.) He talked to Oscar for approximately 20 minutes and asked him what had happened. (64 RT 13109.) Oscar repeated to Victor that he had seen the man who had brought him ice cream in his mother's room. (5 RT 803.) Victor did not talk to Oscar about what had happened. (64 RT 13109-13110, 13176.) Victor testified at the 402 hearing that he did not talk to Oscar about a man named "Juan" until later that day. (5 RT 803-804.)

3. Sanchez's objection and the court's ruling

Sanchez objected to the admission of Oscar's prior statement to Sergeant's Dempsie that the man he saw in his mother's room had a wisp on his chin and was the man who gave him ice cream. He also objected to Oscar's statement to Sergeant Kroutil identifying Sanchez following the single-photo lineup as the man in his mother's room when she was bleeding. (60 RT 12162-12163.)

In a written order, the trial court ruled Oscar's statement to Sergeant Dempsie admissible as an excited utterance and adopted that ruling at the third trial. (8 CT 1941; 64 RT 13026-13027.) The court also found Oscar's statements to Sergeant Kroutil and his identification of Sanchez following the single-photo lineup admissible. Specifically, the court ruled that Oscar's statement was an excited utterances. The court also found that Oscar's statements were prior consistent statements and past recollections recorded. (64 RT 13039-13040.)

B. The Trial Court Properly Admitted Oscar's Prior Statements to Sergeants Dempsie and Kroutil Because They Constituted Spontaneous Statements

Sanchez first contends that Oscar's statements were hearsay and did not qualify under the hearsay exception for spontaneous statements (AOB 132- 139.) He argues that Oscar had ample time to reflect and contrive his statements, because he revisited the crime scene and heard numerous people talking about the crime. (AOB 136-137.) The People disagree. Oscar was under the stress of his mother's and sister's deaths at the time he made statements to Sergeants Dempsie and Kroutil. He did not have an opportunity to reflect or contrive any misrepresentations, and his statements related to the circumstances which put him under such stress. These circumstances establish that Oscar's statements were spontaneous and thus were not rendered inadmissible by the hearsay rule.

1. Applicable law

Pursuant to section 1240,

[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

The theory underlining this exception is that the reflective faculties are dispelled and any utterance becomes the "instinctive and uninhibited

expression” of the person under the stress of nervous excitement. (*People v. Clark* (2011) 52 Cal.4th 856, 925.)

To be admissible under section 1240:

(1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.

(*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

For purposes of this exception to the hearsay rule, “spontaneous” does not mean that the statement was made at the time of the startling occurrence, but at a time where the circumstances are such that the statement is made without reflection or deliberation. (*People v. Raley* (1992) 2 Cal.4th 870, 892; *People v. Hughey* (1987) 194 Cal.App.3d 1383, 1388.) Neither the lapse of time between the startling occurrence and the statements, nor the fact that the statement may have been elicited by a question, change the spontaneous character of the statement. What matters is whether the statement appears to have been made under the stress of the startling occurrence and whether the nervous excitement still dominates the declarant’s reflective powers. (*People v. Thomas* (2011) 51 Cal.4th 449, 495-496.) A number of factors can inform this determination. These factors include the passage of time between the startling occurrence and the statement, whether the statement was a response to a question, and the

declarant's emotional state and physical condition. (*People v. Clark, supra*, 52 Cal.4th at p. 925.)

Whether the requirements of the spontaneous statement exception are satisfied is generally a question of fact. This determination, however, is left to the trial court and not the jury. (*People v. Poggi, supra*, 45 Cal.3d at p. 318.) The preliminary facts that bring statements within the exception require only proof by a preponderance of the evidence (*People v. Tewksbury* (1976) 15 Cal.3d 953, 966; *People v. Anthony O.* (1992) 5 Cal.App.4th 428, 433), and this Court will uphold the trial court's determination if it is supported by substantial evidence. The ultimate decision, however, is reviewed for abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) Because the requirement that the statement be made before there was time to reflect and misrepresent relates to the particular facts of the case more than the other requirements, the discretion of the trial court is at its broadest when it determines whether that requirement is met. (*People v. Poggi, supra*, 45 Cal.3d at pp. 318-319.)

2. Oscar's statements to Sergeant Dempsie were spontaneous

The trial court properly found that Oscar's statements to Sergeant Dempsie met all of the requirements for admission under section 1240. Oscar had obviously been through a startling occurrence, which produced a nervous excitement within him. As the trial court noted, Oscar was a

young boy who had just witnessed his mother die and saw his sister bleeding before going to his aunt's house and then returning to a house whose walls were covered in blood. (8 CT 1941; 64 RT 13205-13207.) Oscar never had the situation explained to him. Instead he witnessed his aunt fall into hysterics and had his cousin remove him to a bedroom, which further produced a nervous excitement within him. (8 CT 1941; 62 RT 12518-12519.) Oscar's excitement was shown by his inability to talk to family members at Rosa's house (62 RT 12728), and his inability to talk with Detective Lewis later that same morning. (5 RT 877-878; 61 RT 12393, 12479-12475.) Thus, the occurrences of the morning were startling enough to produce nervous excitement within Oscar. (*People v. Poggi, supra*, 45 Cal.3d at p. 318.)

At the time Oscar told Sergeant Dempsie about the man he saw in his mother's room, he was under the influence of his nervous excitement to the point that his reflective powers were in "abeyance" and there was no time to misrepresent or contrive. (*People v. Poggi, supra*, 45 Cal.3d at p. 318.) Although Oscar answered Sergeant Dempsie's questions, he was crying and shaking throughout the interview, showing that he was under stress from the situation. (64 RT 13204, 13207-13208.) Sergeant Dempsie interviewed Oscar at approximately 6:50 on the morning of the murders, which was about an hour and a half after he saw Sanchez in his mother's room. (6 RT 1193-1194; 64 RT 13203.) An hour and a half is not a

reasonable time for a five year old to overcome the stress and excitement caused by seeing his mother and sister die, and blood on the walls of his home. This is especially true considering that Oscar then witnessed his aunt fall into hysterics. (8 CT 1941; 62 RT 12518-12519.) Although Oscar appeared "calm" to Detective Lewis a few hours before, as the court found, Oscar's state of mind could best be described as a state of shock considering he was only able to communicate with Detective Lewis briefly before becoming silent upon questioning. (8 CT 1941; 5 RT 877-878; 61 RT 12393, 12473-12475.) Thus, Oscar appeared to be in a state of excitement at the time he was interviewed by Sergeant Dempsie.

Further, Oscar did not have time to reflect or contrive misrepresentations concerning his observations. (*People v. Poggi, supra*, 45 Cal.3d at p. 318.) From the sequence of events following his discovery of his mother's and sister's bodies, it is apparent that Oscar was in a state of shock and did not have an adequate opportunity to communicate his observations. (8 CT 1941.) Oscar appeared calm when he encountered his aunt the morning of the murders and remained in that state while his aunt took him back to his home, where he once again saw blood on the walls and his mother and sister laying dead in their rooms. (62 RT 12513-12514; 12517.) He also appeared calm when his aunt was overcome by emotion and was "hysterical." Oscar calmly told her that she needed to call 911. (62 RT 12517.) He appeared calm to Michelle Chandi, who asked him

what had happened once he and Rosa returned to Rosa's house to call the police. (33 RT 7381-7382; 62 RT 12728.) He also appeared calm to Detective Lewis but was soon unable to speak once Detective Lewis asked him questions about what had happened at his mother's house. (5 RT 870, 874, 876-877; 61 RT 12368.) Throughout this entire series of events, Oscar appeared calm and did not express emotions typical of a five-year-old child who had just seen the dead bodies of his mother and sister. Oscar's behavior showed that he was in a state of shock and unable to communicate his observations. Once interviewed by Sergeant Dempsie, Oscar was finally able to cry and appeared upset. However, Oscar was also able to communicate. (64 RT 13207-13208.)

Following the discovery of the bodies, Oscar had limited interaction with people at his aunt's house and was not provided with an opportunity to reflect upon his observations. Although nearly an hour and a half passed between the time Oscar observe Sanchez in his mother's room and the time he told Sergeant Dempsie about it, Michael, Orosco, and Rosa all testified that they did not talk to Oscar about what had happened. Following Rosa's discovery of the bodies, she did not talk to Oscar about what he had seen or what she had seen. In fact, Rosa testified that she had not talked to anybody about her observations besides police since that day. (62 RT 12559.) This assertion is supported by the testimony of Michael, Benny, and Orosco, who all said that Rosa only told them that an "incident" had

occurred and did not delve into any details. (63 RT 12916, 12942; 65 RT 13340-13341; 69 RT 14122.) Michelle testified at Sanchez's second trial that she asked Oscar what had happened, and he told her that he tried to wake his mother and sister, but was unable to. (33 RT 7381-7382.)

Beyond this brief interaction, Michelle did not talk to Oscar about what had happened in his home or tell him what she thought may have happened.

(62 RT 12734, 12741.) Michael also testified that he did not talk to Oscar about what had happened, or about what he (Michael) had seen when he went into Ermanda's house. (63 RT 12941; 69 RT 14119-14120.) Orosco testified similarly, as did Benny. (65 RT 13346; 69 RT 14123-14124.)

It also appears that Oscar was not in a position to overhear interviews between officers and other family members before he made his spontaneous statements. Michelle testified that she took Oscar to a back bedroom when he came into the house with Rosa. She started a movie for him and he remained in the room watching the movie. (62 RT 12728-12730.) When Detective Lewis interviewed Oscar at approximately 6:20 on the morning of the murders, he did not remember where Oscar entered from, however he testified that he conducted his interviews in the kitchen, away from the other people in the house, who were in the living room. (5 RT 874; 61 RT 12366.) Detective Lewis also testified that there were four to five people sitting in the living room while he conducted his interviews. They looked somber and were not talking about the murders. (61 RT 12366.)

Then between 6:50 and 7:00 that morning, Sergeant Dempsie interviewed Oscar. When he asked to speak with Oscar, somebody went to a back bedroom and retrieved him. (6 RT 1193-1194.) He then interviewed Oscar in the living room with nobody nearby. (6 RT 1194; 64 RT 13211.) At the time of the interview, most of the people at Rosa's house were located in the front yard. (64 RT 13211.) Following the interview, Sergeant Dempsie conducted other interviews, including one with Victor, and when he left Oscar was in the front yard with other people he had interviewed. (6 RT 1244-1245.)

There is no evidence that Oscar heard statements made by other people that effected his own observations. (See Arg. II, *ante.*) Oscar was located in a back bedroom immediately following entry into Rosa's house and remained there. (61 RT 12367; 62 RT 12729.) The interviews Detective Lewis conducted before talking with Oscar occurred in a fashion to insulate Oscar from overhearing. (5 RT 874; 61 RT 12366.) No one in the house between the time of the murders and the time of Oscar's interview with Sergeant Dempsie testified that they talked to Oscar about his observations, besides asking him what had happened to which he was unable to respond. (33 RT 7381-7382; 62 RT 12559, 12734, 12741; 63 RT 12916, 12941-12942; 65 RT 13340-13341, 13346; 69 RT 14119-14120, 14122-14125.) Further, all the witnesses who were in the house at that time testified that they did not talk about the murders among themselves and did

not know who may have committed the crimes. (62 RT 12559, 12730-12732; 63 RT 12941; 65 RT 13346; 68 RT 14010-14011; 69 RT 14123-14124.) Multiple people, including Benny and Michael, had no knowledge of Sanchez at all. (63 RT 12932-12933; 65 RT 13348.) Also at some time following his interview with Detective Lewis, Oscar returned to the back bedroom, away from the other people in the house until Sergeant Dempsie arrived to interview him. (6 RT 1194.)

Although Oscar testified at Sanchez's first trial that he was aware people at his aunt's house talked about the murders, Sanchez cannot show that Oscar heard these conversations before making statements to Sergeant Dempsie. (16 RT 3455-3456.) When Sergeant Dempsie arrived, he saw Oscar come out of a back bedroom, while the rest of the occupants of the house were either in the living room or outside. (6 RT 1194; 64 RT 13211.) There was no evidence showing that Oscar heard others speculate about the murders before he talked with Sergeant Dempsie. During the first trial, Oscar testified that there were only a few people at his aunt's house around the time he talked to the police and he "[p]robably I don't know-" listened to them talking to each other. (16 RT 3455-3456.)

During the second trial, Oscar testified that he did not remember whether there were other people around him before he talked with the police. He also did not remember whether he listened to those people. (34 RT 7551-7552.) At Sanchez's third trial, Oscar remembered that he saw

people at his aunt's house, but he did not talk with them or listen to what they said. (59 RT 11985-11987.) From the whole of Oscar's testimony, it does not appear that he heard anyone talk about the murders or who may have committed them, let alone hear such conversations before he spoke with Sergeant Dempsie. From the whole of the evidence, it does not appear Oscar thought or talked about his statements with others. The evidence shows that a scared little boy remained alone in a bedroom until he was able to communicate what he had seen. There were no outside influences that made Oscar's statements unreliable as Sanchez suggests. (AOB 133; see Arg. II, part B(3), *ante*.)

People v. Poggi, supra, 45 Cal.3d 306, stands for the rule that statements may still be spontaneous despite the passage of time and the fact that the statements were responses to questions. In *Poggi, supra*, 45 Cal.3d at p. 315, a police officer came upon the victim approximately 30 minutes after she had been stabbed. The victim was "in a very excited state, with blood flowing from her mouth ... apparently attempting to recount what had happened to her but was rambling and incoherent." (*Ibid.*) The victim responded to the officer's questions and described the crime while the paramedics treated her. The victim later died. (*Id.* at p. 316.) The defendant argued that the statements were not spontaneous because they were made 30 minutes after the attack and in response to questions. This Court held that the trial court properly admitted the statements because the

victim was obviously under the influence of excitement and she remained in the excited state even though she had become calm enough to speak coherently. (*Id.* at p. 319.)

Likewise in *People v. Trimble* (1992) 5 Cal.App.4th 1225, which was cited in this Court's decision of *People v. Guterrez* (2009) 45 Cal.4th 789, 811, a witness's statements satisfied the spontaneous declaration exception. (*People v. Trimble, supra*, 5 Cal.App.4th at pp. 1228-1229.) In *Trimble*, the victim's sister went to the defendant's cabin. When the defendant left, a two and one-half-year-old child became hysterical and described to her aunt how the defendant stabbed her mother two days earlier. (*Id.* at p. 1229.) The Court of Appeal ruled that the statements were spontaneous because despite "the appreciable interval between the incident and the subject statements," the child made the statements at the first opportunity she was able and was under the influence of excitement. (*Ibid.*; *People v. Guterrez, supra*, 45 Cal.4th at pp. 811-812.)

This case is like *Trimble* and *Poggi*. Oscar was under the influence of excitement when speaking with Sergeant Dempsie as shown by his demeanor, in that he was crying and shaking. (64 RT 13207-13208.) He was unable to communicate prior to his interview with Sergeant Dempsie because he was in shock, just as the victim in *Poggi* was unable to communicate due to pain and the witness in *Trimble* was unable to communicate because she was sequestered with the assailant. As explained

above, Oscar's shock was demonstrated by his inability to communicate with Rosa, Michelle, and later Detective Lewis. (5 RT 876-877; 61 RT 12368; 62 RT 12559, 12728-12730.) Once Oscar was able to communicate, he did so by telling Sergeant Dempsie that he saw the man who had brought him ice cream in his mother's room. (64 RT 13205-13206.)

On the other hand, Oscar's statements to Sergeant Dempsie are distinguishable from those found in *People v. Lynch* (2010) 50 Cal.4th 693, which Sanchez relies on. (AOB 137.) In *Lynch*, the adult victim made statements an hour or two following her injuries. (*Lynch, supra*, 50 Cal.4th at p. 754.) The statements were in response to questions and included "descriptions of such nonessential matters as her engagement in routine household chores," which indicated that the statements were measured and reflected upon. (*Ibid.*) Further, there was no evidence that the victim was frightened or excited at the time she gave her statements. Taken together, this Court held, such circumstances did not support a finding that the victim made her statements in an excited state or without reflection. (*Ibid.*)

The circumstances of Oscar's statements differed from those in *Lynch*. First, Oscar was under a nervous excitement when talking with Sergeant Dempsie, as evidenced by the fact that he was both crying and shaking. (64 RT 13207-13208.) Although his statements were in response to questioning, Oscar did not describe "nonessential matters" such those

found in *Lynch*. Oscar's statements pertained exclusively to the time period between his waking up to see his mother in the room until he retrieved his aunt. (64 RT 13204-13207.) Unlike the witness in *Lynch*, Oscar only described the events that caused his nervous excitement. Given these statements, it is apparent that Oscar did not reflect and deliberate before making his statements to Sergeant Dempsie.

Sanchez argues that Oscar had an opportunity to go back to the crime scene with his aunt, which gave him an opportunity to reflect and misrepresent. (AOB 136.) The People disagree. The circumstances of Oscar's return to his house did not provide an opportunity for a five-year-old to absorb his surroundings in a reflective way. Oscar was still in shock from seeing his mother die and seeing her murderer in his bedroom. He also saw his sister's body covered in blood. He then returned to a house with blood on the walls and the bodies of his mother and sister lying in their respective rooms. (55 RT 11188-A; 59 RT 11983; 62 RT 12515-12516.) Oscar then saw his aunt become hysterical. (62 RT 12517-12519.) These circumstances put Oscar further into an excited state and did not give him an opportunity to reflect and deliberate on the statements he would later give to law enforcement. (8 CT 1941.)

Sanchez also argues that Oscar talked with Victor and reflected upon his (Oscar's) possible statements. (AOB 136.) Although Oscar did speak with Victor, that was not until after he was already interviewed by Sergeant

Dempsie. Victor testified that when he arrived at Rosa's house, Oscar was talking with the police. Officers then talked with Victor. (5 RT 796-797, 804-806.) Sergeant Dempsie testified that he interviewed Victor immediately after interviewing Oscar (64 RT 13117, 13209), meaning that Victor did not talk to Oscar until after both he and Oscar had already spoken with Sergeant Dempsie. Thus, Oscar's conversation with Victor had no relevance to the spontaneous statements he made before that conversation.

Lastly, Oscar's statements related to the event that constituted the startling occurrence. Oscar told Sergeant Dempsie about the circumstances of his mother's death and the observations he made upon waking in his mother's room. (64 RT 13204-13207.) It was this event that startled Oscar, and it was this event his statements related to. Thus, Oscar's statements to Sergeant Dempsie meet the requirements of section 1240, and the trial court did not abuse its discretion by admitting them.

3. Oscar's statement to Sergeant Kroutil was spontaneous

Oscar's statements to Sergeant Kroutil were also made while he was under the nervous excitement created when he saw his mother die, Sanchez walk into his room, and then saw his sister's dead body. As described above, Oscar had experienced an occurrence startling enough to produce a nervous excitement within him—namely being awoken by gun shots

followed by witnessing the death of his mother, seeing her murderer, and seeing his sister's dead bloodied body before returning to this gruesome scene with his aunt, who became hysterical. (8 CT 1941; 62 RT 12518-12519; 64 RT 13205-13207.)

At the time Oscar gave his statements to Sergeant Kroutil, it was also apparent that he was still under the influence of the nervous excitement created by his earlier experience. As the trial court found, Oscar's statements to Sergeant Kroutil occurred close in time, approximately three hours, to his witnessing the death of his mother and seeing his sister's body. (8 CT 1941; 64 RT 13039-13040.) Additionally, given Oscar's age, it was not reasonable for him to have had an opportunity to get over his nervous excitement by the time he spoke with Sergeant Kroutil. Also, as the trial court found, Sergeant Kroutil merely showed Oscar a photo of Sanchez and asked him a simple unsuggestive question of whether he recognized the person in the photograph. (64 RT 13220, 13039-13040.) Oscar's response was instantaneous and not reflected upon, indicating that Oscar's statement was spontaneous and made without deliberation. (64 RT 13221, 13225.)

Given Oscar's age and the circumstances that existed between the time of the murders and his statement to Sergeant Kroutil, Oscar did not have time to reflect and contrive any misrepresentations. As previously described, Oscar was by himself for much of the morning before talking with law enforcement. (See Arg. IV, part C(2), *ante*.) After talking with

Sergeant Dempsie at 7:00 the morning of the murders, Oscar did talk with his brother Victor. (59 RT 11988.) According to Victor, he and Oscar did not talk at length about the events of the morning. (5 RT 803-804; 64 RT 13109-13110, 13176.) Oscar repeated to Victor what he had said to Sergeant Dempsie – that he had seen the man who had brought him ice cream in his mother’s room. (5 RT 803.) Victor testified that although he talked to Oscar for 20 minutes and asked him what had happened, Oscar did not actually tell him what had happened. (64 RT 13109-13110, 13176.) Victor had previously testified that the two did not talk about a man named “Juan” until later that day. (5 RT 803-804.) Thus, Oscar had not had an opportunity to reflect upon his experience, or be influenced by others concerning what had happened.

In sum, at the time Oscar gave his statement to Sergeant Kroutil identifying Sanchez as the man he saw in his mother’s room, he was still acting under the excitement of his mother’s and sister’s deaths. Furthermore, he did not reflect upon or contrive his statements. Given Oscar’s age, lack of interaction with others, and the circumstances of his identification of Sanchez, Oscar spoke spontaneously when making statements to Sergeant Kroutil. Finally, Oscar’s statement identifying Sanchez directly related to the circumstances and events that put him in the an excited state. Accordingly, the trial court did not abuse its discretion by admitting Oscar’s statements to Sergeant Kroutil as an excited utterance.

C. Oscar's Statement to Sergeant Kroutil Also Constituted a Prior Consistent Statement

Sanchez next argues that Oscar's statement to Sergeant Kroutil identifying Sanchez as the person he saw in his mother's room did not constitute a prior consistent statements as the court found. (AOB 139-143.) More specifically, Sanchez argues that he never introduced an inconsistent statement that would provide the foundation for admitting Oscar's statement to Sergeant Kroutil under section 791, subdivision (a). (AOB 141-142.) Also, Sanchez argues that the People cannot prevail under subdivision (b) of section 791. Sanchez alleged that Oscar was generally unreliable as a witness and bias because he overheard conversations at Rosa's house. Sanchez argues that Oscar's bias occurred before his statement to Sergeant Kroutil, making his statement not a prior consistent statement. (AOB 142-143.) The People disagree on both points.

1. Applicable law

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791. (§ 1236.)

Section 791 allows a prior consistent statement to be admitted if it is offered after admission of an inconsistent statement used to attack the witness's credibility and the consistent statement was made prior to the

inconsistent statement. (§ 791, subd. (a).) A prior inconsistent statement may also be admitted when there is an express or implied allegation that the witness's testimony was recently fabricated or influenced by an improper motive, and the statement was made before the fabrication or improper motive took place. (§ 791, subd. (b); *People v. Kennedy* (2005) 36 Cal.4th 595, 614.)

2. Sanchez's charge that Oscar was influenced by bias, in the form of overheard conversations at Rosa's house and through his therapy sessions, provided the foundation to admit Oscar's statements that were consistent with his testimony

Sanchez argues that because he alleged that Oscar was influenced by overheard conversations at his aunt's house and his statement to Sergeant Kroutil was made after the bias occurred, Oscar's statement was inadmissible as a prior consistent statement. (AOB 142.) The People disagree. Oscar did not overhear any conversations about who could have killed his mother and sister prior to his interview with Sergeant Kroutil. Thus, his statements were made prior to Sanchez's charge of alleged bias. Additionally, Oscar's statements to Sergeant Kroutil occurred before Oscar ever met Wanda Newton, whom Sanchez also accused of influencing Oscar's testimony. Each of these grounds provided a basis for admitting Oscar's statement to Sergeant Kroutil identifying Sanchez as the man he saw in his mother's room.

As outlined previously, Oscar never talked to anybody at his aunt's house about who killed his mother. (See Arg. II, part B(3), *ante*.) Multiple witnesses testified that they did not know who killed Ermanda and Lorena that morning. These same witnesses testified that they did not know who Sanchez even was. (62 RT 12559, 12730-12732; 63 RT 12932-12933, 12941; 65 RT 13346, 13348; 68 RT 14010-14011; 69 RT 14123-14124.) They further testified that they never talked with Oscar about what and whom he had seen in his mother's room. (62 RT 12559, 12728-12729, 12734, 12741; 63 RT 12916, 12941-12942; 65 RT 13340-13341, 13346; 69 RT 14119-14120, 14122-14125.) Although Sergeant Kroutil opined that he thought Oscar may have learned Sanchez's name from Victor (6 RT 1173-1174), no evidence supported this contention. Victor testified that he did not talk to Oscar about "Juan" until later that day. When Victor did talk with Oscar however, all Oscar told him was that he saw the man who had brought him ice cream. (5 RT 803-804.) Oscar testified that, while he did talk with Victor that morning, he did not recall Victor ever saying anything to him. (59 RT 11987-11988.) Thus, no evidence suggested that Oscar overheard conversations pertaining to Sanchez's identity before he made the statement to Sergeant Kroutil. Accordingly, Sanchez's charge of bias – alleged overheard conversations – occurred after Oscar's statements to Sergeant Kroutil. Therefore, Oscar's statement was admissible as a prior

consistent statement because the statement was made before any occurrence that would have purportedly biased Oscar.

Additionally, Oscar made those statements prior to his therapy sessions with Wanda Newton, which Sanchez also argued influenced Oscar's testimony. Defense counsel asked both Newton and Oscar about their therapy sessions and the topics of conversation, including Oscar's ability to remember what happened at his mother's house the night she died. (60 RT 12195-12197; 74 RT 14765-14810.) In fact, Sanchez called an expert to testify about the effects of certain therapy techniques upon the memories of a child Oscar's age. (71 RT 14373-14375.) All of this evidence was admitted to show that Oscar's testimony was influenced by his interactions with Newton. Thus, regardless of whether Oscar's statement to Sergeant Kroutil occurred before he overheard any conversations in Rosa's house, the statement was still admissible to rebut Sanchez's charge that Oscar's testimony was influenced by Newton. (§ 791, subd. (b).) This is because a prior consistent statement is admissible if it was made before the existence of any one or more of the biases that, according to the opposing party's express or implied charge, may have influenced the witness's testimony. (*People v. Noguera* (1992) 4 Cal.4th 599, 629, citing *People v. Hayes* (1990) 52 Cal.3d 577, 609 (*Hayes*).

Hayes, illustrates this point. There, a witness was impeached with evidence that criminal charges were pending against him, with the implication that the witness was testifying for leniency because of those pending charges. The prosecution sought to introduce a prior statement of the witness's that was consistent with his testimony and made before the charges were pending against him. The defense tried to exclude the evidence because the witness was on probation and a suspect of the murder in question when he made the statement, and thus also had a motive to fabricate at that time. This Court ruled that the prosecution could properly introduce the prior consistent statement because the statement occurred before one of the express or implied charges of bias and tended to refute that charge. (*Hayes, supra*, 52 Cal.3d at p. 609.)

Here, Sanchez made multiple charges of bias. Not only did Sanchez allege that Oscar was influenced by conversations he purportedly overheard at Rosa's house (71 RT 14346-14349), but he also alleged that Oscar's testimony was influenced by his therapy sessions with Newton. (60 RT 12195-12197; 71 RT 14373-14375; 74 RT 14765-14810.) Oscar's therapy sessions with Newton began in November of 1997, after he moved to Idaho and long after he gave statements to Sergeant Kroutil. (74 RT 14761.) Under *Hayes*, because Oscar's prior statements occurred before this charge of bias, Oscar's statements were admissible to disprove that charge. (*Hayes, supra*, 52 Cal.3d at p. 609.) Accordingly, the trial court properly

admitted Oscar's statements to Sergeant Kroutil as prior consistent statements.

3. **Although Oscar's inconsistent statements were not admitted into evidence, other inconsistent statements were admitted at trial, making Oscar's statements to Sergeant Kroutil ultimately admissible**

In the event Oscar's statement to Sergeant Kroutil cannot be admitted under section 791, subdivision (b), it was still admissible under subdivision (a) of section 791. At the third trial, Oscar was asked about his testimony at the second trial when he said he did not see the man from his mother's room in the courtroom. (60 RT 12226-12227.) Sanchez was unable to introduce this testimony into evidence because Oscar's lack of memory at the third trial was not inconsistent with his previous testimony. (See *post*, Arg. V.) Because this statement was not admitted into evidence, it did not provide the foundation needed under section 791, subdivision (a) for the prosecution to introduce a prior consistent statement. However, Sanchez did introduce other statements Oscar made that were inconsistent with his trial testimony, thus providing the basis for Oscar's prior consistent statement.

For example, Sanchez called Jose Hernandez, Oscar's natural father, to testify about statements Oscar made to him. After moving to Idaho, Oscar told his father that he saw three people in his mother's house the night she died. (66 RT 13489.) One was named "Juan," and another

“Michael” or “Marcos.” (66 RT 13491.) Sanchez also introduced statements Oscar made to Lola Ortiz – that “Juan” was in his house with his mother’s mechanic and Lorena’s boyfriend “Big Man.” (70 RT 14275-14278.) Oscar also mentioned that “Domingo” was there. (70 RT 14289.) Sanchez also introduced statements Oscar made to Wanda Newton indicating that “Juan” did not shoot his mother. (74 RT 14775-14776, 14779, 14804-14805.)

These statements serve as prior inconsistent statements to Oscar’s testimony that Sanchez was the man in his mother’s room the night she died. Although these statements had not been admitted into evidence at the time Oscar’s statement to Sergeant Kroutil was admitted, those statements still serve the purpose of being inconsistent.

Under a plain reading of section 791, subdivision (a) the admission of an inconsistent statement is a prerequisite for admitting a prior consistent statement; however, courts have the discretion to conditionally admit evidence subject to foundational evidence being admitted at a later time. (§ 403, subs. (a)(4), (b).) This was the third time Sanchez had been brought to trial on these charges. The evidence to be presented during trial was well known to both counsel and the court. Thus, when defense counsel introduced Oscar’s statements to his father and Ortiz and Newton into evidence, the prosecution would have been free to introduce Oscar’s statements to Sergeant Kroutil under section 791, subdivision (a). Because

Oscar's statement identifying Sanchez were ultimately admissible and the trial court had discretion to conditionally admit them, the trial court did not err by admitting Oscar's statement to Sergeant Kroutil.

D. Oscar's Statement to Sergeant Kroutil Also Constituted a Past Recollection Recorded

Finally, Sanchez argues that the trial court erred by admitting Oscar's statement to Sergeant Kroutil as a past recollection recorded because Oscar could not make a meaningful attestation to the statement's truth. (AOB 144-147.) The People disagree. Oscar testified that he told the truth when talking with police the day of his mother's murder. This combined with his basic knowledge of the events from that day show that he met the requirements set out by section 1237.

Section 1237, subdivision (a) reads:

(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

(1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

(3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(4) Is offered after the writing is authenticated as an accurate record of the statement.

Section 1237 recognizes that time universally erodes human memory, although to a greater or lesser degree depending on the circumstances of the situation and the individual characteristics of the witness. The purpose behind the section is to allow previously recorded statements into evidence when the trustworthiness of their contents is attested to by the maker, subject to the test of cross-examination. Section 1237 makes only a narrow exception to the hearsay rule, consistent with trustworthiness. (*People v. Simmons* (1981) 123 Cal.App.3d 677, 683.)

In *People v. Simmons, supra*, 123 Cal.App.3d at pp. 683-684, the court ruled that a witness's prior statements were inadmissible because the witness could not recall any event recorded in his prior statement, or making the prior statements, or any circumstance surrounding the recording's preparation. At best he could identify his signature at the bottom of the transcription. The witness simply had "no knowledge at all." (*Ibid.*) "One who has no knowledge as to the truth or falsity of a representation may honestly say it is either true or false to the best of his knowledge with neither rejoinder having any evidentiary value." (*Ibid.*) Because the witness in *Simmons* could not remember the events recorded in his statement, let alone whether the statements in the recording were true, the witness was not subject to a meaningful cross-examination, which section 1237 was not meant to eliminate. (*Id.* at p. 683.)

People v. Cowan (2010) 50 Cal.4th 401, 466 (*Cowan*), provides an example of a meaningful opportunity to cross-examine a witness despite that witness's claim that his past recollections contained in a recording were not truthful. In *Cowan*, this Court found it proper to admit past recollections from a witness who testified that he told "the truth to the best of his ability." (*Cowan, supra*, 50 Cal.4th at p. 466.) The witness testified that his memory while giving the statement was "jumbled" and "scrambled" because of drug use, and that he suffered from delusions. (*Ibid.*) He also admitted making the statements so he could exonerate himself and get out of jail, and that he saw a newspaper article about the murders in question before making and recording his statements. Further, the witness testified that he "might have lied" during portions of his statement. (*Ibid.*) This Court found it proper to admit the witness's statements because the defendant was able to thoroughly cross-examine the witness regarding the events the recording contained. The defendant asked the witness about his multiple motives to lie, and admitted a copy of the newspaper article that the witness had read before making his statements. The defendant also questioned the man who recorded the statements about the witness's demeanor and mental state at the time the statements were given. This Court reasoned that there was "no doubt" that the jury considered all of these factors when deciding the weight to give to the

witnesses statements, and thus the recorded recollection was admissible.

(Ibid.) The same reasoning is applicable to Oscar's prior recollection.

Oscar did not have "no knowledge at all" as to the events recorded in his prior statement and, given Oscar's testimony and general knowledge of the events surrounding his mother's murder, he was subject to a meaningful cross-examination. As the foundation for Oscar's statement to Sergeant Kroutil as a past recollection recorded, Oscar stated that he "[k]ind of" remembered the day his mother and sister were killed. (59 RT 11970.) He first stated that he did not remember talking with police, but then stated that he remembered talking with people that day and that he told the people the truth. (59 RT 11970.)

Defense counsel was able to cross-examine Oscar concerning the events surrounding his mother's death. Although he lacked memories of some of the events, Oscar was able to testify to many events that happened that day. He stated that he remembered seeing his mother and sister laying dead in their rooms. He also remembered seeing blood in the kitchen. (59 RT 11983.) After waking up, he went to his aunt's house and then back to his house with his aunt. The two ultimately returned to his aunt's house. (59 RT 11984.) Oscar remembered seeing Sanchez at his mother's house the day she died, but he did not remember where. (60 RT 12216-12218, 12222-12224.) He also remembered that Sanchez brought him ice cream, but did not remember when. (60 RT 12219.) The defense cross-examined

Oscar about his identification of Sanchez by showing him a picture of Marcos Pena and asking Oscar if he also saw Pena that day. Oscar responded in the affirmative. (60 RT 12227-12229.) Further, defense counsel questioned Oscar about his interactions with the people at his aunt's house, including Victor, and his interactions with Wanda Newton. (59 RT 11985-11988; 60 RT 12195-12196.) These questions were meant to call into question the weight of Oscar's testimony and his prior statement to Sergeant Kroutil, which the jury was able to consider.

The whole of Oscar's testimony shows that Oscar did remember the events recorded, unlike the witness in *Simmons* who lacked all memory of the events in question. (*People v. Simmons, supra*, 123 Cal.App.3d at pp. 683-684.) Although Oscar did not remember being shown a picture of Sanchez the morning of the murders (60 RT 12213), he did remember seeing Sanchez at his mother's house the day she died and telling the truth to the people he talked to. (59 RT 11970; 60 RT 12216-12217.) This provided a sufficient basis to admit Oscar's statement to Sergeant Kroutil as a past recollection recorded, because Oscar was able to attest to the statement's trustworthiness like the witness in *Cowan*, and could have been effectively cross-examined about the events contained in the recording. (*Cowan, supra*, 50 Cal.4th at p. 466.) Accordingly, the trial court did not abuse its discretion by admitting Oscar's statement to Sergeant Kroutil pursuant to section 1237.

E. The Purported Error Was Harmless

In this section, Sanchez attacked admission of Oscar's out-of-court statements to officers, consisting mainly of his identifications of Sanchez as the man in his mother's room the morning she died. (AOB 135-138.)

Thus, had those statements been suppressed, Sanchez would have achieved the same result as he sought in the prior section – to suppress Oscar's prior identifications. However, because the challenge contained here is one of state evidentiary law, the People need only show that a more favorable verdict would not have reasonably resulted had the error not occurred.

(*People v. Watson, supra*, 46 Cal.2d at p. 836.)

As detailed in Arguments I, part C. and III, part C., ample evidence outside of Oscar's prior identifications and out-of-court statements was presented to convicted Sanchez. Accordingly, Sanchez was not harmed under any standard by the admission of Oscar's prior statements to Sergeants Kroutil and Dempsie.

V. THE COURT PROPERLY EXCLUDED OSCAR'S PRIOR TESTIMONY AND INTERVIEW WITH THE PROSECUTION'S INVESTIGATORS BECAUSE THEY WERE NOT RELEVANT TO HIS CREDIBILITY AND DID NOT FALL UNDER A HEARSAY EXCEPTION

Sanchez next argues that the trial court erred when it excluded "critical impeachment evidence," thereby restricting his ability to cross-examine Oscar with his prior statements. (AOB 149.) Specifically,

Sanchez argues that the trial court erred when it did not permit him to introduce statements from Oscar's testimony at the first two trials and statements to the prosecution's investigators, so that he could show Oscar's credibility. The People disagree. The trial court properly found that Oscar was an available witness and was not being evasive while giving testimony. Further, when Oscar gave his prior statements to the prosecution's investigators and during the first two trials, the events of the murders were not fresh in his mind, thus the statements could not be admitted as past recollections recorded. Because of these circumstances, the trial court properly excluded the statements Oscar made to the prosecution's investigators and his testimony during the first two trials.

