In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

PAUL GORDON SMITH, JR.,

Defendant and Appellant.

CAPITAL CASE

Case No. S112442

Shasta County Superior Court Case No. 98F2652
The Honorable James Ruggiero, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On July 16, 1998, the District Attorney of Shasta County filed an information in superior court, case number 98-2652, charging appellant Paul Gordon Smith, Jr., in count I with first degree murder (Pen. Code,[1] § 187), in count II with conspiracy to commit murder (§§ 182/187), and in Count III with false imprisonment by violence (§ 236). (II CT 111-114.) In association with counts I and II, the district attorney alleged that appellant committed the offenses while lying in wait (§ 190.2, subd. (a)(15)), using torture (§ 190.2, subd. (a)(18)), using deadly weapons, a dent puller and a razor (§ 12022, subd. (b)), and inflicted great bodily injury (§ 1203.075).[2] (II CT 113-114.) On July 22, 2008, appellant entered a plea of not guilty and denied the enhancements. (II CT 115.)

On July 16, 2002, a jury was empanelled to try the case. (XXII RT 5131.) On August 29, 2002, the jury found appellant guilty of count I, first degree murder, with a true finding of the torture special circumstance allegation. The jury did not find true the lying-in-wait special circumstance allegation. The jury also found appellant guilty of counts II, conspiracy to commit murder, and III, false imprisonment. In addition, the jury found the weapon and great bodily injury allegations to be true. (XXV CT 6012-6024.)

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[1] Unless otherwise designated, subsequent statutory references are to the Penal Code.

[2] Appellant was originally charged with co-defendants Lori Diane Smith and Francisco Eric Rubio. (II CT 111.) Each co-defendant was charged with all three counts. The only difference in charging was that Rubio was not charged with either deadly weapon enhancement or the great bodily injury enhancement and Smith was not charged with the deadly weapon enhancement pertaining to the use of a razor. (II CT 113-114.) Lori Diane Smith and Francisco Eric Rubio settled their cases prior to trial. (XXX RT 8336.)

On October 30, 2002, the jurors indicated they had reached a verdict in the penalty phase. However, a juror was excused and an alternate was substituted in with the jury being instructed to re-start deliberations. (88 RT 14330-68.) On November 5, 2002, the jury returned a verdict of death. (XXVII CT 6548.)

STATEMENT OF FACTS

Guilt Phase Evidence

In December of 1997, appellant was living with his biological father in Redding, California. (XXIX RT 7819.) Prior to Christmas of that year, for the first time, appellant met Lori Smith, his half sister, who had been living with her mother in the state of Washington. (XXIX RT 7815.) Appellant, 20 years old, was two years older than Lori Smith. (XXIX RT 7815, 7822.) Lori Smith always wanted a big brother and she did what she could to try to please him. (XXIX RT 7821-7822.)

Right after Christmas, appellant's older, full-brother Timothy Smith travelled down to Redding with his fiancée, 20-year old, Lora Sinner, to meet appellant. (XXIX RT 7826, 7860.) However, in January of 1998, Timothy and Lora broke off their relationship. (XXIX RT 7826.) Appellant no longer wanted to stay at his biological father's house and arranged for him and Lori Smith to stay at friend Barbara Atkins' house. (XXIX RT 7823; XXVI RT 7263.) Appellant had recently arranged for his new friend Amy Stephens, a 14-year-old runaway, to stay at Atkins' house as well. (*Ibid.*) Appellant and Amy had become romantically involved even though she was under age and he was married to Jessica Smith and had a daughter with her. (XXVI RT 7262; XXVIII RT 7824.)

Appellant's friend, Eric Rubio, whom he had known for approximately a month, met up with appellant, Lori Smith, and Amy Stephens in February of 1998. (XXIX RT 7825; XXX RT 8337, 8339.) Lori Smith and Eric Rubio became romantically involved the first night

they met. (XXVI RT 7293; XXIX RT 7815.) Lora Sinner joined the group and from this point they all started hanging out together. (XXVI RT 7266; XXX RT 8340.) Amy and appellant indicated that they needed a place to stay and when Eric Rubio's "adopted mother," Kathy Corey declined to let them stay at her house, the group decided to go camping. (XXIX RT 7827; XXX RT 8341.) Kathy Corey had a boyfriend who owned a plot of land in Ono, located in Shasta County, California. (XXIX RT 7825, 7828.) Appellant drove the entire group to the general area in Lora Sinner's red Honda Civic. (XXIX RT 7829.) They first camped near a creek close to Win-River and then, after a day, moved their campsite to the Ono plot of land. (XXVI RT 7270; XXIX RT 7828, 7830; XXX RT 8342.)

As the group camped, appellant and Amy Stephens became romantically involved, leaving Lora Sinner as the lone person without a partner. (XXVI RT 7293; XXIX RT 7831.) Tension began to rise between Amy Stephens and Lora Sinner. (XXX RT 8345.) Amy became jealous of Lora because she began "hitting" on appellant. (XXVI RT 7295, 7310, 7312; XXIX RT 7832.) This consisted of Lora trying to get appellant's attention and spending more time with him. Lora also allowed appellant to drive her car. (*Ibid.*) She would also tell appellant she wanted to talk to him and they would go off on walks together, which Amy took as flirting. (XXIX RT 7832.) Appellant also flirted with Lora. (XXIX RT 8194.) Appellant encouraged Lora to flirt with him in order to use her car. (XXIX RT 7835.) Appellant began paying more attention to Lora than Amy. (*Ibid.*)

Appellant took charge of the camping group, telling them, at times, what they were going to do that day. (XXIX RT 7834.) No one in the group had any money other than appellant and Lora Sinner, who had a checkbook. (XXIX RT 7837.) On at least one occasion, appellant got Lora to pay for their supplies with her checkbook. (XXIX RT 7840-7841.)

Appellant purchased the food for the group and arranged trips to town from the campsite. (XXIX RT 7837-7838.) Lora Sinner never got to go to town by herself. (XXVI RT 7271; XXIX RT 7838.) Someone was always with her and it was usually appellant. On at least one occasion, the group spent the night in town, but left Lora stranded at the campsite. (*Ibid.*) On at least two other occasions, the group left Lora on her own at the campsite during the day. (XXIX RT 7844.) Lora became upset because she was lonely. (XXIX RT 7839.)

While in town, during their camping trip, appellant purchased a dent puller to fix dents he inflicted on Lora Sinner's car. (XXIX RT 7842.) Approximately a week before the murder, the group, excluding Lora, had a meeting where Amy Stephens stated that she wanted something to happen to Lora because Amy was feeling left out. (XXIX RT 7847.) Amy wanted to beat Lora up. (*Ibid.*) Lori Smith also wanted to beat up Lora Sinner because she did not want to see Amy hurt, fearing that appellant might leave her. (XXIX RT 7851.) The group was all in the car, without Lora, when appellant stated that Lora should be killed. (XXIX RT 7848-7849.) Appellant was the only person who mentioned killing Lora. (XXIX RT 7850.)

Four weeks into their camping trip, at approximately 1:00 to 2:00 p.m., Amy Stephens, Lori Smith, Eric Rubio, and appellant were all present during a conversation where Amy reiterated that she wanted to beat Lora Sinner up. (XXIX RT 7852.) Appellant began encouraging Amy and Lori to beat Lora Sinner up. He wanted to see the two girls, Amy and Lora, fight over him. (*Ibid.*) Appellant encouraged Amy to fight to demonstrate that she cared about him. (XXIX RT 7853.) Appellant then began teasing Amy that she could not beat Lora up. (*Ibid.*) Lori then assured Amy that she would jump in if Lora Sinner got the better of the fight. (XXIX RT 7854.)

Later that same day, Amy Stephens and Lori Smith approached Lora Sinner and began hitting her. (XXVI RT 7323; XXIX RT 7855.) Lora started blocking her face and attempted to hit Amy back. (XXVI RT 7324; XXIX RT 7859.) When Lora did this, Lori Smith entered the fight and began hitting Lora. (*Ibid.*) When Lori started hitting her in combination with Amy, Lora Sinner stopped fighting and took a defensive posture, guarding herself. (XXIX RT 7860.) Appellant and Eric Rubio were approximately 15 feet away, watching the fight from inside of the group's tent. (XXIX RT 7863-7864.) During the fight, appellant was laughing and joking. (XXIX RT 7854.) Amy then slammed Lora Sinner's head into a tree.[3] (XXVI RT 7325.) As a result of the attack, Lora Sinner fell to the ground and Amy and Lori continued hitting her. (XXIX RT 7861.)

Amy Stephens retrieved a large, family-size can of chili, 10-12 inches in height, from their supplies and began hitting Lora Sinner in the head with it. (XXVI RT 7325-7326.) Amy hit Lora in the head with the can of chili approximately five to six times.[4] (XXVI RT 7326.) Lori Smith then picked up the can of chili and hit Lora Sinner in the head with it at least once.[5] (XXIX RT 7866.)

Lori Smith then retrieved the dent puller from the tent. (XXVII RT 7334; XXIX RT 7862.) The dent puller consisted oftwo pieces: a 12-14 inch long heavy metal bar, and a round, bulb-like, weighted-metal piece.

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[3] Lori Smith did not recall that she, according to Amy Stephens, slammed Lora's head into the tree. (XXVI RT 7325; XXIX RT 7862.)

[4] There was a discrepancy in testimony between Amy Stephens and Lori Smith as to when, during the fight, the can of chili was introduced as a weapon against Lora Sinner and how many times Amy hit Lora in the head with the can. (XXVI RT 7326; XXIX RT 7866.)

[5] There was a discrepancy in testimony between Amy Stephens and Lori Smith with Amy testifying that Lori hit Lora Sinner's head against a rock during the attack, but Lori Smith making no such admission. (XXVI RT 7327.)

(XXVI RT 7330-7331.) Lori Smith hit Lora Sinner on the back of the head with the metal bar portion of the dent puller approximately two or three times. (XXIX RT 7864.) Lori Smith hit Lora Sinner hard with the bar, swinging with all of her might. (*Ibid.*) While Lori Smith was hitting Lora Sinner, Amy hit Lora "everwhere" with the weight portion of the dent puller. (XXVII RT 7335.) Lora was on the ground unable to fight back and crying for them to stop. (XXVII RT 7336-7337.) Crying, Lora began bleeding from the back of her head. (XXIX RT 7869, 7872.)

Lori Smith stopped her attack when she felt blood from Lora Sinner's head get onto her own hands. (XXIX RT 7870.) Appellant then exited the tent and told them to stop. (XXVII RT 7338, 7348.) Things calmed down a bit and Lori Smith eventually took Lora Sinner down to the nearby creek to help her wash her wounds. (XXVII RT 7343; XXIX RT 7870.) Amy Stephens led the way down to the creek and appellant followed them down as well. (XXIX RT 7874.) When appellant came down to the creek, he had a large ax with him.[6] (XXIX RT 7877.) Appellant tried to hand the ax to Lori Smith, telling her to finish Lora Sinner off, meaning to kill her. (XXIX RT 7878, 7884-7885.) Scared, Lori refused and walked back to the camp. (*Ibid.*) The rest of the group walked up back to the campsite. (XXVII RT 7350.)

Lori Smith testified that she never saw appellant stumbling or having any difficulty moving. (XXIX RT 7886.) However, she did note that he was acting "hyper" as if he had just taken methamphetamine. (XXIX RT 7887.)

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[6] There was a slight discrepancy in testimony as to whether Eric Rubio went down to the creek with the others or walked with them partially and then observed from afar as he testified. (XXIX RT 7877.)

When the group got back to the campsite from the creek, it was dusk. (XXIX RT 7888.) Several people sat in the tent, but Lora Sinner sat on a blue mat outside of the tent and was visibly upset. (XXIX RT 7891-7892.) Appellant then retrieved a half-gallon bottle of Black Velvet whiskey and the group passed it along, with each taking several drinks from it. (XXVII RT 7380; XXIX RT 7895.) Appellant then took the bottle of whiskey and handed it to Lora Sinner, telling her to drink as it would ease the pain. (XXIX RT 7896.) At first, Lora consumed the whiskey voluntarily. (*Ibid.*)

Appellant then retrieved some rope and began tying Lora Sinner up by the legs and arms. (XXIX RT 7896.) Appellant made Lora lie on her stomach and he began tying up her legs. (XXIX RT 7899.) Lora was crying while this was happening. (XXIX RT 7900.) Appellant then began tying up her arms. (*Ibid.*) Appellant appeared mad as he was doing this. (XXIX RT 7901.) Appellant asked Eric Rubio to help him tie up Lora Sinner. (XXIX RT 7897.) Eric refused. Appellant then took an angry tone and ordered Eric to get out of the tent and help him. (*Ibid.*) Eric complied. (XXVII RT 7360; XXIX RT 7897.) Appellant had Eric make a noose out of a rope and appellant then fashioned the noose around Lora's neck and tied the noose to her feet. (XXVII RT 7355; XXIX RT 7896, 7901.)

After Lora Sinner was tied up, appellant told her that she was going to kill herself. (XXIX RT 7901.) He told her that she was already in enough pain so she might as well kill herself and join her mom who had died. (*Ibid.*) Appellant stated that Lora Sinner's death was going to look like a suicide. (XXIX RT 7903.) Appellant then sat at the right side of Lora and untied her hands. Appellant then handed Lora a razor. (XXVII RT 7385; XXIX RT 7903.) The razor was broken and appellant handed Lora the blade portion. (XXVII RT 7386; XXIX RT 7904.) Appellant told Lora to cut herself, to cut her wrists. (*Ibid.*) Lora was crying and stated that she did not want to. (XXIX RT 7905.) Appellant then handed Lora the razor

blade and she cut herself once on the inside of the wrist. (*Ibid.*) Appellant became angry because Lora had not cut herself deeply enough. (XXIX RT 7906.) Appellant told Lora that the cut was not deep enough and then showed her how to do it by cutting Lora on the same wrist with the blade. Appellant then told Lora to do it again. Lora tried again, but did not cut deep enough for appellant. (*Ibid.*) Appellant then took the razor blade from Lora and cut her on her other wrist. (XXVII RT 7387; XXIX RT 7907.) Lora was crying and whimpering throughout this exchange. Appellant cut Lora's wrist a minimum of three to four times, possibly more. (*Ibid.*)

After appellant cut Lora's wrists, he made Lora lean her wrists over the fire pit so the blood could drain over the fire pit. (XXIX RT 7910.) When she failed to do this, appellant hit her with the bar portion of the dent puller. (XXIX RT 7908.) Appellant hit Lora on the hands with the metal bar portion of the dent puller approximately two to three times, causing her to cry. (XXIX RT 7908, 7910.) Appellant was visibly mad, yelling at Lora. (XXIX RT 7909.) Lora was bleeding badly from her wrists at the time. Appellant then began giving Lora more alcohol. When she did not stop crying, appellant started pouring alcohol over her cuts. (XXVII RT 7389; XXIX RT 7910; XXX RT 8424.) He did this two to three times. (XXIX RT 7910.) Every time he poured alcohol over Lora's wrists she screamed in pain. In response, appellant told her to "shut up." (*Ibid.*) Eric Rubio told appellant to "stop, this is getting too deep, you are going too far" when appellant poured whiskey on Lora's cuts wrists. (XXX RT 8429.) Appellant responded that Lora was going to die anyways. (XXX RT 8430.)

After he poured alcohol on her wrists, appellant would make Lora drink more whiskey. (XXIX RT 7911.) He poured large amounts into her mouth. Appellant would hold the bottle up to Lora's lips and make her drink. (*Ibid.*) In all, appellant made Lora drink approximately half of the

half-gallon bottle of whiskey during this exchange. (XXVII RT 7379; XXIX RT 7915.)

Lora Sinner was crying and screaming when appellant made her drink the whiskey so appellant decided to put a black garbage bag over Lora's head. (XXIX RT 7918.) Lora was crying and asking for help. (XXIX RT 7920.) To prevent anyone from hearing her screams, appellant made the bag tight around Lora's face. (XXIX RT 7918-7819, 7820.) Throughout this ordeal, Lora was lying on her stomach with her arms stretched out over the un-lit fire pit. (XXIX RT 7920.) After appellant fixed the bag over Lora's head, he hit her in the arms with the dent puller bar.[7] (XXVII RT 7394; XXIX RT 7921; XXX RT 8428.) He then asked if anyone else wanted to hit Lora.[8] (*Ibid.*) Lori Smith said "okay" and proceeded to hit Lora Sinner on the back of the head with the metal bar two to three times. (XXVII RT 7391-7393; XXIX RT 7922.) Lori Smith testified that she could hear Lora Sinner crying from inside of the bag as she hit her. (XXIX RT 7924.) Appellant became mad because Lori Smith was not hitting Lora Sinner hard enough. (*Ibid.*) Appellant snatched the bar out of Lori's hands and told her she was not doing it right. (XXIX RT 7925.) Appellant then hit Lora Sinner at least three more times in the head and neck area with the metal bar. (XXVII RT 7397; XXIX RT 7925.) After hearing a loud crack sound, appellant stopped hitting Lora. (XXVII RT 7398-7399; XXIX RT 7925.) Approximately five minutes later, at 8:00 p.m., Eric Rubio and appellant buried Lora. (XXVII RT 7400; XXIX RT 7925-7926.)

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[7] There is a discrepancy in the testimony as to when the garbage bag was placed over Lora Sinner's head. (XXVII RT 7394; XXIX RT 7918.)

[8] There is a discrepancy in the testimony between Amy Stephens and Lori Smith with Amy testifying that appellant told her and Lori to "finish what they started" (XXVII RT 7389) and Lori testifying that appellant asked if anyone else wanted to hit Lora Sinner. (XXIX RT 7920.)

Appellant stated to the group that Lora Sinner knew too much, possibly about prior thefts of cars and purses, and he was afraid she would say something to the police. (XXIX RT 7927.)

After Lora Sinner was buried, the entire remaining group sat in the tent. (XXIX RT 7929.) While they were together in the tent, appellant told them if anyone said anything about the murder, they would be the next one's to die.[9] (*Ibid.*) The group discussed that if anyone asked about Lora Sinner, they were to say that she went back on a Greyhound bus to Oregon where her dad lived. (XXVII RT 7403; XXIX RT 7929.) The group then went to bed. (XXIX RT 7930.) Lori Smith testified that no one ever tried to get help for Lora for her injuries. (XXIX RT 7933.) There was one or two houses approximately one mile from the campsite, but no one went there for help. (XXIX RT 7934.)

The following morning the group burned all of Lora Sinner's personal belongings. (XXVII RT 7405-7406; XXIX RT 7931.) Appellant told them that Lora's belonging had to be burned so there would be no trace that Lora was ever there. (XXIX RT 7932.) As a result, they burned Lora's clothes, her backpack, and her identification. (XXVII RT 7419; XXIX RT 7932.) They left camp that same day, driving back into town using Lora's car to stay with Barbara Atkins. (XXIX RT 7933, 7935.) After the murder, the group stayed at Barbara Atkins' house for two weeks. Appellant sold Lora's car to Kathy Corey. (XXIX RT 7937.) Amy Stephens forged Lora Sinner's name to effectuate the sale, but claimed this happened before Lora was murdered. (XXVII RT 7520.) The day after the murder, the group of four was driving around town together when appellant stated that he would

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[9] Amy Stephens appeared to contradict this statement in her testimony, but was impeached with her prior inconsistent statement to Sergeant Clemens. (XXVII RT 7406.)

take the fall if they got arrested because he did not want to see Lori Smith get arrested or get into trouble. (XXIX RT 7939.) Everyone agreed to this. (XXIX RT 7940.)

On or about April 18, 1998, Lori turned to friend Cecil Chrisman for help and told him that she and appellant had beaten and tortured Lora Sinner. (XXVII RT 7465; XXIX RT 7944.) Later that day, Lori Smith spoke with the Sheriff's Office about the murder. (XXIX RT 7946, 7951.) After several different versions, Lori Smith finally admitted her part in the murder of Lora Sinner. (XXIX RT 7951.)

On April 18, 1998, Shasta County Sheriff's Sergeant Ronald Clemens was alerted to the murder of Lora Sinner. (XXVI RT 7232.) Clemens interviewed Amy Stephens that same morning. (XXVII RT 7473; XXVI RT 7233.) He interviewed her two to three times and Amy took him to the campsite and showed him the location of Lora Sinner's body. (XXVII RT 7473-7474; XXVI RT 7242.)

Approximately four days after the murder, appellant and Eric Rubio were arrested together. (XXVII RT 7457; XXIX RT 7940.) Two days after appellant was arrested, he called Lori Smith to remind her not to say anything or she knew what would happen. (XXIX RT 7940-7941.) Lori knew this to mean that she would die. (*Ibid.*)

Defense

Shasta County Sheriff's Detective Terrissa Clemens testified on behalf of the defense. (XXXIII RT 9371.) Detective Clemens accompanied Shasta County Sheriff's Detective Tom O'Conner during their interview of Lori Smith. (*Ibid.*) Detective Clemens testified that when she interviewed Lori Smith, Lori was jumping around and exhibited a very nervous behavior. (XXXIII RT 9373.)

Garrett Brian Auld testified on behalf of the defense. (XXXIV RT 9415.) Auld is an investigator with Child Protective Services of Tehama

County. (*Ibid.*) Amy Stephens stayed with Auld who was a foster parent at the time. (XXXIV RT 9417.) Amy stayed at Auld's foster home for approximately two weeks in April of 1998. (*Ibid.*) Auld testified that in his experience with Amy, he found her to be manipulative. (XXXIV RT 9421.) Amy would use a combination of words and facial expressions to let Auld know that she was unhappy. Auld likened it to a four or five-year-old child throwing a tantrum. Amy was never physically violent. (*Ibid.*) While Amy would not pick a fight, she would find more subtle ways to get what she wanted. (XXXIV RT 9422.) For the most part, Amy was quiet. (*Ibid.*) Auld did believe that Amy had an underlying anger problem. (XXXIV RT 9423.) Auld felt that Amy had some "very deep emotional wounds." (XXXIV RT 9424.) Auld described Amy as being demanding, determined, and strong-willed. (XXXIV RT 9425.) Auld testified that on March 19, 1998, Amy attempted suicide by taking a large dose of Tylenol. (XXXIV RT 9425-9426.))

When Amy returned to Auld's house they attempted to get back into a regular routine. (XXXIV RT 9428.) However, two the three days after returning from the hospital, Amy was at Cecil Chrisman's house and refused to go to school or come back to Auld's home. (XXXIV RT 9428-9429.) As a result, Auld filed a runaway report and Amy never returned back to the Auld household. (XXXIV RT 9429.)

On cross-examination, Auld admitted that Amy filed a complaint against him involving sexual allegations. (XXXIV RT 9430.) This caused Auld problems for some time. (*Ibid.*) Auld also admitted that the behavior Amy exhibited was consistent with a normal teenager and that he did see good in her. (XXXIV RT 9431-9432.)

Beth Livney testified on behalf of the defense. (XXXIV RT 9436.) Livney stated that Lori Smith lived at a group home she supervised from 1993-1995, when the group home closed. (XXXIV RT 9438.) At this

time, Lori Smith was approximately 15 years old. According to Livney, Lori's attitude fluctuated depending on who she was hanging out with. When Lori hung out with gang-affiliated girls, she tended to act like them. (*Ibid.*) However, when she was with the staff of the group home, she was very sweet. (XXXIV RT 9439.) Lori would sometimes pick on mentally challenged children at the group home. Overall, Livney stated that Lori did not really fit in at the home, but she tried to.

Livney testified that in her experience with Lori, Lori would continuously lie, especially if confronted with allegations that she violated the rules of the home. (XXXIV RT 9441.) Livney detailed a couple of incidents where Lori got into fights at the group home including an incident where Lori was verbally abusive and would push and trip a mentally challenged girl at the group home. (XXXIV RT 9442-9444.) Livney explained that Lori could be a bully to try to impress the other girls at the home. (*Ibid.*) She testified that Lori would pick on kids that could not defend themselves. (XXXIV RT 9445.) Overall, Livney stated that Lori had difficulty controlling her anger. (XXXIV RT 9448.) Livney claimed to have personal knowledge that Lori was molested by her biological father. (XXXIV RT 9449.)

Livney stated that Lori could be manipulated and at times pushed around, but she very seldom did what she was told to do by staff. (XXXIV RT 9450.) When the group home closed in May of 1995, Livney became a foster parent and agreed to house Lori. (XXXIV RT 9451.) Livney terminated Lori from her foster care home because Lori repeatedly ran away, refused to follow her rules, and became out of control. (XXIV RT 9458.) While Lori was in jail on charges stemming from this incident, she spoke to Livney on the phone. (XXXIV RT 9464.) During that conversation, Livney testified that Lori said in a surprised fashion: "I really killed her, huh?" (XXXIV RT 9464-9465.)

On cross-examination, Beth Livney admitted that, while under her care, Lori Smith was picked on at the home too. (XXXIV RT 9473.) Livney testified that Lori tried to fit in with the other gang-affiliated girls at the home, in part, for self-protection. (XXXIV RT 9475.) Lori would change her mood to fit in with whomever she was currently with at the home. (*Ibid.*) The "rougher tougher" girls were able to manipulate Lori. (XXXIV RT 9476.) Livney did testify that Lori was good with younger girls, including Livney's two nieces. Also, hitting was common amongst the residents at the home in general, not just for Lori. (*Ibid.*)

In regards to in-custody conversations between Livney and Lori, during most conversations, Lori would deny having anything to do with the death of Lora Sinner. (XXXIV RT 9477.) However, during one conversation with Livney, Lori did break down and admit to being a part of it. (*Ibid.*) It was Livney's personal opinion that Lori was not affiliated with a gang, but that she just wanted to fit in. (XXXIV RT 9478.) In closing, Livney testified that Lori was not all that different from the other children that stayed under her care. (*Ibid.*)

Blanch Orsini testified on behalf of the defense. (XXXIV RT 9485.) At that time, Blanch operated a foster care home. (*Ibid.*) She described it as a temporary home where children stay as they await their future placement. (XXXIV RT 9487.) Amy Stephens stayed with Blanch on March 25 and March 26 of 1998. (XXXIV RT 9486.)

Diane Phillips testified on behalf of the defense. (XXXIV RT 9491.) At the time of trial, Diane was the executive director of Krista Foster Homes in Redding. Before that, Diane was employed with various group homes and helped teenagers that lived in the homes. It was in this capacity that Diane met Lori Smith. (*Ibid.*) Diane met Lori Smith when Lori was 14 years old and she has kept in contact with Lori, even while Lori was in jail. (XXXIV RT 9492.) Diane stated that she would talk to Lori when

Lori would call her office and estimated that she has visited Lori 25 to 45 times. (*Ibid.*) According to Diane, Lori discussed how long she would be in prison as a result of this case with Diane. (XXXIV RT 9494.) Lori expressed to Diane that she did not think she would be in prison that long, but Diane described Lori as living in a bit of a "fantasy world." (XXXIV RT 9495.) Diane stated that Lori would occasionally use marijuana. (XXXIV RT 9497.)

Megan Miller testified on behalf of the defense. (XXXIV RT 9504.) In September or October of 1995, Megan met Lori Smith at a foster care home in Redding. (XXXIV RT 9506.) Megan claimed that Lori and her did not get along because Lori was jealous of Megan. (*Ibid.*) Megan claimed that Lori lied to her all of the time and made up stories to get attention. (XXXIV RT 9507.) When she was 17 years old, Megan testified that Lori Smith and Megan Collins pulled her hair and kicked her when she fell down on the ground. (XXXIV RT 9513.) Megan Miller testified that when she knew Lori Smith, Lori had a violent temper and she verbally picked on other girls. (XXXIV RT 9516.) However, Miller testified that she never saw Lori get physical with other girls. Miller agreed with questioning that Lori Smith was pushy, overbearing, a liar, and a thief. (*Ibid.*)

Steve Davis testified on behalf of the defense. (XXXIV RT 9541.) Davis worked for the Redding Police Department for 24 years and is currently retired. (XXXIV RT 9543.) On April 20, 1997, Davis, as a police officer, responded to a park in Redding and took a statement from Megan Miller. (XXXIV RT 9544.) Davis contacted Miller three months after the incident for follow-up purposes and Miller told him that she did not want to proceed any further with the police department. (XXXIV RT 9545.)

Linda Dexter testified on behalf of the defense. (XXXIV RT 9547.) Dexter was recently divorced from her marriage to Cecil Chrisman. (*Ibid.*) Dexter testified that on an undisclosed day in April of 1998, Amy Stephens was at her home and began receiving several phone calls there. (XXXIV RT 9551.) The calls were either from a person named Lori or Melissa. After one of the calls, Amy began crying and threw the phone down. Amy told Dexter that "they threatened me" and "they were going to kill me." (*Ibid.*) Dexter also testified that she had been married to Cecil Chrisman for 20 years and claimed that he was generally a liar. (XXXIV RT 9553.)

Sheriff's Deputy Thomas O'Conner was recalled to testify on behalf of the defense. (XXXIV RT 9559.) Deputy O'Conner interviewed Lori Smith on April 18, 1998 with Deputy Terrisa Clemens. (XXXIV RT 9560.) Deputy O'Conner interviewed Lori Smith again on April 19, 1998, with Deputy Steven Grashoff. (XXXIV RT 9560.) Deputy O'Conner interviewed Lori Smith a third time on April 21, 1998, with Deputy Steve Berg. (XXXIV RT 9561.) Deputy O'Conner interviewed Eric Rubio on April 18 and 19, 1998, with Detective Ron Clemens. (XXXIV RT 9562-9563.) Initially, Lori Smith did not admit being involved in the murder of Lora Sinner. (XXXIV RT 9574.) However, as the April 18, 1998, interview progressed, Lori Smith admitted to beating up Lora Sinner. (*Ibid.*) Lori Smith told Deputy O'Conner that even though she beat up Lora Sinner, appellant was the one that killed her. (XXXIV RT 9575.) In between the April 18, 1998, and April 19, 1998 interviews of Lori Smith, Deputy O'Conner interviewed appellant who admitted to killing Lora Sinner. (XXXIV RT 9587.)

During Deputy O'Conner's interview of Eric Rubio, Eric mentioned he was afraid of incriminating himself and "afraid of doing 25 years to life." (XXXIV RT 9598.) During the interview, Eric expressed that he was upset that he did not do anything and what he did do he did because he had

to out of fear of appellant. (*Ibid.*) Eric's first and second interview presented a number of discrepancies between each other. This topic was not discussed further. (XXXIV RT 9600.)

Pattye Galba testified on behalf of the defense. (XXXIV RT 9611.) Galba testified that she had been housed in the same jail cell as Lori Smith. (XXXIV RT 9612.) They have also taken a computer class together in the jail. (*Ibid.*)

Shasta County Sheriff's Detective Ronald Clemens testified on behalf of the defense. (XXXIV RT 9618.) Detective Clemens supervised the inspection of Lora Sinner's car after the murder. (XXXIV RT 9619.) Detective Clemens testified that on May 19, 1999, he interviewed Cynthia Lawson. (XXXIV RT 9622, 9635.) Lawson told Detective Clemens that at an undisclosed time, she was passing through Don Vaillancourt's garage to do laundry. (XXXIV RT 9624.) Present at the garage were Don Vaillancourt, appellant, and Eric Rubio. Lawson told Detective Clemens that she heard Eric Rubio state that they should "just take her up to the woods and kill her so that we can have her car." After that statement, everyone in the group started laughing. (*Ibid.*)

On March 14, 2002, Detective Clemens visited with Eric Rubio at the Shasta County jail. (XXXIV RT 9625.) During the visit, Eric Rubio stated, in front of the prosecutor, that he wanted to withdraw his plea. (*Ibid.*) According to Detective Clemens, during that conversation, the prosecutor told Eric that he had the possibility of getting out of custody in 15 years. (XXXIV RT 9627.) The prosecutor also told Eric that he attends parole hearings and passes on information such as when a person has been helpful or not. (XXXIV RT 9627-9628.)

That same day, Detective Clemens interviewed Lori Smith with her attorney. (XXXIV RT 9628.) Lori told the Detective that she did not want to speak with counsel representing appellant. (XXXIV RT 9628-9629.)

On cross-examination, Detective Clemens testified that the prosecutor told Eric Rubio that whether he got out of custody or not depended on Eric. (XXXIV RT 9630.) The prosecutor told Eric that whether he stays out of trouble will determine when he gets out of prison. (XXXIV RT 9630-9631.) The prosecutor also told Eric that serving only 15 years was not very realistic and that most people stayed beyond that. (XXXIV RT 9631.) The prosecutor explained to Eric how "lifer hearings" proceed and what the prosecutor is present at those hearings. The prosecutor did not make Eric any promises. (*Ibid.*)

Detective Clemens also testified on cross-examination that he and the prosecutor interviewed Cynthia Lawson the morning she gave testimony in this case. (XXXIV RT 9632.) Lawson corrected her statement and clarified that it was appellant who made the statement about killing Lora Sinner to get her car. This change took Clemens and the prosecutor by surprise. (*Ibid.*)

David Lawallen testified on behalf of the defense. (XXXIV RT 9643.) Lawallen is an automobile mechanic and owns his own business doing this. (*Ibid.*) At the request of defense counsel, Lawallen tested the transmission of Lora Sinner's car. (XXXIV RT 9645.) Lawallen found that the clutch of Lora Sinner's car was defective. (XXXIV RT 9646.)

John Wheeler testified on behalf of the defense. (XXXIV RT 9649.) Wheeler worked as Director of the Walker High Places group home while Lori Smith stayed there. (XXXIV RT 9649-9650.) Lori Smith was approximately 14 years old at the time when she was placed there and stayed there for 3 years. (XXXIV RT 9650, 9662.) Wheeler recounted a story where he caught Lori Smith in a lie and she refused to admit guilt. (XXXIV RT 9651.) Wheeler stated that Lori Smith was manipulative and would play "mind games" with the staff. (XXXIV RT 9652.) He also testified that Lori tried to fit in with gang members at the home by acting

like them. (XXXIV RT 9653.) Wheeler testified that Lori would get involved in arguments that did not implicate her and would sometimes provoke fights. (XXXIV RT 9654.) Lori was involved in two situations at school, one non-physical situation with a teacher and one physical altercation with a student. (XXXIV RT 9654.) Wheeler also testified that Lori was involved in thefts of other people's property at the group home. (XXXIV RT 9656.) Wheeler testified that on one occasion he saw Lori Smith under the influence of methamphetamine and that, while she was not angry, she was more aggressive during that time. (XXXIV RT 9656.)

Wheeler stated that Lori Smith had a volatile temper and that she had to be physically restrained approximately six times during her stay there. (XXXIV RT 9657.) Wheeler testified that they had to have a male staff-person on hand because if Lori Smith got into an altercation with another resident or a staff member, the female staff could not handle it. (XXXIV RT 9659.) Wheeler stated that Lori was involved in arguing and fighting more than the average child that stayed at that group home. He described Lori Smith as "an attention getter" and that her way of getting attention was negative. (*Ibid.*) Wheeler recounted one fight where Lori hit and kick another resident of the group home while that resident was down on the ground. (XXXIV RT 9661.) On that occasion, Lori did not give up until she was physically removed from the scene. Wheeler also stated that Lori Smith ran away from the group home several times. (*Ibid.*)

Jessica Smith testified on behalf of the defense. (XXXIV RT 9666.) On April 18, 1998, during a meeting with Lori Smith and Cecil Chrisman, Lori told Jessica about the murder of Lora Sinner. (XXXIV RT 9669.) Jessica memorialized this in writing in exhibit T-Q. This writing, according to Jessica, depicted Lori Smith's version of the events. (*Ibid.*) Both Jessica and Lori Smith read over the handwritten statement before signing it. (XXXIV RT 9670.) Jessica talked to Amy Stephens before

typing the statement depicted in exhibit T-Q. (XXXIV RT 9671-9672.) Jessica testified that she has witnessed Lori Smith manipulate people. (XXXIV RT 9681.) Jessica testified that Lori Smith lied quite a bit in her presence. (XXXIV RT 9692.)

On cross-examination, Jessica Smith admitted that she was still married to appellant. (XXXIV RT 9693.) Jessica also admitted that her mother and defense investigator Art Wooden insinuated to her that she should not divorce appellant until the trial was over. (XXXIV RT 9693-9694.) Jessica Smith stated that on May 25, 1999, she spoke to a Detective Runyon and told him that appellant had written and called her on the phone. (XXXIV RT 9696-9699.)

On re-direct, Jessica Smith stated that defense investigator Art Wooden told her that they needed to keep appellant in a good mood. (XXXIV RT 9702.) Jessica took this as meaning she should try to do things that would get him in a good mood such as not file for divorce. (*Ibid.*)

On re-cross, Jessica Smith identified the letter that appellant sent to her on May 25, 1999, and stated that she gave this letter to Detective Runyon. (XXXV RT 9705.) Jessica Smith testified that appellant did not want her to cooperate with the District Attorney's Office. (*Ibid.*)

Tim Smith testified on behalf of the defense. (XXXV RT 9707.) Tim is appellant's brother. (XXXV RT 9724.) Tim stated that he was Lora Sinner's fiancée. (XXXV RT 9708.) He first met her through a friend in Aberdeen, Washington, where she was living with her mother. Before they came to California together, Tim had known Lora for approximately a year and a half. (XXXV RT 9710.) Tim testified that he and Lora went camping approximately two to three times a month while they were in Washington. (XXXV RT 9712.) In 1997, the two went camping near Mt. Vernon in Washington. (XXXV RT 9713.) While there, Tim was driving

Lora's 1991 Honda Civic and was involved in an accident where he rolled the car over twice. (XXXV RT 9714.) Damages to the car were a dent on the rear passenger side quarter panel and a couple of holes inside the radiator. (*Ibid.*) Tim fixed the car himself. (XXXV RT 9717.) When Tim and Lora drove to California in Lora's Honda Civic, the transmission was not working properly. (XXXV RT 9718.) They drove to California to announce that they were getting married. (*Ibid.*) When they arrived, they stayed at Tim's father's house, Paul Smith, Sr. (XXXV RT 9719.) Tim saw bottles of Soma muscle relaxants in his father's medicine cabinet. (*Ibid.*) Lora's mother Voletta died of cancer in 1997 and both Lora and Tim were very upset by this. (XXXV RT 9722-9723.) About a week and a half after they arrived in California, Tim and Lora broke off their dating relationship. (XXXV RT 9725.) However, as in the past, Tim expected to get back together with Lora. (*Ibid.*) On cross-examination, Tim admitted that on February 26, 1997, he was convicted of felony burglary in Washington. (XXXV RT 9735-9736.)

Karol King testified on behalf of the defense. (XXXV RT 9750.) Karol lived in the same house as Lori Smith from November of 1997 to the middle of February of 1998. (*Ibid.*) Karol testified that Lori could be controlling, manipulative and was not easily pushed around. (XXXV RT 9751.) Karol stated that Lori frequently lied and made up stories about herself. (XXXV RT 9754.) Karol stated that near the spring of 1998, she witnessed Lori acting jealous over Lora Sinner's interaction with appellant. (XXXV RT 9754-9755.) Near the end of January of 1998, Karol and her family kicked Lori Smith out of their house. (XXXV RT 9755.) At some point around the end of January 1998, Karol saw Lori Smith and thought she was under the influence of methamphetamine. (XXXV RT 9756.)

On cross-examination, Karol King testified that she thinks of appellant as her brother and has visited him in jail over 20 times. (XXXV

RT 9757.) Karol King is Jessica Smith's sister, who is appellant's wife. (*Ibid.*) Karol testified that she was not happy that Jessica Smith was cooperating with the District Attorney's Office. (XXXV RT 9758.) Even though she admitted that appellant was part of the murder, Karol did not feel that appellant should get the death penalty. (XXXV RT 9758-9759.) Karol admitted that everything she knows about the murder has come from second-hand sources and she has no independent knowledge of it. (XXXV RT 9759.)

William Giguiere testified on behalf of the defense. (XXXV RT 9766.) Giguiere is the clinical director of Park-Gilman Clinics which operates a forensic alcohol and chemistry laboratory that is licensed by the California Department of Health Services. (XXXV RT 9767, 9770.) In preparation for his testimony, Giguiere reviewed the transcript of Dr. Comfort, the autopsy report of Dr. Harold Harrison, and a transcript of Catalina Sundita. (XXXV RT 9780.) Giguiere testified that it was his understanding that a sample of Lora Sinner's blood was tested for blood alcohol content and that test yielded a 0.78 blood alcohol content. (XXXV RT 9782.) Due to the high blood alcohol, Giguiere questioned the validity of the test. (XXXV RT 9783.) Specifically, Giguiere testified that he did not feel the sample accurately depicted the blood alcohol level of the donor because such a level was "probably unachievable in a person twenty years of age." (XXXV RT 9784.) Giguiere also mentioned that there was no preservative in the blood sample which could lead its blood alcohol content reading to go up or down. (*Ibid.*)

When presented with a hypothetical, Giguiere testified that a 205 pound person would have to consume 45 ounces of 80-proof alcohol to achieve a blood alcohol level of .78. (XXXV RT 9788.) Giguiere testified that this was impossible as a person would get sick prior to being able to consume this much alcohol. (XXXV RT 9789.) Giguiere testified that he

was concerned that Lora Sinner's blood sample was contaminated. (XXXV RT 9791.) On cross-examination, Giguiere admitted that he did not know what Lora Sinner's actual blood alcohol level was and that it could have been at a lethal level. (XXXV RT 9843-9844, 9847.)

Douglas Tucker testified on behalf of the defense. (XXXV RT 9892.) Tucker is a medical doctor with a specialty in psychiatry. (XXXV RT 9893.) Tucker reviewed the April 18 and April 19, 1998, video recorded interviews of appellant in preparation for his testimony. (XXXV RT 9904.) Tucker noted that during the interviews, appellant claimed to have consumed alcohol, marijuana, and Soma muscle relaxants. (*Ibid.*) Tucker testified that all three substances are "in the class of sedative hypnotic-type drugs, meaning that they're all central nervous depressants or downers. . . ." (XXXV RT 9908.) Tucker stated that all have depressant effects on a person's central nervous system. When combined, Tucker testified, the effect is even greater. (*Ibid.*) Tucker further testified that cognitive abilities are impaired when someone takes these substances. (XXXV RT 9909.)

Tucker was presented with a hypothetical where a person took 350 milligrams of Soma and consumed an unknown amount of alcohol and marijuana.[10] (XXXV RT 9911.) This combination would affect the takers ability to focus and concentrate. (*Ibid.*) When asked to increase the amount of Soma tablets by a multiple of four, Tucker testified that this would cause many subject to fall asleep or pass out. (XXXV RT 9912.)

Tucker also testified about the effects methamphetamine, a stimulant, has on the human body. (XXXV RT 9921.) In general, Tucker stated that

[10] There was no evidence that appellant, in this case, consumed 350 milligrams of Soma.

methamphetamine does not affect attention and memory as severely as the depressants do. (*Ibid.*)

On cross-examination, Tucker admitted to having no personal knowledge of the events in question. (XXXV RT 9936.) Tucker did not have any knowledge of the mental state of appellant or any of the other witnesses when the events occurred. (XXXV RT 9937.) Tucker admitted that his only source for how many Soma pills appellant took was appellant himself. (XXXV RT 9938.) Tucker also admitted that he provided no opinion about appellant, appellant's diagnostic situation, appellant's behavior at the time of the incident or any particulars about the event in question. (*Ibid.*)

Arthur Wooden was recalled as a witness for the defense. (XXXV RT 9848, 9942.) He testified that he interviewed Amy Stephens three times while she was at the California Youth Authority. (XXXV RT 9853.) He also testified that he attended Amy Stephens' trial in juvenile court regarding these allegations. (XXXV RT 9943.) The parties stipulated that Dr. Harold Harrison testified at Amy Stephens' trial, wrote on a piece of butcher paper during his testimony, and this paper is no longer available to the parties. (XXXV RT 9944.) The diagram written by Dr. Harrison was supposed to exhibit a scale of the damage done to Lora Sinner, with zero being no damage and the end of the scale being the maximum damage. (XXXV RT 9945.) On the diagram, Dr. Harrison marked a point on the scale/timeline where Lora Sinner would have suffered enough to have died from the injuries. (XXXV RT 9946.) The implication from the testimony was that Lora Sinner then received further abuse after this. (*Ibid.*)

People's Rebuttal

Portions of Dr. Harold Harrison's testimony from Amy Stephen's jurisdictional hearing in juvenile court were read for the jury. (XXXV RT 9968.) After examining Lora Sinner's body, Harrison opined that she was

hit several times, but could not point out the blow that was the specific cause of death. (XXXV RT 9969.) Rather, Harrison opined that Lora Sinner was killed as a result of cumulative blunt force trauma. (*Ibid.*) Harrison testified that Lora did receive enough blunt force trauma to kill her but could not estimate how much additional damage was done to her body after she received sufficient wounds to kill her. (XXXV RT 9970.) At this point, Harrison draws on the butcher paper to note a timeline of sorts to demonstrate the injuries sustained by Lora Sinner. (*Ibid.*) In summation, Harrison testified that Lora Sinner received injuries in excess than would have caused her death. (XXXV RT 9971-9972.) Harrison could not estimate how much injury in excess Lora Sinner received. (XXXV RT 9972.)

On cross-examination during Amy Stephens' trial, Harrison stated that Lora Sinner's level of intoxication could have been a contributing factor in her death, but he stated he did not believe it was a large contributing factor. (XXXV RT 9972.) Harrison further testified that Lora Sinner died within minutes of receiving the blunt force trauma. (*Ibid.*) However, Harrison stated that Lora's time of death after receiving the blunt force trauma could not be determined. (XXXV RT 9973.)

Detective Ronald Clemens testified in rebuttal. (XXXV RT 9974.) Clemens testified that he was the investigating officer at the juvenile jurisdictional hearing of Amy Stephens and was in attendance during the testimony given at that hearing. (*Ibid.*) Clemens testified that when the prosecutor pointed to the scale diagram, the line marked "damage" denoted how much damage Lora Sinner had received as a result of the beatings in this incident. (XXXV RT 9976.)

Shasta County Deputy Coroner Investigator Michael Booth testified in rebuttal. (XXXV RT 9977.) Booth testified as to the chain of custody of the biological specimens, heart blood, liver, and gastric, taken from Lora

Sinner's body for laboratory analysis. (XXXV RT 9980-9981, 9984-9986, 9992-9993.) He also testified that Lora Sinner's autopsy was the only one performed at the Shasta County Coroner's office on April 20, 1998. (XXXVI RT 10082.)

California Department of Justice Criminalist Barry Miller testified in rebuttal. (XXXVI RT 10007.) In 2002, Miller ran alcohol-content tests on the blood sample received from Lora Sinner. (XXXVI RT 10012.) Based on Miller's testing, Lora Sinner's blood sample had a 0.77 percent weight per volume of alcohol in the blood. (XXXVI RT 10013.)

Shasta County Senior Sheriff Services Officer Michael Lindsey testified in rebuttal. (XXXVI RT 10031.) Lindsey testified as to the chain of custody for People's Exhibit T-47, an envelope, and its contents, vials of Lora Sinner's blood which were collected at her April 20, 1998, autopsy. (XXXVI RT 10033.) Lindsey took custody of the blood vials from Criminalist Barry Miller. (*Ibid.*)

National Medical Services Senior Forensic Toxicologist Randall Chang testified in rebuttal. (XXXVI RT 10052-10053.) Chang works with Catalina Sundita at National Medical Services. (XXXVI RT 10053.) Chang testified as to the procedures the lab used when it received a specimen for analysis. (XXXVI RT 10054.)

Forensic Toxicologist Alan Barbour from Central Valley Toxicology testified in rebuttal. (XXXVI RT 10062.) Barbour tested blood specimens of Lora Sinner at the request of defense counsel. (XXXVI RT 10064.) Barbour tested the specimens for blood glucose levels and found them to be within normal ranges for a human being. (XXXVI RT 10066.) At the request of the prosecution, Barbour tested Lora's blood specimen for fermenting micro-organisms. (*Ibid.*) Barbour found that there were no micro-organisms that would have fermented glucose in Lora Sinner's blood to alcohol. (XXXVI RT 10067.) Barbour also testified that in his

experience he has seen blood alcohol levels of .78 or higher, including a level of one percent, which he has witnessed twice. (XXXVI RT 10069.) Barbour analyzed crime scene and autopsy photos of Lora Sinner's body and found the body to be in good condition, free of significant decomposition. (XXXVI RT 10066.) Barbour opined that to reach a blood alcohol level of .77 or .78, Lora Sinner would have had to consume half of the 1.75 liter Black Velvet bottle associated with this case. (XXXVI RT 10072.)

Penalty Phase

Prosecution Evidence

Kenneth Sinner, Lora Sinner's biological father, testified for the prosecution. (XXXVIII RT 10618.) Sinner described Lora as being very smart, very intelligent, but a little slow due to a head injury that occurred in a car accident when Lora was young. He further described Lora as caring and loving. (*Ibid.*) Lora's loss has made Kenneth paranoid, afraid to go out and afraid for his sons' safety. (XXXVIII RT 10625.)

Lora Sinner's aunt, Sylvia Grossman, testified for the prosecution. (XXXVIII RT 10630.) Sylvia is Kenneth Sinner's sister. (*Ibid.*) Sylvia re-established more consistent contact with Lora when Lora's mother passed away in October of 1998. (XXXVIII RT 10633.) Sylvia testified that approximately a week prior to her leaving for Redding, Lora spent time with Sylvia and Lora appeared very happy. (XXXVIII RT 10634.) Sylvia described Lora as a caring person who comforted others and loved working with children. (XXXVIII RT 10635.) Sylvia commented that Lora was naïve but a very loving person. (XXXVIII RT 10636.) Lora's death has made Sylvia afraid to do anything, afraid that the same thing might happen to her. (XXXVIII RT 10637.)

Lora Sinner's older brother, Ryan Sinner, testified on behalf of the prosecution. (XXXVIII RT 10642.) Ryan lived with Lora for the majority

of her life. (XXXVIII RT 10643.) Ryan stated that as he and Lora grew up, the family camped quite often. (XXXVIII RT 10644.) Even when Ryan got married, he would go out camping with Lora and his family. (*Ibid.*) Lora got the red Honda Civic for her graduation and Ryan taught her how to drive it because it was a stick-shift. (XXXVIII RT 10645.) Ryan described Lora as his best friend, someone that was always willing to help and would give you the last few dollars she had if you needed it. (*Ibid.*) Ryan stated that Lora was a very kind and loving person, not only to him but to his family and the community. (XXXVIII RT 10646.) Lora frequently took care of Ryan's children and was great at it. She often babysat them. (*Ibid.*) Ryan testified that he has five daughters and, because of what happened to Lora, he is afraid for their safety. (XXXVIII RT 10648.) He is afraid to camp because of safety issues. (*Ibid.*) Lora volunteered a lot of her time working with the disabled. (XXXVIII RT 10650.) Ryan felt Lora would enjoy a future as a counselor or a social worker. (*Ibid.*)

Rudy Bauder, a minister at the First Baptist Church of Hoquiam, Washington testified for the prosecution. (XXXVIII RT 10924.) Bauder knew Lora Sinner because she and her family were active members of Bauder's church. (*Ibid.*) Bauder was Lora's pastor, Sunday school teacher, and youth leader. (XXXVIII RT 10927.) Lora participated in the nursery care, caring for preschool children during the Sunday school and worship hour. She gave care and supervision to the children and did this by herself. (*Ibid.*) Lora had a brother with a disability. He had limited physical mobility and could not speak. (XXXVIII RT 10928.) Lora was positive and supportive in providing help for her brother. (XXXVIII RT 10929.) She provided physical help such as cleaning up after her brother when he had soiled himself. Bauder described Lora as stable, very caring, loving, and interested in children. (*Ibid.*)

Gloria Callaghan testified on behalf of the prosecution. (XXXVIII RT 10942.) In 1996 and 1997, Callaghan worked at Coastal Community Action Program in Aberdeen, Washington. (*Ibid.*) The program helps the low income people in the community and helped the developmentally disabled. (XXXVIII RT 10943.) Lora Sinner worked for the program, specifically with adults with developmental disabilities. (XXXVIII RT 10944.) Lora took adults out into the community, helping them by taking them to movies or other activities. Lora took adults who were institutionalized an acquainted them back with the community, helping them to function in the community. Callaghan described Lora as very dedicated, reliable, dependable, and caring towards the people she worked with. (*Ibid.*) Lora was patient, loving and caring toward the people she worked with. (XXXVIII RT 10945.) Lora also did a lot with her disabled brother, Joshua, helping him interact in the community. (XXXVIII RT 10947.) Callaghan noticed how Lora worked with her brother and how she was very good with him. (XXXVIII RT 10948.)

Mary Anderson, a high school guidance counselor at Hoquiam High School in Hoquiam, Washington, testified for the prosecution. (XXXVIII RT 10954.) Anderson met Lora Sinner when Lora was a sophomore in high school and asked for help in English. After working with the English teacher, they discovered that Lora had learning disabilities. (*Ibid.*) Once they addressed these learning disabilities, Lora's grades improved. (XXXVIII RT 10955.) Lora became an aide in the severely disabled room, where her brother Josh was. (XXXVIII RT 10956.) Lora worked well with all of the kids in the room, but she was especially protective of Josh, like a second mother. After high school, Lora was looking at an early childhood development program at the local community college. Lora received the Brad Knoll scholarship for citizenship and community service in the school. Anderson described Lora as very giving and caring. (*Ibid.*)

Carl Lubsen testified on behalf of the prosecution. (XXXVIII RT 10963.) During March of 1990, Lubsen supervised the South Forty Ranch group home in Shasta County. At that time, appellant lived at this facility.[11] (*Ibid.*) On March 19, 1990, appellant was removed from the group home on a "5150," that he was unable to care for himself, call by the Sheriff's department. (XXXVIII RT 10966.)

Debbie Byron testified on behalf of the prosecution. (XXXVIII RT 10989.) On March 19, 1990, Byron was working at the South Forty group home. (*Ibid.*) Byron identified appellant by a picture taken of him at or near 1990. (XXXVIII RT 10991.) On March 19, 1990, Byron witnessed appellant, on site, chasing after South Forty group home employee Jody Sanford with an undetermined item, trying to hit Sanford with the item. (XXXVIII RT 10992.) Byron testified that they had to call the Sheriff's office because the situation was out of their control. (*Ibid.*)

Jody Sanford testified on behalf of the prosecution. (XXXVIII RT 11003.) On March 19, 1990, Sanford was working at the South Forty group home in Shasta County. (XXXVIII RT 11003.) On that date, Sanford was supervising boys living at the home as they made a gravel walk way behind the house. (XXXVIII RT 11004.) Appellant, via identification by name only, was one of the boys Sanford was supervising.[12] Appellant ran away from the work detail. (*Ibid.*) Appellant then ran to the top of a hill there where there were remnants of an old mine and retrieved a broken neck of a glass bottle. (XXXVIII RT 11005.) Appellant returned to

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[11] Lubsen was not able to identify appellant. He testified as to his administrative knowledge and records regarding Paul Gordon Smith, Jr., appellant's proper name. (XXXVIII RT 10964.)

[12] Sanford could not identify appellant in court, but rather testified that Paul Gordon Smith, Jr. was the person he was talking about. (XXXVIII RT 11004.) Sanford did say the Exhibit T-103, a photo of appellant taken several years ago, did look familiar. (*Ibid.*)

the home and took a swing at Sanford with the broken glass bottle. (*Ibid.*) Appellant tried to run away and Sanford chased him. (XXXVIII RT 11014.) Sanford restrained appellant who he described as "being out of control." (XXXVIII RT 11007.)

Christopher Hill testified on behalf of the prosecution. (XXXVIII RT 10652.) Hill testified that he was in a group home with appellant in Paradise, California in 1990.[13] (XXXVIII RT 10653.) At an undisclosed time when both were staying at the group home, appellant forced Hill to orally copulate another boy. (XXXVIII RT 10656.) Appellant and the other boy, David, blocked Hill's exit from the bedroom and threatened to beat up Hill if he did not perform the sexual act on David. (*Ibid.*) Hill believed that appellant would carry out the threat because appellant had struck Hill on two or three prior occasions. (XXXVIII RT 10657-10658.) Hill was sitting down and appellant put his hand on Hill's back and physically pushed him to force him to commit the sexual act. (XXXVIII RT 10658.) At a later time, during a counseling session, appellant kicked Hill, hitting him on the right side of his face. (XXXVIII RT 10659.) Hill was sitting down at the time and appellant was standing up as he kicked Hill. (XXXVIII RT 10659, 10681.) According to Hill, the hostility was misdirected as it was someone else who made a comment that angered appellant. (XXXVIII RT 10659.) After this incident, Hill did not see appellant again. (*Ibid.*) Hill also remembers being called a "nigger" by appellant during their stay at the group home. (XXXVIII RT 10762.)

Justin Burger testified on behalf of the prosecution. (XXXVIII RT 10685.) In 1990, Burger was working as a home supervisor at the Helping

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[13] Although Hill testified that he knew the defendant in this case and named him as Paul Smith, Hill had a difficult time identifying appellant in court because his appearance had changed since Hill had last seen him 12 years prior. (XXXVIII RT 10653.)

Hands group home in Paradise, California. (*Ibid.*) At that time, Christopher Hill and appellant were staying at the group home.[14] (XXXVIII RT 10686.) On June 2, 1990, Burger observed "seemingly" forced oral copulation by appellant with Hill as the victim. (XXXVIII RT 10691.) On June 18, 1990, Burger observed appellant kick Hill in the face area. (XXXVIII RT 10695-10696.) Appellant was taken away by the police after kicking Hill and did not stay at the home afterwards. (XXXVIII RT 10695.) Appellant stayed at the group home for a total of two months. (XXXVIII RT 10718.)

William Sweeney testified on behalf of the prosecution. (XXXVIII RT 10723.) In June of 1990, Sweeney was the administrator of Helping Hands group home. (*Ibid.*) Sweeney acknowledged that appellant was kicked out of the home after kicking Christopher Hill. (XXXVIII RT 10725.)

Paradise Police Officer Mark Tange testified on behalf of the prosecution. (XXXVIII RT 10763.) Officer Tange responded to the Helping Hands group home in Paradise, California on June 18, 1990, on a report of an assault. (XXXVIII RT 10764.) As a result, Officer Tange arrested appellant.[15] (XXXVIII RT 10765.) When asked about the incident, appellant stated "[Hill] deserved it, so I hit him." (XXXVIII RT 10766.) Appellant was wearing an athletic shoe when he kicked Hill and Officer Tange noted that Hill suffered a swollen right eye. (XXXVIII RT 10767.) Officer Tange also noted that appellant showed no remorse for the attack and treated everyone with contempt. (*Ibid.*)

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[14] Given the time lapse, Burger had some difficulty identifying appellant in court. (XXXVIII RT 10686.)

[15] Similar to other witnesses, Officer Tange had difficulty identifying appellant in court as his prior exposure to appellant was 12 years ago when appellant was a minor. (XXXVIII RT 10765.)

Jerry Holloway testified on behalf of the prosecution. (XXXVIII RT 11053.) On November 5, 1991, Holloway was working at the Excel group home in Turlock, California. (XXXVIII RT 11054.) Appellant was staying at the group home at this time. (*Ibid.*) On this day, during the evening, a group of staff and boys were watching television together. (XXXVIII RT 11055.) Appellant was laying on the floor next to where Holloway was sitting on a couch. (XXXVIII RT 11056.) Appellant slapped Holloway's foot and told him to get his foot out of appellant's face. Appellant then hit Holloway several times in the shin. Holloway attempted to get up, but appellant prevented him from getting up by using his elbow. (XXXVIII RT 11056, 11057.) Holloway reported this conduct to the house counselor and they attempted to get appellant out of the house. (XXXVIII RT 11057.) Appellant refused and had to be physically removed from the home. Appellant then got into a physical altercation with the house counselor on the deck of the home and had to be physically restrained while the police were called. (*Ibid.*) Holloway testified that appellant had a volatile temperament and had been engaged in previous altercations. (XXXVIII RT 11067.)

Craig Jones testified for the prosecution. (XXXVIII RT 11123.) Jones was a child care supervisor for Excel group home on November 5, 1991. Jones investigated the incident between Jerry Holloway and appellant. (*Ibid.*) When Jones arrived, he noted that appellant was out of control, physically. (XXXVIII RT 11124.) Jones tried to talk to appellant who became more agitated. To prevent the situation from escalating, Jones asked appellant to step out of the home. Appellant refused and had to be physically escorted out. (*Ibid.*) While they were outside, appellant continued to escalate his behavior, shouting profanities and flailing his arms. (XXXVIII RT 11125.) During this contact, appellant struck Jones with his arm. (*Ibid.*) Jones and Holloway took appellant to a grassy area

for his safety where he became more violent. (XXXVIII RT 11126.) Appellant then stabbed Jones a couple of times in the wrist and once in the ribs with an ink pen. Appellant also bit Jones on the arm, breaking the skin. The police were called to respond to the incident. (*Ibid.*) Jones described appellant as mischievous and manipulative. (XXXVIII RT 11136.)

Gilbert Parker testified on behalf of the prosecution. (XXXVIII RT 11166.) On October 19, 1992, Parker was staying at the Capital City group home in Sacramento where appellant was also staying. (XXXVIII RT 11166-11167.) On this date, Parker returned to the home from football practice. (XXXVIII RT 11167.) Parker entered the home, put down his helmet, and was about to start eating dinner when appellant punched Parker in the face. (XXXVIII RT 11167-11168.) As a result of the attack, Parker had to be taken to the hospital and his jaw was wired shut for six weeks. (XXXVIII RT 11169.) The police were called to the scene and when Parker returned to the home, appellant no longer worked there. (*Ibid.*)

Sacramento Police Officer Matthew Wimple testified on behalf of the prosecution. (XXXVIII RT 11174.) Officer Wimple responded to the Capital City group home on October 19, 1992. (*Ibid.*) As part of his investigation, Officer Wimple arrested appellant. (XXXVIII RT 11175.) Officer Wimple confirmed that when he met with Gilbert Parker at the scene, Parker's jaw was swollen, he complained of pain to his jaw, and he had a hard time speaking with Officer Wimple. (XXXVIII RT 11178.)

Ralph White testified on behalf of the prosecution. (XXXVIII RT 11194.) White operated several group homes in the Stockton, California area. (XXXVIII RT 11195.) On or about February 19, 1994, appellant was staying at one of White's group homes, named the Stockton Youth Foundation. (*Ibid.*) On this date, the front door of one of White's group homes was set on fire in an arson attempt. (XXXVIII RT 11196.) It appeared that White's cologne was used as an accelerant to the fire. (*Ibid.*)

Manzy Williams testified on behalf of the prosecution. (XXXVIII RT 11151.) On February 12, 1995, both Williams and appellant were being housed at juvenile hall. (XXXVIII RT 11151-11152.) In the morning hours, Williams was playing basketball with a group of other boys when appellant came at him and started punching him. (XXXVIII RT 11152.) Appellant had to be restrained by people at the juvenile hall. (*Ibid.*) Williams suffered a fat lip as a result of the attack and believed appellant did this because he is prejudiced. (XXXVIII RT 11153.)

James Gibson testified on behalf of the prosecution. (XXXVIII RT 11156.) James Gibson, a probation officer at the time, was working at juvenile hall on February 12, 1995. (*Ibid.*) Gibson witnessed appellant issue a racial epithet at Manzy Williams. (XXXVIII RT 11158.) As appellant was doing this, he began to move toward Williams. (*Ibid.*) Appellant then struck Williams on the lower lip with a closed fist. Gibson had to physically intervene to prevent further violence. (XXXVIII RT 11158-11159.)

Shasta County Juvenile Hall Group Counselor Rhonda Schuchart testified for the prosecution. (XXXVIII RT 11072.) In 1995, appellant was sent to the behavior modification unit which required security. (XXXVIII RT 11075.) At an undisclosed time during this year, appellant tapped on his cell door to get Shuchart's attention. He slid a Pepsi can under that door that had been modified into the shape of a knife. (*Ibid.*) Appellant gave the can to Shuchart to show her that he could create such a weapon. (XXXVIII RT 11076.) Shuchart described appellant as smart and manipulative, playing staff against each other. (XXXVIII RT 11082.)

Michael Murchinson testified on behalf of the prosecution. (XLI RT 11529.) On February 2, 1998, Murchinson, his now ex-wife Shannon, her mother Mary Shelton, appellant, his wife Jessica, and Jessica's mother, Margret King were all driving together from Reno, Nevada. (XLI RT

11530.) Appellant was driving the group in his car. (XLI RT 11532.) Murchison had just gotten married to Shannon and appellant had just gotten married to Jessica. (XLI RT 11529.) As they were driving home through Stockton, California, appellant began discussing the purchase of a firearm with Mary Shelton. (XLI RT 11530.) The group did not have enough funds to get back home and were faced with the possibility of being stranded. (XLI RT 11537.) Shelton gave appellant her ATM card and the pin-number so he could withdraw funds to purchase the firearm. (XLI RT 11529.) Murchinson accompanied appellant as he withdrew the money from Shelton's ATM card. (XLI RT 11531.) Appellant then solicited a couple of men in Stockton, inquiring about purchasing a firearm. (*Ibid.*) The men directed appellant and Murchinson to a house where appellant purchased a .22 caliber rifle with a sawed off barrel and an adjoining clip for ammunition. (XLI RT 11535, 11562-11563.)

Appellant and Murchison engaged in a conversation of how there were going to get home because they had expended all of their resources. (XLI RT 11536.) Appellant suggested that they rob a convenience store. (*Ibid.*) As they drove around, Stockton Police Sergeant Charles Arrellano performed a traffic stop on appellant and Murchison for expired registration on appellant's car. (XLI RT 11503.) After thinking it through, appellant decided not to rob a convenience store and instead rob a prostitute. (XLI RT 11538.) Appellant and Murchison drove around Stockton and found a Glenda Lee Jones. (XLI RT 11598.) Appellant invited the Jones into his car. (XLI RT 11538.) Jones sat in the back seat, appellant drove, and Murchison rode in the front passenger seat. Appellant negotiated a price for services with the prostitute. (*Ibid.*) Appellant stopped in an industrial park, got into the back seat of the car with the Jones and had sex with her. (XLI RT 11539.) After they finished, appellant got out of the car and approached Murchison on the front passenger side. (XLI RT 11540.)

Appellant retrieved the rifle, raised it and told Jones, and said "this is the deal." Jones "flipped" and started screaming. Appellant then pointed the rifle at Jones and fired a shot at her. Jones turned away, to run from them, leaving her purse. (*Ibid.*) Murchison yelled at appellant to "get out of here." (XLI RT 11541.) As appellant drove away, Murchison went through Jones' purse, checking for money. He found none, but appellant noticed that his wallet was missing. (*Ibid.*) Appellant insisted on going back to the scene to look for it with Murchison arguing against it. (XLI RT 11543.) Appellant went back to the scene and Stockton police had arrived at the scene as well. Murchison saw the police talking to Jones. Appellant walked right past them, acting as if nothing happened, and was stopped by the police. Appellant and Murchison were stopped by police and subsequently arrested. (*Ibid.*)

Glenda Lee Jones testified on behalf of the prosecution. (XLI RT 11598.) She testified as to the events occurring on February 2, 1998, consistent with the testimony of Michael Murchison. (XLI RT 11599-11609.) She added that as appellant drove away, she noticed that her purse was still in the vehicle. (XLI RT 11606.) She looked around the area, hoping appellant had thrown her purse out of the car. Instead, she found appellant's wallet at the scene. (*Ibid.*) As she walked around, a police officer arrived. (XLI RT 11607.) Jones told the police officer what happened and handed the police officer appellant's driver's license. (*Ibid.*)

Stockton Police Sergeant Charles Arrellano testified on behalf of the prosecution and confirmed that on February 2, 1998, he performed the traffic stop on appellant and arrested him later that day. (XLI RT 11503-11504, 11508.) Stockton Police Officer Steven Thomas testified on behalf of the prosecution and confirmed that on February 2, 1998, he retrieved appellant's wallet at the industrial park area of Stockton. (XLI RT 11510-11512.)

Appellant's wife, Jessica Smith, testified on behalf of the prosecution. (XXXVIII RT 11102.) In April of 1999, Jessica Smith received a letter from appellant while he was staying in county jail. (*Ibid.*) In the letter, appellant talked about escaping from county jail. (XXXVIII RT 11103.) In the letter, appellant asked Jessica Smith to take pictures of the outside of the jail. Prior to receiving this letter, appellant had told Jessica Smith that he would not die in jail and that "he would go out in a blaze of glory." (*Ibid.*)

Stacy Duarte, an investigator with the California Department of Justice, testified on behalf of the prosecution. (XXXVIII RT 11114.) Duarte posed as Jessica Smith's friend, Misty Slettum, in a phone call to appellant regarding his claims that he was going to escape from the jail. A recording of the phone conversation between Duarte and appellant was played for the jury to hear. (XXXVIII RT 11115.)

Shasta County Deputy Sheriff Wesley Collette testified for the prosecution. (XXXVIII RT 10829.) On August 1, 1999, Deputy Collette was working at the Shasta County jail. (*Ibid.*) At that time, appellant was housed in the jail with a Paul Haakinson. (XXXVIII RT 10830.) Search of appellant's cell yielded a six inch shank made of stainless steel. (XXXVIII RT 10831, 10861.) During a subsequent interview, appellant admitted that the two shanks found in the cell were his and that they had entered his cell too quickly for him to hide them. (XXXVIII RT 10920.) Appellant stated that he was going to use the shanks on one of the inmates in the jail, but he refused to state which one. (*Ibid.*) Appellant also said there was a third shank in the cell, but deputies were unable to find it. (XXXVIII RT 10921.)

Shasta County Deputy Correctional Deputy William Gardner testified on behalf of the prosecution. (XXXVIII RT 10776.) On February 25, 2001, Deputy Gardner was working as a deputy in charge of two pods of

the Shasta County jail. (XXXVIII RT 10777.) There are 20 cells in each pod. (XXXVIII RT 10778.) Appellant was housed in the Shasta County jail at that time. (XXXVIII RT 10781.) Gardner noticed that a large amount of water was dripping from appellant's solitary cell. (XXXVIII RT 10782.) Another deputy approached appellant's door and asked him to step away so the deputy could look through the door window to figure out where the water was coming from. (XXXVIII RT 10784.) Appellant refused to move to allow the deputy to see. (*Ibid.*) A few minutes later Deputy Gardner witnessed appellant kicking and yelling in his cell. (XXXVIII RT 10787.) Gardner approached appellant's cell door and appellant said "what are you looking at, you mother fucking -- you punk ass bitch, come in here and I will knock your ass out." (*Ibid.*)

Gardner decided to move appellant to a more secure cell that could withstand his kicking. (XXXVIII RT 10787.) As he approached appellant's cell to move him, appellant had covered up the window on the door so no one could see inside appellant's cell. The deputies opened the door and one of them sprayed OC (olein capsicum) spray into appellant's cell. (*Ibid.*) However, appellant had a t-shirt wrapped around his mouth and face and a plastic baggie covering his eyes. (XXXVIII RT 10788.) The purpose for this was to negate the effects of the OC spray, demonstrating that appellant had thought out what the deputies might do in response to his actions. (XXXVIII RT 10789.) Appellant continued to make comments that he was going to kick his door in as he continued to kick at his cell door. (XXXVIII RT 10790.) A cell extraction team was deployed to handle this situation. (*Ibid.*)

Shasta County Deputy Sheriff Jon Ruiz testified for the prosecution. (XXXVIII RT 10794.) On February 25, 2001, Deputy Ruiz was part of the cell extraction team that attempted to move appellant from his jail cell. (XXXVIII RT 10795.) Four people enter the cell to extract an inmate.

(XXXVIII RT 10796.) No deputies are armed with firearms during the extraction. (*Ibid.*) A video of appellant's cell extraction was played for the jury. (XXXVIII RT 10800.)

Shasta County Sheriff's Deputy Michael Nelson testified for the prosecution. (XXXVIII RT 10869.) On February 24, 2001, Deputy Nelson was working on the cell extraction team at the jail and handled appellant's cell extraction. (*Ibid.*) A couple of days after the cell extraction, appellant expressed to Deputy Nelson that he thought they were going to use a "gauge," which is a form of shotgun that fires bean bags, and appellant stated that his plan was to charge the door during the extraction, take the gauge, and move on from there. (XXXVIII RT 10871.)

Shasta County Deputy Sheriff Edmund Bennett testified for the prosecution. (XXXVIII RT 10881.) Deputy Bennett searched appellant's cell after the February 25, 2001, extraction. (XXXVIII RT 10895.) Deputy Bennett found a twenty eight and one-half inch long, tightly rolled up newspaper. (XXXVIII RT 10896.) The newspaper was very hard and dense and did not bend or break with the deputy used it to hit a concrete table. (XXXVIII RT 10897.)

Aaron Cozart testified for the prosecution. (XLI RT 11691.) On May 11, 2002, Cozart was assigned to the same pod as appellant in the Shasta County Jail. (XLI RT 11692.) After approximately two weeks of arriving there, appellant and Benjamin Williams asked Cozart for help. (XLI RT 11692-11693.) Appellant asked Cozart and his cell-mate to cause a distraction, i.e., attempt to get a hostage and block the doors which would force the jail officers to perform a jail extraction of their cell. (XLI RT 11693.) Appellant wanted Cozart to create this distraction so he could bring weapons and tools up from the outside through his cell window, which he planned to break. (*Ibid.*) Appellant's plan was to tie together strips of his bed sheets, attach them to an anchor, and throw them over the

rail to the fence outside. (XLI RT 11694.) Appellant had Cozart contact "Tim," a former Shasta County Jail inmate who had just been released, to help arrange the escape. (XLI RT 11695.) Appellant arranged to put money in Cozart's jail account and provide Cozart's cellmate with drugs in exchange for his cooperation. (XLI RT 11706.) However, before it actually happened, Cozart contacted jail officers and informed them of appellant's plan. (XLI RT 11698.)

Shasta County Sheriff's Deputy Brian Jackson testified on behalf of the prosecution. (XLI RT 11709.) In May of 2002, Deputy Jackson was working at the Shasta County Jail. (XLI RT 11709.) Inmate Aaron Cozart reported appellant's plan to Deputy Jackson. (XLI RT 11711.) Deputy Jackson checked tape recordings of jail phone conversations and the jail money accounts for inmates. (XLI RT 11711.) Deputy Jackson confirmed that on May 15, 2000[16], a Timothy Yakiatis deposited money on appellant's jail account.

Shasta County Deputy Sheriff Bounpon Kongkeoviman testified for the prosecution. (XL RT 11200.) On June 22, 2002, at approximately 4:00 a.m., Deputy Kongkeoviman was at the booking area of the county jail when he got what appeared to be an emergency message over their radio system. (XL RT 11202, 11205, 11299.) He responded to the C-pod of the jail where the higher security prisoners are held. (XL RT 11211.) Upon his arrival, Deputy Kongkeoviman noticed that a sliding door at the pod was open and unsupervised by jail staff. (XL RT 11219.) As he reached the cell portion of the pod, the Deputy heard a scream coming from the shower area on the second floor. (XL RT 11225.) As Deputy Kongkeoviman

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[16] Based on Deputy Jackson's testimony, it appears Deputy Jackson's reference to the year 2000 is in error. 2002 appears to be the correct year of the occurrence.

headed for the stairs to reach the second floor, he saw appellant on the second floor. (XL RT 11229.) Appellant was moving away from the sound of the person screaming. (XL RT 11230.) As the Deputy rounded the corner, he saw inmate Benjamin Williams, unclothed with only jail-issued orange brief underwear on, coupled with fellow deputy Timothy Renault. (XL RT 11232.) Williams made a motion towards Deputy Renault's face area. (XL RT 11233.) Upon making a second motion, Deputy Kongkeoviman was able to stop Williams and subdue him. (*Ibid.*) Deputy Renault had blood all over him with Deputy Kongkeoviman describing him as nearly unrecognizable because of all of the blood. (XL RT 11234.) Right by the pillar on the second floor, Deputy Kongkeoviman located a weapon fashioned from the metal shower grate and rolled up newspaper. (XL RT 11235.) Deputy Renault suffered injuries all over his head area with large amounts of blood coming from the top of his head. (XL RT 11237.) Deputy Renault was taken to the emergency room at Mercy Hospital. (*Ibid.*) While Deputy Renault was being transported to the emergency room, he stated that appellant and Williams jumped him. (XL RT 11239.)

Shasta County Sheriff's Deputy Karen Luce testified on behalf of the prosecution. (XL RT 11276.) On June 22, 2002, Deputy Luce was working at the booking area of the Shasta County Jail. (XL RT 11277.) Deputy Luce accompanied Deputy Konkeoviman to the distress call in the jail. (XL RT 11278.) As they both got upstairs, Deputy Luce saw appellant walking on the top tier, near the top of the stairs. (XL RT 11278-11279.) Deputy Luce went towards the shower area and saw Deputy Renault against the wall, struggling with another inmate. (XL RT 11279.) Deputy Luce handcuffed the inmate as Deputy Kongkeoviman secured him. (XL RT 11280.) She saw the weapon used in the attack near the showers. (*Ibid.*) Deputy Luce saw appellant fidgeting with his waistband and

searched his person. (XL RT 11282.) Deputy Luce located a two-foot-long strip of torn sheet in appellant's waistband with blood on it. (XL RT 11282, 11290.) The strip was half an inch wide and Deputy Luce opined that it could have been used as a weapon for strangulation. (XL RT 11292.) As other officers were placing appellant in a room near the booking area, a Bic disposable razor fell out of appellant's clothing onto the floor. (XL RT 11283.) The razor blade portion of the razor had string or twine wrapped around it and Deputy Luce testified that it was both contraband for the jail and a potential weapon. (*Ibid.*) Appellant had blood spatters all over his clothing and shoes. (XL RT 11291.)

Shasta County Sheriff's Deputy Bruce Ogden testified on behalf of the prosecution. (XL RT 11298.) On June 22, 2002, Deputy Ogden was working at the Shasta County Jail. (XL RT 11299.) Deputy Ogden responded with Deputy Luce and saw appellant at the top of the stairs. (XL RT 11301.) When he saw them, appellant raised his arms up and stated that he did not do anything. (*Ibid.*) When Deputy Ogden handcuffed appellant, he noticed that appellant had fresh blood on his hands and forearms as well as blood on the shoulder areas of his shirt. (XL RT 11303-11304.) Deputy Renault was not lucid when he was transported for treatment for his injuries. (XL RT 11305.)

Shasta County Correctional Officer Timothy Renault testified on behalf of the prosecution. (XL RT 11317.) On June 22, 2002, Officer Renault was working at the Shasta County Jail, patrolling the level 3 portion of the jail. (XL RT 11318.) At approximately 3:50 a.m., Officer Renault was checking the C-pod area of the jail. (XL RT 11328.) The lights were out in that pod, but Officer Renault had a flashlight with him. (XL RT 11328-11329.) Officer Renault proceeded to the top of the stairs in the C-pod. (XL RT 11330.) He encountered inmate Seems who, through his cell door, frantically whispered to Officer Renault to get out of there.

(XL RT 11332.) Officer Renault then proceeded to the catwalk area and began to call to get the pod door open. (XL RT 11333.) As he began to call, he heard the heard the shower curtain open. Officer Renault looked back and saw inmate Williams crouched down in the shower. (*Ibid.*) Officer Renault saw a second figure in dark clothes, consistent with the jail-issued blue uniform, in the shower area. (XL RT 11334, 11374.) This second person's height and stature were consistent with appellant's. (*Ibid.*) Offer Renault reached for the door and was attacked by the two inmates who came from the shower area. (XL RT 11335.) He was held down in a corner and was hit several times by more than one person. (XL RT 11336.) Officer Renault reached for his radio, but it was gone. (XL RT 11355.) As the main office radioed Officer Renault for his status, someone impersonating him stated that he was okay. (XL RT 11337.) When he heard the microphone to his radio shut off, Officer Renault thought he was dead because the main office would not send anyone to help him. (*Ibid.*)

Officer Renault recalled that on June 20, 2002, a day and a half before the incident in question, he had an episode with appellant. (XL RT 11350.) Appellant became angry of the time of his "time-outs" at jail and the timing of his shower privileges. (XL RT 11352.) When correctional deputies, including Officer Renault, attempting to talk to appellant about his concerns, appellant jammed his door shut, preventing contact. (XL RT 11354.) On June 21, 2002, appellant was taken to the booking area so correctional deputies could investigate the incidents. (XL RT 11353-11354.) When they got to the booking area, appellant threatened Officer Renault saying that he did not know who he (appellant) was, that he (appellant) was the baddest guy on the street and that if he (appellant) ever got out, he would "get" Officer Renault.

As a result of the June 22, 2002, attack, Officer Renault suffered a blood clot in his head. (XL RT 11355.) He had to have surgery to remove

the blood clot. (XL RT 11356.) Officer Renault received seven plates in his head. He sustained a broken jaw and had to have two plates installed in his jaw. He also sustained, a broken tooth, a black eye, and a torn rotator cuff in his shoulder. All total, Deputy Renault was in the hospital for five and a half days and was still receiving treatment at the time of his testimony. (*Ibid.*)

Shasta County Jail Correctional Officer Ben Estill testified for the prosecution. (XL RT 11380.) On June 22, 2002, Officer Estill was called in early to work at the Shasta County Jail. (XL RT 11381.) After the attack on Officer Renault, Estill was tasked with searching appellant's cell. (*Ibid.*) In the vent area of appellant's cell, Officer Estill found small strings tied together with a hoop on each end in a ligature-type device. (XL RT 11382.) Officer Estill opined this ligature could be used to strange another person. (*Ibid.*) The ligature device was approximately 20 inches long and the combination of all of the threads made the composite ligature very strong structurally. (XL RT 11383.)

Shasta County Deputy Sheriff David Heberling testified for the prosecution. (XL RT 11388.) On June 22, 2002, Deputy Heberling was assigned to collect evidence at the scene of the assault at the jail. (*Ibid.*) During this duty, he collected the clothing of appellant. (XL RT 11388-11389.) In appellant's cell, Deputy Heberling located a tightly rolled up normal-sized newspaper, wrapped together with the elastic from boxer shorts. (XL RT 11389.) The newspaper was very tightly wrapped together, constituting a firm instrument. (*Ibid.*) Deputy Heberling noticed that the rolled up newspaper did not bend at all. (XL RT 11390.) Deconstructing it, he noticed that either soap or toothpaste coated the newspaper. (XL RT 11391.) Deputy Heberling opined that this device could be used as a weapon. (XL RT 11392.) He testified that the stiffness of the newspaper device was roughly comparable to the baton he carries as a Sheriff's

Deputy. (XL RT 11393.) Deputy Heberling also checked appellant. (XL RT 11402.) Appellant had several droplets of blood on his person and sustained an abrasion on one of his fingers on his right hand. Appellant's abrasion had a piece of skin missing near the cuticle of the finger. (*Ibid.*)

Harold Seems testified for the prosecution. (XL RT 11456.) On June 22, 2002, Seems was an inmate in the Shasta County Jail, housed on the second floor. (XL RT 11461.) In the early morning hours of that day, Seems saw appellant and Ben Williams walking outside of his cell. (XL RT 11465.) Seems heard appellant ask Williams if he had "it." (XL RT 11466.) Appellant also told Williams "we're going to have to kill him.[17]" (*Ibid.*) Seems then saw appellant and Williams hide in the second floor shower area. (XL RT 11468.) When Officer Renault patrolled the second floor that morning, Seems tried to warn him. (XL RT 11470.) However, before Officer Renault could exit the area, Williams and appellant attacked him. (XL RT 11471.) As Officer Renault attempted to run, Williams and appellant came out of the shower area, pushed Renault up against a metal screen and dragged him back to the shower area. (XL RT 11472.) When the other jail deputies responded, Seems saw appellant move from the shower area towards the stair area and stated that he did not have anything to do with it. (XL RT 11474.) When appellant walked past Seems, appellant had blood on his chest area and blood on a rag or toilet paper hanging out of his pants. (XL RT 11475.)

California Department of Justice Criminalist Sara Day testified on behalf of the prosecution. (XLI RT 11619.) Day analyzed appellant's jail

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[17] Shasta County Sheriff's Sergeant Janet Breshears testified that during this investigation, she interviewed Harold Seems. (XLIII RT 12117.) During the interview, Seems told Sergeant Breshears that he sometimes hears voices in his head and, because of that, he was not quite sure if what he was hearing was real. (*Ibid.*)

shirt that he was wearing on June 22, 2002. (XLI RT 11627.) The shirt had several blood stains on it. (XLI RT 11628-11629.) Day tested the blood and found Officer Timothy Renault's blood on appellant's jail shirt. (XLI RT 11632.) Day also tested blood found in a swab of appellant's right ear and on the shoes appellant was wearing on June 22, 2002. (XLI RT 11634-11635.) Day confirmed the blood on both was consistent with Officer Timothy Renault's blood. (XLI RT 11635.)

California Department of Justice Latent Print Analyst John Palacio testified on behalf of the prosecution. (XLI RT 11647.) Palacio tested the weapon found at the jail scene of the June 22, 2002, incident involving appellant and Officer Timothy Renault for fingerprints. (XLI RT 11648.) Palacio testified that he initially thought the weapon had metal rods in it as it was both rigid and strong. (XLI RT 11651.) Palacio conducted fingerprint tests of the layers of paper that made up the body of the weapon. (XLI RT 11653.) Palacio found the right palm print of inmate Benjamin Williams on the paper. (XLI RT 11654.)

Trauma surgeon James Stone testified on behalf of the prosecution. (XLI RT 11668.) Stone testified as to the nature of Officer Timothy Renault's injuries as a result of the June 22, 2002, attack by appellant and Benjamin Williams. (*Ibid.*) Stone responded to Mercy Medical Center on the date of the incident and treated Renault. (XLI RT 11669.) Renault suffered three deep scalp lacerations on the left side of his head. (*Ibid.*) He suffered a laceration closer to the middle of his skull and another laceration toward the middle, back side of the skull. (XLI RT 11669-11670.) Renault suffered a broken tooth and a laceration inside of his mouth. (XLI RT 11674.)

X-rays demonstrated that Renault had a broken jaw and a fracture of the cheek bone that went up into the base of his eye socket. (XLI RT 11670.) X-rays also demonstrated that Renault had an underlying

depressed skull fracture and a condition known as an epidural hematoma, which was bleeding between the brain and the skull. (XLI RT 11671.) The epidural hematoma is a blood clot that forms outside of the brain and presses on the brain. Stone testified that the epidural hematoma is life threatening. In describing the underlying depressed skull fracture, Stone testified that Renault's skull bone had been fractured with sufficient force that the fractured portion was actually depressed inward. As such, when the fractured portion is depressed in, it depresses on the brain and has a much greater likelihood of tearing blood vessels which cover the brain. (*Ibid.*) The blood clot had to be removed from Renault's brain and the doctors installed plates and screws into Renault's skull to stabilize the fracture. (XLI RT 11674.) Another doctor had to perform a craniotomy, meaning he had to cut and lift up Renault's scalp to lift the depression in his skull. (XLI RT 11675.) The doctors also had to install screws and plates to stabilize Renault's broken jaw. (*Ibid.*)

Defense Evidence

Appellant's mother, Doreen Ann Smith, testified for the defense. (XLI RT 11774.) Smith testified that on December 18, 1982, she saw appellant's father, Paul Smith, Sr., standing over appellant with his pants down. (XLI RT 11783.) Appellant was crying at the time. (XLI RT 11807.) On or about December 31, 1982, Smith's two sons Timothy and appellant, who was five years old at the time, told her that their father had sodomized both of them. (XLI RT 11784, 11807.) Smith reported the incident and Child Protective Services took Smith's daughter, Rebecca, Timothy and appellant away from the Smith household. (XLI RT 11785.) Paul Smith, Sr. moved out of the family residence and the younger children were eventually returned back to Doreen Ann Smith. (*Ibid.*) However, Doreen Ann Smith never got back custody of Timothy or appellant. (XLI RT 11786.) Smith visited appellant approximately once a week, however,

in either 1983 or 1984, she moved to Eureka, California and did not see appellant again. (XLI RT 11787.)

Doreen Ann Smith testified that in 1977, when she was pregnant with appellant, she tried methamphetamine for the first time. (XLII RT 11794.) She also admitted to drinking alcohol "off and on" during her pregnancy with appellant. (XLII RT 11796.) On recall, Doreen Ann Smith testified that her step-father sexually molested her from the age of three until thirteen years old. (XLII RT 12013.) She also stated that she was physically disciplined as a child. (*Ibid.*) According to her, appellant broke his leg as a child riding his bicycle. (XLII RT 12021.)

Carla Alexander, who works for Northern Valley Catholic Social Service, testified for the defense. (XLII RT 11827.) In 1983, she worked for the Shasta Head Start program. (XLII RT 11830.) In or around the spring of 1983, Alexander responded to the Smith home on the allegation that a five year old boy had been molested by his father. (XLII RT 11831-11832.) As a result of the visit, Alexander reported the home to Child Protective Services for gross neglect in relation to how the children were being cared for and the living conditions. (XLII RT 11834.) Overall, it was Alexander's opinion that it was not safe for the children to be living in the Smith residence. (XLII RT 11840-11841.) Alexander saw no attachment between appellant and his mother and guessed that appellant had problems attaching to other people. (*Ibid.*)

Judith Englesby-Smith, the executive director of the Shasta Head Start program, testified for the defense. (XLII RT 11847.) In 1980, Child Protection Services reported the Smith family to the Shasta Head Start program. (XLII RT 11849.) At that time, the focus was on appellant's older brother, Timothy. (*Ibid.*) Englesby-Smith described the Smith household as dirty and chaotic given the number of people coming in and out of the home. (XLII RT 11851.) She described appellant as sad and

withdrawn. (XLII RT 11852.) Englesby-Smith stated that she heard from another person that when he was approximately two to three years old, appellant had broken his arm trying to escape from his room because he had been locked inside it for a long time. (XLII RT 11855.) Englesby-Smith related that Head Start became involved with appellant's family when appellant was approximately two and a half years old and appellant was taken from the home when he was five years old. (XLII RT 11869.)

Julie Buick testified for the defense. (XLII RT 11877.) In 1980, Buick was employed as a home visitor for the Shasta Head Start program. (XLII RT 11878.) She described Head Start as a parenting education program. Some families voluntarily signed up and some were referred to the program by Child Protective Services. (*Ibid.*) Appellant's family was referred to Head Start by Child Protective Services in 1980. (XLII RT 11878.) Buick acted as home visitor for appellant's family for approximately one year. (XLII RT 11880.) She testified as to the poor state of the Smith residence. (XLII RT 11881.) Buick also relayed that appellant had tried to leave his room via an outside window. (XLII RT 11894.) However, in her recounting of the event, appellant broke his leg, not his arm. (*Ibid.*)

Appellant's aunt, Karen Smith testified on behalf of the defense. (XLII RT 11904.) She is married to appellant's father's brother, Pete Smith. (XLII RT 11905.) Karen Smith visited appellant's family residence and described it as messy and cluttered with other relatives living there as well. (XLII RT 11907.) Karen Smith also testified that when appellant was two or three years old, he broke an arm or leg at her house playing around when a leaning door fell on him. (XLII RT 11911-11912.) She was told by someone that they had to lock appellant and his brother in their room to keep them from making "messes" in the house. (XLII RT 11912.)

Leonard Cromp testified for the defense. (XLII RT 11920.) Cromp is Doreen Ann Smith's younger brother. (XLII RT 11922.) Cromp admitted to being convicted of multiple felonies for "violence, dope, guns" and admitted to being in prison when appellant was taken from the Smith household by Child Protective Services. (XLII RT 11921.) Cromp testified that he observed the Smith family when appellant was about two and a half to three years old. He claimed that the children were neglected. Cromp testified that Paul Smith, Sr., would beat Timothy Smith and appellant a lot if they did anything that Paul Sr., thought was wrong. He stated that appellant would receive the worst beatings of all. (*Ibid.*)

Jonathon Cromp testified for the defense. (XLII RT 11928.) Jonathon Cromp is Doreen Ann Smith's younger brother and Leonard Cromp's older brother by one year. (XLII RT 11929.) Jonathon stayed at the Smith residence with appellant when appellant was about four or five years old. Jonathon stated that he was the one who walked in and caught Paul Smith, Sr., molesting appellant. (*Ibid.*) Specifically, Jonathon saw Paul Sr., put his finger into appellant and Timothy's anus. (XLII RT 11935.) Jonathon felt that Doreen Ann Smith knew this conduct was going on. (XLII RT 11936.) Jonathon described the Smith residence as a "pig pen." (XLII RT 11931.) He described appellant and brother Timothy as starved for attention, willing to break things or ruin the house just to get it. (XLII RT 11934.)

Dennis McFall testified on behalf of the defense. (XLII RT 11951.) In 1980, McFall worked for Shasta County Child Protective Services as a supervisor of their investigations unit. (XLII RT 11955.) McFall was never personally acquainted with appellant. (*Ibid.*) He did review the files kept by Child Protective Services. (XLII RT 11956.) McFall spoke of the procedures used by Child Protective Services in removing a child from his family and the general philosophy the agency has in terms of child

placement. (XLII RT 11967.) McFall also testified as to the process of removing a child from his home, as was done in appellant's case. (*Ibid.*) McFall stated that the 13 Child Protective Services-related placements appellant went through from 1983 to 1990 was "alarming." (XLII RT 11970.) He further stated that appellant was moved "way too many times." (*Ibid.*) McFall testified that moving was not healthy for children. (XLII RT 11971.) McFall also opined that until 1982, knowledge and training by Child Protective Services of sexually abused children was minimal. (XLII RT 11977.) He further opined that Child Protective Services was not equipped to deal with appellant in 1983. (XLII RT 11978.) McFall also testified that, in his opinion, Child Protective Services has historically been underfunded. (XLII RT 11983.)

In remarking about appellant, McFall stated that his situation was one of the worst they had encountered at the time. (XLII RT 11983.) Specifically, McFall stated that the early onset of abuse, the length of time it continued, and the severity of the abuse were factors in coming to this conclusion. (*Ibid.*) He further stated that the abandonment of appellant by his mother and then the indecision of whether she would take him back exacerbated his situation. (XLII RT 11986.)

On cross-examination, McFall stated that foster care parent Blanch Orsini, whom appellant spent several years with, was a good foster care parent, exhibiting great patience over the time he worked with her. (XLII RT 11998.) Appellant stayed with Orsini for four years and was kicked out of that home. (XLII RT 12000.)

Medical doctor Anthony Borschneck testified for the defense. (XLII RT 12027.) On January 7, 1983, Borschneck examined appellant upon Redding Police officers and Child Protective Services bringing him to the doctor. (XLII RT 12028.) After an examination, he found that appellant was in no distress. (XLII RT 12029.) The doctor did note that appellant

had a lax rectal muscle which could be consistent with sexual penetration but found no bleeding or tearing which would have been expected in a case involving sexual abuse. (XLII RT 12029-12030.) He also did not see any scar tissue that would have indicated past abuse. (XLII RT 12032.) The doctor described appellant as very cooperative during the examination. (XLII RT 12030.)

Redding Police Sergeant Dan Kupsky testified for the defense. (XLII RT 12034.) On January 7, 1983, Kupsky received a Child Protective Services report of a possible child molestation. (XLII RT 12035.) He arrived at the scene that same day and Child Protective Services had the children taken out of the home. (XLII RT 12036.) Kupsky contacted Paul Smith, Sr., and scheduled him to report to the police station for an interview on January 10, 1983. (*Ibid.*) During this interview, Paul Smith, Sr. admitted to sodomizing his two sons and his daughter. (XLII RT 12037.) Paul Smith, Sr. told Kupsky that he did not know why he personally did it, but did remember telling the boys he was doing it to them as a form of punishment. (*Ibid.*) Paul Smith, Sr. admitted to committing this conduct for approximately two or two and a half years. (XLII RT 12038.) He stated that he did this "bi-monthly." Paul Smith, Sr. also admitted to having an "incident" with his sister when he was 15 or 16 years of age which forced him to be sent away from home for a short period of time. (*Ibid.*) Paul Smith, Sr. was arrested, prosecuted, convicted, and sentenced to state prison. (XLII RT 12039.) He agreed to enter pleas to the charges and demonstrated remorse to Kupsky. (XLII RT 12040.) Sergean Kupsky took appellant to Mercy Medical Center to be examined. (XLII RT 12041.)

Blanch Orsini testified for the defense. (XLII RT 12044.) Orsini has been a foster parent since the 1960s. (*Ibid.*) On June 9, 1983, Orsini became appellant's foster parent when he was five years old. (XLII RT 12045-12046.) Appellant had just come from another foster home. (XLII

RT 12046.) Appellant left Orsini's home on April 12, 1985, to go to a higher level home.[18] (XLII RT 12047-12048.) Orsini noticed that when she first took appellant into her home, he was impulsive and demonstrated inconsistent behavior. (XLII RT 12052.) According to Orsini, once appellant was prescribed Ritalin, his behavior changed for the better. (XLII RT 12053.) He performed better in school and was not as aggressive. (XLII RT 12054.) Orsini relayed that appellant had "anger in him" at a young age. (XLII RT 12058.) She stated that appellant had difficulties accepting affection from others. (XLII RT 12059.) Orsini appeared to attribute at least some of appellant's aggressiveness towards his attention deficit, hyperactivity disorder. (XLII RT 12062.) She testified that she did not remember any particular problems with appellant during his residency with her. (*Ibid.*)

On cross-examination, Orsini agreed with an earlier assessment that appellant was disobedient, destructive and aggressive. (XLII RT 12074.) He constantly broke the house rules by hitting and throwing rocks and tried to dominate other things in the home. (*Ibid.*) Orsini did recall that on one occasion, appellant, who was five or six years old at the time, broke the neck of one of the baby ducks she was raising at her house. (XLII RT 12075, 12078.)

James Briggs testified for the defense.[19] (XLIII RT 12092.) Starting in approximately 1983, Briggs began dating Doreen Ann Smith. (XLIII RT 12093.) Their relationship lasted approximately three years. During that

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[18] Orsini stated that appellant came back to her house in April of 1990, when he was 12 years old, and stayed with her for eleven days. (XLII RT 12060.)

[19] At the time of testimony, Briggs testified that he worked at Briarwood, a residential treatment center for juveniles, located in Reno, Nevada. (XLIII RT 12092.) He began this line of work after he broke off his relationship with Doreen Ann Smith. (XLIII RT 12106.)

time, Briggs testified that "a few times" he accompanied Doreen on visits to Timothy Smith and appellant. However, Briggs was not present during the actual visits with Timothy or appellant. (*Ibid.*) Briggs did, however, claim that he saw the very beginning of the visits and described appellant as "stand-offish" towards Doreen when first introduced to her. (XLIII RT 12094.) Over the course of a year, Briggs estimated that he accompanied Doreen on six to eight visits to her children. (*Ibid.*) He described the amount of time he was able to view appellant during these visits as ten to fifteen minutes. (XLIII RT 12106.) Briggs described Doreen as an inconsistent parent. (XLIII RT 12098.) He also stated that during the time he knew Doreen, she abused methamphetamine and alcohol and also used marijuana. (*Ibid.*)

Defense Investigator Arthur Wooden testified for the defense. (XLIII RT 12123.) He examined photographs of appellant after the June 22, 2002, beating of Officer Timothy Renault. (XLIII RT 12133.) Wooden noticed blood spatters on appellant's forehead, just below his hair line. (*Ibid.*) Wooden opined that appellant was standing two to three feet away from the source of the blood. (XLIII RT 12134.) In reviewing the photographs, Wooden stated that he saw no evidence of blood on appellant's hands. (XLIII RT 12138.)

Lyle Faudree testified for the defense. (XLIII RT 12165.) Faudree was a co-founder of Remi Vista Youth Ranch located in Whitmore, California. The ranch served as a rehabilitative center for juveniles involved in the criminal justice system. (*Ibid.*) Appellant was placed with Remi Vista Youth Ranch on April 12, 1985. (XLIII RT 12169.) Specifically within the ranch, appellant was placed at a home supervised by Francis Jones. (XLIII RT 12170.) Faudree testified that appellant did "pretty well" during his placement at Francis Jones' home. (*Ibid.*) Faudree described appellant as a young, charming man that everyone fell in love

with because of his smile. (XLIII RT 12172.) Appellant's behavior at the home responded to positive attention. (XLIII RT 12176.) Overall, Faudree described appellant as a happy child. (XLIII RT 12187.) In his experience, appellant was able to comply with directions and orders and knew right from wrong. (XLIII RT 12204.)

At one point, Francis Jones decided to go to graduate school and her son, Ken Sloan, took a more active role at the home within the Ranch. (XLIII RT 12178.) The home changed its certification from a foster care home to a group home named Under New Hope. (XLIII RT 12179.) Faudree attempted to make a distinction between foster care homes, which mostly housed children from broken families with Child Protective Services involved, and group homes, which housed children who had been involved in criminal activity. (*Ibid.*) According to Faudree's recollection, appellant was transferred to the Under New Hope home where Ken Sloan worked. (XLIII RT 12180.) Faudree had to consult with Ken Sloan because he spanked someone at Under New Hope. (XLIII RT 12181.) However, Faudree agreed that this was a one-time incident. (XLIII RT 12184.) On the whole, Faudree testified that, overall, Ken Sloan did "very well" in operating the home. (XLIII RT 12181.) He did mention that, at times, Ken Sloan would use his physical presence to intimidate children. (XLIII RT 12182.) However, Faudree admitted that he did not continue his contact with appellant when he was transferred to Under New Hope. (XLIII RT 12182-12183.)

Foster parent Barbara Granberry testified for the defense. (XLIII RT 12204.) On August 20, 1989, appellant was placed in her home. (XLIII RT 12209.) Up until that time, appellant had been staying at the Under New Hope group home managed by Ken Sloan. Appellant stayed with Granberry for two months, leaving October 27, 1989. (*Ibid.*) Granberry described appellant as "a very angry little boy" who was defiant. (XLIII

RT 12210-12211.) Granberry testified that she should have been better trained to handle appellant. (XLIII RT 12212.) After appellant got into an argument with another resident, Michael, at the home and threatened him, Granberry asked that appellant be transferred to another home. (XLIII RT 12213.) Specifically, appellant told Michael that when he was asleep, he would cut his throat. (XLIII RT 12225.) Granberry stated that the child appellant threatened was very aggressive. (*Ibid.*) She described appellant as being controlled by his anger. (XLIII RT 12213.) Granberry stated that near the end of his stay, appellant began threatening her which frightened her. (XLIII RT 12225-12226.) Because of appellant's threat to Michael, Granberry had to "give up" on appellant and ask that he be transferred.[20] (XLIII RT 12227.)

Barbara Granberry recalled that when Ken Sloan initially dropped appellant off at her house for transfer, he warned appellant. (XLIII RT 12216.) Specifically, Granberry heard Sloan instruct appellant how he should act in Granberry's home, how he should behave, and that if he didn't, he'd be going back to stay with Ken Sloan again, remarking "you don't want to do that, do you." (*Ibid.*) She opined that she thought appellant was intimidated by Ken Sloan. (XLIII RT 12218.)

Clinical psychologist Steven Blankman testified for the defense. (XLIII RT 12242.) Blankman met appellant in 1983 after he was made aware that Paul Smith, Sr., had molested appellant. (XLIII RT 12249.) Blankman testified that early childhood molestation, such as occurred to appellant, could, at worst, cause severe damage to a child that could persist

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[20] Granberry admitted to telling an investigator that she thought appellant was a sociopath and was going to be a serial killer. (XLIII RT 12227.) During her testimony, she stated that she regretted saying that. (XLIII RT 12228.) Granberry also admitted that she did not want appellant to get the death penalty. (*Ibid.*)

into adulthood. (XLIII RT 12253.) The damage would relate to a person's self-esteem, his ability to relate to people, and his ability to achieve goals in life. (XLIII RT 12254.) Blankman continued that, at worst, it can result in various psychological disorders, anxiety disorders, mood disorders, other even more serious psychological disorders. He stated that, in its most extreme form, it can disable a person, greatly interfering with their ability to form relationships, to enjoy intimacy, to be able to understand other people and their own feelings. (*Ibid.*)

On April 20, 1983, Steven Blankman interviewed appellant, who was five years old at the time, and submitted that interview to the Shasta County Child Welfare Department. (XLIII RT 12254.) During the interview, Blankman performed certain tests on appellant and described appellant as "uncooperative" during these tests. (XLIII RT 12258.) Based on his research of appellant's history, Blankman labeled the molestation of appellant as "severe." (XLIII RT 12260.) He also stated that Paul Smith, Sr.'s statement that he told appellant that the molestation was a punishment exacerbated the effect it had on appellant. (XLIII RT 12261.) In his testing, Blankman determined that appellant had average intelligence, an average IQ. (XLIII RT 12262.) The testing also indicated that appellant might suffer from mild neurological or developmental problems in hand-eye coordination and auditory/listening attention. (XLIII RT 12263.) Appellant also gave indication of being insecure as well as feeling overwhelmed and isolated. (*Ibid.*) Blankman diagnosed appellant to have an adjustment disorder with disturbance of conduct. (XLIII RT 12269.) His secondary diagnosis indicated a parent/child problem. (*Ibid.*) Blankman indicated as stressors in appellant's life the incest and the probable inconsistency and inadequacy of parental care and supervision. (XLIII RT 12270.) Blankman recommended weekly psychotherapy for appellant, especially if reunification was being considered with his family.

(XLIII RT 12271.) Blankman noted that appellant did not receive weekly psychotherapy from him and that he provided therapy for appellant twice a month. This limit was due to Medi-Cal funding for the therapy. (*Ibid.*)

Blankman wrote a second report to the social worker in charge of the Smith family regarding appellant in March of 1984. (XLIII RT 12279.) In that report, Blankman noticed improvement in appellant in that he displayed inappropriate aggression less frequently. (XLIII RT 12280.) After consulting with the entire family, except for Paul Smith, Sr., Blankman recommended that unless Doreen Ann Smith made substantial changes, appellant would be better off remaining in a foster home. (XLIII RT 12282-12283.)

On September 19, 1984, Steven Blankman wrote a third report to the social worker in charge of the Smith family. (XLIII RT 12283.) In that report, Blankman suggested that a permanent foster home placement should be considered for appellant. (*Ibid.*) Since the last report, Blankman noted that appellant's inappropriate aggression had increased. (XLIII RT 12284.) He attributed that to appellant's realization that he would not be returning to live with his mother and that his mother's visitation with him had ceased. (*Ibid.*) In response to a question from defense counsel, Blankman agreed that the Smith family was "possibly" as "bad" as any family he had come across in his practice. (XLIII RT 12287.)

Gary Janeiro testified on behalf of the defense. (XLIII RT 12306.) In 1980, Janeiro was a child therapist in youth services at the Shasta County Mental Health Department. (XLIII RT 12309.) In October of 1985, Lyle Faudree of Remi Vista, where appellant was staying, referred appellant to Janeiro for a determination of whether appellant would benefit from play therapy. (XLIII RT 12310-12311.) At the end of six sessions with Janeiro appellant had made some progress from the perspective of Janeiro, the school perspective and the foster home. (XLIII RT 12317, 12325.)

Janeiro's recommendation to Faudree was absent constancy, i.e., someone appellant could rely on, and absent him being in a place for a period of time where he could trust authority, Janeiro anticipated that appellant would have more aggressive kind of behavior. (XLIII RT 12319.)

However, on cross-examination, Janeiro admitted that in his discharge summary of appellant, he stated that after six sessions appellant was functioning fairly well and additional treatment was not needed at that time. (XLIII RT 12326.) Specifically, in his report, Janeiro noted that he saw in appellant's "play that he was healthy, normal, intelligent, he had good social skills and he showed sensitivity[.]" (XLIII RT 12327.)

Mary Ranken testified for the defense. (XLIII RT 12336.) Ranken was appellant's school principal at Manzanita Elementary School for approximately three years, starting when appellant was eight years old, and spent extensive time with him during the school day. (XLIII RT 12338, 12359.) She communicated with both appellant and foster parent Ken Sloan, with whom appellant was staying at the time. (XLIII RT 12342.) In her communication with Ken, it was clear that appellant loved Ken, thought of him as his father, and tried to imitate him. (*Ibid.*) Ken also capitulated, stating that he was always there for appellant and thought of him as his son. (XLIII RT 12342-12343.) However, Ken became less of a presence when appellant alleged that Ken Sloan physically abused him. (XLIII RT 12349.) Ranken reported this claim in a December 12, 1986, report and testified that she did not believe appellant's claim. (XLIII RT 12350.) However, it appeared to Ranken that appellant's living arrangement had changed at or around this time. (XLIII RT 12344.) Ken Sloan was not as involved in appellant's life and appellant's behavior changed as he became angrier and he started "hurting things and people." (XLIII RT 12345.)

Paul Smith, Sr.'s younger sister, Sarah Belongie testified for the defense. (XLIII RT 12363.) She testified that in 1969, their biological

father committed suicide. (XLIII RT 12364.) She also mentioned that prior to the suicide, her brother Paul Smith, Sr. was sent away from the family to stay at a mental facility. (XLIII RT 12364-12365.) Belongie testified that prior to her father dying, when she was in either fourth or fifth grade, Paul Smith, Sr. rubbed his penis up against her on more than one occasion. (XLIII RT 12374.) This occurred before he was sent to a mental facility. (*Ibid.*)

Frank Hartmann testified on behalf of the defense. (XLIV RT 12377.) From May of 1989 to March of 2001, Hartmann worked as a probation officer for Shasta County. (XLIV RT 12378.) In June of 1990, Hartmann worked as the intake officer for Juvenile Probation. (XLIV RT 12378-12379.) On June 19, 1990, Hartmann filed a juvenile petition alleging that appellant committed the offense of battery[21]. (XLIV RT 12383, 12390.) Since appellant was 12 years old at the time, Hartmann felt that his age was a positive factor in appellant's life. (XLIV RT 12396.) However, Hartmann also noted that, in his assessment of appellant, something was "broken" inside of him. (XLIV RT 12397.) On cross-examination, Hartmann testified that appellant was a good manipulator at juvenile hall, getting other juveniles to do things for him. (XLIV RT 12399.) He also admitted saying that appellant thought the world revolved around him. (*Ibid.*) Hartmann was also aware that on a previous occasion, appellant had threatened to burn down the foster home where he was staying. (XLIV RT 12401.) Hartmann was concerned that appellant was a danger to society. (*Ibid.*)

Debra Miller testified on behalf of the defense. (XLIV RT 12410.) Miller is Doreen Ann Smith's younger sister. (XLIV RT 12411.) Miller

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[21] Hartmann testified that the allegations in the petition were found to be true in court. (XLIV RT 12406.)

testified that she was around appellant's family from his birth in 1977 to when he was taken away from the home at the age of five. (XLIV RT 12412.) She testified that she lived behind appellant's family when appellant was approximately four years old. (*Ibid.*) Miller recalled that Doreen Ann Smith used to beat appellant and Timothy Smith quite often when they would make a mess around the house. (XLIV RT 12413.) Miller testified that Paul Smith, Sr. beat the boys as well. (XLIV RT 12423.) She also testified that Doreen Ann Smith made appellant and Timothy stay in a small space in the attic as punishment for starting a fire. (XLIV RT 12415.) Miller thought that appellant and Timothy were locked in this space on another occasion as well. (XLIV RT 12416.) Miller further stated that after the birth of Doreen Ann Smith's son Steven, Doreen began using drugs more frequently, using her most of her welfare money to purchase them. (XLIV RT 12420.) However, Miller also admitted that she was heavily using drugs with her sister at the same time. (*Ibid.*)

Raymond Trippo testified on behalf of the defense. (XLIV RT 12433.) Trippo, who was in custody at the time of testimony for violating his parole on an attempted robbery conviction, lived at Ken Sloan's group home at the same time as appellant. (*Ibid.*) Trippo testified that while he was staying there, he saw Ken Sloan hit appellant with boards and grab his hair. (XLIV RT 12435.) Trippo testified that he and appellant ran away from the group home numerous times. (*Ibid.*) Trippo stated that Ken Sloan, as punishment, would make a person move a pile of wood from one side of the house to the other and then back again to the original site. (XLIV RT 12438.) He testified that he saw appellant do this. (*Ibid.*) Trippo stated that when appellant got into trouble, Ken Sloan would call him a "little punk" or a "little bastard." (XLIV RT 12439.)

Daniel Macallair testified on behalf of the defense. (XLIV RT 12506.) Macallair is the Executive Director of the Center on Juvenile and

Criminal Justice, a non-profit public policy organization that conducts policy studies and provides technical assistance to correctional agencies nationally. (XLIV RT 12507.) Macallair was asked by the defense to examine appellant's personnel records and the conditions at the California Youth Authority ("CYA") at the time appellant was there and give an opinion of how it might have affected his later behavior. (XLIV RT 12518.) Appellant was housed in the CYA from February of 1995 to November of 1997. (XLIV RT 12518-12519.) Based on his research of appellant's records, Macallair testified that appellant tested at an educational level that was consistent with his age and grade, which was unusual in the CYA system.[22] (XLIV RT 12523.) He stated that appellant was sent to serve his time at the O.H. Close juvenile facility at a time when CYA as a whole was its most overcrowded in its history. (XLIV RT 12524.) Macallair stated that appellant was placed in the mainstream population and labeled the "programming" he received there as "not very extensive." (XLIV RT 12527.) Macallair opined that at appellant's placement, there was no one-to-one counseling and appellant would not have had access to a licensed mental health professional. Macallair stated that the only counseling that occurred during the time appellant was there was carried out by unit counselors who were trained at CYA's training academy in a six to eight week program. (XLIV RT 12527-1258.) Without giving specific reasons why, Macallair appeared to discount the unit counselors and their evening counseling in the areas of behavioral modification, anger management, and victim awareness. (XLIV RT 12528, 12549.) He stated that the problem with CYA was their lack of resources

[22] Macallair testified that it was his opinion that wards of the CYA usually test at two to three educational grade levels below where they should. (XLIV RT 12523.)

to provide the services they desired. Macallair testified that CYA's legislative purpose was rehabilitation. (*Ibid.*) However, he stated that the capacity of the CYA to provide long-term comprehensive rehabilitative services did not exist when appellant was housed there. (XLIV RT 12529.) He did admit that CYA did provide some specialized programs that were both good and administered by well-trained professionals. But, Macallair stated that these programs were not available to the vast majority of the CYA wards. He claimed that because of his level of functioning, appellant would not have been considered for one of these specialized programs as they are reserved for the most severely mentally ill wards within the CYA. (*Ibid.*)

While the "programming" occurred in the evenings, during the day appellant would attend school at the CYA from approximately 9:00 a.m. to 3:00 p.m. with a lunch break. (XLIV RT 12531.) After class, wards would receive recreation time. (*Ibid.*) Macallair testified that appellant did very well in school, and that he was "certainly ... able to achieve academically." (XLIV RT 12535.) He stated that appellant seemed to enjoy learning. (*Ibid.*) Macallair opined that because of competing interests, relationships between wards and the CYA staff do not develop. (XLIV RT 12534.) After reviewing his CYA file, Macallair stated that appellant had difficulty maintaining relationships and rebelled against authority. (XLIV RT 12535.) Within CYA, after spending four months at O.H. Close, appellant was transferred to the Preston School of Industry for about one year. (*Ibid.*) Macallair described Preston as a unit for older youths who were generally more criminally sophisticated. (XLIV RT 12536.) He labeled it a difficult and dangerous institution. (*Ibid.*) Macallair stated that while at Preston, appellant was placed in an isolation detention facility several times as punishment while at the CYA. (XLIV RT 12540.) However, Macallair

also noted that appellant received his high school degree equivalency while at Preston. (XLIV RT 12541.)

After his year at the Preston facility, appellant was transferred to the Chaderjian CYA facility where he received his most favorable report just prior to being released. (XLIV RT 12537-12538.) Macallair described Chaderjian as a high security CYA facility. (XLIV RT 12541.) It is where the most difficult wards are sent. (*Ibid.*) According to Macallair, the schedule and appellant's behavior difficulties were consistent throughout his stay at CYA. (XLIV RT 12537-12538.) In his opinion, appellant was sent to Chaderjian because of his inability to tolerate authority figures and the problems he was causing for CYA staff. (XLIV RT 12543.) In review of his file, Macallair noted that while at Chaderjian, appellant performed the best and excelled at a training program involving the fixing of computers. Appellant's records also demonstrated that while at Chaderjian, he started to actively participate in the group sessions which occurred during the evenings. Macallair found this to be significant. Appellant resided at Chaderjian for approximately one year, until he was paroled in November of 1997. (*Ibid.*)

On cross-examination, Macallair admitted that each of appellant's transfers at CYA were due to disciplinary reasons. (XLIV RT 12564.) He also admitted that during appellant's stay at Chaderjian, he was caught with a prison-made weapon. (XLIV RT 12565.)

Cedric Burgess testified for the defense. (XLIV RT 12577.) In 1992, Burgess worked for Capitol City Group Homes, a foster home for adolescents. While there, Burgess met appellant. (*Ibid.*) Burgess witnessed a fight between appellant and another resident of the foster home, Parish Parker. (XLIV RT 12578.) He also testified as to the strict nature of this particular foster home and how, in his experience, kids, generally,

responded better to an actual home like atmosphere. (XLIV RT 12580-12581.)

Greg Parker testified for the defense. (XLIV RT 12637.) In 1992, Parker was employed as an attorney for the California Department of Social Services. His job at that time was to prosecute violations of licensed facilities such as group homes, day care, and residential facilities. (*Ibid.*) In this capacity, Parker filed an action against Ken Sloan in either 1990 or 1991. (XLIV RT 12638.) In the action, allegations of physical abuse were filed against Ken Sloan, with appellant being a victim. (XLIV RT 12639.) Specifically, there were approximately seven or eight allegations of abuse against Ken Sloan involving appellant. (XLIV RT 12640.) Parker interviewed appellant as part of the investigation and appellant indicated that he was reluctant to testify against Ken Sloan because Sloan was like a father-figure to him. (XLIV RT 12645.) However, the Department of Social Services did adopt the Administrative Law Judges findings in exhibit T-TT which was entered into evidence. (XLIV RT 12648.)

Clinical neuropsychologist Myla Young testified for the defense. (XLV RT 12665.) At the time of trial, she worked as a supervising psychologist for the California Department of Mental Health. (XLV RT 12668.) Young also mentioned that she maintained a private practice where she performed forensic evaluations. (XLV RT 12669.) At the trial, she was testifying as part of her private practice. (*Ibid.*)

Young was retained by the defense in this case to work with appellant and to evaluate him. (XLV RT 12674.) Young was asked to administer a series of psychological and neuropsychology procedures on appellant, to review a very large number of documents, and to address the question of whether or not appellant experienced a mental disorder. Young described a mental disorder as any disorder that affects a person's brain, affects a

person's functioning producing clinical symptoms, making it difficult or impossible for that individual to function without assistance. (*Ibid.*)

Young met with appellant on six occasions spanning from 2001 to 2002. (XLV RT 12708.) During the testing period, Young found that appellant suffered a concussion as a result of a stun grenade used in a 2001 jail extraction. (XLV RT 12711.) This incident affected Young's ability to assess appellant's normal level of functioning. (*Ibid.*) Young reassessed appellant using the same tests in 2002. (XLV RT 12712.) Based on the battery of tests assessed in 2002, Young found appellant's intelligence quotient (IQ) was in the "high-average" range. (XLV RT 12724.) However, Young found that appellant's performance on all measures of attention and concentration was significantly impaired, with the impairment ranging from mild to moderate. (XLV RT 12726.) Young found that appellant's performance on all measures of memory and learning was significantly impaired. (XLV RT 12727.) Young testified that a claim that appellant suffered brain damage would be a "reasonable conclusion." (XLV RT 12734.)

Using the Rorshach test, Young found that appellant exhibited very serious depression or a mood disorder. (XLV RT 12758.) Young concluded that appellant experiences a mental disorder, calling it "depressive disorder." (*Ibid.*) Young also testified that appellant's performance on the Rorshach test "suggests" that his ability to perceive reality is not "accurate" and not similar to what other people might perceive. (XLV RT 12759.) Specifically, she testified that appellant's responses "suggest" that appellant is "in certain circumstances" vulnerable to misunderstanding a situation or possibly "grossly distorting" the situation. (XLV RT 12760.) Young also found, based on his Rorshach test, that appellant was "significantly vulnerable" to illogical thinking. (XLV RT 12761.) Young's last finding based on the Rorschach test is that

appellant is an angry man. (XLV RT 12762.) Young stated that this suggested that appellant had significantly greater needs for an emotional dependency on another than others do. (*Ibid.*) Young opined that appellant's anger might interfere with his emotional needs being met. (XLV RT 12763.) Young found that appellant's emotional maturity was significantly less than for other adults his age. (XLV RT 12765.)