A. Background

1. Oscar's trial testimony

During testimony at the third trial, Oscar stated that he did not remember much of what happened on the day of the murders. (59 RT 11978-11979; 60 RT 12194, 12208.) Oscar thought he was sleeping when his mother died, and did not remember how she died. (59 RT 11998; 60 RT 12197.) He remembered his mother lying on the floor and his sister "kind of sitting." He also remembered seeing blood in the kitchen and on the walls, and touching his mother. (59 RT 11983.) He thought he went to his aunt's house and told her to see if his mother was dead. Then his aunt

went to his house with him before going back to her own house. (59 RT 11984.)

Oscar remembered seeing Sanchez at his mother's house the day she died, but did not remember where. (60 RT 12216-12218, 12222-12224.) Sanchez had brought him ice cream, but Oscar did not remember when. (60 RT 12219.) Oscar testified that he saw the man depicted in Defense Exhibit Q (Marcos Pena) the night his mother died, and did not know if that man was the same man as Sanchez. (Def. Exh. Q; 1 SCT 33-34; 60 RT 12229-12230.)

During a recess, defense counsel refreshed Oscar's recollection with many of his prior statements. (60 RT 12187-12188.) When testimony resumed, Oscar did not remember how many people were in his mother's room when she died, or what room he was in during the murders. (60 RT 12188-12189.) He did not remember if he got hurt or if anyone grabbed him. He also did not remember if anyone named "Michael" was at his mother's house, or if anybody was there with a weapon. (60 RT 12196-12197.) Finally, Oscar did not remember anybody being in the room with his mother when she died. (60 RT 12206-12207.)

2. Oscar's statements to the prosecution's investigators¹⁹

At the start of the interview with the prosecution's investigators on November 4, 1997, Oscar said that he woke up on the morning of his mother's death because he heard his mother and sister screaming. (2 CT 512.) His mother threw his sister outside, and his sister got mad and did something to his mother that made her bleed. (2 CT 516.) He saw his mother fall by the phone and lay on the ground bleeding. (2 CT 512.) Oscar saw his sister sitting with a pillow, and the pillow was covered in blood. (2 CT 516.) Oscar also saw Sanchez. (2 CT 517.) After Oscar saw his mother, he left the house and went to somebody's house before coming back with them. They saw a lot of blood and tried to call the police, but the phone did not work. (2 CT 512-513, 518.)

As the interview progressed, Oscar told the investigators that he saw Sanchez fighting with his sister in her room, before Sanchez went to his mother's room and did the "same thing." (2 CT 517, 520.) Oscar knew that Sanchez had a gun and knife in his pocket but did not see them. (2 CT 519.) After Sanchez hurt Oscar's mother, he told Oscar to wait outside, but Oscar did not listen and instead ran to somebody's house. (2 CT 520.) Sanchez then got in his yellow truck and left. (2 CT 521.)

¹⁹ The contents of Oscar's interview with prosecution's investigators is summarized in detail in Argument I, part A(1)(e).

Oscar also said that five of Sanchez's friends were at his house. (2 CT 521.) While Sanchez was hurting his mother and sister, his friends were breaking things. (2 CT 522.) Oscar was hiding under the bed when Sanchez grabbed him and hurt him with his feet. Victor was standing behind Sanchez when Sanchez grabbed Oscar. (2 CT 527.) Oscar said that Sanchez hit him in the stomach and on the back and tied him up with a rope, before Sanchez locked the door and drove away by himself. (2 CT 525-526.)

3. Oscar's testimony at the first trial²⁰

Oscar testified that he woke up because he heard shooting. (16 RT 3351-3352.) He was laying in his mother's bed, which he also used, and saw his mother walk into the room screaming. (16 RT 3355, 3357, 3409.) She tried to call somebody on the telephone, but somebody else came into the room. (16 RT 3357-3358.) After seeing his mother, Oscar went to his sister's room and then went to a neighbor's house. (16 RT 3356, 3361-3362.)

Oscar also said that before he fell asleep, a lot of people were at his house. (16 RT 3435.) He thought his mother and sister had a party because he heard loud music. (16 RT 3536-3537.) Oscar remembered a man named "Michael," who had long hair, in his mother's room. (16 RT 3438-

²⁰ Oscar testimony at the first trial is summarized in detail in Argument I, part A(2).

3439.) “Big Man” and “Juan” were there too. (16 RT 3445-3446, 3626-3628.) “Big Man” took the phone from his mother when she tried to call somebody. He then ran out the back door and jumped over the back fence. (16 RT 3446-3447.) Oscar did not remember a “Domingo.” (16 RT 3444.) Oscar identified Sanchez as “Juan.” (17 RT 3626.)

Oscar also testified that he was not choked or tied up when his mother died. (17 RT 3563.) He did not remember where his toys were, but they were not broken and he never poured water on the floor to make it slippery. Victor was also not in the house when their mother died. (17 RT 3568-3569.)

4. Oscar’s testimony at the second trial²¹

Oscar testified that the night his mother died, he was in her room when he woke to the sound of shooting. (34 RT 7483-7484.) He saw a gun and saw “Juan” in his mother’s room, but he did not remember everything about it. (34 RT 7484-7485.) Oscar identified Sanchez as “Juan.” (34 RT 7490-7491.) He remembered seeing the “rest of the guys” in his mother’s room as well. (34 RT 7489.) He then saw his mother dead in her bedroom and his sister dead in another room. (34 RT 7481-7483, 7487.)

On cross examination, Oscar testified that he was positive that Sanchez was the man in his mother’s room, and that Victor was not in his

²¹ Oscar’s testimony at the second trial is summarized in detail in Argument I, part A(3).

mother's room when she died. (34 RT 7519, 7574.) He remembered seeing "guys" run through the front door after he found his mother. (34 RT 7587.) He heard people talk in his mother's room, but did not know who they were or what they said. (34 RT 7595-7596.) Oscar thought he saw a total of three or four men, all carrying guns. (34 RT 7598-7602.)

The next day, Oscar took the stand again. (35 RT 7674.) He testified that when he saw his mother, she was walking towards the telephone and tried to pick it up. Four men with guns were in her room; one was "Big Man" and another was "Michael." (35 RT 7677-7678.) The men chased him, and two of them grabbed his arm. He got free and ran under the covers, where the men did not follow him. (35 RT 7688-7689.)

5. The court's ruling

At the third trial, defense counsel sought to introduce the interview Oscar had with the prosecution's investigators and his testimony during Sanchez's first two trials. (59 RT 11990-11991.) Counsel argued that the evidence was admissible because Oscar's lack of memory made him an unavailable witness (59 RT 12012; 64 RT 13160-13161; 66 RT 13442-13443), his testimony was inconsistent with his prior statements (64 RT 13156, 13158-13159; 66 RT 13443; 67 RT 13687), and his prior statements constituted past recollections recorded (60 RT 12154). The court, however, denied these claims. (59 RT 12012; 60 RT 12154; 64 RT 13161; 66 RT 13444.)

The trial court nevertheless allowed defense counsel to introduce statements Oscar made to his father about his mother and sister coming back for him, and whether Oscar had told his father that there were other men in the house the night his mother died. (66 RT 13474.) The court also admitted Oscar's statements to Lola Ortiz that included mention of "Marcos," "Big Man," and "Domingo" being present when his mother died. (66 RT 13475.) Finally, the court admitted Oscar's entire noon interview with Sergeant Dempsie, which included statements by Oscar that multiple people were in his mother's house at the time she died, including "Juan" and "Michael." (13 CT 3514-3522; 64 RT 13235.)

B. Sanchez Forfeited his Claim that Oscar's Prior Statements Were Not Hearsay, and his Claim Fails Because the Statements Were Not Relevant

Sanchez first contends that Oscar's prior statements to the prosecution's investigators, along with his testimony at the first two trials, were not offered for their truth and therefore did not constitute hearsay. Sanchez argues that the statements constituted circumstantial evidence that Oscar lacked credibility and reliability as a witness, and the jury had a right to know that Oscar "had no concept of a duty to tell the truth." (AOB 161-163.) The People disagree. First, Sanchez has forfeited this claim because he did not argue it at the trial level. Second, Oscar's statements to the prosecution's investigators and at the first two trials were not relevant to the jury's determination of Oscar's credibility.

In arguing that the trial court erred by excluding evidence, Sanchez is limited to theories he presented at trial; in other words, he cannot assert new reasons on appeal why the evidence should have been admitted. (§ 354, subd. (a); *People v. Marks* (2003) 31 Cal.4th 197, 228; *People v. Hill* (1992) 3 Cal.4th 959, 989.) Here, the defense never argued that the court should admit Oscar's previous statements to the prosecution's investigators or his prior testimony because it did not constitute hearsay. Instead, throughout the entire discussion on the issue, defense counsel argued that Oscar should be declared unavailable and his prior testimony read into evidence (59 RT 12007-12012); that his previous statements constituted past recollections recorded (59 RT 12014-12030, 12154); and that his previous statements constituted prior inconsistent statements (64 RT 13155-13159; 66 RT 13442-13445). Sanchez has thus forfeited his claim on appeal.

Regardless, Sanchez cannot prevail because Oscar's prior statements were not relevant for the jury's credibility determination. "Relevant evidence" is defined in section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence is relevant if it tends "logically, naturally, and by reasonable inference" to establish a material fact. (*People v. Hamilton* (2009) 45 Cal.4th 863, 913.) The jury's duty was to determine Oscar's credibility at the time of the current trial and when he gave

statements on the day his mother died. Oscar's statements to the prosecution's investigators and testimony at the first two trials were not relevant to establish Oscar's credibility on those two days.

Throughout trial, Sanchez mounted a defense against Oscar's testimony and against the statements he made on the day of the murders, including Oscar's identifications of him. Sanchez argued that because of Oscar's age and development, he was susceptible to confabulation, and that the jury should not trust his testimony and prior statements because they did not represent what Oscar actually perceived. The defense asserted that Oscar filled in the gaps of his memory with information he overheard from the conversations around him at his Aunt Rosa's house, and with information his therapist, Wanda Newton, told him was true during their therapy sessions. (76 RT 15233-15234, 15239-15240.)

To prove his theory that Oscar's testimony and statements to the police were tainted, the defense introduced evidence about the conversations at Rosa's house and Oscar's proximity to them. (See Arg. IV, part B(2), *ante.*) The jury heard evidence about all of Oscar's statements to the police on the day his mother died. (13 CT 3514; 64 RT 13203-13208, 13220-13223, 13235.) The defense also introduced evidence of Newton's therapy sessions with Oscar, including their topics of conversation and Newton's responses when Oscar would say something that Newton did not think was accurate. (60 RT 12195-12197; 74 RT

14765-14810.) Finally, the defense introduced expert testimony about the effect Oscar's age and development had on his ability to perceive, understand, and relate his perceptions. (71 RT 14334-14379.) All of this evidence was relevant to Sanchez's defense that Oscar's statements to the police and his testimony at trial may have been contaminated by others. The defense did not allege that Oscar purposefully lied to police officers on the day of the murders or during testimony, only that his perceptions had been affected by outside influences.

To properly evaluate whether Oscar's statements to the police and his testimony at the third trial were affected by outside influences, the jury only needed to compare Oscar's statements and testimony with the evidence presented regarding the conversations at Rosa's house and how Newton interacted with Oscar during their sessions. If Oscar's statements or testimony appeared to reflect the information communicated by these influences, then the evidence would tend to prove that Oscar had been contaminated. On the other hand, if Oscar's testimony and statements did not reflect the information communicated by these influences, then it would tend to prove that Oscar's perceptions were not contaminated. The jury did not need to consider Oscar's statements to the prosecution's investigators and his previous testimony to determine whether his current testimony or his statements on the day of the murders had been affected by outside influences. The only purpose Oscar's prior statements and testimony had,

was to show Oscar's state of mind at the time those statements were made, and not his state of mind at the time of the murders or at the time of his testimony at the third trial.

Sanchez argues that Oscar's statements to the prosecution's investigators and his previous trial testimony was relevant because it showed that Oscar "had no concept of a duty to tell the truth." (AOB 162.) However, capacity to understand the duty of truthful testimony is a preliminary fact to be determined exclusively by the court. (*People v. Anderson, supra*, 25 Cal.4th at p. 573.) Thus, it is not the jury's duty to determine whether Oscar understood his duty to tell the truth, but to instead determine whether Oscar's perceptions as related by him on the day his mother died and at the time he testified at the third trial were credible. Oscar's interview with the prosecution's investigators and his previous testimony did not assist the jury in making this determination because those statements were attenuated by time and circumstance from Oscar's initial statements and testimony at the third trial.

As the trial court found, the events of the murders were not fresh in Oscar's mind when he talked with the prosecution's investigators. (60 RT 12154.) In fact, three months had passed since the murders, and Oscar was

mentally processing much upheaval in his life.²² Oscar's statements to the prosecution's investigators were relevant to show his state of mind on the day he made those statements, a credibility determination irrelevant to the determination of whether Oscar's statements on the day of the murders or at the third trial were credible.

The same is true of Oscar's testimony at the first two trials. Oscar's testimony at the first two trials occurred many months and more than a year after the murders and at a time when Oscar was again going through much emotional turmoil.²³ Oscar's testimony at the first two trials was relevant to show his state of mind on the days of that testimony, and whether his cognitive ability was affected at those times. The passage of time and the evolving circumstances in Oscar's life affected his state of mind differently throughout the years between the murders and the third trial. Thus, Oscar state of mind at the first two trials was necessarily different from his state of mind at the third trial.

²² Less than a month after the deaths of his mother and sister, Oscar moved to Idaho to live with a father he had never spent any time with and who could not communicate with him well. (5 RT 955; 66 RT 13487.) He left behind the only family he had ever known and lived with a stepmother who abused him. (4 RT 690; 6 RT 1134-1135; 66 RT 13497.) Oscar was then diagnosed with posttraumatic stress disorder, based on symptoms showing he could not hold his bladder and pulled out his own hair. (4 RT 690; 6 RT 1134-1135.)

²³ Before the first trial, Oscar was adopted by the Fennell family and went to therapy to process his mother's and sister's deaths. (5 RT 957, 962-963.)

In sum, the prosecution presented evidence of Oscar's statements on the day of the murders and at the third trial to prove Sanchez's guilt. The defense did not allege or try to prove that Oscar intentionally lied on those two days, only that Oscar's perceptions on those two days were not credible because they were contaminated. To determine the extent to which Oscar's perceptions were contaminated, the jury needed only to compare those perceptions with the alleged contaminants. This comparison gave the jury an accurate view of Oscar's state of mind on the day of the murders and at the third trial. Evidence of Oscar's prior statements and testimony was relevant only to his state of mind on the days he made them, and not as to the statements the prosecution relied on at the third trial. Accordingly, Oscar's prior testimony and interview with the prosecution's investigators were not relevant.

C. Oscar's Prior Statements Were Not Inconsistent With His Trial Testimony

Sanchez argued to the trial court that Oscar's interview with the prosecution's investigators and his prior testimony constituted prior inconsistent statements in relation to his current testimony. The court ruled that Oscar's prior statements were not inconsistent because Oscar simply did not recall what had happened. Further, the court found that Oscar was not being deliberately evasive. (64 RT 13156, 13158-13159; 66 RT 13443; 67 RT 13657.) Oscar identified appellant, but also identified the man the

parties knew as Marcos Pena as being in his mother's room. (66 RT 13443-13444.) Further, Oscar had no motive to be evasive during testimony. (67 RT 13657.)

Sanchez brings this same claim on appeal. (AOB 163-167.) He argues that it does not matter whether Oscar's memory loss was genuine, because his statements were sufficiently inconsistent in effect to warrant admission. (AOB 166.) The People disagree. Oscar's lack of recall did not amount to a material inconsistency with his prior statements.

Additionally, because Oscar was not deliberately evasive when he failed to remember the events surrounding the murders, his statements were not sufficiently inconsistent to warrant admission pursuant to section 1235.

Section 1235 states, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Prior inconsistent statements are admissible under this provision to prove their substance as well as to impeach the declarant. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.) The "fundamental requirement" of section 1235 is that the statement be inconsistent with the witness's trial testimony. (*People v. Homick* (2012) 55 Cal.4th 816, 859.) "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement" (*Ibid*, citing *People v. Cowan, supra*, 50 Cal.4th at p. 462.) A witness's refusal to answer may be

materially inconsistent with prior statements, exposing the witness to impeachment under section 1235. (*In re Deon D.* (1989) 208 Cal.App.3d 953, 961.) However, if a witness is deliberately evasive, a denial of prior statements is implied, “which creates inconsistency in effect and authorizes admission of the witness’s prior statements under Evidence Code section 1235” (*People v. Perez* (2000) 82 Cal.App.4th 760, 764.) This Court reviews the trial court’s rulings on the admission of evidence for abuse of discretion. (*People v. Homick, supra*, 55 Cal.4th at p. 859.)

Sanchez argues that Oscar’s intent to be evasive does not matter because his testimony was inconsistent in effect with his prior statements. Sanchez does not argue that Oscar’s statements were explicitly inconsistent, just that the whole of his testimony gave the impression, consistent with the prosecution’s theory, that one person murdered Oscar’s mother and sister. This is materially inconsistent, Sanchez argues, with Oscar’s prior statements claiming to have seen multiple people at his mother’s house. (AOB 166.)

At the third trial, Oscar testified about the events he remembered, which began when he woke up and saw his mother laying on the floor and his sister “kind of sitting.” (59 RT 11983.) When asked by defense counsel, Oscar identified both Sanchez and Marcos Pena as being at his mother’s house the day she died. (60 RT 12216-12217, 12227-12228.) He also testified that he did not recall whether other people were at his house

while he was sleeping, or whether anybody was in his mother's room at the time of the murders. (60 RT 12188, 12194, 12206-12207.) Oscar's testimony did not negate the defense's theory that more than one person could have been at Ermanda's house or that the person inside of Ermanda's house when she died was not Sanchez. Oscar's testimony inculpated Marcos Pena in the murders, thus contradicting the prosecution's theory that Sanchez was the lone murderer. Contrary to Sanchez's contention, Oscar did not testify according to the prosecution's theory that one person killed Ermanda and Lorena. (AOB 166.) Thus, Oscar's inconsistencies were not material, and Sanchez cannot demonstrate inconsistency in effect as required by section 1235. (*People v. Homick, supra*, 55 Cal.4th at p. 859; *In re Deon D., supra*, 208 Cal.App.3d at p. 961.)

Neither can Sanchez show that Oscar's failure to recall certain events of the murders amounted to an implied inconsistency. Sanchez argues that the record supports a finding that Oscar was being deliberately evasive during testimony because he had demonstrated greater recall at the prior trials, and his pattern of responses showed deliberate avoidance. (AOB 165.) Contrary to Sanchez's claims however, the record supports the court's finding that Oscar was not being deliberately evasive. (64 RT 13156, 13158-13159; 66 RT 13443; 67 RT 13657.)

While Oscar's testimony at the prior trials contained more descriptions of what he thought happened, his testimony cannot be

described as greater recall of the events surrounding the murders. As Sanchez acknowledges, Oscar's testimony at the first two trials was "inherently or demonstrably false." (AOB 163.) His prior testimony and interview did not demonstrate that he recalled the events in question but was deliberately failing to describe those events at the third trial. Oscar's prior statements demonstrated his lack of ability to recall at the time those statements were made. By the time of the third trial, Oscar's ability to recall the events of his mother's death greatly improved as demonstrated by his own testimony. Oscar did not testify in a confused and disjointed manner as Newton testified he did when uncomfortable with the topic of conversation. (5 RT 974, 979.) His testimony was also corroborated by independent evidence, which was not necessarily the case with all the statements he made to the prosecution's investigators and at the first two trial. (See Arg. IV, *ante*.) Because Oscar's prior perceptions were not corroborated by independent evidence, they do not support Sanchez's contention that Oscar demonstrated greater recall of the events of his mother's death during his interview with the prosecution's investigators or at the first two trials.

Also, Oscar's pattern of responses did not demonstrate evasion. The court noted that Oscar did not have a motive to evade questioning. (67 RT 13657.) The court also noted that Oscar did not give testimony favorable to one party, while refusing to answer questions or incompletely answering

questions to the other party—Oscar gave similar testimony to both the prosecutor and defense counsel. Although Oscar testified that he remembered seeing Sanchez on the day his mother died, he testified on cross-examination that he also saw the man the parties knew as Marcos Pena in his mother's room. (66 RT 13443-13444.) Oscar also testified about his therapy sessions with Newton when asked by defense counsel, thus not deliberately undermining Sanchez's defense that Oscar's testimony had been contaminated by his therapy sessions. (60 RT 12195-12196.)

Oscar also experienced lack of memory when questioned by both parties and was not obviously selective of the information he related. Oscar told both defense counsel and the prosecutor that he did not remember certain events of the murders. (59 RT 11978-11979, 12002; 60 RT 12194, 12218-12219.) He told the prosecution that he did not remember specifics of where he saw Sanchez or when Sanchez brought him ice cream. (60 RT 12218-12219.) Similarly, while Oscar told defense counsel that he did not remember the contents of many of his past statements, including his trial testimony, Oscar did tell defense counsel what he remembered about his aunt's house and what he saw in his mother's house. (59 RT 11979-11987.) In sum, the record supports the trial court's ruling that Oscar was not deliberately evasive, because his answers were not designed to benefit a particular party and his recall of the relevant events was similar on both direct and cross examinations. Because Oscar's testimony was not

materially inconsistent with his prior statements and he was not being deliberately evasive, his prior testimony and interview were not admissible under section 1235.

D. Oscar's Prior Testimony Was Not Admissible Under Sections 1291 and 240, Because Oscar Was an Available Witness

One of Sanchez's theories upon which he wished to introduce Oscar's prior testimony was to have Oscar declared unavailable based on his lack of competency and present recollection of the events he testified about. (59 RT 12004-12006.) In response, the prosecutor argued that Oscar's lack of recollection was not grounds to declare him unavailable, and that Oscar in fact remembered a sufficient portion of the events from the night of his mother's murder. (59 RT 12007-12008.) The prosecutor acknowledged that Oscar did not recall some events; however, "these are mostly in areas that were developed well after the incident, and I think very well may have been things that were speculation on his part at later points in time after – after the murder." (59 RT 12008-12010.) The court ruled that Oscar was not unavailable and, had not lost memory of all the relevant events surrounding the murders. (59 RT 12012; 64 RT 13160-13161; 66 RT 13442-13443.)

Sanchez renews his claim on appeal and argues that Oscar's prior testimony was admissible as statements made by an unavailable witness. (AOB 167-169.) Sanchez cites *People v. Alcalá, supra*, 4 Cal.4th at p. 778,

for the proposition that a witness who testified in detail at one trial, but “claims a complete inability to recall relevant events at retrial is ... ‘unavailable.’” (AOB 168.) Sanchez argues that, like the witness in *Alcala*, Oscar’s memory loss was due to the trauma of witnessing the murders, and because this memory loss was so vast, he was unavailable. (AOB 168.) The People disagree.

In *Alcala*, the witness was declared unavailable under section 240, subdivision (a)(3), which defines witness unavailability to include being “unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.” (*People v. Alcala, supra*, 4 Cal.4th at p. 778.) The witness had been diagnosed as suffering from “posttraumatic stress disorder chronic delayed,” which manifested with “memory impairment arising at least six months following the initial trauma.” (*Id.* at p. 776.) This “infirmity” caused a “complete loss of memory with regard to the events that related to this case.” (*Id.* at p. 775.) This infirmity and the resulting total loss of memory regarding the relevant events led this Court to determine that the witness was unavailable. (*Id.* at p. 778.) But Sanchez’s reliance on *Alcala* is misplaced because Oscar had no “mental illness or infirmity” and no total loss of memory.

When Wanda Newton started her therapy sessions with Oscar in November 1997, she diagnosed him with posttraumatic stress disorder. (6 RT 1133-1134.) By the time of Oscar’s testimony in October 1999, it

did not appear that Oscar suffered as he had before from the symptoms of posttraumatic stress disorder. Oscar no longer suffered from a weak bladder or pulled out his own hair (6 RT 1133-1134), and he no longer lived with the stepmother who abused him. In fact, his therapy sessions with Newton had reduced to about twice a month. (60 RT 12195-12196.)

Oscar was five years old when he witnessed his mother walk into her bedroom followed by her murderer. (13 CT 358; 64 RT 13204-13205.)

Two years had passed before his testimony at the third trial, and in the interim much had occurred in Oscar's life, including moving to another state, being abused by his stepmother, and being adopted by the Fennels. (5 RT 955.) The People note these events because they show that Oscar was navigating a myriad of traumatic experiences that necessarily pulled focus from processing the experiences surrounding his mother's death. The court did not find that Oscar suffered from a mental infirmity, because this evidence did not support the theory that Oscar had a mental infirmity.

Oscar's lack of memory appeared simply to be the result of the passage of time, Oscar's age, and the other experiences in his life. Thus, Oscar was not unavailable due to a mental infirmity effecting his memory.

Also, unlike the witness in *Alcala*, Oscar did not suffer from a total loss of memory regarding the relevant events of the case. Sanchez acknowledges that Oscar's case is not like *Alcala* because Oscar had a "near-total memory loss" when testifying (AOB 168.), and not a complete

memory loss. (*People v. Alvala, supra*, 4 Cal.4th at p. 775.) Sanchez argues however, that Oscar's memory loss was pertained to the relevant events of the case and should be sufficient under the reasoning of *Alcala*. (AOB 168.)

Oscar's entire testimony at the third trial shows that he in fact recalled much of the relevant events that occurred on the day of the murders. Although Oscar did not recall his mother walking into the room and falling to the ground or how many people were in the room with her, he did remember his mother laying on the ground and his sister "kind of sitting" (59 RT 11984), Sanchez being at the house that day (60 RT 12216-12218), Sanchez bringing him ice cream (60 RT 12219), and the process of summoning his aunt, returning to his house, and eventually ending up at her house (59 RT 11984). Oscar also remembered being at his aunt's house with other people, which was relevant to Sanchez's defense that Oscar was contaminated by conversations he overheard there. (59 RT 11984-11988, 12028.) This testimony does not constitute a "near-total memory loss," let alone a complete memory loss as was the case in *Alcala*. (See *Alcala, supra*, 4 Cal.4th at p. 775.) Thus, Oscar was not unavailable, and the court properly denied Sanchez's request to declare him as such.

Even if Oscar was unavailable and his prior testimony was admissible under section 1291, subdivision (a), it would still be inadmissible under subdivision (b) of the same section. "The admissibility of former testimony

under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing” (§ 1291, subd. (b).) As explained above, Oscar’s testimony at Sanchez’s first two trials was not relevant to his credibility at the third trial or when he made statements on the day of the murders. (See Arg. V, part B, *ante*.) Accordingly, even if Oscar had been declared unavailable, his prior testimony was still inadmissible because of its lack of relevance.

E. Oscar’s Prior Statements Were Not Admissible as a Past Recollection Recorded

Sanchez also sought to introduce Oscar’s interview with the prosecution’s investigators on the basis that Oscar’s statements constituted past recollections recorded. The court held a section 402 hearing to determine whether the events of the murders were fresh in Oscar’s mind when he gave statements to the prosecution’s investigators. (60 RT 12137.) At the time of Oscar’s testimony at the third trial, “some” things were “kind of clear” to him, but he had forgotten some things too. (60 RT 12143.) When Oscar talked to the prosecution’s investigators, approximately three months after the murders, he “didn’t forget all of” the things he knew on the day his mother died. (60 RT 12143-12144.) The court ultimately ruled that Oscar’s statements to the prosecution’s investigators were not made when the events were fresh in his mind, because Oscar stated that he forgot

things that had happened at his mother's house by the time of the interview. The court also ruled that the statements were not reliable. (60 RT 12154.)

Sanchez renews his argument on appeal. (AOB 169-170.) The People disagree because, as the trial court found, the events of the murders were not fresh in Oscar's mind when he made the statements contained in his interview with the prosecution's investigators, nor were his statements reliable. (60 RT 12154.)

As described above (Arg. IV, part D), section 1237 permits evidence of a witness's past statement if the witness lacks sufficient present recollection, the statement would otherwise be admissible, and the writing containing the statement meets four criteria for admission. This criteria includes: (1) that the events recorded in the writing were fresh in the witness's memory; (2) the writing was made for the purpose of recording the witness's statement; (3) the writing was offered after the witness testified that the statement was a true statement of fact; and (4) the writing was offered after it was authenticated as accurate. (*People v. Cowan, supra*, 50 Cal.4th p. 465.)

As shown in section B of this argument, Oscar's prior statements were not relevant to the jury's credibility determination. Thus, the statements were not "otherwise admissible," and were properly excluded pursuant to section 1237.

Even if relevant, Oscar's statements were still inadmissible under section 1237. Sanchez argues that, contrary to the court's finding, the events of the murder were fresh in Oscar's mind when interviewed by the prosecution's investigators in November 1997. (AOB 169.) Sanchez cites *People v. Cowan* for support. In *Cowan*, this Court held that a three month lapse between the events and the taking of the statement was not by itself a sufficient reason to suppress the statements due to the lack of freshness. (*Cowan, supra*, 50 Cal.4th at p. 466.) However, this Court also stated that it would "consider all pertinent circumstances in determining whether the matter was fresh in the witness's memory when the statement was made." (*Ibid.*, citing *United States v. Patterson* (9th Cir. 1982) 678 F.2d 774, 779.) This Court then analyzed the witness's statements and found them "fairly detailed," which was supported by the witness who "had sufficient recollection to lead [the investigator] to the house in which he had seen the items." (*Cowan, supra*, 50 Cal.4th at p. 466.)

Here, more evidence than a three month time lapse showed that the events were not fresh in Oscar's mind when he was interviewed by the prosecution's investigators. Oscar was five years old at the time of the murders. (13 CT 358.) During the three months following the murders, Oscar was taken from his home and moved to Idaho with the father he had never known and was abused by his stepmother. (5 RT 955.) Given these experiences, along with witnessing his mother's and sister's murders,

Oscar's therapist diagnosed him with posttraumatic stress disorder around the same time he was interviewed. (6 RT 1133-1134; 74 RT 14761.)

Further, the statements Oscar made during the interview were not corroborated by his statements on the day of the murders. (See Arg. V, part B, *ante*.) This showed that the events as remembered were not fresh enough to remain as initially reported. Given Oscar's age, mental development, and traumatic experiences, he could not freshly recall the events of the murders when interviewed by the prosecution's investigators.

Further, the statement itself was not "fairly detailed" nor were the recollections sufficient enough to help investigating officers, as were the facts presented in *Cowan*. (*Cowan, supra*, 50 Cal.4th at p. 466.) Oscar related impossible scenarios that were not supported by the evidence at the crime scene. For example, Oscar said that he saw worms in his mother's body (2 CT 512); that his mother left the house during the attack and came back with someone else (2 CT 512, 518); that Sanchez's friends were at Oscar's house and broke his toys (2 CT 521-522); that Sanchez hurt Oscar with his feet, hit him in the stomach, and tied him up with a rope (2 CT 525-527) and that Victor was at the house during the murders and pulled Sanchez's hair while Oscar poured water on the floor so Sanchez would slip and fall (2 CT 527-528).

Oscar also contradicted himself and admitted in the interview that some of the statements he had made were not true. Oscar acknowledged

that Victor was not home when their mother and sister died, after he initially stated that Victor was there. (2 CT 528.) Oscar also said Sanchez was alone at his house, but later said Sanchez was there with five of his friends. (2 CT 259.) Oscar's contradictions and implausible scenarios showed that he did not freshly recall the events of his mother's death. Thus, the court properly found that the events were not fresh in Oscar's mind when he was interviewed by the prosecution's investigators.

For the same reasons, Oscar did not have sufficient recall of the events contained in that interview so that he could be adequately cross-examined about them. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1293-1294.) During the interview, Oscar articulated the events that led to his mother's and sister's deaths. He said that Sanchez's five friends were at his house breaking things while Sanchez hurt his mother. (2 CT 522.) He also said that Sanchez kicked him, hit him in the stomach and tied him up with a rope. (2 CT 525-527.) Finally, Oscar said that Victor was at home at the time of the murders. (2 CT 527.) Oscar had no recall of those events at the third trial. He stated that he did not remember how many people were in the house, if he got hurt, or if anyone was there with a weapon. (60 RT 12188-12189, 12196-12197.) In fact, Oscar did not recall any of the events that occurred prior to seeing his mother laying on the ground that he described in his interview with investigators. Because Oscar could not remember the events he articulated in the recording, he could not be

adequately cross-examined about those events. (*Cowan, supra*, 50 Cal.4th at p. 466.) Thus his statements to the investigators were inadmissible under section 1237.

F. Sanchez Was Not Denied His Right to Confront Oscar and Present a Defense Because He Was Given a Meaningful Opportunity to Cross-Examine Oscar

As was discussed in detail, Sanchez was not denied an opportunity to cross-examine Oscar and present a defense. (See Arg. I, part C(1), *ante*.) The jury heard Oscar's entire noon interview with Sergeant Dempsie and evidence regarding the environments at Rosa's house while Oscar was there. (See Arg. II, part A(4)(b), *ante*; 13 CT 3514-3522.) This, combined with other statements Oscar made to police on the day of the murders, gave the jury abundant information concerning Oscar's credibility and reliability on that day. (64 RT 13204-13207, 13221-13223, 13278.) Also, the jury heard evidence about Oscar's therapy sessions (60 RT 12195-12196, 74 RT 14759-14810) and expert testimony regarding the development and general reliability of a child Oscar's age. (71 RT 14434-14379.) Accordingly, Sanchez's right to confront Oscar and to present a defense was not violated by the court's ruling.

G. The Purported Error Was Harmless

As discussed extensively, ample evidence existed outside of Oscar's statements to police on the day of the murders and his testimony to convict Sanchez of the murders. (See Arg. I, part C(2), *ante*.) Thus, had Oscar's

prior statements been used to impeach him, no better outcome would have resulted under any standard.

Sanchez argues that “the evidence of appellant’s guilt at all three trials was essentially the same – Oscar’s identification and appellant’s confession.” (AOB 176.) Sanchez reasons that because this jury was not allowed to hear Oscar’s prior statements, as the other two juries did, this was the reason this jury found him guilty. (AOB 175-176.) The People disagree. At the other trials, the prosecution was unable to present evidence that Sanchez was not at his home and was in fact near Ermanda’s house at the time of the murders. (55 RT 11346-A-11347-A.) Hector’s statements to Ruiz that he saw Sanchez at 5:00 on the morning of the murders did not come to the prosecution’s attention until after the first two trials. (54 RT 11306-11307.) This evidence contradicted Sanchez’s alibi that he was in bed asleep with his wife at the time of the murders. Further, the jury at the third trial also heard evidence that Raul Madrid returned a gun matching the murder weapon to Sanchez a week before the murders. (62 RT 12606; 76 RT 15181.) This evidence had not been admitted at the first two trials. These two items of evidence placed the whole of the evidence in a different light and made a meaningful difference in this jury’s verdict.

Sanchez argues that the prosecution relied heavily on Oscar’s prior statements during its closing argument. This is not supported by the record. The prosecution talked about Oscar’s testimony and how Oscar did not

remember much of what had happened the day of his mother's murders. (76 RT 15156-15157.) However, a majority of the prosecution's closing argument focused on Sanchez's lies during his police interviews and his trial testimony. The prosecution urged the jury to compare Sanchez's lies with the other evidence to show that Sanchez was not credible. (76 RT 15164-15167, 15171-15172.) The prosecution urged the jury to examine Sanchez's statements about the knife and compare them to the evidence, which would disprove Sanchez's claim that he had lost the knife before the murders occurred. (76 RT 15176-15178.) The same was true for the gun Sanchez told officers that he did not own, but the evidence showed that he did. (76 RT 15180-15181.) Finally the prosecutor pointed to the evidence showing that Sanchez had been to Ermanda's house far more times than he claimed (76 RT 15182-15183), before reciting Sanchez's other lies during interviews and during his testimony (76 RT 15184-15194). Whether Oscar's current testimony could be impeached with his prior statements, which held little probative value (See Arg. V, part B, *ante*), would not have changed the verdict given the other evidence the prosecution addressed in its closing argument.

Sanchez finally argues that his counsel's credibility was cast in a "bad light" because she promised the jury that it would hear evidence about Oscar's claims to multiple people that he had seen "four or five assorted people" commit the crime, but was unable to do so because of the court's

ruling. (AOB 175-176.) But defense counsel's credibility was not cast in a bad light, because counsel in fact did present evidence of these statements. Oscar's entire noon interview with Sergeant Dempsie was admitted into evidence. During this interview, Oscar stated that he saw a lot of people in his house. (13 CT 3516.) Oscar also stated that he saw Sanchez at his house with "Michael," who had long hair. (13 CT 3519-3520.) Jose Hernandez testified that Oscar told him that there were three men in the house the night his mother died. (66 RT 13489.) He said that their names were "Juan" and "Marcos" or "Michael." (66 RT 13491.) Oscar also told Lola Ortiz that he saw "Juan" the night of the murders with his mother's mechanic and Lorena's boyfriend, whom he called "Big Man." (70 RT 14275-14278.) Oscar also said that "Domingo" was there. (70 RT 14289.) Finally, in response to cross-examination, Oscar identified Marcos Pena, as well as Sanchez, as being in his mother's room the night of the murders. (Def. Exh. Q; 1 SCT 33; 60 RT 12227-12228.) This evidence delivered on the promise made by defense counsel—that Oscar named multiple people as being in his mother's room and that his perceptions of the murders changed. (52 RT 11049-11051.)

Given the strong evidence proving Sanchez's guilt and evidence pertaining to Oscar's credibility at the time he testified and on the day of his mother's murder, Sanchez was not harmed by the exclusion of Oscar's prior statements. The statements held little, if any, probative value and

would not have resulted in a better outcome. Thus, the purported error was harmless under any standard.