Young testified that combining appellant's emotional needs with his brain disorder could result in appellant acting in an irrational way. (XLV RT 12766.) When presented with appellant's family situations, Young opined that these factors could have led to his brain damage. (XLV RT 12772-12773.) In her diagnosis of appellant, Young diagnosed a depressive disorder, or depression, a psychotic disorder, a post-traumatic stress disorder, and a cognitive or brain disorder. (XLV RT 12792.)

On cross-examination, Myla Young did admit that she reviewed the psychological evaluation of appellant by CYA psychologist Derek Washington in April of 1996. (XLV RT 12810.) In that evaluation, Young admitted that Washington found no evidence that appellant suffered from a major mental disorder, organic brain disease, or affective dysfunction. (XLV RT 12811.) Young also admitted that she reviewed the November 23, 1991, psychological evaluation of appellant for discharge from the facility by Norman Ballinson of the Modesto Psychiatric Center. (XLV RT 12812-12813.) Young admitted that in that report Ballinson found appellant suffered from no organic cerebral dysfunction. (XLV RT 12813.) Young also admitted that, unlike her tests of appellant, the Modesto Psychiatric Center actually took physical samples from appellant and conducted tests for tests for thyroid function, urine and substance abuse screening, and an electrocardiogram. (XLV RT 12802, 12814.) Young also admitted to reviewing Dr. Jeffrey Miller's October 3, 1986, report regarding appellant which found that appellant demonstrated no evidence of

any kind of learning disability or neuropsychological impairment. (XLV RT 12814-12815.) Young also admitted to not performing a brain scan on appellant to support her findings. (XLV RT 12815.) Young admitted on re-cross examination that Dr. Jeffrey Miller, like herself, utilized the Weschler Intelligence test, the Rorschach ink block test, and the wide range achievement test in their assessment of appellant. (XLV RT 12823.)

Elzena Metcalf testified on behalf of the defense. (XLV RT 12836.) On August 30, 1991, Metcalf was employed as a social worker/therapist at the Excel Center in Turlock, California. The Excel Center is a residential treatment center for children. (*Ibid.*) During what was described as a very short period of time, Metcalf acted as appellant's therapist as he resided at the center. (XLV RT 12837.) Metcalf described appellant as "a very disruptive young man who had a lot of anger and expressed it through disruptive behavior and defiance and anger outbursts." (*Ibid.*) Metcalf testified that she was not able to make progress with appellant during their brief time together. (*Ibid.*) Metcalf opined that appellant did not trust anyone and would not let anyone know what was going on inside of him because he was abused at an early age by a person he trusted. (XLV RT 12838.)

On cross-examination, Metcalf testified that the Excel Center did have an on-campus school for severely emotionally distressed children. (XLV RT 12841-12842.) Appellant did not fit into that category. (XLV RT 12842.) From August of 1991 to December of 1991, appellant had 64 incident reports at Excel. (*Ibid.*) During his stay, appellant attacked two staff members at Excel. (XLV RT 12845-12846.) Appellant was sent to the Modesto Psychiatric Center for evaluation and spent three weeks there before coming back to Excel. (XLV RT 12846.) Appellant was terminated from the program at the Excel Center. (XLV RT 12844.)

Michael Bringle testified for the defense. (XLV RT 12901.) In 1985, Bringle was a social worker for Child Protective Services. (XLV RT 12902.) At that time, appellant was one of the children in his caseload. (XLV RT 12903.) At the time, appellant was staying in the foster home run by Frances Jones. (XLV RT 12904.) Bringle, through his notes, testified that Frances Jones and her son Ken Sloan were interested in becoming appellant's guardians. (XLV RT 12907.) Appellant was aware of their interest, but Jones and Sloan never became his guardians. (*Ibid.*) Appellant was moved to Ken Sloan's group home because they provided more services than a foster home could. (XLV RT 12908.) Bringle received a report that Sloan hit appellant with a 2x4 piece of wood and another report that Sloan had spanked appellant. (XLV RT 12909.) Sloan was counseled on the inappropriateness of corporal punishment. After personally interviewing appellant, Bringle did not believe the report that Sloan hit appellant with the piece of wood as alleged. (*Ibid.*) Appellant did run away from Sloan's group home, but upon talking to him, Bringle determined that appellant did want to return to the group home. (XLV RT 12913.) Because of deviant behavior, Bringle recommended that probation take supervision of appellant. (XLV RT 12917-12918.)

On cross-examination, Bringle testified that he found appellant to be manipulative. (XLV RT 12934.) Further, Bringle found that appellant's behavior became more and more aggressive when people tried to get him to do things he did not want to do. Appellant never expressed remorse for any of his misdeeds. (*Ibid.*)

Darla Mandel testified for the defense. (XLVI RT 12952.) At that time, Mandel ran the Environmental Alternatives Warner Mountain Group Home in Modoc County. (XLVI RT 12953.) From 1972 to 1993, Mandel worked for a group home referred to as "I'SOT" also located in Modoc County. Mandel met appellant through his placement with I'SOT in 1991.

(*Ibid.*) Mandel remembered that appellant had a hard time accepting help from anybody. (XLVI RT 12964.) Mandel recalled an incident where appellant was staying at the home and was told that he could not play an outdoor game. (XLVI RT 12966.) Appellant became mad. Appellant retrieved a baseball bat and climbed on top of the truck of an involved staff member and hit the windshield with the bat. Mandel noted appellant went from calm to angry very quickly. She also stated that appellant was not amenable to individual or group counseling as he had a hard time opening up to others. (*Ibid.*) Mandel stated that, in her opinion, appellant trusted no one. (XLVI RT 12967.) Mandel opined that appellant was afraid of adults, afraid of trusting them, afraid of being overpowered. (XLVI RT 12973.) She did not feel that I'SOT was an appropriate setting for appellant and that he would have benefitted from a more therapeutic environment. (XLVI RT 12968.) Mandel believes that she recommended psychiatric intervention for appellant. (XLVI RT 12975.) Appellant was terminated from I'SOT because he stole a gun from staff member Randy Anderson. (XLVI RT 12976-12977.)

Appellant testified on behalf of the defense. (XLVI RT 12989.) Appellant recalls "one time" he was sodomized by his father. He remembered seeing his father sodomize his older brother Timothy "at least once." (XLVI RT 12994.) Appellant stated that he only remembered one incident of sodomy by his father. Appellant testified that his father told him he was doing this as punishment for them being bad. (*Ibid.*) Other than that, appellant stated that he did not recall very much about his father. (XLVI RT 12989.) He testified that he vaguely remembered his mother. (XLVI RT 12990.) He did recall that his mother and father would get drunk and fight each other. (*Ibid.*) Appellant testified that he did tell his mother that his father sodomized him and, to the best of his recollection, his mother reported it to his grandmother and nothing else happened. (XLVI

RT 13004-13005.) Appellant remembered being locked in an attic as a child. (XLVI RT 12991.)

Appellant remembered that when he was in second grade and staying with Frances Jones that her son Ken Sloan promised that as soon as he got his group home established he was going to adopt appellant. (XLVI RT 13017.) Appellant stated that he was impatient for this to happen but Ken Sloan did not adopt him. (*Ibid.*) Appellant recalled that Ken Sloan punished him by spanking him infrequently. (XLVI RT 13018.) Appellant stated that the actual spanking, which occurred while he was clothed, did not hurt, but it was the simple act of being punished that mattered. Ken Sloan would explain to appellant why he was disciplining him. (*Ibid.*) Appellant stated that he loved Frances Jones and Ken Sloan. (XLVI RT 13020.) He testified that Ken Sloan started to change, becoming more sensitive and mean. (XLVI RT 13021.) Appellant stated that Ken had slapped him in the past when he got mad. (*Ibid.*) Appellant reported this conduct to Mike Bringle. (XLVI RT 13023.) Mike Bringle confronted Ken Sloan about it which only made Ken more mad. (*Ibid.*) Also as punishment, Ken Sloan made appellant and other children move either a rock or lumber pile from one spot to another. (XLVI RT 13024.) Appellant remembered running away "several times" from the New Hope Group Home that Ken Sloan was running. (XLVI RT 13026.) Appellant stated that he became fearful of Ken Sloan because Ken became unpredictable. (XLVI RT 13027.) Appellant then recounted several positive activities that Ken Sloan did with him. (XLVI RT 13027-13029.)

Appellant testified that he was embarrassed to talk about his father's molestation of him because he thought he did something wrong. (XLVI RT 13035.) Contrary to Mike Bringle's testimony, appellant stated that Bringle never told him he had the option not to return to Ken Sloan's group home. (XLVI RT 13037.)

Even though he admitted to kicking Christopher Hill in the head, appellant denied forcing him down on another resident's penis while staying at the Helping Hands group home. (XLVI RT 13050.) Appellant also claimed to being forcibly sodomized by a ward named Melvin Green while staying at Ken Sloan's group home. (XLVI RT 13052.) Green was 16 at the time and appellant was 8 years old. Green told appellant not to tell anyone or he would kill him. (*Ibid.*) This was why appellant ran away from Ken Sloan's group home the last time before being transferred. (XLVI RT 13053.) Appellant reported the sodomy to Ken Sloan. Appellant claims that Ken called appellant a liar and smacked him on the head with a board. (*Ibid.*) This caused appellant to fall down and resulted in a bump on his head. (XLVI RT 13054.) Appellant stated that he told Molly (Mary) Ranken at school that Ken Sloan did this, but claimed that she did not believe him. (*Ibid.*)

Appellant stayed with Ralph White at the Stockton Youth Foundation at an undisclosed time. (XLVI RT 13059.) Appellant admitted to lighting White's door on fire after running away from the facility. (XLVI RT 13060.) Appellant stated that he met his father at this time who had recently been released from prison. (XLVI RT 13062.) Appellant asked his father about the molestation, but his father would not talk to him about it, saying they would talk at a later time. His father began visiting him at Ralph White's facility and appellant eventually started visiting with his father at his father's residence. (*Ibid.*) Appellant eventually was allowed to stay with his father for "quite a few months" from 1993 to 1994. (XLVI RT 13063.) Appellant's father asked probation to end this residential relationship with appellant because he was not following the rules. (XLVI RT 13065.) It appears from the record, that appellant had a sexual relationship with Jessica and she had their child Bridgit on August 5, 1994.

(XLVI RT 13064.) Appellant was in juvenile hall until the date of Bridgit's birth. (XLVI RT 13065.)

While at the California Youth Authority, appellant testified that he requested to go the Chaderjian facility and was transferred there from Preston. (XLVI RT 13071.) Appellant stated that he was paroled from CYA on November 11, 1997, and was released to his grandmother's home, where his father was staying. (XLVI RT 13074.) Appellant testified that he did not stay there very often. (XLVI RT 13075.)

Appellant stated that he married Jessica on February first or second in 1998, because she insisted on it, but described not having much of a relationship with her. (XLVI RT 13076-13077.) They got married in Reno, Nevada. (XLVI RT 13077.) According to appellant, on their way back from Reno, Mike Murchison kept mentioning that he wanted a gun. Appellant met Murchison through his uncle and they spent a lot of time together. Because he knew people in Stockton from when he resided there, appellant offered to help Murchison purchase a gun. (XLVI RT 13078.) Appellant stated that Mary Shelton let Murchison borrow the money to buy the gun on the promise that he would pay her back. After appellant and Murchison purchased the gun, they took it back to the motel where the entire party was staying. Shelton began asking how Murchison was going to pay her back. (*Ibid.*) Appellant began thinking of ways to acquire money. (XLVI RT 13079.) Appellant stated that he felt it was alright to steal money from gang members and drug dealers because "they weren't nothing." Appellant also suggested they rob pimps or prostitutes. (*Ibid.*) Appellant did admit "trying to" rob prostitute Glenda Jones. (XLVI RT 13080.) Although he did not admit to shooting the rifle at her, he did admit that "a round did go off" while he was holding the rifle, but claimed he did not know why. (XLVI RT 13080-13081.) Appellant admitted to having sex with Glenda Jones and then offering to pay her. However, when she

stepped out of the car, Murchison handed him the rifle. (XLVI RT 13081.) Appellant held the gun up to Jones' knees and she took off running from the back of the car to the front of the car. (XLVI RT 13082.) This is when appellant claims the rifle went off while he was holding it. (XLVI RT 13083.) Appellant admitted to losing his wallet during this incident. (*Ibid.*) When he went back for it, he was arrested. (XLVI RT 13084.) Appellant was released from custody on March 6, 1998. (*Ibid.*)

Appellant made his way back up to Redding and recalled meeting Amy Stephens in late March of 1998 at the Mercy/Redding Medical Center. (XLVI RT 13085.) He had reunited with his sister Lori Smith just prior to that. (XLVI RT 13085-13086.) Amy Stephens told appellant that her foster home father was molesting her so appellant offered to find a place for her to stay. (XLVI RT 13087.) Appellant took her to stay with Barbara Atkinson, who is Cody Cannady's mother. (*Ibid.*)

Later that month, appellant, Lori Smith, Eric Rubio, Amy Stephens and Lora Sinner decided to go camping. (XLVI RT 13087.) They took Lora's car because appellant wrecked his. (XLVI RT 13088.) According to appellant, he met Lora Sinner when she drove up to Barbara Atkinson's house with Lori Smith, asking for a place to stay. (XLVI RT 13088.) At the time, appellant was staying at Atkinson's house with Amy Stephens. (XLVI RT 13089.) Lora Sinner and Lori Smith began staying there as well and Eric Rubio joined the group a couple of days later. Eric Rubio mentioned that he had a place where they could go camping and they all decided to go. (*Ibid.*)

Appellant testified that prior to the death of Lora Sinner, he did not plan to kill her. (XLVI RT 13089.) He stated that he did not tell anyone that he planned on killing her. Appellant did admit to participating in the death of Lora Sinner. He said he did this because he thought she was dying. (*Ibid.*) Appellant testified that when Lori Smith, Amy Stephens and

Lora Sinner began fighting, he told them to stop. (XLVI RT 13091.) He told them to stop because Lora Sinner did not do anything so it was not right to beat her up. (XLVI RT 13092.) After the fight, appellant felt Lora Sinner's head which he described as soft where it was supposed to be hard. (*Ibid.*) Later that evening, appellant made the decision to kill Lora Sinner because he thought she was dying. (XLVI RT 13093.) Appellant accepted responsibility for Lora's death, but denied torturing her. However, he did admit to cutting her wrists, but did not think that cutting Lora's wrists hurt her. (*Ibid.*) Appellant denied pouring alcohol over Lora's cut wrists. (XLVI RT 13094.) Appellant admitted to hitting Lora Sinner in the head with the dent puller in an attempt to kill her. He also admitted to putting plastic bags over her head, but claimed she was not breathing at the time. (*Ibid.*) Appellant denied being in charge of the camping party. (XLVI RT 13095.) Instead, appellant claimed he was trying to take care of the other people in the camping party. (XLVI RT 13096.)

Appellant admitted to owning the weapon fashioned from a metal tray which was located in his mattress at the Shasta County jail. (XLVI RT 13103.) Appellant also admitted to owning the stick made up of rolled up newspapers, but claims he used that to put under his cell door to keep out noise and water when other people flood their rooms. (XLVI RT 13104.) Even though he did believe he deserved to locked up for his participation in the murder of Lora Sinner, appellant testified that he still planned to escape from jail. (XLVI RT 13105-13106.) Appellant admitted to wanting pictures of the outside of the jail to help plan his escape. (XLVI RT 13106.) Appellant admitted to planning his escape from the jail in May of 2002. (*Ibid.*) Appellant gave the details of his planned escape from jail. (XLVI RT 13107-13110.) After this plan was discovered, appellant started a second plan for escape from jail. (XLVI RT 13110.) Appellant gave the details of this second plan to escape from the jail, which involved an assault

on a jail officer. (XLVI RT 13110-13112.) Initially, appellant did not want to assault Officer Renault because he was new and appellant did not know his badge number which would have been important when he pretended to be him during the escape. (XLVI RT 13115.) Appellant testified that he never discussed killing a cop. (XLVI RT 13116.)

At 4:00 a.m. on the day of the incident, Officer Renault was doing his rounds when appellant and inmate Williams came out of the shower area and attacked him. (XLVI RT 13117.) As they attacked Officer Renault, appellant claimed that Williams began hitting the deputy and appellant pushed the officer away from himself. (XLVI RT 13118.) Appellant denied every hitting Officer Renault, but did admit to grabbing him by the shirt. (XLVI RT 13119.) Appellant claimed that they built their escape plan specifically so that Officer Renault would not be hurt. (XLVI RT 13120.)

On cross-examination, appellant admitted to rationalizing the things he does when he is doing them. (XLVI RT 13129.) Appellant admitted that part of his plan to escape included assaulting a deputy and he could not explain why he did not stop inmate Williams from attacking Officer Renault. (XLVI RT 13134.) Appellant also claimed he did not know why Officer Renault was screaming as he held him while inmate Williams attacked. (XLVI RT 13146.) Appellant denied taking Officer Renault's radio during the assault. (XLVI RT 13151.) Appellant admitted to getting into several altercations with Shasta County Sheriff's Deputies and admitted threatening them as well. (XLVI RT 13169.)

In regards to the murder of Lora Sinner, appellant stated that he did not tie her up. (XLVI RT 13175.) Appellant claimed he was not there when Lora was tied up. (*Ibid.*) Appellant denied making Lora Sinner write a check for money that she did not have in her account. (XLVI RT 13177.)

However, he did state that he may have suggested it to her. He also denied taking the $50 Lora received from her father. (*Ibid.*)

Appellant testified that his father posted his bail from CYA because appellant threatened him. (XLVI RT 13186.) Appellant threatened to implicate his father in the arson, the setting fire of the door, the previous night. (*Ibid.*)

On re-direct examination, appellant denied striking the car windshield with a bat while residing at the I'SOT facility. (XLVI RT 13199.) Appellant claimed another ward of the home did that. (XLVI RT 13200.)

Rothell Williams testified for the defense. (XLVI RT 13229.) In 1994, Williams ran a group home at his residence in Stockton, California. (XLVI RT 13230.) At the time, appellant's brother, Timothy Smith, was living with Williams. (*Ibid.*) Hearing that appellant needed to be placed, Williams interviewed him in Redding and brought appellant back to live with him. (XLVI RT 13231.) Appellant stayed with Williams for six to eight months. (XLVI RT 13232.) At the residence, appellant shared a room with his brother. (*Ibid.*) Williams, who along with his wife are African-American, saw no signs of racial tension in appellant. (XLVI RT 13233.) Williams testified that appellant acted as he was supposed to while he stayed with him. (XLVI RT 13234.) He admitted to referring to appellant's performance as "marginal" for a probation report. (*Ibid.*) Appellant earned the privilege to go back to Redding and visit with his family. (XLVI RT 13237.) On one such occasion, appellant was arrested. Williams met with appellant who showed remorse for what had happened. Williams testified that he was willing to take appellant back. (*Ibid.*)

Lisa Rowe testified for the defense. (XLVI RT 13242.) In 1991, Rowe worked for McCallister Ranch, a group home in Palo Cedro, California when appellant stayed there. (*Ibid.*) Rowe established a relationship with appellant, seeing him on a daily basis. (XLVI RT 13244.)

Rowe even took appellant out to family gathering. (XLVI RT 13245.) Rowe considered adopting appellant but could not given that she was a single mother with two children. (XLVI RT 13246.) Rowe left McCallister ranch when she became pregnant. (XLVI RT 13247.) She told appellant that she could not adopt him given her current situation. (XLVI RT 13248.) Appellant was very upset by the decision. (*Ibid.*) It took him a year to get over his disappointment over not being adopted by Rowe. (XLVI RT 13249.)

Appellant's older sister, Rebecca Brown, testified for the defense. (XLVII RT 13270.) Brown detailed that she remembers being molested by her step-father, Paul Smith, Sr., since the age of three. (XLVI RIT 13271.) Paul Smith, Sr., told her he was doing it to punish her. (XLVII RT 13272.) She also saw him molest appellant "a few times." Brown testified that Paul Smith, Sr., molested appellant until he was taken away from the home. Brown detailed that she told her mother of the conduct and her mother tried to beat Timothy up when he reported it to her. (*Ibid.*)

Psychiatrist George Woods testified for the defense. (XLVII RT 13274.) Woods was retained by the defense to determine whether appellant suffers from a mental disease or a psychiatric disorder. (XLVII RT 13280.) Woods personally examined appellant three times in preparation for the assessment, starting in April of 2002. (*Ibid.*) Based on his research, Woods opined that appellant was raised in a feral, or wild, environment. (XLVII RT 13284.) In addition to the sexual abuse, Woods opined that neglect and abandonment existed in appellant's family upbringing. (XLVII RT 13286.) Woods analyzed appellant's medical records and suggested that appellant was not given the type of treatment he required given his level of damage. (XLVII RT 13303.)

Woods testified that, in his opinion, appellant suffers from a post traumatic stress disorder that is chronic, severe, and manifests itself in

behavioral problems. (XLVII RT 13312.) In examining appellant, Woods found "affective numbing," an inability to have a range of emotion. (XLVII RT 13303.) Woods opined that, based on the testing of Myla Young, appellant has a high potential to make "damaged" choices because he perceives things differently and his anxiety is so high that it impairs his ability to think through problems. (XLVII RT 13333.) Further, appellant has problems with attachment. (XLVII RT 13338.) In conclusion, Woods opined that symptoms of appellant's mental disorder were present at the time of the offense for which he's been convicted which impaired his ability to conform his behavior to the law. (XLVII RT 13352.) Woods specifically stated that he was not saying that appellant was not responsible legally for his actions. However, he did testify that from a psychiatric standpoint appellant has difficulty conforming his behavior. (*Ibid.*)

On cross-examination, Woods admitted that he did not perform any physical exams such as PET scans, CAT scans, or blood tests to rule out organic brain damage. (XLVII RT 13353.) Also on cross-examination, Woods admitted that, contrary to his diagnosis that appellant possessed the inability to experience a range of emotion, appellant did express love for Lisa Rowe and initially for Ken Sloan. (XLVII RT 13354.)

Penalty Phase – Rebuttal

Janet Green testified in rebuttal for the prosecution. (XLVII RT 13377.) From March to October of 1980, Green worked as a social worker for Shasta County Child Protective Services. She performed this duty for a total of 28 years. In the 1980 time frame, Green was assigned to participate in an intervention with Doreen Smith and Paul Smith, Sr. Specifically, Green provided service to the family for six months. (*Ibid.*) This was a voluntary program and the Smiths agree to participate in it. (XLVII RT 13378-13379.) A homemaker was assigned to the home, visiting two to three times a week, two to three hours per visit, and would provide

guidance on hands-on parenting. (XLVII RT 13379.) She also taught life skills such as money management, shopping for food, arranging and transportation to medical appointments. (XLVII RT 13380.) She was also available to the family five days a week in case of an emergency. A public health nurse was also appointed to the Smith family who would visit the family and discuss developmental issues regarding the children. The children were also enrolled in the Head Start pre-school program. One of the children demonstrated speech difficulties, so he was assessed for proper treatment. (*Ibid.*)

In her assessment Janet Green found general neglect in the Smith household. (XLVII RT 13382.) Based on her observations, more would have been required to merit court involvement. (*Ibid.*) During the period in question, March 1980 to October 1980, Green saw no danger to the children that would have merited a referral to the court system. (XLVII RT 13383.) On cross-examination, Green testified that the Smith household was not "corrected" a great deal and found Doreen Smith to be passive in the process. (XLVII RT 13390.)

Ann Stowe testified for the prosecution. (XLVII RT 13409.) Since 1988, Stowe has been employed as a probation officer in Shasta County. In October of 1990, Stowe worked with appellant in her attempt to place him in an appropriate home. (*Ibid.*) Appellant had three prior placements before Stowe got involved. (XLVII RT 13415.) Prior to Stowe's involvement, appellant was placed with Endless Bridges home on July 9, 1990. (XLVII RT 13416.) He was terminated from that program in December of 1990 for aggressive, assaultive behavior toward the other minors. (XLVII RT 13416, 13420.) In December of 1990, appellant was placed with McCallister Ranch. (XLVII RT 13421.) He was terminated from that program on April 29, 1991, for aggressive, assaultive behavior toward the other minors. On June 24, 1991, appellant was placed with

Thurman Stockton. He was terminated from that program on August 27, 1991, because he was verbally and physically assaultive. (*Ibid.*) After this termination, Stowe became involved and placed appellant with the Excel Center in Turlock, California. (XLVII RT 13422.) Stowe testified that she chose this program because it is highly structured with a campus-like setting that has an intensive treatment plan and program. Stowe made several visits to the Excel Center while appellant was staying there and felt it was an appropriate placement for him. Specifically, Excel submitted a treatment plan for appellant that was very detail-oriented and aimed at addressing many of the issues appellant had. (*Ibid.*) Appellant was terminated from the Excel Center on November 27, 1991, due to assaultive and aggressive behavior which culminated in appellant stabbing a staff member with a pen.

On December 23, 1991, appellant was placed with the I'SOT facility in Canby. (XLVII RT 13427.) He was terminated from that program on May 15, 1992, due to appellant stealing a firearm which was proven in Juvenile Court. (XLVII RT 13430.) On June 9, 1992, appellant was placed with the Good Samaritan in Orangevale, California. (XLVII RT 13431.) He was terminated on July 13, 1992, for running away from the program which triggered another violation of probation. (*Ibid.*) On August 4, 1992, appellant was placed with Capital City in Sacramento, California. (XLVII RT 13432.) Appellant was terminated from that program on October 19, 1992, because he committed the crime of battery which was sustained in Juvenile Court. (*Ibid.*) On December 23, 1992, appellant was placed with the Stockton Youth Foundation. (XLVII RT 13433.) Appellant was terminated from that program on September 11, 1993, for running away from the program, causing a warrant to be issued for his arrest. (XLVII RT 13434.) Appellant turned himself into Shasta County Juvenile Hall on November 26, 1993. (*Ibid.*) After this, based on evidence that the Stockton

Youth Foundation presented to probation, they attempted to re-unify appellant with his biological father on a trial placement. (XLVII RT 13435.) They did this because Stockton Youth Foundation found that appellant lacked any motivating factor to participate in a program. (XLVII RT 13434.) However, re-unifying with his father was a motivating factor toward what appellant wanted. (XLVII RT 13435.) Stowe personally got indications that appellant wanted this re-unification with his father. (*Ibid.*) This was also based on prior performance. Before appellant had run away, he did have a few re-unification contacts with his father. (XLVII RT 13436.) Appellant had been allowed to visit his father on a few weekend visits. According to Stowe, this appeared to motivate appellant and he became more settled than he had been previously. (*Ibid.*)

On January 11, 1994, probation made the recommendation to the court that appellant be allowed to stay with his father and his father's mother on a trial basis. (XLVII RT 13437, 13479.) Appellant and his father met with a social worker at the Stockton Youth Foundation to discuss whether this placement would be beneficial. (XLVII RT 13460.) On March 1, 1994, Ann Stowe filed a violation of probation. (XLVII RT 13437.) Appellant's father informed Stowe that appellant could not follow the rules and regulations set for the home. (XLVII RT 13439.) Appellant was placed in juvenile hall. Stowe was then reassigned from appellant. Stowe testified that her main focus in trying to place appellant was what would be in his best interest. (*Ibid.*)

Sheri Leitem testified for the prosecution. (XLVII RT 13493.) In 1994, Leitem was a juvenile placement officer with Probation responsible for locating placements for minors and supervising minors in out-of-home placements. (XLVII RT 13495.) In March of 1994, Letiem took over appellant's file for placement. At this time, appellant was on a trial placement with his father. That placement was unsuccessful and appellant

returned to Juvenile Hall. After several months of looking for a placement, in August of 1994, appellant was placed at the Williams Foundation in Stockton, California, run by Rothell Williams. (*Ibid.*) Leitem described the difficulties she faced trying to place appellant, being rejected by 11 prospective placement homes. (XLVII RT 13496.) Leitem estimated that approximately half of the prospective homes personally interviewed appellant prior to rejecting him. (XLVII RT 13497.) Leitem met with appellant in her efforts to place him and found him uncooperative and manipulative. (*Ibid.*) One of the reasons appellant was rejected by all of the prospective homes was because he would not commit to participating in the program when being interviewed by placement staff. (XLVII RT 13498.) Leitem had exhausted all efforts and due to appellant's unwillingness to participate and absence of willing programs, she recommended that appellant be committed to the Youth Authority. Leitem felt that appellant would benefit from the programs offered by CYA. She made this recommendation to the Juvenile Court, however, they gave appellant one last chance at the Williams Foundation. (*Ibid.*) Appellant was at the Williams Foundation for several months. (XLVII RT 13499.) However, while on a Christmas home-pass to visit his family, appellant was involved in a new offense. Based on this new offense, Leitem recommended that appellant be committed to the CYA. The Juvenile Court agreed. (*Ibid.*) On cross-examination, Leitem agreed that she thought appellant was psychologically damaged and she had never seen a minor go through as many placements as appellant had. (XLVII RT 13504.)

State of California Special Investigator Gary McGhee testified for the prosecution. (XLVII RT 13512.) In 1992, McGhee investigated abuse allegations appellant made against Ken Sloan. (*Ibid.*) McGhee performed this investigation in regard to the license of the group home operated by Sloan, however, if criminal evidence did arise, he stated he would have

contacted the local District Attorney's Office with that information. (XLVII RT 13513.) Specifically, appellant made four separate allegations of abuse against Sloan. Appellant alleged that Ken Sloan struck him with a stick, pulled him up by his ears, hit him with a belt, and hit him with a hammer. (*Ibid.*) McGhee testified that none of these allegations rose to the level of a criminal incident. (XLVII RT 13515.) In his investigation, McGhee found that two of the allegations, that Ken Sloan picked him by the ears and that Sloan hit him with a hammer, deserved to be addressed by the administrative court on a preponderance of the evidence standard. McGhee personally interviewed Ken Sloan who admitted lesser conduct. (*Ibid.*) McGhee determined that neither of the remaining two allegations necessitate medical care for appellant. (XLVII RT 13517.) Regarding the ear pulling incident, McGhee could not determine that Sloan actually pulled appellant up with any force by his ears. Witnesses indicated that appellant could have been pulled up by his shirt and that the force was not enough to pull appellant up off of the ground. (*Ibid.*) Specifically, McGhee found no indication of abuse by Ken Sloan towards appellant, labeling the conduct consistent with corporal punishment. (XLVII RT 13518-13519.)

Paralee Roberts testified for the prosecution. (XLVII RT 13528.) Roberts has been a teacher since 1982. (XLVII RT 13533.) Her husband was the executive director of Endless Bridges Group Home. (XLVII RT 13535.) She acted as a tutor, mentor, and person that took minors out on activities at the group home. (*Ibid.*) On July 18, 1990, appellant was placed with the Endless Bridges Group Home. (XLVII RT 13536.) Roberts did not feel comfortable being in a room alone with appellant as he threw frightening temper tantrums. (XLVII RT 13537.) During group sessions at the home, appellant spoke openly about harming animals. (XLVII RT 13547-13548.) Specifically, appellant talked about decapitating and strangling cats and dogs. He also talked about picking at

birds until they had no feathers. (XLVII RT 13548.) Roberts testified that the conviction with which appellant made these statements was frightening. (*Ibid.*)

CYA Staff Psychologist Dr. Derek Washington testified for the prosecution. (XLVIII RT 13656.) On April 18, 1996, Washington performed an evaluation of appellant while he was at the Preston facility. (XLVIII RT 13663.) Washington interviewed appellant for approximately one hour. (*Ibid.*) In the evaluation, Washington found no symptoms of any major mental disorder. (XLVIII RT 13664.) Washington noted that appellant's thinking was coherent, focused and goal-oriented. He also noted that appellant clearly demonstrated a recognition of the difference between right and wrong and had a clear perception of what he wanted to do with himself when he got out of CYA. (*Ibid.*) Washington found appellant had no symptoms of organic brain disease. (XLVIII RT 13665.) Washington found appellant had no symptoms of affective dysfunction. (XLVIII RT 13666.) After reviewing appellant's file and interviewing him, Washington found that appellant did not have much motivation to rehabilitate himself because appellant did not believe he had any problems. (XLVIII RT 13671.) Washington made clear that psychotherapy was available to him and explained the procedure to attain such services, but appellant stated that he was not interested. (XLVIII RT 13672.) Washington found that appellant had an anti-social personality disorder. (XLVIII RT 13673.) On cross-examination, Washington testified that appellant did not suffer from post-traumatic stress disorder. (XLVIII RT 13691.)

Psychiatrist John Shale testified for the prosecution. (XLVIII RT 13699.) Shale did not agree with Myla Young's finding that appellant suffered from major depression. (XLVIII RT 13713.) Specifically, Shale testified that Young failed to provide any data to substantiate that appellant

suffered from depression. (XLVIII RT 13714.) Shale found that in making her diagnosis, Young did not review the criteria of depression. (XLVIII RT 13717.) She did not present any evidence of depression. (*Ibid.*) Shale also testified that Young's diagnosis that appellant suffered from a cognitive disorder is too vague to be of use because that particular diagnosis does not include any criteria. (XLVIII RT 13717-13718.) Shale also noted that appellant's intelligence quotient scores are inconsistent with a diagnosis of cognitive dysfunction. (XLVIII RT 13718-13719.) Shale also found that appellant demonstrated no evidence of a brain disorder and no history of brain trauma. (XLVIII RT 13720.) Shale opined that the Rorshach test is subjective and has proven, over time, not to be scientifically valid. (XLVIII RT 13722.)

Shale also disagreed with George Woods' assessment that appellant suffered from post-traumatic stress disorder. (XLVIII RT 13724.) Specifically, Shale found that Woods' assessment did not offer any evidence to substantiate the criteria necessary for such a diagnosis. (*Ibid.*) Rather, like Young in her assessment, Woods listed several risk factors and assumed that appellant suffered from the disorder. (XLVIII RT 13725.) Such an analysis is incorrect. (*Ibid.*) Rather, Shale found that appellant meets all of the criteria for anti-social personality disorder. (XLVIII RT 13737, 13747.) He further testified that his diagnosis was that appellant suffered from severe anti-social personality disorder. (XLVIII RT 13747.) Shale opined that most people who have anti-social personality disorder do not go on to become murderers. (XLVIII RT 13746.) Shale found no indications that appellant suffered from major depression. (XLVIII RT 13740.) Shale found no evidence that appellant suffered from any significant mental illness. (XLVIII RT 13742.) Shale testified that appellant did not suffer from a mental disease. (XLVIII RT 13747.) In reviewing his files, Shale did find that therapy was consistently offered by

the state to appellant throughout his youth and appellant rejected the therapy. (XLVIII RT 13745.)

During both direct examination and on cross-examination, Shale admitted that he did not personally interview appellant. (XLVIII RT 13738, 13776.) However, he did review appellant's video-recorded interviews with law enforcement. (XLVIII RT 13738.) In those interviews, as he described the murder of Lora Sinner, appellant was callous and demonstrated a hero complex, showing a stunning lack of remorse for her death. (*Ibid.*)

State Parole Agent Anthony Vegas testified for the prosecution. (XLVIII RT 13832.) In 1995, Vegas worked as a parole agent for CYA, stationed at the O.H. Close facility in Stockton, California. (XLVIII RT 13833, 13837.) In this capacity, Vegas met appellant. (XLVIII RT 13837.) Appellant was first assigned to O.H. Close on May 30, 1995, leaving October 19, 1995. (XLVIII RT 13841.) While there, appellant was enrolled in a program to address his anger issues and improve his coping skills. (XLVIII RT 13842.) Vegas testified that appellant had an extremely difficult time adjusting to the facility. (XLVIII RT 13843.) In his experience, appellant had problems with authority figures. (XLVIII RT 13844.) Appellant was disciplined several times while at the institution for threatening staff, indecent conduct, and possessing contraband. (XLVIII RT 13845-13846.) Appellant was transferred from the facility due to lack of maturity, propensity for violence, lack of cooperation and responsiveness toward treatment, and his age. (XLVIII RT 13846.)

CYA Parole Agent Thomas Palacioz testified for the prosecution. (XLIX RT 13868.) Currently, and in October of 1995, Palacioz worked as a parole agent at the Preston School of Industry CYA facility. (XLIX RT 13869.) While there, appellant received one small group counseling session and one large group counseling session per week. (XLIX RT

13872.) Appellant engaged in computer repair and computer graphics classes while at Preston. (*Ibid.*) Appellant was transferred to another unit on April 26, 1996. (XLVIX RT 13873.) Appellant exhibited poor decision-making, anger management issues including hostility towards staff. (*Ibid.*)

CYA Parole Agent Michael Millington testified for the prosecution. (XLIX RT 13883.) In April of 1996, Millington was assigned to the Preston School of Industry, during which he had contact with appellant. (*Ibid.*) Appellant was transferred to a re-direct part of the facility that was very restrictive. (XLIX RT 13885.) He was incarcerated approximately 23 hours a day and received one hour of recreation time. (XLVIX RT 13884.) While there, appellant had three serious violation of behavior that led to his transfer to a higher security facility. (XLIX RT 13885-13886.)

CYA Parole Agent Karri Burks testified for the prosecution. (XLIX RT 13890.) In November of 1996, Burks was working in that capacity at Chaderjian Youth Correctional Facility. (XLIX RT 13891.) This facility is the highest security facility in CYA. Burks was appellant's parole agent there for eight months until he was discharged on November 10, 1997. (*Ibid.*) While there, appellant was offered an informal drug program, a victim awareness program, an anger management program and a social thinking skills program.[23] (XLIX RT 13892.) Appellant did not complete any of these programs. (*Ibid.*) During the eight months he was at the facility, appellant had incidents of fighting, possessing contraband, and possessing a weapon. (XLIX RT 13893.)

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[23] The facility also offered an employability skills program, but appellant had already completed this program at another facility. (XLIV RT 13892.)

Ken Sloan testified for the prosecution. (XLIX RT 13898.) Sloan met appellant at the age of seven through his mother's foster home in Redding, California. (XLIX RT 13898-13899.) Appellant lived with Sloan or his mother for approximately five years. (XLIX RT 13905.) Sloan testified that he never promised appellant that he was going to adopt him. (XLIX RT 13900.) Mike Bringle, appellant's social worker at the time, had started the idea and Sloan did think about it. Sloan decided to "run it by" appellant and did so only once. Sloan described appellant as intelligent, combative, and manipulative. (*Ibid.*) He testified that appellant had several problems at school while living in the foster care home, almost getting expelled a couple of times. (XLIX RT 13903.) Sloan worked with the principle of the school, Molly Ranken, to try to address appellant's needs. (XLIX RT 13903-13904.) Sloan also provided a behavioral modification program in the foster home. (XLIX RT 13904.) Sloan noted that even with other kids older than him, appellant always tried to be in control. Sloan described appellant as having a dominant personality. (*Ibid.*) Also, appellant would use his intellectual skills to manipulate and control people. (XLIX RT 13907.) Sloan stated that he still loves appellant. (XLIX RT 13908.) Sloan stated that he noticed a change in appellant when Sloan began dating his now-wife. Appellant acted in a hostile manner toward Sloan's now-wife and somewhat towards Sloan as well. Sloan did take time to explain his relationship with his now-wife to appellant. (*Ibid.*) However, appellant refused to accept that relationship. (XLIX RT 13909.)

Sloan testified that he took over the group home from his mother, who remained involved as a counselor. (XLIX RT 13908.) While other homes he operated did have more kids, the one where appellant stayed at had five children per house, including appellant. Sloan utilized behavior modification techniques at his homes, including the wood pile. Sloan utilized the wood pile in situation where children were out of control. This

activity allowed them to burn up their pent-up anger. (*Ibid.*) The children would move wood, used in a burning stove, from one spot to another. (XLIX RT 13910.) It gave the children something to do with their hands and provided stress relief for them. Because appellant was diagnosed as hyper-active, the wood pile was an activity that he might have done more than the other children staying there. The children were supervised when they engaged in this activity. (*Ibid.*)

Sloan did admit to engaging in corporal punishment with appellant. (XLIX RT 13911.) As a surrogate parent, Sloan stated that he set up an environment where there were consequences when someone did something wrong. (*Ibid.*) In response to appellant cutting a lizard's tail off, Sloan asked appellant about the incident. (XLIX RT 13912, 13914.) In demonstrating that he should not hurt animals, Sloan testified that he might have pulled on appellant's ear or his shirt. (XLIX RT 13914, 13960.)

Sloan had to terminate appellant from the group home based on his behavior. (XLIX RT 13914.) When Sloan moved out of the group home in anticipation of getting married, appellant's behavior "deteriorated." (XLIX RT 13915.) Appellant's violent acts intensified. Appellant would attempt to control the other children in the home either physically or mentally. Sloan tried to get appellant to get alone with his fiancé, now-wife, but appellant remained hostile towards her. (*Ibid.*)

On cross-examination, Sloan admitted to being convicted of a felony in either 1977 or 1978. (XLIX RT 13921.) Sloan testified that in 1985 the home transitioned from a foster parent status to a small family home. (XLIX RT 13922-13923.) This transition was done before it eventually became a group home in 1989. (XLIX RT 13923, 13941.) Sloan denied using any objects, such as Manzanita switches, boards, or hammers, when he punished a child. (XLIX RT 13924, 13959.) He testified that he never left any bruises on appellant's back or butt. (XLIX RT 13959.) Sloan

denied every threatening appellant. (XLIX RT 13961.) Sloan stated that when he stayed with him, he noticed that appellant's psychological intelligence was superior to kids two or three years older than him. (XLIX RT 13950.)

Criminalist Thomas Vasquez testified for the prosecution. (XLIX RT 13982.) He analyzed blood deposits on the clothing appellant was wearing during the June 22, 2002, attack of Officer Renault and found that appellant had a large amount of blood on the knee area of his pants. (XLIX RT 14000.) Based on the blood spatters on appellant's clothing, Vasquez testified that appellant was within two to three feet of the source of the blood during the attack. (XLIX RT 14002.)

Defense Sur-rebuttal

Psychologist Jule Kriegler testified for the defense. (XLIX RT 14105.) Kriegler was retained by the defense in this case. (XLIX RT 14113.) Kriegler disagreed with John Shale's testimony stating the post traumatic stress disorder, if it did exist in appellant, would have been secondary to his anti-social personality disorder. (XLIX RT 14115.) Kriegler testified that it was the opposite. Kriegler also stated that Shale's testimony did not address appellant's history enough when coming to his conclusions. (*Ibid.*) Specifically, Kriegler testified that early childhood trauma can have a very serious impact in determining the brain's development. (XLIX RT 14116.) She testified that a critical stage in brain development is during the ages of two to five years old. (XLIX RT 14117.) Kriegler stated that appellant's ability to form loving relationships was inconsistent with a diagnosis of anti-social personality disorder. (XLIX RT 14130-14131.) Kriegler testified that appellant never received the long term, consistent treatment that he needed. (L RT 14144.) Kriegler opined that appellant met the criteria for a diagnosis of post-traumatic stress disorder. (L RT 14166.) Kriegler testified that this disorder affects

appellant's ability to participate in relationships and his ability to learn. (*Ibid.*)

I. TRIAL COURT'S DENIAL OF APPELLANT'S CHANGE OF VENUE MOTION DID NOT VIOLATE HIS CONSTITUTIONAL RIGHTS

Appellant contends that the trial court's denial of his change of venue motions violated his 6th, 8th & 14th Amendment rights. (AOB 151.) Respondent disagrees.

A. Background

On October 19, 2001, appellant filed a motion for change of venue. (IX CT 1290.) On October 31, 2001, the trial court held a hearing on the motion for change of venue. (V RT 1045.) During the hearing, the defense called Stephen Schoenthaler.[24] (V RT 1048.) Schoenthaler is a professor of criminal justice at California State University, Stanislaus. (V RT 1049.) He has worked in this capacity since 1982. (V RT 1051.) Schoenthaler was retained as a witness by the defense. (V RT 1061.) He testified that the "whole area of change of venue" is based upon pretrial publicity. (*Ibid.*) Schoenthaler reviewed the materials provided by him by the defense and suggested that a survey would be worthwhile to measure the extent of knowledge and prejudgment by the community in this case. (V RT 1063.) The publicity that led him to recommend a survey was the fact that in the first six days after the murder had been discovered, April of 1998, five articles were written about the topic. (*Ibid.*) Schoenthaler testified that it was troubling that an alleged confession in the case was given to the local

[24] During the testimony, defense counsel did not receive court designation of Schoenthaler as an expert in any particular area. At one point, defense counsel did state: "I guess he's an expert, I can lead him." (V RT 1075.) However, no other mention of designating Schoenthaler as an expert for any purpose was made during testimony.

newspaper, the Redding Record Searchlight. (V RT 1064.) He testified that confessions are linked to public prejudgment of guilt. (*Ibid.*) Schoenthaler also noted that one of the articles stated that appellant had a prior criminal history without naming any specific charges. However, he still felt this mention was problematic, though not to the same extent as the reference to a confession. (*Ibid.*)

Schoenthaler testified that two articles printed in the local newspaper on April 25, 1998, also were cause for concern. (V RT 1065.) He mentioned that the first article stated that the case was "unfolding" which he though could be prejudicial. The second article was devoted to the victim, putting her in an empathetic light. Schoenthaler stated that articles, not necessarily these, were featured on the front page of the newspaper and he attempted to categorize the reporting as a "soap opera" without giving any specific reasons for this depiction. (*Ibid.*) Schoenthaler also had to acknowledge that the news, printed in April of 1998, was now potentially old in October of 2001. (V RT 1066.) However, Schoenthaler attempted to argue that this further justified a survey to gauge whether the public was still affected by three-and-one-half-year-old news. (*Ibid.*)

Schoenthaler testified that he did conduct a survey of the members of the community regarding this case. (V RT 1068.) Schoenthaler defined "prejudgment" for his purposes as "[a] formed opinion that is formed prior to being contacted by anyone in this survey." (V RT 1072.) Schoenthaler was directed to a news article printed on August 11, 1998. (V RT 1074.) In this article, the District Attorney at the time, McGregor Scott, was quoted as calling for the death penalty. (V RT 1075.) Schoenthaler testified that in assessing the prejudice of publicity, the source of the comments, particularly their credibility, is important. (V RT 1076.) Without stating a sample size or a reference point, Schoenthaler testified that statements from a district attorney are "probably in the top third" of a

list that somehow ranks honesty and integrity. (*Ibid.*) He also claimed this opinion also applied to deputy district attorneys. (V RT 1077.) Schoenthaler testified that the District Attorney's comment that appellant had an extensive juvenile and adult criminal record, that he had a "main role" in the beating of the victim, and his call for the death penalty in this case was prejudicial. (*Ibid.*) He also testified that the District Attorney's statement that every time his office had sought the death penalty in a case, since it's re-introduction in the 1970's, it had achieved that sentence was "extremely" prejudicial. (V RT 1079.)

Schoenthaler also pointed to comments by the victim's step-father, Eli Harvey, regarding appellant's intent and the fact that he desired the death penalty in this case as prejudicial. (V RT 1078.) However, Schoenthaler acknowledged that the impact of these comments were lower than those of the District Attorney. (V RT 1079.)

Defense counsel pointed Schoenthaler to a September 18, 1998, article regarding Amy Stephens' fitness hearing. (V RT 1083.) Schoenthaler found the reporting of the clinical psychologist's testimony that depicted Stephens as "a 14-year-old Redding girl [who] was manipulated by her cult leader-type boyfriend when she helped beat a woman in the woods near Ono ..." to be prejudicial. (*Ibid.*) However, Schoenthaler again acknowledged that the impact of these comments was less than that of comments from the District Attorney. (*Ibid.*) Schoenthaler further pointed to statements in the article that appellant was married, that Stephens had just been released from hospital care due to a suicide attempt, and references to a "Charles Manson-like lifestyle" as being "potentially" prejudicial. (V RT 1085-1086.)

Defense counsel pointed Schoenthaler to a November 4, 1998, article that quoted Superior Court Judge Anthony Anderson. (V RT 1091.) In that article Judge Anderson was quoted as referring to the psychologist in Amy

Stephens' hearing which referred to appellant as manipulating the teenage Stephens and seducing her days after she was released from a psychiatric hospital due to a suicide attempt. (*Ibid.*) Schoenthaler found this echoing prejudicial, if people recalled it, as the public views judges as more credible than others and because it was repeated from another article, assuming either article was read by a potential juror. (V RT 1092.) Further, Shoenthaler attributed extreme prejudice from Judge Anderson's statement that appellant was the most brutal participant in the crime, someone who planned and directed the killing. (V RT 1093.)

Schoenthaler referenced a September 17, 1999, article entitled "Rubio Want To Change His Plea." (V RT 1080.) Schoenthaler testified that this article's mention of appellant's living arrangements in the jail painted him as a flight risk or a risk of further danger which was prejudicial.[25] (V RT 1081.)

After reviewing all of the articles presented to him, including the ones mentioned above, Shoenthaler testified that he performed a survey of 131 members of the Shasta County community.[26] (VI RT 1108, 1267.) The survey was done via telephone calls. (VI RT 1112.) Further, the people taking the survey remained anonymous and were not subject to any oath for truthfulness. (VI RT 1260.) He also admitted that given the telephonic nature of the interviews, it was impossible to see the people taking the survey and also impossible to judge their body language, if any. (*Ibid.*) Shoenthaler did admit to an inescapable margin for error in his surveys as they are dependent on whether the unseen person called is in fact truthful in

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[25] Schoenthaler acknowledged that there were actually no news articles regarding this case in the entire year of 2001. (VI RT 1282.)

[26] Schoenthaler appeared to agree with prosecutor's citation to census numbers that the population of Shasta County in 2000, when the survey was given, was approximately 162,200. (VI RT 1267.)

their responses, notably responses that would make them eligible or ineligible for jury service in the first place such as age. (VI RT 1111-1112.) Shoenthaler prepared a declaration in support of appellant's motion for change of venue. (VI RT 1225.)

Based on his survey and his review of the pre-trial publicity, Shoenthaler opined that the amount of knowledge, prejudgment of guilt, and prejudgment of penalty by people taking his survey rose to a level where there is "far more than a reasonable likelihood" that appellant would not receive a fair trial. (VI RT 1228.) Schoenthaler stated that, according to his survey, 49 percent of the people taking the survey prejudged appellant's guilt and 52 percent prejudged the penalty in this case. (*Ibid.*) Schoenthaler also stated the he did not expect the passage of time from his survey to the proposed trial date of May 8, 2002, to produce a reduction of his reported prejudgment. (VI RT 1230.)

After Schoenthaler's testimony and argument by both parties, the trial court took the motion under submission. (VI RT 1311.) On November 5, 2001, the trial court bifurcated appellant's venue motion and ordered that jury selection resume. (VI RT 1323.) In doing so, the trial court doubted that a change of venue was warranted in this case. (*Ibid.*) In arriving at this procedural decision to bifurcate, the trial court stated that once the parties were closer to picking an actual jury, he would be willing to hear additional argument on appellant's likelihood of receiving a fair trial. (*Ibid.*) In explaining its finding that the standard for changing venue had not been met, the judge ruled:

> As we know, the issue before this Court is whether the evidence presented at this hearing on the motion to change venue has established that based upon pretrial publicity there is a reasonable likelihood that the defendant cannot receive a fair trial unless the Court grants the motion to change venue. In making this determination, trial courts have been directed to

balance the five factors that counsel have discussed in their arguments.

First thing I'm going to do is go over with you how I have evaluated the various factors, starting first with the size of population of the county. The issue there is, has it been shown that the size of the population of Shasta County is large enough to neutralize or dilute the impact of adverse publicity.

That's basically paraphrasing from Proctor. The only testimony that I really had on that issue was from the one witness who testified, and basically there wasn't much basis for his opinion that in this particular case this particular population wasn't large enough to neutralize or dilute the impact of the adverse publicity.

My evaluation on that is, based upon the evidence, I can only find it to be a rather neutral factor not weighing one way or the other at this time.

In terms of the nature and gravity of the offense, clearly it being a capital offense, capital case, it has a certain seriousness attached to it unlike any other type of case. There is no presumption that every capital case warrants a change of venue, and obviously every capital case has special allegations alleged which make it somewhat different from what would otherwise be a first degree murder charge.

I didn't find -- again, I'm looking at this as a judge who has seen these cases from a variety of points of view as to have any excessive seriousness, if you can define it in that way. The factors probably somewhat supportive of a change of venue are somewhat neutral.

The existence of political overtones, I find none present that would weigh against a change of venue.

The status of the victim and accused, I find that to be basically insignificant, and also weighs against the change of venue.

Now, the nature and extent of the publicity. There is a few things I want to say about that. I would point out there was no controverting evidence, so I assume there was none in a case of this magnitude. One would expect to see evidence, if it existed.

I note that according to the testimony of the Doctor and the survey that was conducted, there was 71 percent of the people surveyed recognized the case without any specific factual questions. And if my review is correct, with the addition of the facts specific questions, there was a 73 percent that indicated some case recognition. 49 percent of the people, according to the Doctor on the survey, had an opinion regarding the guilt of the defendant, that is some measure of conviction that the defendant was guilty before the survey was conducted. 52 percent indicating that if the defendant was guilty of the offense he deserved the death penalty. And 56 percent had an opinion that was either guilt and/or deserved the death penalty if he was guilty.

The -- I took note of the fact that there were three co-defendants in this case, one of which actually went to hearing. And there was coverage of that. There is also the entry of plea by two of the other co-defendants, and the indication that they would or might testify against the defendant.

I noted that only 30 of 131 had some knowledge of the co-defendants' fate. That's about 12 percent of the people surveyed.

Other things that I factored into the assessment on this particular factor was the passage of time. The last substantive article, basically an article that went into some of the facts, in my determination, was October 23rd of 99. The last article that mentioned the case in the context of other cases and other issues was June 26th of 2000.

The -- factored into this, also the number of articles, the fact that there is the passage of time, and also that while there were facts that were recited in the articles that could be described as prejudicial or inflammatory, for the most part the articles recanted facts without a lot of hype about the use of language describing those events.

I did find certain problems with the survey basically in terms of trying to determine how much weight to put on the conclusions that were drawn based upon the survey. Among those were the following: One, there is no way to evaluate the credibility of the people being polled other than at some later test of the survey to see how accurate it was. Because they're being polled on the

telephone, there wasn't any of the ability to actually observe people, their demeanor, their body language, and those kind of things to assess credibility.

The second problem that I had with the survey was the persons being polled weren't necessarily qualified to serve as jurors even if they were truthful. They were only asked about their age, voter registration and driver's license. And I know that in the supporting affidavit the witness minimized the amount of impact that asking additional qualifying questions would have. Nonetheless, they weren't asked, and I really don't know why not.

I did have, which I tried to clarify with some of my questioning, and at times the witness answered my questions at times, and at times he went off on different topics. But I did have trouble with the fact that question 16, 16a and 17 were asked after one, the asking of question No. 10, which supplied some subtle facts, including the term "slowly murdering a 20 year old woman." The preamble to question 16, which supplied a number of facts which wouldn't be unexpected, would lead people to come to the conclusion that one who had committed those offenses, even though it's phrased in allegations, or law enforcement officials believe, would lead or tend to cause one to prejudge guilt and penalty.

And I was also troubled by the fact that having provided that information to people on the telephone, he -- it was really difficult to tell if those folks that answered in the affirmative adequately could separate what they just heard with what was being refreshed in their recollection, and the fact that there weren't a lot of follow-up questions to try to make a determination. Obviously there is reason for no follow-up questions, but nonetheless, I do find that as a shortcoming.

I struggled a little bit with the fact that based upon the testimony this case came out with factors showing that there was the same or greater case recognition and rate of prejudgment as in the Davis case, the Davis case being one that was of, in my opinion, tremendous press coverage and notoriety. And it either supports the conclusion of the witness that the case is more affected by pretrial publicity than Davis, or one could conclude there might be something wrong with this particular survey since the findings fly in the face of what I certainly would have expected.

I was troubled by the fact that few people, it's been my experience that few people answer questions directly. Frequently there is a lot of words before you get to the real answer, particularly when you're probing their recollection of something that has occurred some time ago. And there is really no way to evaluate it unless you see those people talking in front of you. Obviously the phone calls weren't recorded, wasn't any recounting in detail of people's responses, the kinds of things I'm talking about.

And I think I alluded to, in some of my questions, responses, for instance, to question 16 that – "Gee, I don't know. Guilty, I guess," could come out as a guilty in the survey. Or if in 16a – "Boy, I don't know. It must have been before. Yeah, I guess before." I'm speculating obviously, but I don't know what the questions were.

However, overall looking at these, I have to say that the bottom line is this factor favors a change of venue based upon the evidence that was presented, despite the fact that I have those problems with it.

The question the Court has to answer as best he can is whether there is a reasonable likelihood the defendant will not get a fair trial. I believe that the evidence supporting the change of venue is basically the survey. All of the other factors weigh in favor of not granting a change of venue.

I do believe it is possible that the defendant would not get a fair trial, and it is likely that some members of the population of Shasta County hold such fixed opinions as a result of pretrial publicity that those individuals might not give the defendant a fair trial. But I do not believe the evidence presented establishes a reasonable likelihood that the defendant will not get a fair trial, at least not at this time. I think it's dependent upon what happens in voir dire.

To decide this question based upon the evidence presently before the Court is, in my mind, engaging in what would be guesswork as opposed to waiting and finding out exactly what we're dealing with. There is the closing argument that I know counsel have made, I think it's the prosecution, and talked something about blind people trying to describe an elephant by touching it. And it seems to me that why would you rely on

such testimony if you have the witness who actually saw it. Actually questioning potential jurors, evaluating their credibility I think is critical. If we end up needing to use fact specific questions, if I'm convinced that that's necessary, we'll have to do that. If that ends up producing a biased or prejudiced jury, or members of the jury that can't overcome those prejudices, then I'll have to -- I will need to know that. And I certainly would grant a change of venue motion if these prejudices and biases are real and exist and can't be set aside and they're not something that is imagined.

In this case, quite frankly, I found it impossible on the basis of the survey in this case, the telephone polled people who may or may not be qualified jurors, to say there is a reasonable likelihood that the defendant will not get a fair trial. But I do believe, based on the survey, that such is possible. But absent proceedings with voir dire, I cannot find a reasonable likelihood that the defendant will not get a fair trial.

Some of the testimony suggested that jurors cannot be trusted to be truthful about their bias and prejudice, although the witness did at one point indicate a properly conducted voir dire could uncover such things. Yet I found it kind of odd, I guess, that we trust jurors to follow the court's instructions, we trust them with some of the most serious of society's decisions, trusting they will abide by the instructions and admonitions of the court, despite the obvious pressures that can arise not to do so in a jury deliberation room.

Moreover, it seems to me that fundamental principles of American justice lie in the fact that we believe the best way to determine truth is to require people to take an oath, testify before the finder of fact, and subject them to questioning from people representing opposing sides. All of this seems inconsistent with the notion that jurors won't be truthful in voir dire, that we cannot ascertain truth, their true ability to set aside biases or prejudices they may have. And I'm not at all suggesting that because a juror says oh, I can do that, that I would conclude that they can't.

I believe that there are cases where a court can make this determination without voir dire one way or the other. The court may be wrong, but I think the court, there are cases where

> clearly a change of venue would not be in order, clearly change of venue would be in order. I don't think this is one of them.

(VI RT 1315-1323.)

On June 22, 2002, as was detailed in the penalty phase section of the statement of facts, appellant was involved, along with inmate Benjamin Williams, in an attempted escape of the Shasta County jail in which Correctional Officer Timothy Renault was severely beaten and injured. (XL RT 11229-11239.) The trial court was still conducting jury selection in the criminal trial on the present charges at this time. (XX RT 5430.) As a result of defense counsel's motion, the trial court closed the proceedings, excluding the public as well as the media to argue a restraints motion. (*Ibid.*) Defense counsel then renewed its change of venue motion even though the original was still subject to ruling. (XX RT 5433.) After the hearing on the restraints, the trial court opened the courtroom to the public. (XX RT 5498.)

On June 25, 2002, defense counsel moved to disqualify the jury panel as a whole. (XX RT 5504.) That same day, the trial court denied the motion, preferring to inquire of the jurors themselves. (XX RT 5508-5509.) The trial court re-opened voir dire to allow itself and the parties, via the submission of questions, to question the jurors further on whether they had any knowledge of the June 22, 2022, event. (XX RT 5511, 5516.) The trial court specifically set forth its intent to poll the jury as to who had received information regarding the June 22, 2002, incident. (XX RT 5510.) Separating these individuals, the trial court revealed its intended admonition that it would provide individually to each juror regarding the media reports of the incident. (XX RT 5511-5513.)

On June 27, 2002, defense counsel made a blanket challenge to every prospective juror who had heard about the June 22, 2002, incident. (XXII RT 5954.) On June 28, 2002, the trial court requested further briefing on

the change of venue motion. (XXII RT 6075.) Specifically, the trial court wanted briefing on the issue of how the court should evaluate publicity caused by the defendant's actions, other than the conduct for which the defendant was on trial, as compared to publicity caused by a defendant who actually contacts the press. (*Ibid.*) On July 3, 2002, defense counsel "impose[d] a general challenge on everybody that has the pretrial publicity in their mind." (XXIII RT 6385.) Specifically as to each juror, the trial court denied the challenges. (XXIII RT 6387.)

On July 11, 2002, both parties presented argument regarding the change of venue motion. (XXV RT 6970.) The trial court took the matter under submission to consider all of the exhibits presented. (XXV RT 6983.) On July 12, 2002, the trial court issued a written ruling denying the motion for change of venue. (XIX CT 4108-4112.) In reaching this ruling, the trial court made specific findings as to the amount of media coverage of the case and the status of jury selection up to that point:

> The media covered the events extensively during the month of April 1998 [the month the victim's body was found].
>
> The media coverage subsided significantly until September 1998, when the juvenile suspect's [co-defendant Amy Stephens] Jurisdictional hearing was held. Again, in April through July, media attention was heightened during the juvenile's dispositional proceedings and the entering of guilty pleas by two co-defendants [Eric Rubio and Lori Smith]. Media coverage again subsided and all but ceased in June of 2000.
>
> Very little media attention was paid to this case leading up to the start of trial and during the initial phase selection. Then, during jury selection, after 73 jurors had survived the challenge for cause procedure, and with a number of prospective jurors still awaiting their individual voir dire interviews, and five days before the anticipated completion of voir dire and exercise of peremptory challenges, an incident occurred in the jail which was reported extensively in the media.

> In the newspaper, on the radio, and on television, the media reported an incident occurring in the jail. Over the course of several days, the media reported that early on Saturday morning, June 22, 2002, a correctional officer in the Shasta County Jail had been making his usual rounds when he was assaulted by two inmates who had gotten out of their cells, fashioned a crude instrument and waited, concealed in a shower. As the officer approached, he was attacked and then beaten for several minutes before other officers arrived. He sustained very serious injuries, including a fracture to his skull and several to his jaw. Mr. Smith, the defendant in this case, and another inmate awaiting trial on a notorious murder charge, were identified as suspects. The media also reported that jail officials believed the assault was related to a plan to escape.
>
> The other inmate, Benjamin Williams, is a co-defendant with his brother in which they are alleged to have killed two men because of their sexual preference. They have already been convicted of arson for the burning of synagogues in Sacramento. They have frequently been in the press.
>
> On June 25 and June 26, 2002, the remaining prospective jurors where individually interviewed. The previously qualified 73 prospective jurors were summoned back to court and questioned about their exposure to media reports and private conversations about the June 22 jail incident. Three prospective jurors were excused for hardship. Eighteen were excused for cause because of the effects of the publicity regarding the jail incident. Of the fifty-two remaining prospective jurors who were not excused for cause, three had very little knowledge of the incident, twenty-nine had some, three had extensive information about the incident, and sixteen had absolutely no information about it. One prospective juror failed to appear. Because additional prospective jurors were excused, additional panels of prospective jurors were summoned and the jury selection procedure continued.

(XIX CT 4108-4109.) In denying the change of venue motion, the trial court made the following factual findings:

> The nature and gravity of the crime weighs slightly in favor of a change of venue because of its nature as a capital crime. Apart from that fact, the facts and circumstances of the crime itself are

not such that make it of any greater severity than other murders that are alleged as capital murders.

The extent and nature of the publicity weighs somewhat in favor of a change of venue, however that weight is moderated by several facts. One, the defendant's own allegedly willful conduct which has resulted in new criminal charges was the cause of the most recent pretrial publicity concerning the June 22 jail incident. Two, this Court has taken judicial notice of evidence presented in case #02 F 4954 that the circulation of the Record Searchlight is approximately 35,000 in a county with a population of approximately 168,000 and a jury pool of approximately 70,000. Three, careful voir dire of prospective jurors in individual sessions has revealed the prospective jurors, in general, had very little knowledge of specific facts of the crime charged, very few opinions that the defendant is guilty, and very good compliance with the Courts orders not to read, listen to, view, or talk about the charges in this case or anything connected with this case, and to bring any such exposure to media reports to the Court's attention. Four, the prospective jurors were questioned about the latest media reports about the June 22 jail incident and prospective jurors who had formed a bias because of exposure to such reports have been excused.

The nature and gravity of the crime and the extent and nature of the publicity are two factors which slightly favor granting the motion.

For reasons previously stated in the order bifurcating the hearing, the Court finds the size and nature of the community, the status of the victim, and the status of the accused to be neutral factors.

Simply evaluating these five factors, this Court concludes the defendant is not reasonably likely to be denied a fair trial. This conclusion is further supported by the fact the Court and counsel engaged in an exhaustive voir dire, conducted by way of extensive written questionnaires, individual interviews of prospective jurors on general qualifications to sit as jurors in a capital case, and extensive and fact specific inquiry regarding pretrial publicity about both the crime charged and the June 22 incident at the jail. Having assessed the credibility of these prospective jurors this Court concludes the panel of prospective jurors who have survived the challenge for cause

process and are available for final selection procedures are fully capable of doing what they said they would do: make all decisions they are asked to make as trial jurors based only on the evidence presented in court and not from any other source, and be fair and impartial.

(XIX CT 4110-4111.)

B. Discussion

Penal Code section 1033 provides in pertinent part:

In a criminal action pending in the superior court, the court shall order a change of venue

(a) On motion of the defendant, to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county.

In ruling on such a motion, as to which the defendant bears the burden of proof, the trial court considers as factors the gravity and nature of the crime, the size and nature of the community, the status of the victim and the defendant, and the extent and nature of the publicity. (*People v. Jenkins* (2000) 22 Cal.4th 900, 943, quoting *People v. Proctor* (1992) 4 Cal.4th 499, 523.)

On appeal from denial of a change of venue motion, a defendant seeking relief from the denial of the motion must make two showings: (1) that it was reasonably likely that a fair trial could not be had at the time the motion was made; and (2) that it was reasonably likely that a fair trial was not, in fact, had. (*People v. Dennis* (1998) 17 Cal.4th 468, 523.) The reviewing court conducts a de novo evaluation of the trial court's determination as to whether there was a reasonable likelihood of an unfair trial. The trial court's resolution of factual issues is reviewed under a deferential substantial evidence standard. (*People v. Sanders* (1995) 11 Cal.4th 475, 505.)

A motion for change of venue will be granted when "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county" in which the defendant is charged. (§1033, subd. (a); *People v. Famalaro* (2011) 52 Cal.4th 1, 21-22.) It is appellant's burden on appeal to prove both error and prejudice, i.e., that "at the time of the motion it was reasonably likely that a fair trial could not be had in the county, and that it was reasonably likely that a fair trial was not had." (*People v. Davis* (2009) 46 Cal.4th 539, 578, citations omitted; *People v. Hayes* (1999) 21 Cal.4th 1211, 1250: [On appeal an appellant must demonstrate that the ruling denying a motion for change of venue was error because it was reasonably likely that a fair trial could not be had and that the error was prejudicial because a fair trial was in fact denied."].)

Both the trial and reviewing court's analysis of a venue motion must consider five factors: "(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1394, citations omitted.) This Court will sustain the trial court's determination of the relevant facts if supported by substantial evidence. (*People v. Hart* (1999) 20 Cal.4th 546, 598.) In addition, this Court will "independently review the [trial] court's ultimate determination of the reasonable likelihood of an unfair trial." (*Id.* at p. 598.)

C. Nature and Gravity of Offense

Addressing the first factor, the nature and gravity of the offense, the present crimes of murder and torture are indeed serious offenses. However, as this Court found in *People v. Proctor* (1992) 4 Cal.4th 499, 524, "every capital case presents a serious charge." Further, the presence of this factor, standing alone, does not require a change of venue. (*People v. Famalaro, supra*, 52 Cal.4th at pp. 21-22, citing *People v. Zambrano* (2007) 41

Cal.4th 1082, 1125, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) As to the first factor, the trial court found that the nature and gravity of the offense:

> weigh[ed] slightly in favor of a change of venue because of its nature as a capital crime. Apart from that fact, the facts and circumstances of the crime itself are not such that make it of any greater severity than other murders that are alleged as capital murders.

(XIX CT 4110.) As such, the trial court found that the charges were not so out of the ordinary that a fair trial could not have been had in Shasta County. Respondent notes that the present case alleges first degree murder with torture special circumstances. By their very definition, the conduct must be extreme to qualify for charging purposes. Such extreme conduct, on its own, cannot be the grounds for a change of venue. Were it otherwise, no capital case could ever be heard in Shasta County. As such, the first factor did not point toward change of venue.

The cases cited by appellant only further demonstrate that a change of venue is not appropriate with regard to the nature and gravity of the offense. Appellant cites *People v. Hernandez* (1988) 47 Cal.3d 315 and *People v. Edwards* (1991) 54 Cal.3d 787, in support of his argument that the nature and gravity of the present offenses merited a change of venue. (AOB 163.) Review of both cases demonstrates that they are clearly distinguishable from the present one. The offenses in *People v. Hernandez* included gruesome murders and sexual mutilation of the victims. (*People v. Hernandez, supra*, 47 Cal.3d at pp. 334, 336.) The offenses in *People v. Edwards* included not only premeditated murder of the victim, but also the attempted murder of two 12-year old girls. (*People v. Edwards, supra*, 54 Cal.3d at pp. 807, 809.) Neither of these aggravating factors was present here. Rather, the conduct complained of as aggravating was, in fact, the conduct that justified the special circumstance. As appellant argues, infra,

that there was insufficient evidence to support the torture special circumstance (see AOB Argument VII), his argument that the facts of the present case were gruesome and merited a change of venue ring hollow.

D. Nature and Extent of Media Coverage

As to the second factor, the nature and extent of the media coverage, even extensive media coverage can be reduced in influence by time. As this Court found, it is entirely reasonable to infer that the memories of prospective jurors who may have read newspaper stories or listened to television reports about the present incident would have been dimmed by the passage of time. (*People v. Famalaro, supra*, 52 Cal.4th at pp. 22-23, citing *Patton v. Yount* (1984) 467 U.S. 1025, 1034 ["That time soothes and erases is a perfectly natural phenomenon, familiar to all"].) Further, even when heavy media coverage does weigh in favor of a change of venue, this factor does not necessarily require a change of venue. (*People v. Famalaro, supra*, 52 Cal.4th at pp. 22-23, citing *People v. Ramirez* (200) 39 Cal.4th 398, 434 [upholding a trial court's denial of a motion for change of venue by an accused serial killer even though the trial court found the media coverage of the murders and defendant's arrest constituted "saturation."]

In addressing the nature and extent of the media coverage, the trial court found that the media covered the events extensively during April of 1998 which was the month the victim's body was found. (XIX CT 4108.) However, it also found that the media coverage subsided significantly until September of 1998, when juvenile co-defendant Amy Stephens' Jurisdictional hearing was held. (*Ibid.*) Again, in April through July of 1999, media attention was heightened during the Amy Stephens' dispositional proceedings and the entry of guilty pleas by co-defendants Eric Rubio and Lori Smith. (XIX CT 4108) Notably, the trial court found

that media coverage again subsided and all but ceased in June of 2000. (*Ibid.*)

As the trial court further found, little media attention was paid to the present case leading up to the start of trial and during the initial phases of jury selection. (*Ibid.*) The media reports contained in the record support the trial court's findings. However, as the trial court found, appellant's June 22, 2002, attempted escape from the Shasta County jail was reported extensively in the media, including the newspaper, radio and television. (XIX CT 4050-4105, 4108-4109.) The other inmate involved in the attempted escape with appellant, Benjamin Williams, was a co-defendant in another case with his brother in which they were alleged to have killed two men because of their sexual preference. (*Ibid.*) Additionally, the Williams brothers had already been convicted of arson for the burning of synagogues in Sacramento. (*Ibid.*) Without citing any specifics in the court record, the trial court found that the Williams brothers had frequently been in the press. (XIX CT 4109.)

While the trial court found that the extent and nature of the publicity weighed "somewhat" in favor of a change of venue, it specifically found that this factor was moderated by several facts. (XIX CT 4110-4111.) First, the trial court found that appellant's own willful conduct caused the most recent pretrial publicity concerning the June 22, 2002, jail incident. Second, the trial court took judicial notice of evidence that the circulation of Shasta County's local newspaper, the Record Searchlight, was, at the time, approximately 35,000 in a county with a population of approximately 168,000 and a jury pool of approximately 70,000. (XIX CT 4111.) Third, the trial court found that careful voir dire of prospective jurors in individual sessions revealed that the prospective jurors, in general, had very little knowledge of specific facts of the crime charged. (XIX CT 4111) Based on its personal observations, the trial court found that very few of the

prospective jurors possessed opinions that appellant was guilty. (*Ibid.*) The trial court further found that the prospective jurors exhibited very good compliance with the trial court's orders not to read, listen to, view, or talk about the charges in the present case or anything connected with this case and to bring any such exposure to media reports to the Court's attention. (*Ibid.*) Last, the trial court noted that the prospective jurors were questioned about the latest media reports regarding the June 22, 2002, jail incident and prospective jurors who had formed a bias because of exposure to such reports were excused. (*Ibid.*)

Appellant further argues that the trial court erred by denying the change of venue motion after his June 22, 2002, jail escape attempt, resulting in violations of his due process rights to a fair trial and impartial jury under the Sixth and Fourteenth Amendments. (AOB 165-166.) Having cited *Irvin v. Dowd* (1961) 366 U.S. 717, appellant should realize its ruling:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

(*Id.* at p. 722.) Additionally, the *Irvin* court noted "the test is whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality." (*Ibid.*, quoting *Reynolds v. U.S.* (1878) 98 U.S. 145, internal quotation marks omitted.) The *Reynolds* court further held that a trial court's finding on the issue of "the force of a prospective

juror's opinion" should not be set aside by a reviewing court "unless the error is manifest." Id. at p. 156.)

In the present case, the trial court found that careful voir dire of prospective jurors in individual sessions revealed that the prospective jurors, in general, had very little knowledge of specific facts of the crime charged. (XIX RT 4111.) Based on its personal observations, the trial court found that very few of the prospective jurors possessed opinions that appellant was guilty. (*Ibid.*) The trial court further found that the prospective jurors exhibited very good compliance with the trial court's orders not to read, listen to, view, or talk about the charges in the present case or anything connected with this case and to bring any such exposure to media reports to the Court's attention. (*Ibid.*) Last, the trial court noted that the prospective jurors were questioned about the latest media reports regarding the June 22, 2002, jail incident and prospective jurors who had formed a bias because of exposure to such reports were excused. (*Ibid.*) Review of the record on appeal substantiates the trial court's findings. As such, factor two did not weigh in favor of a change in venue.

Appellant takes further issue with the trial court's ruling on the nature of the publicity. Specifically, appellant argues that the trial court erroneously discounted the recent publicity because it did not concern the facts underlying the charges of the present case. (AOB 167.) Appellant also argues that the trial court erroneously discounted the recent publicity because it resulted from appellant's own willful actions. (AOB 168.) First, it must be noted that the trial court did not base its entire ruling on this principle. Specifically, the trial court held:

> In addition, publicity occurring as a result of a defendant's actions during the trial may preclude the defendant from using such publicity as justification for a motion to change venue. *People v Gomez* (1953) 41 Cal.2d 150,162 (defendant attempted to escape from the court room during jury

> selection, and was apprehended). Although such publicity may not be ignored to the extent that the defendant is denied a fair trial. *Fain v. Superior Court* (1970) 2 Cal.3d 46 (defendant escaped from the jail and remained at large for a period of time pending a second penalty phase trial after reversal of the verdict in the first penalty trial.)

(XIX CT 4110.) As such, the trial court specifically stated that publicity caused by appellant's own actions *may*, rather than must, preclude him from using the publicity as a justification for change of venue. However, the trial court also qualified this principle by citing *Fain* for the proposition that such publicity may rise to the extent of denying a defendant a fair trial and, therefore, cannot be ignored. However, appellant attempts to paint this qualified recognition of a principle the entire basis for the trial court's ruling on the change of venue motion. In doing so, appellant cites *Fain v. Superior Court* (1970) 2 Cal.3d 46, where a motion for change of venue was granted on the appellate level, prior to trial, in support of his argument. (AOB 168.) It is clear from reading the trial court's ruling that it did not base its decision on the fact that appellant created this negative publicity and, therefore, cannot achieve a change of venue because of it. The trial court's ruling demonstrates that it thoroughly went through the relevant five factors in coming to its decision.

However, even if the principle, as announced by this Court in *People v. Williams* (1988) 44 Cal.3d 1127, 1155–1157, that "As a matter of policy, a defendant is not permitted to profit from his own misconduct," was the basis of the trial court's ruling, it was not error. (*Id.* at p. 1156.) *Fain* is clearly distinguishable from the present case in many important ways. First, the present case is procedurally distinguishable from *Fain*. It is undisputed that the current venue challenge is post-trial. This Court in *Fain* held that that it is preferable for appellate review of a venue motion to occur prior to trial. (*Id.* at p. 54.) While this does not prevent an appellant

from arguing the issue on appeal, he can no longer urge that doubts be resolved in his favor. (*People v. Quinlan* (1970) 8 Cal.App.3d 1063, 1070.) By waiting after trial, an appellant cannot complain "if inferences of possible prejudice, available on a semi-silent record, have been refuted by the actualities of voir dire and of trial." (*Ibid; People v. Blake* (1971) 21 Cal.App.3d 211, 219-220.)

The present case is also factually distinguishable from *Fain*. Unlike the present case, the defendant in *Fain* victimized multiple people, people who happened to be vulnerable minors. The defendant stopped a car containing three high school students, two girls and a boy, outside a town in Stanislaus County. He killed the boy with a shotgun blast, kidnapped the girls in his own car, and sexually assaulted them, in a remote field. Defendant was arrested the next morning and charged with murder, kidnapping, rape, and oral copulation. (*Fain v. Superior Court, supra*, 2 Cal.3d at p. 49.) As such, unlike the multiple victims in *Fain*, the victim in the present case was neither well-known, well-liked, or particularly vulnerable. Specifically, the victim in the present case was a friend of appellant's. Additionally, unlike the defendant in *Fain*, appellant was not a stranger or newcomer to the community.

Further, the nature of the media coverage was far more intense in *Fain* than in the present case. The coverage of the Fain defendant's crimes and the trial in the local newspapers was "substantial." (*Fain v. Superior Court, supra*, 2 Cal.3d at p. 49.) As this Court specifically found, "every procedural step taken, no matter how trivial, has apparently been deemed worthy of coverage." (*Id.* at p. 50.) This Court found that

> (1) most newspaper articles mentioning defendant since his conviction over two years ago reiterated the nature of his crimes and the names and ages of his victims, and (2) virtually every article mentioning defendant since [this Court's] decision on his appeal also reiterated the reasons [this Court] gave for reversal.

(*Id.* at p. 51.) The news articles reported that the defendant in *Fain* was arraigned at a "semi-secret" hearing "due to concern by the Stanislaus County Sheriff's office of possible violence by friends and relatives of the victims." (*Ibid.*) Additionally, the media related that the

> Tension created by the apparently cold blooded slaying of Ulrich, a popular Oakdale High School athlete, and the rape of the two young girls continued to cause the sheriff's department a great deal of concern Friday as Fain was kept under heavy guard during his stay in the Oakdale courtroom.

(*Ibid.*) Further, the Fain defendant's death-judgment was reversed by this Court, causing further media attention to the ruling and the re-trial. (*Ibid.*) None of these factors were present in the instant case, further differentiating *Fain*.

Last, and of incredible importance, while both cases entail an escape from jail, appellant's escape attempt, unlike the defendant in *Fain*, was not successful. In *Fain*, prior to the re-trial on his penalty phase, defendant and five fellow prisoners escaped from the Stanislaus County jail. (*Fain v. Superior Court, supra*, 2 Cal.3d at p. 50.) While two of the prisoners were quickly captured, the defendant remained out in the community as the headlines in the principal Modesto newspaper announced, "Murderer Remains On The Loose." This Court found that all three local newspapers gave the event heavy coverage, characterizing defendant as "desperate" and a man "with nothing to lose." (*Ibid.*) Two days after the escape, the Modesto press reported the recapture of defendant also publishing large photographs of him in the custody of officers and detailing the negative effects of defendant's escape had on the community. (*Ibid.*)

> The same issue also contained an article describing the fear and alarm felt by local citizens upon learning of defendant's escape: "During his period of freedom, some frightened residents of the county locked doors and expressed anxious fear the county jail is not equipped or staffed for long-term detention of prisoners requiring maximum security." The view was voiced that a

> prisoner such as defendant was too dangerous to be housed in the community jail facilities. One newspaper reported that the district attorney praised local residents who assisted in the search operations, calling it "citizen involvement at its best." The article quoted defendant as telling his captors that he "would try to escape again if he had the chance because he had nothing to lose."

(*Id.* at pp. 50-51.) In the present case, appellant's escape attempt was thwarted and none of the factors that directly affected the community in *Fain* were present in the instant case. As such, Fain is both procedurally and factually distinguishable from the present case and, therefore, is of suspect value. Appellant's reliance on it should be discounted.

In fact, several of this Court's opinions have held that it is not error to refuse further voir dire when a defendant's own actions have caused possible prejudice amongst actual jurors. In *People v. Huggins* (2006) 38 Cal.4th 175, defendant misbehaved on several occasions. (*Id.* at p. 200.) He telephoned certain jurors from jail. He struck one of his two defense counsel, knocking her to the ground and causing jurors to react in alarm. (*Id.* at pp. 200-201.) On appeal, this Court upheld the trial court's denial of defendant's motion to voir dire the jurors, after the assault, on whether each could remain impartial. (*Id.* at p. 201.) In reaching that conclusion, this Court cited its affirmance of the trial court's refusal to permit voir dire to determine if the defendant's disruptive in-court conduct had prejudiced the jury in *People v. Williams, supra,* 44 Cal.3d at p. 1155–1157.) In *Williams*, this Court noted: "As a matter of policy, a defendant is not permitted to profit from his own misconduct." (*Id.* at p. 1156.) This Court also cited *People v. Hendricks* (1988) 44 Cal.3d 635, 643 [Defendant may not complain on appeal about the possible effect on jurors of his own misbehavior after the jury has been sworn.], *People v. Hines* (1997) 15 Cal.4th 997, 1054 [rejecting a claim of juror misconduct on the ground that if any occurred the defendant invited it, and citing with approval the policy

statement in *Williams*.], and *People v. Gomez* (1953) 41 Cal.2d 150, 162, 258 P.2d 825 [during voir dire defendant attempted to escape, causing a commotion; doctrine of invited error applied to reject contention that the trial court should have discharged the jury panel].)

In the present case, the trial court did not prevent further voir dire on the increased publicity caused by appellant's June 22, 2002, jail escape attempt. As will be addressed in argument II, the trial court did limit questioning on the topic. However, as demonstrated above, the trial court was well within its discretion in so limiting voir dire.

E. Size of the Community

As to the third factor, the size of the Shasta County Community was large enough to neutralize or dilute the impact of the adverse publicity. "The larger the local population, the more likely it is that preconceptions about the case have not become imbedded in the public consciousness." (*People v. Jennings* (1991) 53 Cal.3d 334, 363, citation omitted; *People v. Proctor, supra,* 4 Cal.4th 499, 525.) However, the size of the county by itself is not determinative. (*Ibid.*) The critical factor is whether the size of the county's population is large enough to neutralize or dilute the impact of the adverse publicity. (*Ibid, citing People v. Jennings, supra,* 53 Cal.3d at p. 363.)

As noted above, the trial court took judicial notice of evidence that the circulation of the Record Searchlight was, at the time, approximately 35,000 in a county with a population of approximately 168,000 and a jury pool of approximately 70,000. (XIX CT 4111) Review of the California Department of Finance, Statistical Abstract, demonstrates that as in July of 2002, Shasta County had a population of 171,689 people. (See www.dof.ca.gov/html/fs_data/stat-abs/sec_B.htm; attachment A.) Review of the abstract demonstrates that Shasta County ranks 28 out of 58 counties

in terms of population numbers. As such, Shasta County's population outnumbers 30 other counties in the State of California.

Appellant citation of *People v. Proctor* (1992) 4 Cal.4th 499 in support of his argument that change of venue was merited misreads this Court's opinion. (AOB 163.) While this Court in Proctor did note that Shasta County ranked 28 out of 58 counters in terms of population, it also held that a change of venue was not required in that case. Specifically, this Court held that while this factor weighed "somewhat" in favor of a change of venue, it was not determinative of the issue. (*People v. Proctor, supra*, 4 Cal.4th at p. 353.)

F. Community Status of Defendant

The fourth factor, the community status of the defendant, does not weigh in favor of a change of venue. There is no indication of public hostility toward appellant. Change of venue is not appropriate when the record is devoid of any evidence of public hostility toward defendant. (*People v. Whalen* (1973) 33 Cal.App.3d 710, 716.) There is no evidence that appellant or his family was well known before his arrest for the murder. He grew up in and out of Shasta County, and, as such, could not be considered an "outsider," and did not have a substantial criminal record prior to the present offense, especially within the county. Further, appellant was not associated with any group, such as a racial minority or juvenile street gang towards which the community was "likely to be hostile." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 940; *compare with People v. Williams* (1989) 48 Cal.3d 1112, 1131-1132 [where defendant was a nonresident and an African American in a county where only 402 of the 117,000 residents were African American, the status of defendant weighed in favor of a change of venue].) As such, the trial court was well within its discretion in finding that appellant's "community status" was a "neutral

factor." (XIX CT 4111; *Odle v. Superior Court, supra*, 32 Cal.3d at p. 942.)

G. Prominence of Victim

The fifth factor, the prominence of the victim, did not weigh in favor of change of venue. A victim who has achieved a status in the community as "well known or well liked, or both," may weigh in favor of a change of venue. (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 584.) However, in the present case, there is no indication that Lora Sinner was in any well "well known" in the community before her disappearance. To the extent the media coverage gave Lora Sinner a certain amount of prominence after she disappeared, that was a result of the nature and extent of the media coverage, as discussed above. The trial court was well within its discretion in finding this to be a "neutral factor." (XIX CT 4111.) As such, this factor did not support a change of venue.

All of the trial court's findings are specifically supported by the record on appeal, which include the actual news articles and media excerpts included in support of the motion for change of venue.

As the trial court noted, on June 25 and June 26, 2002, the remaining prospective jurors where individually interviewed. (XIX RT 4111.) The previously qualified 73 prospective jurors were summoned back to court and questioned about their exposure to media reports and private conversations about the June 22, 2002 jail incident, involving appellant. Three prospective jurors were excused for hardship. Eighteen prospective jurors were excused for cause because of the effects of the publicity regarding the jail incident. Of the fifty-two remaining prospective jurors who were not excused for cause, three had very little knowledge of the incident, twenty-nine had some, three had extensive information about the incident, and sixteen had absolutely no information about it. One prospective juror failed to appear. Because additional prospective jurors

were excused, additional panels of prospective jurors were summoned and the jury selection procedure continued. (XIX CT 4108-4109.)

Appellant's argument that the trial court erred by deferring its ruling on the venue motion until after voir dire is immaterial and is harmless at best. Appellant argues that the trial court erred by not immediately ruling on the motions for change of venue. (AOB 165.) In support of his argument, appellant cites this Court's ruling in *People v. Beames* (2007) 40 Cal.4th 907, 922. (AOB 165.) However, that ruling in no way held that it was error to withhold judgment on a motion for change of venue until after voir dire. Rather, the *Beames* opinion warned that it was not suggesting "that trial courts may deny motions to change venue solely on the theory that jury voir dire is a better method of assessing the need to change venue." (*People v. Beams, supra*, 40 Cal.4th at p. 922.) In no way does the opinion suggest that it is error to do so, especially in such a situation as in the present case. The alleged harm, appellant postulates, is that by waiting until voir dire, great quantities of time and expense were committed to the process and these expenditures, in some way, weighed against a change of venue. (*Ibid.*) Appellant openly admits that such factors should not be considered. (AOB 165, fin. 7.) Appellant offers no authority that expenditure of time and resources force a trial court to rule one way or another on any type of motion, let alone a motion for change of venue. What appellant does is offer blatant speculation without any support in the record. There is no indication that the expenditure of more time and resources swayed the trial court either way on the motion. Rather, the trial court specifically delayed ruling on the motion to determine whether, in fact, the potential jurors were, in any way affected, by the pre-trial publicity. Further, appellant fails to demonstrate prejudice. How is the present situation different than if the trial court would have denied the motion "without prejudice" allowing appellant to re-litigate it after voir

dire? Both afford appellant the opportunity test the jury pool and argue the issue with this greater access to information. Appellant's claim is speculative, at best, and must fail.

Appellant appears to take issue with the trial court's reliance on prospective jurors' statements that they could be fair. Appellant argues that the trial court erroneously relied on the assurances of prospective jurors who assured the court they could be fair and impartial despite any publicity. (AOB 167.) This Court gives great weight to a trial judge's finding of a potential juror's ability to be fair. (*People v. Davis* (2009) 46 Cal.4th 539, 581; *People v. Cooper* (1991) 53 Cal.3d 771, 807.)

> When pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes [especially] good sense" because the judge "sits in the locale where the publicity is said to have had its effect" and may base her evaluation on her "own perception of the depth and extent of news stories that might influence a juror." Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges.

(*Skilling v. U.S.* (2010) ___ U.S. ___; 130 S.Ct. 2896, 2918, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 427; *People v. Famalaro, supra*, 52 Cal.4th at p. 23.) It is unclear how it could be any other way. The trial court specifically questioned each juror and determined whether each was honest in stating that he/she could be fair. Contrary to the "cold transcript received by the appellate court," the trial court is able to assess a prospective juror's "inflection, sincerity, demeanor, candor, body language, and apprehension of duty." (*Skilling v. U.S., supra,* ___ U.S. ___; 130 S.Ct. at p. 2918.) Yet, appellant argues that the trial court's assessment should be distrusted as should that of each prospective juror. Appellant attempts to insert his own skepticism, implying that he knows whether the

jurors could be fair more so than the judge. Appellant's argument is self-serving and speculative at best.

While appellant argues that "most" of the actual jurors had knowledge of the charged offense or the jailhouse attempted escape, such a fact, even if true, does not necessitate a change of venue or change of jury venire. (AOB 171.) Preliminarily, the trial court was in a unique and advantageous situation in instructing the prospective jurors. Due to the recent timing of the attempted jail escape, the trial court was able to both warn and instruct the jury not to pay attention to media depictions of these events. Juries are presumed to understand and follow instructions given to them by the trial court. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) This presumption includes limiting instructions given by the trial court. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

More importantly, knowledge of a case is far different than pre-judgment. Appellant asserts that five of the twelve actual jurors had "some" knowledge of the facts underlying the murder allegations and eight of twelve jurors had "some" knowledge of he facts underlying appellant's attempted jail escape. (AOB 171.) Even a situation where most of the actual jurors have prior knowledge of a case does not necessarily require a change of venue.

> The relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant. It is not unusual that one's recollection of the fact that a notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed.

(*Patton v. Yount* (1984) 467 U.S. 1025, 1035, citation omitted; see, e.g., *People v. Davis* (2009) 46 Cal.4th 539, 580 [all 12 jurors with prior knowledge of the case]; *People v. Ramirez*, supra, 39 Cal.4th 398, 434 [11 jurors with prior knowledge of the case]; *People v. Bonin* (1988) 46 Cal.3d

659, 678, overruled on other grounds as recognized in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [10 jurors exposed to media coverage of the case]; People v. Leonard, supra, 40 Cal.4th at pp. 1396–1397 [eight jurors with prior knowledge of the case].)

Juror by juror analysis of the jurors appellant claims had prior knowledge of the murder or attempted jail escape demonstrates no pre-judgment and very limited knowledge of the facts underlying either offense. Juror number 1 specifically stated that he did not read the local newspaper and described his memory of the underlying murder case as "just barely." (XXV RT 6797.) He stated that he remembered "[n]o details or no anything else" about the case. (*Ibid.*) When specifically prompted by defense counsel about certain publicized aspects of the case, juror number 1 recalled none of them. (XXV RT 6798-6800.) In relation to the attempted jail escape, juror number 1 demonstrated the level of knowledge of that incident as follows: "That some inmate had beat up a sheriff's officer or something. Tricked them. Tricked them into doing something and beat him up. Something like that. That's about all I know." (XXV RT 6800.) Furthermore, juror number 1 did not even associate appellant with the attempted jail escape. (XXV RT 6801.)

When specifically prompted by defense counsel about certain publicized aspects of the murder case, juror number 2 was familiar with none of them. (XXIII RT 6410-6411.) Juror number 2 specifically stated that appellant's name did not even "ring a bell" "for anything." (XXIII RT 6412.) As for the attempted jail escape, juror number 2 did say that he/she heard something about it on the radio. (*Ibid.*) Asked for detail, the juror stated that his/her only memory was that it somehow involved a police officer "[o]r a sheriff, or whatever they are, at the jail." The juror explained the passing extent of his/her exposure to the publicity when asked by defense counsel "what happened to that police officer or sheriff": "Oh, I

don't know. I don't know because I spin the channel. I'm looking for music. So when the news comes on, I'm looking for another music channel." (*Ibid.*) The juror could only remember that two people and a sheriff were in the shower at the jail and was not even sure if they were in the shower together. (XXIII RT 6412-6413.) The juror could recall no other details of this incident.[27]

Juror number 4 only had knowledge of the attempted jail escape. The juror stated that he heard a report on channel 7 that a deputy had been beaten up. (XXII RT 5982.) Juror number 4 relayed the following about what he/she heard about the case:

> Basically -- I really wasn't listening to the news all that much, and I kind of heard it in the background while I was preparing a meal at the time. And I happened to look up -- I got a 60 inch TV, kind of hard to miss, but I seen Mr. Smith's picture there. And that was the first time that I associated anything with the two. Up to that point I didn't have any idea who it was or anything.

(XXII RT 5982-5983.) Other than that a broken jaw was sustained by the deputy, the juror did not recall any other detail from the news broadcast, reiterating that he/she "really wasn't paying all that much attention to it." (XXII RT 5983.) Juror number 4 stated that he/she saw the front page of the newspaper with "your [sic]" picture on it. (*Ibid.*) He did not indicate whose picture he was referring to, appellant or the trial court judge asking the question, but he did make clear that he did not read the newspaper article associated with the photograph. (*Ibid.*) The juror did say that he knew that "Williams" was also involved in the jail incident and that he knew who Williams was. (*Ibid.*) However, juror number 4 also stated that nothing about Williams' association with appellant would cause him/her

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[27] Appellant does not allege that juror number 3 had any prior knowledge concerning the underlying murder or the attempted escape.

any concern or have any effect on his/her assessment of appellant. (XXII RT 5983-5984.) Juror number 4 also acknowledged that he could not consider anything reported in the media due to concern over its accuracy. (XXII RT 5984.) Juror number 4 stated that he could set aside the media exposure and not consider it for any purpose. (*Ibid.*)

Juror number 5 stated that she saw a headline that mentioned appellant's name in that Sunday's paper. (XX RT 6058.) However, juror number 5 stated that she could not recall what the headline said and did not read the article because the trial court had admonished her not to read anything about the case and she followed that order. (*Ibid.*) Juror number 5 saw the headline of the newspaper and two photos. (XXII RT 6058.) The caption underneath the photos said "Williams" and "Smith." The caption mentioned something happening at the jail. (XXII RT 6059.) The juror saw no other newspaper articles and did not hear/see anything on the radio or television. (XXII RT 6059.) Based on this exposure, the juror thought something happened at the jail and a deputy was hurt, but the juror had no idea how badly the deputy was hurt. (XXII RT 6060.) The juror further stated that Mr. Williams' involvement in this would in no way impact appellant. (XXII RT 6061.)

Contrary to appellant's assertion, juror number 8 stated that he/she had no knowledge of the underlying murder and no knowledge of the attempted jail escape incident. (XXIV RT 6517, 6520-6521.)

Juror number 9 did mention that he/she did recall hearing something about the murder case when it first happened but could not recall what that was. (XX RT 5277.) Juror number 9 could not recall any specifics about the present murder case. (*Ibid.*) In response to points reported in the press, juror number 9 had no recollection of those reports other than a reference to a can of chili. (XX RT 5279.) As for the attempted jail escape, juror number 9 stated that the previous day on the television he/she heard

appellant's name, that someone was beaten up, and something about picking a jury. (XXIII RT 6175.) However, juror number 9 stated that he/she shut off the television "real quick." (*Ibid.*) The juror did state hearing mention of another name, but could not recall the name. When asked by the trial court if the juror knew who the victim was, juror number 9 responded: "I wasn't quite sure, because it was -- all I could hear was you [the judge] in my head going, turn it off, turn it off, so -- ." (*Ibid.*) The juror did not know if someone was injured. (XXIII RT 6176.) The juror does not receive the local newspaper and only watches channel 7. (*Ibid.*)

Juror number 10 did recall some facts of the underlying murder. Juror number 10 recalled the can of chili, the dent puller, and the location of the murder. (XI RT 2793.) However, juror number 10 stated that she had no thoughts or opinions as to whether appellant was guilty. (*Ibid.*) Even with prompting on specific topic about the case covered in the media, juror number 10 had no recollection of any of the topics mentioned. (XI RT 2795.) She did mention that she did see a headline in the newspaper about the attempted jail escape. (XXII RT 6009.) Juror number 10 stated that she did not remember what it said and recalled only that "I just knew I shouldn't be reading it." (*Ibid.*) Juror number 10 knew that a "guard" was attacked and knew from the photographs that appellant and "Williams" were involved. (*Ibid.*) From the placement of the photographs and the headline, juror number 10 assumed that the two photographed attacked the guard. (XXII RT 6010.) When asked if she saw anything on television regarding the attempted jail escape, juror number 10 responded: "I knew once I saw that headline not to watch TV, not local news." (*Ibid.*) Juror number 10 did not see any media reports or read any articles about this incident. (*Ibid.*) Juror number 10 did recognized Williams' picture from the "Happy Valley" case. (XXII RT 6011.) However, juror number 10 stated that the fact that appellant and Williams may be connected "in some

fashion" did not concern her. (*Ibid.*) Juror number 10 stated that she understood that she could not consider the media reports regarding the jail escape attempt for any purpose at the murder trial and for no purpose, unless it was admitted, at the penalty phase. (XXII RT 6011-6012.)

Juror number 12 said the following in relation to the attempted jail escape:

> I have not read or seen anything. I had heard on the radio about an incident at the jail, but no name was mentioned. Later that day my mother-in-law mentioned Mr. Smith's name, and I told her I didn't want to hear anything else.

(XXII RT 5963.) Juror number 12's mother-in-law stated that "a guard was hurt by" appellant. However, juror number 12 stated that she had not read or heard anything else about it and did not know if anyone else was involved. (XXII RT 5963-5964.) Juror number 12 did not subscribe to the local newspaper, the Record Searchlight. (XXII RT 5964.) Juror number 12 stated that she could set aside the information she had received and would not use it for any purpose. (*Ibid.*)

Here, all 12 jurors testified under oath that they could put aside outside influences and fairly try the case. (XI RT 2794, 2796, XXII RT 5964, 5984, 6012, 6060, XXIII RT 6176-6177, 6413, XXV RT 6801.) Although a juror's assertion of impartiality does not automatically establish that appellant received a fair trial, "a review of the entire record of voir dire may still demonstrate that pretrial publicity had no prejudicial effect." (*People v. Howard* (1992) 1 Cal.4th 1132, 1168; *People v. Famalaro, supra*, 52 Cal.4th at p. 31.) Review of the record demonstrates that the jury selection process yielded panel of jurors untainted by the publicity surrounding this case. There is no indication that any juror was not able to impartially judge appellant's guilt or held a bias that the selection process failed to detect.

In support of its venue argument, appellant's claim that the trial court discounted the nature and extent of publicity because (1) it did not concern facts underlying the charges in the guilt phase, and (2) the trial court reminded jurors of the inaccuracy of media reports is, in and of itself, inaccurate. (AOB 173, 176.) However, neither finding had any bearing on the motion for change of venue. It is true, the trial court made the following finding:

> Moreover, the latest publicity, which actually occurred during the jury selection phase of the trial, does not concern the facts underlying the charges in this case. In addition, the publicity about the jail incident is so recent, and because this Court has repeatedly reminded jurors of the incompleteness and inaccuracy of most media reports and its inapplicability to this proceeding unless actually admitted into evidence, the media reports have had no time to permeate the prospective jurors' attitudes unchallenged by the reality that media coverage is often inaccurate and incomplete.

(XIX CT 4112.) However, it made this ruling in denying appellant's motion for a continuance, which was an alternative request to the change of venue motion. Prior to making this ruling, the trial court had already denied appellant's motion for change of venue after having analyzed the five factors addressed above. (*Ibid.*) As such, the "discounting" if any had to do with whether appellant should be granted a continuance to prepare for voir dire, not whether the motion for change of venue motion should be granted. Appellant's reliance otherwise is unsupported by the record.

Appellant's assertions (1) that the trial court inconsistently and incompletely admonished the jurors as to pre-trial publicity and (2) that the trial court did not instruct the jurors that the media reports were not evidence are unsupported by the record. (AOB 173-174.) Rather, the opposite is demonstrated by review of the appellate records. Using appellant's chosen sample of jurors who he claims had heard about the underlying murder charge or the attempted escape attempt, or both, it is

clear that the trial court consistently instructed the jurors that evidence is limited to information presented in court and that they could not consider information from any other source. (XXII RT 5964, 6011, 6060, XXIII RT 6176, 6414, XXIV RT 6521, XXV RT 6801.) It is also clear, using appellant's chosen sample of jurors, that the trial court consistently admonished the jurors not to consider pre-trial publicity. (XXII RT 5965, 6012, 6061.) Further, review of the responses of the jurors as cited above demonstrated that the jurors heard, understood, and heeded the trial court's warnings. (XXII RT 5963, 5984, 6009, 6010, 6011-6012, 6058, XXIII RT 6175.) Review of the appellate record defeats appellant's assertions.

Appellant's assertion that appellant's jail escape attempt with Benjamin Williams "could" cause bias is unsupported by the record. (AOB 179.) Of the actual jurors that appellant claims had any knowledge of the jail escape attempt, only jurors 4, 5, and 10 knew that Benjamin Williams was involved at all. (XXII RT 5983, 6011, 6058-6059.) However, juror number 4 also stated that nothing about Williams' association with appellant would cause him/her any concern or have any effect on his/her assessment of appellant. (XXII RT 5983-5984.) Juror number 4 also acknowledged that he could not consider anything reported in the media due to concern over its accuracy. (XXII RT 5984.) Juror number 4 stated that he could set aside the media exposure and not consider it for any purpose. (*Ibid.*) Further, juror number 5 stated that Mr. Williams' involvement in this would in no way impact appellant. (XXII RT 6061.) Additionally, juror number 10 stated that the fact that appellant and Williams may be connected "in some fashion" did not concern her. (*Ibid.*) Juror number 10 stated that she understood that she could not consider the media reports regarding the jail escape attempt for any purpose at the murder trial and for no purpose, unless it was admitted, at the penalty

phase. (XXII RT 6011-6012.) Review of the record demonstrates that appellant's speculative claim otherwise is baseless.

II. VOIR DIRE OF JURORS REGARDING PRE-TRIAL PUBLICITY DID NOT VIOLATE SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS

Appellant claims that the trial court improperly limited voir dire on the issue of potential bias from pre-trial publicity regarding the June 22, 2002, attempted escape from jail, resulting in violations of his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 179.) Respondent disagrees.

A. Background

On June 25, 2002, appellant moved to disqualify the entire jury panel, rather than re-opening questioning regarding the jurors' exposure to media coverage of the June 22, 2002, attempted jail escape. (XX RT 5504.) After hearing argument from both sides, the trial court denied the motion as follows:

> I'm going to deny the motion for these two reasons. One, first of all, you know, theory is one thing. And we have to rely on that typically before we actually have living, breathing jurors that we're talking to. But we have them, and we can inquire of them. We can inquire. Some of the folks may not even be aware of the events. A number of people don't take the Record Searchlight. I was very surprised at the number of the people who never heard of the case and had no recollection, even when I ran through the list of specific factors to see if they had any recollection.
>
> In addition, the key question if they have been exposed is whether or not they can in fact set aside that information. And the best way to know if they can is to be able to ask them a question and look them in the eye when they answer it.
>
> As to the changing status of the case, in light of the potentially new evidence, I think the key is we can't ask them specifically how would you feel about this kind of evidence or that kind of

evidence. So I don't think that the motion is meritorious and will be denied. Okay.

(XX RT 5508-5509.) In stating how it intended to proceed with voir dire given the new incident, the trial court stated:

> Here is what my inclination was to do in that regard. Okay. These are my initial thoughts, counsel, and you can certainly -- certainly soliciting your input. It would be my intention to proceed as follows with the Court asking the questions and inviting additional questions through counsel in writing, unless you convince me there is some need to have counsel conduct the questioning.
>
> First, my initial thought was to bring in all of the, however many jurors we have qualified by Thursday morning and basically advise them accordingly. Since the start of jury selection back in May -- will, there have been no new Media reports --
>
> [¶...¶]
>
> Since the start of jury selection back in May, there have been some news media reports concerning Mr. Smith and/or this case, and there have been more than just what was reported this weekend. There have been some indications of the case and the status. I would like a show of hands as to which of you read, seen or heard about any such news media report that you have not already told us about in either our questionnaire or in person.
>
> I probably will stress some of these points. Those of you who have not raised your hand may now leave the courtroom. Do not discuss this matter with anyone. Then with the group that remained, those who indicated they had some exposure I would say the following. In a moment I'm going to ask you to leave the courtroom, and provide your name to my clerk as you do. We will be calling you individually and have a few questions for you. The questions will concern the information you have obtained from these news media reports that you have heard since your interviews.
>
> The questions will also concern your ability to be fair and impartial in light of whatever information you may have obtained. I'm about to reiterate some principles we spoke about

at your interviews. I want you to think about these principles, and be prepared to answer the questions we pose to you with the utmost honesty.

As you know, anything reported if [*sic.*] the media is only reported in part and often not accurately. In a trial, a juror must limit themselves to considering only the evidence presented in court and not from any other source. This makes sense, because only in court will jurors get a complete picture. Nonetheless, it may happen that information obtained outside of the courtroom may affect a juror in such a way that he or she cannot truthfully say or they can put it completely aside and not let it affect in any way any decisions the juror is asked to make.

Of course, if an event reported in the media is actually presented in court, all the relevant information will be presented, it could then be considered for the purpose allowed my law.

The questions we will be asking you in which I want you to think about and answer truthfully are the following: Can you assure us that you can completely set aside any information obtained from these media reports and base any decisions that you're asked to make as trial jurors solely on the evidence presented in court and the law as the Judge gives it to you. And in light of the information you obtained, can you be fair and impartial to both sides.

I would then send the jurors out of the courtroom, obtaining their names, call them in individually and ask the individual jurors these questions: What news media reports did you read -- see or read or hear about? What information do you recall? And then depending upon what they tell me, assuming they've read these articles or some portion of them and have some information or seen it on television, I would state the following: It may be that evidence regarding the events about which you became aware from the news media will be admitted into evidence. However, unless some evidence is admitted in this trial, you must not consider it for any purpose. Can you do that? Do you recall the instructions I have given you that a juror must base any decisions he or she is asked to make solely upon the evidence presented in court and not from any other source. In light of the information you have obtained, do you believe you can do that? Can you assure us that unless such information is admitted into evidence, you will completely set it aside and not

> consider it. Can you assure us that unless such evidence is admitted during the trial it will not affect your decision regarding whether Mr. Smith is guilty or not guilty, and whether the special allegations are true or not true? Can you assure us that if there is a penalty trial, unless such evidence is admitted during that trial, it will not affect your decision making in such penalty trial? Do you believe you will be fair and impartial to both sides?
>
> I certainly would ask follow-up questions, depending upon the nature of the responses. That's my initial proposal. I'm willing to hear your thoughts, criticisms, suggestions and-- ¶...¶] and then if there is specific questions I'll have you submit them to me in writing.

(XX RT 5510-5513.) The parties then offered suggestions on how to accomplish this with the jury pool, notably questioning each juror individually, when they indicated they had been exposed to pre-trial publicity on the attempted escape, which the trial court accepted.[28] (XX RT 5514-5515.) The trial court then invited the parties to submit voir dire questions for the prospective jurors. (XX RT 5502-5503, 5516-5517.)

On June 26, 2002, defense counsel submitted a list of proposed voir dire questions to address the June 22, 2002, attempted jail escape incident. (XVIII CT 3825-3826.) That same day, after receiving the list of proposed questions, the trial court stated that its intended instructions to the prospective jurors were as follows:

> I'd bring all the thirty some odd jurors in. We have called you back in. Since the start of jury selection back in May there have been -- there have been some news media reports concerning Mr. Smith and/or this case. I'm going to be inquiring into whether you have read, seen, heard or heard about any such

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[28] The juror questionnaire used in the present case asked whether the prospective juror had any friends, acquaintances, or family members in law enforcement. (20 RT 5506.) The juror questionnaire also questioned prospective jurors about high-publicity cases and whether the prospective juror has or had followed any. (*Ibid.*)

news media reports that you have not already told us about in either your questionnaire or in person.

If you have been exposed to any such information, you must tell me about it. You will not get in trouble. The purpose of the questioning is not to get anyone in trouble, but to find out the extent to which you have been exposed to information reported by the media.

And, counsel, I'm not going to be bound to this script. I may expand upon it, as it seems appropriate by the response of the jurors.

Do not discuss this matter with anyone. Do not read or listen to or watch any news media coverage of Mr. Smith, this case, the jail or the death penalty in general. In a moment I'm going to ask you to leave the courtroom and wait in the hallway. We will be calling you in individually and asking you a few questions. The questions will concern any information you may have obtained from these news media reports that you have heard since your interviews.

The questions will also concern your ability to be fair and impartial in light of whatever information you may have obtained. I'm about to reiterate some principles we spoke about at your interviews. I want you to think about those principles and be prepared to answer the questions posed to you with the utmost honesty.

As you know, anything reported if [*sic*] the media is only reported in part and often not accurately. In a trial, the jurors must limit themselves to considering only the evidence presented in court and not from any other source. This makes sense because only in court will jurors get a complete picture. Nonetheless, it may happen that information obtained outside of the courtroom may effect a juror in such a way he or she cannot truthfully say he or she can put it completely aside and not let it effect in any way any decisions the juror is asked to make.

Of course, if an event reported in the media is actually presented in court or all the relevant information would be presented, it could then be considered for the purposes allowed by law. Among the questions we will be asking you and the

issues which I want you to think about while you are waiting are the following.

Can you honestly assure us that you will completely set aside any information obtained from these media reports and base any decisions you are asked to make as trial jurors solely upon the evidence presented in court and the law as I give it to you. In light of any information you may have obtained, can you be fair and impartial to both sides. Then I would excuse the jurors, call them individually and pose the questions to the jurors as follows. I'm kind of going to go back and forth here.

Did you read, see, hear about or hear any news media reports concerning Mr. Smith or this case. If they say no -- if they say yes, I'm obviously going to inquire as to specifics. If they say no, I'm going to ask them if they had any information about an incident occurring. Read, heard, seen, et cetera, in the Shasta County jail over the weekend.

Again, I'll ask what information did they recall. Depending upon what they say, I'll ask follow up questions. I will ask if they discussed it with anyone. If there's any indication that they have become aware of Mr. Williams' involvement, I will probe them with some questions about feelings, about thoughts, opinions or what they know about those matters and any spillover effect it may have on Mr. Smith.

If I get negative responses, I may follow up with inquiries about whether they subscribe to the Record Searchlight, local news broadcasts, those kinds of things. I may or may not ask the questions. Kind of depends on their responses.

In terms of some -- there's additional questions I'll ask. I'm going to break off here. I won't be asking them about, will they keep an open mind regarding -- pass on those types of questions. It's got nothing to do with pretrial publicity. That's your question number 1, Mr. Jens. Questions 2 through 5, I've indicated it will depend on the circumstances, what I've seen from some of the questions asked today. That even though they answered negatively to some of my questions, when there were follow up questions about whether or not they subscribe to the newspaper, read it regularly, and then follow up questions were asked, there was additional information obtained. So I will make use of those questions.

Likewise, the incident in the jail, I'll refer to that if I get a negative response on the other more general question. I will ask the questions about what they specifically remember hearing, seeing or reading. If they have discussed it. I may or may not ask questions 9 12 and 10 about thoughts, feelings and -- excuse me. Thoughts, feelings and opinions generated by the events. It will depend on what they have seen and heard.

I've already indicated I'll inquire about Mr. Benjamin Williams. Again, depending upon the responses. As to 12 and 13, I won't be asking those questions. In my opinion, that would be asking them to prejudge evidence. 14 and 15, in one form or another will be asked or referred to.

And the additional questions I'll be asking; okay? Do you recall the instructions I've given you that a juror must base any decision he or she is asked to make solely on the evidence presented in court and not from any other source. In light of the information you obtained, do you believe you can do that. Again, if I get ambivalent responses, I'm going to press the issue.

Then I have a series -- I have questions that I propose to ask. Can you assure us that unless such information is admitted into evidence, you will completely set it aside and not consider it. The same question but directed specifically towards the issue of guilty or not guilty and truth or untruth of special allegations. And then, again, directed specifically as to any decision they make in the penalty trial.

The reason why I threw that in there was because -- I've gone back and forth with unless such information is admitted into evidence, in order to be a correct statement of the law, it's possible that some of this may come into evidence. Not the news reports, but the information contained. And I've -- if I'm telling them now that they can't consider it ever, that wouldn't be correct.

On the other hand, at this point, since it's not in evidence, they can't consider it. So I've kind of gone back and forth on whether I should use that language or not. Now, that's my proposal. I'm willing to hear your thoughts on it. And in addition, as we go through the questioning, if I neglect to ask a question or if in light of their responses you have a sense that I

> ought to probe an area that I haven't, you simply can approach the bench and I'll hear your thoughts and concerns on that.
>
> Obviously, my goal is to determine what they heard, if anything, and its content and then question them on whether they can set it aside and evaluate their credibility based upon the information they have, their responses. So any thoughts, concerns, suggestions --

(XXII RT 5930-5935.) During this hearing, all parties agreed that Benjamin Williams' name should not be mentioned during jury selection. (XXII RT 5936.) During that same hearing, defense counsel brought up the issue of a correctional officer as victim and whether that should be addressed in voir dire. (XXII RT 5937.) After which, the following exchange took place between the trial court and defense counsel Rolland Papendick:

> THE COURT: The only way I could see asking that question is if in the penalty phase there was evidence admitted in which Mr. Smith assaulted a correctional officer. How would that -- I mean it's -- that's asking them to prejudge evidence.
>
> MR. PAPENDICK: Again, it depends on what the juror says. [¶...¶] If a juror says I heard all about it, I read about it, I know this officer was attacked, and then just how does that make you feel, well, it bothers me. Do you have close friends or relatives that are in law enforcement. Yes, I do. I'm thinking right now of the girl whose father is a sheriff's officer. I can't think of her name right now.
>
> THE COURT: If the door opens in that extent, I'm certainly willing to consider it.
>
> MR. PAPENDICK: Okay.
>
> THE COURT: But – [¶...¶] -- as a general rule, I wouldn't just up and ask them.

MR. PAPENDICK: I understand.[29](XXII RT 5937-5938.) On June 28, 2002, the trial court did specifically question a prospective juror who indicated her father was a deputy sheriff. (XXII RT 6907, 6101.) The questioning was as follows:

COURT: You had indicated that your father was in law enforcement?

PROSPECTIVE JUROR: Yes.

COURT: Okay. Anything about the fact that he's in law enforcement, this incident of some sort happened in the jail. Is that going to have any affect on how you evaluate this case?

PROSPECTIVE JUROR: No.

COURT: Okay. And by some reason you got additional information, you would let us know?

PROSPECTIVE JUROR: Yes.

(XXII RT 6101.) Defense counsel did not object to this line of questioning. (*Ibid.*)

B. Discussion

Trial courts retain "considerable discretion" to "restrict voir dire within reasonable bounds to expedite the trial." (*People v. Avila* (2006) 38 Cal.4th 491, 536; see also *Ham v. South Carolina* (1973) 409 U.S. 524, 528; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1120.) This discretion extends to the process of voir dire in death penalty cases as established by *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985)

[29] These two portions of the reporter's transcripts contradict appellant's assertion on appeal that defense counsel emphasized the correctional officer victim was the most significant fact for additional voir dire. (AOB 180.) They also contradict appellant's assertion on appeal that the trial court refused to allow voir dire on the correctional officer point. (AOB 180-181.) It is clear from the record that the trial court stated it was willing to consider questioning as to a prospective juror's connections to a correctional officer if the issue presented itself. (XXII RT 5938.)

469 U.S. 412. (*People v. Butler* (2009) 46 Cal.4th 847, 859.) The exercise of discretion by trial judges in conducting voir dire is accorded considerable deference by appellate courts, and is reviewed for abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 990; *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313.)

"It is not a proper object of voir dire to obtain a juror's advisory opinion based upon a preview of the evidence." (*People v. Butler, supra,* 46 Cal.4th at p. 860, citation omitted.) Instead, the proper inquiry is "directed to whether, without knowing the specifics of the case, the juror has an 'open mind'" on the issues presented. (*Id.* at p. 859, citation omitted; see also *People v. Clark* (1990) 50 Cal.3d 583, 597.) While the parties are entitled to ask prospective jurors questions specific enough to determine if those jurors harbor bias that would cause them not to follow an instruction on the issues presented in the case, an inquiry cannot be so specific that it require a prospective juror to prejudge an issue based on a summary of the evidence likely to be presented at trial. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47; *People v. Burgener* (2003) 29 Cal.4th 833, 865; *People v. Cash* (2002) 28 Cal.4th 703, 721-722; *People v. Sanders* (1995) 11 Cal.4th 475, 538-539.)

This is especially true in death penalty cases. Voir dire "seeks to determine only the views of the prospective jurors about capital punishment in the abstract.... The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination." (*People v. Clark* (1990) 50 Cal.3d 583, 597, *People v. Butler, supra,* 46 Cal.4th at p. 859.) As this Court remarked in *Mason*,

> Many persons whose general neutrality toward capital punishment qualifies them to sit as jurors might, if presented with the gruesome details of a multiple-murder case, conclude that they would likely, if not automatically, vote for death.

(*People v. Mason* (1991) 52 Cal.3d 909, 940; see also *People v. Sanders, supra*, 11 Cal.4th 475, 539.) In deciding where to strike the balance between appropriate juror questioning, trial courts have considerable discretion. (*People v. Butler, supra,* 46 Cal.4th at p. 859; *People v. Cash, supra*, 28 Cal.4th 703, 721-722; *People v. Zambrano, supra*, 41 Cal.4th at pp. 1120-1121; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1285-1287.)

In the present case, there is no indication that the fact that appellant attempted to escape from his jail cell and that this attempt resulted in Correctional Officer Timothy Renault being attacked by Benjamin Williams resulted in an impartial jury. None of the jurors who heard the case indicated that they had any special relationship with a member of law enforcement. More specifically and germane to this case, no juror indicated that they had a special relationship to a correctional officer in any way. Not only was the trial court well within its discretion in limiting voir dire on this issue, the composition of the jury demonstrates why it limited voir dire in the way it did. It is clear from the record that in situation where a relationship with law enforcement was indicated by a prospective juror, that juror was subjected to additional questioning. There is no indication that this was needed with the jurors who actually heard the case. As such, there is no indication that the jury was impartial in any way given the facts of the June 22, 2002, attempted jail escape in which he participated. Appellant's claim must fail.