VI. THE TRIAL COURT PROPERLY RESTRICTED THE TESTIMONY OF DEFENSE EXPERT DR. SUSAN STREETER BECAUSE OPINION TESTIMONY REGARDING THE CREDIBILITY OF A WITNESS IS NOT A PROPER SUBJECT FOR EXPERT TESTIMONY, MAKING ANY HEARSAY STATEMENTS SUPPORTING THAT OPINION IRRELEVANT

Sanchez argues that the trial court erred when it limited the testimony of defense expert, Dr. Susan Streeter, by preventing her from testifying about Oscar's hearsay statements to support her belief that Oscar's perceptions were unreliable. Sanchez argues that this ruling prevented Dr. Streeter from explaining how her expert testimony applied to Oscar's reliability and competency. (AOB 178-179.) The People disagree. The credibility of a witness is a question meant exclusively for the jury and not the proper subject matter of expert testimony. Because the expert's opinion regarding Oscar's credibility was improper, any hearsay statements supporting that opinion were irrelevant and constituted incompetent hearsay.

A. Background

1. In limine motion

At Sanchez's third trial, the prosecution objected to any testimony by Dr. Streeter concerning Oscar's reliability, competency, and truthfulness. The People argued that Oscar's reliability and truthfulness were ultimate

issues left to the trier of fact. (70 RT 14191.) The prosecution further argued that Dr. Streeter's opinion that Oscar's testimony was tainted by others was speculation. In sum, the prosecution argued, it was permissible for Dr. Streeter to testify concerning how a five-year-old child's perceptions might be tainted by adults around him or her, but testimony specific to Oscar was not permissible. (70 RT 14192-14193.)

As an offer of proof, defense counsel stated that Dr. Streeter would testify that she examined all available statements of Oscar, including statements made on the day of the incident until trial, and observed his demeanor during testimony. Dr. Streeter would testify that Oscar was incompetent and did not know the difference between the truth and lie at the time he gave his statements on the day his mother died. She would also testify that his reliability at the time of trial was affected by his age and the fact that his perceptions and recollections were tainted by other sources. (70 RT 14192.) Additionally, she was expected to testify to the factors that created contamination in a young child's perception. Defense counsel acknowledged that the hypothetical questions she wished to ask Dr. Streeter consisted of Oscar's statements that were excluded from evidence. (70 RT 14196.)

The trial court ruled that Oscar's reliability as a witness was a question for the trier of fact and analogized the issue to the one found in *People v. Page* (1991) 2 Cal.App.4th 161. (70 RT 14195.) The court

explained that the *Page* court limited expert testimony regarding the reliability of a confession to the “factors that may affect reliability.” (70 RT 14197.) The factual issue of whether the confession was reliable, was an issue “that the jurors could answer as easily as the expert.” (70 RT 14197.) The court then limited Dr. Streeter’s testimony to the general principles affecting the reliability and credibility of a child Oscar’s age. (70 RT 14197-14198.)

Defense counsel stated that she intended for Dr. Streeter to “state what factors she observed in the history of the child’s development from August 4, 1997, through the two trials – the three trials, the indicia or indicators that support her – her belief that the minor was in that state of fantasy, confabulation during the time that he made his observations about Juan Sanchez.” (70 RT 14201.) Defense counsel then voiced the intent to introduce Oscar’s prior statements from Sanchez’s first two trials and the interview with the prosecution’s investigators into evidence through Dr. Streeter as evidence of Oscar’s confabulatory state. (7 RT 14202-14203.)

The court denied that request. It ruled that Oscar’s prior statements constituted incompetent hearsay that could not be introduced to the jury in the form of a hypothetical question. (70 RT 14203.)

2. Dr. Streeter’s trial testimony

Dr. Streeter testified that she is a psychologist specializing in children and adolescent behavior. (71 RT 14334-14336.) In preparation for her

testimony, Dr. Streeter reviewed the court testimony of Oscar, Wanda Newton, Oscar's new mother Nancy Fennell, and Oscar's biological father Jose Hernandez. Dr. Streeter had also reviewed police reports, Wanda Newton's notes, Oscar's school reports, district attorney reports, and a behavior health report. (71 RT 14344-14345.)

Typically, a five-to-seven year-old child has fluid thought processes that jump around more frequently than an older child or adult. Five-to-seven year-old children use their imagination more often and can easily confuse fantasy with reality. (71 RT 14345-14346.) This includes merging events that occur over the course of several hours or several days. (71 RT 14346, 14354.) Children of this age may "confabulate," which means to fill in the blanks of their understanding with information from their own thoughts or information from their environment. They are also easily influenced by the adults around them. (71 RT 14346-14347.) Once a child enters the eight-to-ten year range, they tend to rely on their imagination a lot less and are reality oriented. (71 RT 14352.)

Five-to-seven year olds should be capable of remembering and reporting what they see. However, if a child is impaired in some way, then his or her cognitive ability may be affected. (71 RT 14347-14348.) The factors for assessing cognitive ability include a child's language processing skills and the extent to which the child imitates something they have heard. A child who has impaired cognitive ability tends to parrot explanations he

or she has heard without the ability to analyze them and does not understand questions containing more than four words. (71 RT 14348-14349.) Further, a child in the five-to-seven year range does not have the ability to distinguish between something they know from their memory and something they have heard from another source. (71 RT 14349.)

If a child is able to report events, but later says he does not remember them, it could be the result of the child being tired of talking about the subject, or the child could have short or long term memory problems. It could also indicate that the child is confused about whether he even saw the events in the first place. (71 RT 14355-14356.) The response "I don't recall" could be the result of cues sent to him from adults pressuring him in some way. Children are very adept at giving an adult what that adult wants, especially if the child knows what the adult wants. (71 RT 14356-14357.)

Depending on the circumstances, it may not be appropriate for a counselor to refresh a child's lost memories. (71 RT 14373-14374.) When an adult challenges a child's memory, it tells the child that the adult does not believe him. This could lead the child to believe that what the adult is saying is more important than the child's memory, thus causing the child to adopt the content of the challenge over his or her own memory. (71 RT 14374-14375.) If an adult told a child that it was okay to not remember, and all that child had to do was say they do not remember to stop talking about the event, then the child would interpret that to mean, that by saying

he did not remember something, he did not have to talk about it. (71 RT 14378-14379.)

To assess the credibility of a child's statement, Dr. Streeter recommended looking at the child's construction of narratives to see if the narrative makes sense in an adult's reality. Dr. Streeter also recommended considering whether the details follow what is to be expected in the normal course of events. Finally, Dr. Streeter would assess whether the child could be filling in the details with his or her internal resources. (71 RT 14377-14378.)

3. Evidence relating to possible influences on Oscar's perceptions²⁴

When Wanda Newton started treating Oscar in November 1997, he was "very frightened and withdrawn" with Newton and had several bald spots from pulling out his own hair. (74 RT 14761-14762.) Her goal for Oscar was to help him sort through the recent losses in his life and "grow up with his memories." (74 RT 14763.) To do this, Newton and Oscar talked about Oscar's history, including his mother's and sister's deaths. (74 RT 14765-14766.)

²⁴ Evidence of Oscar's therapy sessions with Newton are discussed in depth in Argument I, part A(4)(c). The environment at Rosa's house after the discovery of the bodies is discussed in depth in Argument II, part A(4)(b) through (c).

The two talked about Sanchez, but Oscar forgot his name on occasion and describe him as “the man that was in the house that night that my mom died.” (74 RT 14766-14767.) Newton did not remind Oscar of Sanchez’s name. On one occasion, Oscar drew a picture of the man he saw in his mother’s room. (74 RT 14767-14768.) Oscar told Newton that he remembered that the man’s hair was shaved around the bottom and stood up on the top of his head. (74 RT 14769-14770.)

On March 3, 1998, Newton and Oscar discussed Oscar’s mother’s death. Early in the session, Oscar told Newton that “Juan” did not shoot his mother. Later in the session, Oscar looked under the couch and said that he was “talking” to his mother. He said that his mother wanted him to tell Newton that she was not shot. (74 RT 14775-14776.) Newton then told Oscar that he needed to tell the truth. (74 RT 14776-14777.) Although telling a child that you do not believe them could cause them to reject one thought for another, Newton did not believe that that happened here. Newton saw that Oscar was being playful to avoid talking about things that happened, so she told him to tell the truth and not to play. (74 RT 14777-14778.)

During another session, Oscar told Newton that he did not think “Juan” shot his mother. He thought that his mother had cut herself with a knife, and that she just bled and died. (74 RT 14804-14805.) He did say,

however, that “Juan” took the phone from his mother. (74 RT 14779-14780.)

Newton had no knowledge of the facts surrounding the murders. (74 RT 14805.) She and Oscar had an ongoing discussion about what was real and talked about why Oscar’s memories changed between sessions. Oscar would frequently tell Newton that he did not remember things about his mother’s death and would express confusion about his memories of the day of the murders. (74 RT 14804-14805.)

People present at Rosa’s house following the murders also testified to possible influences on Oscar. As described in detail in Argument II, Oscar did not hear the conversation between Rosa and the 911 operator. In fact, Rosa did not have a prolonged or detailed conversation with the operator or anyone else in the house. Instead, Rosa simply told others that there was an “incident” at Lorena’s house. (6 RT 1043, 1061.) Further, once Oscar was inside of Rosa’s house, he went to a back bedroom and watched a movie, and he did not discuss the murders until police officers arrived. (6 RT 1042-1043, 1070-1071.)

Other witnesses – including Orosco, Michael Martinez, Michelle Chandi, Benny Martinez, Efrain Martinez, and Neal Scott Smith – all testified that they did not hear anyone speculate about who could have murdered Ermanda and Lorena. (5 RT 785, 788-789; 62 RT 12728-12729; 65 RT 13344; 68 RT 13947-13949; 69 RT 14119-14120, 14124-14125.) In

fact, most of the people at Chandi's house the morning of the murders did not know Sanchez or had never seen him. (62 RT 12559, 12730-12732; 63 RT 12932-12933, 12941; 65 RT 13346, 13348l; 68 RT 14010-14011; 69 RT 14123-14124.) Further, although Oscar talked with Victor that morning and told him that he saw the man who had brought him ice cream in his mother's room, Victor did not talk about what had happened with Oscar. (59 RT 11988; 64 RT 13109-13110, 13176.)

B. The Court Properly Limited Doctor Streeter's Testimony to the General Development and Factors Bearing Upon the Reliability of a Child Oscar's Age

Sanchez argues that while the court allowed "Dr. Streeter to testify generally about the psychological development of five- to seven-year-old children, including general factors bearing on the reliability of statements made by children in that age range," it erred by restricting the use of Oscar's prior statements and testimony. Further, Sanchez argues, the court erred by barring Dr. Streeter from rendering an opinion about Oscar's reliability and competency. (AOB 183-184, 189.) The People disagree. Dr. Streeter's opinion that Oscar was unreliable and incapable of knowing the difference between a truth and lie on the day his mother died pertained directly to his credibility as a witness, which was an improper topic for an expert to opine about. Because the opinion itself was improper, the statement's Dr. Streeter relied upon for that opinion constituted

incompetent hearsay and were improper to present to the jury in any fashion, including in a hypothetical.

1. Experts may only testify to subjects requiring special knowledge and not relating to common experience

“The state and federal Constitutions guarantee the defendant a meaningful opportunity to present a defense” (*People v. Woods* (2004) 120 Cal.App.4th 929, 936.) However, “[a]pplication of the ordinary rules of evidence ... does not impermissibly infringe on a defendant’s right to present a defense.” (*Mincey, supra*, 2 Cal.4th at 440.) Among the rules of evidence are those governing expert testimony. Section 720 allows for a person with special knowledge, skill, experience, training, or education on a particular subject to testify as an expert on that subject. Section 801 limits the expert’s testimony on a particular subject to that which is “sufficiently beyond common experience,” so that the expert’s opinion assists the trier of fact. (§ 801, subd. (a).) Section 801, subdivision (b), also limits an expert’s opinion testimony to opinions based on matter reasonably “relied upon by an expert in forming an opinion upon the subject which his testimony relates” whether admissible or not.

Further, an expert cannot testify to subject matter for which the expert lacks an adequate foundation. (*People v. Cornwell* (2005) 37 Cal.4th 50, 83.) An expert’s opinion may not be based on assumptions that lack evidentiary support, or on speculative or conjectural factors. (*People v.*

Richardson (2008) 43 Cal.4th 959, 1008.) Exclusion of expert opinions that rest on guess or conjecture “is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?” (*Ibid.*)

This Court applies the abuse of discretion standard of review to Sanchez's claim that the trial court erred in limiting the scope of the proffered expert testimony. (See *People v. Cornwell, supra*, 37 Cal.4th at pp. 83-84.)

2. Dr. Streeter's opinion that Oscar was unreliable and not competent on the day of the murders was a question for the jury

Sanchez argues that the court abused its discretion when it “precluded Dr. Streeter from testifying about Oscar's prior statements and testimony on the ground that the issue of his ‘competency’ and reliability were for the jury” (AOB 189.) This argument fails because Oscar's prior statements were irrelevant given that the opinion they supported was improper and inadmissible.

a. Questions of credibility are not sufficiently beyond common experience that the expert's opinion would assist the trier of fact

This Court has interpreted the “beyond common experience” element of section 801 as requiring the exclusion of the expert testimony “only when it would add nothing at all to the jury's common fund of information.” (*People v. Stoll* (1989) 49 Cal.3d 1136, 1154, quoting

People v. McDonald (1984) 37 Cal.3d 351, 367 (*McDonald*), overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) The controlling question in determining the admissibility of expert opinion evidence is whether the relevant subject is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness; or, on the other hand, whether the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (*People v. Cole* (1956) 47 Cal.2d 99, 103-104.)

Opinion evidence offered to establish whether a witness is telling the truth is not a permissible form of expert testimony. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82 (*Coffman*)). This is the case because a jury is generally considered to be able to judge the credibility of a witness without the need of expert testimony. (*People v. Smith* (2003) 30 Cal.4th 581, 628; see also *People v. Anderson* (2001) 25 Cal.4th 543, 576 [“the psychiatrist may not be in any better position to evaluate credibility than the juror”].) *Coffman*, perfectly illustrates this point. In *Coffman*, in addressing an ineffective assistance of counsel claim, this Court pinpointed the exact moment expert testimony relating to reliability and truthfulness became improper. Specifically, an expert in “battered woman syndrome” testified about certain aspects of the complaining witness’s behavior that a layperson might find irreconcilable with the witness’s claim to have been battered. However, multiple times during testimony, the expert’s opinion

became improper by stating that “in her professional opinion, [the complaining witness] was truthful.” (*Coffman, supra*, 34 Cal.4th at p. 82.)

This Court concluded that an objection to such conduct should have been sustained. (*Ibid.*)

In making this decision, this Court explained:

The general rule is that an expert may not give an opinion whether a witness is telling the truth for the determination of credibility is not a subject sufficiently beyond common experience that the expert’s opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful.

(*Coffman, supra*, 34 Cal.4th at p. 82, citing § 801, subd. (a).)

The *Coffman* court explained that an expert can properly testify about the effects a traumatic experience may have on a person, if a layperson would not necessarily understand these effects; however, the expert was not permitted to testify about her opinion regarding the truthfulness of the complaining witness. It was the jury’s task to consider the expert’s testimony and apply it, if relevant, in evaluating the complaining witness’s statements and testimony. Knowing the effects of trauma, makes the jury just “as well equipped as the expert to discern whether a witness is being truthful.” (*Coffman, supra*, 34 Cal.4th at p. 82.)

Here, the court excluded Dr. Streeter’s proffered opinion testimony that Oscar’s prior statements were unreliable and that he lacked the competency to differentiate truth from lie. In doing so, the court found that

“Doctor Streeter is certainly qualified and may testify about Oscar’s developmental stage and the general principles that apply to a child of that age insofar as reliability is concerned ... but beyond that, there’s – there’s ample evidence before the jury to make that determination” (70 RT 14198.) This ruling drew the line of permissible expert testimony at the exact point this Court drew the line in *Coffman*. Like the expert in *Coffman*, Dr. Streeter was permitted to opine about the effect that age and development of a child Oscar’s age had on his ability to perceive, understand, and relate experiences. But Oscar’s credibility was an issue for the jury. (70 RT 14197-14198.)

Thus, the trial court properly limited Dr. Streeter’s testimony to the psychological development of five-to-seven-year-old children, including general factors bearing on the reliability of statements made by children of that age range.

b. Because Dr. Streeter’s opinion regarding Oscar’s credibility was properly excluded, Oscar’s hearsay statements supporting that opinion were irrelevant

Since an expert’s opinion “is no better than the facts on which it is based” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618), experts should generally be allowed to testify to all facts upon which they base their opinions (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1012). “An expert may generally base his opinion on any “matter” known to him, including

hearsay not otherwise admissible, which may “reasonably ... be relied upon” for that purpose.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 403; § 801, subd. (b).) Although an opinion may be predicated on hearsay, the trial court has discretion to “exclude from the expert’s testimony ‘any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.’” (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172.) “[P]rejudice may arise if, ‘under the guise of reasons,’ the expert’s detailed explanation ‘[brings] before the jury incompetent hearsay evidence.’” (*Carpenter, supra*, 15 Cal.4th at p. 403.)

Trial courts have the discretion to weigh the probative value of inadmissible hearsay evidence relied upon by an expert witness as a basis for the expert’s opinion against the risk that the jury might improperly consider it as independent proof of the facts recited therein. (*People v. Coleman* (1985) 38 Cal.3d 69, 91 (*Coleman*); accord, *People v. Bell* (2007) 40 Cal.4th 582, 608; *Gardeley, supra*, 14 Cal.4th at p. 619.) In particular, the trial court must exercise its discretion pursuant to section 352 in order to limit the inadmissible hearsay evidence to its proper uses. The exercise of this discretion may require exclusion of portions of inadmissible hearsay that were not related to the expert’s opinion. In other cases where the risk of improper use of the hearsay outweighs its probative value as a basis for the expert opinion it may be necessary to exclude the evidence altogether. (*Coleman, supra*, at pp. 92-93; accord, *People v. Gonzales* (2011) 51

Cal.4th 894, 923; *People v. Nicolaus* (1991) 54 Cal.3d 551, 582 [“It is well established that the court may exclude the hearsay basis of an expert’s opinion.”].) “The discretion to exclude hearsay applies to defense, as well as prosecution, expert evidence.” (*Carpenter, supra*, 15 Cal.4th at p. 403.)

It is important to properly frame the inquiry in applying section 352 to out-of-court statements admitted as expert basis evidence. In this context, “probative value” refers to the relative reliability of the inadmissible evidence and its necessity to the jury’s understanding of the credibility and basis for the expert opinion. This must be weighed against the risk that the jury will view and use this inadmissible evidence for an improper purpose. (*People v. Dean* (2009) 174 Cal.App.4th 186, 199; see also *Coleman, supra*, 38 Cal.3d at p. 91; *Gardeley, supra*, 14 Cal.4th at p. 619.)

Here, the trial court properly excluded Oscar’s prior testimony and interview with the prosecution’s investigators because it was irrelevant to Dr. Streeter’s expert testimony. Thus any hypothetical including those hearsay statements were improper. As stated previously, it was the jury’s job to determine Oscar’s credibility. Dr. Streeter, through her expert testimony, gave the jury the tools to do that. (See Arg. VI, part B(2)(a), *ante*.) Admitting statements that the court determined inadmissible and not subject for the jury’s consideration to support an opinion that was never given, would have confused the jury and constituted an undue consumption of time. (§ 352; see *People v. Alcala* (1992) 4 Cal.4th 742, 787-789

[probative value of proffered expert testimony concerning allegedly suggestive nature of police interrogation to impeach witness's testimony did not outweigh probability that its admission would necessitate undue consumption of time, confuse issue, or mislead jury].) Oscar's hearsay statements were simply irrelevant once Dr. Streeter's opinion regarding Oscar's credibility was deemed improper and within the realm of common experience.

Sanchez argues that the "jury had little evidence upon which to tie Dr. Streeter's testimony regarding the factors bearing upon the reliability of a child's perception and ability to relate an event." (AOB 190.) Sanchez believes that by allowing Dr. Streeter to discuss Oscar's prior statements, she would be able to explain why she had concluded that the factors bearing on Oscar's reliability were at play. (AOB 191-192.) This, Sanchez reasons, is why the trial court's reliance on *People v. Page, supra*, 2 Cal.App.4th 161 (*Page*), was misplaced. (AOB 189-190.) In *Page*, the court properly limited expert testimony regarding false confessions to factors that may effect the reliability of a confession. (*Page, supra*, 2 Cal.App.4th at p. 188.) Sanchez attempts to distinguish *Page* by claiming that the jury in *Page* was told more about the circumstances of the defendant's confession and could "'thoroughly explore' the physical and psychological environment in which the confession was obtained." (AOB 190.) Thus, Sanchez argues, the jury in *Page* was better able to apply the

factors told to it by the expert. According to Sanchez, if the court had allowed Dr. Streeter to testify about Oscar's prior statements, the jury here would have been in the same position as the *Page* jury and been able to properly apply the factors that Dr. Streeter had testified about. (AOB 190-191.)

The People disagree. The jury was given ample evidence of Oscar's environment and developmental progress to "thoroughly explore" his credibility. As described, the jury was tasked with determining Oscar's credibility when he gave statements the day his mother died and when he testified. Dr. Streeter testified about some factors the jury could consider when judging credibility, such as a child's language skills and the extent the child imitates something he or she heard. (71 RT 14348-14349.) Dr. Streeter also told the jury that children Oscar's age confabulate, are easily influenced by adults, and want to please the adults around them. (71 RT 14346-14347, 14356-14357.) Ultimately, Dr. Streeter essentially advised the jurors to examine how the child constructs his or her story to see if it makes sense in an adult's reality. (71 RT 14377.) But Oscar's previous testimony and statements did not constitute the basis for Dr. Streeter's admissible testimony, which did not pertain specifically to Oscar, but instead addressed factors to consider in evaluating the credibility of children in general. Thus, Oscar's previous statements and testimony were not admissible as a basis for Dr. Streeter's expert testimony.

In any event, the jury heard ample evidence bearing on the credibility of Oscar's identification of Sanchez. In addition to the admission of Oscar's statements the day his mother died, the jury also heard evidence concerning the number of people at Rosa's house. (59 RT 11985-11987; 62 RT 12529-12530, 12534.) The jury heard evidence about the topics of conversation among the people at Rosa's house. (6 RT 1044, 1074; 62 RT 12728-12729; 69 RT 14119-14120, 14123.) The jury heard about Oscar's conversations with Victor. (59 RT 11988; 64 RT 13109-13110, 13176.) The court also admitted the entire video showing Oscar's interview with Sergeant Dempsie, in which Oscar claimed to have seen multiple people in his mother's room. (64 RT 13235.) This video showed the jury evidence of the confabulation, which Dr. Streeter spoke of. (13 CT 3515-3516.) In other words, the jury heard evidence that was relevant to the factors Dr. Streeter testified about.

The same is true as to Oscar's testimony. In addition to Oscar's testimony, the jury heard Oscar's prior statements to police he made on the day of his mother's death and were able to compare those statements to his current testimony. (61 RT 12375; 64 RT 13204, 13207, 13221, 13225, 13235.) The jury was also aware that years had passed since the events Oscar was testifying about had occurred. The jury was also made aware of Oscar's therapy session and the general discussion topics of those sessions. (74 RT 14759-14805.) Newton testified to specific statements Oscar made

to her, including that “Juan” did not shoot his mother and that his mother wanted Oscar to tell Newton that she was not shot. (74 RT 14777-14779.) The jury also heard about the manner in which Newton conducted her sessions with Oscar. (74 RT 14763, 14804-14805.) Lastly, the jury heard that Oscar had made multiple contrary statements regarding his mother’s murderer. Oscar told his father, Jose Hernandez, that three people were in his mother’s house the night she died, and two of their names were “Juan” and “Marcos” or “Michael.” (66 RT 13489, 13491.) Oscar also told Lola Ortiz that he saw “Juan” with “Domingo” and “Big Man.” (70 RT 14275-14278, 14289.)

All of this evidence, along with Oscar’s testimony itself, gave the jury ample information to evaluate Oscar’s credibility. Oscar was forgetful during testimony and could not recall the factual scenarios contained in his prior testimony and statements to the prosecution’s investigators. Although he identified Sanchez as being in his mother’s house the night she died, Oscar also identified Marcos Pena as being there. (Def. Exh. Q; 1 SCT 33; 60 RT 12227-12228.) Oscar’s inadmissible hearsay statements would not have assisted the jury in making a credibility determination, because those statements did not factor upon the reliability of his trial testimony or the statements he made the day of the murders. (See Arg. V, part B, *ante*.) Thus, Sanchez’s attempt to distinguish *Page* is misplaced because the jury here was given sufficient and relevant context to Oscar’s statements on the

day of the murder and trial testimony. Therefore, the court properly relied on the reasoning in *Page* to limit Dr. Streeter's testimony and her discussion of Oscar's prior statements.

Dr. Streeter's opinion regarding Oscar's credibility and reliability was not proper expert testimony because it was not sufficiently beyond common experience to justify the use of an expert to assist the jury. Thus, any evidence or hypothetical question that included Oscar's hearsay statements, was irrelevant and would risk confusing the jury, while providing little, if any, probative value given the other evidence introduced to assist the jury in making its determination. Accordingly, the trial court properly ruled that Oscar's prior testimony and interview with the prosecution's investigators constituted incompetent hearsay evidence not to be admitted for any purpose.

C. The Purported Error Was Harmless

Had Dr. Streeter been allowed to testify that she found Oscar unreliable and used his inadmissible statements as support for this opinion, Sanchez would still have been found guilty and sentenced to death under any standard. First, ample evidence outside of Oscar's testimony and prior identifying statements was presented to convict Sanchez, indeed, Oscar's identification of Sanchez was corroborated by Sanchez's own confession. (See Arg. I, part C(2), *ante*.) Second, the statements Sanchez sought to have introduced through Dr. Streeter held little, if any, probative value. (See

Arg. V, part B, *ante.*) The jury was already given sufficient evidence to judge Oscar's credibility for the day his mother died, because witnesses testified about his demeanor, surroundings, and other statements he made that day. Further, evidence was introduced so that the jury could accurately judge Oscar's credibility while testifying. The addition of hearsay statements that were not made close in time to testimony or to the events in question would have added little, if anything, to the jury's determination of Oscar's credibility. (See Arg. I, part C(1), *ante.*)

VII. THE TRIAL COURT PROPERLY DENIED SANCHEZ'S MOTION TO SUPPRESS HIS CONFESSION BECAUSE HE NEVER INVOKED HIS RIGHT TO SILENCE, AND THE CONFESSION WAS NOT COERCED

Sanchez argues that the trial court erred by admitting his confession into evidence because the police ignored his invocation of the right to remain silent, in violation of *Miranda v. Arizona, supra*, 384 U.S. 436. (AOB 205-212.) He further argues that his confession was involuntary, because it was the product of coercive successive interrogations. (AOB 212-218.) The People disagree. The admission of Sanchez's confession did not violate *Miranda*, because a reasonable officer would not have understood Sanchez's statements to be an invocation of his right to silence. Additionally, Sanchez's confession did not result from coercive police pressure and was voluntarily made.

A. In limine motion and section 402 hearing

On November 20, 1998, Sanchez filed a motion to exclude his confession because his statements were made in violation of *Miranda v. Arizona, supra*, 384 U.S. 436, and were not voluntarily made. (3 CT 779-796.)²⁵ Over the course of several days, the court held a section 402 hearing to determine whether Sanchez's statements should be suppressed on these grounds. (4 CT 985; 5 CT 1182-1193, 1234-1236, 1239-1242; 2 RT 316.)

1. Sanchez's interview with Sergeant Kroutil on the day of the murders

a. Prosecution evidence

Sanchez was arrested sometime between 11:00 and 11:20 on the morning of the murders by Lieutenant Ernie Garay. (7 RT 364; 9 RT 1795-1796.) The only thing Lieutenant Garay said to Sanchez was "put your hands up, don't move." (9 RT 1796-1897.) Following his arrest, Sanchez was transported to the Porterville Police Station, where, at 1:00 p.m., Sergeant Eric Kroutil interviewed him for less than an hour in Lieutenant Garay's office. (8 RT 1629, 1630, 1644.) He read Sanchez his *Miranda* rights from an advisement printed on a department-issued notebook. (8 RT 1628, 1661.) Sergeant Kroutil remembered the rights to include specific

²⁵ On August 2, 1999, Sanchez renewed this motion for the third trial. (9 CT 2252-2254.)

waivers after each right. For example, he would inform Sanchez of his right to remain silent and then ask whether Sanchez understood that right. (8 RT 1646-1647.) Sanchez responded that he understood each right and never requested an attorney. (8 RT 1585, 1628-1629, 1647-1648.)

Sergeant Kroutil did not obtain a signed waiver from Sanchez or tape record the interview. (8 RT 1648.) Sergeant McMillan stepped into the room after the interview started and stayed for about five minutes but never talked to Sanchez. (8 RT 1584, 1642-1643, 1645.)

Sergeant Kroutil assumed Sanchez was given something to eat after the interview, but did not give him the food or see him eat. (8 RT 1625-1626, 1628, 1654-1657.) When the interview was done, Sanchez was taken back to the holding facility at the Porterville Police Department. (8 RT 1630.) He was then transported to the main jail in Visalia. (8 RT 1630-1633.)

b. Defense evidence

Sanchez testified that, during his arrest, Lieutenant Garay pointed a gun at him, and asked his name and questions about a knife. (7 RT 1365-1366.) Sanchez told officers his name and stated that he did not know anything about a knife. (7 RT 1366.)

When Sanchez first spoke with Sergeant Kroutil, they were at the police station in the area where suspects were fingerprinted. (7 RT 1367.) Sergeant Kroutil never informed him of his *Miranda* rights. (7 RT 1368.)

Sanchez then asked for an interpreter and a lawyer, but Sergeant Kroutil responded that he did not need an attorney and would get one after he was interviewed. (7 RT 1369-1370.) Officers then asked Sanchez identifying questions and took his clothing before sending him to an office where Sergeant Kroutil sat with another officer. (7 RT 1369, 1371.)

The other officer, and not Sergeant Kroutil, asked Sanchez where he had been at 3:00 a.m. on the morning of the murders, to which Sanchez replied he had been asleep at home. He responded similarly when asked about his whereabouts at 4:30 and 5:00 that morning. (7 RT 1371.) The other officer then yelled at him, "Don't fucking lie to me," and then quietly said that they had the wrong person. (7 RT 1371-1372.) Sergeant Kroutil told the other officer that they did not have the wrong person and should interview Sanchez again. (7 RT 1372.)

Sanchez did not remember the other officer's identity, and only remembered that he was an older Caucasian man, was tall and thin, and had not been present at any court proceeding. (7 RT 1371-1373.) Sanchez later testified that the officer was "a tall person, more or less square or stocky, not fat, nor thin." (7 RT 1410.)

Sanchez was eventually taken to the Tulare County jail, where he claimed not to have received food. (7 RT 1374.) Sanchez claimed that he did not receive any food the entire day. (7 RT 1373.)

2. Sanchez's Interview With Detective Shear on the Day After the Murders

a. Prosecution evidence

On the day after the murders, Sergeant Kroutil drove Sanchez from the county jail in Visalia to the Visalia Police Department so that he could be interviewed by Visalia Police Detective Steven Shear. (8 RT 1635-1367.) Detective Shear and Sergeant Dempsie accompanied them. (8 RT 1524-1525, 1639-1640.) Sergeant Kroutil did not witness the interview; however, Detective Shear asked him before the interview to interrupt it at specific times to remind Detective Shear to change the tapes in the recording device. (8 RT 1637-1638.)

Detective Shear interviewed Sanchez at approximately 9:00 on the morning after the murders. (8 RT 1519, 1521.) The purpose of the interview was to conduct a Voice Analyzer Stress (VSA) test. (8 RT 1522.) Detective Shear tape recorded the entire interview "from start to finish." (8 RT 1521, 1531.) Once Sanchez entered the interview room, Detective Shear explained who he was, explained how the VSA test worked, and then reminded Sanchez of his right to remain silent and his right to speak with an attorney. Detective Shear also asked Sanchez if he had previously been advised of his rights. (Court's Exh. 8 at pp. 1-3.) Sanchez responded in the affirmative. (Court's Exh. 8 at pp. 2-3; 8 RT 1532-1534.) Detective Shear then informed Sanchez about his right to remain silent again:

DETECTIVE SHEAR: You, you know that you don't have to talk to me? You don't have to. You can say I don't wanna talk to you. I don't wanna take this test, I don't wanna talk to you. Do you want to talk to me? Will you answer questions for me?

SANCHEZ: Yes, why not?

(Court's Exh. 8 at p. 3.) Sanchez reaffirmed that he wanted to talk with Detective Shear and also said that he had experienced no problems when he had talked with Sergeant Kroutil the day before. (Court's Exh. 8 at p. 4.)

Sanchez told Detective Shear that he had never been in trouble with police before. Detective Shear urged Sanchez to be honest even though it was natural to be scared in a situation like the one Sanchez found himself in. (Court's Exh. 8 at pp. 5-6.) Detective Shear then explained the process of the VSA test to Sanchez. He told Sanchez that he (Detective Shear) did not know much about the facts of the case, and the officers only told him a little about what had happened. To take the examination portion of the test, Sanchez and Detective Shear needed to write questions about the murder that Detective Shear would then ask Sanchez while he was hooked up to the VSA test machine. (Court's Exh. 8 at p. 7.) Detective Shear explained the test at the 402 hearing as consisting of two parts—the pre-interview and the examination. The pre-interview was conducted “for the purpose of preparing the questions for the examination.” (8 RT 1547.)

After explaining the VSA test, Detective Shear asked Sanchez whether he had ever been arrested. Sanchez lied multiple times before he

ultimately admitted he had previously been arrested for cocaine possession.

(Court's Exh. 8 at pp. 8-10.) Detective Shear told Sanchez that the officers investigating his crime knew that he was not being truthful with them and he needed to tell them why he had murdered Ermanda and Lorena.

(Court's Exh. 8 at pp. 9-10, 12.) Detective Shear also told Sanchez that he could not give Sanchez any leniency. Sanchez said he understood.

(Court's Exh. 8 at p. 11.)

Sanchez and Detective Shear then talked about Sanchez's whereabouts on the night before the murders. (Court's Exh. 8 at pp. 12-13.) Sanchez said that he went to his friend Hector's house at 10:00 that night and stayed there for an hour, never leaving during that time. (Court's Exh. 8 at pp. 14-15.) After Detective Shear stressed the importance of telling the truth, Sanchez eventually admitted that he had left Hector's house to go to the store and then returned. (Court's Exh. 8 at pp. 15-16.) The two then talked about whether Sanchez was present when his wife had purchased two knives at the 99-Cent Store. (Court's Exh. 8 at pp. 18-20.)

After 30 or 45 minutes of the pre-interview, Sanchez told Detective Shear that he did not want to talk any longer and wanted to take the VSA test. (8 RT 1545-1546.) Just prior to stating that he wanted to take the test, somebody interrupted the interview and Detective Shear turned the tape over in the recording device. (Court's Exh. 8 at pp. 20-21.) Once the recording continued, the following occurred:

DETECTIVE SHEAR: I beg your pardon?

SANCHEZ: (inaudible)

DETECTIVE SHEAR: Yeah, I know. I cannot

SANCHEZ: I don't wanna say nothing no more and I told you that, that that's the truth.

DETECTIVE SHEAR: So you just wanna take that test?

SANCHEZ: Yes sir.

DETECTIVE SHEAR: Okay.

(Court's Exh. 8 at p. 21.) Sanchez demanded proof that he had committed the crimes, and Detective Shear stated that, if officers found his or his wife's fingerprints on the knife found with Lorena, then that would be proof. (Court's Exh. 8 at pp. 21-24.) Sanchez became upset and said that his wife had not been involved in the murders and that he had never been in Ermanda's house. (Court's Exh. 8 at p. 24.) Sanchez claimed to have lost the small knife his wife had bought. (Court's Exh. 8 at p. 25.)

Sanchez insisted that he was not at Ermanda's house on the night before the murders but admitted that he bought ice cream for Oscar two days before the murders. (Court's Exh. 8 at p. 33.) Detective Shear told Sanchez that Oscar had said he saw the man who had brought him ice cream when his mother had gotten hurt. Sanchez immediately became enraged and said he had not been at Ermanda's house the night before the murders. (Court's Exh. 8 at pp. 33-34.)

Detective Shear and Sanchez then started to write the questions for the examination. The questions, Detective Shear explained, would involve the facts the two had just discussed. (Court's Exh. 8 at p. 36.) After compiling the first question, Sanchez requested an interpreter and Visalia Police Detective Alice Jaramillo came into the room to interpret for Sanchez. (Court's Exh. 8 at p. 36-37; 8 RT 1553-1554.) Sanchez and Detective Shear then went over the evidence with Detective Jaramillo. (Court's Exh. 8 at pp. 37-40.) Sanchez then stated that he was willing to take the examination portion of the test. (Court's Exh. 8 at p. 40.) The interpreter explained how the examination worked and how the VSA test machine could tell that he was lying. (Court's Exh. 8 at pp. 41-42.) The group then went over the questions in the exam and what Sanchez's answers would be to those questions. (Court's Exh. 8 at pp. 42-47.) Sanchez then took the examination, which consisted of the exact questions the group went over. (Court's Exh. 8 at pp. 48-51.)