Appellant's assertion that his federal constitutional rights were violated is baseless. The United States Constitution "does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." (*People v. Avila* (2006) 38 Cal.4th 491, 536, quoting *Morgan v. Illinois* (1992) 504 U.S. 719, 729; see also *People v. Robinson* (2005) 37 Cal.4th 592, 613; *People v. Box* (2000) 23 Cal.4th 1153, 1179.) The trial

court, moreover, has a duty to restrict voir dire within reasonable bounds to expedite the trial. (*People v. Wright* (1990) 52 Cal.3d 367, 419.) The trial court's planning and limitation of voir dire was reasonable. All 12 jurors testified under oath that they could put aside outside influences and fairly try the case. (XI RT 2794, 2796, XXII RT 5964, 5984, 6012, 6060, XXIII RT 6176-6177, 6413, XXV RT 6801.) Further, the trial court's willingness to permit additional time for counsel to prepare for voir dire and its willingness to receive input from counsel on potential areas of voir dire demonstrated the trial court's commitment to seating an impartial jury. Appellant has demonstrated absolutely no evidence to the contrary.

Defendant reliance on this Court's decision in *People v. Cash, supra*, 28 Cal.4th 703, is misplaced. (AOB 182.) In *Cash*, the trial court's error was "precluding mention of any general fact or circumstance not expressly pleaded in the information." (*Id.* at p. 722.) Additionally in *Cash*, the question defense counsel was barred from asking was "whether prospective jurors could return a verdict of life without parole for a defendant who had killed more than one person, without revealing that defendant had killed his grandparents." (*Id.* at p. 719.) On the contrary, in the present case the trial court did not prevent counsel from raising matters beyond the allegations in the information. As is demonstrated by the interactions between the parties and the trial court, the trial court solicited input on questioning of the jurors regarding the case in general and the attempted jail escape. (XX RT 5502-5503, 5516-5517; XXII RT 5930-5935, 5937-5938.) Defense counsel sought to introduce questioning about whether news of "a police officer being beat up in the jail" would affect the ability to decide the murder case. (XXII RT 6074.) The court properly refused to allow this line of inquiry on a general level. First, no police officer was beaten up in jail. It is undisputed that the victim in the June 22, 2002, attempted jail escape was Timothy Renault, a Shasta County Correctional Officer responsible for

security inside of the Shasta County Jail. (XL RT 11317-11318.) Appellant's attempted line of questioning to include all police officers was clearly too broad and the trial court reasonably declined the request to the prospective jurors, generally. Further, a situation where a police officer is attacked in the general public is in stark contrast to an inmate attempting to escape from jail and that escape resulting in the injury of one of the individuals responsible for jail security. The latter is far less centered on the status of the victim as a law enforcement officer and far more concerned with affecting an escape from a secured facility. Appellant cites no case law authority for his speculative claim that his attempted jail escape which injured a correctional officer caused jurors to lose their impartiality and vote for the death penalty, in disregard of the mitigating evidence presented. (AOB 183.) Further, as stated above, the trial court's reasonable use of its discretion was demonstrated when it allowed questioning on the jail incident to a prospective juror who actually had a connection to law enforcement. (XXII RT 6100-6101.) As such, *Cash* is distinguishable from the case and does not support appellant's argument.

Moreover, even assuming that the trial court abused its discretion in restricting voir dire, and there is no indication that it did, appellant has failed to establish prejudice. (*People v. Carter* (2005) 36 Cal.4th 1215, 1251-1252, citing *People v. Carpenter, supra*, 15 Cal.4th at p. 354 and *People v. Bittaker* (1989) 48 Cal.3d 1046, 1082 [no abuse of discretion where the court formulated four specific questions to ask prospective jurors during the death-qualifying process, and refused to permit further questions from counsel].) The trial court did not unreasonably restrict questioning of prospective jurors. As to those prospective jurors who ultimately heard the case, appellant does not explain what additional inquiry was necessary for an intelligent exercise of peremptory challenges in light of their responses to questions the trial court did permit.

Further, introduction of evidence regarding the June 22, 2002, disassociated appellant from the actual beating of Correctional Officer Timothy Renault. Deputy Bounpon Kongkeoviman testified that as headed for the stairs to reach the second floor of the jail, he saw appellant on the second floor. (XL RT 11229.) Deputy Karen Luce echoed this depiction of the events. (XL RT 11278-11279.) As the deputies arrived on scene, appellant was seen moving away from the sound of the person screaming or apart from that physical struggle. (XL RT 11230, 11278-11279.) As the deputies rounded the corner, they saw inmate Benjamin Williams, unclothed with only jail-issued orange brief underwear on, coupled with fellow deputy Timothy Renault. (XL RT 11232, 11279.) It was Williams who was physically attacking Deputy Renault's. (XL RT 11233, 11279.) Deputy Bruce Ogden responded with Deputy Luce and saw appellant at the top of the stairs. (XL RT 11301.) Deputy Ogden testified that when appellant saw them, appellant raised his arms up and stated that he did not do anything. (*Ibid.*) The victim, Timothy Renault, testified that as he patrolled the area, he saw inmate Williams crouched down in the shower. (XL RT 11333.) He was not able to identify appellant as being on the scene other than that there was another figure present whose build was consistent with appellant's. (XL RT 11334, 11374.) Inmate Harold Seems did testify that he heard appellant tell Benjamin Williams "we're going to have to kill him," without specifying he they were talking about. (XL RT 11466.) However, Shasta County Sheriff's Sergeant Janet Breshears testified that during her interview of Seems he told Sergeant Breshears that he sometimes hears voices in his head and, because of that, he was not quite sure if what he was hearing was real. (XLIII RT 12117.)

At the penalty phase, appellant admitted to planning his escape from the jail. (XLVI RT 13107-13110.) Initially, appellant testified that he did not want to assault Officer Renault because he was new and appellant did

not know his badge number which would have been important when he pretended to be him during the escape. (XLVI RT 13115.) Appellant testified that he never discussed killing a cop. (XLVI RT 13116.) Appellant testified that at 4:00 a.m. on the day of the incident, Officer Renault was doing his rounds when appellant and inmate Williams came out of the shower area and attacked him. (XLVI RT 13117.) As they attacked Officer Renault, appellant claimed that Williams began hitting the deputy and appellant pushed the officer away from himself. (XLVI RT 13118.) Appellant denied every hitting Officer Renault, but did admit to grabbing him by the shirt. (XLVI RT 13119.) Appellant claimed that they built their escape plan specifically so that Officer Renault would not be hurt. (XLVI RT 13120.) Given the voir dire process and the evidence presented regarding the jail escape attempt, appellant has failed to demonstrate how the limitations on voir dire resulted in an impartial jury. As such, appellant has failed to demonstrate any prejudice. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1157-1158, citing *People v. Williams, supra*, 29 Cal.3d at pp. 410–411.)

III. TRIAL COURT'S ADMISSION OF SGT. CLEMENS' TESTIMONY AS TO APPELLANT'S EMOTIONAL STATE DURING HIS POLICE INTERVIEW WAS PROPER

Appellant alleges that the trial court's admission of Shasta County Sheriff's Sergeant Ronald Clemens' testimony as to appellant's emotional state during his police interview violated his due process rights and his right to a fair trial. (AOB 188.) Respondent disagrees.

A. Background

In the prosecution's case-in-chief, Shasta County Sheriff's Sergeant Ronald Clemens testified as to his personal interview of appellant. (XXXIII RT 9339.) During direct examination, the following exchange occurred between the prosecutor, Brent Ledford, and Sergeant Clemens:

Ledford: Sergeant Clemens, several times during the playing of the interview with Paul Gordon Smith on the 18th of April, 1998, it appeared that he was breaking down and crying. Did you observe that?

Clemens: I saw what was on the video, yes.

Ledford: What was your observation of his physical condition at those points?

(XXXIII RT 9339.) Before he was allowed to answer, defense counsel objected asserting there was no foundation for the witness to answer and that the question called for speculation. (*Ibid.*) At the bench, defense counsel argued that the video spoke for itself and further argued that testimony on this issue would be irrelevant and also made a "352 objection." (XXXIII RT 9340.) The following exchange between the court, prosecutor Ledford, defense counsel Jens took place:

Court: No. As long as -- as I've ever seen videos, there's frequently a great difference between what's seen on the video and what people testify to who actually saw what happened. I don't think that precludes someone who was there from saying this is my observation, assuming it's a proper opinion that can be rendered and it's relevant. That's the question. What's he going to say and why is it relevant?

Ledford: Well, it's relevant that there were no tears. There was no reddening of the eyes. Just sniffing. Anybody can sniff. You know, (sniffing sounds) sounds. There was no attendant physical outward physical manifestations of this alleged – [¶ ... ¶] – emotional.

Jens: Well, okay, if he's going to say his eyes weren't red, that's certainly something we -- we didn't see that. Well, whether his eyes were red. What sniffing means, how he's feeling and things like
that --

Court: No, he's talking about whether there were tears, red eyes, red face, those kinds of things. I think he can do that.

(XXXIII RT 9340.) After the court limited the scope of the question, the following exchange took place:

> **Ledford**: Sergeant Clemens, how far were you sitting away from the defendant when you were conducting this interview that was memorialized in the tape of -- the videotape we just saw?
>
> **Clemens**: Two or three feet.
>
> **Ledford**: And did you have a good look at the defendant's face?
>
> **Clemens**: Yes, I did.
>
> **Ledford**: And you could see detail?
>
> **Clemens**: Yes.
>
> **Ledford**: During those two or three times that the defendant appeared from the videotape to be displaying some emotion, did you ever see any physical manifestations that would support that emotion that appeared to be described on the tape?
>
> **Clemens**: No.
>
> **Jens**: Objection, vague.
>
> **Court**: It's vague, yeah.
>
> **Ledford**: What did you see during those periods of time?
>
> **Clemens**: The times you are speaking of, he would always cover his eyes with his hand. And I didn't see any tears.
>
> **Ledford**: Did you see any red eyes?
>
> **Clemens**: No.
>
> **Jens**: Objection, no foundation.
>
> **Court**: Overruled.
>
> **Ledford**: Did you see any red face that would show that there was some emotion coming through?

Clemens: No.

(XXXIII RT 9341-9342.)

B. Discussion

A trial court's exercise of discretion in admitting or excluding evidence is reviewed for abuse of discretion "and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Booker* (2011) 51 Cal.4th 141, 170.) A court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal .4th 1198, 1226.) The abuse of discretion standard applies to the trial court's weighing of probative value against prejudice and its determination that the probative value of evidence outweighed its potential for undue prejudice under Evidence Code section 352. (*People v. Lewis* (2001) 26 Cal.4th 334, 374–375; *People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.) It is presumed that the trial court regularly performs its duties. (Evid. Code, §664.)

Generally, a lay witness may not give an opinion about another person's state of mind. However, "a witness may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397.)

Appellant was charged with first degree murder and the additional special circumstance was alleged that the murder was perpetrated by means of torture. "All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree." (CALJIC No. 8.20.) In order to substantiate the special circumstance of torture, the prosecution had to prove:

The murder was intentional; and

> The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose; and
>
> The defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration.

(CALJIC No. 8.81.18.)

1. Relevancy

Appellant's claim that Clemens' testimony as to appellant's "mental state" during his statement to law enforcement was irrelevant misstates the testimony. Appellant appears to acknowledge that his "not guilty plea" put at issue all elements of the offense, and the prosecution is "entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent." (*People v. Steele* (2002) 27 Cal.4th 1230, 1243-1244, citation omitted; AOB 190.) However, appellant now attempts to portray Sgt. Clemens' testimony as to appellant's physical manifestations of emotion as direct testimony regarding the "nature and quality" of appellant's emotional state which he asserts is irrelevant. (AOB 190-191.)

Close scrutiny of Clemens' testimony demonstrates that he offered no such testimony regarding appellant's "mental state." The video tape of appellant's interview with Clemens appeared to feature appellant "sniffing." In conjunction, appellant was attempting to justify his actions of killing Lora Sinner, claiming she was going to die of her wounds. (V CT 862, 864-867, 868.) The "sniffing" appeared to corroborate his claim of remorse over his actions. However, as stated above, the prosecution was tasked with proving that appellant "intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose . . . ." (CALJIC No. 8.81.18.) As such, it was incredibly relevant if appellant had any other

physical manifestations that demonstrated actual remorse. Rather than give opinion on appellant's mental state as alleged, Clemens' testimony detailed that during the interview appellant "would always cover his eyes with his hand," that Clemens did not see appellant shed any tears, that appellant did not have red eyes or a red face that demonstrated emotion. (XXXIII RT 9341-9342.) Reading Clemens' testimony makes clear that he was not giving an opinion about appellant's state of mind, but rather testifying "about objective behavior and describe behavior as being consistent with a state of mind" which he is clearly allowed to do. (*People v. Chatman, supra,* 38 Cal.4th at p. 397.) Clemens gave no opinion over whether appellant was being genuine in the display of his emotions. Rather, he was testifying as to specific, objective and observable behavior that was not noticeable on the video tape. It was still up to the jury to determine whether, given these objective mannerisms, appellant was credible in his depiction of his involvement in Lora Sinner's murder. The testimony was relevant on the issue of intent, specifically in relation to the torture special allegation. The trial court was well within its discretion in admitting the testimony.

2. Improper Opinion Testimony

Appellant next asserts that the very same testimony by Sgt. Clemens amounted to improper opinion which invaded the jury's fact-finding function. (AOB 192-193.) Respondent disagrees. As noted above, Sgt. Clemens gave no opinion on the truthfulness of appellant's statement nor on whether appellant's show of emotion was genuine. Rather, he testified as to objective, physical manifestations, or the lack thereof, exhibited by appellant during the interview. In no way did Clemens state that he "believed" or disbelieved appellant. In no way, contrary to appellant's claims, did Clemens testify as to the sincerity of appellant's emotional condition. (AOB 194.) Clemens gave no opinion on appellant's emotional

state. Rather, he testified to the presence, or lack, of objective physical manifestations that were not readily apparent on the video tape of the interview. Appellant's claims otherwise are unsubstantiated and clearly at odds with the actual testimony presented. The trial court was well within its discretion in admitting the testimony of Sgt. Clemens and, as such, appellant's claim must fail.

3. Evidence Code Section 352 Violation

Appellant also asserts that the trial court erred in that the admission of Sgt. Clemens' testimony was more prejudicial than probative under Evidence Code Section 352. (AOB 195.) Respondent disagrees.

"Evidence is substantially more prejudicial than probative ... [only] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724, citation omitted.) However, the type of prejudice that makes evidence inadmissible pursuant to Evidence Code Section 352 must be distinguished from relevant, probative evidence.

> Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt.

(*People v. Crew* (2003) 31 Cal.4th 822, 842.) As such, prejudice as alleged here must be differentiated from relevant, probative evidence that damages a defendant's alibi and justification. (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

In the present case, admission of Sgt. Clemens' testimony did not prejudice appellant pursuant to Evidence Code Section 352. As stated above, Clemens' gave no testimony as to the veracity of appellant's attempt to minimize his involvement in the murder of Lora Sinner. Rather, he testified to specific physical manifestations seen by him during his

interview with appellant that were not readily apparent on the video tape. In no way did Clemens give an opinion as to whether appellant was being truthful.[30] It was the provence of the jury to determine the sincerity of appellant's emotional display, and the lack of physical symptoms of his emotions was an appropriate consideration for the jury. That such evidence tended to demonstrate that appellant's emotions were not sincere does not render the evidence prejudicial in the sense contemplated by Evidence Code section 352. As such, the trial court was well within its discretion in admitting this testimony. Appellant's claim must fail.

4. Improper Opinion Testimony As to Co-Defendants

Appellant claims that Sgt. Clemens testimony that he told each of the co-defendants to "tell the truth" amounted to improper opinion testimony as to the truthfulness of the co-defendants' testimony. (AOB 195.) Respondent disagrees.

Review of the testimony at issue demonstrates that co-defendant Lori Smith asked Sgt. Clemens for transcripts of her previous testimony because, due to the time lapse, she could not remember everything she had said. (XXXIV RT 9631.) The following exchange then took place:

> **Ledford**: And on both of those interviews -- and, in fact, all interviews, haven't we asked all of our witnesses to tell the truth?
>
> **Jens**: Objection, irrelevant. Objection, irrelevant.
>
> **Court**: Overruled.

---

[30] Appellant also asserts that the fact that the testimony in question came from a police officer gave it greater importance to the jury than it should have. (AOB 195.) Appellant makes this blanket assertion without any citation to authority. In no way did Sgt. Clemens use his peace officer status to put forth his opinion as to appellant's veracity during the interview.

Clemens: Yes.

Ledford: The overriding premise is to tell the truth?

Clemens: Yes.

(XXXIV RT 9631-9632.)

Contrary to appellant's claim, Clemens never testifies that it was his opinion that each of the witnesses they interviewed told the truth. On the contrary, the testimony demonstrates that Clemens asked the witnesses to tell the truth during their interviews. Clemens, in so advising the witnesses, was indicating that he was interested in the truth. In no way did he testify that a particular witness was, in fact, telling the truth. It is a clear and obvious goal for the police to seek out the truth and ask for it from its witnesses. However, contrary to the speculation provided by appellant, the determination of whether any of the witnesses was credible or not was left completely up to the jury. Clemens gave no opinion as to the veracity of any of the co-defendants. As such, the trial court was well within its discretion in admitting this testimony. Appellant's claims otherwise are baseless and must fail.

5. Harmless Error

Error, if any, in the admission of Sgt. Clemens' testimony was harmless. Contrary to appellant's claim otherwise, under Evidence Code section 352, appellant courts review a trial court's exercise of its discretion in the admission of testimony under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) Such normal exercise of discretion does not implicate the Federal Constitution and is assessed for state law error. (*Id.* at p. 611.) "[T]he erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice."

(*People v. Richardson* (2008) 43 Cal.4th 959, 1001, citing Evid. Code, §§ 353, subd. (b), and 354.)

> [A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that 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, supra*, 46 Cal.2d at p. 836.)

In the present case, error, if any was harmless. Appellant admitted to killing Lora Sinner. Multiple witnesses testified as to his actions which substantiated the special circumstances allegation of torture. None of this evidence came from Sgt. Clemens. Further, Sgt. Clemens' testimony and his interview with appellant allowed appellant to present mitigating evidence as to his reason for killing Lora Sinner without actually testifying. Appellant has failed to demonstrate that had the testimony not been admitted, it is reasonably probable that he would have achieved a different result.

IV. TRIAL COURT DID NOT ERR IN ADMITTING STATEMENTS MADE BY APPELLANT AND CO-DEFENDANTS

Appellant claims that the trial court erred when it admitted statements made by appellant, himself, and co-defendants and that this error violated his due process rights and right to a fair trial. (AOB 198.) Respondent disagrees.

A. Background

Prior to their admission, appellant requested that portions of his statement to the police be redacted.

1. First Set of Appellant Statements

First, defense counsel objected that appellant's statement "I can't kill someone like that" was of little probative value and prejudicial in that it indicated that he could kill someone under other circumstances. (VII RT

1660.) Second, defense counsel objected that appellant's statement "a lot of people deserve to die, people who hurt other people" was not relevant, had little probative value, and was very prejudicial. (*Ibid.*) Defense counsel argued it was a prejudicial comment on who deserved to die and who did not. (VII RT 1661.) In response, the prosecution argued that the comments were probative of appellant knowing right from wrong. (VII RT 1660.) The prosecutor pointed out that earlier in the interview, depicted on the previous page of the transcript, Sgt. Clemens asked appellant if it was right to kill somebody. Appellant answered: "No." In effect, Sgt. Clemens was trying to catch appellant in a lie, first stating that he could not kill anyone like the victim, but then actually killing the victim. The prosecutor argued that appellant's comments were an "admission of guilt in a round about way." (*Ibid.*) The defense countered that there was no insanity defense or dispute that appellant knew right from wrong and the comment was redundant. (*Ibid.*) After argument by both parties, the trial court denied the defense request to redact the comments. (VII RT 1660-1661.)

2. Second Set of Appellant Statements

Next, defense counsel objected to the following portion of appellant's statement to Sgt. Clemens: "No I wouldn't kill nobody over that. I have specific set down reasons why I would kill somebody, and I don't know why I killed her." (AOB 198; V CT 835; VII RT 1665.) Defense counsel argued that the statement was inflammatory and prejudicial. (VII RT 1666.) It demonstrated that appellant did have certain reasons for killing people. (*Ibid.*) Defense counsel further stated that it was not probative and filed a "352" objection. The prosecution argued that the statement was probative of appellant's motive and his state of mind. In denying the motion to redact, the trial court found that the statements were connected to his statement that he did not know why he killed the victim and, therefore, probative. (*Ibid.*)

3. Third Set of Appellant Statements

Next defense counsel argued that the following portion of appellant's statement to Sgt. Clemens should be redacted at trial:

> [I]t's not killing somebody, I don't have a problem with that. That's not what bothers me. The killing of her bothers me, killing somebody else doesn't bother me. I don't glorify it, but I don't think it would bother me as much as this thing did.[31]

(AOB 199; V CT 862; VII RT 1677.) The prosecutor argued that the comments showed an indifference to life, demonstrated premeditation and intent. (VII RT 1678.) The prosecutor added that this statement was an admission by appellant. (*Ibid.*) Defense counsel argued that the term "somebody" did not prove premeditation as to the present victim. (*Ibid.*) Defense counsel further argued the statement was inflammatory and irrelevant. (*Ibid.*)

In denying the motion to redact this statement, the trial court held:

> Well, the way I see it, he's attempting to explain his mental state, his intent or his feelings about it. It's hard to tell, but it's kind of like I don't get the sense from that. He's not saying it's not killing somebody else, it's the fact that I killed a human being, that doesn't particularly bother me, but it bothers me in this case because it happens to be somebody that I like. And I think it's probative on his mental state, and not prejudicial. So that one is denied.

(*Ibid.*)

4. Fourth Set of Appellant Statements

Last, defense counsel argued the following portion of appellant's statement to Sgt. Clemens should be redacted: "First time in my life I

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[31] On appeal, appellant appears to expand the objection to include the beginning of the sentence and the two preceding sentences. (AOB 199.) Review of the objection demonstrates that these sections were not objected to by trial counsel and, therefore, they cannot be argued by on appeal. (VII RT 1677; *People v. Scott* (1994) 9 Cal.4th 331, 356.)

haven't had a gun when I needed one, when it really counted." (AOB 199; V CT 868; VII RT 1680.) Defense counsel argued that there was no gun in the present case, that it was inflammatory in that it indicated that appellant did have guns on prior occasions, and, therefore, would be prejudicial at the penalty phase. (VII RT 1680.) The prosecution argued that the statement demonstrated appellant's intent. The trial court denied the motion to redact. (*Ibid.*)

5. Co-Defendant's Statements Involving Torture

Appellant, through defense counsel, also requested that certain statements made by co-defendants be redacted to delete the term torture. (AOB 202; VII RT 1662; VIII RT 1725-1741.) The understanding was that these statements may not be needed since the co-defendants in question were all scheduled to, and did, give live-testimony in court. In addressing defense counsel's objection in limine to the admissibility of statements given by co-defendants that involved the word "torture," the trial court held:

> I think there's a difference when a witness uses a term and then has to be asked what they mean by that term. Or when a witness is asked, what is your opinion. For instance, it may be highly improper, I'm not going to pre-rule on this, but if a witness -- if an attorney asked one of the witnesses, in your opinion, did the defendant torture the victim, I think there's a good chance I'd sustain an objection to that question. And on the other hand, if the witness is testifying and uses the term he was beating her, he was doing this, he was doing that, he was torturing her, I can't think of an objection that could be sustained to the witness using a term that they are describing an event that they saw. I can certainly see a follow up question, well, you said -- you used the word torture, what do you mean by that, and exploring what's their support for this term that they have used.
>
> Frequently witnesses use terms that at some point in the jury instructions are defined. They obviously don't have a clue what the legal definitions are. And I know of no prohibition on them using that terminology. So I don't think we're in the area of lay

> opinion. I know as to this specific series of statements -- and I can't specifically recall if it was the witness who used the word torture and then the officer simply asked how was he torturing her as one would to explore what this witness meant by the term that they were using and had initiated.
>
> So I don't think we even get to some of the issues that have been raised. No one solicited an opinion. Nor is it being proffered as an opinion. However, there is one statement in here, line 21, where it says, and he -- does he like to torture people. That to me sounds like improper character evidence that wouldn't be admissible. So that statement needs to come out. As to the balance, the motion is denied.

(VIII RT 1736-1737.)

B. Discussion

As stated above, a trial court's exercise of discretion in admitting or excluding evidence is reviewed for abuse of discretion "and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10; *People v. Booker, supra,* 51 Cal.4th at p. 170.) A court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. DeSantis, supra,* 2 Cal .4th at p. 1226.) The abuse of discretion standard applies to the trial court's weighing of probative value against prejudice and its determination that the probative value of evidence outweighed its potential for undue prejudice under Evidence Code section 352. (*People v. Lewis, supra,* 26 Cal.4th at pp. 374–375; *People v. Barnett, supra,* 17 Cal.4th at p. 1118; *People v. Cudjo, supra,* 6 Cal.4th at p. 609.)

Also, as stated above: "[e]vidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Waidla, supra,* 22 Cal.4th at p. 724, citation omitted.) We must be

careful not to confuse the type of prejudice that makes evidence inadmissible pursuant to Evidence Code Section 352 with relevant, probative evidence that points towards appellant's guilt. (*People v. Doolin, supra,* 45 Cal.4th at p. 439; *People v. Crew, supra,* 31 Cal.4th at p. 842.)

Evidence Code section 1220 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

It is presumed that the trial court regularly performs its duties. (Evid. Code, §664.)

As stated above, appellant was charged with first degree murder with the special circumstance allegation of torture. In order to prove appellant was guilty of first degree murder, the prosecution was tasked with demonstrating appellant committed a "willful, deliberate and premeditated killing with express malice aforethought . . . ." (CALJIC No. 8.20.) In order to substantiate the special circumstance of torture, the prosecution had to prove, amongst other things that (1) appellant intentionally murdered the victim, and (2) appellant intended to inflict extreme cruel physical pain and suffering upon the victim for the purpose of revenge, extortion, persuasion or for any sadistic purpose. (CALJIC No. 8.81.18.) As appellant acknowledges, his guilty plea put at issue all elements of the offense, including intent. (AOB 190; *People v. Steele, supra,* 27 Cal.4th at pp. 1243-1244.)

In the present case, the trial court was well within its discretion in admitting the afore-mentioned statements by appellant and the co-defendants. In his April 18, 1998, statement to Sergeant Clemens, appellant first denied any involvement in the murder, stating he "never harmed [Lora Sinner] in any way." (V CT 803.) As the interview

developed, appellant then changed his statement to admit that he did kill Lora Sinner, but had no reason for doing so. (V CT 834-835, 837, 845.) Appellant then changed his statement, claiming he committed the murder completely on his own, without any participation of the others. (V CT 859.) Then appellant changed his statement to claim that he killed Lora Sinner out of mercy because she would not survive the injuries she sustained after being beaten by Lori Smith and Amy Stephens. (V CT 862, 864-867, 868.) As demonstrated, appellant's intent in murdering Lora Sinner was very much in question and subject to several different versions. Appellant's first statement: "I can't kill someone like that" and his second statement: "a lot of people deserve to die, people who hurt people" were very relevant to appellant's intent in committing the murder. First, in effect, it caught appellant in a lie. He initially adopted a "code of honor," but then later retreated on that stance in attempting to justify why he killed the victim. It was very probative as to appellant's intent to demonstrate how his story changed, thereby casting doubt on his supposed "mercy killing" of Lora Sinner.

Similarly, his second set of statements: "No I wouldn't kill nobody over that. I have specific set down reasons why I would kill somebody, and I don't know why I killed he" was in direct contrast to his later admission that he killed Lora Sinner to save her from suffering from the wounds inflicted by Lori Smith and Amy Stephens. Again, it was extremely probative to show how appellant's story changed to put his current claim into context. The statement demonstrated appellant's state of mind and his supposed lack of motive, which was counter-acted by his later admission.

Appellant's third set of statements directly showed his intent in murdering the victim and his indifference to life. Specifically, appellant stated the killing of the victim bothered him, whereas killing someone else did not. This set of statements demonstrated appellant's malice

aforethought, that he held an indifference to life. It also demonstrated his intent in killing Lora Sinner, he was bothered by killing the victim. In context with his other statements, appellant finished the job. Amy Stephens and Lori Smith ganged up on the victim and beat her severely. Appellant then demonstrated his intent in finishing her off. As the trial court appropriately found, appellant was explaining his mental state, his intent in killing the victim, and how he felt about it. (VII RT 1678.)

Appellant's fourth set of statements demonstrated a sadistic purpose as required by the torture special circumstance allegation. By stating that this was the first time he did not have a gun when he really needed one, appellant demonstrated his intent in killing the victim. Appellant intended to "put down" the victim like a sick animal. Rather than attempting to seek medical help, appellant demonstrated a sadistic purpose, more than just an indifference to human life, in killing the victim. This statement was incredibly probative in revealing appellant's intent in murdering Lora Sinner.

As to the potential statements by appellant's co-defendants, the trial court properly found them to be admissible. There was no indication that the co-defendants were asked for their opinion of what appellant did to the victim. Their statements simply attempted to describe what they saw in the specific language that they chose. The statements were incredibly relevant and probative as each was a percipient witness to the murder. Witnesses are allowed to testify as to what they saw. In no way was appellant precluded from cross-examining each co-defendant as to their observations of appellant's conduct. The statements were never offered as a legal or lay opinion and, as such, the court was well within its discretion in admitting the statements.

Further, the court did agree to redact co-defendant statements as to the torture issue. (VIII RT 1737, 1740.) The fact that the court did redact

some portions of appellant's statements demonstrated that it did exercise its discretion in applying Evidence Code section 352. Since the statements in question were relevant, no due process violation could have occurred. Appellant's claim must fail.

Error, if any, was harmless. As stated above, appellate courts review a trial court's exercise of its discretion in the admission of testimony under the harmless error standard of *People v. Watson, supra,* 46 Cal.2d at p. 836. (*People v. Cudjo, supra,* 6 Cal.4th at p. 611.) Under that standard, error is harmless if it is not reasonably probable that the error affected the verdict. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Appellant argues that alleged opinion testimony of his co-defendants was improperly admitted at trial, but he does not cite to the actual testimony at issue. Instead, appellant only cites to the objections and the court rulings. (AOB 202.) Specifically, appellant lists volume VII of the reporter's transcripts, pages 1661 and 1698. (AOB 202.) The "torture" issue does appear to be discussed on page 1662, but there is no mention of any such objection to testimony on page 1698. Additionally, there is no reference to the testimony actually presented at trial. Appellant also lists volume VIII of the reporter's transcripts pages 1725 to 1740. (AOB 202.) That section does detail discussion on the torture issue as well as defense counsel's objections. However, it does appear that at least part of the issue was settled by all parties agreeing that portions of co-defendants' testimony be redacted. (VIII RT 1740.) Also, none of the transcript pages listed details any of the actual testimony given on the topic. As such, appellant has failed to object to specific testimony given at trial. More importantly, appellant has failed to demonstrate that testimony was admitted at trial erroneously. As such, appellant has failed to demonstrate that he was prejudiced in any way by the court's rulings. Error, if any, was harmless.

Error, if any, was further proven harmless as Lori Smith was able to demonstrate how her use of torture was not lay or legal opinion testimony. In reviewing the testimony at trial, respondent did find the word "torture" in the testimony of Lori Smith. Specifically, Lori Smith was testifying as to what she told Cecil Chrisman after the murder of Lora Sinner. Lori Smith testified that Lora Sinner "got beat and tortured" and that she and appellant did it. (XXIX RT 7944.) On cross-examination, defense counsel, Jens, engaged in the following exchange with Lori Smith:

> **Jens**: Now, you -- you tortured Lora Sinner; didn't you?
>
> [¶ ... ¶]
>
> **Smith**: No, I didn't.
>
> [¶ ... ¶]
>
> **Jens**: Well, you were hitting her, beating her up, she couldn't fight back for herself. Don't you consider that torture?
>
> **Smith**: Yeah.

(XXIX RT 8106-8107.) As this exchange demonstrates, defense counsel was able to cross-examine Smith as to what she meant by using the word torture. The exchange further demonstrates that Lori Smith was in no way attempting to give an opinion as to appellant's actions. Rather, she used the word torture to describe her actions towards Lora Sinner. As such, there is no reasonable probability that the testimony of Lori Smith was proffered as opinion testimony. The jury instructions given in this case further mitigate any possible error.

Further, jury instructions cured any error. It is undisputed that the trial court instructed the jury with CALJIC No. 8.81.18. This instruction specifically defined what torture meant for the purposes of the special circumstance alleged. It detailed the specific elements the prosecution needed to prove in order to merit a true finding on this allegation. It is also

undisputed that the jury was instructed with CALJIC No. 2.09, that some evidence was presented for a limited purpose. It is also undisputed that the jury was instructed with CALJIC No. 1.00, that the judges' instruction on the law is binding and that anything that conflicts with the instructions should be disregarded. Jurors are presumed to understand and follow the jury instructions and the trial court's admonitions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Delgado* (1993) 5 Cal.4th 312, 331.) As such, the jury instructions cured any error presented by this claim. Error, if any, was harmless. Appellant's claim must fail.

V. APPELLANT FORFEITED THIS ARGUMENT; TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL ON ALLEGATIONS OF PROSECUTORIAL MISCONDUCT FOR SHOWING OF ENLARGED PHOTOGRAPHS OF THE VICTIM'S BODY IN THE GRAVE

Appellant claims that his Federal Constitutional rights were violated when the prosecution committed misconduct by projecting photographs of the victim's body that were not previewed by the trial court and defense counsel. (AOB 206.) Appellant forfeited this argument by failing to properly object at trial. In any event, appellant argued this point in a motion for mistrial and the trial court properly denied the motion. (XXVI CT 6112; XLI RT 11735.)

A. Forfeiture

An appellant may not argue on appeal that the prosecution committed misconduct unless appellant at trial (1) objected in a timely fashion, (2) objected on the same ground as in the appeal, (3) requested an assignment of misconduct, and then (4) requested that the jury be admonished to disregard the impropriety. (*People v. Benson* (1990) 52 Cal.3d 754, 794; *People v. Ashmus* (1991) 54 Cal.3d 932, 976; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Ochoa* (1998) 19 Cal.4th 353, 427; *People v. Ayala* (2000) 23 Cal.4th 225, 284; see also *People v. Panah* (2005) 35

Cal.4th 395, 462.) Failure to specify the correct basis for an objection waives the objection on appeal. (*People v. Priviteria*, (1979) 23 Cal.3d 697, 710; *People v. McDowell*, (1972) 27 Cal.App.3d 864, 879.)

In the present case, it is undisputed that appellant did not request an assignment of misconduct during the guilt phase when the evidence was presented and did not request that the jury be admonished to disregard the alleged impropriety. (XXXIII RT 9101, 9123-9125; XLI RT 11730-11735.) Appellant has therefore forfeited this argument for appellate purposes. In any event, appellant's claim must fail.

B. Background

On June 28, 2002, the prosecution projected the photographs it intended on showing the jury in the courtroom with all parties and the trial court present. (XXIII RT 6207-6208.) As projected, the trial court estimated that the photos would appear to the jury at a size of approximately 68 inches by 48 inches. (XXIII RT 6211.) The prosecution then projected people's exhibits 1 through 16 and 18, 20, 21, and 25. (XXIII RT 6208, 6212-6214.) While earmarks were made for people's exhibits 17 and 25 on the compact disc containing all of the pictures, they did not show up during the presentation. (XXIII RT 6213-6214.) The prosecutor then presented several other photographs of the scene of the incident for the trial court's perusal. (XXIII RT 6214-6215.) Defense counsel then objected to the projection of the photographs depicted in people's exhibit 1 and then the photos starting at people's exhibit 18 as compared to presenting the photos to the jury in 10 inch by 13 inch format. (XXIII RT 6216-6217.) Defense counsel did not object to the projection of the photographs depicted in people's exhibits 10 through 16. (XXIII RT 6216-6217.) The prosecution did explain that the projection of the photographs would occur from across the courtroom rather than a situation

where the photos were placed on an easel in front of the jury and accessible to them during deliberations. (XXIII RT 6218.)

After argument by both parties, the trial court ruled that people's exhibits 10 through 16 could be projected as requested by the prosecution. (XXIII RT 6218.) The trial court then made the following ruling:

> 1 through 9 I find to be unduly prejudicial when projected, even at the 50 percent level that I saw them, both at the 6 foot by 4 foot, and then about half of that. I find them to be unduly prejudicial in terms of their emotional impact on the jurors. And there is no reason for it, as you pointed out, to explain the technical issues involved in the injuries and causation of the injuries and those kinds of things. So you can't use 1 through 9 on the projector.
>
> Likewise for 18.
>
> 20 through 21, if they do come in, again not on the projector.
>
> And the other -- other one was 25. And the ruling is same, no on that, for the same reasons.

(XXIII RT 6218-6219.) The trial court did agree to the prosecutor's request to revisit the issue in the future if the prosecutor could find contrary legal authority. (XXIII RT 6219.)

On July 11, 2002, using people's exhibit 18 as an example, the prosecution brought to the trial court's attention that at 8 inches by 12 inches, the photographs did not show the level of detail for the coroner-witness to sit in front of the jury and point out the injuries. (XXV RT 6965.) The trial court agreed to assess the admissibility of enlarged versions of the photos if the prosecution presented them to the court. (XXV RT 6966.)

On August 1, 2002, people's exhibits 10 through 17 and 26 were projected in front of the jury during Lieutenant Compomizzo's testimony. (XXXII RT 9094-9098.) Lieutenant Compomizzo described people's exhibit 17 as follows:

> This is the last label or what we referred to as a final excavation at this point, probably our third layer that we have gone to where we fully expose the body. Um, we were confident that we dug down to, at the disturbed dirt, because we began hitting solid earth again. And basically showing our observation of a female nude body that we found within this grave site.

(XXXII RT 9097-9098.) Lieutenant Compomizzo described people's exhibit 26 as follows:

> One against, a front on view depicting her condition. You can see the black plastic bag that appears to be over her, or wrapped around her head here. We were trying to depict the conditions of her arms and legs, the metal bar in this case has actually been removed at this point and taken as evidence after it was documented.

(XXXII RT 9098.) No objection to either exhibit was made at this time. After presentation of people's exhibit 26, the prosecutor asked for a break. (XXXII RT 9099.) At sidebar, the following discussion took place between the trial court and the prosecutor, Brent Ledford:

> LEDFORD: It just appears to me there are several jurors that are in a highly emotional state at this point, and I thought maybe a moment so that they could gather themselves.
> COURT: I don't think so. Okay.

(XXXII RT 9099.) During a break, outside the presence of the jury, defense counsel objected to the admission into evidence of people's exhibits 10, 17, 26, and 27 on the following grounds:

> In that they are cumulative. That one or two can show what they are trying to demonstrate. To use all of them is cumulative and prejudicial. And it's obvious from the reaction of the -- of the jury to all the pictures that they are having an impact on the jury. And I just -- I don't see what the relevance is of the extra photographs.

(XXXII RT 9123-9124.) The trial court overruled the objection and received the above-mentioned exhibits into evidence. (XXXII RT 9124.) The trial court then asked defense counsel if it had any more photograph objections. (*Ibid.*) Defense counsel indicated that it did not. (*Ibid.*) The

trial court then admitted the remaining photographs submitted by the prosecution. (*Ibid.*) Defense counsel then requested that before "any other" photographs are projected in front of the jury defense counsel has a chance to preview them first. (XXXII RT 9125.) The prosecution had no objection to this motion and the trial court made that order. (*Ibid.*)

On September 17, 2002, after the jury's verdict on the guilt phase, but prior to their verdict on the penalty phase, appellant filed a motion for a mistrial. (XXVI RT 6112.) The grounds for the motion were that the prosecution projected people's exhibits 17 and 26 in front of the jury which had not previously been shown to the trial court resulting in prejudice to appellant. (XXVI RT 6114-6115.) That day, the trial court heard argument from all parties on the motion. (XLI RT 11730-11735.) In denying the motion for a mistrial, the trial court specifically found:

> Well, even assuming there was a violation of the Court order, there is nothing to indicate it was intentional. So I don't see there is any prosecutorial misconduct.
>
> The question is, did the showing of these two photographs in some way prejudice the jury. And I don't recollect all of my rulings before the trial started. Had it been shown to me, looking at them, I certainly would have approved the use of at least one. The other was simply cumulative. I don't see there was any terrible prejudicial effect that would outweigh any probative value other than it was a second photograph of the same thing. So the motion for mistrial is denied.

(XLI RT 11735.)

C. Discussion

A trial court's ruling on a request for mistrial is reviewed for abuse of discretion. (See *People v. Ayala* (2000) 23 Cal.4th 225, 282; *People v. McLain* (1988) 46 Cal.3d 97, 113 [mistrial motion based on prosecutorial misconduct committed to trial court's discretion].) A motion for mistrial should be granted only when "a party's chances of receiving a fair trial

have been irreparable damaged." (*People v. Welch* (1999) 20 Cal.4th 701, 749.) Reversal of a conviction for prosecutorial misconduct is not necessary unless it is reasonably probable defendant would have obtained a more favorable result had the misconduct not occurred. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 390-391.)

As this Court has ruled

> a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. Under the federal Constitution, conduct by a prosecutor ... is not a constitutional violation unless the challenged action "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

(*People v. Riggs* (2008) 44 Cal.4th 248, 298, internal citations omitted; see also *People v. Letner* (2010) 50 Cal.4th 99, 169.) The mere eliciting of evidence by a prosecutor does not amount to misconduct. (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380.) For such an action to constitute misconduct it must be demonstrated that a prosecutor intentionally elicited inadmissible evidence. (*Id.* at pp. 379-380.)

In the present case, the trial court was well within its discretion in denying the motion for a mistrial. There was no violation of the court's order. The trial court did not order that people's exhibits 17 and 26 were inadmissible or that prosecution was not able to project those exhibits in front of the jury. It had yet to rule on either's admissibility. Further, the trial court specifically found that if there was a violation of its order, it was not intentional by the prosecution. The trial court's finding is supported by there record as there is absolutely no indication that the prosecutor intentionally withheld these exhibits from the trial court or the defense as

required for a finding of misconduct. (*People v. Chatman, supra,* 38 Cal.4th at pp. 379-380.) As such, the trial court was well within its discretion in denying the motion for a mistrial.

It must be noted that as Lieutenant Compomizzo testified, the exhibits in question are photographs of the victim and crime scene. It is undisputed that people's exhibit 17 is a photograph of the grave site where appellant buried the victim and people's exhibit 26 is a photograph of the victim as she was found in the grave site with the plastic bags appellant personally put over her head to suffocate her. (XXXII RT 9097-9098.) It is undisputed that both photographs accurately depict the grave site and the victim's body as it was found by law enforcement authorities. These photographs were highly relevant to the prosecution's case and therefore, as the trial court found, were admissible in the prosecution's case in chief. (XLI RT 11735; Evid. Code, § 351 ["all relevant evidence is admissible."] Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.).) People's exhibit 17 demonstrated the gave site which proved the location of the crime and was relevant to the accusation that appellant buried the victim after murdering her. (XXXII RT 9097.) People's exhibit 26 depicted the victim's body found at the grave site, displaying her head wounds which corroborated the allegations that she was bludgeoned in the head and also displaying the plastic bag around her head which corroborated the allegations that appellant attempted to suffocate her while bludgeoning her. (XXXII RT 9097-9098.) These photographs were highly relevant and probative of the allegations that appellant murdered the victim. Appellant's claim that publishing of these relevant pieces of evidence constituted misconduct must fail.

Error, if any, was harmless. Error in the admission of evidence is subject to the harmless error analysis of *People v. Watson* (1956) 46 Cal.2d

818. (See *People v. Reed* (1996) 13 Cal.4th 217, 230–231.) Under the *Watson* test, the trial court's judgment may be overturned only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Further, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test." (*Id.* at p. 439.)

As the trial court stated in its ruling, had it seen people's exhibits 17 and 26, it would have admitted one and it further found that the other was cumulative. (XLI RT 11735.) As review of the exhibits and Lieutenant Compomizzo's testimony demonstrates, the exhibits were relevant and depicted evidence that corroborated the allegations that appellant tortured and murdered the victim prior to burying her at the crime scene. As this Court reminded us in *People v. Karis* (1988) 46 Cal.3d 612, 638, appellant must demonstrate prejudice above and beyond that which result from admissible evidence as all evidence that tends to prove guilt is damaging or prejudicial to the defendant's case. As such, the "prejudice" appellant must demonstrate, as referred to in Evidence Code section 352, "applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*Id.* at p. 638.) As stated above and as found by the trial court, the evidence in question was highly probative and highly relevant to the prosecution's case in chief. Appellant cannot demonstrate that he was prejudiced by the introduction of evidence that the trial court would have admitted or felt had already been admitted previously. Appellant's claim must fail.

VI. RESTRAINTS EMPLOYED ON APPELLANT DID NOT VIOLATE HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Appellant argues that the use of restraints during his trial court appearances violated his Sixth and Fourteenth Amendment rights to a fair trial and due process as well as his Eighth Amendment rights against cruel and unusual punishment because they were unnecessarily harsh and visible. (AOB 212.) Respondent disagrees.

A. Procedural History

On October 11, 2000, Shasta County Counsel filed a motion to transfer appellant from the Shasta County jail to be housed in state prison pending his trial, pursuant to Penal Code § 4007. (IV CT 549.) In support of its motion, county counsel provided sworn declarations from Shasta County Sheriff's deputies. Those declarations demonstrated that since he entered the Shasta County jail on April 10, 1998, appellant has received 56 disciplinary "write-ups." (IV CT 550, 556.) In particular, appellant had threatened the life of then-co-defendant Francisco "Eric" Rubio. (IV CT 550, 558, 570.) He also threatened Shasta County jail staff several times. (IV CT 550, 555, 558, 560.) On August 17, 1999, appellant complained of having a paper tray for his food. (IV CT 555.) He demanded a regular tray so he could stab a Deputy Sheriff in the neck with it. (*Ibid.*)

On December 28, 1999, a Dr. Andrews saw appellant for a medical appointment in the medical exam room of the jail. (IV CT 562.) After the appointment, Dr. Andrews reported that he was missing a black ink pen. Deputies Edmund Bennett and NFN Jorgensen searched appellant's cell. Upon return to his cell, appellant told Deputy Bennett: "If I did have your fucking pen, you would be dead motherfucker. You're stupid. I should kill you." (*Ibid.*) Sheriff's Deputy Chris McQuillan asked appellant if he would actually hurt Deputy Bennett, one of the deputies he had threatened. (IV CT 550.) Appellant replied: "Yeah, if I had a chance." (IV CT 550, 558.) During that interview, appellant stated: "Your rules don't apply to me." (IV CT 558.)

Appellant had been found to possess weapons in his cell on six different occasions, including open blades from pencil sharpeners and a metal shank made from a metal food tray. (IV CT 550, 558.) Further, appellant had been "written-up" on four occasions for causing significant destruction of jail property. (IV CT 550, 552, 553-554, 555-556, 570, 572-573.) The latest incident involved appellant destroying two separate steel cell doors and a holding cell window. (IV CT 550, 552, 553-554.)

On December 5, 2000, after hearing testimony on the issue, the trial court stayed the transfer order pending further proceedings. (IV RT 631.) However, on March 23, 2001, the trial court lifted the stay after testimony demonstrated that appellant had recently flooded his cell, kicked in his cell door and his aggressiveness towards jail staff had escalated since he returned from state prison. (V CT 734-738; IV RT 497-794; V RT 796.) Appellant was transferred to state prison and ordered to be returned 30 days prior to trial. (V RT 796.)

On May 8, 2002, appellant objected to being fitted with the shock device in addition to the leg brace. (VIII RT 1843.) Marshall Sergeant Brian Connolly from the Shasta County Marshall's Office testified in support of the stun device. (VIII RT 1847-1849.) Defense Counsel Roland Papendick remarked that the stun device, which was strapped to appellant's arm, consisted of a one-inch wide band that extended approximately six to seven inches across the arm. (VIII RT 1851.) He further relayed appellant's claim that the band made his arm feel "tingly" and left red marks on it. (*Ibid.*) Given that panels of potential jurors were waiting for voir dire to occur, the trial court ordered that the stun device be removed from appellant and that the motion be heard at a later time. (VIII RT 1849, 1851.) Later that day, Sergeant Connolly resumed his testimony. (VIII RT 1910.) The matter was then continued to the following day for further hearing on the issue of restraints, allowing evidence to also be presented by

the defense. (VIII RT 1913, 1914.) On May 9, 2002, the hearing resumed. (IX RT 2165.) At this hearing, the Marshall's office changed its restraint request as to appellant. (IX RT 2166.) Instead of the stun device that would have been affixed on appellant's arm, the Marshall's office requested that appellant be fitted with belly chains and leg irons. (*Ibid.*) Sergeant Connolly made this request because in-between hearing dates, he had become aware of appellant's plan to escape from the jail, a plan that originated in 1999 and was documented by law enforcement. (IX RT 2166-2168.) Appellant had attempted to employ his wife, Jessica Smith, in gathering photographs and information to aid his escape from the jail facility. (IX RT 2167-2168.)

After both parties questioned Sergeant Connolly, the trial court inquired as to the different options for restraining a defendant in court, the level of security provided by each, and the visibility of the restraint. (IX RT 2203.) The defense then presented testimony on the issue. (IX RT 2210.) All parties declined the opportunity to question the jail expert on the specifics of the stun restraint device. (IX RT 2223, 2227.)

In ruling upon the motion, the trial court found as follows:

> Okay. All right. Well, here is how I see it, counsel. First of all, obviously Mr. Smith has had a long history of some significant nonconforming conduct, and there has been sufficient evidence of that, and it was presented at the hearings previously. I'm concerned about what clearly I don't what [*sic*] people have other people take photographs of the jail for any reasons other than to start thinking about the possibility of means of escaping. I'm sure there is [*sic*] other reasons. But with all the evidence that's been presented, clearly that was an issue. Also concerned with the fact that there has been testimony that Mr. Smith was checking on the number of marshals in the courtroom, whether they were armed, streets around the courthouse. And I know that was back in 1999.
>
> Nonetheless, this will be the longest period of time that he'll be in court. And there was additional testimony, the fact he has

> been in lockdown for four years suggests that he is a problematic inmate, and obviously I made that finding when I had him housed in state prison. So I do find there is a manifest need for restraints.
>
> However, based upon his -- what he's done in court thus far, I'm very reluctant to put anything, any kind of restraint on him that would be visible to the jury, absent some -- something further. So I will order what appears to me to be the less restrictive means, and that I'm assuming, and we'll see on Monday -- on Tuesday morning, that would not be visible to the jury. And I will order that he have the leg brace which he's had, and also the stun device on one leg, assuming that will be concealed from view.

(IX RT 2230-2231.)

Subsequently, as detailed more fully in the penalty phase portion of the Statement of Facts, on June 22, 2002, appellant attempted to escape from the Shasta County jail with another inmate which resulted in an assault on Deputy Timothy Renault that produced great bodily injury. (XL RT 11234-11239.)

On June 25, 2002, further evidence was presented as to the proposed stun-device. Brian Sharp, a Deputy with the Shasta County Marshall's Office testified as to the technical aspects of the proposed stun device and how it would be utilized in court. (XX RT 5481-5488.) After arguments by both parties, the trial court held as follows:

> All right. All right. I looked at People versus Duran. Also People versus Seaton. [...] And, basically, addressed the issue of shackling and referred to People versus Duran and Holbrook versus Flynn. [...]
>
> And citing People versus Duran, the court indicated that a defendant may be physically restrained at trial only if there is a manifest need for such restraint. Shackling should be permitted only where justified by essentially state interest specific to each trial. Such a manifest need arises only upon a showing of unruliness and announced intention to escape or evidence of any nonconforming conduct or planned nonconforming conduct

which disrupts or would disrupt the judicial process if unrestrained.

Moreover, the showing of nonconforming behavior must appear as a matter of record. Imposition of the physical restraints in the absence of the records showing violence, threats of violence or other nonconforming conduct would be deemed to the abuse of discretion based upon the evidence that was presented in the original proceedings in front of Judge Gallagher, which I reviewed as part of the renewed motion to house Mr. Smith in the Department of Corrections rather than in the county jail based upon the warning that Judge Gallagher gave to Mr. Smith. And then Mr. Smith's continued conduct in the jail after that warning based upon the information that was provided in the hearing when originally the leg irons and belly chains were requested and I denied that request. And based upon the information that I have, which was presented in this courtroom that basically Mr. Smith and Mr. Williams in some fashion planned to be out of their cells at a time that they must have agreed upon, that they basically waited at some location for an unsuspecting officer who was doing a regular look-through, and that they were armed with a very serious looking weapon that was fashioned out of items from the jail, the fact that two people assaulted an unsuspecting victim, beating him with such force and violence that he sustained the fracture to his skull, multiple breaks to his jaw, now has a plate in his head, reconstructive surgery to his jaw, I think the defendant's demonstrated basically two things.

One, a very developed ability to understand the way the jail works and how to get around it. Keen instincts of observation and ability to figure out the routines of security and, basically, unrestrained violence as he feels it's appropriate. So for those reasons, clearly, there's a manifest need for the restraints that have been requested and I would order them.

In addition, I will order that -- assuming the defense wants this -- I would order some kind of butcher paper or something along the bottom of the table so the jurors can't see underneath the table. [...]

(XX RT 5494-5496.)

On September 11, 2002, appellant, through defense counsel, made the following statement:

> Mr. Smith advises me that he's in these chains from 8 to 5, including lunch time, and he's getting scabs on his ankles and it's painful and uncomfortable. They tell him it's for security purposes, and –

(IXL RT 11184-11185.) The trial court then asked if defense counsel would like a doctor to examine appellant. (IXL RT 11185.) Defense counsel stated that it would and the trial court agreed to have this done. (*Ibid.*)

The appellate record contains a document that purports to state that on or about September 11, 2002, appellant complained to California Forensic Medical Group that he had cuts on his ankles and bruising from shackles. (XXVIII CT 6849.) The document in the appellate record appears to detail that appellant had a one-quarter of an inch laceration over his upper Achilles tendon on both his ankles. The report referred to the lacerations as "minor." The report further states that both were healing and showed no sign of infection. It also detailed "some callous formation" over an undesignated lower Achilles. The report noted that enjoyed active full range of motion in both ankles. (*Ibid.*)

On September 12. 2002, defense counsel requested that appellant be un-shackled during lunch time. (IXL RT 11494.) The trial court then asked to hear input from the bailiffs responsible for maintaining courtroom security. (*Ibid.*) The following exchange then took place between Bailiffs Martin and Connolly, the trial court, the prosecutor (Ledford), and defense counsel (Jens):

> THE COURT: I think we need to hear from the bailiffs.
>
> BAILIFF CONNOLLY: Our position hasn't changed from the shackles.

THE COURT: Has there been anything additional, Deputy Martin?

BAILIFF MARTIN: We have a holding facility. It's not as secure as the jail facility. And in case we have to move somebody, and in case of emergency, it would require the deputies to have to go hands-on with that individual. And based on our situation -- in the jail they have people that work the doors, and there is controls. We don't have that in our facilities.

THE COURT: Don't we have Ben Williams having a jury trial, too?

BAILIFF MARTIN: That makes it a whole different issue for us with the number of people that are housed back there. The only other difference, we have four people back there.

THE COURT: Mr. Williams is back in this holding facility as well?

THE BAILIFF: Yes.

MR. LEDFORD: Based upon the evidence that this Court has heard throughout the trial, the ingenuity of Mr. Smith in his ability to manufacture weapons and try to escape, it has been amply demonstrated –

MR. JENS: May I propose another solution, and that is –

THE COURT: Are those documents to be marked?

MR. JENS: That simply that his leg irons be taken off at lunch. That means the rest can stay on so he can't manufacture anything or get anywhere. So that would solve the problem.

THE COURT: I'm going to deny the request.

(IXL RT 11494-11495.)

B. Argument

A trial court's decision to impose restraints on a defendant during court proceedings is reviewed for an abuse of discretion. (*People v. Mar* (2002) 28 Cal.4th 1201, 1217; *People v. Pride* (1992) 3 Cal.4th 195, 231-

232; *People v. Duran* (1976) 16 Cal.3d 282, 293, fn. 12.) As this Court has held, a "trial court has broad power to maintain courtroom security and orderly proceedings." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269; *People v. Stevens* (2009) 47 Cal.4th 625, 632.) A criminal defendant may not be subjected to courtroom physical restraints in the jury's presence absent a showing of a "manifest need" for such restraints. (*People v. Duran* (1976) 16 Cal.3d 282, 290-291; see also Pen. Code § 688 ["No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."].) As such, the trial court is tasked with the responsibility of balancing the need for heightened security against the risk that additional precautions will prejudice the accused in the eyes of the jury. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 570.)

A "manifest need" for physical restraints may arise from a showing that the defendant has threatened or assaulted other inmates, or has otherwise engaged in violent, disruptive, or other nonconforming conduct. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1031-1032.) Manifest need may also be demonstrated by "a showing of unruliness, an announced intention to escape, or '[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained ....'" (*People v. Cox* (1991) 53 Cal.3d 618, 651, *disapproved of on other grounds in People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, quoting *People v. Duran, supra*, 16 Cal.3d at p. 292, fn 11.) When physical restraints are used, they "should be as unobtrusive as possible, although as effective as necessary under the circumstances." (*People v. Mar, supra*, 28 Cal.4th at p. 1217.) In the appropriate circumstances, this Court has held that a "stun-belt" is an appropriate form of restraint to insure courtroom security and is examined

in the same manner as conventional shackles. (*Id.* at pp. 1217-1218; *People v. Howard* (2010) 51 Cal.4th 15, 28.)

Federal courts in California apply a similar standard for determining whether a trial court's decision to restrain a defendant violates federal due process rights. In *Deck v. Missouri* (2005) 544 U.S. 622, 629 (*Deck*), the United States Supreme Court held that trial court judges, in the exercise of their discretion, are allowed to take into account special circumstances, including security concerns, that may call for shackling. (*Id.* at p. 633.) The United States Supreme Court in *Deck* recognized the need to restrain dangerous defendants to prevent courtroom attacks and the need to give trial courts latitude in making individualized security determinations. (*Id.* at p. 632.) The Court advised that such determinations are case specific, "that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." (*Id.* at p. 633.)

In the present case, the trial court was well within its discretion in ordering that appellant be fitted with a leg brace on one leg and a stun belt on the other. Even prior to the June 22, 2002, attempted jail escape, the motion to transfer appellant to be housed in state prison demonstrated the necessary "unruliness" and "nonconforming conduct" that merited restraint in the courtroom. (IV CT 550, 555-558, 560; *People v. Cox, supra,* 53 Cal.3d at p. 651, *disapproved of on other grounds in People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22, quoting *People v. Duran, supra*, 16 Cal.3d at p. 292, fn 11.) This conduct included threatening to kill then-co-defendant Francisco "Eric" Rubio, who would be a witness at trial, and several jail staff employees who would be responsible for his transfer to and from the jail to court during the trial process. (IV CT 550, 555-558, 560, 562.) Appellant demonstrated the ability to make common items, readily available, into weapons with the potential to cause great bodily injury. (IV CT 555, 558.) Appellant also demonstrated actual violent

tendencies as evidenced by the numerous situations where he was responsible for significant damage to his jail cells and other jail property. (IV CT 550, 552-556, 570, 572-573.) Appellant presented a real threat to the safety of each person in the courtroom as evidenced by his statement to Sheriff's Deputy Chris McQuillan: "Your rules don't apply to me." (IV CT 558.)

Further, direct evidence was presented that appellant's plan to escape Shasta County jail originated in 1999. (IX RT 2166-2168.) Appellant was caught attempting to employ his wife to gather photographs of the jail and other information in an effort to aid his escape from the facility. (IX RT 2167-2168.) This desire to escape culminated in the June 22, 2002, attempt that resulted in significant injuries to Sheriff's Deputy Timothy Renault. (XL RT 11234-11239.)

It is also clear that the trial court considered all of the restraint options, from the most restrictive, to the far less restrictive option that was actually employed at trial. The Marshall's office specifically requested that appellant be fitted with belly chains and leg irons which was considered the most restrictive restraint option available. (IX RT 2166.) However, the trial court specifically asked Marshall Sergeant Brian Connolly about the different options for restraining appellant in court, the level of security each provided, and the visibility of the restraint. (IX RT 2203.) As the trial court ruling demonstrates, the trial court ordered the least restrictive restraint requested by the Marshall's office. (IX RT 2231.)

Appellant's claim that his restraints were visible to the jury attempts to mislead this Court and is absolutely un-substantiated by the record. In an attempt to support his claim, appellant asserts that his restraints were visible to the jury. (AOB 215.) However, the only "proof" he provides is an instruction the trial court provided to the entire jury pool before the jury

was actually selected. Specifically, the trial court instructed the venire as follows:

> All right. The other thing I need to admonish you about is from time to time – there's always security in every courtroom, and it varies not only from case to case but from day to day for a variety of reasons that have absolutely nothing to do with the issues that you'll be asked to decide.
>
> So to the extent that you see certain security measures taken, which can include the number of the bailiffs in the courtroom, the kinds of restraints that may or may not be placed on the defendant, those are issues not for your consideration, and you may not consider them in any way in reaching the determinations that you're asked to make.

(XXII RT 5949). As is demonstrated by the trial court's statement, there is absolutely no indication that the restraints were visible to anyone. This admonition was a precautionary warning to potential jurors as to courtroom security, i.e., what could happen and what they should do if it did. Further, this instruction was given to the general pool of jurors. There is absolutely no indication that the restraints were visible to anyone on the actual jury. Appellant's claims otherwise are speculative and totally unsubstantiated by the record.

The injuries appellant claimed to have suffered as a result of the use of the restraints were minor, at the very worst. As stated above, the medical report specifically described the alleged injuries as a result of the leg brace as "minor." (XXVIII CT 6849.) Further, the report stated that the injuries were already in the process of healing, which demonstrated that what ever conditions caused them had been remedied and was no longer causing further injury. (*Ibid.*) The report further stated that appellant had "active full range of motion in both ankles." (*Ibid.*) There is no indication that the stun-device fitted on appellant's leg caused any physical injuries. Most importantly, there is absolutely no indication that appellant was not

able to participate his defense as a result of the restraints. Appellant was a clear threat to the security of the courtroom as well as a threat to escape. The trial court specifically chose the least noticeable and intrusive means of restraining appellant. Appellant's claims otherwise are purely speculative and unsubstantiated by the record.

Error, if any, was harmless. Error in the use of restraints is harmless if there is no evidence the jury was aware that a defendant was shackled during trial, and no evidence the shackles impaired or prejudiced the defendant's right to testify or participate in his or her defense. (*People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583–584; *Castillo v. Stainer* (9th Cir. 1993) 983 F.2d 145.) Moreover, a jury's brief observation of physical restraints is generally viewed as non-prejudicial. (*People v. Cleveland* (2004) 32 Cal.4th 704, 740 .)

In the present case, appellant provides absolutely no proof in the record that anyone on the jury was aware that he was restrained in any way. The trial court took special care not only to choose the least noticeable form of restraint, but also to provide cover for counsel table so the jury could not see appellant's legs. (IX RT 2231; XX RT 5495-5496.) Appellant is able to cite to no proof in the record that any juror ever saw appellant restrained or that his ability to participate in his defense was negatively affected by the use of the restraints, which were clearly warranted given his prior violent conduct. Appellant's claim is based on pure speculation and must fail.

VII. SUFFICIENT EVIDENCE SUPPORTED THE TORTURE SPECIAL CIRCUMSTANCE FINDING

Appellant claims insufficient evidence supported the jury's true finding of the special circumstance of torture in this case. (AOB 217.) Respondent disagrees.

An appellate court's review of an insufficiency of evidence claim is limited.

> In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

(*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331.) More recently and more plainly, this court held:

> To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.

(*People v. Zamudio* (2008) 43 Cal.4th 327, 357; emphasis in original, citing *People v. Maury* (2003) 30 Cal.4th 342, 403.) Substantial evidence includes circumstantial evidence and reasonable inferences. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.)

If the verdict is supported by substantial evidence, appellate courts are bound to give due deference to the trier of fact and not retry the case for themselves. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 326; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Hale* (1999) 75 Cal.App.4th 94, 105.) Moreover,

> [i]f the circumstances reasonably justify the [conviction], the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination
>
> [. . .].

(*People v. Roberts* (1975) 51 Cal.App.3d 125, 138 .)

Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient to support a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) "[T]he testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions." (*People v. Leigh* (1985) 168 Cal.App.3d 217, 221, citation omitted.)

> 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.

(*People v. Maury* (2003) 30 Cal.4th 342, 403, citation omitted.) Further,

> [t]o warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

(*People v. Barnes*, *supra*, 42 Cal.3d at p. 306, quoting *People v. Thornton* (1974) 11 Cal.3d 738, 754, quoting *People v. Huston* (1943) 21 Cal.2d 690, 693, citations and internal quotation marks omitted.)

> Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it.

(*People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 357; *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

In order to substantiate the special circumstance of torture, the prosecution had to prove:

1. The murder was intentional; and

2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose; and

3. The defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration.

(CALJIC No. 8.81.18; §190.2, subd. (a)(18).)

A true finding of the torture-murder special circumstance requires proof that a defendant intentionally performed acts that were calculated to cause extreme physical pain to the victim. (*People v. Cole* (2004) 33 Cal.4th 1158, 1228.) Required is "an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." (*People v. Elliot* (2005) 37 Cal.4th 453, 479.) Unlike first degree murder by torture, however, the special circumstance does not require that the acts constituting the torture cause the death. (*People v. Bemore* (2000) 22 Cal.4th 809, 843.) Rather, section 190.2, subdivision (a)(18) simply requires "some proximity in time [and] space between the murder and torture". (*Ibid.*)

In the present case, sufficient and substantial evidence supports the jury's finding of the special circumstance of torture. The evidence presented made clear that appellant's murder of Lora Sinner was intentional. After he tied her up, appellant told Lora that she was going to kill herself. (XXIX RT 7901.) Appellant specifically stated that Lora Sinner's death was going to look like a suicide. (XXIX RT 7903.) Appellant also invited/ordered Amy Stephens and Lori Smith to "finish what they started," meaning killing Lora Sinner. (XXVII RT 7389-7390; XXVIII 7878; XXX RT 8411, 8422, 8425.) Prior to the murder, appellant stated on several occasions that he wanted to kill Lora. (XXIX RT 7849-7850; XXX RT 8784; XXXIII RT 9313.)

The evidence also demonstrated that appellant intended to inflict extreme cruel physical pain and suffering upon Lora Sinner for a sadistic purpose. Appellant's order to Lora to kill herself by slashing her own

wrists demonstrated a sadism that went above and beyond his desire to kill her. When Lora would not cut herself deeply enough, appellant took the razor blade away from her, cut her himself, and then ordered her to cut herself again. (XXIX RT 7905-7906.) This exchange with appellant cutting her and then directing her to cut herself occurred three to four times. (XXIX RT 7907.) Additionally, appellant's order/invitation for others to help in the killing of Lora demonstrated his attempt to cause extreme pain to Lora and sent the message to Lora that the entire group was against her, that the entire group was killing her. Appellant also ordered Lora Sinner to keep her hands over the fire pit and, if she did not, he hit her with the pole portion of the dent puller. (XXIX RT 7908.) Appellant hit Lora on the hands with the metal bar portion of the dent puller approximately two to three times, causing her to cry. (XXIX RT 7908, 7910.) Hitting Lora in the hands could only have been for the purpose of causing pain since such blows would not have caused her death. So even in the process of killing her, appellant still elevated the physical and psychological trauma suffered by Lora.

The evidence presented demonstrated that appellant placed the garbage bag over Lora Sinner's head not to suffocate her, but to muffle her screams of pain. (XXIX RT 7918-7819, 7820.) As such, he demonstrated an intent to torture Lora above and beyond his intent to kill her. The evidence presented shows that Lora continued to breath, but struggled in doing so, while appellant and Lori Smith continued to beat her with the dent puller bar. (XXVII RT 7399; XXX RT 8428.) The garbage bag was also described as black. (XXVIII RT 7918.) This prevented Lora from seeing who was attacking her and when she was going to be attacked next. Again, this added a psychological abuse to the physical abuse.

Most notably, appellant's decision to pour alcohol over Lora Sinner's deeply cut wrists demonstrated his sadistic purpose. Lora was bleeding

badly from her wrists at the time and she cried out in pain. If Lora did not stop crying, appellant would pour alcohol over her cuts. (XXVII RT 7389; XXIX RT 7910; XXX RT 8424.) He did this two to three times. (XXIX RT 7910.) Every time he poured alcohol over Lora's wrists she screamed in pain. In response, appellant told her to "shut up." (*Ibid.*) The sadistic nature of appellant's actions was so apparent, it caused Eric Rubio to attempt to stop it. Eric told appellant to "stop, this is getting too deep, you are going too far" when appellant poured whiskey on Lora's cuts wrists. (XXX RT 8429.) Appellant demonstrated his sadistic intent to inflict extreme pain to Lora by responding that she was going to die anyways. (XXX RT 8430.) Knowing she was going to die, appellant still chose to inflict more pain onto Lora.

The evidence makes clear that appellant did, in fact, inflict extreme cruel physical pain and suffering upon Lora Sinner. The evidence presented demonstrated that Lora was crying for help and in pain throughout appellant's treatment of her. (XXVI RT 7354; XXVII 7379, 7386, 7387; XXVIII 7900, 7905, 7907, 7910, 7918, 7920.) She was bleeding profusely from her wrists as a result of appellant cutting her. (XXVII RT 7910.) Further, her cries of pain were so loud, appellant felt the need to put a bag over her head to muffle her screams.

Throughout the torture of Lora Sinner, appellant was angry. He was mad that Lori Smith was not hitting Lora hard enough. (XXIX RT 7924.) Appellant punished Lora for crying out by pouring whiskey on her wounds. (XXVII RT 7389; XXIX RT 7910; XXX RT 8424.) Further, while appellant was hitting Lora with the bar portion of the dent puller, he was visibly mad, yelling at Lora. (XXIX RT 7909.) Appellant's anger at Lora demonstrated his intent to inflict extreme pain on Lora in addition to his plan of killing her.

Appellant's reliance on *People v. Mungia* (2008) 44 Cal.4th 1101, is misplaced as that case is distinguishable from the present one. (AOB 218.) In *Mungia*, the victim's hands and feet were bound and evidence was presented that victim experienced great pain and suffering as defendant battered her to death with blunt object. (*People v. Mungia, supra*, 44 Cal.4th at p. 1136.) However, in *Mungia* this Court found that the defendant's prior statements to his sister suggested that he killed the victim to ensure that she would identify him as the person who robbed her. (*Id.* at p. 1137.) In *Mungia*, this court further found that while the murder was "savage" the nature of victim's injuries did not suggest that defendant inflicted any of them in an attempt to torture victim rather than simply to kill her, and there was no evidence that defendant was angry at victim or had motive to inflict pain in addition to the pain of death. (*Ibid.*)

The facts of *Mungia* are clearly distinguishable from those in the present case. While appellant did appear to express concern that Lora Sinner witnessed prior thefts and might betray him, he also exercised a control over Lora that demonstrated that this was not a concern that affected his intentions of torturing and killing her. Lora never went into town by herself. Appellant had commandeered her vehicle and dictated where she could and could not go. Appellant exercised his influence over her in getting her to pay for the group's supplies. Appellant openly flirted with Lora and gave her the attention she desired. There is no indication that Lora was a threat to appellant.

Further, as stated above, appellant's actions went above and beyond those presented in *Mungia*. Rather than killing her himself, appellant started by forcing Lora to cut her wrists in an attempt to kill herself. This level of control and sadism went beyond the killing to protect oneself as presented in *Mungia*. Further, appellant's invitation/order for the others to join in and help kill Lora demonstrated his desire to create the image that

everyone was against Lora. Appellant's use of the bag, not to suffocate Lora, but simply to mute her screams also demonstrated his extra intent. Also, his repeated pouring of liquor onto Lora's open wounds, which made her scream out in pain, demonstrated a sadism not present in *Mungia*. Appellant's actions in the present case are clearly distinguishable from those in *Mungia*, rendering that ruling inapplicable to the present situation.

Sufficient and substantial evidence supported the torture special circumstance in this case. Appellant's claim must fail.

VIII. THE TORTURE-SPECIAL CIRCUMSTANCE INSTRUCTION IS NOT UNCONSTITUTIONAL

Appellant argues that the torture special circumstance finding in this case must be vacated because the jury instruction describing the special circumstance was insufficiently narrow and thus constitutes cruel and unusual punishment and a denial of due process under the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 221.) Respondent disagrees.

As appellant concedes, this Court has rejected this argument in *People v. Raley* (1992) 2 Cal.4th 870. (AOB 222.) Specifically, this Court has ruled that the torture special circumstance "sufficiently channels and limits the jury's sentencing discretion consistent with Eighth Amendment principles" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1162-1163, citing *People v. Raley, supra*, 2 Cal.4th at p. 898), and "meaningfully narrows the group of persons subject to the death penalty." (*People v. Barnett, supra,* 17 Cal.4th at pp. 1162-1163, citing *People v. Davenport* (1985) 41 Cal.3d 247 and *People v. Raley, supra*, 2 Cal.4th at p. 900). Further, this Court has directly held that the term "sadistic purpose" in CALJIC No. 8.81.18 is not unconstitutionally vague or overbroad. (*People v. Raley, supra*, 2 Cal.4th at p. 899; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 223.) Additionally, this Court has upheld the constitutionality of the torture special

circumstance law, section 190.2, subdivision (a)(18), as enacted in 1978. (*People v. Davenport* (1985) 41 Cal.3d 247, 266–271; *People v. Elliot* (2005) 37 Cal.4th 453, 479.) For the reasons set forth above, appellant fails to show any constitutional violation here.

Appellant's attempt to liken the present case to *People v. Mungia, supra*, 44 Cal.4th at pp. 1136-38, on this issue is misguided. (AOB 223.) In that case, this Court found the evidence insufficient to sustain the torture-murder special circumstance where the victim was killed because she could identify the Defendant. (*Ibid.*) However, this Court in *Mungia* did not hold that CALJIC No. 8.81.18 was unconstitutional. Therefore, it has no bearing on the present argument. Further, as respondent argued above in Argument VII, the facts of *Mungia* are substantially distinguishable from the present case. Respondent hereby incorporates that analysis to counter any attempt to align *Mungia* and the present case. As such, appellant's reliance on *Mungia* for this argument is misguided. Appellant's claim must fail.

IX. IMPOSITION OF THE DEATH PENALTY DID NOT AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT; THERE IS NO INDICATION APPELLANT COULD NOT CONTROL HIS BEHAVIOR

Appellant asserts that imposition of the death penalty in this case constitutes cruel and unusual punishment, in violation of the Eight Amendment, because he allegedly suffers from a "fixed" brain chemistry that renders him unable to control his behavior. (AOB 225.) Respondent disagrees.

In evaluating appellant's claim, the relevant standard is whether the punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*People v. Dillon* (1983) 34 Cal.3d 441, 477-482; *People v. Smithey* (1999) 20 Cal.4th 936, 1015.) It is undisputed that the crime of

murder with the special circumstance of torture does qualify a defendant for the death penalty under California Law. (§§ 187, 190.2 (a)(18).) During the penalty phase, appellant presented his current "fixed" brain defense through the testimony of psychologist Myla Young. Young, retained by the defense in this case, testified that a claim that appellant suffered brain damage would be a "reasonable conclusion." (XLV RT 12734.) However, Young never directly testified that appellant suffered from actual brain damage or mental retardation.[32] As such, appellant's citation to *Atkins v. Virginia* (2002) 536 U.S. 304, 316, for the proposition that execution of a mentally retarded person is excessive, is not relevant to the present case. (AOB 225.) Further, as this Court found, even if appellant did have brain damage, and, as stated below, the evidence on this issue was completely disputed by the experts, this would not necessarily render the death penalty cruel or unusual. (*People v. Poggi* (1988) 45 Cal.3d 306, 348.) Also, it is undisputed that appellant was approximately 20 years, 4 months old at the time of the murder. As such, appellant's citation to *Roper v. Simmons* (2005) 543 U.S. 551, 571, for the proposition that death should be excluded for offenders 18 years and under, is immaterial to the present case.[33] (AOB

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[32] On appeal, appellant asserts that the fact that he was subjected to repeated acts of anal rape by his father over the course of three years destroyed his ability to cope and respond for the rest of his life. (AOB 227.) However, it must be noted that during his testimony at the penalty phase, appellant testified that he only remembered one incident of being sodomized by his father. (XLVI RT 12989, 12994.)

[33] Additionally, appellant's citation to *Kennedy v. Louisiana* (2008) 554 U.S. 407, is confusing. (AOB 226.) *Kennedy* involved the rape of a child victim where the child died. The question in that case was whether the death penalty was appropriate when the defendant did not possess the intent to kill the victim. (*Id.* at p. 413.) In the present case, appellant tortured and murdered the victim. Testimony was presented that appellant admitted to intending to kill the victim to put her out of her misery, thereby demonstrating intent. (XXX RT 8430.)

225-226.) There is no indication that appellant's culpability or blameworthiness was diminished "to a substantial degree, by reason of youth and immaturity" as required by the United States Supreme Court. (*Roper v. Simmons, supra*, 543 U.S. at p. 571.)

Rather, the evidence presented to the jury demonstrated that appellant suffered no such inability to control his behavior. On cross-examination, Myla Young admitted that she reviewed the psychological evaluation of appellant by CYA psychologist Derek Washington in April of 1996. (XLV RT 12810.) In that evaluation, Young admitted that Washington found no evidence that appellant suffered from a major mental disorder, organic brain disease, or affective dysfunction. (XLV RT 12811.) Young also admitted that she reviewed the November 23, 1991, psychological evaluation of appellant for discharge from the facility by Norman Ballinson of the Modesto Psychiatric Center. (XLV RT 12812-12813.) Young admitted that in that report Ballinson found appellant suffered from no organic cerebral dysfunction. (XLV RT 12813.) Young also admitted that, unlike her tests of appellant, the Modesto Psychiatric Center actually took physical samples from appellant and conducted tests for thyroid function, urine and substance abuse screening, and an electrocardiogram. (XLV RT 12802, 12814.) Young also admitted to reviewing Dr. Jeffrey Miller's October 3, 1986, report regarding appellant which found that appellant demonstrated no evidence of any kind of learning disability or neuropsychological impairment. (XLV RT 12814-12815.) Young also admitted to not performing a brain scan on appellant to support her findings. (XLV RT 12815.) Young admitted on re-cross examination that Dr. Jeffrey Miller, like herself, utilized the Weschler Intelligence test, the Rorschach ink block test, and the wide range achievement test in their assessment of appellant. (XLV RT 12823.)

Psychiatrist George Woods also testified for the defense. (IXLVII RT 13274.) Woods was specifically retained by the defense to determine whether appellant suffers from a mental disease or a psychiatric disorder. (IXLVII RT 13280.) Woods personally examined appellant three times in preparation for the assessment, starting in April of 2002. (*Ibid.*) Woods testified that, in his opinion, appellant suffers from a post traumatic stress disorder that is chronic, severe, and manifests itself in behavioral problems. (XLVII RT 13312.) Woods opined that symptoms of appellant's mental disorder were present at the time of the offense for which he's been convicted which impaired his ability to conform his behavior to the law. (XLVII RT 13352.) However, Woods specifically testified that he was not saying that appellant was not responsible legally for his actions. On the contrary, he did testify that from a psychiatric standpoint appellant has difficulty conforming his behavior. (*Ibid.*)

On closer examination, Woods admitted that he did not perform any physical exams such as PET scans, CAT scans, or blood tests to rule out organic brain damage. (XLVII RT 13353.) Also, Woods admitted that, contrary to his diagnosis that appellant possessed the inability to experience a range of emotion, appellant did express love for Lisa Rowe and initially for Ken Sloan. (XLVII RT 13354.)

Respondent submits that appellant presented insufficient evidence to support his current claim that he was unable to control his behavior. In addition, the evidence concerning appellant's alleged mental difficulties during the penalty phase was directly contradicted by evidence presented by the prosecution. CYA Staff Psychologist Dr. Derek Washington testified for the prosecution. (XLVIII RT 13656.) On April 18, 1996, Washington performed an evaluation of appellant while he was at the Preston facility. (XLVIII RT 13663.) In the evaluation, Washington found no symptoms of any major mental disorder. (XLVIII RT 13664.)

Washington noted that appellant's thinking was coherent, focused and goal-oriented. He also noted that appellant clearly demonstrated a recognition of the difference between right and wrong and had a clear perception of what he wanted to do with himself when he got out of CYA. (*Ibid.*) Washington found appellant had no symptoms of organic brain disease. (XLVIII RT 13665.) Washington found appellant had no symptoms of affective dysfunction. (XLVIII RT 13666.) After reviewing appellant's file and interviewing him, Washington found that appellant did not have much motivation to rehabilitate himself because appellant did not believe he had any problems. (XLVIII RT 13671.) Washington found that appellant had an anti-social personality disorder, but did not suffer from post-traumatic stress disorder. (XLVIII RT 13673, 13691.)

Further, psychiatrist John Shale testified for the prosecution. (XLVIII RT 13699.) Shale directly disputed Myla Young's finding that appellant suffered from major depression. (XLVIII RT 13713.) Specifically, Shale testified that Young failed to provide any data to substantiate that appellant suffered from depression. (XLVIII RT 13714.) Shale found that in making her diagnosis, Young did not review the criteria of depression and did not present any evidence of actual depression. (XLVIII RT 13717.) Shale also testified that Young's diagnosis that appellant suffered from a cognitive disorder was too vague to be of use because that particular diagnosis does not include any criteria. (XLVIII RT 13717-13718.) Shale also noted that appellant's high intelligence quotient scores were inconsistent with a diagnosis of cognitive dysfunction. (XLVIII RT 13718-13719.) Like psychologist Derek Washington, Shale also found that appellant demonstrated no evidence of a brain disorder and no history of brain trauma. (XLVIII RT 13720.) In commenting on Young's reliance on the Rorshach test in her testimony, Shale opined that the Rorshach test is

subjective and has proven, over time, not to be scientifically valid. (XLVIII RT 13722.)

Shale also disagreed with George Wood's assessment that appellant suffered from post-traumatic stress disorder. (XLVIII RT 13724.) Specifically, Shale found that Woods' assessment did not offer any evidence to substantiate the criteria necessary for such a diagnosis. (*Ibid.*) Rather, similar to Young's assessment of appellant, Woods listed several risk factors and assumed that appellant suffered from the disorder, resulting in an incorrect analysis. (XLVIII RT 13725.) On the contrary, Shale found that appellant met all of the criteria for anti-personality disorder. (XLVIII RT 13737, 13747.) To the point presented here, Shale opined that most people who have anti-personality disorder do not go on to become murderers. (XLVIII RT 13746.) Shale found no indications that appellant suffered from major depression. (XLVIII RT 13740.) Shale found no evidence that appellant suffered from any significant mental illness. (XLVIII RT 13742.) Shale testified that appellant did not suffer from a mental disease. (XLVIII RT 13747.) Defense psychologist Jule Kriegler then disagreed with John Shale's testimony, and argued that appellant did meet the criteria for a diagnosis of post-traumatic stress disorder. (L RT 14166.)

The jury in this case heard and considered all of the above evidence in reaching its conclusion that death was the appropriate punishment. The mitigation evidence presented by appellant was not of the nature that it absolutely precluded application of the death penalty (i.e. *Atkins v. Virginia*). That the jury did not give proffered evidence the mitigating weight that appellant believes it should have does not result in a constitutional violation.

As such, respondent asserts there was insufficient evidence in the record on appeal to support appellant's allegation that he was not

responsible for his own behavior. The jury heard all of the expert testimony on appellant's mental capabilities and specifically found that appellant possessed the specific intent required for the crime of murder, and that he inflicted torture on Lora Sinner during the commission of this crime. As noted above, ample evidence supported these findings. Viewing the conflicting evidence in the light most favorable to the judgment (*People v. Smithey, supra,* 20 Cal.4th at p. 1015; *People v. Davis* (1995) 10 Cal.4th 463, 509), sufficient and substantial evidence supported the jury's findings in rejecting appellant's current claim that he was unable to control his behavior and respond appropriately to his circumstances and to other people. As such, appellant has completely failed to demonstrate that his punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*People v. Dillon, supra,* 34 Cal.3d at pp. 477-482; *People v. Smithey, supra,* 20 Cal.4th at p. 1015.) His sentence in this case is in no way disproportionate given his heinous actions in torturing and murdering Lora Sinner. Appellant's claim must fail.

X. THIS ARGUMENT IS FORFEITED; TRIAL COURT WAS WITHIN ITS DISCRETION IN EXCUSING PROSPECTIVE JUROR SWIFT

Appellant claims that the trial court erroneously excused prospective juror Billie Jean Swift based on her views of the death penalty in violation of his Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 231.) Respondent disagrees.

A. Background

On June 6, 2002, prospective juror Billie Jean Swift requested a hardship from serving on the jury in the present case. (XV RT 3961.) On her jury questionnaire, Swift explained: "If [*sic*] have a lot of pain in my wrist (fractured). I am not anticipating it. I have concern [*sic*] with child care." (XVIII CT 15022-15023.) In conjunction with this request, Ms.

Swift completed a "Request for Hardship Disqualification" form. (LVII 15030.) In that form, Ms. Swift stated, under penalty of perjury, the following:

> I have a fractured wrist and still waiting [*sic*] for an appointment from orthopedist to get a cast. Also, I have for [sic] children at home ages 5, 9, 11 + 13 and no child care available until approx. noon during the week. Unless I pay somebody, but I can't afford to. I am not sure that my jobs (Walmart + U.S. Post Office casual-temporary position) will pay me for time off because of jury duty.

(LVII 15030.) On June 7, 2002, the following discussion occurred with Ms. Swift and the trial court:

> SWIFT: Okay. I found out yesterday that -- that they will not pay me. But, also, they laid me off.
>
> THE COURT: Because you are a part-time worker; right?
>
> SWIFT: Yeah. And because of this.
>
> THE COURT: They are going to lay you off because of your injury?
>
> SWIFT: Yes. I can't --
>
> THE COURT: You can't work? Why don't you come on up.
>
> SWIFT: I'm sorry.
>
> THE COURT: That's all right. Let me get out your hardship form so I can remember. As I recall, you had two jobs; right?
>
> SWIFT: Yes. I work on -- I work on Saturdays at Wal-Mart right now.
>
> THE COURT: Okay. So if -- if you are not going to be able to work at the post office because of your arm -- is that what you are telling me?
>
> SWIFT: Right. Yes. They will be call me back later towards Christmas. But not right now.
>
> THE COURT: So you should be able to serve on the jury?

SWIFT:Right. As of right now, yes.

(16 RT 4101-4102.) There does not appear to be another reference to prospective juror Billie Jean Swift, either by name or her juror badge number (220033971), in the entire reporter's transcript in this case. Ms. Swift's financial hardship did not appear to be addressed by the trial court.

In his argument, appellant cites specific portions of the reporter's transcript that purport to detail argument on Ms. Swift's suitability as a juror. (AOB 231-232, citing XIX RT 5232-5233.) However, review of those pages reveals no discussion with or of Ms. Swift. Further, appellant argues that Ms. Swift was excused by the court for cause on June 20, 2002. (AOB 231.) Review of the clerk's transcripts from the June 6, 2002, request for hardship by Swift to June 26, 2002, reveals no references to Swift by name or juror number. (XVIII CT 3772-3782, 3786-3804, 3816-3818.) However, those dates do detail that: (1) on June 20, 2002, five unspecified jurors were excused for cause by stipulation of counsel, (2) on June 21, 2002, four unspecified jurors were excused for cause by stipulation of counsel, (3) on June 25, 2002, three unspecified jurors were excused for cause by stipulation counsel, and (4) on June 26, 2002, four unspecified jurors were excused for cause by stipulation of counsel. (XVIII CT 3791, 3793, 3802, 3817.)

B. Forfeiture

Appellant has forfeited or waived this argument by failing to object to the excusal of Ms. Swift at the trial court level. As this Court has ruled, failure to object to a claim of error with respect to discharge of jurors at the trial level waives the argument for appellate purposes. (*People v. Holt* (1997) 15 Cal.4th 619, 656 [an objection must be made in the trial court in order to preserve for appeal a claim of error in excusing a juror].) In the present case, as detailed above, there is no indication in the appellate record

that appellant objected to the excusing of Ms. Swift as a juror. On the contrary, during the time in question, 16 unspecified jurors were excused for cause by stipulation of counsel. (XVIII CT 3791, 3793, 3802, 3817.) There in no indication in the record that Ms. Swift's excusal was objected to by any party at the trial level. As such, appellant's claim is waived or forfeited for appellate purposes.

C. Discussion

As stated above, there is no indication in the record that appellant objected to the excusal for cause of Ms. Swift for cause. Even assuming that appellant did object, appellant does not dispute that a prospective juror may be excluded when serving on the jury would cause them a financial hardship or would be physically troublesome. (See *People v. Earp* (1999) 20 Cal.4th 826, 893 ["As we observed in *People v. Lucas* (1995) 12 Cal.4th 415, 489, a juror facing personal hardship might feel 'some pressure to bring the penalty deliberations to a speedy close'"].) The record demonstrates that Ms. Swift had a financial/family hardship in that she had no one to care for her four children, ages 5, 9, 11, and 13, other than herself and that she could not afford to pay someone for doing this. (XVIII CT 15023, 15030.) In addition, Ms. Swift stated that suffers from "a lot of pain" in her wrist as a result of the fracture. (XVIII CT 15022.) Both of these reasons were sufficient to excuse her for cause.

Further, again assuming an objection was made, a prospective juror may be excluded for cause from a capital case if the juror's views on capital punishment would "prevent or substantially impair" the performance of his or her duties in accordance with the juror's oath and the court's instructions. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. McKinnon* (2011) 52 Cal.4th 610, 646.) Further, a prospective juror may be disqualified on the basis of his or her questionnaire responses alone "if it is clear from the answers that he or she is unwilling to temporarily set aside

his or her own beliefs and follow the law." (*People v. Avila* (2006) 38 Cal.4th 491, 531; see *People v. Russell* (2010) 50 Cal.4th 1228, 1262; accord, *Wilson* (2008) 44 Cal.4th 758, 787; *People v. Thompson* (2010) 49 Cal.4th 79, 97; *People v. McKinnon, supra*, 52 Cal.4th at p. 647.) When a trial court rules on the suitability of a juror from their questionnaire alone, appellate courts review this determination de novo, without affording the deference that would apply had the court observed the prospective juror in person. (*People v. Avila, supra,* 38 Cal.4th at p. 529.)

In the present case, substantial and sufficient evidence supported excusing Ms. Swift for cause based on her beliefs regarding the death penalty. In question 24 of the jury questionnaire, Swift was asked: "Do you have any religious or moral beliefs that would affect your ability to participate in this trial, follow the law, or be a fair and impartial juror?" (LVII CT 15009.) Swift responded: "Yes, I can not bring myself to decide whether or not a man should live or die." (*Ibid.*) In question 53 of the jury questionnaire, Swift was asked: "Is there any reason you would like to sit or not like to sit as a juror on this particular case?" (LVII CT 15013.) Swift responded: "I would not like to sit as a juror because I would hate to be wrong on my decision[.] I cannot judge this man." (*Ibid.*) In question 63 of the jury questionnaire, Swift was asked: "If the judge gives you instructions on how you must evaluate a case (according to current law), and his instructions (the law) differ from your beliefs or opinions, how will you deal with the situation? (LVII CT 15014.) Swift responded: "I will be uncomfortable about it." (*Ibid.*) In question 93 of the jury questionnaire, Swift was asked: "What are your general feelings about the death penalty?" (XVIII CT 15019.) Swift responded: "I don't like the idea of killing a man. God's word says thou shalt not kill. No offense to Judges or disrespect but God is the bigger Judge. He makes the final decision where man will spend eternity. This man that is on trial is still entitled to

forgiveness by the grace of God. The death penalty makes me uncomfortable. Like I said a few questions back I would hate to be wrong." (LVII CT 15019, 15023.) In question 96 of the jury questionnaire, Swift was asked: "Are you, or have you been a member of any organization or group that takes a position one way or the other on the death penalty?" (LVII CT 15019.) Swift responded: "No," but further explained "Unless you [sic] church beliefs." (*Ibid.*) In question 100, Swift responded "None" when asked about what types of crimes would justify the imposition of the death penalty. (LVII CT 15020.) In question 102, Swift was asked to circle the statement which most accurately stated her position on the death penalty. (LVII CT 15020.) Swift chose the most extreme option of "Strongly Opposed." (*Ibid.*) In response to question 103, Swift responded that she has "very strong feelings concerning the death penalty[.]" (*Ibid.*) Question 111 asked: "Are your feelings about the death penalty such that in every case you would always vote AGAINST the death penalty?" (LVII CT 15021.) Swift responded "YES" to this question. (*Ibid.*) Swift's responses demonstrated that her views on capital punishment would "prevent or substantially impair" the performance of his or her duties in accordance with the juror's oath and the court's instructions. (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. McKinnon, supra,* 52 Cal.4th at p. 646.) In addition, it was clear from her answers to the jury questionnaire that she was "unwilling to temporarily set aside [...] her own beliefs and follow the law" as to the issue of penalty in this case. (*People v. Avila* (2006) 38 Cal.4th 491, 531; see *People v. Russell* (2010) 50 Cal.4th 1228, 1262; accord, *Wilson* (2008) 44 Cal.4th 758, 787; *People v. Thompson* (2010) 49 Cal.4th 79, 97; *People v. McKinnon, supra*, 52 Cal.4th at p. 647.) As such, even if appellant can demonstrate that he did object to the excusal of Ms. Swift for cause, the trial court was well within its discretion in

excusing her based on her stated views of the death penalty. Appellant's claim fails both procedurally and on the merits.

As stated above, during the time in question cited by appellant, 16 unspecified jurors were excused for cause by stipulation of counsel. (XVIII CT 3791, 3793, 3802, 3817.) Assuming Ms. Swift was one of them, review of the record demonstrates good cause why appellant's trial counsel would stipulate to Ms. Swift's excusal for cause. In addition to her responses above, Ms. Swift made certain statements that would have made her a bad juror from a defense perspective. Ms. Swift stated that her cousin is a Sheriff and her husband's cousins are corrections officers. (LVII CT 15011.) Further, in question 77 of the jury questionnaire, Ms. Swift replied that she "Agree[d] Strongly" that "Regardless of the law the defendant in a criminal trial should be required to prove his or her innocence." (LVII CT 15016.) Expanding upon this, Swift wrote: "He better be able to prove his innocense [sic] if he doesn't want to die or stay behind bars for the rest of his life." (*Ibid.*) In question 81, Swift responded that she would never disagree with a policeman. (LVII CT 15017.) In question 82, Swift responded that she would automatically believe a police officer's testimony. (*Ibid.*) Given these responses, it is understandable why defense counsel would have stipulated to Swift's excusal as a potential juror in this case.

In summation, given the absence of evidence showing an objection to Ms. Swift's excusal, appellant has forfeited or waived this argument. As noted by the 16 unspecified prospective jurors that were excused for cause, one of which could have been Ms. Swift, defense counsel's agreement to stipulate to her removal could be implied from her responses to her questionnaire. Assuming an objection was made, Swift's financial and physical hardships justified her being excused as a potential juror. Again assuming an objection was made, substantial and sufficient evidence

supported the trial court's decision to excuse Ms. Swift for cause based on her adamant objection to the death penalty. In any and all events, appellant's claim must fail.

XI. TRIAL COURT DID NOT COMMIT MISCONDUCT WHEN IT DENIED APPELLANT'S MOTION FOR A MISTRIAL BASED ON JUDICIAL MISCONDUCT; THE COURT WAS WITHIN ITS DISCRETION TO HEAR THE MOTION

Appellant claims that the trial court committed judicial misconduct when it allegedly made facial gestures during the testimony of defense expert witness Dr. Woods. (AOB 243.) Appellant further claims that the trial court erred when it did not inquire of the jurors if his alleged gestures affected them in any way. (*Ibid.*) Appellant asserts that the trial court erred by denying the defense's request for a hearing before an impartial judge. (*Ibid.*) Appellant claims these alleged errors violated his Sixth and Fourteenth Amendment rights to a fair trial and due process and his Eighth Amendment guarantee of reliable sentencing. (*Ibid.*) Respondent disagrees.

A. Background

On October 10, 2002, during the penalty phase, defense counsel Roland Papendick brought to the court's attention allegations that the presiding judge was making facial expressions during the testimony of defense witness Dr. George Woods, demonstrating disbelief. (XLVII RT 13343.) However, the prosecutor and penalty phase defense counsel Papendick noted that neither saw any expressions made by the judge during the testimony. (XLVII RT 13346, 13406.) When the jury returned, with the agreement of defense counsel, the judge advised the jury as follows:

> I just want to remind all of the jurors that anything that I have said or done or any question that I may have asked or by any ruling that I've made, if that in any way intimated or suggested to you what you should find to be the facts or that I believe or disbelieve any witness, it should be disregarded and,

> obviously, has not been intended in any fashion to be such. If anything I have done, including any facial expressions, or anything I have said has seemed to so indicate to you, you will disregard and form your own conclusion.

(XLVII RT 13349-13350.)

After the judge considered polling the jury and all parties discussed potential questions to ask them, defense counsel made a motion for a mistrial based on judicial misconduct. (XLVIII RT 13558.) Defense counsel also asked for another judge to hear the motion. (*Ibid.*) The judge expressed his opinion that, based on the allegations, the law did not require that he recuse himself. (XLVIII RT 13559.) The trial court then held a hearing on the motion for a mistrial.

At the hearing, Russell Swartz testified on behalf of the defense. (XLVIII RT 13562.) Prior to his testimony, the judge personally advised Swartz as follows:

> Mr. Swartz, whatever you have to say is in no way will cause me to hold anything against you. I most certainly want you to testify fully and freely so that the truth can come out in this particular hearing. We've known each other a long time, and obviously whatever you may have seen I would like to hear about fully. I don't want you to hesitate at all because I happen to be a judge.

(XLVIII RT 13563.) Swartz responded: "I would presume nothing less." Swartz is a criminal defense attorney in Shasta County and has been practicing in California since 1976. (*Ibid.*) On October 10, 2002, Swartz was present in court when Dr. Woods was testifying. (XLVIII RT 13564.) Swartz stated that Dr. George Woods was a potential witness in one of his cases and he wanted to view the testimony. On the date in question, Swartz testified that he saw "a movement up at the bench" in what he "interpreted" as the judge's reaction to Woods' testimony. (*Ibid.*) Specifically, Swartz testified:

> At various times I would see the Judge, I couldn't see his eyes, but the movements were consistent with rolling his eyes. He would at times put his fist up to his face and sort of go down, look down. He would at times turn away from the testimony just as the Doctor said something. The immediate reaction I had was this Judge does not believe this witness and, um, finds some of his testimony incredible.
>
> [¶ ... ¶]
>
> Just facial expressions, mainly, um, looking away. Um, the big one was several times the, what I call the arching the eyeballs up, that I would go with what I would go rolling the eyeballs (demonstrating). But I did not see his eyes precisely, because I was in the very back of the courtroom. But the arching of the eyebrows back, the head went back a little bit, that's what I saw.

(XLVIII RT 13565.) When asked if the judge's reactions were consistent with innocent facial gestures, Swartz responded: "Well, I don't know what you mean by innocent facial expresses. I'm not going to suggest that the Judge was deliberately trying to convey anything." (XLVIII RT 13566.) When asked if the judge's gestures were meaningless, typical of someone just listening to testimony, Swartz answered:

> Well, part of the time, yes, that would have been true. But overall, the impression I had, because after I started watching him I concentrated on it. And over and over and over it came to me, you know, this man does not believe the testimony of this witness and he's expressing that through his facial expressions and his body movements, and it was disturbing to me, because I felt that the jury might be influenced, and so I brought it to your attention.

(*Ibid.*) When asked if he noticed any reaction to the judge on the juror's faces, Swartz responded: "It was hard to say. I noticed that the jurors would look to the Judge on several occasions, but I can't interpret that too much. I don't know what they were doing." (*Ibid.*) On cross-examination, Swartz testified that the judge putting up his fist to his face was similar to

leaning their head/face on their hand during long testimony. (XLVIII RT 13567.) Swarz also admitted that when the judge turned away during the testimony, it was possible that he was looking at documents. (XLVIII RT 13568.) Upon questioning by the judge, Swartz summarized that: "Just had the overall impression that this was a witness that the Court was not particularly believing, or having the most respect for." (XLVIII RT 13570.)

Art Wooden testified on behalf of the defense. (XLVIII RT 13571.) Prior to giving testimony, the judge personally advised the witness as follows:

> Mr. Wooden, before you start testifying, I just want to let you know that I want to encourage you to testify fully, frankly and freely. I would not hold it against you, anything that you have to say. Obviously you work on court appointments. We've known each other long before this trial started, so obviously it would not be anything that I would take personally. I just want the truth to come out.

(*Ibid.*) Wooden acknowledged this advisement. (*Ibid.*) Wooden testified that he was in the courtroom at the same time Mr. Swartz was on October 10, 2002. (XLVIII RT 13572.) During the testimony of Dr. George Woods, Wooden testified that he thought, based on the judge's facial expression and body language, that the judge was bored. (XLVIII RT 13574.) Wooden continued:

> Then I wrote down it doesn't seem to like the testimony. And then I started writing a little more on point, things, saying things like his facial, he's expressive in his facial in the negative way, frowns. He's raising his eyebrows, sighs a lot, taking deep breaths, eyes rolling to the roof, frowns again, he's rocking his head back and forth. And those are just kind of general observations of things that I noted.

(*Ibid.*) On cross-examination, Wooden admitted that is not uncommon for anyone to raise their eyes or look different ways when court is in session.

(XLVIII RT 13575.) Upon questioning by the judge, Wooden remarked: "It was like I didn't think the Court was doing it on purpose, if that was the question. I'm not quite sure." (XLVIII RT 13578.) Wooden also admitted that while this was going on, he was sitting in the back row of the courtroom and so was Swartz. (XLVIII RT 13579.) Wooden also agreed that from the back wall to the judge's seat was approximately 35 to 40 feet. (XLVIII RT 13580.) On re-direct, Wooden testified that in the afternoon, after he was notified of his potential behavior, the judge began making efforts to prevent making any facial expressions. (XLVIII RT 13580-13581.)

After the testimony of Art Wooden, both parties agreed that the lighting conditions in the audience area of the courtroom are reduced as compared to the lighting in the well area of the courtroom. (XLVIII RT 13582.)

Bunny Masterson testified for the defense. (XLVIII RT 13584.) Prior to her testimony, the judge personally advised her as follows:

> Miss Masterson, before you start, I just want to encourage you that I'm not in any way going to be offended by anything that you have to say, but you're here to tell us what you observed. That's what I want to hear. I want you -- to encourage you to be full, frank, truthful, and don't worry about the fact that I happen to be the Judge and I'm sitting up here on the bench, okay.

(XLVIII RT 13584-13585.) Masterson acknowledged the judge's advisement. (XLVIII RT 13585.) Masterson testified that on October 10, 2002, she was sitting in the back row of the courtroom during Dr. George Woods' testimony. (XLVIII RT 13585-13586.) In attempting to describe the facial expressions she claimed the judge made, Masterson stated: "The best way I can describe, one of them was rolling of the eyes. And another time with pursing of the lips, and involved the lips, the eyes, and the cheeks, I guess you would say . . . ." (XLVIII RT 13586.) Masterson

testified that it was her feeling the judge held disbelief during certain portions of Dr. George Woods' testimony. (XLVIII RT 13588.) Masterson also stated that the judge did not demonstrate disdain, but was possibly annoyed by the testimony. Masterson also admitted to being upset when the court admonished her for her behavior during the testimony of Dr. Woods. (*Ibid.*) Contrary to the court's advisement, Masterson claimed that she, in no way, attempted to stare the judge down during testimony. (XLVIII RT 13589.)

Guilt phase defense counsel Jeffrey Jens testified for the defense. (XLVIII RT 13590.) Prior to testimony, the judge advised Jens as follows:

> You heard me tell all the other witnesses not to be bashful about testifying, because there is no way I'm going to hold that against them. Likewise, I have known you for years and years, and I want you to testify truthfully what you saw, what your impressions were. No way ever would I hold that against you.

(XLVIII RT 13590-13591.) Jens acknowledged that he understood the advisement. (XLVIII RT 13591.) On October 10, 2002, during the morning portion of Dr. George Woods' testimony, Jens testified he saw "some rolling of the eyes and looking away with disbelief on the part of the Judge . . . ." (XLVIII RT 13592.) When he saw this, Jens interpreted this to mean that the judge did not believe Dr. Woods. Jens described the gestures made by the judge as "above average," enough to call his attention to them. (*Ibid.*)

Shasta County Sheriff Sergeant Ronald Clemens testified on behalf of the prosecution. (XLVIII RT 13593.) Prior to testimony, the judge advised Clemens as follows:

> Before you start, I just want to encourage you, Sgt. Clemens, to speak frankly. Don't be bashful about telling us the truth just because I'm the Judge. We've known each other a long time. Whatever you saw, whatever questions are asked of you, just feel free to respond to them fully.

(XLVIII RT 13593-13594.) Clemens acknowledged this advisement. (XLVIII RT 13594.) Clemens has acted as the investigating officer for the prosecution and has been personally present during "a good majority of the trial." On October 10, 2002, Clemens was seated at the prosecution's table during Dr. George Woods' testimony. (*Ibid.*) Clemens detailed how he tries to watch everything that goes on in court, including the judge, the jury, and counsel, for "information" purposes. (XLVIII RT 13594-13595) Clemens testified that there were several distractions in court on October 10, 2002. (XLVIII RT 13595.) One of the distractions was defense investigator Joe Barthel. (XLVIII RT 13595-13596) Barthel entered the court late that morning and an electronic device on his person kept going off when court was in session. (XLVIII RT 13596.) As a result of this, the judge looked in Barthel's direction. Also, there had been a problem with Barthel and his electronic device prior to that, causing the judge to look in his direction. In explaining the other in-court occurrences, Clemens testified:

Other things took place. Mr. Swartz came in twice that morning, once I believe with a carrier, once without the carrier. Mr. Swartz is kind of a big guy and he's very noticeable to me, and I have known him for a long time, too. Some type of electronic device went off when he was in the courtroom one time, and there was [*sic*] three beeps. Mr. Swartz, whenever he gets up, he doesn't patiently let the seat go forward, and it makes a lot of noise throughout the court. And the Judge looked in that direction when those things were just taking place. He was looking in that direction, as was I. During that, bailiffs that morning, seemed like there was substantial amount of movement. I don't know why, but there was a lot of movement over by the door to the left, my left, you know, three at a time, and stuff. There was just a lot of movement. And the Judge would notice that. The

Judge always, because I watch the Judge a lot. (*Ibid.*) In describing the judge's normal conduct when court in session, Clemens testified:

> Like I said, the Judge looks around his courtroom, not always just because of noises or stuff. He just kind of looks around. He takes a lot of notes. He watches people in the court. He looks at the attorneys, because I watch him look at the attorneys. He looks at the jury, looks in the gallery, not that there has been that many people, but that's just some of the things he does.

(XLVIII RT 13596-13597.) In response to the testimony that the judge was making facial expressions, Clemens testified:

> One of the other things I think is important as I see it is the Judge utilizes cough drops. When he sucks on his cough drops, his whole face movement, his forehead movement, his cheeks move, his forehead moves, you can just envision sucking on a cough drop and your whole face is going to move, and he does that. And I'm not going to get into that.

(XLVIII RT 13597.) Clemens testified that in his observations of the judge, he did not see the judge make any facial expressions that indicated disbelief or annoyance at Dr. Woods' testimony. (*Ibid.*) On cross-examination, Clemens clarified that the judge might have been sucking on cough drops during the testimony of Dr. Woods which would have changed his facial expressions. (XLVIII RT 13599.)

Prosecutor Brent Ledford testified for the prosecution. (XLVIII RT 13600.) Prior to Ledford's testimony, the judge advised him as follows: "Likewise, Mr. Ledford, the same admonition applies to you. Whatever you have to say, I'm obviously not going to hold against you in any way?" Ledford acknowledged the judge's advisement. (*Ibid.*) In regards the allegations of facial expressions made by the judge, Ledford testified:

> One, is that the Judge has a mustache that goes substantially below his -- the side of his lips, the edge of his lips. The other is, he has a prominent crease in his forehead, that even when his face is at a neutral position you can see that crease. And I think those two factors accentuate any facial features that -- maybe I

have noticed that they accentuate any facial features that may be expressed. I have also noted that during, um, technical testimony that there is, um, a tendency for him to frown and look down, but I have always felt that that was more of trying to get down exactly what is being said as compared to disbelief or not.

(XLVIII RT 13600-13601.) In regards to reactions to disturbances in the courtroom, Ledford testified:

Judge Ruggiero is notorious for not wanting electronic devices to go off in the courtroom. And I did note that when Mr. Swartz' device went off, and again earlier when Mr. Barthel's, that he did show some displeasure in that. But again, I was concentrating mainly on Dr. Woods. And every time I looked at the Court, um, other than look of concentration, I did not see anything that would be disbelief.

(XLVIII RT 13601.)

After this testimony was presented, the judge inquired whether either party would like testimony from the court bailiff who may have had the most opportunity to observe the judge. (XLVIII RT 13604.) In prefacing any testimony, the judge explained:

We have -- what I told him [the bailiff] was I don't want to talk about this at all, and I told both my Clerk and my Bailiff they're free to speak to the attorneys about anything. I didn't really have any time to tell the Court Reporter the same thing. But obviously my only interest is that we get all of the facts out, and we have a full record. I would like to hear from my bailiff, because he looks at me and I look at him a lot.

(*Ibid.*)

Court bailiff Daniel Martin testified on behalf of the prosecution. (XLVIII RT 13604.) Prior to testimony, the judge advised Martin as follows:

Deputy Martin, same thing applies to you. I wouldn't want you to hesitate to be truthful, because we work together, you're in my courtroom. What I regard in the highest is the truth, and that's what I want to hear.

(XLVIII RT 13604-13605.) Deputy Martin acknowledged the advisement. (XLVIII RT 13605.) Martin remarked that his has to be sensitive to and cue in on the judge's non-verbal communications. In regards to the morning of October 10, 2002, Martin testified that the judge's facial expressions were consistent with the way he normally conducts himself since Martin has been assigned to his courtroom. Martin did acknowledge that there were distractions in the courtroom that day, including Mr. Barthel. (*Ibid.*) He also added that:

> Mr. Swartz is not gentle in the courtroom when he comes through the door. Watching the jurors, he becomes a distraction, and sitting down he's a distraction. There was some note passing between him and Mr. Wooden. I think that some of the jurors were keying on to those motions.

(*Ibid.*) In regards to how the jury was affected, if at all, by the occurrences in court or the judge's demeanor, Martin testified:

> My estimation, the jurors were more focused on, it's kind of like a tennis match. They watch the witness' answer and they watch the attorney's next question. I didn't witness anything that, from where I was sitting, that any of the jurors were cuing in on the Judge for any particular reason. But it was just normal, what I would call normal courtroom distractions that were happening in the audience. People got up and moved around, but nothing out of the Judge that I would consider any different than his normal day on the bench for the last 14 months.

(XLVIII RT 13606.) On cross-examination, Martin testified that from approximately 10:00 to 10:15, during Dr. Woods' testimony, he took a break from the courtroom. (XLVIII RT 13606-13607.) He also testified that he was not in the courtroom when Mr. Swartz electronic device went off in court. (XLVIII RT 13607.)

The judge then asked both parties if they wanted to call Deputy Dan Neville. (XLVIII RT 13609.)

Deputy Dan Neville testified for the prosecution. (XLVIII RT 13609.) Prior to giving testimony, the judge advised Neville as follows: "Same admonition to you, deputy. Feel free to speak frankly and truthfully. The fact that I happen to be the Judge shouldn't have any affect." (XLVIII RT 13609-13610.) Neville acknowledged the advisement. (XLVIII RT 13610.) On the morning of October 10, 2002, Deputy Neville testified that there were distractions in the courtroom. Neville testified that he cues in on the judge's expressions for an indication if he is going to give him non-verbal directions as to what to do with distractions. In regards to distraction in court that day, Neville testified:

> Most notable one was Mr. Swartz, when he came in, he tends to bring in electronic devices, as he did on this day. I observed Mr. Swartz using a, what I call PDA device, palm pilot. It was making a ticking noise for a period of time, and it shortly after that make four beeping noises, which I think he was turning down. He then put the palm device away. And then shortly after that, I saw Mr. Swartz had his cell phone in his hands and looked like he was doing something on the key pad for a period of time. I noticed that. The time that palm device was being used, Deputy Haagenson was in the courtroom. I was looking at the Judge to see if he was hearing it, and if it was being a distraction. And the Judge diverted his attention from what I -- appeared to be the general witnesses, and towards my way and Mr. Swartz' way. And I tried to cue in Deputy Haagenson to talk to Mr. Swartz. Deputy Haagenson started to get up, Mr. Swartz put his phone in his pocket.

(XLVIII RT 13610-13611.) In regards to the judge's potential reactions to testimony, Neville testified:

> When the Judge -- I have noticed that when the Judge, during objections, I have noticed, it may be because my attention is more diverted to the Judge, waiting for his response, but I noticed he tends to look towards the ceiling when he thinks, and I have noticed that on more than one occasion. And

I have seen him -- I can see his hand and a notepad from where I'm sitting. And I have seen him look towards the ceiling when he's taking notes as well.

(XLVIII RT 13611.)

After witness testimony on the mistrial motion concluded, the judge offered the following thoughts:

I have obviously thought about a lot of this to see, and I'm not consciously aware of my facial expressions, but I know some things that I do which may be misinterpreted or may not. And I'm not suggesting by my stating these things what the interpretation should be. But, um, a couple of the things. The quote pursing lips that Miss Masterson described, I know I do that a lot. Sometimes it's to mask any kind of a reaction, sometimes I just do it, and that's what I showed you where I pull my lips close, tight together, sometimes something funny maybe happened and I don't want to be laughing, and everybody else may be, and I will do that. It's sort of -- I tried to deadpan my expressions. I know that I'm -- I move around a lot. I don't like to sit still. I don't like to sit in my office. I don't like to sit still up here, and I rock. If you watched me this morning, I rock. I do move side-to-side. I frequently check and adjust the microphone to the left. I didn't hear anything that might have been misinterpreted from that, although I do do that.

When I think, I do look up. I have noticed that on objections and when there is testimony sometimes I will rock back and look up like that, because I'm thinking about what they're saying, whether I think it makes sense, or that's an interesting point, or I disagree with that point. I know I do that. Um, sighing, I know I do that periodically. I'm not aware of it. My dad used to get on me about it when I was a kid, and it's just something -- and it doesn't -- I'm sure I have done it throughout the trial at a variety of points.

Let's see. I do take -- I take notes constantly, so I'm looking up and down. Let's see. In the afternoon, as far as I can tell, I was concerned that maybe I was demonstrating disinterest by, I was trying to basically stare and being expressionless and not move around too much, which is completely atypical for me. I'm usually expressive. I try not to send signals, but I know I make facial expresses. I rock in the chair, I lean back, I lean

forward. I furrow my brows. That's why I have that line there. And let's see. I think that's about all that I probably need to put on the record.

And other than what I stated earlier that, um, in terms of when Dr. Woods was testifying, and Mr. and Mrs. Brown were in the courtroom, I was looking back there, periodically I listened to something that Dr. Woods would say about Mr. Smith, and I would think on how it might be affecting Miss Brown having grown up in the same environment. And I do scan the courtroom. I do look at jurors to make sure they're paying attention, if they're not paying attention. I might move around a little bit more so oh, yeah, we're in court here, those kinds of things. I try to show an interest in all witnesses. Whether or not I do, like I just did right then, something that is unintentional, some expression, I don't know. I hope that most of it was directed to the left side of the courtroom and not where the jury could see it.

I have no reason to disregard what the witnesses have said at this point, and I realize we're not completed with the hearing. But I wanted to get that information out to you to use however you will.

(XLVIII RT 13611-13614.)

After presentation of evidence and comments, the judge discussed several California Appellate cases on judicial misconduct. (XLVIII RT 13645-13649.) In denying the motion to poll the jury as to whether the judge's reactions, if any, affected their assessment of Dr. Woods' testimony, he reasoned:

> But the question is, at what level, when do we have to inquire of the jury on each and every one of these, the totality of them. Now, I definitely recognize that the Court holds a special position with the jury, at least I think it does, in terms of trust. And they may be more apt to take direction from the Court than from an interested party, counsel or investigator. So I recognize that difference. But I think we need a showing of something more than what would be my normal, but perhaps some quirky physical characteristics to require an inquiry of the jury. I suspect before this trial is over, despite my best efforts to be the automaton the court says the judge need not be,

although I will try to be, I'm going to raise my eyebrows, I'm going to look up, I will probably sigh. These are things I do, whether I'm in a casual conversation with my clerk, or I'm in court. And I think that the law recognizes that. And there needs to be something more than those kinds of things before the court is required to conduct an inquiry.

I think the law is clear that the defendant is entitled to a fair trial, but he's not entitled to a perfect one, because that is clearly an impossibility. As I indicated, I believe there needs to be some threshold showing before the duty rises to inquire of the jury, however that may be articulated with language, I don't believe it's been reached here. If I'm wrong and the case warrants review by the Supreme Court based upon what findings the jury may make, I'm sure they will correct me to Mr. Smith's benefit.

I'm relying on a large part -- to a large part on the cases wherein an instruction was found not to be curative. And in those cases there were clear signals sent from the Court to the jury about the Court's opinions or feelings about certain witnesses. In none of those cases was it a judge's normal body language which could be interpreted a certain way, nor were they cases in which there was any question about the juror's awareness of the court's actions. If an instruction cures the problem, an inquiry is irrelevant or superfluous. I think to hold otherwise, would mean every time a judge raises an eyebrow, frowns, rocks backs and forth in his or her chair, or engaging in any other type of normal human conduct which could be subject to—

[¶ ... ¶]

and subject to some type of -- I forgot what I said. Some type of interpretation, be it positive for the witness, or negative to the witness, an inquiry would be required. And granted, having three witnesses state what they said certainly raises an issue. I don't think it crosses the threshold I said. I could be wrong, but that's my assessment.

And for those reasons, I'm going to deny the request to question the jury. They have been admonished at the start of this trial, they were admonished during the trial, and they'll get the instruction again if you would like at the conclusion of the trial.

(XLVIII RT 13652-13654.) Leaving the issue open until video coverage of the courtroom was reviewed, the judge then denied the motion for the mistrial after being prompted by defense counsel. (XLVIII RT 13655.) Specifically, the judge found the jury instructive sufficient to cure any problems posed by his mannerisms. (*Ibid.*)

A video tape taken inside of the courtroom during the testimony in question was entered into evidence. (XLVIII RT 13818.) After reviewing the video tape, notably its recording of the judge, guilt phase defense counsel stated that nothing on the video tape was probative of the issue of whether the judge reacted to the testimony. (XLVIII RT 13819.) After viewing the video tape, the prosecutor agreed with this assessment. As a result, the judge chose not to view the video tape. (*Ibid.*)

B. Discussion

1. Judicial Misconduct

The due process clause of the Fourteenth Amendment requires "a fair trial in a fair tribunal [] before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905, quoting *Withrow v. Larkin* (1975) 421 U.S. 35, 46, internal quotation marks omitted.) Appellate courts assess whether any judicial misconduct or bias was so prejudicial that it deprived defendant of "a fair, as opposed to a perfect, trial." (*People v. Snow* (2003) 30 Cal.4th 43, 78.) A trial court has the duty to control a trial and is given wide latitude in doing so. (Pen. Code, § 1044; *People v. Fudge* (1994) 7 Cal.4th 1075, 1108.) A trial court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or create the impression it sides with the prosecution. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237-1238; *People v. Fudge, supra,* 7 Cal.4th at p. 1107.) A judge's comments are evaluated:

> on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury. The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.