At the end of the interview, Detective Shear reminded Sanchez that it was important for him to tell the truth. (Court's Exh. 8 at p. 54.) Detective Shear also told Sanchez that the machine said he had lied when he said he was not at Ermanda's house the morning of the murders. (Court's Exh. 8 at pp. 55-56.) Sanchez insisted that he had told the truth and had not been at Ermanda's house on the night before or the morning of the murders. (Court's Exh. 8 at pp. 56, 58-60.)

Following the interview, Sanchez wanted to talk with Sergeant Kroutil about the knife. This conversation took less than five minutes. (8 RT 1638-1639.) After their discussion, Sergeants Kroutil and Dempsie took Sanchez to the Bob Wiley Detention Facility, which was ten minutes away. (8 RT 1639-1640.) During the drive, Sergeant Kroutil and Sanchez talked about Sanchez's predicted test results and perhaps the knife. (8 RT 1640-1641.) In the car, Sanchez did not invoke his right to counsel or his right to silence. (8 RT 1641-1642.)

b. Defense evidence

Sanchez testified that he had asked Detective Shear for an interpreter and an attorney. He was given an interpreter, but he still did not want to say anything because the interpreter was a police officer. (7 RT 1378.) When Sanchez asked for an attorney, Detective Shear told him that he did not need one. Sanchez also claimed that Detective Shear did not inform him of his *Miranda* rights before the VSA test. (7 RT 1379.) When confronted with the recording showing that Detective Shear had informed him of his *Miranda* rights, Sanchez claimed that he had not understood Detective Shear because Shear informed him of the rights in English. (7 RT 1379-1380.)

Sanchez testified that he was not mistreated by police until after the interview ended and Detective Shear turned off the video recording. (7 RT 1427-1429, 1433.) Detective Shear said, “[y]ou only but a fucking liar,”

and “[e]verything is lying, look at ... the machine, all this are lies, and you did it, and you lied.” (7 RT 1430.)

During the drive to the Bob Wiley Detention Facility, Sergeant Kroutil accused Sanchez of stealing a friend’s car and then told him that they had evidence he was involved in the murders because they “had a sandal full of blood.” (7 RT 1383-1384.) The conversation then ended, and the officers eventually dropped Sanchez off at the detention facility. (7 RT 1384.) A sack lunch was provided to Sanchez, but he could not eat it. (7 RT 1385-1386.) Sanchez was eventually moved to a cell. He did not recall if he was served dinner there or whether he instead slept during dinner. (7 RT 1436-1438.)

3. Sanchez’s confession to Lieutenant Garay two days after the murders

a. Prosecution evidence

In the morning, one day after the VSA test and two days after the murders, Sanchez was interviewed again at the Porterville Police Station. Porterville Police Officer Steve Ward conducted the first interview, in which Sergeant Dempsie was present for three to five minutes at the start. (8 RT 1569-1570; 9 RT 1755-1757.) The interview lasted about half an hour and was not recorded. (9 RT 1756.) Before the interview began, Officer Ward advised Sanchez of his *Miranda* rights. (9 RT 1758.) Sanchez appeared to understand his rights and never requested the presence

of an attorney or an interpreter. (9 RT 1759.) Officer Ward spoke to Sanchez in English, and Sanchez responded in English. (9 RT 1759, 1776.) Sanchez said that he had drank a lot of beer the night before the murders and was "loaded" on methamphetamine. (9 RT 1781.) He also said that he could not remember everything about that night, including whether he was at home. (9 RT 1782.) Officer Ward never threatened Sanchez by telling him that he would put Sanchez in a cell with a crazy person or that Sanchez would get a lethal injection. (9 RT 1758.) Sergeant Dempsie did not hear Officer Ward threaten Sanchez. (8 RT 1571.)

At approximately 12:30 on the same day, Lieutenant Ernie Garay took over the interview. (9 RT 1797.) Lieutenant Garay talked to Sanchez in both Spanish and English, but most of the conversation was in Spanish. (9 RT 1798.) The interview consisted of two parts. The first part took place from 12:30 p.m. until 1:55 p.m., when they took a break. (9 RT 1809, 1851.) They resumed at 2:20 p.m., and that part of the interview was recorded. (9 RT 1809.) It was standard interview procedure at the Porterville Police Department for officers to talk to suspects without recording the conversation in order to establish a rapport or lay a foundation. After the officer understood the substance of the suspect's statement, the officer would then record the interview. (9 RT 1846-1847.)

When Lieutenant Garay entered the interview room, Sanchez was sitting on a couch and had just finished eating. (9 RT 1798.) Lieutenant

Garay advised Sanchez of his *Miranda* rights in Spanish, after he had asked Sanchez about his language preference. (9 RT 1798, 1805-1806, 1849.) Lieutenant Garay read the rights from the Spanish version of a department-issued *Miranda* card. (9 RT 1798-1801, 1849.) When he read Sanchez these rights, he read each right separately, and Sanchez acknowledged that he understood each one. (9 RT 1805.)

Lieutenant Garay then asked Sanchez what had happened, and Sanchez said "I'm screwed" in Spanish. (9 RT 1850.) The two went over preliminary questions, including how Sanchez knew the victims. After 20 to 30 minutes, Sanchez started to confess. (9 RT 1853.) He said he had killed Ermanda and Lorena for owing him money. (9 RT 1853-1854.) He did not know where he had shot the victims, but he had been in the house for five minutes. (9 RT 1855.) He did not see anybody else in the house and did not come in through a window. (9 RT 1855-1856.) Sanchez claimed to have used a .22-caliber gun but was not sure because he was not familiar with guns. (9 RT 1855-1856; 10 RT 1916.) Sanchez spoke in a narrative throughout the interview. (9 RT 1851.)

This conversation continued until 1:55 p.m., when Lieutenant Garay asked Sanchez if he needed to use the restroom. During the break, Lieutenant Garay told Sanchez that they were going to go over his statement again, but this time he would record it. Sanchez agreed. (9 RT 1851.)

Lieutenant Garay never threatened Sanchez's family or mentioned them at all. (9 RT 1806-1807.) He spoke with Sanchez "matter-of-factly" and told him he needed to find out what had happened. (9 RT 1807-1808.) Lieutenant Garay never promised to help Sanchez if Sanchez confessed to the murders. (9 RT 1808-1809.)

At the start of the recorded confession, Lieutenant Garay read Sanchez his *Miranda* rights by explaining individual rights and asking Sanchez whether he understood those rights. Sanchez then agreed to talk with Lieutenant Garay. (13 CT 3526-3527.) Sanchez then said that he entered Ermanda's house alone through the front door with a gun. (13 CT 3527-3528.) He looked for Ermanda because she owed him money and had said insulting things about him. He was infuriated and tired of everything. (13 CT 3528-3530.) He did not see Ermanda right away, but when he did, he "just shot" two or three times. (13 CT 3531.) Then he saw Lorena and "just shot" "about two times." (13 CT 3532.) Sanchez did not remember much because it all happened fast, but he did remember that he shot the two women. (13 CT 3532-3533.)

Sanchez denied having sexually assaulted Lorena or knowing how her panties had gotten torn. (13 CT 3543-3544, 3556-3558, 3560-3562.) He did not bring a knife to the house, but he saw Lorena with a knife and thought she was going to kill him. (13 CT 3541, 3543-3544, 3550-3552.) He "blacked out" and just shot her. (13 CT 3558-3559.)

Sanchez did not see anyone else in the house but thought he heard a noise, so he left through the front door after shooting the women. (13 CT 3533-3534.) He drove away in his truck and threw the gun out the passenger window into a field on Olive Street. (13 CT 3536-3537.) Sanchez believed he had used a .22-caliber gun, but he did not know much about guns and was uncertain. (13 CT 3538.) After Sanchez had thrown the gun out the window, he went straight home. (13 CT 3539.)

b. Defense evidence

Sanchez testified that, during his interview with Officer Ward, Officer Ward told him, "If you don't tell me the truth, then I'm going to put you in a cell with a crazy man crazier than you so he can kill you." (7 RT 1391.) Officer Ward also threatened Sanchez with the possibility of an "injection." (7 RT 1392-1394, 1395-1396.) Sanchez told Officer Ward that he had not committed the murders because he was home nursing a hangover during the times they had asked about. (7 RT 1391.) Officer Ward tore up the paper he had been writing notes on and told Sanchez, "You – you were the one; you were the one. You killed 'em, you motherfucker ... cold-blooded killer." (7 RT 1391-1392.) Sanchez asked for an attorney and an interpreter "three times" and then asked only for an interpreter. (7 RT 1392.) Officer Ward told Sanchez that he did not need an attorney. (7 RT 1395.)

When Lieutenant Garay came in the room, he told Sanchez to tell the truth because he had enough evidence to convict him. (7 RT 1394.) When Sanchez asked to see the evidence, Lieutenant Garay told him that that was not necessary until trial. (7 RT 1397-1398.) Lieutenant Garay did not advise Sanchez of his *Miranda* rights. (7 RT 1396-1397.) When Sanchez asked for an attorney, Lieutenant Garay told him he did not need one. (7 RT 1397.) Sanchez later testified that the only time he had been told his *Miranda* rights during this interview was right before he had confessed. (7 RT 1411-1412.) He attempted to request an attorney at that time, but Lieutenant Garay made Sanchez wait until after he had finished advising him of his rights, and then Sanchez did not ask for a lawyer. (7 RT 1412-1416, 1418-1420.) Lieutenant Garay promised to help Sanchez if he told him what had happened. However, he threatened to take away Sanchez's family if Sanchez did not confess. (7 RT 1398-1399.) Lieutenant Garay also told Sanchez that he had left his hand print on "the girl" with his semen. (7 RT 1400.)

Sanchez had not eaten on the morning of his confession. (7 RT 1401, 1446-1447.) An hour or two into his interview with Lieutenant Garay, Sanchez was asked if he was hungry, at which point he was taken to a cell and ate half a hamburger. (7 RT 1401, 1446-1448.) Afterward, Sanchez was again interviewed by Lieutenant Garay. (7 RT 1449-1450.) Lieutenant Garay offered Sanchez a cigarette, which he took to get away

from the interrogation. (7 RT 1401-1403, 1450-1451.) After Sanchez “had already been threatened [and] pressured,” he gave a statement admitting he had killed Ermanda and Lorena so that he “could just get this over with and get out of it.” (7 RT 1401-1403.) Sanchez falsely confessed “[b]ecause of all the threats that they had made to me, I no longer knew what to tell them, and yes, I was afraid at that moment that yes, that they were going to be taking my family away.” (7 RT 1403.)

4. The court’s ruling

The trial court issued a lengthy written ruling denying Sanchez’s suppression motion. (6 CT 1341-1344.) The court ruled that Sanchez’s confession was not coerced as a result of food and sleep deprivation. The record showed that Sanchez had actually been provided with food, except for one dinnertime oversight, and had also been provided with the opportunity to sleep. Further, Sanchez’s recorded interviews with Detective Shear and Lieutenant Garay did not reflect that he had suffered from hunger or sleep deprivation. (6 CT 1341.) The court also found that Sanchez’s claims that he and his family had been threatened were not credible. Likewise, the court found that Sanchez’s claims that he had requested an attorney multiple times were not credible. (6 CT 1342.)

The court denied Sanchez’s claim that he had invoked his right to remain silent during his interview with Detective Shear. (6 CT 1343.) The court reviewed the tape recordings of Sanchez’s interview with Detective

Shear. (6 CT 1343, fn.2.) Based on those recordings, the court determined that before Sanchez had made statements that he did not want to say anything more, the interview progressed as follows:

SANCHEZ: I want you to put the machine, sir.

DETECTIVE SHEAR: Beg your pardon?

SANCHEZ: I want you to put the machine on me.

DETECTIVE SHEAR: Yeah, I know.

SANCHEZ: I'm not going to say nothing more. I told you the truth. That's the truth.

DETECTIVE SHEAR: Now you just want to take the test?

SANCHEZ: Yes.

(6 CT 1343.) The court then ruled:

In context, Mr. Sanchez was not seeking to terminate the interview. Shearer [*sic*] had explained to Mr. Sanchez the voice stress test was like a lie detector and would determine whether Mr. Sanchez was telling the truth when he denied involvement in the deaths of his friends. At the point of dispute, Mr. Sanchez did not state he wanted to be silent. He did not indicate a refusal to talk about the case. By implication, he indicated impatience with Shear's pre test interrogation and clearly stated he wanted to proceed to the test portion of the interview. Mr. Sanchez's insistence that Shearer [*sic*] proceed with testing him by the "machine" does not equate to an invocation of his right of silence.

(6 CT 1343, citations omitted.)

Finally, the court found that Lieutenant Garay did not make "any promise of leniency." (6 CT 1344.)

B. Trial Evidence Regarding Sanchez's Confession

1. Prosecution evidence

Sergeant Kroutil testified that Sanchez was initially cooperative during their interview. (55 RT 11214-A, 11226-A.) Sanchez told Sergeant Kroutil that he had not seen Ermanda from the time she had moved two years earlier until two days before the murders. (55 RT 11215-A-11216-A.) Ermanda invited him to her house for beer; he accepted and stayed for three hours. Sanchez also bought ice cream for her son Oscar. (55 RT 11216-A-11217-A.) When asked whether he had seen Ermanda after that, Sanchez first told Sergeant Kroutil that he had gone to Ermanda's house on the morning before the murders to fix her car. (55 RT 11217-A.) He then said he had gone to give her a watch, and later said he had gone to give her money. (55 RT 11218-A-11219-A.)

Sergeant Kroutil also showed Sanchez a photograph of a large knife. (55 RT 11225-A-11226-A.) Sanchez loudly denied ever having seen the knife in the picture. (55 RT 11226-A-11227-A.) After a short time, Sanchez said he recognized the knife as a knife from his house purchased by his wife from the 99-Cent Store. (55 RT 11227-A.) Sanchez told Sergeant Kroutil that his wife had not purchased any other knife at the time she had bought the knife pictured. (55 RT 11228-A.)

Detective Shear testified that when he had interviewed Sanchez, he caught him in multiple lies. (54 RT 11297-11298.) Sanchez admitted that

he had gone to Ermanda's house on the morning before the murders to give her a watch, but later stated it was to give her money so she could fix her car. (54 RT 11326-11329.) He then said that he had gone to the house of his friend Hector Hernandez at 9:00 or 10:00 on the night before the murders and left an hour later. (54 RT 11329-11331.) Sanchez then admitted that he had left Hector's house for a "period of time" before returning there. (54 RT 11331-11332, 11388-11389.) Sanchez also said he had never been arrested but eventually admitted that he had been arrested for a narcotics violation. (54 RT 11323-11324.) Detective Shear also questioned Sanchez about his relationship with Hector. (62 RT 12593.) Sanchez initially said that he had been close friends with Hector but later admitted that he "had a sexual episode with Hector on only one occasion." (62 RT 12594-12595.) Sanchez also lied about his knowledge regarding a knife his wife had bought. He stated that he did not recognize the knife officers had found at his home before he admitted that his wife had bought the knife along with a smaller knife at the 99-Cent Store. (54 RT 11332-11334.) He indicated he had not touched the smaller of the knives "until about a week ago." (54 RT 11337-11338.) Sanchez then stated that the small knife had been left in his backyard or had been lost about a week before. (54 RT 11339-11340.)

Officer Ward testified that he had not threatened Sanchez during his interview. (56 RT 11410.) Sanchez also did not confess during this interview. (56 RT 11415.)

Lieutenant Garay testified that Sanchez had denied shooting the victims, before eventually stating that he had been upset with Ermanda for things she had said about him and because she had owed him money. (13 CT 3528-3530; 53 RT 11168, 11173-11174; 54 RT 11252.) Sanchez then admitted having gone to Ermanda's house with a gun and shooting both her and Lorena. (13 CT 3527-3528; 53 RT 11163-11164, 11174.) Sanchez walked into Ermanda's house through the unlocked front door and shot Ermanda two or three times. (13 CT 3531; 53 RT 11174.) He then saw another person and shot at that person more than one time before leaving the house. (13 CT 3532; 53 RT 11175.) After he left, he got in his truck and drove away, throwing the gun into a field. (13 CT 3536-3537; 53 RT 11179.) Sanchez continuously denied having sexually assaulted Lorena. (13 CT 3543-3544, 3556-3558.) He did not bring a knife to the house but saw Lorena with a knife and thought she was going to kill him. (13 CT 3541, 3543-3544, 3550-3552.) He claimed to have been "blacked out," and he just shot her. (13 CT 3558-3559.) Sanchez believed he had used a .22-caliber gun but did not know much about guns and was uncertain. (13 CT 3538.)

2. Sanchez's testimony

Sanchez testified that, when interviewed by Sergeant Kroutil, he had not been advised of his *Miranda* rights and had requested an attorney multiple times, but Sergeant Kroutil and Sergeant McMillan never wrote down his request. (67 RT 13697.) Sanchez was more comfortable speaking in Spanish than English, although he could converse in English "more or less." (66 RT 13557.)

Sanchez also asked Detective Shear for an attorney but could not explain why his request was not on the recording of the interview. (66 RT 13607-13609; 67 RT 13698.) Detective Shear also turned off the recording during the interview and called Sanchez a "fucking liar." (67 RT 13704.)

During the interview with Officer Ward, Sanchez had asked for a lawyer and an interpreter when they first went inside of the room, but Officer Ward ignored him. (66 RT 13599; 67 RT 13699.) Officer Ward told Sanchez that, if he did not tell him what he did, then Officer Ward would put him in a jail cell with a crazy man so the man could kill him. (66 RT 13597.) Officer Ward also told Sanchez that he was going to personally inject him so that he could see him suffer and die "little by little" for what he had done. (66 RT 13598.) Sanchez was scared. (66 RT 13597.)

At some point, Officer Ward ripped up his notes, threw them in the trash, and left the room. Lieutenant Garay was outside and walked into the room. (66 RT 13600.) Lieutenant Garay asked Sanchez if he was going to

tell the truth. (66 RT 13600-13601.) Sanchez said that he needed help, but he meant that he needed the help of an attorney. (66 RT 13601.) Sanchez also asked for an attorney but had not been given one. (67 RT 13701.) He later confessed to killing Ermanda and Lorena because he had felt scared and pressured and wanted to be left in peace. (66 RT 13602, 13604-13605; 68 RT 13892, 13906-13910.) Sanchez did not “recall too well” what Lieutenant Garay said that made him confess. (66 RT 13602.) He testified that Lieutenant Garay had said he would help him and that they were buddies of the same race. Lieutenant Garay also threatened him by threatening to take his family away. (66 RT 13602.) Sanchez knew how to answer Lieutenant Garay’s questions because Lieutenant Garay had guided him to say what he wanted Sanchez to say. (66 RT 13605; 67 RT 13828; 68 RT 13909.)

The only times Sanchez was advised of his rights was by Detective Shear and Lieutenant Garay when they had recorded him. (67 RT 13705.)

3. Expert testimony

Martha Falcon is a certified Spanish interpreter and listened to Sanchez’s interview with Lieutenant Garay. (66 RT 13583-13585.) The transcript read that Sanchez had said he would talk to Lieutenant Garay “[a]bout what I want to say.” (13 CT 3526; 66 RT 13586.) Falcon, however, would have translated Sanchez’s words to mean “I’ll tell you what you want.” (66 RT 13586.)

Dr. Richard Ofshe is an expert in interrogation tactics that lead to false confessions. (72 RT 14576-14577, 14581.) Modern interrogations could be broken into two parts: the pre-admission phase and the post-admission phase. The preadmission phase motivates someone who initially says "I didn't do it" to say "I did it." (72 RT 14592.) The post-admission narrative tells the story of the crime that can also be used as evidence to link the person to the crime or show that the admission was false. (72 RT 14593.) At the center of these two parts is the "break point," where a person shifts from denying guilt to admitting guilt. (72 RT 14592-14593.) A person making a true confession should know details about the crime; a person making a false confession would lack information about the crime. (72 RT 14594-14595.)

To get a suspect to admit guilt, officers often employ "evidence ploys." (72 RT 14596.) "An evidence ploy is any statement made by the interrogator that purports to be a fact, a fact that if it were true would link the person to the crime and reveal them as the perpetrator." (72 RT 14596.) The object is to make the suspect feel that there is so much evidence against him or her that the situation is hopeless and that a confession is not needed. (72 RT 14598.) If a person is guilty, then they are likely to perceive that they had been caught, while an innocent person is likely to feel that some terrible mistake had occurred. (72 RT 14615.)

Low-end motivators usually motivate a guilty person who thinks they are caught to confess but will usually not work on an innocent person.

(72 RT 14616, 14618.) These low-end motivators include telling a suspect to take responsibility for what they did, appealing to their sense of pride, or telling them that they are better off confessing. (72 RT 14615-14617.)

High end motivators are more coercive because “they seek to make somebody do something by threatening harm or offering leniency”

(72 RT 14618.) The interrogator may appeal to the suspect’s interest by claiming to want to help the suspect and suggesting explanations that would result in a lower level of punishment. (72 RT 14619.) An innocent person in this situation would panic and may accept the story that the interrogator laid out. (72 RT 14619-14620.)

After a suspect admits guilt, officers are trained to get the story of the crime. (72 RT 14622.) When the interrogation is recorded from start to finish, it is easy to evaluate each factual statement. In a partially recorded interrogation, it is much more difficult because of the possibility that the suspect had been contaminated as to what to say. (72 RT 14629.) When evaluating a confessions, Dr. Ofshe looks at seven categories: (1) statements consistent with a deal having been made; (2) whether the story was volunteered by the suspect as a narrative; (3) whether the interrogator was formatting the story; (4) whether the suspect was able to supply verifiable factual information; (5) whether there were errors about facts the

perpetrator should have known; (6) whether the suspect expressed concern about displeasing the officer; and (7) whether the suspect issued periodic denials. (72 RT 14641-14644.)

C. Because Sanchez Did Not Unambiguously Invoke His Right to Remain Silent During His Interview With Detective Shear, There Was No *Miranda* Violation

Sanchez first claims that he invoked his right to remain silent during his interrogation with Detective Shear. (AOB 205-212.) He argues that his subsequent confession to Lieutenant Garay should be suppressed because officers ignored his invocation and continued to interrogate him in violation of *Miranda*. (AOB 208-212.) The People disagree. Sanchez did not invoke his right to remain silent when he said that he was “not going to say nothing more” because he wanted to be hooked up to the VSA test machine. (Court’s Exh. 8 at p. 21.) The context of the interview showed that Sanchez expressed frustration with the interview process; he wanted Detective Shear to proceed to the examination portion of the VSA test, which Detective Shear did. (6 CT 1343.) Thus, Sanchez’s statement was not an unambiguous request to cease questioning and did not amount to an invocation of his right to remain silent.

1. Applicable law

On appeal, this Court reviews the record and makes an independent determination of whether the defendant has invoked his or her *Miranda* rights, but it may “‘give great weight to the considered conclusions’ of a

lower court that has previously reviewed the same evidence.” (*People v. Jennings, supra*, 46 Cal.3d at p. 979.) This Court also accepts the trial court’s factual findings regarding the circumstances of the defendant’s statements, if the findings are supported by substantial evidence. (*People v. Dykes* (2009) 46 Cal.4th 731, 751.)

“Under California law, issues relating to the suppression of statements made during a custodial interrogation must be reviewed under federal constitutional standards.” (*People v. Nelson* (2012) 53 Cal.4th 367, 374.) *Miranda* provides that a suspect in custody “must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” (*Miranda, supra*, 384 U.S. at p. 479.) After the warnings have been given, if the suspect indicates in any manner that he wishes to remain silent or consult with an attorney, the interrogation must cease. (*Id.* at pp. 473-474.) Otherwise, “any statement obtained from him during interrogation thereafter may not be admitted against him at his trial’ [citation], at least during the prosecution’s case-in-chief.” (*People v. Lessie* (2010) 47 Cal.4th 1152, 1162.) A suspect may waive his rights expressly or impliedly. (*People v. Nelson, supra*, at pp. 374-375.)

Whether, after initially waiving his rights, a suspect subsequently invokes them is a separate question subject to an objective inquiry. (*Davis v. United States* (1994) 512 U.S. 452, 458-459; *People v. Williams* (2010) 49 Cal.4th 405, 427.) Although a suspect is not required to use the exact words of the *Miranda* warnings when invoking his or her right to silence (see *People v. Carey* (1986) 183 Cal.App.3d 99, 104-105), the United States Supreme Court has made it clear that, following an initial waiver, a subsequent invocation of the right to remain silent must be unambiguous in order to require the police to cease questioning. (*Berghuis v. Thompkins* (2010) 560 U.S. 370 (*Thompkins*)). In *Thompkins*, the court explained the reason for this rule: “A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that ‘avoid[s] difficulties of proof and ... provide[s] guidance to officers’ on how to proceed in the face of ambiguity.” (*Id.* at pp. 381-382.)

The California Supreme Court has held that “[a] defendant has not invoked his or her right to silence when the defendant’s statements were merely expressions of passing frustration or animosity toward the officers, or amounted only to a refusal to discuss a particular subject covered by the questioning.” (*People v. Williams, supra*, 49 Cal.4th at pp. 433-434.) The determination of whether a defendant has invoked his or her right to silence often depends on the context of the statements. (*Id.* at p. 429; see also *People v. Jennings* (1988) 46 Cal.3d 963, 978; *In re Joe R.* (1980) 27

Cal.3d 496, 515.) It is not enough for a reasonable officer to understand that the suspect might be invoking his rights. Faced with an ambiguous or equivocal statement, law enforcement officers are not required to ask clarifying questions or to cease questioning altogether. (*People v. Stitely* (2005) 35 Cal.4th 514, 535, citing *Davis v. United States, supra*, 512 U.S. at pp. 459-462.)

2. Sanchez did not invoke his right to silence

The trial court made factual findings supported by substantial evidence regarding Sanchez's interview with Detective Shear. (*People v. Dykes, supra*, 46 Cal.4th at p. 751.) After reviewing the recordings of the interview, the court determined that Sanchez made statements not contained in the transcript of the interview and made statements that were different than those included in the transcript. (Court's Exh. 8 at p. 21; 6 CT 1343, fn.2.) Immediately before stating that he was not going to talk anymore, the court found that Sanchez said, "I want you to put the machine on me," referring to the VSA test machine. Sanchez then responded in the affirmative when Detective Shear clarified that Sanchez wanted to take the VSA test after stating that he was "not going to say nothing more. I told you the truth. That's the truth." (6 CT 1343.) These statements found by the trial court to be what Sanchez actually said (6 CT 1343) differ from the transcript, which reported Sanchez to have said "I don't wanna say nothing no more and I told you that, that that's the truth." (Court's Exh. 8 at p. 21.)

From the context of this interaction, Sanchez did not unambiguously invoke his right to silence. (*People v. Williams, supra*, 49 Cal.4th at pp. 433-434.) Sanchez's statement that he was not going to talk anymore was made during the pre-interview phase of the VSA test and included mention of the VSA examination. Detective Shear had not given Sanchez the VSA examination yet, and Sanchez was frustrated with how the pre-interview was progressing. (Court's Exh. 8 at p. 20-21; 6 CT 1343.) Immediately after telling Detective Shear to hook him up to the VSA test machine, he expressed his frustration by stating that he was not going to talk with Detective Shear anymore because he "just want[ed] to take the test." (6 CT 1343.) Specifically, Sanchez said "I want you to put the machine, sir," and "I want you to put the machine on me," and when Detective Shear affirmed, "Yeah, I know," Sanchez interrupted, "I'm not going to say nothing more." (6 CT 1343.) This expression of frustration was not an invocation of the right to silence; in fact, it was tied to Sanchez's request to give his statement while connected to the VSA test machine. (*Williams*, at pp. 433-434.)

As the court properly found, Sanchez "did not indicate a refusal to talk about the case." (6 CT 1343.) Rather, he indicated that he did want to talk about the case but while hooked up to the VSA machine. (6 CT 1343.) A statements should be considered in the context of the "full tape" of the interview rather than just the "reporter's transcript of those portions of the

interview on which appellant relies.” (*People v. Jennings* (1998) 46 Cal.3d 963, 978.) Sanchez’s intention to continue talking about his case was further supported by Detective Shear’s clarifying question made immediately after Sanchez indicated that he did not want to talk. Detective Shear asked Sanchez whether “he just want[ed] to take the test?” and Sanchez responded in the affirmative. (Court’s Exh. 8 at p. 21; 6 CT 1343.) This response provided more context to Sanchez’s statement that he did not want to talk and showed that he actually did want to talk with Detective Shear but while taking the VSA examination. Following Sanchez’s request and the pre-interview phase of the VSA test, Detective Shear and Sanchez compiled the test questions with the assistance of an interpreter, and then Sanchez took the examination. (Court’s Exh. 8 at pp. 36-52.)

From the context of the discussion between Detective Shear and Sanchez, a reasonable officer would interpret Sanchez’s statements to mean that he wanted to talk with Detective Shear but while connected to the VSA test machine. Because Sanchez indicated that he desired to continue talking with Detective Shear, his request was not an unambiguous request to cease all questioning, and Sanchez did not invoke his *Miranda* rights. Thus, the court properly denied his suppression motion. (*People v. Williams, supra*, 49 Cal.4th at pp. 433-434.)

Thus, Sanchez’s argument that his invocation was not scrupulously honored fails because there was never an invocation to honor. (AOB 208-

212.) As a result, the trial court did not err in finding no *Miranda* violation. Further, because his confession was properly admitted into evidence, Sanchez's testimony was not induced by the confession's improper admission. As such, Sanchez's subsequent statements could properly be used to impeach him, contrary to his assertion. (AOB 212, citing *Lujan v. Garcia* (9th Cir. 2013) 734 F.3d 917, 925-926.)

3. Sanchez's confession was properly admitted even if he invoked his right to silence during his interview with Detective Shear

In the event this Court finds that Sanchez did invoke his right to remain silent during his interview with Detective Shear, his later confession to Lieutenant Garay was still properly admitted. Under *Michigan v. Mosley* (1975) 423 U.S. 96, Sanchez's confession was properly admitted because his interview with Lieutenant Garay was sufficiently attenuated from his invocation during the interview with Detective Shear, and Sanchez acknowledged and waived his *Miranda* rights prior to the interview.

In *Michigan v. Mosley, supra*, 423 U.S. at page 104, the Supreme Court held that a defendant's statements may be admitted against him at trial, even though the statements resulted from a police interview conducted after the defendant had invoked his right to remain silent. The defendant in *Mosley* was arrested in connection with several robberies and properly *Mirandized*. (*Ibid.*) When he said he did not want to answer any questions about the robberies, the police officer stopped questioning him. Two hours

later, the defendant was again *Mirandized* and questioned by a different police officer about a different crime, a murder, to which he confessed. (*Ibid.*) The defendant in *Mosley* argued his confession should be suppressed because he previously invoked his right to remain silent and the homicide investigators violated *Miranda* by questioning him again. (*Id.* at pp. 99-100.) The high court was not persuaded; it found the confession admissible.

Mosley makes it clear that nothing in the *Miranda* opinion can sensibly be read to “create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.” (*Mosley, supra*, 423 U.S. at pp. 102-103.) The high court thus envisioned situations where questioning could properly resume on the same subject matter after an initial invocation of the right to remain silent. The question *Mosley* left unanswered is under what circumstances, if any, may a suspect who is in custody and has previously invoked his right to remain silent when previously questioned about certain crimes be asked about those same crimes in a subsequent interview with a different law enforcement officer. Even though the high court did not answer this question directly, it listed certain factors it considered relevant to this determination and adopted a totality of circumstances approach. These factors include whether the defendant was properly given his *Miranda* rights before the initial

interrogation, whether the interrogation immediately ceased upon invocation of the right to remain silent, the reissuance of *Miranda* warnings before a second interview, the time between the two interrogations, the scope of the second interrogation, and whether the second interrogation was an attempt to “wear down” the suspect’s resistance and make him change his mind. (*Mosley, supra*, 423 U.S. at pp. 104-106.)

In *People v. Warner* (1988) 203 Cal.App.3d 1122 (*Warner*), the appellate court determined that the defendant’s case was like that found in *Mosley*, despite being questioned about the same crime in a subsequent interview. In *Warner*, the defendant invoked his right to remain silent after an officer transported him to the police station following his arrest and advised him of his constitutional rights. The officer immediately ceased questioning. The next morning, a detective, unaware that the defendant had invoked his *Miranda* rights the prior evening, met with him in the jail and told him he wished to speak with him about his arrest and the charges. After the defendant said he was willing to talk to him, the detective read him his constitutional rights, which the defendant said he was willing to waive; the defendant also signed a waiver form. He then gave a statement to the detective. (*Warner, supra*, 203 Cal.App.3d at p. 1125.)

The *Warner* court rejected the defendant’s contention that his confession was inadmissible under the federal *Mosley* standard, concluding instead that the circumstances under which the defendant’s statement was

made met the federal constitutional standards under the factual test of *Mosley*. (*Warner, supra*, 203 Cal.App.3d at p. 1129.) The court noted that the record was “remarkably free of any suggestion of police misconduct”; after the defendant invoked his right to remain silent, the officer scrupulously honored his right to cut off questioning by simply ending the conversation without attempting to persuade the defendant to reconsider his position; after an overnight interval, a detective who was unaware the defendant had previously invoked his constitutional right interviewed him; and after indicating his willingness to talk, the detective advised him of his constitutional rights, and the defendant waived those rights both orally and in writing. (*Id.* at pp. 1129-1130.) The court further noted the “record is devoid of even a hint that police at any time tried to ‘wear down’ defendant’s resistance, or ‘browbeat’ him into submission, or used any form of force or coercion or threatened him or made promises to him, or resumed questioning only a short time after he had invoked his rights, or that there was any kind of collusion among the officers.” (*Id.* at p. 1130.)

Finally, the court noted that while the second interrogation in *Mosley* related to an entirely different crime, whereas the second interrogation in *Warner* was for the same crime, that was but one factor to be considered in applying the test of *Mosley*. (*Warner, supra*, 203 Cal.App.3d at p. 1130.)

Here, upon application of the factors announced in *Mosley*, Sanchez’s *Miranda* rights were not violated when Lieutenant Garay interviewed him

about the murders the day after Sanchez's interview with Detective Shear. Sanchez was properly given his *Miranda* rights before his interview with Detective Shear. (Court's Exh. 8 at pp. 1-3.) In fact, Sanchez was not only advised of his *Miranda* rights by Detective Shear, he had also previously been advised of his *Miranda* rights by Sergeant Kroutil the day of the murders. (8 RT 1628, 1646-1648.) Sanchez acknowledged his rights and waived them during the interview with Sergeant Kroutil and the interview with Detective Shear. (Court's Exh. 8 at pp. 2-3; 8 RT 1628-1629, 1647-1648.) As described, the trial court made factual findings that Sanchez was advised of his rights by both Detective Shear and Sergeant Kroutil, and rejected Sanchez's claims to the contrary because Sanchez was not credible. (6 CT 1342-1343.) Given the multiple advisements and Sanchez's admitted understanding of them on audio tape with Detective Shear, the record shows that Sanchez understood that he had the ability to cut off questioning when he wished to do so.

In the event this Court finds that Sanchez actually did invoke his right to remain silent during the interview with Detective Shear, then Sanchez's invocation was not scrupulously honored. Detective Shear continued to interview Sanchez after he had indicated that he wanted to move on to the VSA exam portion of the test, and ultimately gave Sanchez the exam he requested. (Court's Exh. 8 at pp. 21-25, 48-51.) Detective Shear promptly honored Sanchez's request to speak to an interpreter and he allowed

Sanchez to speak with Sergeant Kroutil when Sanchez indicated that he wanted to speak with him about the knife he had lost. (Court's Exh. 8 at pp. 36-37, 58-60; 8 RT 1638-1639.) Although Sanchez's invocation, if in fact it was an invocation, was not immediately honored by Detective Shear, his other requests were honored showing Sanchez that he had control over the interview process.

Additionally, after the interview with Visalia Police Detective Shear at the Visalia Police Department, Sanchez was transported to his jail cell where he stayed until the next day. (8 RT 1639-1640.) This day break gave Sanchez time away from the inherently coercive nature of interrogation and time alone to reevaluate his decision to not talk with officers. The time between questioning in *Mosley* was only two hours, and California courts have previously held overnight gaps between questioning to be more than sufficient, with gaps of as little as one hour to still be admissible. (*People v. Riva* (2003) 112 Cal.App.4th 981, 994 [one hour]; *Warner, supra*, 203 Cal.App.3d at p. 1130 [next day].)

The morning after Sanchez's interview with Visalia Police Detective Shear at the Visalia Police Department, he was taken back to the Porterville Police Department and interviewed first by Porterville Police Officer Steve Ward, and then by Porterville Police Lieutenant Ernie Garay. (8 RT 1569-1670; 9 RT 1755-1757.) Both of these officers advised Sanchez of his *Miranda* rights, with Lieutenant Garay advising Sanchez multiple times in

Spanish. (13 CT 3526-3527; 9 RT 1758, 1798-1801, 1805-1806.)

Following these advisements, Sanchez again stated that he understood his rights and then waived them, deciding that he wanted to talk with officers. (13 CT 3526-3527; 9 RT 1759, 1805.)

Sanchez's interviews with Officer Ward and Lieutenant Garay covered the same topics as his interview with Detective Shear, but did not include a VSA test. The interviews with Officer Ward and Lieutenant Garay did not occur in an interview room like the interview with Detective Shear. (8 RT 1527.) The interviews occurred in a "soft interview room," which included a couch and was a more casual environment than the other interview rooms located at the station. (9 RT 1797-1798.)

Further, there is no evidence that either Lieutenant Garay or Officer Ward knew that Sanchez had invoked his right to silence during his interview with Detective Shear. Thus, these subsequent interviews were not conducted for the purpose to "wear down" Sanchez and get him to talk despite his previous invocation. (*Mosley, supra*, 423 U.S. at pp. 104-106.) In fact, the record is free of evidence of collusion between Detective Shear and the officers that interviewed Sanchez the next day. Detective Shear belonged to a different police agency than Lieutenant Garay and Officer Ward, and neither Lieutenant Garay nor Officer Ward were present when Sanchez was interviewed by Detective Shear. (8 RT 1524-1524, 1639-1640.)

Finally, the trial court made factual findings that are supported by the record showing that Sanchez's confession was not the product of police coercion. The court found that Sanchez was not threatened during any of his interviews. (6 CT 1342.) The court also found that Sanchez was not promised leniency or any other incentive in exchange for his confession. (6 CT 1343-1344.) In fact, the court properly found that Sanchez's confession was voluntary and the product of his own free will. (See Arg. VII.D, *post.*) Accordingly, given the lack of coercion by officers, the time lapse between Sanchez's invocation and his interview with Lieutenant Garay, and Sanchez's understanding of his *Miranda* rights, Sanchez's confession was admissible under the totality of the circumstances test announced in *Mosley, supra*, 423 U.S. at pages 104-106.

D. Sanchez's Confession to Lieutenant Garay Was Not the Product of Coercive Police Conduct

Sanchez next argues his confession should have been excluded because it was involuntary. (AOB 212-218.) Sanchez argues that his "characteristics, the conduct of the law enforcement officers interrogating him and the extent of the interrogations together dictate a finding that [his] confession was coerced and involuntary." (AOB 214.) The People disagree. The totality of the circumstances support a finding that Sanchez confessed voluntarily.

1. Applicable law

When reviewing the trial court's denial of a suppression motion on involuntariness grounds, this Court accepts "the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence." (*Duff, supra*, 58 Cal.4th at p. 551.) This Court independently determines "from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained." (*Ibid.*)

"A statement is involuntary if it is not the product of a rational intellect and free will. The test for determining whether a confession is voluntary is whether the defendant's will was overborne at the time he confessed." (*People v. McWhorter* (2009) 47 Cal.4th 318, 347.) In assessing whether statements were the product of free will or coercion, this Court considers the totality of the circumstances, including "the crucial element of police coercion, the length, location, and continuity of the interrogation, and the defendant's maturity, education, and physical and mental health." (*People v. Duff* (2014) 58 Cal.4th 527, 555-556 (*Duff*).

"A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions." (*People v. McWhorter, supra*, 47 Cal.4th at p. 47.) A confession may be found involuntary if it is the product of threats or violence, obtained by direct or implied promises, or secured by the pressure of improper

influence. Although coercive police activity is a necessary predicate to a finding that a confession was obtained involuntarily, it does not itself compel a finding that a resulting confession was involuntary. The inducement must cause the involuntary statement. (*Ibid.*)

2. Sanchez's confession was voluntary

Sanchez's argument that the police coerced his confession relies on the premises that his invocation of his right to silence was ignored, that Officer Ward threatened him with physical harm, and that Lieutenant Garay threatened to take his family away. (AOB 215-216.) But the court made findings against Sanchez on each of these assertions. The court properly found that Sanchez did not invoke his right to silence, and thus Detective Shear did not ignore any invocation of Sanchez's *Miranda* rights. Even had Sanchez invoked his rights to Detective Shear, Sanchez's interview with Lieutenant Garay occurred at such a time, and after Sanchez was advised of and waived his rights, that the interview was proper under *Mosley*. (See Arg. VII, part C, *ante*; 6 CT 1343.) The court also found that Officer Ward did not threaten to physically harm Sanchez, and that Sanchez's claims to the contrary were not credible. Finally, the court found that Lieutenant Garay did not threaten Sanchez's family or make him any offers of leniency, and that Sanchez's claims to the contrary were not credible. (6 CT 1342.) This Court must accept the trial court's factual findings as true. (*Duff, supra*, 58 Cal.4th at p. 551.) Given these factual

findings, and Sanchez's failure to show he had invoked his right to silence when interviewed by Detective Shear, Sanchez's claim is not supported by the record. Accordingly, under the totality of the circumstances, Sanchez's confession was voluntary because the record reflects that he confessed due to his free will and not because of coercive police conduct. (*People v. McWhorter, supra*, 47 Cal.4th at p. 347.)

Additionally, the record supports the trial court's findings and ultimate ruling that Sanchez's confession was voluntary. Sanchez participated in four interviews over the course of three days. The first interview was conducted by Sergeant Kroutil and lasted less than an hour after Sergeant Kroutil had advised Sanchez of his *Miranda* rights. (8 RT 1628-1630, 1646-1647.) Sanchez acknowledged that he understood each of these rights and waived them. (8 RT 1585, 1628-1629, 1647-1648.) The next interview was held the following day, at a different facility, with Detective Shear. (8 RT 1519, 1521.) Detective Shear also advised Sanchez of his *Miranda* rights. (Court's Exh. 8 at pp. 2-3.) Sanchez acknowledged that he understood these rights, waived them, and agreed to talk with Detective Shear. (Court's Exh. 8 at pp. 2-3; 8 RT 1532-1534.) Further, Sanchez acknowledged that he had been advised of his rights the day before and that he had experienced no problems when interviewed by Sergeant Kroutil. (Court's Exh. 8 at p.p. 2-4.) The entire interview with Detective Shear was recorded and lasted between one and two hours. (8 RT 1557.)

Sanchez's next interview occurred the following day at the Porterville Police Station, with Officer Ward. It lasted less than half an hour before Lieutenant Garay took over. (9 RT 1756.) Officer Ward also advised Sanchez of his *Miranda* rights. (9 RT 1758.) Finally, Sergeant Garay's interview with Sanchez consisted of two parts with a 25-minute break in the middle. (8 RT 1809, 1851.) Before each part of the interview, Lieutenant Garay advised Sanchez of his *Miranda* rights in Spanish, and Sanchez waived them before agreeing to talk with Lieutenant Garay. (13 RT 3526-3527; 9 RT 1798, 1805-1806, 1849.)

Further, the record shows that Sanchez understood his rights, even though he claimed that he did not because he did not speak English well. Sergeant Kroutil, Detective Shear, Officer Ward, and Lieutenant Garay all testified that Sanchez seemed to understand his rights when he was advised of them in English. Sanchez also understood all the questions asked of him, and the officers understood all of his answers. (8 RT 1568, 1628-1629, 1645-1646; 9 RT 1759, 1776, 1798.) From the portion of Sanchez's interview with Detective Shear before Sanchez asked for an interpreter, it appears that Sanchez understood Detective Shear and could communicate coherently with him without the assistance of an interpreter. (Court's Exh. 8 at pp. 1-37.)

At every stage of Sanchez's interviews he was told that he did not have to talk with law enforcement and could have the assistance of an

attorney. Each time, Sanchez declined to exercise his rights and instead found it preferable to speak with officers. The evidence did not support Sanchez's claims to the contrary that he was not advised of his rights or that he had asked multiple times for an attorney and was denied.

Sanchez's claim that he was threatened by multiple police officers is also not supported by the evidence. (7 RT 1398-1399.) The evidence shows that Sanchez was treated appropriately throughout the interview process. Lieutenant Garay spoke to Sanchez in Spanish after Sanchez indicated that he preferred to speak in his native language. (9 RT 1798.) He was given a meal (9 RT 1798) and a 25-minute break (9 RT 1809, 1851) that included an opportunity for Sanchez to use the restroom (9 RT 1851) and to smoke a cigarette (7 RT 1401-1403, 1450-1451). Sanchez was not threatened during his interview with Detective Shear either. (Court's Exh. at p. 8.) Sanchez's request to talk with Sergeant Kroutil during his interview with Detective Shear was honored (8 RT 1556-1557), as was his request for an interpreter (Court's Exh. 8 at p. 37). Further, Sanchez told Detective Shear that he had no problems speaking with officers on the day of his arrest. This shows that Sanchez was not threatened, as he claimed, during his interview with Sergeant Kroutil. (Court's Exh. 8 at p. 4.)

A thorough reading of Sanchez's interviews with Detective Shear and Lieutenant Garay shows that Sanchez was not threatened with harm or that his family would be taken away. Detective Shear did accuse Sanchez of

lying about his whereabouts at the time of the murders (Court's Exh. 8 at pp. 55-56), and Lieutenant Garay did tell Sanchez that they had certain evidence proving his guilt, which in reality did not exist. (9 RT 1867.) However, these statements were permissible under the law because they would not have caused an innocent person to confess and instead were used to encourage Sanchez to confess to his crimes. (*People v. Smith* (2007) 40 Cal.4th 483, 505-506; 72 RT 14615.)

The record does not support Sanchez's claim that Lieutenant Garay had promised him leniency if he confessed or that Lieutenant Garay had threatened to take his family away. (7 RT 1398-1399.) The court did not find Sanchez's testimony at the section 402 hearing credible nor his allegation that Lieutenant Garay had threatened him. (6 CT 1342.) The record supports the court's finding because Sanchez lied multiple times that he was not advised of his rights by any officers (7 RT 1368, 1379, 1396-1397), but was recorded being advised twice and admitted on the recording that he had also been advised after his arrest. (Court's Exh. 8 at pp. 2-4; 13 CT 3526-3527.) Further, the contents of the interview with Lieutenant Garay show that Sanchez tried to minimize his own culpability by stating that he was "blacked out," "infuriated," "tired from everything," and "just shot" the victims. (13 CT 3528, 3531.) These statements were not in reference to any promise of leniency on the part of Lieutenant Garay. The context of Sanchez's confession shows that these statements were designed

to minimize his own culpability in the murders and in no way were induced by Lieutenant Garay's statements to him, including any alleged promise of leniency or threat. (13 CT 3526-3532.)

Sanchez was not promised leniency during his interview with Detective Shear either. Detective Shear urged Sanchez to tell him what had happened and whether "[s]omething different" had happened that day that affected his "mind" or his "body" that could explain why he did what he did. (Court's Exh. 8 at pp. 11-12.) This was not delivered in a threatening way, and it was told to Sanchez after Detective Shear said that he could not offer Sanchez leniency in any way, and Sanchez acknowledged that he understood. (Court's Exh. 8 at p. 11.) In fact, during Sanchez's interview with Detective Shear, Detective Shear urged Sanchez to tell the truth even if Sanchez thought the truth would make him look bad. Detective Shear caught Sanchez lying or telling half truths multiple times and responded by urging him to be truthful. (See Court's Exh. 8 at pp. 5-6, 10-11, 15-16, 54.) Thus, the evidence supports the court's finding that Sanchez was not offered leniency in exchange for his confession. (6 CT 1343-1344.)

Sanchez did have a low IQ and, by all accounts, was not sophisticated. He appeared to be in excellent physical and mental health and was not impaired by a disability that was apparent to the investigating officers. He also had been arrested before, showing that this was not his first interaction with law enforcement. (Court's Exh. 8 at pp. 8-11.) Based on Sanchez's

ability to understand English, his past interactions with law enforcement, and his ability to parry with the officers, the evidence did not support a finding that his will was overcome by the officer's tactics during his interviews.

Sanchez alleges that his status as a Mexican national disadvantaged him because he was "especially susceptible to making involuntary statements." (AOB 217-218.) The People disagree. Sanchez showed that he had the ability to converse in English throughout all of his interviews. (8 RT 1568, 1628-1629, 1645-1646; 9 RT 1759, 1776, 1798.) Although he requested that his interview with Lieutenant Garay be conducted in Spanish, Lieutenant Garay testified that Sanchez appeared to understand him and to communicate properly and completely in English. (9 RT 1798.) A review of Sanchez's interview with Detective Shear, before Sanchez requested an interpreter, also supports a finding that Sanchez was able to communicate in English. (Court's Exh. 8 at pp. 1-37; People's Exhs. 18, 19.)

Further, Sanchez had lived in the United States since he was 13 or 14 years old. (78 RT 15662.) He was in his mid-thirties at the time of his arrest (Court's Exh. 8 at p. 4.), meaning that he had been a resident of the United States for most of his life. He had family and friends in Porterville, including his wife, children, and siblings. (78 RT 15664-15665.) Sanchez was not a Mexican national who lacked resources and connections within

the United States, and thus was not particularly vulnerable to police interrogations given his status. (See *People v. Enraca* (2012) 53 Cal.4th 735, 757-758.) Based on this evidence, the trial court properly denied Sanchez's motion to suppress his confession because Sanchez's confession was voluntary.

E. The Purported Error Was Harmless

The erroneous admission of a statement obtained in violation of *Miranda* is reviewed under the harmless error standard set forth in *Chapman v. California, supra*, 386 U.S. at p. 24. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *People v. Cunningham* (2001) 25 Cal.4th 926, 994.) The same standard applies to the admission of a coerced confession. (*People v. Cahill, supra*, 5 Cal.4th 478 at pp. 509-510.) Thus, there is no prejudice if the error is harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) The California Supreme Court has similarly recognized that "confessions, 'as a class,' '[a]lmost invariably' will provide persuasive evidence of a defendant's guilt [citation], and ... often operate 'as a kind of evidentiary bombshell which shatters the defense'" (*People v. Cahill, supra*, 5 Cal.4th at p. 503.) Consequently, "the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial under the traditional harmless-error standard." (*Ibid.*)

Here, despite the significant probative value of Sanchez's confession, the purported error was harmless because there was abundant additional evidence against Sanchez. For example, Oscar saw Sanchez come into his mother's room immediately after she walked into the bedroom to call the police. He made his observations in an illuminated room and paid a high degree of attention to Sanchez's actions. Oscar also recognized a familiar face in his mother's room and was not forced to remember the traits of a stranger when making this identification. He identified Sanchez three times during the morning of the murders and then again at trial. These consistent identifications show the level of certainty Oscar had when identifying Sanchez as the man who was in his mother's room after she and Lorena had been shot. (See Arg. III, part B(1)(b), *ante*.)

Further, in the weeks and days leading to the murders, multiple witnesses saw Sanchez at Ermanda's house; in fact, Sanchez was seen arguing with Ermanda multiple times. (56 RT 11555-11561, 11563, 11586; 57 RT 11689-11691, 11740, 11750; 62 RT 12676, 12668-12669; 65 RT 13313, 13319, 13323-13324, 13290.) He was seen arguing with her outside of her house, driving by her house "real, real slow," and also arguing with her in her garage a mere four hours before the murders. (56 RT 11550, 11555-11557; 56 RT 11558-11561, 11563.) This behavior showed Sanchez was angry at Ermanda near the time of her murder; in other words, he had a motive.

Also, Sanchez possessed a gun matching the murder weapon. Raul Madrid returned a nine-millimeter handgun to Sanchez a week before the murders. The day before the murders, Sanchez claimed to have owned a gun. (57 RT 11659-11660, 11668.) After the murders, Sanchez did not possess any gun (55 RT 11389-A), showing that he had disposed of the weapon he claimed to have owned the previous day. The same is true about the knife found with Lorena's body. Sanchez's wife, Mary Lucio, testified that she had bought two knives from the 99-Cent Store. One knife was large, while the other was small. (56 RT 11494-11495.) After the murders, Sanchez only possessed the large knife, and the small knife was not at his home. (56 RT 11495-11496.) An expert testified that the knife found with Lorena was similar to the knife found at Sanchez's home and was most likely made by the same manufacturer. (63 RT 12863.)

Further, Sanchez was unable to provide a credible alibi. Mary Lucio testified that Sanchez was at home in Porterville asleep at the time of the murders. Mary went to bed at 4:30 on the morning of the murders, and Sanchez was also in bed. (56 RT 11467-11468.) She slept soundly that night and did not feel Sanchez get out of bed. However, Mary also admitted that Sanchez had sneaked out of the house "thousands of times" without her noticing. (56 RT 11472-11476.) A visitor at Sanchez's house heard Sanchez's truck shortly after Mary went to bed, thus indicating that Sanchez left the house shortly after Mary went to sleep at 4:30 a.m. (64 RT

13056-13060, 13074-13075.) Additionally, Sanchez was at his friend Hector's house a half hour before the murders. (55 RT 11350-A-11351-A, 11355-A.) Hector lived two and a half minutes from Ermanda's house, making it feasible for Sanchez to drive or walk to Ermanda's house, sexually assault Lorena and kill her and her mother, all before Oscar saw Sanchez in his mother's room shortly before 5:30 that same morning. Considering all of the incriminating evidence, the purported error in admitting Sanchez's confession was harmless beyond a reasonable doubt.

VIII. THE COURT PROPERLY ADMITTED EVIDENCE OF SANCHEZ'S HOMOSEXUAL RELATIONSHIP WITH HECTOR HERNANDEZ BECAUSE IT WAS RELEVANT TO ASSESS HECTOR'S BIAS AND SANCHEZ'S CREDIBILITY

Sanchez argues that the trial court erred by allowing the prosecution to elicit evidence of Hector Hernandez's homosexual relationship with Sanchez because the prejudicial effect of this evidence substantially outweighed the probative value. (AOB 221.) The People disagree. Hector had stated that Sanchez was at his house—which was near the location of the murders—shortly before the time of the murders. At trial, he denied making these statements. Evidence of Hector's relationship with Sanchez was relevant for the jury to judge his credibility, so it could determine which version of events Hector was truthful about. Further, the existence of the affair was relevant to evaluate Sanchez's credibility when he gave statements denying the affair during police interviews and at trial.

A. Background

1. Pre-testimony discussion

Before Hector's testimony at the third trial, the prosecution asked the trial court to revisit its prior trial rulings to exclude the nature of Hector's and Sanchez's relationship. (54 RT 11304.) The prosecutor argued that the relationship was relevant to show Sanchez's pattern of lying and then revealing a little bit of information at a time once confronted with the truth. (54 RT 11305, 11311-11317.). The nature of the relationship was also relevant because of prior statements Hector made to Margarita Ruiz. Hector had told Ruiz that Sanchez was at his house at 5:00 on the morning of the murders and confessed to having committed the murders. The relationship was relevant to show Hector's bias for not coming forward earlier with this information. (54 RT 11306-11307.) The trial court ruled that the nature of Hector's and Sanchez's relationship was admissible to show the inconsistencies in Sanchez's prior statements to the police during interviews. (54 RT 11317-11320.) However, the court deferred ruling regarding Hector's bias until it heard the evidence presented at trial. (54 RT 11308.)

2. Evidence of Hector's bias

At trial, Hector testified that Sanchez arrived at his house at approximately 8:00 on the night before the murders. (55 RT 11306-A, 11309-A.) After arriving, Hector told Sanchez that he (Hector) needed gas

for his lawn mower and cigarettes for his mother. He also noticed that Sanchez's license plate light was out, so he told Sanchez to get a new one. (55 RT 11309-A.) Sanchez left at 8:30 p.m. in his yellow truck to get the items and returned at around 10:00 that night. (55 RT 11310-A-11311-A.) When Sanchez returned, he and Hector had a beer and talked in Hector's driveway. Hector asked Sanchez for a ride to work the next morning and Sanchez agreed. (55 RT 11311-A.) Sanchez left Hector's house at 11:00 that night. (55 RT 11314-A.)

Hector awoke at 5:00 the next morning, which was his usual time. He expected Sanchez to pick him up at 6:00 that morning. (55 RT 11316-A-11317-A.) However, Hector called his brother, Eddie Hernandez, at 5:30 asking for a ride to work. (55 RT 11318-A-11319-A.) Hector testified that he did not see Sanchez on the morning of the murders. (55 RT 11341-A.) He also denied ever telling Margarita Ruiz that he saw Sanchez at his house during the early morning the day of the murders. (55 RT 11323-A.) However, Hector did remember talking to Ruiz on the morning of the murders and again a few days after the murders. (55 RT 11322-A, 11340-A.)

Hector told the prosecution's investigator that it was possible that Sanchez stopped by his house the morning of the murders; but if Sanchez did stop by, Hector did not see him. (55 RT 11318-A, 11346-A-11347-A.)

Margarita Ruiz testified that she talked to Hector on the phone on the morning of the murders. Hector told her that Sanchez had been at his house at 5:00 that morning. (55 RT 11350-A-11351-A.) Two days later, Hector again told Ruiz that Sanchez “went back to his house around five o’clock in the morning.” (55 RT 11355-A.)

The prosecutor informed the court that he intended to recall Hector as a witness so that he could question him about his relationship with Sanchez. (55 RT 11360-A.) Defense counsel agreed the evidence was relevant to Hector’s bias; however, she argued that it had limited probative value because Hector told officers he no longer had feelings for Sanchez. Thus, Hector had no motive to lie. (55 RT 11360-A; 61 RT 12483.) The jury heard evidence that Sanchez and Hector were “good friends,” which, according to defense counsel, was adequate to show Hector’s bias. (61 RT 12483.) The defense further argued that this evidence was highly inflammatory in nature, and therefore, its potential for prejudice outweighed its probative value. (61 RT 12483-12484.)

The court acknowledged that the state of the evidence was uncertain and that there was “a legitimate concern about potential undue prejudice.” (61 RT 12486.) However, the court agreed that Hector’s credibility was relevant because his testimony and prior statements could assist the jury in determining whether Sanchez was asleep at home, as his wife claimed, or was “active and about in the community of Porterville at or about the time

of the homicide.” (61 RT 12486-12487.) The court also agreed that there is a “material difference” between a close friendship and an intimate relationship. With this in mind, the court ruled that the nature of Sanchez’s relationship with Hector was admissible because it was not unduly prejudicial under section 352. (61 RT 12486-12487.) The court further found that the length of the relationship was relevant, but the number of times Sanchez and Hector were intimate was excluded. The prosecution affirmed that it did not want to go into the number of times Sanchez and Hector were intimate, except to establish that it was more than the one time Sanchez admitted during police interrogations. The court agreed and then invited defense counsel to draft a limiting instruction. (61 RT 12490-12491.)

Before Hector testified, the court admonished the jury as follows:

All right. Ladies and gentlemen, before we go any further on the issue, I want you to clearly understand something, and there will be a formal jury instruction on this. [¶] This evidence is being introduced for the purpose of showing, if it does, that Mr. Sanchez and Mr. Hernandez were engaged in a consensual sexual relationship and on more than one occasion.

This evidence – the evidence is admitted for a limited purpose. It may be used to judge the credibility and believability of Mr. Hernandez when he denied seeing Juan Sanchez on August the 4th, 1977 [*sic*], at about five o’clock in the morning. [¶] It may be used to evaluate the truthfulness of Mr. Sanchez’s statements to Detective Shear relating to his relationship with Mr. Hernandez, and it may be used in considering the credibility and believability of Mr. Sanchez’s testimony at trial.

It absolutely is not being introduced for any other purpose unless I direct you otherwise. [¶] Now, ladies and gentlemen, we did not voir dire you on this issue. Obviously, consensual adult sexual relationships are not illegal in our society. As a matter of fact, there are constitutional protections in place that recognize that.

If any of you cannot accept this limiting instruction of the court, I – you might be comfortable in accepting it, let me know that at this time. However, you are all well aware of your oath and responsibilities as jurors. [¶] In that respect then, if any of you have any difficulty in accepting the court's admonition in this respect, you are under an absolute duty to, at an appropriate time that's comfortable for you, to let the bailiff know that there's a matter that you need to discuss with me, and we'll talk about it. But if this bothers you, again, you're under an absolute duty to let us know, no exceptions. And this shall be done – the bailiff shall be notified if this is an issue for you no later than ten o'clock tomorrow morning. Thank you very much.

(62 RT 12580-12581.)

Hector then testified that he and Sanchez had been involved in a sexual relationship for approximately five years. (62 RT 12579-12580.)

Hector was in love with Sanchez in 1997 and also at the time of his testimony. (62 RT 12582.)

Following this testimony, and outside the presence of the jury, defense counsel requested that the instruction include a specific charge that evidence of Sanchez's relationship with Hector could not be used to determine Sanchez's propensity to commit a particular crime, specifically the crimes charged in this case. (62 RT 12596-12598.) The court and defense counsel then had the following discussion:

COURT: Well, what occurs to me is that if the jury believes Mr. Hernandez, it could also be considered for the – I mean, some adults practice sodomy, sodomy in other adults are averse to sodomy. It certainly suggests that Mr. Sanchez is not averse to sodomy. So it's – there is some probative value to it, separate and apart from the concerns that are provided in Evidence Code Section 1101(b). [¶] So it does have probative value in that respect.

DEFENSE COUNSEL: Your Honor, I had previously argued that it had no probative value in that respect because this was a consensual sexual relationship, unlike the one we're dealing with here which is not consensual, and I did not ask Hector anything about my client's tendency to be rough or gentle as a sexual partner which would be probative in this case, not the conduct, itself, but what – what type of sexual partner he was; whether he would tend to be rough or gentle. [¶] I mean, I don't want to go into that because I think that's what's wrong with this case already, that contaminating them over again with the type of conduct is very prejudicial, but to say that consensual sexual conduct is – has any probative value in a forced sexual conduct case I think would be like saying that because a man has sex with a woman, that he is a rapist.

COURT: No, I – I disagree with your analysis in that respect. It has probative value and that's something that can be articulated in a jury instruction that they will get. [¶] They were given a limiting instruction. They know what it's limited to. I said it may be considered, I think, for other purposes if I tell you that it can be. I've limited it.

This – that evidence has nothing to do with bad character or propensity to commit a crime, and I'm not – I'm not going to suggest – there's just no need to give it and put it in those negative terms, but I will allow you to, of course, bring this up again during jury instructions and I did tell them, as I recall, that they will get a jury instruction on it. So that will be a complete admonition from the court as to this issue, complete and final admonition.

(62 RT 12598-12600.)

3. Evidence of Sanchez's inconsistent statements to police

In his interview with Detective Shear, Sanchez initially denied his relationship with Hector and then admitted he and Hector had been intimate a single time. (66 RT 13630-13632.) At trial Sanchez testified that he and Hector had been together "one, two, or three times." (66 RT 13631.) He denied that the sexual relationship had lasted for five years. (66 RT 13631-13632.)

During a break, the prosecutor argued that Sanchez's statements to Lieutenant Garay should be admitted to further show Sanchez's history of admitting the truth after being confronted with the inconsistencies in his lies. (67 RT 13667-13669.) The court agreed that the evidence was probative, especially as it concerned Sanchez's claim that he made a false confession. Sanchez claimed the his inability to provide details about the murders during his confession, proved that he had made a false confession. Yet, the court noted, he also did not supply details about something known to be within his personal knowledge – e.g. the affair with Hector. Thus, Sanchez's failure to recall details about something known to be within his personal knowledge was relevant to show that Sanchez's failure to recall details about the murders may not have been genuine. The trial court, however, agreed that the jury needed to be instructed so that it would not misuse the evidence. (67 RT 13669-13671.)

Before Sanchez testified, the court admonished the jury as follows:

All right. Ladies and gentlemen, before we begin, there – there was evidence introduced yesterday again on the consensual sexual relationship between Mr. Sanchez and Hector Hernandez. [¶] I just wanted to remind you I've already given you a limited instruction on the use of that evidence, and I just wanted to remind you at this point again that it is being offered for a limited purpose of, among other – excuse me, the limited purpose of judging the credibility of Mr. Hector Hernandez. It may be used in considering the truthfulness of Mr. Sanchez's testimony in court. It may be used to consider the truthfulness of Mr. Sanchez's testimony relating to his whereabouts on the morning in question, and as I believe I already mentioned, it may be used in judging Mr. Sanchez's credibility. It is admitted for those limited purposes.

...

Excuse me, one other thing...And I think this goes without saying, that you're not permitted to consider that evidence for any other purpose than one that the court has instructed you may consider, and you will get a formal jury instruction on this at the time of jury instructions.

(67 RT 13672-13674.)

The prosecution then questioned Sanchez about his interview with Lieutenant Garay. When asked whether he told Lieutenant Garay that he had never had sex with Hector, Sanchez responded that he did not lie or try to hide anything from Lieutenant Garay, he just agreed with whatever Lieutenant Garay said to him. (67 RT 13731-13732.) Sanchez then testified that he did not know whether it was true when he told Lieutenant Garay that he never had sex with Hector, but he did have sex with Hector; however, it was not the five year relationship that Hector claimed. (67 RT

13732.) Sanchez admitted he was not truthful with Detective Shear and Lieutenant Garay when he told them that he and Hector only had sex a single time. (67 RT 13738.) The prosecution then questioned Sanchez about the particulars of his confession, including the reasons that he claimed caused him to falsely confess. (68 RT 13906-13910.)

4. The court's instructions

Before jury deliberations, the court instructed the jury as follows:

Evidence has been introduced for the purpose of showing, if it does, that the defendant and Hector Hernandez were engaged in a consensual relationship. [¶] Such evidence, if believed, may not be considered by you to prove that Mr. Sanchez is a person of bad character or that he has a disposition to commit crimes, including the crimes for which he is not charged. [¶]

...

Such evidence, if believed, may be considered by you only for the limited purpose of determining if it tends to show the following: The credibility/believability of Mr. Hector Hernandez when he denied seeing Juan Sanchez on August 4th, 1997, at or about five o'clock in the morning; the credibility/believability of Juan Sanchez's statements to police officers and his testimony at trial.

For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider this evidence for any other purpose.

(75 RT 15071-15072.)

B. The Trial Court Did Not Abuse Its Discretion by Admitting Evidence of Sanchez's Relationship With Hector, Because its Probative Value Was Not Outweighed by its Prejudicial Effect

A trial court may, in its discretion, exclude evidence if its “probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (§ 352.) Under section 352, a court has “broad power to control the presentation of proposed impeachment evidence ‘to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.’” (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1089-1090, citing *People v. Mills* (2010) 48 Cal.4th 158, 195.) This Court has repeatedly held the trial court retains wide latitude to manage cross-examination and the related admission of evidence. (*People v. Mendoza, supra*, 52 Cal.4th at p.p. 1089-1090, citing *People v. Harris* (2008) 43 Cal.4th 1269, 1292.)

“‘Relevant evidence’ means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (§ 210; *People v. Jefferson* (2015) 238 Cal. App. 4th 494, 504.) Evidence is substantially prejudicial within the meaning of section 352 if it encourages the jury to prejudge the defendant’s case based upon extraneous or irrelevant considerations. (*People v. Cowan* (2010) 50 Cal. 4th 401, 479; *People v. Rogers* (2006) 39 Cal.4th 826, 863.)

Put another way, evidence is considered substantially more prejudicial than probative if it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome.” (*People v. Dement* (2011) 53 Cal. 4th 1, 36.) This includes the risk that the jury would convict the defendant of the charged offenses, regardless of his guilt, to punish him for the admitted prejudicial evidence. (*Ibid.*; *People v. Balcom* (1994) 7 Cal.4th 414, 427.)

1. Evidence of Sanchez’s relationship with Hector was relevant to show both Hector’s and Sanchez’s credibility

Sanchez claims that his homosexual relationship with Hector was not relevant to either Hector’s or his own credibility, and was unduly prejudicial. First, he argues that the relationship was not relevant to Hector’s credibility because Hector provided favorable testimony to the prosecution; and for the prosecution to impeach that testimony would necessarily undercut its own theory. (AOB 243.) Also, Sanchez argues that the relationship was not relevant to his own credibility during his interviews with law enforcement and his testimony. (AOB 245-246.) The People disagree with both of these contentions.

a. Sanchez's relationship with Hector was relevant to assess Hector's credibility when he testified that he did not see Sanchez on the morning of the murders

Hector initially testified that he did not see Sanchez on the morning of the murders. (55 RT 11341-A.) Hector denied ever telling Ruiz that Sanchez had been at his house at 5:00 on the morning of the murders, though he admitted that he had talked to Ruiz later that day. (55 RT 11322-A.) Ruiz's testimony, that Hector told her that Sanchez was at his house at 5:00 on the morning of the murders, served to impeach Hector's testimony. (55 RT 11350-A-11351-A, 11355-A.) As the trial court noted, this was relevant to show that Sanchez was near the scene of the murders at the time he claimed that he was at home asleep. (61 RT 12486-12487.)

Sanchez's whereabouts at the time of the murders was a disputed fact of the case. The prosecution argued that Sanchez was present and killed both Ermanda and Lorena in the early morning hours of August 4, while Sanchez argued that he was at home asleep. (66 RT 13571-13573; 76 RT 15155-15156.) The fact that Hector told Ruiz that Sanchez came to his house around 5:00 that morning supported the prosecution's theory of the case because it contradicted testimony by both Sanchez and his wife that he was home sleeping at the time of the murders. (56 RT 11468-11469, 11471; 66 RT 13573.) In fact, it placed Sanchez two and a half minutes from the location of the murders, near the time of the murders. (60 RT

12242-12243.) The court noted this conflict when it ruled on the prosecution's motion. (62 RT 12580-12581.)

Thus, the evidence that Hector was in a sexual relationship with Sanchez tended to discredit Hector's trial testimony that he did not see Sanchez the morning of the murders, and explained why he did not testify to the same statements he previously made to Ruiz and the prosecution's investigator. As the trial court noted, "[t]here is a material difference between a friendship, even a close friendship, and an intimate relationship, particularly an intimate relationship wherein the person whose veracity is at issue has expressed a love for the principal at issue." (61 RT 12487.) According to Hector, he and Sanchez were not just close friends, but were involved in a five-year intimate relationship. (62 RT 12579-12580, 12582.) Additionally, Hector admitted to loving Sanchez at the time of the murders and at the time of his testimony. (62 RT 12582.) Hector's past relationship with Sanchez and the emotions involved in their relationship were relevant to Hector's credibility and was therefore highly probative.

Sanchez argues that there was "no credibility or bias issue, except that contrived by the prosecution in misstating the evidence" and that the court relied on that misstatement when ruling that evidence of the relationship could be admitted. (AOB 242.) Sanchez refers to the prosecution's proffer that Ruiz would testify that Hector told her Sanchez confessed to the murders. (54 RT 11306.) The People disagree with this interpretation of

the record. The trial court did not rely on the prosecution's proffer regarding Ruiz's proposed testimony when it admitted evidence of the relationship between Hector and Sanchez. In fact, the court deferred ruling regarding Hector's bias until it heard the evidence presented during testimony, and did not make any ruling until after Hector had denied making statements to Ruiz. (54 RT 11308; 55 RT 11360-A.) Thus, although the prosecution was mistaken that Ruiz would testify that Hector told her Sanchez confessed to the crime, this mistake had no bearing on the court's ruling.

Sanchez also argues that the relationship should not have been admitted because "[i]nstead of testifying as the prosecutor proffered, that Hernandez told her Sanchez came to his house the morning of the crimes and more-or-less confessed, Ruiz testified that Hernandez vouched for Sanchez's innocence." (AOB 243.) But Hector's belief in Sanchez's innocence was not the relevance of Hector's statement that Sanchez was at his home at 5:00 on the morning of the murders. Instead, Hector's statement was relevant to Sanchez's whereabouts near the time of the murders. Hector's statements to Ruiz and his testimony at trial made evidence of his relationship with Sanchez relevant, because it informed the question of whether Hector actually saw Sanchez around the time of the murders.

Sanchez argues that Hector's "supposed 'bias' had no probative value in determining Sanchez's whereabouts in the early morning hours of August 4 – i.e., whether he was at home sleeping or at Reyes's house." (AOB 244.) But as respondent has explained, evidence that Hector saw Sanchez at Hector's own home at 5:00 on the morning of the murders showed that Sanchez was not at home sleeping at that time, as he claimed. Hector's sexual relationship with Sanchez was relevant to this point because it tended to explain the contradiction between the statements Hector made to Ruiz and those he made at trial. Thus, the court properly admitted the relationship between Sanchez and Hector because it was relevant to Hector's credibility.

b. Sanchez's relationship with Hector was relevant to Sanchez's credibility during his testimony and his interviews with the police

The truth of Sanchez's confession was a disputed fact of the case. To prove Sanchez's confession was truthful, the prosecution sought to illustrate Sanchez's process of revealing the truth. (76 RT 15165-15176, 15180-15182, 15184-15185, 15192, 15193-15194.) Because Sanchez eventually revealed his relationship with Hector the same way he eventually revealed his guilt, it was proper to admit Sanchez's relationship with Hector to illustrate Sanchez's consistent behavior patterns.

During Sanchez's interviews with officers, he initially denied committing the murders of Lorena and Ermanda. (54 RT 11252.) But in

the course of the interview process, Sanchez revealed that he did in fact commit the murders and detailed how he went about it. (13 RT 3527-3533.) This gradual revelation of the truth was a process that occurred with other subjects during the interviews. For example, when asked if he was at Ermanda's house the Saturday before the murders, Sanchez stated that he went there to fix her car, but then stated he went there to give her a watch, then again changed his story to say that he went to Ermanda's house to give her money. (55 RT 11217-A-11219-A.)

As another example, Sanchez claimed to have taken his wife to a barbeque at his brother's house on the afternoon before the murders, however he admitted that was not true after he was confronted with his wife's statements that she never went to the barbeque. (55 RT 11219-A; 56 RT 11466.) Later, Sanchez claimed to have been at his friend Hector's house from 9:00 p.m. to 11:00 p.m. before going home for the rest of the night. (54 RT 11329-11331; 55 RT 11220-A.) However, Sanchez later admitted that he left Hector's house for a "period of time" and went shopping at several stores before returning to Hector's house. (54 RT 11329-11332, 11388-11389; 55 RT 11220-A.)

Sanchez denied knowing about a knife when shown a photograph by Sergeant Kroutil. After being told that the photo was taken at his home, Sanchez admitted to having seen the knife, but insisted that his wife only purchased that one knife. (55 RT 11225-A-11228-A.) Sanchez later

admitted to Detective Shear that his wife had bought two knives but he thought that the smaller of the two knives was lost. (54 RT 11334-11335.)

Sanchez also told Detective Shear that he never used the knife but later admitted that he had used the knife and lost it in the backyard. (54 RT 11337, 11339-11340.)