(*People v. Sanders* (1995) 11 Cal.4th 475, 531–532, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 770 and *People v. Melton* (1988) 44 Cal.3d 713, 735, internal quotation marks omitted; *People v. Cash* (2002) 28 Cal.4th 703, 730.) Mere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate judicial bias. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111.) Further,

> The role of a reviewing court is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.

(*People v. Harris* (2005) 37 Cal.4th 310, 347, quoting *People v. Snow, supra,* 30 Cal.4th at p. 78, internal quotation marks omitted.)

In the present case, the trial court did not commit judicial misconduct. It is not alleged that the judge in this case made any comments that discredited the defense. Rather, the allegations here consist entirely of supposed facial expressions, body movements, and taking deep breaths. In no way did the evidence demonstrate that the judge was taking sides with the prosecution. In no way has appellant demonstrated that his right to a fair trial or due process was impacted in any way. As such, the judge's conduct was susceptible to a multitude of interpretation as was demonstrated at the hearing.

Appellant's blanket statement that witnesses testified that the judge made facial gestures that demonstrated a negative attitude toward the

defense expert is inconsistent with the entirety of the testimony given at the hearing. (AOB 252.) Specifically, defense attorney Swartz testified that he saw movements by the judge that were consistent with rolling his eyes, but also admitted that he could not see the judge's eyes at all. (XLVIII RT 13565.) Swartz also testified that when he was witnessing the judge's actions, he was seated at the "very back of the courtroom." (*Ibid.*) The parties stipulated that the lighting at the back of the courtroom was "reduced" as compared to the well of the courtroom. (XLVIII RT 13582.) Swartz also testified that the judge would at times put his fist up to his face, look down and at times turn away from Dr. Woods during testimony. (XLVIII RT 13565.) However, he also admitted that the fist to the face conduct was similar to a person leaning their face on their hand during long testimony. (XLVIII RT 13567.) Swartz further admitted that when the judge turned away during testimony, it was possible that the judge was looking at documents. (XLVIII RT 13568.) When asked if the judge's reactions were consistent with innocent facial gestures, Swartz responded: "Well, I don't know what you mean by innocent facial expresses. I'm not going to suggest that the Judge was deliberately trying to convey anything." (XLVIII RT 13566.) As such, Swartz testified that it was his impression that the judge was not trying to convey disbelief of the witnesses to anyone.

It also should be noted that Shasta County Sheriff's Sergeant Ronald Clemens testified that Mr. Swartz is a big guy who is very noticeable and whenever he gets up, he makes a lot of noise throughout the court. (XLVIII RT 13596.) Clemens further testified an electronic device went off when Swartz was in the courtroom, beeping three times and that the judge looked in that direction when those things occurred. (*Ibid.*) Clemens also noted that there was a lot of movement in the courtroom over by a door on the left hand side and the judge noticed the movement as it was occurring during Woods' testimony. (*Ibid.*)

Appellant's assertion that the jurors observed the judge's alleged gestures is inconsistent with the evidence presented at the hearing. Appellant boldly states that "the judge's gestures, observed by at least some of the jurors, amounted to judicial misconduct . . ." (AOB 252.) However, appellant cites to no actual testimony that substantiates his claim that jurors actually witnessed the complained of conduct. Review of Mr. Swartz testimony is speculative at best. When asked if he noticed any reaction to the judge on the juror's faces, Swartz responded: "It was hard to say. I noticed that the jurors would look to the Judge on several occasions, but I can't interpret that too much. I don't know what they were doing." (*Ibid.*) As such, contrary to appellant's claim, there was no evidence that the jurors noticed, or had any reaction to, the judge's alleged facial gestures.

Defense investigator Art Wooden testified that, based on the judge's facial expression and body language, he thought the judge was bored. (XLVIII 13574.) Wooden also noted that the judge frowned, raised his eyebrows, sighed a lot, took deep breaths, rocked his head back and forth, and rolled his eyes to the roof. (XLVIII 13574.) However, Wooden further testified that he did not think the judge was doing these things on purpose. (XLVIII 13578.) He also admitted that like Mr. Swartz, when Wooden witnessed the judge's actions, Wooden was sitting in the back row of the courtroom which he agreed was approximately 35 to 40 feet from where the judge was sitting. (XLVIII 13580.) Wooden also testified that after the judge was alerted to that he was potentially making gestures, the judge made efforts to prevent making any facial expressions. (XLVIII 13580-13581.)

Bunny Masterson testified that the judge rolled his eyes and pursed his lips during the testimony of Dr. Woods. (XLVIII 13586.)

This was the entirety of the evidence appellant presented at the hearing to support allegations that the judge showed disbelief in regards to

the testimony of Dr. Woods. However, several witnesses demonstrated the contrary. If the allegations that the judge was distracted during the testimony of Dr. Woods are to be believed, several reasons for that were presented during the hearing. Specifically, Ronald Clemens testified that there were several distractions in court on October 10, 2002. (XLVIII RT 13595.) One of the distractions was defense investigator Joe Barthel. (XLVIII RT 13595-13596) Barthel entered the court late that morning and an electronic device on his person kept going off when court was in session. (XLVIII RT 13596.) As a result of this, the judge looked in Barthel's direction. Also, there had been a problem with Barthel and his electronic device prior to that, causing the judge to look in his direction. Also, Clemens testified that Mr. Swartz came in twice that morning. Clemens commented that an electronic device went off when Swartz was in the courtroom one time, giving off three beeps. Clemens also explained that Swartz makes a lot of noise throughout the court when he gets in and out of a seat. Clemens noted that the Judge looked in that direction when those things were just taking place. Clemens also testified that during that morning, there was a substantial amount of movement in the court room over by the door to the left and the Judge noticed it. (*Ibid.*)

Clemens also presented good background information on how the judge normally conducts himself in the courtroom. Clemens testified that the Judge looks around his courtroom, not always just because of noises. (XLVIII RT 13596-13597.) The judge takes a lot of notes, he watches people in the court, he looks at the attorneys, he looks at the jury, and he looks in the gallery. (*Ibid.*) In regards to facial expressions, Clemens testified that the Judge uses cough drops and when he does, his whole face movement, his forehead movement, his cheeks move, his forehead moves. (XLVIII RT 13597.) He stated that the judge might have been sucking on cough drops during the testimony of Dr. Woods which would have changed

his facial expressions. (XLVIII RT 13599.) Clemens specifically testified that in his observations of the judge, he did not see the judge make any facial expressions that indicated disbelief or annoyance at Dr. Woods' testimony. (*Ibid.*)

Prosecutor Brent Ledford noted for the record that the Judge has a mustache that goes substantially below the edge of his lips and he has a prominent crease in his forehead, that even when his face is at a neutral position you can see the crease. (XLVIII RT 13600-13601.) Ledford opined that those two factors accentuate any facial features that may be expressed. Ledford also noted that during "technical testimony," the Judge has a tendency for him to frown and look down. However, Ledford testified that this was a result of the Judge "trying to get down exactly what is being said as compared to disbelief or not." (*Ibid.*)

Ledford also testified that the Judge is notorious for not wanting electronic devices to go off in the courtroom. (XLVIII RT 13601.) Ledford noted that when Mr. Barthell and Mr. Swartz' devices went off, the Judge showed displeasure. In regards to the testimony of Dr. Woods, Ledford testified that, other than the look of concentration, he did not see anything in the facial expressions that could be construed as disbelief. (*Ibid.*)

Court bailiff Daniel Martin testified that he has to be sensitive to and cue in on the judge's non-verbal communications. (XLVIII RT 13605.) In regards to the morning of October 10, 2002, Martin testified that the judge's facial expressions were consistent with the way he normally conducts himself since Martin has been assigned to his courtroom. Martin did acknowledge that there were distractions in the courtroom that day, including Mr. Barthel. Martin also agreed that Mr. Swartz can become a distraction when he enters the courtroom and sits down. He also testified

that Mr. Swartz and Mr. Wooden engaged in "note passing" which was also distracting. (*Ibid.*)

In regards to how the jury was affected, if at all, by the occurrences in court or the judge's demeanor, Martin testified the jurors were focused on the witness and the questions from the attorneys. (XLVIII RT 13606.) Martin specifically testified the he did not witness anything that would indicate that any of the jurors were cuing in on the Judge for any particular reason. (*Ibid.*) In addressing the Judge's conduct during Dr. Woods' testimony, Martin testified that he did not see any conduct from the Judge that he considered any different than his normal day on the bench for the last 14 months.[34] (*Ibid.*)

Deputy Dan Neville testified that on the morning of October 10, 2002, there were distractions in the courtroom. (XLVIII RT 13610.) Neville testified that he cues in on the judge's expressions for an indication if he is going to give him non-verbal directions as to what to do with distractions. (*Ibid.*)

Neville testified that on October 22, 2002, Mr. Swartz came into court with a PDA device that was making a ticking noise for a period of time, and it shortly after that make four beeping noises, which he attempted to turn down. (XLVIII RT 13610-13611.) Putting the PDA device away, Mr. Swartz had his cell phone in his hands and was doing something on the key pad for a period of time. Neville established that he was in the courtroom during Deputy Martin's break. Neville stated that when Swartz' PDA went off, the Judge diverted his attention from the general witnesses and towards Deputy Neville and Mr. Swartz' way. Deputy Nevilee I tried to cue in

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[34] Martin testified that from approximately 10:00 to 10:15, during Dr. Woods' testimony, he took a break from the courtroom. (XLVIII RT 13606-13607.) He also testified that he was not in the courtroom when Mr. Swartz electronic device went off in court. (XLVIII RT 13607.)

Deputy Haagenson, who was filling in for Deputy Martin, to talk to Mr. Swartz. Deputy Haagenson started to get up, but Mr. Swartz then put his phone in his pocket. (*Ibid.*) In regards to the judge's potential reactions to testimony, Neville testified that the judge tends to look toward the ceiling when he is thinking and also when he is taking notes. (XLVIII RT 13611.)

Appellant's reliance on *People v. Sturm* (2006) 37 Cal.4th 1218, is misguided as that case is distinguishable from the present one. In *Sturm*, during the penalty phase, the trial judge told the jury that the defendant had been convicted of premeditated murder, which was not true. This inaccurate statement advanced the prosecutor's argument that the defendant had premeditated the murders and "severely damaged" the defense's position that lack of premeditation and deliberation was a mitigating factor in the penalty decision. (*Id.* at p. 1232.) Further, in Sturm the judge interrupted defense counsel 30 times during the presentation of the defense evidence, and, in the presence of the jury, disparaged defense counsel and defense witnesses. (*Id.* at pp. 1232-1238.) Because the judge's misconduct affected every aspect of the trial, from jury selection to closing argument, this Court held it was prejudicial and reversed the jury's death penalty recommendation. (*Ibid.*) Unlike *Sturm*, in the present case, the judge's conduct did not affect the entire trial and were not prejudicial in any way.

There was absolutely no indication that the judge committed misconduct of any kind during the testimony in question. The allegations made by appellant were quickly put into context by the court bailiffs and Ronald Clemens. Appellant has attempted to turn innocent and regular behavior by the judge into some form of misconduct. Most importantly, there is absolutely no indication that the jury (1) saw the conduct in question or (2) interpreted the conduct in the far-fetched manner in which appellant is now arguing. Appellant's claim otherwise is baseless. (AOB 252.) Specifically, the bailiffs, people who work with this judge every day,

testified that the judge's mannerisms during the testimony of Dr. Woods were no different than the way the judge conducted himself throughout the trial. (XLVIII RT 13605, 13606, 13611.) Appellant has failed to demonstrate judicial misconduct and so his claim must fail.

2. Impartial Hearing

Appellant also claims that the judge's decision to hear the motion deprived him of an impartial hearing. Respondent disagrees.

Generally, appellate courts review a trial court's ruling on a motion to recuse itself for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 237.) Code of Civil Procedure section 170.3, subdivision (c)(2), specifically states:

> Without conceding his or her disqualification, a judge whose impartiality has been challenged by the filing of a written statement *may* request any other judge agreed upon by the parties to sit and act in his or her place.

(Emphasis added.) Although he argues otherwise, appellant cites no authority that mandates that a judge have another judge sit in his or her place when the issue of impartiality is still contested. That is why Code of Civil Procedure section 170.3, subdivision (d), dictates that the issue of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal. (*People v. Panah* (2005) 35 Cal.4th 395, 444; *People v. Brown* (1993) 6 Cal.4th 322, 334 [statute foreclosing appellate review of statutory disqualification of a judge applies in capital cases.].[35])

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[35] Respondent acknowledges that Code of Civil Procedure, § 170.3, subdivision (d), does not foreclose appellate review of non-statutory due process claims that the final judgment is invalid due to bias of a trial judge. (*People v. Brown, supra*, 6 Cal.4th at p. 334.)

Further, an evidentiary hearing was not even required in this case. As this Court held in *People v. Chatman* (2006) 38 Cal.4th 344, an evidentiary hearing was not required on a capital murder defendant's motion to disqualify the judge based on a brief courtroom encounter between the judge and the victim's father. (*Id.* at p. 364.) In that case, there were factual discrepancies between the trial judge's depiction of the encounter and those of the courtroom witnesses. This Court found the judge's account to be more complete than the witness's but not inconsistent to them. (*Ibid.*) That is the same situation presented here. Just as the witness in Chatman heard only part of the conversation, the witnesses claiming misconduct were only present during certain portions of the testimony and, as such, had a limited frame of reference to compare the judge's normal conduct in the courtroom. (*Ibid.*) As the daily bailiff for the courtroom testified, the judge's conduct during Dr. Woods's testimony was entirely consistent with his conduct throughout the 14 month trial. (XLVIII RT 13606.) Defense witnesses testified to certain facial expressions made by the judge during the testimony of Dr. Woods. However, the judge explained his conduct in a neutral manner that demonstrated absolutely no bias towards appellant or his penalty phase witness. (XLVIII RT 13611-13614, 13652-13654.) As such, a hearing was not even required on the issue and appellant cannot demonstrate the judge's decision to hear the motion amounted to structural error. (AOB 260-261.) The trial judge was well within his discretion in hearing the motion and denying it based on the nature of the evidence of the alleged conduct. Appellant's claim must fail.

Error, if any, was cured by the judge's curative instruction. Appellant has failed to demonstrate that the error, if any, constitutes federal constitutional error or, in the more extreme case, structural error. As stated above, after being informed of the allegations in regards to his conduct, outside the presence of the jury, the judge instructed the jury with CALJIC

Number 17.30, dictating that they take no cues from him and form their own conclusions on the case. (XLVII RT 13349-13350.) Jurors are presumed to understand and follow the trial court's instructions and admonishments. (*People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Delgado* (1993) 5 Cal.4th 312, 331.) Further, while appellant now argues the importance of Dr. Woods's testimony, he ignores that he presented two other witnesses on the same subject, Myla Young and Julie Kriegler. It is undisputed that all three testified as to the development of the brain, specifically addressing appellant's background and how that could have affected his decision making process. Appellant makes no claims that the judge committed misconduct during the testimony of either Young or Kriegler.

C. Sentence Reliability

Appellant claims that the judge's conduct amounted to a violation of his Eight Amendment right to reliability in the determination of sentencing. (AOB 262.) Respondent disagrees. Appellant's assertion that the jurors observed the judge on several occasions while he was grimacing lacks any substantiation in the record. Appellant cites the testimony of Mr. Swartz for this proposition. However, review of Swartz' testimony reveals he said no such thing. On the contrary, Swartz did testify that it was his belief that the judge did not believe Dr. Woods during parts of his testimony. (XLVIII RT 13565.) However, he also testified that "I'm not going to suggest that the judge was deliberately trying to convey anything." (XLVIII RT 13566.) Most telling, when asked if the jurors noticed the judge's mannerisms, Swartz testified: "It was hard to say. I noticed that the jurors would look to the judge on several occasions, but I can't interpret that too much. I don't know what they were doing." (*Ibid.*) Contrary to appellant's assertions here, there was absolutely no evidence that the jurors noticed or placed any emphasis on the alleged conduct by the judge during

the testimony of Dr. Woods. As such, there is no indication that the jurors based their sentence finding on the judge's alleged mannerisms. Appellant's current claims otherwise are speculation at best. Appellant's claim is unsubstantiated and must fail.

XII. TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL; THERE WAS NO JUROR MISCONDUCT

Appellant argues that the trial court violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, a fair and impartial jury, and reliable sentencing by (a) failing to excuse juror number 11 for misconduct during penalty phase deliberations, pursuant to section 1089, and (b) for denying his motion for a new trial based on allegations of jury misconduct. (AOB 263, 271, fn. 19.) However, the arguments must be assessed consistently in how they were presented to the trial court. First, juror 11 was challenged for cause based on her remarks to the Jury Commissioner. Next, Juror 11's participation in the jury process was alleged to be misconduct based on alleged concealment of personal information, communication with a former juror, and communication during deliberation. In all respects, respondent disagrees.

A. Procedural History

On October 30, 2002, during penalty phase deliberations, Shasta County Superior Court Jury Coordinator Jeanne Capell stated the following:

> Yes. I had two jurors -- two jurors in the basement of the courthouse yesterday during my lunch hour approach me and ask me a question about their juror notebooks, and whether or not their personal opinions that they had made notations of in those notebooks, whatever, be brought out in the case. And I told them that as far as I knew, that the books were either destroyed or marked confidential within the case and filed away with the rest of the information, and as far as I knew the opinions won't ever be brought out unless there was a question of juror misconduct at some point, and that it should be okay.

> And proceeded to make sure that they were aware that they should decide based on what they heard in court, and not based on their opinions. [...]

(L RT 14333.) When asked by the trial court if either juror disclosed to her the nature of their personal opinions, Ms. Capell replied:

> One did, yes. One [juror 6 (#12929)] said that she had written in her notebook that the defendant was a prick, with an arrow pointing towards him, I'm presuming -- well, I shouldn't presume, the way that she said it to me assume that she was showing it to somebody else on the jury panel -- the defendant was a prick with an arrow. The other lady [juror 11 (#18604)] didn't tell me exactly what she wrote.

(L RT 14334, 14340.) When the trial court asked if they disclosed any other information to her, Ms. Capell responded:

> Not in reference to the remarks that they made in the notebooks. I think they were concerned that their opinions weren't what they were making their decision on, and they were just curious as to what may happen with the notebooks, to the notebooks, and whether or not any court employee would actually see what they had written in, if they were destroyed, that type of thing.

(*Ibid.*) The trial court then had juror 11 and then juror 6 come into court individually. (L RT 14342, 14343.) Juror 11 stated that she did speak with the Jury Commissioner regarding what was going to happen to her notes. (L RT 14342.) Juror 11 specifically stated that during the course of that conversation she did not disclose any of the contents of her notes, her thoughts, or her deliberative process. (*Ibid.*) She did admit to being with juror 6 when she made the inquiry of the Jury Commissioner. (*Ibid.*) However, juror 11 stated that she did not discuss with juror 6 her concern over what was going to happen to her jury notes. (*Ibid.*) Juror 11 further stated that she did not have any discussion with juror 6 about the contents of her notes, her opinions, or any of the deliberative process. (L RT

14343.) None of the parties had any additional questions of juror 11. (*Ibid.*)

Juror 6 admitted to approaching the Jury Commissioner with a question about what was going to happen to her notes. (L RT 14343.) Juror 6 stated that during the course of her conversation she did relay a specific comment she made in her notes to the Jury Commissioner. (*Ibid.*) Juror 6 stated that she did not discuss any of the contents of her notes outside of the jury room with any other juror. (L RT 14344.) Juror 6 stated that she did not discuss any of her opinions or thoughts, outside of the Jury Commissioner, with any other juror. (*Ibid.*) Juror 6 further stated that she did not discuss the particular comment she made in her notes with any other juror at any time. (*Ibid.*) After discussion by all parties, the trial court dismissed Juror 6 from service and replaced her with an alternate juror (#65230). (L RT 14346.) The trial court then ordered the jury to begin deliberations anew. (L RT 14347-14348.)

During the afternoon session on October 30, 2002, defense counsel made a formal challenge to Juror 11 sitting as a juror based on the comments made by the Jury Commissioner. (L RT 14351.) Jury Commissioner Jeanne Capell then testified under oath. (L RT 14353.) Capell testified that juror 11 and juror 6 approached her separately. (L RT 14354.) Juror 11 came up to Capell first. According to Capell, Juror 6 walked by them to go to the elevator and then turned around and came back, joining Capell and Juror 11 "a couple of minutes later." (*Ibid.*) Juror 11 already had a "short conversation with Capell about what happened to the juror notebooks before Juror 6 approached. (L RT 14355.) When Juror 6 approached, she told Capell that she was concerned about what happened to her notebook. (L RT 14355-14356.) Capell stated that juror 11 was in her and Juror 6's presence when Juror 6 stated that she wrote the word "prick" in her notebook in reference to appellant. (L RT 14354.) Capell

stated that Juror 6 and Juror 11 were standing next to each other when juror 6 made this comment. (L RT 14356.) Capell "assumed" that Juror 11 heard Juror 6's comment and said Juror 11 would have to have been completely ignoring this portion of the conversation to not hear Juror's 6's admission. (L RT 14357.) Capell could not remember Juror 11 having any reaction, physical or verbal, to Juror 6's admission. (L RT 14354.) Capell estimated that this conversation lasted five to seven minutes from beginning to end, which presumably included Juror 11's individual conversation with Capell before Juror 6 arrived. (L RT 14355.) When asked whether there was any indication that Juror 6 had shown the comment in her notebook to anyone, Capell testified that she was "vague" on that topic. (L RT 14361.) Capell also testified that she was "confused" by Juror 6's reference to an arrow in her notes. (*Ibid.*) Capell also testified that prior to this conversation she did not see Juror 6 and Juror 11 hanging out together in the lunchroom. (L RT 14362.)

The trial court then called Juror 11 into the courtroom. (L RT 14365.) Juror 11 was asked if she heard former Juror 6 express anything that was contained in her notes. (L RT 14365-14366.) Juror 11 responded:

> You know, I was thinking, and I don't remember her saying anything except she had a word in there she didn't want anybody to read. She never said the word, nothing, and actually I had just barely heard that. I was going to the elevator to save the elevator. She started it and -- I stopped first, and then she came in behind me, so...

(L RT 14366.) Juror 11 followed up by saying she had "no idea" what Juror 6 wrote in her notebook. (*Ibid.*)

In denying appellant's motion to challenge Juror 11, the trial court held:

> Well, in evaluating credibility, I have to assess what the juror told me versus what Miss Capell told me. I'm considering something here that is of concern. That is, I have a trained Jury

> Commissioner who interacts with our juries on a regular basis who should not be participating in conversations with jurors who are assigned to a trial, never mind, jurors who are deliberating. I hate to have to say that about one of my own employees, but I'm seriously concerned about that and let this factor into my consideration.
>
> Quite frankly, I think the juror was being truthful with us. I don't know Miss Capell had a clue whether [juror 11] was listening or present or heard the conversation or not, so I'm going to deny the challenge.

(L RT 14367.)

On November 25, 2002, appellant filed a motion for new trial, alleging juror misconduct, trial court errors, and prosecutorial misconduct. (XXVII CT 6558-6586.) Germane to this argument, appellant included declarations/affidavits from three jurors in support of its juror misconduct argument. (XXVII CT 6571-6573, 6574-6577, 6578-6585.) In the first affidavit, juror 49545 declared that he was a seated juror during both phases of the jury trial. (XXVII CT 6571.) He stated in relevant part:

> [Juror] 18604 [juror 11] was frustrated after the first penalty phase verdict was set aside. She had lost it in the jury room. She had been loud, upset and crying, to the extent that I was set back by her attitude. The pressure the first day by 18604 was way out of line. It was tough on 65230 [new juror 6] that first day. I was going to approach 18604 the next day but 18604 finally calmed down the second day.
>
> We told 65230 to take her time. We gave her the evidence to look at as we had already done that. 65230 was voting for life.
>
> I did not hear any talk by 18604 about [juror] 12929 [former juror 6]. I normally don't listen to the girl[']s small talk every morning.
>
> Paul Smith's being in the general prison population was discussed by all but I don't know who started it. It went on over two days. The idea that he would be out in the yard instead of in a cell by himself raised an issue as to whether he could hurt or

kill another person. I sent a note to the judge about that. Judge said it wasn't the determining factor but could be an issue to be talked about if you give it weight. I told the others he would be in the yard with the others and not locked in the cell.

[¶ ... ¶]

18604 was always talking. She tried to dominate discussions. I even told her to shut up and it worked for about five minutes. 18604 was dominant and had strong feelings and lets you know it. 18604 told about her own life, not caring if you wanted to hear it or not.

As overbearing and obnoxious as 18604 was I do not think she swayed anyone. She was opinionated, loud and always talking.

I was impressed with the jury. They did the job they had to do. The final decision was an individual thing but we came together as a collection. I do not think several of them could have done it without the group.

[¶ ... ¶]

The jury was going to come to a decision one way or the other. We told 65230 to convince us, help us see it when she held out for life. I told the jury if I am the last one for death I will come over. I told them we were not going to hang up. We had worked too hard. I felt it was an awsome [*sic*] responsibility. It was hard to give the penalty and I had some tears in my eyes first [*sic*] time. The second time was a little easier.

(XXVII CT 6571-6572.)

In his/her affidavit, juror 03405, who was a seated juror during the penalty phase, declared in relevant part:

I was aware that [defense investigator] Art Wooden had already spoken to [juror] 65230. I did not know much of what was discussed but knew that 65230 was concerned about the jury deliberations.

When we first went back to the jury deliberation room in the first phase of the trial we had started by electing a

foreperson. We asked the Marshall how to elect the foreperson and he had said that usually if someone had experience they were selected. We found that [juror] 12929 had prior jury experience so we elected her. She knew about aggravating and mitigating evidence.

[Juror] 02528 and myself were the two people who held out against the special allegation of lying in wait charge and won over the rest of the jury to vote no to that count. We all came to agreement on the rest of the charges in the first phase.

On our first vote in the second phase we found that we were split eight to four. The four who were for life without possibility of parole were myself, 02528, 30691, and 34615.

At one point I asked what would happen if we were a hung jury. We all felt we had to come to a unanimous decision one way or the other. We would not hear of a hung jury and did not want to pass it on to someone else.

After 12929 got kicked off the jury we were all shocked. We didn't know what happened and I wanted to know what happened. I coaxed 18604 into telling what she knew. 18604 said that she had heard that 12929 asked someone down in the cafeteria what would happen to the notebooks. 18604 had claimed she did not hear what was talked about. 19409 said, don't talk so no one else gets in trouble. I thought that the books were private. I started tearing pages out of my own notebook after she heard that.

We were talking about how to start over. We put the pictures back on the wall and got the rules out. We told [juror] 65230 to go through all the evidence and we went through it also. I remember telling 65230 to please convince me to go the other way. 02528 and others said for her to convince them. All eleven of the other jurors had already voted for the death penalty. I knew 65230 was feeling a lot of pressure. We gave her the evidence we looked at it. We'd already done it, she was catching up. 65230 was for life, we'd already voted, and 65230 wanted to read and look at everything, so she felt pressure.

As we began deliberating again 18604 lost it. After 12929 was kicked off the jury they were deliberating but 18604 was upset about having to start all over again. 18604 started

crying and cried all day; 19409 was crying some also. I do not recall any cussing but 18604 was talking loud and was annoyed.

18604 was pacing and sighing and saying I can't believe we have to do this. 18604 also said I can't take this anymore. Even after she calmed down she continued to cry.

18604 told me that we would not be in this mess if it wasn't for me. If I had not held out for life during the first penalty phase deliberation; the jury would have had a verdict before 12929['s] problem in the cafeteria which caused her removal from the jury.

18604 had come back into the jury deliberations on Thursday and said that she had talked to 12929 the night before. She said 12929 told her to tell us something to the effect; "remember the work we've already done". I heard 18604 say that she had been talking to 12929 after 12929['s] removal from the jury. I commented to 18604 that maybe she should go back and tell the judge that she had talked to 12929 after her removal. 19409 was made and didn't say anything more.

We had talked about where Paul Smith would be going to prison. [...]

18604 said she knew what prison life was like; and acted like she knew. 18604 said if Paul Smith was given life without parole he would go into general population. A debate started. A lot of people thought that if Paul Smith was in general population he would be in a situation where he would be a danger to other inmates or deputies. We also considered that he might be able to break out.

I remember 18604 telling us that she was abused as a child and made the comparison that she had never grown up and killed anyone. This came out once in the first penalty phase. In the second penalty phase it came out that she was severly [*sic*] abused sexually. She was comparing her life to Paul Smith's life.

12929 and 18604 hung out together during the trial. I had told the others even to the end that I wished I could have had more time to review and think. 18604 came into the jury room on Tuesday and said that all the attorneys were in the courtroom again. 18604 asked me what did you do now? Both

18604 and 19409 always had a lot of innuendoes and comments like that. They were common and the rest of the jury tried to ignore them.

18604 and 19409 were always noisy and the rest of the jury wanted them to leave so we could think.

At the end I wish I had more time. My decision may not have changed but I did want more time.

I had phone conversation with 65230 after the verdict. I told her that when they polled the jury I had a difficult time saying yes due to needing more time when the judge asked if it was my verdict. I will not ever be comfortable making such a decision.

(XXVII CT 6574-6576.)

In his/her affidavit, juror 65230 [new juror 6], who was a seated juror during the penalty phase after a juror was excused, declared in relevant part:

There are several things that one of the jurors named 18604 said that I do not believe she was suppose [*sic*] to say. Several of the jurors were antagonistic to my stance when I went into the juror room and I feel that they have been this way to others before I got there. Most of the pressure I felt was due to the situation not the attitude of people. There were comments made by 18604 the day I was placed on the panel that I feel I need to tell someone.

I know that Investigator Barthel is trying to talk to several of the jurors. I feel more comfortable knowing that I wasn't the only one he was trying to talk to.

I don't want it on my conscience if there has been misconduct. I feel there may be an issue of jury misconduct. On the jury misconduct part I do not know if it was done intentionally. I did not know how appropriate or not it was but I have to say something.

I came in on Wednesday at about 10:45 A.M. October 30th for the verdict. All of a sudden I was a juror and 12929

was excused. I felt shocked but prepared because I had taken two and one half notebooks of notes.

Everyone in the deliberation room was shocked. Their emotions were different than mine as they had already reached a verdict once. Everyone was shocked that they had to start over and that 12929 had been taken off the jury. During the deliberation that I was involved in 18604 discussed why 12929 had been excused from the jury.

18604 told us during deliberations that she and 12929 had talked to the jury coordinator about 12929['s] notebook and whether it would be thrown away. 18604 did not describe to the jury the conversation that took place between 12929 and the jury coordinator. She claimed she never heard her say anything.

18604 during deliberations, was also talking about 12929 being kicked off the jury after they already had a verdict.

The statements made by 18604 were made during deliberations after I was seated as a juror. Thereafter, one of the jurors said lets just not talk about that. [Juror] 03995 was elected foreperson as she had set [*sic*] next to 12929 who was the previous foreperson and liked how 12929 had organized the previous deliberations.

We started discussions after lunch. First everyone wanted to know how I would vote. I said I was reluctant to tell them. I did not know how they had voted. They explained that maybe we would not have to start all over. My vote was for life without possibility of parole. The foreperson 03995 then said ok well we're starting over. Everyone was upset about starting over. I just wanted to do the right thing. I was under a lot of pressure at that time.

18604 lost control of her emotions. She was crying, talking with a loud voice, carrying on, cussing, and was very upset. 18604 said that if she didn't get this trial over with she was going to have a nervous breakdown. I cannot remember the exact curse words that 18604 used but did remember her saying I want this man out of my life; meaning Paul [Smith].

We were all stressed out but 18604 was really stressed. I felt it all came out at me; the yelling, cussing, and the emotions.

[¶ ... ¶]

On Wednesday the first day of deliberations we started discussing the case. 03995 followed 12929['s] format from the time before. They put all the evidence in the middle of the table and showed all the evidence at me and said lets let her catch up. I said that I wanted to see the instructions as I had not paid much attention in court. I also wanted to see the aggravating and mitigating page. [Defense counsel] Mr. Papendick had told them to take time to read Mr. Sloan's findings on the juvenile matter.[36] I also had questions about what you could consider as mitigating factors. I felt this taking the time to review these documents upset 19409 and especially 18604. I read the autopsy report because I had not seen it before. I saw there was carbon monoxide in Lora Sinner's lungs indicating she was a smoker. I felt this was important because 18604 wanted to make sure that I saw the cigarette butt under Lora's armpit when she was brought to the coroner[']s office. 18604 said they were all standing around the body smoking. 65230 argued it could have been trash debris dumped in when the hole was filled.[37] 18604 wouldn't hear it she had her mind made up. I did not remember any testimony about Paul [Smith] smoking but 11 people thought so so I gave that up.

There were many conversations going on at the same time in the deliberations room. It was making it very hard to concentrate. Everyone was talking while I tried to read and study. It was very loud and 03995 had to quiet them so I could read. They indicated they had already been through this, you catch up.

[...] I believe all the psychological damage and dysfunctions were real. I had no doubt in my mind. I felt that everyone believed that too. My hang-up was that I thought it

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[36] Juror 65230's reference to Mr. Sloan, i.e., Ken Sloan, appears to be in error.

[37] The reference to "65230" appears to be in error as that juror is the declarant.

was enough but they didn't give it as much weight. I stuck with it quite awhile until Friday. I was firmly stuck in the ground and felt strongly. They wouldn't change. I told them I felt a lot of pressure. I told them I could not make a decision yet. I felt that some of them wanted me to sway them back to my point of view. That added even more pressure.

I felt the jury was trying to go by the rules. Several people told me to take all the time I needed. I still felt that 19409 and 18604 wanted it over as they continued to make comments.

On Thursday morning after the testimony of Paul Smith and Dr. Woods was read 18604 commented that she (18604) had talked to 12929 the previous night. 18604 said that 12929 had told her during a phone conversation the previous night don't forget everything I've (12929) done. When 03995 heard the statement she put her hand up and turned away like don't go there. The comment bothers me because 18604 was clearly talking to 12929 overnight, on Wednesday, during deliberations after 12929 was thrown off the jury for talking outside the jury room. I wondered why the judge had left 18604 on the jury.

My reading of the jury is that most were kind and patient to me, with the exception of 18604 and 19409 who seemed impatient to get it over with. I feel they were tired of the whole situation and it being drug out. 19409 was crying when she said comments like ["]I'm the sole support of my daughter and need to get back to work. She said she needed to get back to work and this is taking a toll on her.["] 19409 also said numerous times "is Paul's life worth more than Lora's?". This was putting pressure on me to get it over. 19409 would roll her eyes at me at times if I talked or she would give big sighs. 18604 was the one that pressured me the most.

Each time I pointed out a different perspective, 18604 would always come back at me with a disagreement.

18604 told me if Paul [Smith] does not get the death penalty, he will be in general population and he will kill or hurt someone and said to me "how are you going to feel if that happens?". 18604 said that several times over and over. [...] I argued that they did not know where Paul [Smith] would be placed.

[¶ ... ¶]

I argued that I was not one hundred percent sure Paul [Smith] was responsible for all the damage to Tim Renault. I pointed out Deputy Boone's testimony regarding intercepting Mr. Williams's [*sic*] overhand blows to Mr. Renault. 18604 started saying over and over that Paul [Smith] would be back in general population and will hurt someone. She asked me how I would feel if he hurts or kills someone. If 18604 had not been so adamant about Paul's placement in general population, I feel strongly I would not have changed my mind and voted for death.

[¶ ... ¶]

18604 told us that she was brutally raped at one point in her life and seemed to be equating that somehow to this case. 03405 had told me that all of that had come out before the first deliberations. 03405 said that 18604 was talking of being molested and raped. I questioned why 18604 was left on the jury and other jurors wondered the same thing. 18604 had her opinion and it did not appear that anyone else could win. The rest of the jury just tried to ignore her.

[...] I argued with 19409 regarding whether or not Paul Smith was going to get out or [sic] prison. The pressure on Friday got so bad I could not take it anymore so we agreed to stop; take some time to think, and we went home early.

[¶ ... ¶]

I tried to find the answer by looking at the facts with no emotion. I hoped that someone would change their mind and back me. No one had. I finally decided all these rational people can't be wrong. I felt I must be missing something. I decided to take my own emotion and compassion out. I felt that most people would probably think he should die based on the facts and the law.

Emotionally I decided I couldn't take starting over. I decided I had to take the emotion out and base it on facts and not feelings. I wasn't happy with my decision. I couldn't face starting the pressure again. I remembered that the week before someone had said if 65230 doesn't change her mind we will be a hung jury. 34615 said if it got to that point he would be willing

to change his vote before hanging up. 18604 said she would never change so we were back to the same problem. They all felt they had to come to a decision in the end. I changed my vote to death based on no emotion for Paul [Smith], considering only the facts.

(XXVII CT 6578-6584.)

After argument by all parties, the trial court denied the motion for new trial as follows:

> All right. Like I said, I looked at this both reviewing the entirety of the affidavits, and then in the fashion that I have provided you a copy of the Court exhibit with significant portions stricken out because a lot of it did involve the mental processes of the jurors. The three areas that arguably may have been misconduct was the fact that JUROR NO. 18604 contacted JUROR NO. 12929 and then related this statement of, don't forget all the work we've done.
>
> The second area would have been, although this is, I don't know from reading the cases, you know, jurors often relate what they're experiencing in deliberations, what they've heard in the evidence to their own personal experiences, and some of that is okay and some of that goes over the line. If you're improperly injecting their personal experiences, it's hard to tell exactly at what level JUROR NO. 18604 was doing that.
>
> And in addition, there was discussion about the housing circumstances for Mr. Smith, which would be discussion about facts as to which there was no evidence, which they're not entitled to do.
>
> What also struck me in these affidavits was in, particularly in JUROR NO. 49545, he seems to indicate that notwithstanding JUROR NO. 18604, the jurors each did their job, had discussion, frank, obvious discussions, had their concerns, and reached a verdict. I can't imagine that deliberations in a case such as this would result in anything but a sole-searching [*sic.*] experience for twelve people who don't normally deal with these kinds of issues. I can't imagine that there wouldn't be jurors who would get emotional one way or the other, vastly in support of the death penalty or struggling to

grate that in making that kind of a decision. That's not a decision people normally make in their day-to-day life.

And I think our system envisions that the jurors would have frank discussions and will struggle with these issues. In fact, we want them to struggle with these decisions, because we want them to reach good decisions. And we can't keep out every single inappropriate comment from juror deliberations. We would never have a jury deliberate, a jury that would sustain scrutiny, we would never have a jury verdict that would ever sustain scrutiny.

It seems to me that while those three areas may have been misconduct, I can see nothing that was prejudicial, in that the jury did its job. It considered all of the evidence. And I don't think those rise to the level, when compared to other cases where the courts have held that conduct was in violation of court orders, in violation of the instructions, amounted to prejudicial misconduct under my verdict. So the Motion for New Trial is denied.

(LI RT 14436-14438.)

B. Discussion

1. Challenge to Juror 11 Based Conduct with Jury Commissioner

Section 1089 provides in relevant part:

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, ... the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

Historically, a trial court's decision to remove a juror pursuant to section 1089 was reviewed on appeal for abuse of discretion. (See, e.g., *People v. Leonard*, supra, 40 Cal.4th at p. 1409.) However, this Court has since clarified this standard as being even stronger than requiring an abuse

of discretion. More recently, this Court has held that a juror's inability to perform as a juror must be shown as a "demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.) This standard requires a "stronger evidentiary showing than mere substantial evidence." (*Id.* at p. 488 (conc. opn. of Werdegar, J.); *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) As this Court recently held:

> To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.

(*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; *People v. Wilson, supra*, 44 Cal.4th at p. 821.)

Appellant's attempts to paint Juror 11's conversation with the Jury Commissioner as misconduct are directly rebutted by the appellate record. Juror 11 did admit that she spoke with the Jury Commissioner regarding what was going to happen to her notes. (L RT 14342.) However, Juror 11 stated that during this conversation she did not disclose any of the contents of her notes, her thoughts, or her deliberative process. (*Ibid.*) Juror 11 further stated that she did not discuss with former Juror 6 her concern over what was going to happen to her notes, nor did she have any discussion with former Juror 6 about the contents of her notes, her opinions, or any of the deliberative process. (L RT 14342-14343.)

As to the contents of former juror 6's notes, Juror 11 testified that she did not remember Juror 6 saying what was in her notes other than that there was a "word in there she didn't want anybody to read." (L RT 14366.) Juror 11 testified that Juror 6 never said the word to her and she had no idea what former Juror 6 wrote in her notebook. (*Ibid.*) While Jury Commissioner Jean Capell "assumed" that Juror 11 heard former Juror 6's

comment that she referred to appellant as a "prick" in her notebook, she did this only based on the proximity of the two jurors to herself during the conversation. She could not recall juror 11 having any reaction, physical or verbal, to former Juror 6's admission. (L RT 14354.) Capell further testified that she was "vague" on whether there was any indication that former Juror 6 had shown the comment in her notebook to anyone. (L RT 14361.) The trial court made a specific credibility finding on this point. (LI RT 144336-14438.) That finding is entitled to great weight.

Appellant's allegations that Juror 11 knew about former Juror 6's comment about appellant are further refuted by the declarations of other jurors. In his/her affidavit/declaration juror 03205 declared that Juror 11 (18604) stated that she did not hear what former Juror 6 (12929) said about the notebooks in the cafeteria area. (XXVII CT 6575.) New Juror 6's (65230) declaration further backs up Juror 11's statement. New Juror 6 (65230) declared that Juror 11 did not describe to the other jurors the conversation that took place between former Juror 6 (12929) and the jury commissioner. (XXVII CT 6579.) New Juror (65230) further declared that Juror 11 told them that she did not hear former Juror 6 (12929) say anything on this topic. (*Ibid.*) As such, there is no indication that Juror 11 heard former Juror 6's comment about appellant. Appellant's argument otherwise is pure speculation without any support in the record. The trial court was well within its discretion in denying appellant's challenge to Juror 11.

2. Motion for New Trial

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. (*People v. Davis* (1995) 10 Cal.4th 463, 524.)

> A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. "The determination of a motion for a new trial rests so completely within the court's discretion that its

> action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."

(*Ibid.*, quoting *People v. Williams* (1988) 45 Cal.3d 1268, 1318.) It must be noted that the declarations attached to the motion for new trial cannot be considered in their entirety by this Court. Evidence Code section 1150, subdivision (a), provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

As such, the portions of the declarations that stated the subjective reasoning processes of the individual juror are inadmissible in assessing the motion for a new trial. (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.) "The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." (*Id.* at p. 1261.) For example, on appeal it is inappropriate to consider why a juror was experiencing stress, or what verdict he/she was leaning toward. (*People v. Danks* (2004) 32 Cal.4th 269, 301-302.) Additionally, it is inappropriate to consider the reasons a juror voted for the death penalty. (*Ibid.*, citing *People v. Hedgecock* (1990) 51 Cal.3d 395, 419 ["when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150"].)

a. Prior Sexual Abuse

A juror's concealment of relevant facts or the giving of false answers during voir dire examination may constitute misconduct. (*In re Hitchings* (1993) 6 Cal.4th 97, 110–111.) However, there is a legal difference between intentional concealment of material information by a potential juror and inadvertent or unintentional concealment.

> Although intentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal, mere inadvertent or unintentional failures to disclose are not accorded the same effect.

(*People v. McPeters* (1992) 2 Cal.4th 1148, 1175; see *People v. San Nicolas* (2004) 34 Cal.4th 614, 644; *People v. Wilson, supra*, 44 Cal.4th at p. 823.) Rather, this Court has held that the correct test to apply when unintentional concealment is alleged "is whether the juror is sufficiently biased to constitute good cause for the court to find under Penal Code sections 1089 and [former] 1123 that he is unable to perform his duty." (*People v. McPeters, supra,* 2 Cal.4th at p. 1175; *People v. Wilson, supra*, 44 Cal.4th at p. 823.) [Relevant? Intentional?]

First, it is highly questionable whether juror 11 (18604) intentionally concealed relevant information during the voir dire process. There was absolutely no indication that a juror's prior alleged sexual abuse would be relevant to the current murder case. Jurors were exhaustively questioned about whether they could follow jury instructions, base their verdict only on the evidence presented, and apply the death penalty if appropriate. However, the issue of prior sexual abuse did not appear relevant to a murder case with lying in wait and torture special circumstances. As in *People v. Wilson, supra*, 44 Cal.4th at p. 823, juror 11 was never asked whether she would interpret evidence of any abuse defendant may have suffered as a child "through the prism of [her] own experiences." As stated

by this Court in Wilson: "we expect jurors to use their own life experiences when evaluating the evidence." (*Ibid.*, citing *People v. Bell* (1989) 49 Cal.3d 502, 564 ["[I]n our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; ... it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups"].) As such, appellant cannot demonstrate that juror 11's failure to disclose this prior victimization was intentional in any way.

Further, there is no indication at all that juror 11 was "sufficiently biased" to constitute good cause for the trial court to find under Penal Code section 1089 that she was unable to perform her duty as a juror. (*People v. McPeters, supra,* 2 Cal.4th at p. 1175; *People v. Wilson, supra*, 44 Cal.4th at p. 823.) While the declarations included as part of appellant's motion for a new trial paint juror 11 as feeling the pressure of the deliberations and re-deliberations, none of them allege that she was biased against appellant in any way. Rather, juror 49545 declared: "[a]s overbearing and obnoxious as [juror 11] 18604 was I do not think she swayed anyone." (XXVII CT 6572.) Juror 49545 further declared: "I was impressed with the jury. They did the job they had to do. The final decision was an individual thing but we came together as a collection." (*Ibid.*) As such, appellant's claim must fail.

b. Discussion with Former Juror

A trial court is well within its discretion in proceeding with a trial after an allegation of improper contact with a juror if the trial court, after considering factors such as the nature of the communication, the responses by the jurors, and the curative ability of instructions, finds that the jury can and will remain impartial and render a verdict based solely on the evidence,

not the alleged improper contact. (*People v. Harris* (2008) 43 Cal. 4th 1269, 1304.) When the claim of juror misconduct involves an allegation of unauthorized communication with or by a juror, a presumption of prejudice does not arise unless there is a showing that the content of the communication was about the matter pending before the jury, such as the guilt or innocence of the defendant. (*In re Hamilton* (1999) 20 Cal. 4th 273, 305-306.) A reviewing court considers the nature of the alleged misconduct, the surrounding circumstances, and the penalty phase record. (*In re Carpenter* (1995) 9 Cal.4th 634, 653–654.)

In the present case, appellant objects to former juror 6 (12929) telling juror 11 either: "remember the work we've already done" or "don't forget everything I've done." (XXVII CT 6575, 6581.) However, these comments must be taken into context. If the former statement is to be considered true, the comment at its core appears to be an attempt to encourage the jury who was put in a very tough situation, tasked with making a very tough decision about a person's fate. All of the declarations attached to the motion for a new trial depict how difficult the process was of choosing the proper penalty in this case. Understanding this, former juror 6's (12929) can be properly interpreted to be words of encouragement.

If the second statement is to be considered true, it is explained by the dynamics of former juror 6's (12929) role with the jury. It is undisputed that former juror 6 (12929) was the jury foreperson. (XXVII CT 6574, 6579.) It is also appears from the record that Juror 03995 was elected the foreperson after former juror 6 (12929) was taken off of the jury because she had sat next to former juror 6 (12929) and the jury liked how former juror 6 (12929) had organized the previous deliberations. Understanding this, former juror 6's (12929) can be properly interpreted to encourage the remaining jurors to deliberate fairly and in an organized manner.

In neither case is the communication misconduct. Unlike other cases of juror misconduct, the person doing the communication is a former juror, a juror who not only deliberated in the guilt and penalty phases of the trial, but was also the foreperson. Such contact does not carry with it the stigma of a third-party who has an actual stake in the outcome for one side or the other. Further, in no way does the communication affect the remaining juror's duty to remain impartial. The communication did not order the jurors to vote a certain way. More importantly, in no way did the communication discuss the guilt or innocence of the defendant nor impart any information about the case. (*In re Hamilton, supra,* 20 Cal. 4th at pp. 305-306.) Taking a look at the situation as a whole, the trial court was well within its discretion to determine that this contact did not merit a mistrial. Appellant's claim must fail.

c. Prison Life Comments

Appellant further argues that the jury committed misconduct by considering what his life in prison would be like. (AOB 281.) "A jury's verdict in a criminal case must be based on the evidence presented at trial, not on extrinsic matters." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1414.) A juror commits misconduct if the juror conducts an independent investigation of the facts (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 682 [measuring something at stores similar to the scene of the accident]), brings outside evidence into the jury room (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 320-321 [consulting a dictionary]), injects the juror's own expertise into the deliberations (*In re Stankewitz* (1985) 40 Cal.3d 391, 400 [former police officer telling other jurors he knew the law]), or engages in an experiment that produces new evidence (*Smoketree–Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [conducting an experiment regarding the pouring of concrete]).

It should be noted that the alleged discussion of prison life occurred during deliberations at the penalty phase rather than the guilt phase, which is significant. As opposed to the fact-finding function undertaken by the jury during the guilt phase, at the penalty phase

> the sentencing function is inherently moral and normative, not factual; the sentencer's power and discretion ... is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances.

(*People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) "Given the jury's function at the penalty phase under our capital sentencing scheme, for a juror to interpret evidence based on his or her own life experiences is not misconduct." (*People v. Wilson, supra*, 44 Cal.4th at p. 830.) "Jurors' views of the evidence ... are necessarily informed by their life experiences, including their education and professional work." (*In re Malone* (1996) 12 Cal.4th 935, 963.)

> [D]uring the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations....
>
> A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting "an opinion explicitly based on specialized information obtained from outside sources," which we have described as misconduct.

(*People v. Steele, supra*, 27 Cal.4th at p. 1266.) As this Court has found:

> the jury is a "fundamentally human" institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution.

(*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

It appears from the three declarations attached to the motion for a new trial that what appellant's life in prison would be like was discussed amongst the jury. However, it must be noted that none of the jurors had actual knowledge of what prison life would be like. As jurors, none of them could have personally experienced prison life as it would have exempted them from service. (See Code Civ. Proc., § 203, subd. (a)(5); Pen. Code, § 893 [convicted felons cannot serve on juries.].) As such, there is no indication that any individual juror was injecting his or her own expertise into the deliberations (*In re Stankewitz, supra,* 40 Cal.3d at p. 400.) Rather, what appears from the declarations is that the jurors drew reasonable inferences as to what prison life would be like. There is no indication that any one juror's voice was authoritative on this topic or that any particular depiction of what jail life would be like was adopted by the jury. Mere speculation as to jail life does not constitute misconduct. "Jurors are not automatons. They are imbued with human frailties as well as virtues." (*In re Carpenter* (1995) 9 Cal.4th 634, 654-655.) Rather, this was simply a case of each juror bringing in their "diverse backgrounds, philosophies, and personalities into the jury room … ." (*In re Hamilton, supra*, 20 Cal.4th at p. 296.) Appellant's claim must fail.

d. Beginning Deliberations Anew

Appellant alleges that when former juror 6 (12929) was excused from jury service and the new juror 6 (65230) was inserted, the jury failed to begin deliberations anew as required. (AOB 282.) Appellant cites *People v. Engleman* (2002) 28 Cal.4th 436, 445, in support of this argument, but that case stands for the proposition that jurors must engage in deliberation generally and appears to be procedurally different from the present one. (AOB 283.) It is undisputed that when former juror 6 (12929) was excused, the trial court did instruct the jury to begin deliberations from the

beginning. (L RT 14347-14348.) Appellant's claim that the jury did not due this is speculative and unsupported by the record.

Review of the declarations of the jurors does not substantiate appellant's claim that the jury did not begin its deliberations from the beginning when former juror 6 (12929) was excused and replaced with juror 65230. Rather, the declarations appear to demonstrate that the other jurors gave new juror 6 (65230) time to catch up and look at the evidence that the jury had before it. (XXVII CT 6571.) Only then did deliberations begin. It was clear from juror 03405 that the jury knew it had to "start all over again." (XXVII CT 6575.) In her own declaration, new juror 6 (65230) stated that the foreperson, juror 03995, instructed the jury that they were "starting over." (XXVII CT 6579.) Appellant's claim otherwise is pure speculation that has no substantiation in the record. The evidence presented makes clear that the jury was instructed it must start over and that it did just that. Appellant's claim must fail.

e. Prejudice

Even if appellant can demonstrate misconduct, he must also show that the misconduct was prejudicial. A party moving for a new trial on the ground of juror misconduct must show both the occurrence of misconduct and prejudice resulting from the misconduct. (*People v. Nesler* (1997) 16 Cal.4th 561, 580, 590.)

> [W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways.

(*In re Carpenter, supra*, 9 Cal.4th at p. 653.) The first is if the "extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror." (*Ibid.*)

> Under this standard, a finding of "inherently" likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this "inherent prejudice" test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.

(*Ibid.*)

> Under the second form of analysis
>
> > even if the extraneous information was not so prejudicial, in and of itself, as to cause "inherent" bias under the first test, the nature of the misconduct and the "totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose.

(*In re Carpenter, supra*, 9 Cal.4th at pp. 653-654.)

As the arguments above and the record on appeal demonstrate, the trial court was well within its discretion in denying the motion for a new trial based on allegations of juror misconduct. As the trial court properly found, all indications demonstrated that "the jury did its job. It considered all of the evidence." (LI RT 14438.) This ruling is supported by the record. In juror 49545's declaration, he plainly stated:

> I was impressed with the jury. They did the job they had to do. The final decision was an individual thing but we came together as a collection. I do not think several of them could have done it without the group.

(XXVII CT 6572.) As new juror 6 (65230) succinctly stated: "I changed my vote to death based on no emotion for Paul [Smith], considering only the facts." (XXVII CT 6584.) Appellant could demonstrate no prejudice as a result of his allegations of juror misconduct. Given the record on appeal, the trial court was well within its discretion in denying the motion for a new trial. Appellant's claim must fail.

XIII. TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF AGGRAVATING FACTORS AT THE PENALTY PHASE

Appellant claims that the trial court violated his Fifth, Eighth and Fourteenth Amendment rights by erroneously admitting into the penalty phase as aggravating evidence information that did not involve criminal activity or force or violence as required by section 190.3, subdivision (b). (AOB 288.) Specifically, appellant points to four instances where the trial court allegedly erred in admitting evidence: (1) the April 1999[38] jail escape attempt, (2) the May 2002 jail escape attempt, (3) his possession of a rolled-up baton fashioned from newspaper while in jail, and (4) the details of his forcible jail extraction from his cell in February of 2001.) (AOB 289, 291, 293, 296.) In all instances, respondent disagrees. In any event, error, if any, was harmless.

At the penalty phase, a trial court's decision to admit evidence of a defendant's prior criminal activity is reviewed under the abuse of discretion standard. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127; *People v. Smithey* (1999) 20 Cal.4th 936, 991. In determining whether the penalty should be death or life without possibility of parole, section 190.3, subdivision (b), states that the trier of fact shall take into account any of the following factors if relevant:

> (b) The 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.

"Criminal activity" as contemplated by section 190.3 is conduct that constitutes an offense proscribed by statute. (*People v. Lancaster* (2007) 41 Cal.4th 50, 93; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1259; *People v. Anderson* (2001) 25 Cal.4th 543, 588 [§ 190.3, factor (b) requires

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[38] It appears that appellant is referring to the March 26, 1999, attempted jail escape. (XXV CT 5903; XXXVII RT 10533.)

that conduct be "criminal in fact" in order to constitute valid penalty evidence].)

> Evidence of prior criminal behavior is relevant under section 190.3, factor (b) if it shows "conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute. . . ."

(*People v. Pensinger, supra,* 52 Cal.3d at p. 1259, quoting *People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Anderson, supra,* 25 Cal.4th at p. 588 [§ 190.3, factor (b) requires that conduct be "criminal in fact" in order to constitute valid penalty evidence]; *People v. Combs* (2004) 34 Cal.4th 821, 859; *People v. Clair* (1992) 2 Cal.4th 629, 672.)

However, a threat of violence, notably against property, which is not in itself a violation of a penal statute is not admissible under subdivision (b) of section 190.3.[39] (*People v. Boyd* (1985) 38 Cal.3d 762, 776.) While evidence of a nonviolent escape may be inadmissible as an aggravating factor under section 190.3, subdivision (b), this does not render such evidence "inadmissible on cross-examination to rebut good character evidence offered by defendant." (*People v. Burgener* (2003) 29 Cal.4th 833, 874, citation omitted; see also *People v. Boyd, supra*, 38 Cal.3d at p. 776.) Respondent will address each incident individually.

A. April 1999 Jail Escape Attempt

On August 27, 2002, appellant objected to the prosecution's use of evidence of his March 26, 1999, attempt to escape from jail during the penalty phase. (XXXVII RT 10533.) After hearing argument from all parties, the trial court held that appellant committed an attempt to escape

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[39] In *Boyd*, this Court held that evidence of defendant's uncharged crime involving violence to or a threat of violence to **property** was not admissible as other criminal activity involving violence. (*People v. Boyd* (1985) 38 Cal.3d 762, 776, 777, emphasis added.)

from jail and that evidence of this attempt would be admissible at the penalty phase. (XXXVII RT 10536.)

Section 4532, subdivision (b)(1), provides in relevant part:

> Every prisoner arrested and booked for, charged with, or convicted of a felony ... who is confined in any county or city jail, [or] prison ... is in the lawful custody of any officer or person, or is confined pursuant to Section 4011.9 ... who escapes or attempts to escape from a county or city jail, [or] prison ... is guilty of a felony and, if the escape or attempt to escape was not by force or violence, is punishable by imprisonment in the state prison for 16 months, two years, or three years, to be served consecutively, or in a county jail not exceeding one year.

(Emphasis added.) In *People v. Mason* (1991) 52 Cal.3d 909, 955, this Court upheld the trial court's admission of evidence of escape "on the theory that an escape through the window would have involved defendant in a confrontation with a guard and, thus, entailed an 'implied threat to use force or violence'" as required by section 190.3, subdivision (b).

In the present case, the trial court was well within its discretion in admitting evidence of appellant's attempted jail escape as the evidence contained both criminal activity and appellant's "implied threat to use force or violence" as required by section 190.3, subdivision (b). Appellant's estranged wife, Jessica Smith, testified as to the escape attempt. (XXXIX RT 11103.) Jessica testified that on or about April of 1999, she received a letter from appellant where he talked about escaping from jail. (*Ibid.*) In the letter, appellant asked Jessica to take photographs of the outside of the jail. (XXXIX RT 11103.) The letter contains very detailed instructions on the specific areas, of the jail and adjacent courtroom, appellant wanted photographs of, including a hand-drawn map of the jail facility and ventilation ducts, and how to take those photographs, including suggestions of distances and angles. (XLIV CT 11092A-11092E.) In the letter, appellant instructed Jessica not to send the original photographs and to

mark the copies of the photographs she sent as "legal mail." (XXXIX CT 11092C.) Prior to receiving the letter, appellant had already spoken to Jessica about escaping from jail. Specifically, appellant stated that he would not die in jail and "he would go down in a blaze of glory." (XXXIX RT 11103.) Concerned about appellant's statements, Jessica contacted law enforcement. (XXXIX RT 11105.) She then referred appellant to her friend, Misty Slettum, for the purposes of helping appellant with his jail escape attempt. (*Ibid.*) On April 21, 1999, law enforcement Special Agent Stacy Milliron posed as Misty Slettum in a pre-textual phone call to appellant where appellant confirmed his plans to have specific photographs taken. (XXXIX CT 11095A-11109.) In that conversation, appellant made clear that helping him in this endeavor would constitute a felony. (XXXIX CT 11108-11109.)

Both the specificity of appellant's plans and his pledge to Jessica demonstrated that appellant attempted to escape from jail and that this attempt included an "implied threat to use force or violence" as required by section 190.3, subdivision (b). As stated above, an attempt to escape from jail is a crime in violation of Penal Code section 4532, subdivision (b)(1). That part of the "criminal activity" requirement of section 190.3, subdivision (b), is met. Further, appellant's pledge that he would not die in jail and "he would go down in a blaze of glory" demonstrated an implied threat that if anyone tried to prevent his escape, he would use force or violence against them. (XXXIX RT 11103.)

The case law appellant relies on is clearly distinguishable from the present case. Appellant relies heavily on *People v. Boyd, supra*, 38 Cal.3d 762, in support of his claim that evidence of his jail escape should have not been admitted at the penalty phase. (AOB 290.) However, Boyd is clearly distinguishable from the present case as in *Boyd* the "injury," if there was one, was the removal of a metal grating from an air vent. (*Id.* at p. 776.)