Sanchez lied again when Detective Shear asked about his arrest record. Initially, Sanchez denied ever having been arrested. (54 RT 11322-11323.) He later admitted that he had been arrested, but only for driving without a license. (54 RT 11323-11324.) As Detective Shear questioned Sanchez further, he admitted he had been arrested for a narcotics violations. (54 RT 11324.) At some later point, Sanchez admitted that the narcotics violation was for cocaine, but then subsequently said that it was “just marijuana.” (54 RT 11325.)

Each time Sanchez’s responses were called into doubt, he revealed more of the truth. This process of revealing the truth was part of the prosecution’s argument concerning why Sanchez’s confession was credible. The prosecution could point to examples where Sanchez objectively lied before subsequently telling police the truth and then lying again about his involvement. (76 RT 15165-15169, 15174-15177, 15180-15181, 151884-15185, 15190-15192, 15193-15194.) This provided a framework for the jury to work through when assessing the credibility of Sanchez’s contemporaneous statements to officers regarding the murders.

Just like these lies, Sanchez initially denied killing Ermanda and Lorena. (53 RT 11167-11168; 54 RT 11252.) He then said he was upset with Ermanda for things she had said about him and because she owed him money. (53 RT 11168, 11173-11174.) Twenty to thirty minutes into the interview with Lieutenant Garay, Sanchez admitted to going to Ermanda's house with a gun and shooting both her and Lorena. (53 RT 11163-11164, 11174.) He walked into Ermanda's house through the unlocked front door and shot Ermanda two or three times. (53 RT 11174.) He then saw another person and shot at her more than one time before leaving the house. (53 RT 11175.) He claimed to have not known who the second person was and denied having sexually assaulted Lorena. (13 CT 3543-3444, 3556-3558; 53 RT 11175.) After he left, Sanchez got in his truck and drove toward the town of Poplar, where he threw the gun into a field. (53 RT 11179.)

When Sanchez was questioned about his relationship with Hector, he engaged in the same sort of conduct that he did when confronted about his arrest record, the knife found with Lorena, his reasons for visiting Ermanda, and the murder itself. At first Sanchez denied any sort of intimate relationship with Hector, except being a friend. (62 RT 12594.) Detective Shear then confronted Sanchez with statements made by Hector, which led Sanchez to admit that he had sexual relations with Hector "on only one occasion." (62 RT 12595.) When questioned about the same topic by Lieutenant Garay, Sanchez again said that he did not have a sexual

relationship with Hector. However, when confronted by Lieutenant Garay with Hector's statements to the contrary, Sanchez admitted to having a sexual relationship. (67 RT 13731-13736.)

Most telling, Sanchez engaged in the same behavior at trial when the prosecution asked him the same line of questions. When asked whether he had lied to Detective Shear and Lieutenant Garay when he told them that he did not have sex with Hector, Sanchez testified that he did not lie. (67 RT 13731-13732.) Upon further questioning, Sanchez ultimately revealed that he did have a sexual relationship with Hector, but that they only had sex "one, two, or three times." (67 RT 13733-13734.) Sanchez also ultimately admitted that he did lie to Detective Shear and Lieutenant Garay. (67 RT 13738.)

It was this behavior that the prosecution sought to illustrate so the jury could properly analyze Sanchez's confession. Sanchez confessed to the murders the same way he ultimately admitted to his relationship with Hector. Not only did he act this way during police interviews, but also during testimony when asked about his relationship with Hector. Thus, the trial court properly determined that Sanchez's relationship with Hector was relevant to assess Sanchez's credibility. (54 RT 11317-11320.)

2. Sanchez's relationship with Hector was not unduly prejudicial

As detailed above, the court instructed the jury a total of three times about the proper use of evidence that Sanchez had a homosexual relationship with Hector. (See Arg. VIII, part A(2)(b)-(c), *ante.*) When it delivered the first instruction, the court invited any juror who was uncomfortable accepting the instruction to inform the court, so that they may discuss it with the court. The court was careful not to single out any juror, and instead directed them to approach the bailiff at a time that was comfortable for them. (62 RT 12581.) The court further informed the jurors that consensual adult sexual relationships were not illegal and that there were constitutional protections in place to recognize that. (62 RT 12580-12581.)

The court's second admonition reiterated that the evidence of the relationship could only be used for the purposes explained by the court – the credibility of Hector and credibility of Sanchez during his police interviews and testimony. (67 RT 13672-13674.) The court gave this instruction before the prosecution questioned Sanchez, thereby ensuring that the jury would interpret the evidence as directed by the instruction.

Finally, the instructions given prior to deliberations, the court again impressed upon the jury that the evidence of a consensual relationship between Hector and Sanchez could not be used to “to prove that Mr.

Sanchez is a person of bad character or that he has a disposition to commit crimes, including the crimes for which he is not charged.” (75 RT 15071-15072.) The jury was again told that the only purpose for which the evidence could be used pertained to the credibility of Hector and the credibility of Sanchez during the police interviews and at trial. (75 RT 15071-15072.)

All of these instructions ensured that the jury would use the evidence of Sanchez’s relationship with Hector properly. And on appeal, it is presumed that the jury understood and followed the instructions. (*People v. Sandoval* (2011) 62 Cal.4th 394, 422.)

Sanchez points to the court’s comments about a person’s propensity to commit sodomy to prove that evidence of his homosexual relationship was easily interpreted for prejudicial purposes. (AOB 250, citing 62 RT 12598-12600.) But the court made those comments outside the jury’s presence, so they are irrelevant to Sanchez’s claim.

The court repeatedly and explicitly limited the use of the evidence of Sanchez’s relationship with Hector to three purposes: (1) to judge the credibility of Hector when he denied seeing Sanchez on August 4; (2) to judge the credibility of Sanchez’s testimony; and (3) to judge the credibility of Sanchez’s statements during his police interviews. The trial court explicitly instructed the jury it could not use the evidence for any other purpose. (62 RT 12580-12581; 67 RT 13672-13674; 75 RT 15071-15072.)

Again, it is presumed that the jury followed these instructions, and Sanchez has not rebutted this presumption. (*People v. Avila* (2006) 38 Cal.4th 491, 574.)

Sanchez argues that defense counsel's proposed instruction would have better guarded against prejudice because, as written, the court's instruction allowed the "*fact* of [his] relationship to be used to assess [his] credibility with respect to all his statements and testimony – including his denial of guilt." (AOB 251-252, italics in original.) The defense's proposed instruction would have limited the use of the evidence to four principles:

(1) evidence had been introduced for the purpose of showing that Sanchez and Hernandez had been engaged in a consensual sexual relationship on more than one occasion; (2) such evidence could not be considered by the jurors to prove that Sanchez was a person of bad character or that he had a disposition to commit crimes, including the charged crimes in this case; (3) the relationship could only be used to judge Hernandez's credibility when he denied seeing Sanchez on August 4, 1997, at 5:00 a.m.; and (4) the number of occasions that Sanchez and Hernandez engaged in consensual sexual conduct could only be used in considering Sanchez's testimony at trial.

(AOB 251-252, citing Appendix A.)

Sanchez argues that the court's instruction was too permissive as to the fourth principle, because it allowed the jury to use the existence of the relationship to judge his credibility. Instead the court should have instructed the jury that it could use the relationship to judge whether

Sanchez was credible when he denied being intimate with Hector on more than one occasion. (AOB 252.) A reasonable reading of the court's instruction; however, made clear to the jury that the relationship could only be used to assess the credibility of Sanchez's statements to officers and during testimony regarding the topic of the relationship. In fact, this is exactly what the prosecution argued to show that Sanchez had a process of revealing the truth, which he exhibited when confronted about his relationship with Hector and when confessing to the murders. (54 RT 11305, 11311-1317.)

The evidence of the relationship was relevant because it showed that Sanchez's statements about the relationship to officers and during testimony were not true. The jury then saw the process of Sanchez eventually admitting the truth to those known lies. It could then compare Sanchez's testimony and police interviews in general to that process. The court ruled this was a permissible use of the evidence (61 RT 12486-12487), and it crafted an instruction that adequately communicated this to the jury.

Further, "the jury was not tempted to convict defendant of the charged offenses, regardless of his guilt, in order to assure that he would be punished for" engaging in a homosexual relationship. (*People v. Balcom* (1994) 7 Cal.4th 414, 427.) Sanchez took part in a five-year consensual relationship with another man. Hector did not testify that Sanchez was

abusive to him or violent in any way. In fact, Hector stated that he loved Sanchez. (62 RT 12582.) There was nothing about Sanchez's relationship with Hector that would make a juror convict Sanchez of a violent double homicide. This, considered with the court's instructions limiting the use of the relationship to judge Hector's and Sanchez's credibility, dispelled any prejudicial effect Sanchez's homosexual relationship could have on the jury. Accordingly, the probative value of the relationship was not outweighed by its prejudicial impact, the court did not abuse its discretion by overruling Sanchez's objection and the admission of this evidence did not deprive Sanchez of due process.

C. The Purported Error Was Harmless

Routine application of state evidentiary law does not implicate a defendant's constitutional rights. (*People v. Mills* (2010) 48 Cal.4th 158, 196.) Had Sanchez's relationship with Hector been excluded from evidence, it is not reasonable that a more favorable verdict would have resulted. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) As described above, the evidence itself had little prejudicial impact, especially considering the court's numerous limiting instructions. (See Arg. VIII, part B(2), *ante.*) As described in Argument I, part C, ample evidence existed to convict Sanchez of the crimes charged. Further, even if Sanchez's relationship with Hector had been excluded, the jury still would have heard Oscar's testimony placing Sanchez in his mother's house on the day of the

murders. (60 RT 12216-12218, 12222-12224.) Also, exclusion of the relationship would not have eliminated evidence that Sanchez was near Ermanda's house, close to the time she and Lorena were murdered. (55 RT 11350-A, 11355-A; 60 RT 12242-12243.) Besides Ruiz's testimony, other evidence tended to show that Hector's prior statements were credible. In fact, Hector also stated to the prosecution's investigator that it was possible Sanchez stopped by his house the morning of the murders. (55 RT 11318-A, 11346-A-11347-A.) Further, Hector called his brother for a ride to work at 5:30 on the morning of the murders, before the 6:00 scheduled time Sanchez was supposed to pick him up. (55 RT 11316-A-11319-A.) This showed that Hector knew that Sanchez would not pick him that morning. In sum, it is not reasonably probable that Sanchez would have received a more favorable verdict but for the evidence of his relationship with Hector; indeed, the purported error was harmless beyond a reasonable doubt.

IX. THE COURT PROPERLY ADMITTED STATEMENTS SANCHEZ MADE TO LIEUTENANT GARAY AFTER HE INVOKED HIS RIGHT TO SILENCE TO IMPEACH HIS TESTIMONY AT TRIAL

Sanchez argues that the trial court abused its discretion when it allowed the prosecution to question him regarding his homosexual relationship with Hector. He first claims that the topic should have been inadmissible in whole because its probative value did not outweigh its prejudicial effect. (AOB 267-271.) Sanchez next argues that the court

erred by allowing the prosecution to use statements, that were earlier ruled inadmissible under *Miranda*, to impeach his trial testimony. (AOB 258-278.) According to Sanchez, the prosecution should not have been allowed to question him about his denial to Lieutenant Garay that he and Hector had an affair, because he did not testify contrary to those statements.

The People disagree. As discussed in Argument VIII, Sanchez's relationship with Hector was relevant to assess the credibility of Sanchez's testimony and his statements to police. The questioning of Sanchez specifically regarding the issue of his affair with Hector was not unduly prejudicial when compared to its relevant value. Further, Sanchez's statements to Lieutenant Garay denying his relationship with Hector were admissible under *Harris v. New York* (1971) 401 U.S. 222. Sanchez testified that his confession was false, and sought to prove this by demonstrating that it lacked detail that the actual murderer would be able to provide. Sanchez's statements to Lieutenant Garay were thus admissible to impeach Sanchez's testimony that he falsely confessed.

A. Background²⁶

Sanchez testified that he confessed to the murders because Officer Ward and Lieutenant Garay threatened him, and because he was tired to the

²⁶ The complete background facts for this argument can be found in the Background section of Argument XIII. For clarity purposes, the People have reiterated some relevant facts.

point that he just wanted the interrogation process to be over. (66 RT 13604-13605.) As to the contents of his confession, Sanchez claimed that he knew what to say about the specifics of the murders because Lieutenant Garay basically explained to him what had happened through his questions, and Sanchez would state the facts he thought Lieutenant Garay wanted to hear. (66 RT 13605.) This testimony supported Sanchez's defense that his confession could be proven false because it lacked information that should have been known to the true murderer. (53 RT 11054.)

During a break in Sanchez's testimony, the prosecutor argued that Sanchez's statements to Lieutenant Garay that he did not have an affair with Hector should be admitted to show Sanchez's history of admitting the truth after being confronted with the inconsistencies in his lies. (67 RT 13667-13669.) The court agreed that the evidence was probative, especially as it concerned Sanchez's claim that he made a false confession. (67 RT 13669-13671.) Sanchez claimed that his inability to provide details about the murders during his confession proved that he had made a false confession. (53 RT 11054; 66 RT 13604-13605.) Yet, the court noted, he also did not supply details about something known to be within his personal knowledge – e.g. the affair with Hector. Thus, the court reasoned, Sanchez's failure to recall details about something known to be within his personal knowledge was relevant to show that Sanchez's failure to recall

details about the murders may not have been genuine. (67 RT 13669-13671.)

Before Sanchez testified, the court admonished the jury about the limited purpose for which evidence of Sanchez's homosexual relationship with Hector was to be used. (67 RT 13672-13674.) The prosecution then questioned Sanchez about his interview with Lieutenant Garay. When asked whether he told Lieutenant Garay that he had never had sex with Hector, Sanchez responded that he did not lie or try to hide anything from Lieutenant Garay; instead he just agreed with whatever Lieutenant Garay said to him. (67 RT 13731-13732.) Sanchez then testified that he did not know whether it was true when he told Lieutenant Garay that he never had sex with Hector. He then testified that he did have sex with Hector; however, it was not the five year relationship that Hector claimed. (67 RT 13732.) Sanchez admitted he was not truthful with Detective Shear and Lieutenant Garay when he told them that he and Hector only had sex a single time. (67 RT 13738.) The prosecution then questioned Sanchez about the particulars of his confession, including the reasons that he claimed caused him to falsely confess. (68 RT 13906-13910.)

B. The Relevance of Sanchez's Affair With Hector Was Not Substantially Outweighed by Its Prejudicial Effect

Sanchez appears to argue that he should not have been questioned about his affair with Hector because its prejudicial effect outweighed its

probative value. (AOB 267-271.) As discussed in detail in Argument VIII, Sanchez's prior statements about his affair with Hector were admissible because they were relevant to his credibility. (See Arg. VIII, part B(1)(b), *ante*.) Further, the court forestalled any prejudicial effect by instructing the jury about the proper uses of the evidence. (See Arg. VIII, part B(2), *ante*.) Accordingly, the trial court properly found that evidence of Sanchez's affair with Hector was not unduly prejudicial and excludable under section 352.

Sanchez's reliance on *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011 (*Winfred D.*), is misplaced. In *Winfred D.*, the plaintiff sued the defendant tire company, alleging that a tire defect caused an accident that severely injured the plaintiff. The defense claimed the accident was not caused by a tire defect, but rather from the plaintiff's action in overloading the vehicle. During trial, the defendants were permitted to introduce evidence that the plaintiff had an affair while married to his first wife, later married his mistress without divorcing his first wife, and subsequently had an affair with yet another woman, resulting in the birth of two children. (*Id.* at p. 1014.)

The appellate court held the admission of this evidence was irrelevant to the underlying proceedings, and to the extent that it could be considered relevant, its probative value was far outweighed by its prejudicial impact, resulting in a miscarriage of justice. (*Winfred D.*, *supra*, 165 Cal.App.4th at p. 1014.) As is relevant to this discussion, the defendants sought to

introduce the evidence to explain the plaintiff's motive to overload the van. The defendants theorized that the plaintiff had an incentive to overload the van so he could make more money, because he had two families to support. The appellate court recognized that this evidence could be relevant to show his financial condition; however, virtually no financial evidence was presented in the case. (*Id.* at p. 1037.) The court concluded that the evidence's probative value was weak, while its prejudicial impact was significant. (*Id.* at pp. 1037-1038.) As the court explained, "[f]rom start to finish, [the defendants] painted [the plaintiff] as a liar, cheater, womanizer, and man of low morals based principally, if not solely, on what we have concluded was inadmissible evidence." (*Id.* at p. 1038.)

Unlike in *Winfred D.*, the evidence here was relevant to Sanchez's credibility when he made statements to the police denying his affair with Hector and when he testified that he had made a false confession. As articulated, Sanchez supported the contention that he made a false confession by claiming he confessed to the facts he thought Lieutenant Garay wanted to hear and that his confession lacked details that should have been known to the true murderer. (53 RT 11054; 66 RT 13604-13605.) Yet, he also failed to provide details to officers on subjects known to be within his personal knowledge, such as his affair with Hector and his past arrests. Questioning Sanchez about the affair, and his prior statements denying it during police interrogations, tended to show that Sanchez's

failure to recall details of the murder may not have been genuine, similar to his failure to recall details of the affair. (67 RT 13669-13671.)

Also unlike *Winfred D.*, the evidence here was not unduly prejudicial. As discussed previously, the evidence of Sanchez's affair with Hector was not unduly prejudicial in view of the admonitions from the court. The court also invited any juror who was uncomfortable with his or her duty to consider the affair for only the stated purposes to inform the bailiff so that he or she could talk with the judge. (See Arg. VIII, part B(2), *ante.*) Because evidence of Sanchez's statements to officers about the affair tended to show that Sanchez did not give a false confession, his statements were relevant. (67 RT 13667-13669.) Further, because the court could properly guard against prejudice by instructing the jury about the proper uses of such evidence, the court properly allowed Sanchez to be questioned about his affair with Hector.

C. The Court Properly Allowed the Prosecutor to Question Sanchez About His Statements to Lieutenant Garay

Sanchez next argues that the prosecutor should not have been allowed to question him about his denial of the affair to Lieutenant Garay, which occurred in a portion of the interview the court had excluded under *Miranda*. (AOB 271-274.) The People disagree. Sanchez's defense at trial was that he gave a false confession that did not provide the details of the crimes because he did not commit the murders. (53 RT 11054.) To support

this defense, Sanchez testified that the facts he confessed to were facts not within his personal knowledge, but were instead facts that he thought Lieutenant Garay wanted to hear. (66 RT 13604-13605.) In a portion of Sanchez's interview with Lieutenant Garay the court had excluded under *Miranda*; however, Sanchez also failed to provide details of the affair with Hector when questioned, which was a topic well within Sanchez's personal knowledge. (22 RT 4591-4595.) Thus, evidence that Sanchez lied about facts known to be within his personal knowledge was admissible to impeach his testimony that he was unable to provide particulars about the murders because he had no personal knowledge about the circumstances of the murders. (67 RT 13669-13671.)

In *Harris v. New York* (1971) 401 U.S. 222 (*Harris*), the Supreme Court held that although the prosecution may not introduce a statement that was obtained in violation of *Miranda* as part of its case-in-chief, it may use such a statement to impeach a defendant's inconsistent testimony. The court explained that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." (*Id.* at pp. 225.) Having voluntarily taken the stand, the defendant was under an obligation to speak truthfully, and the prosecution could utilize the traditional truth-testing devices of the adversary process. If the defendant had made inconsistent statements to a third person, the prosecutor would be permitted to introduce

that evidence by way of cross-examination and impeachment. (*Id.* at pp. 225-226.) “The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.” (*Ibid.*)

The impeachment process provides a valuable aid to the jury in assessing the defendant’s credibility. (*People v. Walder* (1954) 347 U.S. 62, 65.) The benefits of this process should not be lost because of the speculative possibility that impermissible police conduct will be encouraged. “Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.” (*Ibid.*)

As outlined in Argument V, part C(2), the “fundamental requirement” to admit impeachment evidence is that the statement be inconsistent with the witness’s trial testimony. And inconsistency in effect satisfies this requirement; contradiction in express terms is not required. (*People v. Homick, supra*, 55 Cal.4th at p. 859, citing *People v. Cowan, supra*, 50 Cal.4th at p. 462.)

Here, Sanchez’s statements to Lieutenant Garay denying his affair with Hector were admissible to impeach his trial testimony. Sanchez testified that he made a false confession (66 RT 13604-13605; 67 RT 13763-13764, 13828; 68 RT 13913), and argued during his opening statement that his confession was coerced (52 RT 11053-11054). He also

testified that he told Lieutenant Garay what he thought Lieutenant Garay wanted to hear when confessing about the details of the crimes. (66 RT 13604-13605; 67 RT 13828; 68 RT 13909.) The thrust of Sanchez's testimony was that his confession was false and he did not have any personal knowledge of the murders because he did not commit them. (66 RT 13604-13605.) This led the trial court to note that Sanchez supported his defense that his confession was false by arguing that it lacked the details of the murders the true killer would have known. (67 RT 13669-13671.)

Sanchez's statements to Lieutenant Garay denying his affair with Hector were inconsistent with his claim that he did not provide details of the murder because he lacked personal knowledge of those details. Sanchez failed to answer truthfully and completely when asked questions about his affair with Hector by Lieutenant Garay, which was a topic within his personal knowledge. (67 RT 13732-13733.) This tended to prove that Sanchez's lack of detailed recall of the circumstances surrounding the murders may not have been truthful, but instead similar to his behavior when failing to recall details of his affair with Hector when questioned by Lieutenant Garay. (67 RT 13669-13671.) Accordingly, the trial court properly admitted Sanchez's statements to Lieutenant Garay denying his affair with Hector because it impeached his trial testimony.

D. The Purported Error Was Harmless

Even if the trial court erred by admitting Sanchez's statements to Lieutenant Garay denying his affair with Hector, it is certain beyond a reasonable doubt that the jury would have still found Sanchez guilty of the charged crimes and sentenced him to death. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Sanchez denied having an affair with Hector on multiple occasions. He denied the affair in his interview with Detective Shear, and also denied it in his trial testimony. (67 RT 13732, 13734.) Evidence that Sanchez also denied the affair to Lieutenant Garay was duplicative of this other evidence and did not affect the jury's determination more so than Sanchez's other denials.

Further, the trial court specifically instructed the jury on how to use Sanchez's statements to Lieutenant Garay, separate and apart from the general instructions on how to use evidence of the affair. The court instructed:

At one point in the videotaped statement to Sergeant Garay[,] Mr. Sanchez stated, quote, "I don't want to talk anymore," unquote, and I believe that's found on page 44 of the transcript that is in evidence. [¶] In any event, as to any statements made by Mr. Sanchez to Sergeant Garay after this point in time, you are to consider only such statements, if any, that are inconsistent with his trial testimony. [¶] Any such statements may be considered by you only for the purpose of testing the defendant's credibility. [¶] You are not to consider such statements as evidence of guilt. This limiting instruction

does not apply to statements which you find were made prior to Mr. Sanchez's statement I don't want to talk anymore.

(75 RT 15065.) The court then reread the instruction with an addition to make sure that the jury fully understood its charge.

At one point in the videotaped statement to Sergeant Garay, Mr. Sanchez stated, "I don't want to talk anymore." As to any statement made by Mr. Sanchez to Sergeant Garay after this point in time, you are to consider only such statements, if any, that are inconsistent with his trial testimony. [¶] Any such statements may be considered by you only for the purpose of testing the defendant's credibility as a witness. You are not to consider such statements as evidence of guilt. [¶] This limiting instruction does not apply to statements which you find were made prior to Mr. Sanchez's statement I don't want to talk anymore.

(75 RT 15065-15066.)

These instructions, along with the court's other admonitions regarding Sanchez's affair with Hector were sufficient to dispel any prejudice. (See Arg. VIII, part B(2), *ante.*) It is presumed that the jury followed these instructions, and Sanchez has not met his burden to prove otherwise. (*People v. Sandoval, supra*, 62 Cal.4th at p. 422.)

Further, as described in Argument VIII, part C, ample evidence supported the jury's guilty verdicts and death penalty finding. Given the weight of the evidence and the court's instructions, it was not likely that evidence of Sanchez's affair with Hector prejudiced the jury into convicting Sanchez regardless of the evidence presented. (*People v. Balcom, supra*, 7

Cal.4th at p. 427.) Thus, admission of Sanchez's affair with Hector and his statements denying the affair were harmless beyond a reasonable doubt.

X. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF SANCHEZ'S GUN OWNERSHIP BECAUSE IT WAS RELEVANT AND NOT UNDULY PREJUDICIAL

Sanchez argues that statements he made to Catherine Barrera and Alonzo Perez regarding a gun he owned were not admissible because "the prosecution did not and could not claim that the gun referenced" by either of those witnesses was the murder weapon. (AOB 279-280.) The People disagree. The trial court properly admitted the evidence of Sanchez's gun ownership because the gun Sanchez claimed to have owned could have been the murder weapon and the evidence's prejudicial effect did not outweigh its relevant value.

A. Background

1. Motion in limine

In a motion in limine, Sanchez moved to exclude Alonzo Perez's testimony that Sanchez told him he owned a gun on the day before the murders. Sanchez argued that Perez's testimony was inadmissible because it constituted generic gun evidence that was irrelevant under section 1101, subdivision (b), and its prejudicial effect outweighed its probative value. (9 CT 2439-2440; 55 RT 11139-A-11141-A.) The court denied Sanchez's motion, stating that Perez's testimony was relevant because Sanchez's claim of gun ownership occurred close in time to the murders. Given the

close proximity in time, the gun Sanchez claimed to have owned could have been the murder weapon. (55 RT 11141-A.)

2. Evidence of Sanchez's gun ownership presented at trial

At the third trial, Alonzo Perez testified that the day before the murders, he and Sanchez went to the garbage dump in Sanchez's pickup truck. (57 RT 1659.) Sanchez told Perez that he had a gun at home. Perez never saw the gun, and never saw Sanchez with a gun. (57 RT 11660, 11668.)

Catherine Barrera testified that Sanchez lived with her in the summer of 1997. At one point during that time, he mentioned that he owned a gun. (62 RT 12645-12646.) He did not say what kind of gun he owned, and he did not show any gun to Barrera. (62 RT 12646-12647.)

During Sanchez's confession, he told Lieutenant Garay that he thought he used a .22-caliber handgun when committing the murders, but was uncertain because he did not know much about guns. (13 CT 3538.) He claimed to have disposed of the gun by throwing it into a field while driving towards the town of Poplar. (53 RT 11179.) However, no gun was found during multiple searches of the field where he said he threw it. (55 RT 11282-A.) No gun was found in Sanchez's home either. (55 RT 11386-A.) Officer Steve Ward did find bullets for a small caliber weapon in a dresser drawer in the master bedroom. He believed that the bullets

belonged to a .22-caliber weapon. (55 RT 11387-A.) A total of five nine-millimeter Luger bullets were found at the crime scene, two of which were expended bullets that had not been fired. (55 RT 11205-A-11206-A; 58 RT 11828-11829, 11837-11838.) The bullets matched a nine-millimeter semi-automatic handgun, which was most likely used to commit the murders. (58 RT 11831-11832.)

Sanchez denied ever telling Barrera or Perez that he owned a gun. (67 RT 13771-13772.)

B. The court properly admitted evidence of Sanchez's gun ownership

Sanchez objects to two instances of gun evidence admitted against him. First he objects to Perez's testimony, which was based on statements made by Sanchez the day before the murders. (57 RT 1659.) Second, he objects to Barrera's testimony, which was based on statements made by Sanchez during the same summer the murders took place. (62 RT 12645-12646.) But Sanchez has forfeited his claim that Barrera's testimony was inadmissible. Further, the testimony of both Perez and Barrera was admissible because Sanchez owned a gun that could have been used in the murders. Also, the admission of evidence that Sanchez owned a gun close in time to the murders was not unduly prejudicial.

1. Sanchez has forfeited his claim that Barrera's testimony was inadmissible, because he did not object to it at trial

After a thorough review of the record, respondent is unable to find any objection by Sanchez at the third trial to Catherine Barrera's testimony that he admitted owning a gun.²⁷ Because Sanchez failed to object to Barrera's testimony at trial, he has not preserved his claim regarding this testimony. In the absence of a timely objection in the trial court, "questions relating to the admissibility of evidence will not be reviewed on appeal." (*People v. Williams* (2008) 43 Cal.4th 584, 620.) Any objection made regarding the admission of evidence must fairly inform the trial court, as well as the party offering the evidence, of the specific reason the objecting party believes the evidence should be excluded. This gives the party offering the evidence the opportunity to appropriately respond and the court the opportunity to make an informed ruling. (*People v. Valdez* (2012) 55 Cal.4th 82, 130.) Because Sanchez failed to object to Barrera's testimony at trial, he has forfeited his claim on appeal.

²⁷ The People note that Sanchez did object to Barrera's testimony based on sections 1101, subdivision (b) and 352 during his first and second trials, and the objection was overruled. (22 RT 4595-4597, 4696-4698; 39 RT 8375-8376.)

2. Sanchez's ownership of a gun that could have been used to commit the murders was relevant

Evidence that a defendant committed misconduct other than that currently charged is generally inadmissible to prove he or she had a propensity to commit the charged crime. (§ 1101, subd. (a); *People v. Jones* (2013) 57 Cal.4th 899, 929-930.) However, such evidence is admissible if it is relevant to prove, among other things, intent, knowledge, identity, or the existence of a common design or plan. (§ 1101, subd. (b); *Jones*, at p. 929; *People v. Carter* (2005) 36 Cal.4th 1114, 1147.)

Evidence of defendant's possession of a weapon not used in the crime charged can lead to an inference that the defendant is the kind of person who surrounds himself with deadly weapons. This fact is of no relevance to the jury's determination of guilt. (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360.) In other words, if the only relevance of possession of a weapon unrelated to the underlying charges is to show a disposition toward violence, then it is error to admit that evidence. Thus, where the evidence shows that a certain type of weapon was used in a crime, it is error to admit evidence that other weapons were found in the defendant's possession. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056.) However, where there is evidence that a defendant possessed a weapon that might have been used in the crime, the evidence can be admissible if relevant. (*People v. Cox* (2003) 30 Cal.4th 916, 956-957; see also *People v.*

Carpenter (1999) 21 Cal.4th 1016, 1052 [no error in admitting evidence that defendant possessed gun that might have been murder weapon].)

Evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action” is relevant (§ 210), and therefore prima facie admissible. (§ 351.) To be relevant and admissible to establish a defendant’s possession of a weapon used in the murder, “[t]here need be no conclusive demonstration that the weapon in defendant’s possession was the murder weapon.” (*People v. Rinegold* (1970) 13 Cal.App.3d 711, 720.) Evidence of any weapons in the defendant’s possession that could have been used in the crime are admissible. (*Ibid.*) It is enough that the evidence shows that “it might have been” the weapon used by the defendant. (*People v. Carpenter, supra*, 21 Cal.4th at p. 1052 [gun evidence is relevant and admissible, because “[a]lthough the witnesses did not establish the gun necessarily was the murder weapon, it might have been”].) Evidence of a gun in the defendant’s possession is admissible unless it is positively excluded as a possible weapon in the charged crime. (See *People v. Cox, supra*, 30 Cal.4th at p. 956.)

This Court reviews a trial court’s evidentiary rulings for abuse of discretion. (*People v. Cox, supra*, 30 Cal.4th at p. 956.)

The evidence revealed that a nine-millimeter semi-automatic handgun was most likely used to kill both Ermanda and Lorena (58 RT 11831-

11832); that Sanchez confessed to using a .22-caliber handgun when committing the murders, but did not know much about guns (13 CT 3538); that he disposed of the gun in a field after the murders (53 RT 11179); that the gun was never recovered (55 RT 11282-A, 11292-A); and that he had told multiple people a short time before the murders that he possessed a gun (57 RT 11660, 11668; 62 RT 12646).

From this evidence it was reasonable to infer that Sanchez's lack of knowledge about weapons led him to mistake the type of weapon he owned, and he actually owned a small-caliber handgun. A small-caliber handgun was consistent with the type of weapon used to commit the murders. (58 RT 11831-11832.) Additionally, no gun was found at Sanchez's house (53 RT 11386-A), tending to prove that he recently disposed of a gun he claimed to have owned the day before. This evidence corroborated Sanchez's confession that he disposed of the gun he used to commit the murders. (53 RT 11179.) Indeed Raul Madrid's statements that he had returned a nine-millimeter handgun to Sanchez a week before the murders (62 RT 12606), placed such a weapon in Sanchez's possession before the murders.

In sum, the evidence of Sanchez's possession of a gun was not admitted to show his propensity to possess dangerous weapons, the purpose for which it would have been inadmissible character evidence. (*People v. Barnwell, supra*, 41 Cal.4th at p. 1056 & fn. 13.) The evidence was

relevant because it showed that Sanchez possessed a weapon that might have been the one used to commit the charged crimes. Thus, the evidence was highly relevant.

3. Evidence of Sanchez's gun ownership was not unduly prejudicial

Sanchez argues that the evidence showing that he possessed a gun in the days and weeks prior to the murders was unduly prejudicial because it led to the unfounded inference that he possessed the weapon used to shoot the victims. (AOB 281-282.) As explained above, this was not an unfounded inference, but one supported by the evidence. (See Arg. X, part B(2), *ante.*)

Prejudice as contemplated by section 352 is not so broad that it includes evidence the opponent finds inconvenient. Evidence is not prejudicial merely because it undermines the opponent's position and supports that of the proponent. (*People v. Scott* (2011) 52 Cal.4th 452, 490.) The potential for prejudice is decreased when testimony describing the defendant's acts is no stronger and no more inflammatory than the testimony concerning the charged offenses. (*People v. Eubanks* (2011) 53 Cal.4th 110, 144.) Here, the fact that Sanchez owned a gun was not likely to have inflamed the passions of the jury. The facts of Lorena's and Ermanda's murders were far more inflammatory than the evidence that Sanchez claimed he owned a gun in the days and weeks before the murders.

Because the evidence was not unduly prejudicial, the trial court did not abuse its discretion by overruling Sanchez's objection under section 352. Thus, the evidence he possessed a gun was "relevant and admissible as circumstantial evidence to show that he committed the charged offense." (*People v. Carpenter, supra*, 21 Cal.4th at p. 1052.)

C. The Purported Error Was Harmless

In any event, any error in admission of the evidence was not prejudicial. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Carter, supra*, 36 Cal.4th at p. 1152.) As discussed above, ample evidence existed to convict Sanchez of the murders and sentence him to death. (See Arg. I, part C, *ante*.) Further, Oscar's prior statements identifying Sanchez as the man he saw in his mother's room at the time of the murders, and his testimony placing Sanchez at his mother's house the day she died, corroborated Sanchez's confession and other evidence that showed he murdered Ermanda and Lorena. (See Arg. VII, part E, *ante*.)

Moreover, even without the evidence that Sanchez admitted having a gun, the jury still would have heard Raul Madrid's statements to Camereno Reyes that he returned a nine-millimeter handgun to Sanchez a week before the murders, after Sanchez had left the gun in Raul Madrid's car. (62 RT 12606.) This evidence placed a gun that was consistent with the murder weapon in Sanchez's possession close in time to the commission of the murders. Further, Sanchez admitted that he disposed of the gun after he

killed Ermanda and Lorena, and no nine-millimeter or other handgun was found in his possession or at his home. (53 RT 11179; 55 RT 11282-A, 11292-A.) Thus, it is not reasonably probable that the exclusion of Sanchez's statements that he owned a gun would have altered the verdicts or the sentence. Indeed, the purported error was harmless beyond a reasonable doubt.

XI. THE TRIAL PROPERLY ADMITTED EVIDENCE OF SANCHEZ'S ALLEGED THREAT TO ERMANDA UNDER SECTION 403

Sanchez argues that the trial court abrogated its duty to ensure a fair trial when it allowed the prosecutor to elicit evidence that Sanchez made a threatening statement to Ermanda, concerning her and Lorena, without proper foundation. (AOB 286-302.) The People disagree. The court, properly relying on the prosecution's proffer, found through Lola Ortiz's prior statements that she had personal knowledge of Sanchez's threat. Thus, admission of Sanchez's threat was proper under section 403.

A. Background

1. In limine motions regarding Sanchez's threat to Ermanda

Ermanda's friend, Lola Ortiz, was expected to testify for the defense that she had never seen Sanchez at Ermanda's house. (65 RT 13427-13428.) The prosecution stated its intention to impeach Ortiz with her statements to two people claiming she heard a conversation between Ermanda and Sanchez at Ermanda's house a week and a half before the

murders. During that conversation, Sanchez threaten that if Ermanda did not pay him the money she owed, then her daughter would. (65 RT 13428-13429.)

Defense counsel objected to this evidence and argued that it was unclear whether Ortiz actually heard Sanchez make these statements. Ortiz, according to defense counsel, had a habit of stating events like she was there and was a percipient witness, but eventually it would be apparent she heard about the events from Ermanda. (65 RT 13430.) Defense counsel then asked for an offer of proof, to which the prosecution replied:

PROSECUTOR: The two witnesses said that she was present at the time and listened to the conversation of the defendant – between the defendant and Ermanda Reyes.

DEFENSE COUNSEL: Well, then maybe they were present and they can testify.

PROSECUTOR: They weren't present.

DEFENSE COUNSEL: Then it's hearsay as to Lola.

PROSECUTOR: No, it's not hearsay as to Lola. Lola was present when the defendant was having a conversation

(65 RT 13430-13431.)

The next day the parties went over multiple in limine motions pertaining to Lola Ortiz. As relevant here, defense counsel objected to Ortiz's testimony about a conversation where Sanchez threatened Ermanda that if she did not give him the money she owed him, then her daughter would pay. Defense counsel argued that Ortiz had given "conflicting

statements” about whether she was a witness to this conversation. (66 RT 13471-13472.) The prosecution countered that two witnesses—Margaretta Zepeda and Maria Alicia Palomares—both stated that Ortiz told them she was at Ermanda’s house when Sanchez came over to be paid for work he had done on Ermanda’s car. According to Zepeda and Palomares, Ortiz heard Ermanda tell Sanchez that her car was running worse than it had before, and that if Sanchez would fix it, she would pay him. Sanchez responded by threatening Ermanda that if she did not pay him, then her daughter would. (66 RT 13472-13473.) Defense counsel renewed her hearsay objection and also objected that the evidence was unduly prejudicial. (66 RT 13474.)

The court found sufficient foundation for the evidence that Sanchez made threatening remarks to Ermanda. The court specified that Ortiz could be asked about what she heard Sanchez say to Ermanda and, depending on her answer, impeached with the evidence of her prior statements to Margaretta Zepeda and Maria Alicia Palomares. (66 RT 13475-13476.)

2. Testimony regarding Sanchez’s threat to Ermanda

During Sanchez’s testimony, the court agreed with the prosecution that it could ask him about the threat Ortiz overheard and then reported to Zepeda and Palomares. The court insisted the jury be admonished and that the prosecution later meet hearsay requirements through the testimony of

other witnesses. (67 RT 13787-13791.) The prosecution then asked

Sanchez:

PROSECUTION: Were you at Lola Ortiz's house approximately a week to a week and a half before Ermanda and Lorena were murdered, having a conversation with Ermanda in the presence of Lola; during the conversation, were you asking for money for payment for fixing Ermanda's vehicle?

SANCHEZ: No. I absolutely do not know of her – of what you're talking about.

PROSECUTION: And did –

SANCHEZ: I never went to that lady's house, no.

PROSECUTION: When – did you tell Ermanda when she told you no, she wasn't going to pay you till the car was fixed that either she was going to pay or her daughter was going to pay?

SANCHEZ: How could I when I never had any conversation of anything like that? I don't know what you're talking about, absolutely not.

(67 RT 13792.)

The court then admonished the jury:

All right. Ladies and gentlemen, I think it's appropriate to remind you, once again, that questions of counsel are not evidence. Counsel has just asked two questions. Mr. Sanchez has denied it, and unless there is some other evidence relating to it, that's it. It didn't happen. You're not to speculate otherwise.

(67 RT 13793.)

Ortiz subsequently testified for the defense. She stated that she had never seen Sanchez at Ermanda's house, including when she was there for a barbeque about a month before the murders. (70 RT 14273-17275.)

The prosecution called Ortiz during its rebuttal case. Ortiz testified that she was not present at Ermanda's house a week to a week and a half before the murders when Sanchez was also there. (74 RT 14828-14829, 14834.) She also did not hear Sanchez tell Ermanda that he wanted to be paid for work he had done on her car. Nor did she hear Ermanda tell Sanchez that if he ever fixed her car that she would pay him. Ortiz also denied hearing Sanchez tell Ermanda that if she did not pay him, then her daughter would. And she denied telling Margaretta Zepeda or Alicia Palomares about such a conversation. (74 RT 14836.)

The court again admonished the jury regarding the evidentiary weight of the prosecution's questions by stating, "Remember, ladies and gentlemen, the questions of counsel are not evidence. It's the testimony of the witness that is." (74 RT 14836-14837.)

The prosecution then called Margaretta Zepeda to testify. (74 RT 14839.) After a conversation between the parties where it was established that the prosecution could ask leading questions to avoid the potential of eliciting prejudicial evidence (74 RT 14842-14844), the following occurred:

PROSECUTION: Let's see, the conversation that I'm asking you about with Lola would have referred to a time when Lola heard Juan Sanchez make certain statements to Ermanda. So that's where I want – that's where I want to ask about. [¶] Did she tell you she was present and heard Juan Sanchez say some things to Ermanda?

ZEPEDA: No.

PROSECUTION: Well, is this something that you reported – do you remember having a conversation with District Attorney investigator by the name of Florencio Camarillo on September 7, 1999?

...

PROSECUTION: Was there a time that you spoke to some investigators while Maria Alicia Palomares was at your house?

ZEPEDA: Oh, yes, I did say that.

PROSECUTION: Okay. Now, did you talk to them about what Lola had told you that she heard Juan say?

ZEPEDA: No, she did not hear. She was told by Ermanda.

(74 RT 14845-14846.)

Defense counsel objected and moved for a mistrial. (74 RT 14846-14847.) The court denied the motion stating that striking the testimony and delivering an admonition would be sufficient to dispel any prejudice. (74 RT 14947-14848.) The court then instructed the jury:

All right. Ladies and gentlemen, there's been reference in the testimony about something that Ermanda purportedly said to somebody else was reported to somebody else, that part of this witness's testimony is stricken. You shall disregard it. [¶] Do you all understand that? Do you all understand how important that is? This case is not going to be decided in any way by inadmissible hearsay. [¶] Some hearsay is admissible under the law, but some is so unreliable it does not come in, and this is exactly that type of unreliable hearsay. It's stricken. You shall disregard it in its entirety.

(74 RT 14848.)

The prosecution then called Palomares. Palomares testified that she was present when Ortiz spoke to her about something that occurred before Ermanda's murder. (74 RT 14850-14851.) Ortiz, however, did not say that she was present when Sanchez made certain statements. The court dismissed the jury, so that the prosecution could ask more questions of Palomares without tainting the jurors. (74 RT 14851-14852.) The prosecution then asked:

PROSECUTION: Ma'am did you speak to some investigators, Florencio Camarillo and Wayne Spencer at the house of Margareta Zepeda about a month ago?

PALOMARES: Yes

PROSECUTION: And did you tell them something about Lola telling you that she heard the defendant Juan Sanchez at the house of Ermanda Reyes asking to be paid for some mechanical work?

PALOMARES: She did not say that she heard.

...

PROSECUTION: Well, I guess I'm – I guess what I'm asking is what did you tell the investigators as to how Lola knew this?

PALOMARES: I do not know how she found out. I do not know whether Ermanda told her or she heard it. I never asked her.

PROSECUTION: Okay. So your testimony is that you did not tell the investigators that Lola was present and heard this conversation?

PALOMARES: No, I have never said that Lola was present.

(74 RT 14854.)

3. Hearing regarding the prosecution's basis for introducing evidence of Sanchez's threats

Following the testimony of Palomares, the trial court inquired into the prosecutor's good faith belief that he was eliciting admissible evidence.

The prosecutor stated that he believed, based on the reports and speaking with the investigator, that the witness had told the investigator that Lola Ortiz had stated that she was present when Sanchez threatened Ermanda.

(74 RT 14857.) District Attorney Investigator Florencio Camarillo told the court that he spoke with both Zepeda and Palomares on September 7, 1999.

Investigator Camarillo stated that, according to his report, the women said that Ortiz was present when Sanchez made the statements to Ermanda. (74

RT 14859-14860.) Camarillo then read from his report,

Lola told 'em the defendant Juan Sanchez had gone over to victim's residence in the evening to be paid for some mechanical work he'd done on her car. She told him that Ermanda told him – told defendant that her car was running worse than before he worked on it. Ermanda supposedly told Defendant Sanchez that if he would fix her car, then she would pay him. Defendant Sanchez told – then told Ermanda that if she didn't pay him, her daughter would pay him.

(74 RT 14861.) When speaking with Zepeda and Palomares, Investigator

Camarillo understood them to say that Ortiz witnessed the conversation

between Sanchez and Ermanda. (74 RT 14861.) When talking with the

prosecutor about the conversation, Camarillo told him that Ortiz was

present to hear Sanchez's threat to Ermanda. (74 RT 14862.)

The prosecution requested that the court admonish the jury, and defense counsel moved for a mistrial. (74 RT 14864.) The court ruled that the evidence presented in the prosecution's rebuttal case lacked foundation, but that the prosecutor had a good faith belief that Zepeda and Palomares would impeach Ortiz's testimony with Ortiz's prior statements. The court denied Sanchez's mistrial motion and indicated that it would issue a "strong admonition to the jury about disregarding this evidence." (74 RT 14865.)

The court therefore admonished the jury when it reentered the court room:

Ladies and gentlemen, all of the rebuttal evidence is stricken. You are to entirely disregard it. [¶] Now, by rebuttal evidence, I'm talking about the evidence today of Lola Ortiz, and thank you for crossing those out of your notes, if you made any notes. [¶] The testimony of Miss [Zepeda] As well as the testimony of Ms. Palomares. You are to entirely and totally disregard it. It is unreliable and shall not be considered by you in any way whatsoever. You're to strike it from your mind right now, totally.

And I'm not only talking about the testimony obviously. By striking testimony, that means that the questions of counsel are out, as well, because questions of counsel, as you well know, as I've previously admonished you many times, are not evidence. So there's absolutely nothing to consider relating to the testimony of those three witnesses. [¶] As it stands, the defense has completed its case. If the prosecutor has any rebuttal evidence, it has not presented any rebuttal evidence; we will hear that on Monday.

Do you all understand the court's admonition?

(74 RT 14867.) The court then polled the jurors as to their understanding of the admonition. All jurors said that they understood the admonition and would follow it. (74 RT 14867-14871.)

During jury instructions, the court once again admonished the jury and instructed, in relevant part:

Statements made by the attorneys during the trial are not evidence. However, if the attorneys have a stipulation or agreed to a fact, you must regard that fact as proven. [¶] Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps u[s] to understand the answer.

You have been specifically admonished to disregard certain questions posed by both counsel. I remind you that questions of counsel standing alone are not evidence. You are not to speculate as to what is inferred or the accuracy of what is inferred in a question. [¶] Further, if an objection was made to a question and the objection was sustained, you are not to speculate as to the reason the objection was made, why the objection was sustained or guess what the answer might have been. You shall totally disregard such questions and not consider them in any way whatsoever. Your responsibility is to consider the evidence presented in this trial and to follow the court's instructions on the law.

...

Do not consider for any purpose any offer of evidence that was rejected or any evidence that was stricken by the court. Treat it as though you never heard it.

The entire testimony of the witnesses Lola Ortiz, Margaretta Zepeda and Maria Palomares given on Friday, October 9th, 1999, was stricken by the court. You are instructed to entirely disregard that evidence and not consider it in any way. You are reminded of that instruction. [¶] The witness Lola Ortiz testified prior to Friday, October 29th, 1999. You are

to consider Lola Ortiz's testimony given prior to October 29th, 1999, the same way you would any other witness in this case.

(75 RT 15056-15057.)

B. The Trial Court Did Not Err by Conditionally Admitting Evidence of Sanchez's Threat to Ermanda

Sanchez argues that the trial court erred by admitting evidence of Sanchez's statements, because the prosecution failed to prove that Lola Ortiz had personal knowledge of the statements, as required by section 403, subdivision (b). (AOB 291.) Section 403 required the court to meet the requirements of section 702 before conditionally admitting evidence. Here, the prosecutor made a showing of Ortiz's personal knowledge of Sanchez's statements by producing evidence that she told multiple people she heard Sanchez threaten Ermanda. (65 RT 13430-13431; 66 RT 13471-13473, 13475.) This made Sanchez's threats conditionally admissible under section 403.

Section 403, subdivision (b) states:

Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

Under section 702, subdivision (a), "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." A witness's testimony must be excluded unless "there is evidence sufficient to sustain a finding" that the witness has such

personal knowledge. (*People v. Anderson, supra*, 25 Cal.4th at p. 573.)

Personal knowledge, however, may be demonstrated by “any otherwise admissible evidence, including [the witness’s] own testimony.” (§ 702, subd. (b).) Evidence is insufficient to sustain a finding of personal knowledge only if no jury could reasonably find that the witness had personal knowledge. (*Zambrano, supra*, 41 Cal.4th at 1140.)

Here, the prosecutor made a showing of Ortiz’s personal knowledge through the admissible evidence of her prior inconsistent statements.

(§ 1235.) Defense counsel indicated that she anticipated Ortiz would deny having heard Sanchez’s threat to Ermanda if she were questioned about it.

(65 RT 13430; 66 RT 13471-13472.) Relying on investigation reports and conversations with Investigator Camarillo, the prosecutor countered with evidence showing that two people recalled a conversation with Ortiz where she told them that she saw an argument between Ermanda and Sanchez.

(65 RT 13430-13431; 66 RT 13472-13473.) During that argument, Ortiz heard Sanchez threaten Ermanda that if she did not pay him the money she owed him, then her daughter would. (65 RT 13428-13429.) While defense counsel thought that Ortiz heard about the threats from Ermanda, she did acknowledge that Ortiz had made “conflicting statements” about the issue.

(66 RT 13471-13472.)

Given this evidence, the court knew that Ortiz had made statements to others that she heard Sanchez threaten Ermanda with a specific threat

against her and her daughter. Defense counsel admitted that Ortiz had said she heard Sanchez's threat (66 RT 13471-13472), and two witnesses told the prosecution's investigators that Ortiz said she heard Sanchez make the threat (65 RT 13430-13431; 66 RT 13472-13473). Although defense counsel thought Ortiz may not have told the truth when telling Zepeda and Palomares about the threat, there was nothing to show that defense counsel's speculation was more accurate than Ortiz's own prior statements. Further, Ortiz related details of the threat that would more likely be known by someone who actually observed the threat, instead of someone hearing it second hand. For example, Ortiz related not only the particulars of Sanchez's threat, but also the conversation between Ermanda and Sanchez leading up to the threat. Further, she related the location of the conversation, instead of merely relating the contents of the conversation and threat. (65 RT 13430-13431; 66 RT 13472-13473.) This evidence supports a finding that a jury would reasonably find Ortiz had personal knowledge of the statements she related to Zepeda and Palomares.

(*Zambrano, supra*, 41 Cal.4th at 1140.)

Sanchez relies on *People v. Valencia* (2012) 146 Cal.App.4th 92 (*Valencia*), to support his claim of error. (AOB 292-293.) In *Valencia*, the prosecution failed to present evidence that the declarant had personal knowledge of the subject at issue, leading to the admission of prejudicial evidence. The defendant in *Valencia* had been convicted of, among other

charges, the continuous sexual abuse of his sister, D., which required proof of three or more acts of abuse over at least a three-month period.

(Valencia, supra, at pp. 94, 101.) The defendant argued that his trial counsel had been prejudicially ineffective for failing to object to the testimony of Rosalia Correa on the ground that she would relate statements for which the declarant lacked personal knowledge. Correa testified that the defendant's sister, L., had told her the defendant had been touching D. inappropriately since D. was four years old. *(Id. at pp. 101-102.)*

However, L. had consistently and repeatedly stated she did not learn defendant had abused D. until July 15, 2004. *(Id. at pp. 95, 104.)* Correa testified that her conversation with L., in which L. told her about the inappropriate touching, took place in August 2004, a month after L. had claimed to have learned of D.'s abuse. *(Id. at pp. 97-98.)* By the time of trial, L. and D. were both denying the defendant had ever molested D., despite considerable evidence to the contrary. *(Id. at p. 99.)*

The Court of Appeal agreed that L. lacked personal knowledge that D. had been molested since the age of four. The court reasoned that L. had always claimed she learned of the defendant's abuse of D. in July 2004 and not before. *(Valencia, supra, 146 Cal.App.4th at pp. 95, 97.)* Further, there was no evidence that L. had a motive to lie to the police about how she first learned of D.'s molestation because L. freely discussed the particulars of her own abuse and what D. had told her when the girls initially reported the

molestations to the police. There was also nothing in L.'s statement to Correa about D. that suggested she was speaking from personal knowledge. (*Id.* at pp. 96-97.)

Valencia is distinguishable from Sanchez's case. As discussed above, here, the prosecutor provided evidence showing that Ortiz had personal knowledge of Sanchez's threat, because Ortiz claimed in her statements to Zepeda and Palomares that she heard Sanchez threaten Ermanda. (65 RT 13430-13431.) And Zepeda's testimony supported this contention. Zepeda testified that she "did say that" when asked whether she told the investigator that Ortiz "was present and heard Juan Sanchez say some things to Ermanda[.]" (74 RT 14845-14846.) Thus, unlike the prosecution in *Valencia*, the prosecution here showed that Ortiz had personal knowledge of Sanchez's statements through Ortiz's own claims that she heard Sanchez's threat to Ermanda.

Sanchez also claims that the trial court failed to "fulfill its obligation to hold a hearing to resolve" the issue of Ortiz's personal knowledge. Sanchez cites no authority requiring the court to hold a hearing to resolve this issue. (AOB 293-294.) The parties argued the issue of Ortiz's personal knowledge to the court over several days. This was not a time sensitive determination the court made in the middle of trial, but a determination made after the parties argued their positions and proffered evidence supporting those arguments. (65 RT 13427-13431; 66 RT 13454-

13471.) Section 702 does not require that an evidentiary hearing take place before the court determines whether a witness has personal knowledge of the events they testify about. Section 702 requires that the court, upon objection of a party, make a finding based on sufficient evidence that the witness has personal knowledge. (*People v. Anderson, supra*, 25 Cal.4th at p. 573.) Thus, the trial court fulfilled its duty under section 702 by making a finding based on Ortiz's own statements that she had personal knowledge of Sanchez's statements before admitting evidence of Sanchez's threat to Ermanda. (66 RT 13475-13476.)

C. The Instructions Cured Any Prejudice

Section 403 addresses the situation that occurred when the evidence elicited at trial did not corroborate Ortiz's prior declaration that she had personal knowledge of Sanchez's threat. In the event the court admits evidence for which the preliminary fact was never proven, section 403 provides that the court shall instruct the jury to disregard the evidence. (§ 403, subd. (c)(2).)

Here, the court did better than simply admonish the jury to disregard the evidence, as required by section 403. After the first reference in front of the jury to Sanchez's threat, the court warned it to hear the evidence with caution. The court reminded the jury that the prosecutor's questions were not evidence and that, unless the prosecutor could supply other evidence, any reference to a threat was to be ignored. (67 RT 13793.) This prompt

admonition was specific enough to inform the jury that the questions contained references to unreliable information and should not be considered evidence of Sanchez's guilt. The court cautioned the jury in the same manner again following Ortiz's testimony. (74 RT 14836-14837.)

After Zepeda testified, the court struck her entire testimony and ordered the jury to not consider it. Most importantly, the court instructed the jurors why they were not to consider this evidence. The court repeatedly stated that the evidence elicited from Zepeda was "unreliable." (74 RT 14848.)

The court's next admonition, following Palomares's testimony, again impressed upon the jury that the prosecution had presented "unreliable" evidence. (74 RT 14807.) The court then struck all testimony and questions from the prosecutor's rebuttal case. It also reminded the jury to discard any notes they had taken on the topic. (74 RT 14807.) Striking the entirety of the rebuttal evidence, instead of specific testimony, made it easier for the jury to understand which evidence it needed to disregard. In other words, the jury was left with no doubt that all the evidence the prosecution presented at that point in its rebuttal case was unreliable and not to be considered.

Following this admonition, the court polled the jury as to their understanding of the state of the evidence. There is nothing from the jurors answers that suggested they did not understand their duty as jurors and that

they were required to disregard the previous testimony. (74 R1 14867-14871.) Also, the court's polling of the jurors gave the jurors an opportunity to question the court if they were confused, thus ensuring that each juror understood the state of the evidence. The polling also impressed upon the jurors the importance of disregarding the evidence and any insinuations conveyed by the questions.

Finally, the court's instruction before jury deliberations reminded the jurors of their duty to disregard evidence when told, and that all testimony and questions about the subject of Sanchez's threat to Ermanda were to be ignored. (75 RT 15056-15057.) It is presumed that the jury followed these instructions, and Sanchez has not met his burden to prove otherwise.

(*People v. Sandoval, supra*, 62 Cal.4th at p. 422.) Because the court cautioned the jury as it heard conditionally admitted evidence of Sanchez's threat to Ermanda, and then effectively instructed the jury to disregard the evidence once it proved unreliable, the court did not err by conditionally admitting evidence of the threat pursuant to sections 403, subdivision (b) and 702.

D. The Purported Error Was Harmless

Sanchez cannot prove prejudice under any standard. As discussed above, the court's instructions were adequate to dispel any prejudice the evidence of Sanchez's threat may have had upon the jury. (See Arg. XI, part C, *ante*.) Further, the evidence was duplicative to evidence already

before the jury. Sanchez was seen multiple times and by multiple people arguing with Ermanda. (56 RT 11555-11561, 11563, 11586; 65 RT 13290; 57 RT 11689-11691, 11740, 11750; 62 RT 12676, 12668-12669; 65 RT 13311-13313, 13316-13319, 13323-13324.) Sanchez also confessed to killing Ermanda because she owed him money. (13 CT 3528-3530.) Besides the existence of a specific threat, the jury already heard the substance of Ortiz's statement to Zepeda and Palomares – that Sanchez was angry with Ermanda because she owed him money. Thus, the stricken evidence of Sanchez's threat to Ermanda was not the only evidence tending to show a motive, contrary to Sanchez's contention. (AOB 301-302.)

Finally, given the weight of the other evidence (see Arg. I, part C, *ante*), including Oscar's prior identifications of Sanchez (13 CT 3513; 61 RT 12375; 64 RT 13205, 13221, 13225), and his trial testimony (59 RT 11983-11985; 60 RT 12216-12217, 12227-12228), it is certain beyond a reasonable doubt that the verdict would be the same had the court not conditionally admitted Sanchez's threat to Ermanda.

XII. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT BY ELICITING HEARSAY TESTIMONY REGARDING SANCHEZ'S THREAT TO ERMANDA BECAUSE THE PROSECUTOR HAD A GOOD FAITH BELIEF THAT THE STATEMENTS WERE ADMISSIBLE

Sanchez argues that the prosecutor committed prejudicial misconduct "by insinuating through his questioning that shortly before the murders[,]

appellant had demanded money from Ermanda Reyes and told her that if she did not pay him, her daughter, Lorena, would pay.” (AOB 303.)

Sanchez also argues that the prosecutor should have cautioned witnesses against revealing that Ermanda was the source of the information, and his failure to admonish these witnesses constituted prejudicial misconduct.

(AOB 303.) The People disagree. The prosecutor had a good faith belief, based on investigation reports and conversations with investigators, that Sanchez’s threatening statements were admissible evidence. Further, the prosecutor never intended to elicit the source of those threats, in the event they constituted hearsay, and crafted his questions to guard against that possibility. Regardless, given the trial court’s repeated admonitions and the weight of the evidence, Sanchez’s right to a fair trial was not impacted by the prosecutor’s conduct.

A. Background²⁸

As described above, after the testimony of Margareta Zepeda and Maria Alicia Palomares did not show that Ortiz had personal knowledge of Sanchez’s threat to Ermanda, the trial court inquired into the prosecutor’s good faith belief that he was eliciting admissible evidence. The prosecutor stated that he relied on the investigation report and a conversation with the

²⁸ The background relevant to this argument is contained in Argument XI, part A. For the purpose of clarity, respondent has repeated some relevant facts.

investigator when representing to the court that Ortiz had personal knowledge of Sanchez's threat. In both the report and the conversation, the investigator said that the witnesses had told him that Lola Ortiz had stated she was present when Sanchez threatened Ermanda. (74 RT 14857.) The court also questioned District Attorney Investigator Florencio Camarillo, in which he said that he spoke with both Zepeda and Palomares on September 7, 1999. Reading from his report, Camarillo recalled that the women told him Ortiz was present when Sanchez made the statements to Ermanda. (74 RT 14859-14861.) When talking with the prosecutor about that conversation, Camarillo represented to him that Ortiz was present to hear Sanchez's threat. (74 RT 14862.)

Following this inquiry, defense counsel moved for a mistrial based on prosecutorial misconduct. (74 RT 14864.) The court found that the prosecutor had a good faith belief that Zepeda and Palomares would impeach Ortiz's testimony with Ortiz's prior statements. The court then denied Sanchez's motion for a mistrial. (74 RT 14865.) The court admonished the jury when it reentered the courtroom, and polled the jurors as to their understanding of the admonition. (74 RT 14867-14871.)

B. The Prosecutor Did Not Commit Misconduct By Eliciting Evidence of Sanchez's Threat to Ermanda or by Refraining from Cautioning Witnesses About the Source of Sanchez's Statements

"[A]n appellate court reviews a trial court's ruling on prosecutorial misconduct for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) "The applicable federal and state standards regarding prosecutorial misconduct are well established." (*People v. Smithey* (1999) 20 Cal.4th 936, 960 (*Smithey*)). A prosecutor's behavior violates the federal Constitution when it consists of a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*Ibid.*) Under state law, conduct that does not render a criminal trial fundamentally unfair can still amount to prejudicial misconduct only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Ibid.*)

A prosecutor is held to a higher standard than other attorneys. This is due to the unique function of the position in representing the interests, and in exercising the sovereign power, of the state. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) "A prosecutor has a duty to prosecute vigorously. 'But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" (*Berger v. United States* (1935) 295 U.S. 78, 88.)

“[A] determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct.” (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Rather, the issue is whether the defendant’s right to a fair trial was impacted by the prosecutor’s conduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 760.) Thus in addition to showing that the prosecutor’s conduct was improper, the defendant must also show a reasonable likelihood that the jury was improperly influenced by the prosecutor’s remarks. (*People v. Sanders* (1995) 11 Cal.4th 475, 526.)

- 1. The prosecutor had a good faith belief based on investigation reports and conversations with the investigator that Sanchez’s statements were admissible**

Sanchez argues that it was improper for the prosecutor to elicit inadmissible hearsay evidence that Sanchez told Ermanda she needed to pay him money she owed or her daughter would do so. (AOB 311-315.) Respondent disagrees. The prosecutor had a good faith belief that Ortiz told Zepeda and Palomares that she was present for the conversation between Sanchez and Ermanda. This belief gave the prosecutor the foundation to impeach Ortiz with the testimony of Zepeda and Palomares.

“It is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist.” (*People v. Friend* (2009) 47 Cal.4th 1, 80; *People v. Warren* (1988) 45 Cal.3d 471, 480-481.) Stated differently, if a prosecutor has

evidence, which provides a good faith belief in the existence of a preliminary fact, then the prosecutor is entitled to question the witness in an attempt to establish a foundation for further evidence related to that good faith belief. (*People v. Lucas* (1995) 12 Cal.4th 415, 467.)

The trial court did not abuse its discretion when finding that the prosecutor acted in good faith when questioning several witnesses regarding Sanchez's statements to Ermanda. All the evidence indicated that Zepeda and Palomares told Investigator Camarillo, who then related to the prosecutor, that Ortiz had witnessed Sanchez's threat to Ermanda.

Investigator Camarillo told the court that during an interview, Zepeda and Palomares told him facts related to them by Ortiz. (74 RT 14859-14861.)

The women phrased the events as if Ortiz was actually there, and Investigator Camarillo took that to mean that Ortiz was in fact present for the conversation. (74 RT 14861.) Investigator Camarillo also recalled that the women said Ortiz was present for the conversation. (74 RT 14859-14860.)

This is further supported by Investigator Camarillo's written narrative in his report, which he read to the court. (74 RT 14861.) In that narrative, Investigator Camarillo wrote the events as the women described them. This included Ortiz's claim that Sanchez went to Ermanda's house and demanded to be paid for work he had done to her car. When Ermanda refused, Sanchez threatened her that if she did not pay, then her daughter

would. Zepeda and Palomares related this as an event Ortiz had witnessed. (74 RT 14861.) Not only did Investigator Camarillo relate in his report that Ortiz witnessed the interaction between Sanchez and Ermanda in person, but he also followed up with the prosecutor in person and represented to the prosecutor that Ortiz had witnessed the interaction. (74 RT 14857, 14862.)

The testimony of both women and their comments to the court further support Investigator Camarillo's and the prosecutor's belief that Ortiz told them that she witnessed the interaction between Sanchez and Ermanda. During Zepeda's testimony, the prosecutor asked her, "Did [Ortiz] tell you she was present and heard Juan Sanchez say some things to Ermanda?" (74 RT 14844-14845.) After Zepeda said no, the prosecutor confronted her with her conversation with Investigator Camarillo. After recalling the conversation, Zepeda testified, "Oh, yes, I did say that" to Investigator Camarillo. (74 RT 14845-14846.) When asked again about the conversation, Zepeda then indicated that Ortiz was not present for the conversation but had heard about it from Ermanda. (74 RT 14846.) Given the context of Zepeda's testimony, it appears that Zepeda told Investigator Camarillo that Ortiz was present for the conversation between Sanchez and Ermanda, and it was not until later that she learned that Ortiz was not present and had actually heard about the threat from Ermanda.

Palomares's testimony bolsters this point. Palomares testified, outside the presence of the jury, that she did not know whether Ortiz was present

for the conversation or whether she learned of the threat through Ermanda. In fact, Palomares never asked and lacked any knowledge as to how Ortiz knew of Sanchez's threat. (74 RT 14854.) She stated that she did not tell Investigator Camarillo that Ortiz was present, but given her lack of knowledge, it can be reasonably inferred that she also did not tell Investigator Camarillo that Ortiz was not present. (74 RT 14854.) Taking both women's testimony together, it appears that Zepeda told Investigator Camarillo that Ortiz witnessed the conversation between Sanchez and Ermanda, and Palomares said nothing to contradict Zepeda's assertions. Given the women's statements to Investigator Camarillo, his report and recollections accurately reflect that Ortiz told Zepeda and Palomares she was present for the conversation between Sanchez and Ermanda.

Additionally, the discussion between the parties prior to testimony on this topic gave the prosecution further assurance that Ortiz stated to Zepeda and Palomares that she was present for the conversation between Sanchez and Ermanda. During the discussion regarding Ortiz's testimony, defense counsel could not rebut Investigator Camarillo's report stating that Ortiz told the women she was present during the conversation between Sanchez and Ermanda. In fact, defense counsel stated that Ortiz had made "conflicting statements" on the subject. (65 RT 13471-13472.) This assertion, indicated that Ortiz may have told the women she was present

during the conversation between Ermanda and Sanchez at Ermanda's house.

Given the whole of the evidence before it, the court did not abuse its discretion when finding that the prosecutor had a good faith belief that he was eliciting admissible evidence when questioning multiple witnesses regarding Sanchez's threat to Ermanda. The prosecutor properly relied on Investigator Caramillo's report stating that Ortiz told Zepeda and Palomares that she was present for the conversation. As revealed during testimony, Zepeda told Investigator Caramillo that Ortiz told her that she was present for the conversation, and Palomares said nothing to dispel that assertion. Taking all of this evidence into account, the prosecutor did not commit error, because he asked his questions in a good-faith belief that the evidence elicited would be admissible.

2. The Prosecutor did not commit error by failing to caution the witnesses to not reveal the source of Ortiz's knowledge concerning Sanchez's threat

Sanchez next argues that it was misconduct for the prosecutor not to have cautioned Ortiz, Zepeda, and Palomares against revealing that Ortiz actually heard of Sanchez's threat from Ermanda, in the event that Ortiz did not witness the interaction. (AOB 315-319.) The People again disagree. While Sanchez did move for a mistrial based on prosecutorial misconduct, that motion was based on the prosecutor having elicited inadmissible evidence in bad faith. (74 RT 14846-14847.) Sanchez never brought the

motion based on the prosecutor's failure to caution his witnesses; thus he has forfeited this claim on appeal. Regardless, this claim fails because the prosecutor did not believe that he was eliciting inadmissible evidence and crafted his questions in a way to guard against such a possibility.

a. Sanchez has forfeited his claim that the prosecutor committed misconduct for failing to admonish witnesses against revealing the source of Ortiz's knowledge

At the time of each of his objections and requests for a mistrial based on prosecutorial misconduct, Sanchez only made the objection that prosecutor committed misconduct because he elicited testimony he did not have a good faith belief was admissible. (74 RT 14849-14847, 14856-14857.) Sanchez never objected, nor moved for a mistrial, on the ground that the prosecutor should have admonished his witnesses not to state where Ortiz learned of Sanchez's threat to Ermanda in the event that the information was not from Ortiz's personal knowledge.

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* (2003) 31 Cal.4th 518, 553.) "If the defendant fails to object to the asserted misconduct and does not request an instruction or admonition to lessen any possible prejudice, then the asserted objection is thereby waived." (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36.)

Here, Sanchez did not object to the prosecutor's actions on the ground that the prosecutor should have warned his witnesses not to testify about the source of Ortiz's knowledge. (74 RT 14849-14847, 14856-14857.) The failure to object on this specific ground denied the prosecutor a full and fair opportunity to respond to Sanchez's allegations and argument. It further denied the court the opportunity to rule on this ground and deliver a proper and timely admonition to the jury. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328 ["The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice."].) Because Sanchez did not object during trial on the ground he now asserts on appeal, he has forfeited this claim.

b. The prosecutor did not commit misconduct by failing to admonish witnesses against revealing the source of Ortiz's knowledge, because he did not believe he was eliciting inadmissible evidence and crafted his questions to guard against such risk

"It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order." (*People v. Crew* (2003) 31 Cal.4th 822, 839.) However, if the prosecutor asks a question that is likely to elicit a reference to inadmissible evidence, the question may constitute "misconduct even if the prosecutor did not intend to elicit such a reference." (*People v. Leonard* (2007) 40 Cal.4th

1370, 1405.) Therefore, “[a] prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement.” (*People v. Warren* (1988) 45 Cal.3d 471, 481-482.)

Initially, it should be noted that the only witness who revealed the source of Ortiz’s knowledge of the threats was Zepeda, and not also Palomares as Sanchez mistakenly asserts. (AOB 317; 74 RT 14846.) The jury had been excused from the courtroom before Palomares guessed at a likely source of Ortiz’s knowledge upon questioning from the prosecutor. (74 RT 14852-14854.) Ortiz and Palomares never testified in front of the jury that Ermanda told Ortiz about Sanchez threatening her. (74 RT 14827-14829, 14834-14836, 14852-14854.)

As shown in detail above, the prosecutor reasonably believed that he was eliciting admissible evidence when questioning Ortiz, Zepeda, and Palomares and did not see the need to caution them. The prosecution’s duty to admonish witnesses against making inadmissible statements only applies when the prosecution “believes a witness may give an inadmissible answer.” (*People v. Warren, supra*, 45 Cal.3d at 481-482.) Here, the trial court found that the prosecutor reasonably believed that he was eliciting admissible evidence. (74 RT 14865.) As shown, this finding was supported by the record. (See Arg. XII, part B(1), *ante*.)

Further, the prosecutor crafted his questions in such a way that no inadmissible evidence – Ermanda as the source of Ortiz’s knowledge – would be elicited during testimony. When questioning Ortiz, the prosecutor asked pointed questions about the contents of the threat (74 RT 14834), and Ortiz’s conversation with Zepeda and Palomares (74 RT 14831). The prosecutor did not elicit potential inadmissible evidence by asking Ortiz if she had heard of Sanchez’s threats from someone else, and who that person was.

During Zepeda’s testimony the prosecutor asked leading questions upon permission from the court. (74 RT 14842-14844.) This was to ensure Zepeda would not testify about inadmissible evidence. The question that inadvertently elicited Zepeda’s response that Ortiz heard of Sanchez’s threat from Ermanda was, “Now, did you talk to [investigators] about what Lola told you that she heard Juan say?” (74 RT 14846.) This question could not reasonably be interpreted to elicit evidence regarding the source of Lola’s knowledge. The question already attributed the source to Sanchez and required a yes or no answer.

Finally, during Palomares’s testimony, the prosecutor asked leading questions, and once the parties realized Ortiz’s prior statements were inadmissible hearsay the jury was dismissed. (74 RT 14850-14852.) The prosecutor’s precautions of asking pointed and leading questions was designed to prevent inadmissible evidence from being inadvertently

admitted. Although it does not appear that the prosecutor cautioned his witnesses against revealing the source of Ortiz's knowledge, he did take steps to fulfill his duty to prevent the presentation of inadmissible evidence to the jury. (See *People v. Warren, supra*, 45 Cal.3d at pp. 481-482.)

3. The prosecutor's conduct did not rise to the level of misconduct, because Sanchez cannot show he was denied a fair trial

Even assuming prosecutorial error occurred, reversal is not required unless Sanchez can show he suffered prejudice. (See *People v. Arias* (1996) 13 Cal.4th 92, 161.) Under federal law, Sanchez can prevail if he shows that he was denied a fair trial, while under state law it is sufficient to show prejudicial misconduct if the prosecutor acted with "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Smithey*, 20 Cal.4th at p. 960) The defendant must also show a reasonable likelihood that the jury was improperly influenced by the prosecutor's remarks. (*People v. Sanders, supra*, 11 Cal.4th at p. 526.)

Sanchez cannot show that the prosecutor acted with deceptive or reprehensible methods. As shown above, the prosecutor acted in good faith when questioning witnesses regarding Sanchez's threat to Ermanda. (See Arg. XII, part A(1), *ante*.) The investigation report, conversations with Investigator Caramillo, and Zepeda's own testimony established that the prosecutor acted under the reasonable belief that Ortiz had been present during the conversation between Sanchez and Ermanda. (74 RT 14845-

14846, 14861.) Thus, the prosecutor's actions were not deceptive or reprehensible. (*Smithey*, 20 Cal.4th at p. 960.)

Further, Sanchez cannot show that he was denied a fair trial or that there was a reasonable likelihood a juror was improperly influenced by evidence of Sanchez's threat to Ermanda. (*Smithey, supra*, at p. 960; *Sanders, supra*, at p. 526.) The court struck evidence of Sanchez's threat as unreliable, and polled the jury about its understanding of the state of the evidence. All jurors indicated that they would follow the court's admonition and disregard evidence of Sanchez's threat. (74 RT 14867-14871.) Also, the evidence was duplicative of evidence already presented to the jury. Sanchez confessed to killing Ermanda because she owed him money, and multiple witnesses saw Sanchez arguing with Ermanda in the days and weeks before her death. Besides a particular threat, evidence of Sanchez's threat told the jury what it already knew – Sanchez was mad at Ermanda because she owed him money. (See Arg. XI, part D, *ante*.) Given the evidence of Sanchez's motive already before the jury and the jurors' understanding of their duty to disregard evidence of the threat, it is not reasonably likely that any juror would have improperly considered Sanchez's threat to Ermanda to convict him and sentence him to death.

C. The Purported Error Was Harmless

As explained in great detail in Argument XI, part C, the trial court thoroughly instructed the jury during testimony and before deliberations

about its duty to disregard the prosecution's rebuttal evidence. It also polled the jury to ensure no one juror was confused about his or her duty and the state of the evidence. (74 RT 14867-14871.) There is no evidence to support a finding that the jury did not do as instructed.

Further, as described in Argument I, part C, ample evidence supported Sanchez's guilty verdict and penalty finding. (See *People v. Welch* (1999) 20 Cal.4th 701, 735 [no prejudice resulted from prosecutor's comments in light of the evidence against defendant].) When this evidence is considered with Oscar's identifications of Sanchez on the day of the murders and his trial testimony, it is certain beyond a reasonable doubt that the prosecutor's questions about Sanchez's threat had no effect on the verdict. Thus, the purported error was harmless under both the state and federal standards.

XIII. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT BY APPEALING TO THE EMOTIONS OF THE JURY BECAUSE THE PROSECUTOR'S STATEMENTS DID NOT INVITE THE JURY TO VIEW THE CASE THROUGH THE EYES OF THE VICTIM

Sanchez contends that the prosecution committed prejudicial misconduct by appealing to the emotions of the jury when he stated during his guilt phase closing argument that Ermanda died knowing Lorena was dead, but not knowing whether Oscar was going to survive. (AOB 323-326.) The People disagree. Although vigorous, the prosecutor's argument was a fair comment on the evidence and did not invite the jury to view the

case through the victim's eyes. Regardless, the prosecutor's comment did not rise to the level of misconduct because he did not engage in a pattern of reprehensible conduct designed to persuade the jury based on improper considerations.

A. Background

During the guilt phase, at the end of the prosecutor's closing argument, the prosecutor said:

And we have a little idea of the order of the shooting, in part from Evelyn Vanciel, 'cause what did she say that she heard. She heard two shots, a pause of four or five seconds and then the last shot, and that's where Ermanda got killed, outside her daughter's door, watching, most likely, her daughter dying. [¶] She has one other child in the house, and she gets to her bedroom where that child is and she gets on the phone. The defendant goes in there and she's not even able to call the police. She died not knowing if her youngest was gonna make it, but knowing her oldest hadn't.

(76 RT 15201.)

During the next break, Sanchez objected to the prosecutor's argument. He argued that the prosecutor had committed misconduct by inflaming the jury with the thought process of the victim by describing that Ermanda died without knowing whether Oscar would survive. (76 RT 15203-15204.)

The court denied the motion and found that the prosecutor had not made a pattern of appealing to the emotions of the jury, but if a pattern was later established, then the court would deal with it appropriately. The trial court then put the prosecutor "on notice of the defense's objection" and

stated that “there is a line between what is argument and inflaming. I’m not ruling the prosecutor has reached the point of inflammatory argument. [¶] Defense has put her concern on record, and the court will continue to listen to the argument and, if there’s a further objection, I’ll consider it.” (76 RT 15203-15204.)

B. The Prosecutor’s Comments Did Not Constitute Error

As explained, “a prosecutor’s behavior violates the federal Constitution when it consists of a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” (*Smithey, supra*, 20 Cal.4th at p. 960.) Under state law, conduct that does not render a criminal trial fundamentally unfair can still amount to prejudicial misconduct also if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” (*Ibid*; see Arg. XII, part B, *ante*.) “Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

Generally, “a prosecutor is given wide latitude during argument. 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* (1998) 17 Cal.4th 800, 819.) Also, this

Court must view the statements in the context of the argument as a whole. (*People v. Dennis, supra*, 17 Cal.4th at p. 522.)

It is “improper to make arguments to the jury that give it the impression that ‘emotion may reign over reason,’ and to present ‘irrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role, or invites an irrational, purely subjective response.” (*People v. Redd* (2010) 48 Cal.4th 691, 742.) Appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial. (*People v. Fields* (1983) 35 Cal.3d 329, 362.) “It is misconduct for a prosecutor to appeal to the passions of the jurors by urging them to imagine the suffering of the victim” (*People v. Jackson* (2009) 45 Cal.4th 662, 691, quoting *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057.) An appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial. (*Ibid.*)

This Court reviews claims of prosecutorial misconduct for abuse of discretion. (*People v. Alvarez, supra*, 14 Cal.4th at p. 213.)

1. The prosecutor’s statements were not improper

The prosecutor’s comment did not invite the jury to view the crime through the eyes of the victim, nor did the prosecutor invite the jury to imagine Ermanda’s suffering. The prosecutor stated as fact that Ermanda died knowing her daughter had been killed, but not knowing whether Oscar

would survive. (76 RT 15201.) This statement was supported by the evidence.

Evelyn Vanciel heard two gun shots before hearing an additional single shot. (62 RT 12768.) Lorena was shot twice (55 RT 11059, 11064-11070), while Ermanda was shot once (52 RT 11088-11089). Forensic evidence showed that Ermanda was shot outside her daughter's room and then walked back to her own bedroom (55 RT 11179-A, 11190-A-11191-A, 11266-A; 58 RT 11869-11873, 11888, 11919, 11922-11923), followed by her murderer (61 RT 12375; 64 RT 13204-13205), where Oscar was sleeping in his mother's bed (59 RT 11982; 64 RT 13204). Ermanda collapsed next to her bed and eventually died there. (58 RT 11897-11898, 11901-11902, 11935.)

This evidence supports the prosecutor's reasonable inference that Ermanda saw her daughter get shot twice before being shot once herself. It also supports the prosecutor's reasonable inference that Ermanda died in a room where Oscar was left alone with her murderer. This was a fair statement of the evidence, especially given that the sequence of events leading to two deaths was told to the jury through the testimony of several witnesses contributing both scientific evidence and eyewitness testimony. Part of the prosecutor's task was to explain how the various items of evidence, from various witnesses, showed what had happened on the night of the murders. While pointing to specific items of evidence, the

prosecutor told the jury the story of the murders and vigorously argued that Ermanda witnessed her daughter's death and died leaving her son in a room with her murderer. (76 RT 15157, 15182, 15201.) The prosecutor never invited the jury to imagine Ermanda's suffering; instead the prosecutor described Ermanda's suffering as shown by the evidence. This constituted a fair comment on the evidence because it did not suggest to the jury that emotions could reign over reason. (*People v. Redd, supra*, 48 Cal.4th at p. 742.) Thus, the prosecutor's argument was proper.

2. The statements did not rise to the level of misconduct

Regardless of whether the prosecutor's conduct was improper, it did not rise to the level of misconduct under state law because the prosecutor did not use deceptive or reprehensible methods to persuade the jury. (*Smithey, supra*, 20 Cal.4th at p. 960.) As explained, the prosecutor referred to specific items of evidence when arguing his case to the jury. (See Arg. XIII, part A, *ante*.) The prosecutor stated the events in a factual tone and ultimately concluded that Ermanda watched her daughter die before dying herself in a room where her son was left alone with a murderer. (76 RT 15201.) The prosecutor did not invite the jury to imagine what that must have been like for Ermanda, nor did he mention Ermanda's subjective emotions during the ordeal. The prosecution focused on pieces of evidence presented at trial to describe the sequence of events leading to two deaths.

(76 RT 15157, 15182, 15201.) Because the argument was based on the evidence and presented as an argument instead of an invitation to view the case from the victim's perspective, the argument did not constitute deceptive practices forbidden by state law. (*Smithey, supra*, 20 Cal.4th at p. 960.)

The prosecutor's argument did not constitute misconduct under federal law either, because there was no pattern of conduct that infected the trial with such unfairness that Sanchez was denied due process. (*Smithey, supra*, 20 Cal.4th at p. 960.) The court explicitly found that there had been no pattern of conduct designed to appeal to the sympathies of the jury. (74 RT 15203-15204.) Sanchez has not demonstrated that there was in fact such a pattern; so he has not shown that his right to due process was violated.

Finally, Sanchez cannot show he was denied due process because there was no reasonable likelihood that the jury applied the prosecutor's statement in an objectionable way. (*People v. Ayala, supra*, 23 Cal.4th at pp. 283-284.) As described, the prosecutor's statements were made as part of a larger narrative that wove together several pieces of evidence to give the jury a timeline of the murders. (76 RT 15201.) Every factual statement was supported by a piece of evidence elicited at trial. (52 RT 11088-11089; 11059, 11064-11070; 55 RT 11179-A, 11190-A-11191-A, 11266-A; 58 RT 11869-11873, 11888, 11897-11898, 11901-11902, 11919, 11922-11923,

11935; 59 RT 11982; 61 RT 12375; 62 RT 12768; 64 RT 13204-13205.)

With that evidence, the prosecutor concluded that Ermanda witnessed Lorena being shot and then died leaving Oscar alone with her murderer. (See Arg. XII, part B(1), *ante*.) This was presented as an inference from the evidence and not told through any particular point of view.

The jury would not reasonably view the case from Ermanda's perspective, given the substance of the prosecutor's argument and reliance on specific pieces of evidence. There is nothing in the record to suggest that the jury used the prosecutor's comment in an objectionable fashion. (*People v. Ayala, supra*, 23 Cal.4th at pp. 283-284.) Accordingly, the prosecutor's statement did not constitute misconduct; and Sanchez was not denied a fair trial.

C. The Purported Error Was Harmless

Assuming the prosecutor committed misconduct, Sanchez's claim fails because he cannot demonstrate prejudice under the state or federal standard. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071 [“conviction will not be reversed for prosecutorial misconduct’ that violates state law ... ‘unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct’”]; *People v. Williams* (2013) 58 Cal.4th 197, 274 [no “relief for prosecutorial misconduct under federal law” unless the defendant shows “the challenged conduct was not harmless beyond a reasonable doubt”].)

Here, the prosecutor's brief comment did not undermine the outcome of the trial and was harmless beyond a reasonable doubt because the evidence against Sanchez was strong and the evidence supporting his claimed defense was weak. (See Arg. I, part C(2), *ante.*) In addition to the strong evidence described in Argument I, part C(2) and Sanchez's confession, Oscar's consistent identifications of Sanchez on the day of the murders and during his testimony support Sanchez's guilt by placing him at the scene of the crime when the murders occurred. (13 CT 3514; 64 RT 13203-13208, 13220-13223, 13235.) Further, there is no indication in the record "the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Finally, the court instructed the jury it could not allow "sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" to influence its decision (75 RT 15054-15055) and that the attorneys' closing arguments were not evidence (75 RT 15056). This Court presumes that the jurors understood and followed the court's instructions. (*People v. Myles* (2012) 53 Cal.4th 1181, 1212.) Thus, the alleged error was harmless.

XIV. SUBSTANTIAL EVIDENCE SUPPORTS SANCHEZ'S BATTERY AGAINST TAMMY LUCIO AS AN AGGRAVATING FACTOR

Sanchez contends that there was insufficient evidence to support his battery against his stepdaughter, Tammy Lucio, as a penalty factor under

Penal Code section 190.3. (AOB 327-331.) The People disagree. The trial court properly admitted evidence of Sanchez's battery against Tammy because there was substantial evidence that Sanchez struck Tammy on the head to discipline her.

A. Background

Before Tammy testified for the prosecution during the penalty phase, defense counsel moved to exclude evidence of an assault or battery against her by Sanchez. (77 RT 15441.) Defense counsel argued that Tammy would not testify Sanchez hit her on the head, but instead say that he tapped her on the head to get her attention. (77 RT 15442.) The prosecution replied that Tammy initially reported that Sanchez hit her, and it was not until later that she minimized his conduct and said that he tapped her. The trial court ruled that even though Tammy might not corroborate evidence of the battery, the evidence was admissible because the trier of fact would determine whether a battery had actually occurred. (77 RT 15443-15444.)

During testimony, Tammy stated that when Sanchez disciplined her he would yell at her, and when he was upset would tap her on her head "to knock some sense in[to] her." (77 RT 15513-15515.) Tammy claimed Sanchez never hit her, but would tap her on the head "very gently." (77 RT 15506, 15513-15514.) However, she acknowledged that she may have responded "Hm-hmm" when asked by the prosecution's investigator whether Sanchez disciplined her by striking a blow, but she did not mean

that he hit her hard, or even that he had hit her before. (77 RT 15514-15515.)

The jury was instructed in pertinent part:

Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: striking Tammy Lucio in the head, a violation of Penal Code section 242, Battery; Before a juror may consider any criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal act. A juror may not consider any evidence of any other criminal act as an aggravating circumstance, under "Factor B".

(CALJIC No. 8.87; 11 CT 2855.)

The jury was also instructed:

Every person who willfully uses any force or violence upon the person of another is guilty of the crime of battery in violation of Penal Code section 242. [¶] in order to prove this crime, each of the following elements must be proved: [¶] 1. A person used force or violence upon the person of another; and [¶] 2. The use was willful.

(CALJIC No. 16.140; 11 CT 2857.)

B. Substantial Evidence Supported the Admission of Sanchez's Battery Against Tammy

During the penalty phase, Penal Code section 190.3, factor (b) allows the trier of fact to consider evidence of "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Sanchez brings two claims related to the admission of evidence regarding a battery he committed on his stepdaughter. First, Sanchez

argues that the court should not have admitted the evidence at all. Second, Sanchez argues that the court should never have allowed the issue to go to the jury. (AOB 327.) The People disagree on both points.

1. The trial court properly admitted evidence of Sanchez's battery on Tammy

The court held a preliminary inquiry about the alleged battery on Tammy. (77 RT 15441-15444.) During this inquiry, the prosecution did not bear the burden of establishing beyond a reasonable doubt that Sanchez committed a violent crime. (*People v. Rodriguez* (2014) 58 Cal.4th 587, 636, citing *People v. Ochoa* (1998) 19 Cal.4th 353, 449.) It is within the trial court's discretion to accept "evidence that would allow a rational trier of fact to make a determination beyond a reasonable doubt as to [such] criminal activity." (*People v. Ochoa, supra*, 19 Cal.4th at p. 449, quoting *People v. Clair* (1992) 2 Cal.4th 629, 676.) The preliminary inquiry need not amount to evidentiary hearing and may instead be based on an offer of proof. (*People v. Jones* (2011) 51 Cal. 4th 346, 380; *People v. Young* (2005) 34 Cal.4th 1149, 1209; *People v. Hart* (1999) 20 Cal.4th 546, 649.)

Here, the prosecution presented an offer of proof that Tammy had reported that Sanchez hit her. Later, Tammy recanted her statements to minimize Sanchez's culpability. (77 RT 15443.) Defense counsel believed Tammy would not testify that Sanchez hit her, but would claim instead that he had tapped her to get her attention. (77 RT 15442.) Given the offer of

proof, it was within the court's discretion to allow evidence of Sanchez's battery to be presented to the jury.

Tammy made statements to the prosecution's investigators that Sanchez had hit her. (77 RT 15443, 15514-15514.) A reasonable juror could have credited that statement to determine beyond a reasonable doubt that Sanchez had willfully used violence against Tammy. (Penal Code, § 242; CALJIC No. 16.140.) The defense attorney's claim that Tammy would not testify consistent with the proffer (77 RT 15442) does not change the prosecution's evidence supporting the finding that a battery had occurred. Defense counsel's assertion merely presented a question of credibility that was properly left to the trier of fact. Thus, it was within the court's discretion to allow Tammy's statement to be presented to the jury because that statement consisted of sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Sanchez committed a battery. (*People v. Ochoa, supra*, 19 Cal.4th at p. 449.)

2. The court properly allowed the jury to determine whether Sanchez committed a battery.

"In determining whether to admit challenged other-crimes evidence, the trial court considers whether the prosecution has adduced substantial evidence to prove each element of the other crime activity." (*People v. Edwards* (2013) 57 Cal. 4th 658, 753, citing *People v. Griffin* (2004) 33 Cal.4th 536, 584.) The standard is the same as the standard to be met at the

preliminary inquiry stage; however, the facts considered are those adduced during testimony instead of those made in the proffer. Thus, the prosecution must have adduced substantial evidence of violent criminal activity that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt. (*Ibid.*) “[A] trial court’s decision to admit ‘other crimes’ evidence at the penalty phase is reviewed for abuse of discretion, and no abuse of discretion will be found, where, in fact, the evidence in question was legally sufficient.” (*People v. Boyer* (2006) 38 Cal.4th 412, 477, fn. 51.)

Penal Code section 242 defines a “battery” as “any willful and unlawful use of force or violence upon the person of another.” “Any harmful or offensive touching constitutes an unlawful use of force or violence’ under this statute. It has long been established that ‘the least touching’ may constitute battery.” (*People v. Shockley* (2013) 58 Cal.4th 400, 404-405.) Put another way, force against the person is sufficient; it need not be violent or cruel; in fact, it need not cause bodily harm or pain. (*Ibid.*) Therefore, “[o]nly a slight unprivileged touching is needed to satisfy the force requirement of a criminal battery.” (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 860, fn. 2, disapproved on other grounds in *People v. Santana* (2013) 56 Cal.4th 999, 1011, fn. 6.)

Tammy denied that Sanchez had hit her. (77 RT 15506, 15513-15514.) However, Tammy acknowledged that she had previously admitted

saying Sanchez had hit her. (77 RT 15514-15515.) Tammy testified that when Sanchez disciplined her, he would yell at her, and when he was upset he would “knock some sense in[to] her.” (77 RT 15513-15515.) Although Tammy tried to minimize Sanchez’s culpability by claiming that she never meant that Sanchez hit her hard (77 RT 15514-15515), the truth between her inconsistent statements was a credibility determination for the jury. The prosecution presented evidence that Sanchez would strike his 16-year-old stepdaughter on the head when he disciplined her. Her prior statement was sufficient to sustain a conviction for battery, and so was sufficient under Penal Code section 190.3, factor (b). (§ 242; See *People v. Shockley*, *supra*, 58 Cal.4th at pp. 404-405.)

C. The Purported Error Was Harmless

Even if evidence of Sanchez’s battery on Tammy should have been excluded, the jury would have still sentenced Sanchez to death. ““State law error occurring during the penalty phase will be considered prejudicial when there is a reasonable possibility such an error affected a verdict. [Citations.] Our state *reasonable possibility* standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of [*Chapman v. California*, *supra*, 386 U.S. at p. 24].” (*People v. Nelson* (2011) 51 Cal.4th 198, 218-219, fn. 15, italics in original.)

In addition to Sanchez’s special circumstance murders of Ermanda and Lorena, under factor (b), the prosecution presented evidence of

multiple instances of Sanchez's violent criminal activity. In one instance, Sanchez hit his wife, Mary, sending her to the hospital. (77 RT 15519-15520.) On another instance while visiting their home, Sanchez's sister, Martha, saw Sanchez hit Mary two or three times. (78 RT 15586-15587.) Another time, Martha saw Sanchez hit Mary with a closed fist to her face. (78 RT 15587, 15589.) And on yet another occasion, Martha saw Mary with bruises on her face. Sanchez told her, "it was his business and you guys weren't to be involved." (78 RT 15589.) Further, Sanchez was known to have a bad temper and the police were called on multiple occasions to his house when he would fight with Mary. (77 RT 15508.) Finally, Sanchez also threatened to throw a chair at Solomon Bravo after he and Sanchez got into an argument about Sanchez being fired from a job. (78 RT 15575-15576.) Evidence of Sanchez's battery of Tammy was not nearly as violent as Sanchez's other violent activities, including his assault on his wife that resulted in her hospitalization.

The prosecution did not specifically mention Sanchez's battery on Tammy in his argument to the jury. The prosecutor referenced Sanchez's prior violent conduct by stating, "We have prior criminal activity, the activity of violence or implied violence or force. If it's present, that's aggravating. If it's absent, that's mitigating." (79 RT 15881.) This squarely put the determination in the hands of the jury whether Sanchez's hitting of Tammy on her head was a battery. It further left the weight to

assign it, to the jury as well. The prosecutor spent most of his time talking about the circumstances of the crime (79 RT 15874-15881), and then mentioned Sanchez's domestic violence against Mary (79 RT 15884-15885) when urging the jury to sentence Sanchez to death. The prosecutor did not rely on the battery when he argued that the jury should sentence Sanchez to death.

The evidence of the Sanchez's battery on Tammy was minor in comparison to the “[m]uch more direct and graphic evidence of [Sanchez's] violent conduct [that] was before the jury.” (*People v. Lewis* (2008) 43 Cal.4th 415, 528.) The jury was permitted to consider the circumstances of the current crimes (factors (a) and (b)) in determining penalty. (Pen. Code, § 190.3.) Sanchez raped and sodomized a 16-year-old girl during a home invasion, before he brutally shot and killed her and her mother. “The cold-blooded, cruel, and senseless murder[.]” of Ermanda and Lorena “sealed [Sanchez's] fate.” (*People v. McKinnon* (2011) 52 Cal.4th 610, 684.)

To rebut the overwhelming aggravating evidence, Sanchez offered weak mitigating evidence. Sanchez's character witnesses included his wife, stepchildren, nieces, grandson, and son. Each explained that Sanchez was like a father figure to his stepchildren and relatives. (77 RT 15510; 78 RT 15606, 15626, 15637, 15645-15646, 15668, 15672, 15675.) Sanchez's nieces testified that Sanchez always told them to stay in school, and that he

would usually give them ice cream when he came to visit. (78 RT 15668, 15670-15671, 15673, 15675.) Sanchez's stepdaughter testified that Sanchez taught her how to respect herself, and that he did not like it when certain boys would come to the house to see her. (77 RT 15510-15512.) The character evidence was not persuasive, particularly in light of the fact that he repeatedly abused his wife, and that he sexually assaulted 16-year-old Lorena when he killed her, failing to give either of them the same consideration he gave his teenage stepdaughter and nieces.

Evidence of Sanchez's below average intelligence was not persuasive. Dr. La Calle, a psychiatrist, testified that Sanchez had an IQ of 84, which was consistent with a person who could perform manual labor but had a low ability to understand abstract concepts. (79 RT 15783-15784.) Dr. La Calle's diagnoses did little to diminish Sanchez's culpability. Dr. La Calle testified that Sanchez had a "short fuse," but did not become violent. (79 RT 15787, 15790.) Dr. La Calle based his opinion on interviews with Sanchez that involved written tests, some of which were impossible to administer given Sanchez's language skills. (79 RT 15785.) The weight of Dr. La Calle's expert opinions was diminished by his limited interactions with Sanchez. (See 79 RT 15783, 15785, 18504-18505.)

Under these circumstances, there is no reasonable doubt that Sanchez would have received the same penalty verdict even if the jury had not heard or considered the evidence of Sanchez's battery on Tammy. The jury found

beyond a reasonable doubt Sanchez committed the premeditated and deliberate murder of Ermanda. The jury also found him guilty of murdering Lorena after he sexually assaulted her. The jury heard about Sanchez's violent nature towards his wife and his reputation for having a bad temper. There is no reasonable doubt that any juror would have voted against a death verdict but for the evidence of Sanchez's battery of Tammy. "[I]t would require capricious speculation for [this Court] to conclude' that any error in admitting ... [evidence] under factor (b) 'affected the penalty verdict.'" (*People v. Valdez* (2012) 55 Cal.4th 82, 172, citations omitted.) As a result, any error in regards to the challenged battery evidence was harmless beyond a reasonable doubt and this Court should uphold the judgment of death.

XV. THERE WAS NO CUMULATIVE PREJUDICE FROM GUILT PHASE AND PENALTY PHASE ERRORS WARRANTING REVERSAL

Sanchez contends that the cumulative effect of the alleged errors in the guilt phase and penalty phase warrants reversal of his convictions. (AOB 332-334.) This claim is without merit. Whether considered individually or for their cumulative effect, there is no "reasonable probability" that any alleged errors affected the outcome of the trial, or that the jury would have reached a different result absent the errors. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117; see *People v. Watson* (2008) 43

Cal.4th 652, 704 [rejecting cumulative error].) In a close case, the cumulative effect of multiple errors may constitute reversible error. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236.) The “litmus test” is whether a defendant received due process and a fair trial. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 319.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Stewart* (2004) 33 Cal.4th 425, 521-522.) Sanchez cannot show that reversal is warranted even if multiple errors were committed.

First, as demonstrated above, this was not a close case. There was overwhelming evidence that Sanchez murdered both Ermanda and Lorena. (See Arg. I.C, *ante*.) Because the case was not close, it was not reasonably probable that Sanchez would have obtained a more favorable result even if no alleged error had occurred. (See *People v. Bunyard, supra*, 45 Cal.4th at pp. 1236-1237.)

Second, to the extent that there were any errors in this case, they were not substantial. As discussed in Arguments I through VI, any error resulting from Oscar’s testimony was harmless because ample evidence outside of Oscar’s testimony and prior statements existed to support Sanchez’s verdicts and punishment. Further, as explained in Arguments VII and IX, any error resulting from the admission of Sanchez’s confession or statements he made as part of his confession were harmless because

ample evidence outside of the confession was presented to convict Sanchez of the murders. Also, as explained in Arguments XIII and IX, any error resulting from admission of evidence about Sanchez's affair with Hector was harmless because the court's repeated instructions ensured the jury would not use such evidence in a prejudicial manner. Finally, as discussed in Arguments XI and XII, any error resulting from the admission of motive evidence, later found to have lacked foundation, was not prejudicial because the court repeatedly instructed the jury to disregard that evidence to ensure the jury would fairly decide Sanchez's case.

As discussed thoroughly in Argument I, part C, the prosecution presented evidence showing that Sanchez fought with Ermanda on multiple occasions, including four hours before he murdered her and Lorena. Sanchez owned both a knife similar to the one used to cut Lorena's bra and a gun similar to the one used to murder the victims. Sanchez possessed both weapons before the murders; however, neither of them were in his possession after. Further, Sanchez was seen in Porterville close in time and area to the murders. In light of the overwhelming evidence, the court's instructions, and defense counsel's arguments, any possible errors would not have aggregated to result in cumulative error. (See *People v. Bunyard*, *supra* 45 Cal.3d at p. 1236 [because errors at trial were not substantial, the cumulative impact of those errors did not prejudice the defendant].)

Third, because the alleged errors were separate and distinct from one another, their cumulative effect would not have resulted in an unfair trial. (See *People v. Loy* (2011) 52 Cal.4th 46, 77 [no cumulative prejudice when two evidentiary errors found by reviewing court were “directed primarily at different trial issues”]; *People v. Moore* (2011) 51 Cal.4th 386, 417-418 [no cumulative prejudice from three errors found or assumed by reviewing court because they “related to distinct procedural or evidentiary issues not closely related to one another”].)

In sum, there were no errors in this case, and any that did occur were clearly harmless and were not closely related. Even if other errors occurred, they were not prejudicial and thus could not have combined to render Sanchez’s trial fundamentally unfair. Accordingly, even if there were multiple errors at trial, there would be no cumulative prejudice to warrant reversal, and Sanchez’s claim of cumulative error must be rejected.

XVI. CALIFORNIA’S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Sanchez raises an array of familiar arguments challenging the constitutionality of California’s death-penalty statute and the jury instructions implementing it. (AOB 335-349.) As Sanchez acknowledges, all of these claims have been rejected by this Court in prior cases. (AOB 335.) Sanchez presents no compelling reason for this Court to reconsider any of its previous holdings. In asking this Court to reconsider those

decisions, Sanchez states that he wishes to preserve them for federal habeas review. (AOB 335.) The People address Sanchez's claims only briefly.

A. California's Death Penalty Statute Sufficiently Narrows the Class of Murders to Which It Applies and Is Thus Constitutional

Sanchez contends that California's capital sentencing scheme is unconstitutional because it does not meaningfully narrow the class of murders eligible for the death penalty under *Furman v. Georgia* (1972) 408 U.S. 238, 313. (AOB 335-336.) Specifically he contends that the number of special circumstance under which the death penalty can be applied makes it unconstitutional. Sanchez is incorrect.

The California Supreme Court has consistently rejected this contention. (See, e.g., *People v. Linton* (2013) 56 Cal.4th 1146, 1214 [§ 190.2 is not impermissibly overbroad in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution]; accord *People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. Williams* (2010) 49 Cal.4th 405, 469.)

Sanchez offers no unique fact or legal argument supporting his request that this Court revisit the issue. This Court should, therefore, decline to do so.

B. Factor (a) Appropriately Allows the Jury to Consider Circumstances of the Crime

Sanchez contends that factor (a), which allows jurors to consider the circumstances of the crime in determining penalty, permits them “to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death;” and that it therefore violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 336-337.)

This Court has repeatedly rejected this claim finding that “factor (a) is not impermissibly overbroad facially or as applied.” (*People v. Robinson* (2005) 37 Cal.4th 592, 655, and cases cited therein.) Factor (a) correctly allows the jury to consider the “circumstances of the crime.” (*People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. D’Arcy* (2010) 48 Cal.4th 257, 308.)

Sanchez presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

C. California’s Death Penalty Scheme and Corresponding Instructions Set Forth the Appropriate Burden of Proof

Sanchez contends California’s death penalty scheme and accompanying penalty-phase instructions fail to set forth the appropriate burden of proof. (AOB 338-346.) He argues that: (1) the jury was not instructed that it had to find that the aggravating factors outweighed any

mitigating factors beyond a reasonable doubt (AOB 338); (2) the jury was not instructed that the prosecution had the burden of persuasion regarding any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, or, in the alternative, that neither party had the burden of proof (AOB 340-341); (3) the jury was not instructed that it had to unanimously find aggravating factors true beyond a reasonable doubt (AOB 338-339); (4) the instructions were impermissibly broad or vague in directing jurors to determine whether the aggravating factors were “so substantial” in comparison to the mitigating factors (AOB 344-345); (5) the jury was not instructed that the central determination is whether death is the appropriate punishment (AOB 344-345); and (6) the jury was not instructed regarding the presumption of life (AOB 345-346).

1. Aggravating factors outweigh mitigating factors

This Court has found that “the greater weight of aggravating circumstances relative to mitigating circumstances ... are not subject to a burden-of-proof qualification.” (*People v. Elliot* (2005) 37 Cal.4th 453, 487-488, and cases cited therein.) This Court has further found that “[n]othing in the United States Supreme Court’s recent decisions interpreting the Sixth Amendment’s jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584 []; *Apprendi v. New Jersey* (2000) 530 U.S. 466[]) compels a different

answer to th[is] question[].” (*People v. Thomas, supra*, 51 Cal.4th at p. 506; *People v. Lee, supra*, 51 Cal.4th at pp. 651-652.)

2. Burden of proof or no burden of proof

This Court has found that “[t]he death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence.” (*People v. Thornton* (2007) 41 Cal.4th 391, 469; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1298; *People v. Howard* (2010) 51 Cal.4th 15, 39; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Lomax* (2010) 49 Cal.4th 530, 594-595.) The death penalty law and instructions are also not defective “for failing to inform the jury that there was no burden of proof.” (*People v. Gonzales, supra*, at p. 1298; *People v. Lomax, supra*, at p. 595.)

3. Unanimity of aggravating factors

This Court has found that section 190.3 is not unconstitutional “for failing to require unanimity as to the applicable aggravating factors.” (*People v. Elliot, supra*, 37 Cal.4th at pp. 487-488.) This Court has further held that “[n]othing in the United States Supreme Court’s recent decisions interpreting the Sixth Amendment’s jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584

[]; *Apprendi v. New Jersey* (2000) 530 U.S. 466[]) compels a different answer to th[is] question[].” (*People v. Thomas, supra*, 51 Cal.4th at p. 506; *People v. Lee, supra*, 51 Cal.4th at pp. 651-652.)

4. The “so substantial” standard

This Court has found that “[t]he instructions were not impermissibly broad or vague in directing jurors to determine whether the aggravating factors were ‘so substantial in comparison with the mitigating factors that it warrants death instead of life without parole.’” (*People v. Valdez* (2012) 55 Cal.4th 82, 180, citing *People v. Carter* (2003) 30 Cal.4th 1166, 1226; *People v. Gonzales, supra*, 54 Cal.4th at pp. 1298-1299; *People v. Lomax, supra*, 49 Cal.4th at p. 595.)

5. Central determination whether death is the appropriate penalty

This Court has found that CALJIC No. 8.88 does not improperly fail to inform the jury that the central determination is whether death is the appropriate punishment. The instruction properly explains to the jury that it may return a death verdict only if the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death. (*People v. McDowell* (2012) 54 Cal.4th 395, 444; *People v. Gonzales, supra*, 54 Cal.4th at p. 1299; *People v. Mendoza* (2007) 42 Cal.4th 686, 707.)

6. Presumption of life

This Court has found that a trial court is not “required to instruct on a ‘presumption of life.’” (*People v. Gonzales, supra*, 54 Cal.4th at p. 1299; *People v. Howard, supra*, 51 Cal.4th at p. 39; *People v. Lomax, supra*, 49 Cal.4th at pp. 594-595.)

Sanchez presents no compelling reason for this Court to reconsider its prior decisions rejecting these claims.

D. The Jury Instructions Regarding Mitigating and Aggravating Factors Were Constitutional

Sanchez contends the penalty phase jury instructions regarding mitigating and aggravating factors violated his constitutional rights. (AOB 347-348.) He argues that the trial court failed to delete inapplicable sentencing factors. This Court has found that “[t]he trial court is not required to delete inapplicable sentencing factors from CALJIC No. 8.85.” (*People v. McDowell, supra*, 54 Cal.4th at p. 444; *People v. Stitely* (2005) 35 Cal.4th 514, 574.) “[T]he full list of factors may be put before the jury as a framework for the penalty determination.” (*People v. Davis* (2009) 46 Cal.4th 539, 624.)

Sanchez presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

E. The United States Constitution Does Not Require Inter-case Proportionality Review of Death Sentences

Sanchez contends that California's death penalty scheme violates the United States Constitution because it does not require "inter-case proportionality review" of sentences. (AOB 348.)

This Court has repeatedly rejected the claim that the United States Constitution requires inter-case proportionality review of death sentences. (*People v. Valdez, supra*, 55 Cal.4th at p. 180; *People v. Foster, supra*, 50 Cal.4th at p. 1368; *People v. Prieto* (2003) 30 Cal.4th 226, 276.)

Sanchez presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

F. California's Death Penalty Law Does Not Deny Capital Defendants Equal Protection under the Law

Sanchez contends that California's death penalty scheme violates the Equal Protection Clause because it denies procedural safeguards to capital defendants that are afforded to noncapital defendants. His claims that unlike noncapital cases, the death penalty scheme is unconstitutional because there is no standard of proof in the penalty phase, no requirement of juror unanimity on the aggravating factors, and no requirement that the jury justify the death sentence with written findings. (AOB 348-349.)

As this Court has stated, "The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two

categories of defendants are not similarly situated.” (*People v. Lee, supra*, 51 Cal.4th at p. 653.) In other words,

The availability of certain procedural protections in noncapital sentencing—such as a burden of proof, written findings, jury unanimity and disparate sentence review—when those same protections are unavailable in capital sentencing, does not signify that California’s death penalty statute violates Fourteenth Amendment equal protection principles.

(*People v. Thomas, supra*, 51 Cal.4th at p. 507.)

Sanchez presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

G. Application of the Death Penalty Does Not Violate International Norms

Sanchez claims his sentence violates international law. (AOB 349.)

This Court has repeatedly held that international law does not prohibit a death sentence rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Lewis, supra*, 43 Cal.4th at p. 539; *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Boyer* (2006) 38 Cal.4th 412, 489-490.) Because Sanchez has failed to show that either state or federal law was violated, this Court need not consider his claim of international law violations. (*People v. Hoyos* (2007) 41 Cal.4th 872, 925; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

Moreover, Sanchez fails to demonstrate standing to invoke the jurisdiction of international law in this proceeding because the principles of international law apply to disputes between sovereign governments, not

individuals. (See *Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547.) Sanchez does not have standing to raise claims that his conviction and sentence resulted from violations of international treaties. Article VI, section 2, of the United States Constitution provides, in pertinent part, that the Constitution, the laws of the United States, and all treaties made under the authority of the United States are the supreme law of the land. Under general principles of international law, individuals have no standing to challenge violation of international treaties in absence of a protest by the sovereign involved. (*Matta-Ballesteros v. Henman* (7th Cir. 1990) 896 F.2d 255, 259; *United States ex rel. Lujan v. Gengler* (2d Cir. 1975) 510 F.2d 62, 67.)

International law does not compel the elimination of capital punishment in California. (*People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In *Ghent*, this Court held that international authorities did not compel elimination of the death penalty and do not have any effect upon domestic law unless they are either self-executing or implemented by Congress. (*Ghent*, at p. 779; *Hillhouse*, at p. 511.)

This Court is not a substitute for international tribunals and, in any event, American federal courts carry the ultimate authority and responsibility for interpreting and applying the American Constitution to

constitutional issues raised by federal and state statutory or judicial law.

Finally, this Court's earlier decisions preclude relief.

CONCLUSION

For all of the foregoing reasons, the People respectfully requests this Court affirm Sanchez's judgment and sentence.

Dated: July 27, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Brief** uses a 13 point Times New Roman font and contains 101,593 words.

Dated: July 27, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Sanchez**

No.: **S087569**

I declare:

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

On July 27, 2016, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, 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 July 27, 2016, at Sacramento, California.

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