The defendant in Boyd was linked to this removed grate by the presence of a t-shirt that might have belonged to him. (*Ibid.*) In that case, it did not appear that any direct evidence was presented that appellant actually removed the metal grating. Rather, the only connection presented between appellant and the grating was the location of a dirty t-shirt at the scene and the fact that defendant did not have a t-shirt on when they located him. (*Ibid.*) Further, there did not appear to be any evidence that the metal grating was removed for the purposes of effectuating an escape from jail.[40]

On the contrary, the evidence of appellant's intent to escape from jail was direct. Appellant's detailed letter to his estranged wife, Jessica Smith, contained specific directions to take photographs of the jail exterior to aid in his escape. Further, appellant makes his intentions known by vowing not to die in jail and that "he would go down in a blaze of glory" which demonstrates an implied threat he will use force or violence against anyone who gets in his way. (XXXIX RT 11103.) Appellant further made clear his intentions by telling the person he thought was Misty Slettum that helping him would constitute a felony. (XXXIX CT 11108-11109.) As such, appellant's reliance on *Boyd* and the other cases mentioned is misguided.

Further, even if this Court finds that there was insufficient evidence of an implied threat of force or violence, the evidence of his March/April 1999 jail escape attempt was admissible to rebut good character evidence appellant introduced during cross-examination of prosecution, penalty-phase witnesses. William Sweeney testified on behalf of the prosecution. (XXXVIII RT 10723.) In June of 1990, Sweeney was the administrator of

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[40] Appellant acknowledges that *People v. Boyde* (1988) 46 Cal.3d 212, is distinguishable as that case involved an alleged escape from juvenile hall by defendant. (*Id.* at p. 249, AOB 291.)

Helping Hands group home. (*Ibid.*) Sweeney acknowledged that appellant was kicked out of the home after kicking Christopher Hill. (XXXVIII RT 10725.) After cross-examination, appellant, through defense counsel, turned Sweeney into a defense witness and presented evidence on what type of training was available to group home workers who were presented with allegations of sexual misconduct at the time appellant was alleged to have sexually abused fellow group home client Justin Burger. (XXXVIII RT 10735, 10739.) Appellant then used Sweeney to present evidence that group homes such as Helping Hands were often used to house children who were sexually traumatized and that they did not have the resources to properly deal with someone as "damaged" as him or other sexually abused children. (XXXVIII RT 10740, 10746, 10748.) Specifically, appellant was attempting to get the jury to show mercy on him because of his life history. (XXXVIII RT 10750.)

Additionally at the penalty phase, Shasta County Juvenile Hall Group Counselor Rhonda Schuchart testified for the prosecution regarding appellant's stay there in 1995. (XXXIX RT 11072.) On cross-examination, defense counsel asked Schuchart if she got along with appellant. (XXXIX RT 11078.) Schuchart responded "yes." (*Ibid.*) Through Schuchart, defense counsel also presented evidence that appellant would tend to "act out" after visits with his father and grand-mother. (XXXIX RT 11079.) Schuchart responded "yes" when asked by defense counsel if she considered appellant intelligent. (*Ibid.*) During re-cross-examination, defense counsel directly asked Schuchart if she liked appellant. (XXXIV RT 11082.) Schuchart responded "yes." (*Ibid.*)

By presenting this evidence at the penalty phase, appellant was clearly attempting to elicit good character evidence in relation to his stay in custody at juvenile hall. As such, the prosecution was entitled to rebut this good character evidence with evidence that he was attempting to escape

from custody while at the Shasta County Jail. The trial court was well within its discretion in admitting this evidence.

Even if this Court finds it was error to admit such evidence, it was harmless beyond a reasonable doubt. Error in the admission of evidence under section 190.3, subdivision (b), is reversible only if "there is a reasonable possibility it affected the verdict," which is "essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Lancaster* (2007) 41 Cal.4th 50, 94.) In *People v. Carrington* (2009) 47 Cal.4th 145, 194, this Court held that admission of evidence of what was painted as a non-violent escape attempt from jail constituted harmless error. *Carrington* is factually very similar to the present case. Both *Carrington* and the present case demonstrated a weakness of the evidence of the actual escape in that, in this case, it was thwarted by good police work. (*Id.* at p. 194.) Further, in both cases, the key witness as to the escape attempt initially refused to testify at the penalty phase. (*Ibid.*, XXXIX RT 11102.) Further, as in *Carrington*, even if the jurors believed Jessica Smith's statements in the present case, the incident she described, i.e., taking photographs of the exterior of the jail facilities, was relatively minor when compared to the facts of the crimes for which appellant was convicted and other evidence presented at the penalty phase. (*People v. Carrington, supra,* 47 Cal.4th at p. 194.) It must be noted that appellant was convicted of the torture and murder of Lora Sinner. Evidence presented included the prolonged beating to death of Lora Sinner. Further, in the penalty phase the prosecution presented evidence of a violent jail escape attempt that involved elaborate planning and the infliction of great bodily injury to Correctional Deputy Timothy Renault. As in *Carrington*, there is no indication that the prosecutor focused on the evidence of the March/April 1999 attempted escape as a justification for the death penalty in this case. (*Ibid.*) As such, there is no

reasonable possibility that this evidence influenced the jury's decision to impose the death penalty. Error, if any, in the admission of this evidence was harmless.

B. May 2002 Jail Escape Attempt

Appellant objected to the prosecution's use of evidence of his May 18, 2002, attempt to escape from jail during the penalty phase. (XXXVII RT 10542.) In denying appellant's motion, the trial court consulted the jury instruction on attempted jail escape and then ruled as follows:

> All right. Yeah, I think it's -- it would be admissible. It's certainly an attempt, particularly with the putting of the money on the books. Whether the witness is credible, that will be an issue for the jury. But there certainly would be sufficient evidence to allow its admission.

(XXXVII RT 10545.) As stated above, section 4532, subdivision (b)(1), makes it a criminal offense to attempt to escape from jail custody.

In the present case, the trial court was well within its discretion in admitting evidence of appellant's May 2002, attempted jail escape as the evidence contained both criminal activity and appellant's "implied threat to use force or violence" as required by section 190.3, subdivision (b). Aaron Cozart testified for the prosecution on the issue of the May 2002, jail escape. (XLI RT 11691.) On May 11, 2002, Cozart was assigned to the same pod as appellant in the Shasta County Jail. (XLI RT 11692.) Within two weeks of arriving there, appellant and Benjamin Williams asked Cozart for help. (XLI RT 11692-11693.) Appellant asked Cozart and his cell-mate to cause a distraction, i.e., to get a hostage and block the doors which would force the jail officers to perform a jail extraction of their cell. (XLI RT 11693.) Appellant wanted Cozart to create this distraction so he could bring weapons and tools up from the outside through his cell window, which he planned to break. (*Ibid.*) According to Cozart, appellant's plan was to tie together strips of his bed sheets, attach them to an anchor, and

throw them over the rail to the fence outside. (XLI RT 11694.) He would then retrieve the weapons and tools from someone helping him from the outside. (*Ibid.*) Appellant had Cozart contact "Tim," a former Shasta County Jail inmate who had just been released, to help arrange the escape. (XLI RT 11695.) Appellant offered to put money in Cozart's jail account and provide Cozart's cellmate with drugs in exchange for his cooperation. (XLI RT 11706.) However, before it actually happened, Cozart contacted jail officers and informed them of appellant's plan. (XLI RT 11698.)

Shasta County Sheriff's Deputy Brian Jackson also testified on behalf of the prosecution as to the May 2002, jail escape attempt. (XLI RT 11709.) Inmate Aaron Cozart reported appellant's plan to Deputy Jackson. (XLI RT 11711.) Deputy Jackson checked tape recordings of jail phone conversations and the jail money accounts for inmates. (XLI RT 11711.) Deputy Jackson confirmed that on May 15, 2000, a Timothy Yakiatis deposited money on appellant's jail account.

On its own, evidence of the May 2002, jail escape attempt was admissible. It demonstrated both criminal activity and the "implied threat to use force or violence" as required by section 190.3, subdivision (b). By appellant's own direction, Aaron Cozart was to take a hostage in order to create a diversion so he and Benjamin Williams could bring weapons and tools through their cell window without jail personnel noticing. The taking of a hostage demonstrated the implied use of force as directed by appellant. Further, the import of weapons into his jail cell also demonstrated the implied threat to use force or violence on jail personnel to effectuate their escape. Viewed as a conspiracy or attempt to escape from jail, the May 15, 2000, deposit of money on appellant's jail account by the aforementioned "Tim," i.e., Timothy Yakiatis demonstrated an "act in furtherance" of the escape. On the facts alone of the May 2002 incident, there was sufficient and substantial evidence of criminal activity and the "implied threat to use

force or violence" as required by section 190.3, subdivision (b). The trial court was well within its discretion in admitting evidence.

However, the facts of the May 2002, escape attempt should not be viewed in a vacuum. The planned escape in May of 2002, comes right before the actual jail escape attempt of June 22, 2002, that resulted in the taking of Deputy Renault as a hostage and his serious injury. The two offending parties are the same, appellant and Benjamin Williams. The goal was the same, to escape from jail custody by taking a hostage and using weapons to effectuate their plans. Appellant does not and cannot argue that evidence of the June 22, 2002, was inadmissible as it involved both criminal activity and the use of force or violence. Evidence of the May 2002, escape attempt can be viewed as part and parcel of the June 22, 2002, incident. This is supported by the closeness in time of the events. The prosecution's intent in treating them as linked events can be evidenced by the order in which the witnesses were presented on these topics. The testimony of Aaron Cozart and Deputy Jackson were presented right in the middle of the evidence on the June 22, 2002, violent jail escape attempt. This demonstrated a continuous and consistent plan to escape custody by force and, as such, was admissible as part of the June 22, 2002, jail escape attempt.

In the alternative, the May 2002, jail escape attempt was admissible as evidence of appellant's intent to attempt to escape from jail in the June 22, 2002, incident. (Evid. Code § 1101, subd. (b).) Specifically, Evidence Code section 1101(b) provides in relevant part that:

Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident ...) other than his or her disposition to commit such an act.

For evidence of uncharged misconduct to be admissible under Evidence Code section 1101, subdivision (b), to prove such facts as motive, intent, identity, or common design or plan, the charged offenses and uncharged misconduct must be "sufficiently similar to support a rational inference" of these material facts. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The least degree of similarity ... is required in order to prove intent." (*People Ewoldt* (1994) 7 Cal.4th 380, 402.) The uncharged misconduct need only be "sufficiently similar to support the inference that the defendant" had the same or similar intent in each situation. (*Ibid.*; see *People v. Memro*, (1995) 11 Cal.4th 786, 864–865.) As stated above, the two offending parties were the same in both the May 2002, and June 2002, escape attempts, appellant and Benjamin Williams. The goal in both instances was the same, to escape from jail custody by taking a hostage and using weapons to effectuate their plan. As such, the evidence of the May 2002, jail escape attempt was admissible to demonstrate appellant's intent in escaping from jail by force. Under numerous theories, the trial court was well within its discretion in admitting this evidence.

Even if this Court finds it was error to admit such evidence, it was harmless beyond a reasonable doubt. Respondent incorporates the legal authority for the harmless error standard as stated in sub-argument A. As in this Court's opinion in *People v. Carrington, supra,* 47 Cal.4th 145, even if the jurors believed inmate Aaron Cozart's statements, the incident he described, i.e., the planned taking of a hostage as a decoy to hide incoming weapons contraband, paled in comparison to both the murder and prolonged torture of Lora Sinner and the month-later, June 22, 2002, violent escape attempt that seriously injured Deputy Renault. (*People v. Carrington, supra,* 47 Cal.4th at p. 194.) In addition to the evidence of the torture and murder which literally involved Lora Sinner being bludgeoned to death, forcing her to cut herself, and suffocating her during the beating,

the prosecution presented evidence of a violent jail escape attempt that involved elaborate planning and the infliction of great bodily injury to Correctional Deputy Timothy Renault. As in *Carrington*, there is no indication that the prosecutor focused on the evidence of this attempted escape as a justification for the death penalty in this case. (*Ibid.*) As such, there is no reasonable possibility that this evidence influenced the jury's decision to impose the death penalty. Error, if any, in the admission of this evidence was harmless.

C. February 2001 Jail Extraction

On August 27, 2002, appellant objected to the prosecution's use of evidence of his February 25, 2001, jail extraction during the penalty phase. (XXXVII RT 10536.) The trial court viewed a video recording of the actual jail extraction in question. (XXXVII RT 10540.) In ruling that evidence admissible at the penalty phase, the trial court held:

> Well, I might have to listen to the tape. But come on in here and I will do whatever the blanks were, it sounds to me, and again the tape may prove me wrong, assuming those statements are on there, I do have a recollection of that, it would be a PC 69. Plus the rolled up newspaper to be used in the form of a baton, statements afterwards, would show a crime, plus a threat of violence.

(XXXVII RT 10542.) The trial court further clarified its ruling at a later time:

> No. And I think I thought about that as I listened to the testimony. But we don't just have the video. The officer testified in his talking to the defendant about the water, the defendant basically challenged him to fight, which in effect is an executive officer. It's a threat by the defendant trying to keep him from performing his duties. And it followed up with this whole violent activity. So that's my basis for denying your motion.

(XXXVIII RT 10817-10818.) On September 5, 2002, the prosecutor proposed to play a video recording of the February 25, 2001, cell extraction. However, defense counsel objected that extended portions of the recording were inaudible. (XXXVIII RT 10704-10705.) On September 5, 2002, Shasta County Correctional Deputy William Gardner testified at the penalty phase as to the February 25, 2001, cell extraction. (XXXVIII RT 10776.)

Deputy Gardner testified that on February 25, 2001, at approximately 2 p.m., he noticed water flooding the third floor of the jail where appellant resided. (XXXVIII RT 10781.) Gardner testified that it took a fair amount of time and preparation by a person to get that much water on the floor. (*Ibid.*) He stated that this flooding posed both a physical and health safety issue at the jail. (XXXVIII RT 10782.) Gardner determined that the water was coming from appellant's cell, where he resided alone. (*Ibid.*) When deputies approached appellant's door, they noticed that he was blocking the window, preventing the deputies from seeing inside of his cell. (XXXVIII RT 10784.) Blocking of a cell window is against jail regulations. (XXXVIII RT 10783.) Other than his drinking water, the deputies shut off the hot water and toilet water to appellant's cell. (XXXVIII RT 10784.) Appellant became angered by this and began kicking and yelling obscenities at the deputies. (*Ibid.*)

A couple of minutes later, Deputy Gardner re-approached appellant's cell as appellant had continued kicking and yelling loudly. (XXXVIII RT 10785.) Appellant saw Deputy Gardner and said to him: "what are you looking at, you mother fucking -- you punk ass bitch, come in here and I will knock your ass out." (XXXVIII RT 10787.)

Deputy Gardner decided to move appellant to a more secure cell. (XXXVIII RT 10787.) He made this decision because appellant's current jail cell did not have a food port to give him food, which the secure cell did

and if appellant continued to kick the door, the more secure cell's door lock would be harder to break. (*Ibid.*) Throughout this time, appellant kept kicking at his cell door and making comments that he was going to kick this door open, challenging the deputies that they had better know how to use their OC, and that he was "ready to go back to High Desert [State Prison], go ahead, take me." (XXXVIII RT 10790.)

When the deputies approached appellant's cell to move him, they found the window all covered up. (XXXVIII RT 10787.) When they opened the door, they sprayed OC (olein capsicum) spray in appellant's cell which can cause the eye and lip area of a person's face to burn. (XXXVIII RT 10788.) However, appellant had wrapped a t-shirt around his head and a plastic bag around his eyes, surprising the deputies. (XXXVIII RT 10787-10788.) Deputy Gardner testified that appellant took these steps to negate the effects of the OC spray. (XXXVIII RT 10789.) Given these circumstances, the deputies were forced to leave appellant in his cell and contacted the cell extraction team at the jail. (XXXVIII RT 10789-10790.)

Section 4600, subdivision (a), provides in relevant part:

> Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any jail, prison, or any public property in any jail or prison, is punishable by a fine not exceeding ten thousand dollars ($10,000), and by imprisonment pursuant to subdivision (h) of Section 1170, except that where the damage or injury to any city, city and county, or county jail property or prison property is determined to be nine hundred fifty dollars ($950) or less, that person is guilty of a misdemeanor.

Section 69 provides:

> Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment

pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment.

In the present case, the trial court was well within its discretion in admitting evidence of the February 25, 2001, jail extraction. The evidence presented demonstrated both criminal activity and the "implied threat to use force or violence" as required by section 190.3, subdivision (b). Appellant's conduct constituted both destruction of jail property, section 4600, subdivision, (a), and threats to a peace officer performing his or her duty, section 69. As such, appellant engaged in criminal activity. Further, the evidence presented demonstrated that appellant conveyed the "implied threat to use force or violence" in his conduct. First, appellant demonstrated anger, including yelling obscenities, and physical violence towards the correctional deputies when they turned the water off to his cell. (XXXVIII RT 10784.) Appellant further demonstrated threats of physical violence towards Deputy Gardner when he re-approached appellant's cell as appellant had continued kicking and yelling loudly. (XXXVIII RT 10785.) When appellant saw Deputy Gardner he said to him: "what are you looking at, you mother fucking -- you punk ass bitch, come in here and I will knock your ass out." (XXXVIII RT 10787.) This constituted a physical threat, one to use force or violence against Deputy Gardner. Appellant's preparation for the OC spray also demonstrated that he was ready to resist any attempt to take him out of his cell. The fact that he purposefully flooded his cell and the jail evidenced an intent to challenge the jail officers to provoke a physical confrontation. As such, evidence of appellant's February 2001 jail extraction demonstrated both criminal activity and an "implied threat to use force or violence" as required by section 190.3. The trial court was well within its discretion in admitting this evidence.

Even if this Court finds it was error to admit such evidence, it was harmless beyond a reasonable doubt. Respondent incorporates the legal authority for the harmless error standard as stated in sub-argument A. In *People v. Lewis* (2008) 43 Cal.4th 415, 527, this Court found that the erroneous admission of evidence that the defendant damaged his cell was harmless. As in *Lewis*, the evidence of the damage to the jail cell was relatively minor when compared to the facts of the crimes for which appellant was convicted. (*Id.* at pp. 527-528.) In *People v. Silva* (1988) 45 Cal.3d 604, this Court found admission of evidence at the penalty phase that defendant threatened officers to be harmless. In Silva as well, this Court found that the evidence of the threats was relatively minor in comparison to the facts of the crimes for which defendant was convicted. (*Id.* at p. 636.) As noted above, appellant was convicted of the torture and murder of Lora Sinner, which entailed brutal and extensive beating of the victim. Also, in the penalty phase the prosecution presented evidence of a violent jail escape attempt that involved elaborate planning and the infliction of great bodily injury to Correctional Deputy Timothy Renault. As in *Lewis and Silva*, there is no indication that the prosecutor focused on the evidence of this attempted escape as a justification for the death penalty in this case. (*People v. Lewis, supra,* 43 Cal.4th 527-528, *People v. Silva, supra,* 45 Cal.3d at p. 636.) As such, there is no reasonable possibility that this evidence influenced the jury's decision to impose the death penalty. Error, if any, in the admission of this evidence was harmless.

D. Possession of Soda Can Shank and Newspaper Baton

On August 27, 2002, appellant objected to the introduction of evidence at the penalty phase that he possessed a shank made from a soda can while incarcerated in juvenile hall in 1995. (XXXVII RT 10529.) In hearing argument on this topic, the trial court pondered:

> How is it different from possession of a silencer or sawed-off shotgun? Something that the possession is illegal, here the possession is illegal. And basically it's the kind of item that really only use would be for violence. I can't imagine –

(XXXVII RT 10530.) The trial court then reserved ruling on the admissibility of this incident until it could question the people involved to determine the timing of the incident and what was involved. (XXXVII RT 10531.) After further determination, the evidence was admitted.

While possession of a weapon may not always be an act committed with actual or implied force or violence (*People v. Jackson* (1996) 13 Cal.4th 1164, 1235), the factual circumstances surrounding the possession may indicate an implied threat of violence. (*Id.* at pp. 1235-1236; *People v. Bacon, supra,* 50 Cal.4th at pp. 1126-1127) This is especially so when the weapon is possessed by a defendant in jail or prison custody. As this Court observed:

> In a series of cases . . . , we have held that the possession of a weapon in a custodial setting - where possession of any weapon is illegal – "involve[s] an implied threat of violence even when there is no evidence defendant used or displayed it in a provocative or threatening manner."

(*People v. Michaels* (2002) 28 Cal.4th 486, 535; *People v. Bacon, supra,* 50 Cal.4th at pp. 1126-1127.) As this Court ruled in *People v. Roberts* (1992) 2 Cal.4th 271, 332, prior possession of an unsharpened piece of metal while in custody can be admissible as aggravating evidence in the penalty phase of a trial. Further, juvenile misconduct is properly introduced under section 190.3, subdivision (b). (*People v. Hartsch* (2010) 49 Cal.4th 472, 515.)

1. Soda Can Shank

Shasta County Juvenile Hall Group Counselor Rhonda Schuchart testified for the prosecution on the issue of the soda can shank. (XXXIX RT 11072.) In 1995, appellant was sent to the behavior modification unit

of Juvenile Hall which required security. (XXXIX RT 11075.) At an undisclosed time during this year, appellant tapped on his cell door to get Shuchart's attention. He slid a Pepsi can under that door that had been modified into the shape of a knife. (*Ibid.*) Appellant gave the can to Shuchart to show her that he could create such a weapon. (XXXIX RT 11076.) Shuchart described appellant as smart and manipulative, playing staff against each other. (XXXIX RT 11082.)

The trial court was well within its discretion in admitting evidence of the Pepsi can shank. As this Court held in *People v. Michaels, supra,* 28 Cal.4th at p. 535, an inmates possession a weapon in jail can demonstrate an "implied threat of violence" even when "there is no evidence defendant used or displayed it in a provocative or threatening manner." Here, appellant demonstrated to Schuchart what he could do even under the custodial limitations of Juvenile Hall. (XXXIX RT 11076.) Appellant was specifically transferred to the "behavior modification unit" because he failed to abide by the directions of Juvenile Hall. (XXXIX RT 11073, 11074.) This section was different than other sections of Juvenile Hall because it required security supervision. (XXXIX RT 11074.) Appellant specifically got Schuchart's attention to present her with the shank. (XXXIX RT 11075.) His ability to turn readily available materials into a weapon, "a make-shift knife" as Schuchart described it, that could cause physical harm demonstrated that he was a threat to perform that harm. (XXXIX RT 11075, 11076.) The incident caused Schuchart to file an incident report. (XXXIX RT 11075-11076.) As the trial court correctly found, the possession of the shank was illegal, constituting "criminal activity," and its only logical reason for being demonstrated an implied threat of violence. Moreover, the specific manner in which appellant presented the shank to Schuchart strongly suggested a threat of violence against her or other staff.

2. Newspaper Baton

Shasta County Deputy Sheriff David Heberling testified for the prosecution as to the possession of the newspaper baton. (XL RT 11388.) On June 22, 2002, Deputy Heberling was assigned to collect evidence at the scene of appellant's attempted escape and assault of Correctional Deputy Timothy Renault at the jail. (*Ibid.*) In appellant's cell, Deputy Heberling located a tightly rolled up normal-sized newspaper, wrapped together with the elastic from boxer shorts. (XL RT 11389.) The newspaper was very tightly wrapped together, constituting a firm instrument. (*Ibid.*) Deputy Heberling noticed that the rolled up newspaper did not bend at all. (XL RT 11390.) Deconstructing it, he noticed that either soap or toothpaste coated the newspaper. (XL RT 11391.) Deputy Heberling opined that this device could be used as a weapon. (XL RT 11392.) He testified that the stiffness of the newspaper device was roughly comparable to the baton he carries as a Sheriff's Deputy. (XL RT 11393.)

The trial court was well within its discretion in admitting evidence of the newspaper baton. Again, as this Court held in *People v. Michaels, supra,* 28 Cal.4th at p. 535, an inmates possession a weapon in jail can demonstrate an "implied threat of violence" even when "there is no evidence defendant used or displayed it in a provocative or threatening manner."

First, this evidence can be viewed as part and parcel of the evidence presented on the June 22, 2002, escape attempt. It was possessed at the same time as the escape attempt. It was discovered on the same day as the June 22, 2002, escape attempt during further investigation of appellant and his cell. As such, the violent nature and result of the escape attempt can be attributed to the newspaper baton as appellant possessed it in anticipation of effectuating his escape.

Second, in and of itself, the baton constituted a weapon. (XL RT 11392.) The stiffness/density of the weapon made it comparable to a police baton. (XL RT 11393.) Making the newspaper baton demonstrated great thought and effort in (1) collecting paper, (2) coating each sheet with either soap or toothpaste, and (3) binding the sheets together, rolling them into a dense stick. There was no other reason to possess this baton in a jail cell except to use it as a violent weapon. Its possession, whether viewed directly with the June 22, 2002, violent escape attempt or separately demonstrated "criminal activity" and an implied threat to use force or violence as required by section 190.3, subdivision (b).

Even if this Court finds it was error to admit such evidence, it was harmless beyond a reasonable doubt. Respondent incorporates the legal authority for the harmless error standard as stated in sub-argument A. In *People v. Collins* (2010) 49 Cal.4th 175, 220, this Court found that the erroneous introduction of evidence at the penalty phase that appellant possessed a weapon was harmless. In *Collins*, the prosecution presented evidence that an officer recovered an open pocketknife from defendant's pants pocket following his arrest. (*Ibid.*) While the prosecutor argued that the knife was a concealed weapon, it was conceded on appeal that possession of a pocketknife was insufficient to establish a violation of section 12020 because, at the time the offense was committed, a pocketknife did not fall within the statutory definition of a concealed weapon. (*Ibid.*, citing *People v. Bain* (1971) 5 Cal.3d 839, 851–852; *People v. Forrest* (1967) 67 Cal.2d 478, 480–481.) As such, the evidence introduced did not even meet the "criminal activity" element of section 190.3, subdivision (b). Even if this Court does find that there was no implied threat to use force or violence, the introduction of the soda can shank was far less egregious than the facts of *Collins* which this Court held was harmless. Again, as was taken into account by this Court in *Collins*,

the evidence presented on both weapons, the soda can schank and the newspaper baton, was relatively minor when compared to the facts of the crimes for which appellant was convicted. (*People v. Collins, supra,* 49 Cal.4th at p. 220; see *People v. Prieto* (2003) 30 Cal.4th 226, 269 [possession of shanks in jail cell harmless.]) As noted above, appellant was convicted of the torture and murder of Lora Sinner. In addition, the prosecution presented evidence of a violent jail escape attempt that involved elaborate planning and the infliction of great bodily injury to Correctional Deputy Timothy Renault. As in *Collins*, there is no indication that the prosecutor focused on the evidence of this attempted escape as a justification for the death penalty in this case. (*Ibid.*) As such, there is no reasonable possibility that this evidence influenced the jury's decision to impose the death penalty. Error, if any, in the admission of this evidence was harmless.

XIV. TRIAL COURT PROPERLY EXCLUDED IRRELEVANT EVIDENCE PROFFERED BY APPELLANT DURING PENALTY PHASE

Appellant claims that the trial court violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by erroneously excluding "multi-generational" allegedly-mitigating evidence which included a family history of covering up abuse. (AOB 302.) Appellant cites portions of the testimony of his mother, Doreen Smith, Sherry Bigger, and his paternal aunt, Sarah Belongie, as being improperly excluded. (AOB 302, 304.) Respondent disagrees.

A. Background

Prior to the close of prosecution evidence at the penalty phase, the prosecution, Brent Ledford, made the following objection:

> LEDFORD: In addition, I will be asking that the defense, or the Court ask the defense to, when they're talking about with the defendant's family, family members, that they only testify to things that directly relate to the defendant, not to the victim's

father or mother or second cousin twice removed, under the impression that some of that testimony may try to be elicited.

THE COURT: I'm not sure I understand.

LEDFORD: Well, the mother's upbringing, Doreen Smith, may come into play, and that may be testified to by her and by the uncles.

(XLI RT 11746.) The following exchange then took place between the trial court and counsel, prosecutor Brent Ledford and defense attorney Roland Papendick:

MR. PAPENDICK: I have some comments if the Court desires. The issue is multi-generational dysfunction. And my expert witnesses will testify that that is a significant part, to make the analogy the briefest, a parent who herself has never been parented does not have the parenting skills. A child that was beaten by their parents has a propensity to believe that that is the way you discipline a children -- a child is by beating them. So we believe very strongly that the genetics, if you will, the family tree is clearly relevant. I do not --

[¶ ... ¶]

THE COURT: Multi-generational dysfunction.

MR. PAPENDICK: Yes, sir.

THE COURT: All right. Is the type of dysfunction that the defendant suffers any different, or will your experts so testify, depending upon -- I mean, what I'm saying is, there are certain facts that affected the defendant's life certain ways. He was treated by his mother's father, whoever.

MR. PAPENDICK: Yes.

THE COURT: And there will be testimony about the affects of that on Mr. Smith.

MR. PAPENDICK: Yes.

[¶ ... ¶]

THE COURT: Why is it relevant? [¶ ... ¶] Why the mother or the father did these things. The issue -- isn't the issue that these things did happen to Mr. Smith?

MR. PAPENDICK: Yes.

MR. LEDFORD: And I'm not contesting that portion --

[¶ ... ¶]

MR. PAPENDICK: And the issue is to understand why they happened.

THE COURT: Why is that relevant?

MR. PAPENDICK: Because I don't think there can be mercy until there is understanding. And unless the jury clearly understands the whole picture, you know, this is an area that I'm not going to dwell greatly on. But I think it's real important for the jury to know that Doreen Smith, Paul's mother was herself sexually abused. That the sexual abuse was so bad that she ran away at a young age with a sailor and had her first --

THE COURT: I'm not seeing the why of that, and I'm questioning you, because I'm trying to understand. [¶ ... ¶] The question is what happened to Mr. Smith. And if the jury ends up hating his mother or hating his father, so be it. The point is, Mr. Smith suffered these things, regardless of why the mother did it or why the father did it. And so I'm not seeing the relevance of the reasons that the mother or the father abused Mr. Smith.

MR. PAPENDICK: The relevancy is that the jury has to understand the parenting skills that the mother had. And when Head Start came out in 1980 and found her completely incapable of cooperating, that the jury will understand why.

THE COURT: See, but the "why." I don't see the relevance. She was incapable of cooperating, yes.

MR. PAPENDICK: Because that's part of the prong of the multi-generational dysfunction. It runs in the family. The apple doesn't fall too far from the tree, and gives them more understanding as to why Paul --

THE COURT: I'm assuming there is not any testimony about genetics?

MR. PAPENDICK: Well, I don't know that testimony about studies regarding dysfunctional families is not genetics. I don't know. I mean, we're not calling any microbiologist and DNA experts. We are calling psychiatrists, psychologists and clinical psychologists who have studies multi-generational issues.

THE COURT: What significance attaches to whether it's multi-generational or the mom was the first one to start all this, for whatever reasons? What difference is the affect on Mr. Smith, or the effect on mitigating factors? The issue is Mr. Smith was abused, mistreated, et cetera, et cetera, et cetera. [¶ ... ¶] So whether mom was the first one in her family to do it, and she did it for no good reason, or she did it because it happened one hundred years before, I don't see how that makes a difference.

MR. PAPENDICK: The psychiatrist says it makes a difference.

THE COURT: How so?

MR. PAPENDICK: I'm not sure I can explain it.

THE COURT: What I'm going to do is sustain his [the prosecution] objection . . . .

(XLI RT 11746-11750.) During the penalty phase testimony of Doreen Smith, defense counsel, Roland Papendick, made the following offer of proof:

MR. PAPENDICK: This is Papendick. I think it's relevant at this point to establish whether or not her parents taught her how to be a parent.

THE COURT: I don't see it. What I'm thinking about doing is taking a couple of minutes and looking at that case, though.

(XLII RT 11801.) After all parties were given an opportunity to review relevant case law, the trial court re-opened argument on the issue. (XLII RT 11811.) After further argument by all parties, the trial court again excluded testimony by Doreen Smith on her family background, stating to

defense counsel: "I'm not limiting you on evidence as to what were the family dynamics that Mr. Smith was involved in." (XLII RT 11823.)

However, on September 25, 2002, during the penalty phase, appellant, through trial counsel, renewed its motion to present evidence of multi-generational mitigation evidence. (XLII RT 11902.) In support of this motion, defense counsel presented the declaration of Clinical Neuropsychologist Myla Young. (*Ibid.*, Ct. exh. T-35.) The trial court changed its ruling on the admissibility of this evidence as follows:

> Well, I think this is precisely the kind of thing that was lacking. I saw no connection between what you proffered as testimony and what any doctor would be testifying to. Whether or not I believe the jury will accept the analysis is not the issue. What weight I think is -- I think it's entitled to is not the issue. The only issue would be a [Evidence Code section] 352(c). And in weighing that, I don't anticipate, one, significant testimony or consumption of time on some of these issues and, two, the person rendering the diagnosis is going to have to relate some of this, anyway, so I'm going to reverse my ruling and permit you to put on that evidence.

(XLII RT 11902-11903.)

Contrary to appellant's claims, the trial court did not exclude "all testimony about Doreen [Smith] and her siblings (the Cromps) and their drug problems, problems with their own children, and being in and out of prison." (AOB 303.) Rather, the trial court reserved ruling on the testimony of James Briggs on a question by question basis, depending on whether he personally witnessed certain relevant conduct. (XLIII RT 12088.) Briggs lived with Doreen Smith for a limited time in Eureka, California. (XLIII RT 12086.)

As to the proposed testimony of Sherry Bigger, the following discussion took place between the prosecution (Ledford), defense counsel (Papendick), and the trial court:

MR. PAPENDICK: Sherry Bigger is the girlfriend of at least one of the Cromps. It may be more. She knows the Cromp family, most of the eleven brothers and sisters. Doreen Smith and her brothers and sisters. And her -- the purpose of her testimony is to go through the family members that she knows. And most of them are heavily into drugs. And she's going to talk about family members of Doreen.

MR. LEDFORD: My understanding, your Honor, is that she's never met Doreen. She's only spoken to her on the phone a few times. I was going to argue that prior to her coming on, but I can now. She has -- she has no knowledge. And what happens to the other family members is irrelevant.

THE COURT: It's getting a bit --

MR. LEDFORD: Attenuated.

THE COURT: Yeah, distant from -- I mean it's one thing to talk about, you know, Ms. Smith's life and that multi-generational effect.

MR. PAPENDICK: Well --

THE COURT: It's another to call people in, people that knew her brothers and sisters and talk about what low-lifes they were.

MR. PAPENDICK: Except that those low-lifes were living in the home.

THE COURT: Did she see the reaction between Doreen Smith and Mr. Leonard Cromp or Jonathon Cromp or any of these other Cromps?

MR. PAPENDICK: No, I don't believe so.

THE COURT: I'll have to hear the nature of how much she knows those folks. She doesn't seem like she has a lot that's relevant. We'll take it question by question.

MR. LEDFORD: Your Honor, she's never even met Ms. Cromp.

THE COURT: And she may come in and talk about who she knew and who she didn't know and you may object to the next

six, seven questions and they may get sustained, they may get overruled, so I don't know. Anything else?

(XLIII RT 12088-12090.)

As to Sherry Bigger, the following, later conversation occurred:

MR. PAPENDICK: I have since learned that even though that Sherry Bigger met John Cromp in '79, and she has been in and out of the family, but she never ever saw any family members around Paul Smith, so -- and was not in the area at the time all this in '83 -- when all of this came about, so she has never seen the -- any of the Cromp family members interact with Doreen while P.J. [appellant] was around.

I would be asking general questions regarding does she know John Cromp. What is her opinion of John Cromp. Does she know Lenny Cromp. What is her opinion of Lenny Cromp. And the answers are -- is that John Cromp has been into drugs, in and out of prison. Lenny Cromp, says the same thing.

THE COURT: Why is that relevant?

MR. PAPENDICK: The only relevance it has is on the –

THE COURT: Did she ever see their interaction with Doreen Smith?

MR. PAPENDICK: No, not during the relevant period of time. And I'm bringing that up because I don't want to waste the Court and the jury's time putting her on. But that is the offer of proof. Then she could testify to all the problems the Cromps have had. Individual Cromps, in and out of prison, drug problems, problems with their own kids.

THE COURT: All right. Other than if she's observed the interaction between them and Doreen Smith, it's not relevant, as far as I'm concerned, and I would exclude it.

MR. PAPENDICK: That's correct.

THE COURT: Okay. Well, that's my ruling.

MR. PAPENDICK: Okay. And I will not be calling her.

(XLIII RT 12202-12203.)

Sarah Belongie testified that she was the sister of Paul Smith, Sr., appellant's biological father. During her testimony, defense counsel asked Belongie in what way her step-father, Jim Brooks, was not a good step-father. (XLIII RT 12366.) The trial court sustained the prosecution's objection as to the relevancy of this evidence. (*Ibid.*) The trial court further sustained relevancy objections when Belongie was asked how her step-father, Jim Brooks, treated her, meaning Belongie. (XLIII RT 12367.) However, defense counsel's offer of proof that appellant's grand-mother, Phyllis Jones, knew that her daughter were allegedly being molested by husband Jim Brooks was directly refuted by their own defense investigator's report. (XLIII RT 12371.) Defense counsel could not, as an offer of proof, demonstrate that Phyllis Jones had any knowledge that Jim Brooks was molesting her daughters. As such, the trial court sustained the relevancy objection as to this line of questioning. (XLIII RT 12371-12372.) The trial court also sustained the prosecution's objection to defense counsel's question to Belongie regarding whether she joined the Army.[41] No other objections or limitations were made to Belongie's testimony.

B. Discussion

Pursuant to the Eighth Amendment to the United States Constitution a jury in a capital case must be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a

[41] Defense counsel's offer of proof claimed that Belongie met Margaret King, the mother of appellant's wife, Jessica King. (XLIII RT 12374.) Defense counsel proposed to offer character evidence about Jessica King. (XLIII RT 12375.) This is not relevant to the current argument.

sentence less than death." (*People v. Loker* (2008) 44 Cal.4th 691, 727, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604, fn. & italics omitted.) However, even in the penalty phase, the trial court still retains discretion to determine whether evidence is admissible under relevancy grounds:

> [T]he United States Supreme Court has made clear that the trial court retains the authority to exclude, as irrelevant, evidence that has no bearing on the defendant's character, prior record or the circumstances of the offense.

(*People v. Frye* (1998) 18 Cal.4th 894, 1015, disapproved of on unrelated ground in *People v. Doolin* (2009) 45 Cal.4th 390, 420; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 & fn. 12; *People v. Virgil* (2011) 51 Cal.4th 1210, 1272.) As such, the trial court:

> determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury.

(*People v. Williams* (2006) 40 Cal.4th 287, 320, *People v. Loker, supra*, 44 Cal.4th at p. 727.)

Evidence presented in mitigation at the penalty trial of a capital case must be relevant to the defendant's character and prior record, or the circumstances of the charged offense. (*People v. Lancaster* (2007) 41 Cal.4th 50, 98.) Evidence regarding family background "is of no consequence in and of itself." (*People v. Rowland* (1992) 4 Cal.4th 238, 279.) Such evidence is only relevant "to the extent that, it relates to the background of defendant himself." (*Ibid.*)

In the present case, appellant's assertion that the trial court excluded "multi-generational mitigation evidence" is not supported by the record on appeal. As noted above by the trial court's rulings, the trial court approached the admissibility of mitigating evidence on a question-by-

question basis, at all times allowing defense counsel the opportunity to provide an offer of proof as to the relevancy of the intended evidence. Contrary to his broad claims on appeal, there was no wholesale exclusion of family background evidence. In fact, quite the opposite is true. Appellant's mother, Doreen Smith, testified extensively regarding her family background. He described her family arrangements with appellant, his siblings, and their father, Paul Smith, Sr. (XLI RT 11774-11777.) She testified as to her own and Paul Sr.'s discipline methods and the children's behavior. (XL RT 11780-11782.) She testified as to the allegations that Paul Sr., sexually abused her children and what steps were taken after these allegations surfaced, including the involvement of her mother-in-law, Phyllis Jones. (XLI RT 11783-11785.) This included the loss of her children, for a time, to Child Protective Services. Doreen also fully testified about her struggle with substance abuse. (XLII RT 11794-11795.) Doreen also testified about her own family and upbringing in upstate New York. This included her being molested by her step-father from ages 3 to 13. (XLII RT 12011-12017.) She fully discussed her struggles as a parent. (XLII RT 12021-12026.)

Further, expansive evidence was presented about the status of the Smith household and the challenges appellant faced growing up there. This included the testimony of social workers Carla Alexander, Janet Green, Judith Englesby-Smith, and Julie Buick who all testified as to appellant's living conditions as a child. (XLII RT 11834, 11860, 11848, 11879.) This included reports of alleged sexual abuse of the children by family members. (XLII RT 11889-11890.)

Additionally, appellant's aunts and uncles testified during the penalty phase. This included Doreen Smith's younger brothers, Leonard and Jonathon Cromp, her younger sister Debra Miller, as well as appellant's paternal aunt, Karen Smith. (XLII RT 11920-11926, 11929, 11905; XLIV

RT 12411.) This testimony included the conditions of the Smith family home, Doreen's struggles as a parent, and allegations of sexual abuse of the children. Ample testimony was also presented as to Paul Smith, Sr., his stay in a mental facility, and evidence of his molestation of his children. Appellant's paternal aunt, Sara Belongie fully testified as to her living arrangements, growing up with Paul Smith, Sr., and their mother Phyllis Jones. (XLIII RT 12367.) She talked about her father committing suicide and the fact that Paul Smith, Sr. was the person that found their father dead. (XLIII RT 12364.) Belongie testified that she was molested more than once by Paul Smith, Sr. (XLIII RT 12373-12374.)

Further, medical health professionals testified extensively as to the effects this upbringing had on appellant. Among others Drs. Steven Blankman, Myla Young, and George Woods all testified as to how appellant's sexual abuse and family situation affected him growing up. (XLIII RT 12242; XLV RT 12665; XLVII RT 13274.) As such, appellant's claim that he was denied his constitutional right to present multi-generational mitigating evidence is directly rebutted by the record on appeal.

Looking at the specific citations of appellant's argument demonstrates that the trial court was well within its discretion in excluding the proffered evidence as irrelevant. The trial court made clear that in no way was it limiting any evidence as to "the family dynamics that Mr. Smith was involved in." (XLII RT 11823.) As stated above, the trial court re-considered its ruling on multi-generational mitigating evidence and such evidence was presented at the penalty phase. (XLII RT 11902-11903.) Appellant cannot demonstrate how the testimony of James Briggs or Sherry Bigger would have been relevant. Briggs lived with Doreen Smith for a limited time when they were in Eureka. There was no indication that he personally witnessed anything relevant to appellant's character, prior

record, or the circumstances of the underlying offense. Similarly, Sherry Bigger was alleged to be a girlfriend of one of Doreen Smith's brothers. While she might have been able to testify as to the substance abuse problems of a particular brother, there was absolutely no connection between her experiences and appellant, or even appellant's mother. Last, Sarah Belongie was able to testify as to the Smith family dynamic. Objections were sustained as to how her step-father treated her. (XLIII RT 12366-12367.) Appellant cannot demonstrate how her step-father mistreating her had any effect on appellant's character or how such evidence would tend to mitigate appellant's sentence. Even if she was molested by her step-father, that in no way is relevant to the issue of appellant's character. If it did have probative value, such value was clearly "outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." (*People v. Williams, supra*, 40 Cal.4th at p. 320, *People v. Loker, supra*, 44 Cal.4th at p. 727.) As such, the trial court was well within its discretion in admitting appropriate evidence at the penalty phase. Appellant's claim must fail.

Error, if any, was harmless. Whether assessed under the federal constitutional (*Chapman v. California* (1967) 386 U.S. 18, 24) or the state (*People v. Watson* (1956) 46 Cal.2d 818, 836) standard of review, there is no reasonable possibility that admission of the excluded proposed mitigating evidence would have changed the jury's verdict at the penalty phase given the overwhelming evidence that appellant tortured and murdered Lora Sinner and that he staged a violent jail escape attempt that severely injured Correctional Deputy Timothy Renault. Given the expansive amount of evidence presented about appellant and his family history, the excluded testimony would have not added anything in mitigation. Admission of evidence that did not directly involve appellant and his upbringing was irrelevant. Error, if any, was harmless.

XV. TRIAL COURT DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN EXCLUDING EVIDENCE: (1) THAT APPELLANT WOULD ADJUST WELL IN PRISON AND (2) AS TO SECURITY LEVELS IN STATE PRISON; DEFENSE COUNSEL WAS NOT INEFFECTIVE

Appellant claims that the trial court violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to present a defense, to a fair trial, and protection against cruel and unusual punishment and reliable sentencing by excluding evidence that appellant would adjust well in state prison and by excluding evidence as to the security levels in state prison in rebuttal. (AOB 310.) In the alternative, appellant asserts that defense counsel was ineffective for referring to its witness on these topics prior to litigating the admissibility of this evidence. (AOB 316.) This Court has repeatedly denied such claims. As such, respondent disagrees.

A. Background

On September 19, 2002, defense counsel included James Park on its penalty phase witness list. (XXVI CT 6232.) Prior to opening statements at the penalty phase, the trial court instructed the jury as follows:

> Now, once again, counsel have an opportunity to give an opening statement. And I'll remind you that what the lawyers say is not evidence and it's not argument at this point either. It's simply a statement of what the lawyers believe the evidence will show. And it's offered to assist you in following the presentation of evidence. And as you know, the people have the opportunity to give an opening statement first. Then the defense has the opportunity. They can give an opening statement, they can choose not to give an opening statement, or -- or they could reserve and decide if they want to make an opening statement at a later time.

(XXXVIII RT 10610.) On September 24, 2002, defense counsel made the following comments during its opening statement of the penalty phase:

> The evidence will show that he [appellant] is totally ill-equipped to deal with any of the functioning necessary in society. And in

that regard, we will call another expert, Jim Park. Jim Park is the former associate warden of San Quentin prison, among other places. Since leaving the direct employ of the California Department of Corrections, he has been a consultant. He not only is a consultant to come to court and testify, he's also been a consultant to the legislature on the building of new prisons and security for those prisons, among other things.

He will come in and he will describe to you the different levels of security that are maintained in the prison, and there is actually four levels. Level 4 is for life prisoners and life without possibility of parole prisoners. He will testify that if Paul is given a sentence of life without possibility of parole, that is the level that he will enter, and that he will remain.

He will indicate to you that level 4 prisoners are also what he calls under the gun. By that is meant at all times, 24 hours a day, there is always a posted guard with a gun being behind a security glass area that visually has contact with every cell and every inmate, has contact with every inmate when they go to lunch, dinner, at all times. He will testify that guards never ever enter areas where prisoners are unless there is at least two guards together.

He will testify that if an inmate does not behave, that they go to areas in prisons called SHUs. And there currently is one operating SHU within the California Department of Corrections, and that's at Pelican Bay. And a SHU is a prison within a prison, a place where inmates that cannot get along are placed, and they have actually no human contact. Everything is automated. And they are virtually locked down, with exception of short periods of time.

He will render the opinion that if sent to prison Paul will adjust to prison life. And he will testify that our prison system needs life prisoners. They need life prisoners because they do provide a stabilizing affect for the prison population.

(XLI RT 11771-11773.)

On October 3, 2002, the parties argued the admissibility of the testimony of James Park on the areas of (1) a day in the life of a person in prison, and (2) security levels in prison as rebuttal to prosecution evidence.

(XLV RT 12653-12664.) Later that day, the trial court excluded evidence on these two issues as follows:

> I looked at a number of cases that were submitted and I also looked at this issue of the argument on future dangerousness. I looked at People versus Welch, which is at 20 Cal. 4th, 701, page 761. And I'll just read this section to you. It says, defendant claims that the prosecutor committed misconduct by arguing that he would be dangerous to fellow inmates and others with whom he came in contact if he were given a sentence of life imprisonment without possibility of parole.
>
> Specifically, he argued that defendant demonstrated sodomy urges, that he endangered other inmates, and that his violent behavior jeopardized the health and safety of any guards, visitors, social workers, inmates or clergy who may come into contact with him. As we have stated -- and it's quoting another case -- it is settled that argument concerning a defendant's future dangerousness as a life prisoner is proper when it is based on evidence of past crimes admitted under one or more statutory factors in aggravation.
>
> It cites People versus Millwee. In this case, as reviewed above, there is ample evidence of defendant's violent past, including numerous assaults on prison and jail officials in the commission of sodomy. The prosecution's argument regarding defendant's future dangerousness based on his history of violence was not misconduct.
>
> All right. Keeping that in mind, I looked at the cases cited, and the issue -- I haven't changed my mind on the issue of what it's like to be in prison. That aspect. So the issue is on security. And as I looked at the cases, including Fudge, in which the evidence -- all of the evidence precluded was four or five varieties of evidence that would have included, I assume from reading the case, some of the security measures in the state prison, and there was no error found in excluding that evidence.
>
> But what I focused on is kind of what I hinted at earlier. The issue is, does it relate to the defendant's character, culpability or circumstances of the offense? And I believe that the security in a prison as compared to the security in a jail does not relate to those issues, is not probative of those issues, because it does not,

being a more secure institution, interfere with a defendant's efforts to do whatever and do so more effectively.

But what fact is the character and culpability of the defendant? What are the issues, the statutory aggravating and mitigating factors as they apply to the defendant's character, culpability or circumstances of the offense? And for those reasons, I'm going to sustain the people's objection to the presentation of that witness.

(XLV RT 12751-12753.)

B. Discussion

1. Exclusion of Evidence

As noted in argument XIV, a jury in a capital case must be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*People v. Loker, supra,* 44 Cal.4th at p. 727, quoting *Lockett v. Ohio, supra,* 438 U.S. at p. 604, fn. & italics omitted.) However, the trial court still retains discretion to determine whether evidence is admissible under relevancy grounds. (*People v. Frye* (1998) 18 Cal.4th 894, 1015, disapproved of on unrelated ground in *People v. Doolin* (2009) 45 Cal.4th 390, 420; see also *Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-5; *Lockett v. Ohio, supra,* 438 U.S. at p. 604 & fn. 12; *People v. Virgil, supra,* 51 Cal.4th at p. 1272.) Therefore, the trial court determines the potential relevancy of proposed evidence and may exclude evidence "whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." (*People v. Williams, supra,* 40 Cal.4th at p. 320, *People v. Loker, supra,* 44 Cal.4th at p. 727.) Put plainly, penalty phase mitigation evidence "must be relevant to the defendant's character and prior record, or the circumstances of the

charged offense" to be admissible. (*People v. Lancaster, supra,* 41 Cal.4th at p. 98.)

> Contrary to appellant's claims, this Court has routinely held that evidence concerning conditions of confinement for a person serving a sentence of life without possibility of parole is not relevant to the penalty determination because it has no bearing on the defendant's character, culpability, or the circumstances of the offense under either the federal Constitution or section 190.3, factor (k).

(*People v. Martinez* (2010) 47 Cal.4th 911, 963; *People v. Jones* (2003) 29 Cal.4th 1229, 1261, citing *People v. Quartermain* (1997) 16 Cal.4th 600, 632; *People v. Daniels* (1991) 52 Cal.3d 815, 876-878; *People v. Thompson* (1988) 45 Cal.3d 86, 138-139.) This is particularly true because:

> Describing future conditions of confinement for a person serving life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do.

(*People v. Thompson, supra*, 45 Cal.3d 86, 139.)

This Court's holding in *People v. Martinez, supra*, 47 Cal.4th 911, is controlling in the present case. In *Martinez*, defense counsel sought to introduce testimony from a penalty phase expert concerning the "details of the prison system" that defendant would experience if he was sentenced to life without possibility of parole. (*Id.* at p. 962.) This evidence included pictures of prison facilities and descriptions of prison procedures. As a whole, this evidence was offered to show defendant had the potential to successfully adjust to life in prison and to directly rebut the prosecution's claim that defendant was a threat of future dangerousness. (*Ibid.*) This Court held that the trial court's exclusion of this evidence did not violate the statute defining death penalty sentencing factors or defendant's rights to due process and a reliable penalty determination under the Eighth and Fourteenth Amendments. (*Id.* at pp. 962-963.)

As in *Martinez*, the trial court's ruling excluding the specific testimony offered was narrow. Nothing in the trial court's ruling interfered with appellant's overall ability to present evidence on his future dangerousness or his ability to conform to a structured environment. Careful reading of the trial court's ruling demonstrates that it did not specifically exclude Jim Parks' testimony regarding appellant's likely adjustment to prison. As the trial court made clear, appellant was still free to present mitigating evidence regarding his character, culpability or circumstances of the offense. (XL RT 12753.) As such, appellant's constitutional rights were not impacted by the trial court's ruling. Appellant's claim must fail.

Error, if any, was harmless. Whether assessed under the federal constitutional (*Chapman v. California, supra,* 386 U.S. at p. 24) or the state (*People v. Watson, supra,* 46 Cal.2d at p. 836) standard of review, there is no reasonable possibility that admission of the excluded proposed mitigating evidence would have changed the jury's verdict at the penalty phase given the overwhelming evidence that appellant tortured and murdered Lora Sinner and that he staged a violent jail escape attempt that severely injured Correctional Deputy Timothy Renault. Given the expansive amount of aggravating and mitigating evidence presented by the parties in this case, the excluded testimony would have not added anything in mitigation. Error, if any, was harmless.

C. Effective Assistance of Counsel

The standard for establishing whether trial counsel was ineffective assistance is well settled. A defendant arguing he received ineffective assistance of counsel must demonstrate that: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for his attorney's unprofessional errors, the result of the proceeding would have been more favorable to defendant.

(*People v. Stanley* (2006) 39 Cal.4th 913, 954, citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Id.* at p. 954.)

> Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel, and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

(*Ibid.*, internal quotation marks and citations omitted.)

Appellant is unable to prove either prong necessary to demonstrate that he received ineffective assistance of counsel. Opening statements are based on evidence that trial counsel anticipates presenting. (*People v. Boyette* (2002) 29 Cal.4th 381, 446-447.) As such, "[m]aking promises about the defense evidence in opening statement and then failing to deliver does not constitute ineffective assistance per se." (*People v. Burnett* (2003) 110 Cal.App.4th 868, 885.) "Whether the failure to produce a promised witness amounts to ineffective assistance of counsel is a fact-based determination that must be assessed on a case-by-case basis." (*People v. Stanley, supra*, 39 Cal.4th at p. 955, citing *United States v. McGill* (1st Cir.1993) 11 F.3d 223, 227.) Forgoing the presentation of testimony or evidence promised in an opening statement can be a reasonable tactical decision, depending on the circumstances of the case. (*People v. Stanley, supra*, 39 Cal.4th at p. 955, citing *Turner v. Williams* (4th Cir.1993) 35 F.3d 872, 904; *Johnson v. Johnson* (3rd. Cir.1976) 531 F.2d 169, 177.)

Further, defense counsel "does not render ineffective assistance by choosing one or several theories of defense over another." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007.) "[E]ven debatable trial tactics" do not constitute ineffective assistance of counsel. (*People v. Weaver* (2001) 26 Cal.4th 876, 928.) Thus, while the defense mapped out by appellant's counsel did not succeed, "Lack of success does not reflect

incompetence of counsel." (*People v. Cox* (1991) 53 Cal.3d 618, 662; *People v. Reeves* (1966) 64 Cal.2d 766, 773.)

In the present case, defense counsel mentioned Jim Parks as a witness he reasonably expected to be able to present at the penalty phase. Appellant has presented no authority for the proposition that counsel is deficient for mentioning a witness in opening statement when the admissibility of that witness is pending before the trial court. Defense counsel had good reason to mention Parks in his opening as Parks was on the defense witness list and counsel had no reason, at that point, to believe he would not be able to present him as a witness. While the later ruling by the trial court prevented defense counsel from presenting Parks' testimony on conditions of confinement and whether appellant would adjust well to prison life, this does not amount to deficient performance. When defense counsel made the reference to Parks, he fully expected to be able to present his testimony on these issues. There is no indication in the record that defense counsel had been given a preliminary ruling that Parks' testimony would be inadmissible. Often, trial counsel will refer to evidence in opening statement and then, for whatever reason, will be unable to present that evidence to the jury. Such conduct cannot be deemed to be deficient, especially in light of the evidence defense counsel actually did present at the penalty phase.

Informative on this issue is this Court's holding in *People v. Coddington* (2000) 23 Cal.4th 529, 629-630[42]. In that case, this Court found that defense counsel was not ineffective in capital murder trial when it failed, before calling a defense witness, to seek a ruling on the admissibility of an FBI agent's anticipated rebuttal testimony that this same

[42] Overruled on unrelated grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.

witness had told agent that defendant often read "The Anarchist Cookbook" and seemed interested in killing women. (*People v. Coddington, supra,* 23 Cal.4th at pp. 629-630.) This Court made this ruling even though the primary defense in that case attempted to persuade the jury that the murders were not premeditated. (*Ibid.*) The parallel to the present case is clear as defense counsel in this case had not yet obtained a final ruling on the admissibility of Jim Parks' testimony before mentioning him in his opening statement. In neither case was counsel ineffective.

Even if this Court were to conclude counsel's failure to present the witness and testimony described in his opening statement had no tactical justification and fell below the normal range of competency, such error was non-prejudicial. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216–218, 233.) It is undisputed that the trial court instructed the jury that opening statements by counsel were not evidence, but rather simply a outline of what counsel thinks the evidence will show. (XXXVIII RT 10610.) Appellate courts presume that the jury heeded the trial court's instruction that the arguments of the attorneys are not evidence. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) There is no reason to assume the jury necessarily concluded counsel was unable to produce the witness, or that the failure to produce the witness meant defendant would not be able to adjust to life in prison, or that the jury indeed based its penalty phase verdict on the failure of the defense to produce the witness, contrary to the instructions they were sworn to follow. Appellant cannot demonstrate he was prejudiced.

Defendant's reliance on *Anderson v. Butler* (1st Cir.1988) 858 F.2d 16 is misplaced. (AOB 317, 320.) In *Anderson*, defense counsel made his opening statement after the prosecution rested its case-in-chief, and the very next day the defense rested without presenting the promised expert witness testimony. Under those particular circumstances, the *Anderson* court

concluded the failure to produce the promised expert witness testimony likely altered the outcome of the case. (*Id.* at pp. 17–19.)

However, in the present case, defense counsel presented its penalty phase opening statement on September 24, 2002. (XLI RT 11741, 11759.) On October 24, 2002, defense finally rested its penalty phase case. (L RT 14187.) As such, in the present case, the defense rested its penalty phase case a month after delivering its opening statement. The effect of the opening statement, if any, was attenuated by the month-long gap between the statement and the close of penalty evidence, a month which was filled with defense witness testimony and evidence offered in mitigation. Given the strength of the evidence against appellant in the penalty phase, defense counsel's failure to present the testimony of Jim Parks referred to in the opening statement did not prejudice the penalty phase verdict. (*People v. Ledesma, supra*, 43 Cal.3d at pp. 216-218; *People v. Stanley, supra*, 39 Cal.4th at p. 955.) "There is no reason to assume the jury ... based its guilty verdicts on the failure of the defense to produce [evidence] ... contrary to the instructions they were sworn to follow." (*Id.* at p. 955.)

Further, there is no claim by appellant that his trial counsel could have obtained evidence vindicating appellant had trial counsel been more diligent. This sheds light on the true competency of defense counsel. As stated earlier, the evidence of aggravating factors in this case was overwhelming and, for this reason, appellant cannot show that the result of the penalty phase would have been different in the absence of counsel's claimed errors. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-688, 693-694; *People v. Ledesma, supra*, 43 Cal.3d at pp. 216-218.) Appellant's claim must fail.

XVI. THERE WAS NO CUMULATIVE PREJUDICE

Appellant argues the multiple errors in the guilt and penalty phases of his trial resulted in constitutionally unreliable convictions. (AOB 321.) Respondent disagrees.

Specifically, appellant argues that these errors violated his Fifth, Sixth, Eighth, and Fourteenth amendment rights to due process and a fair trial and sentence. Appellant asserts that constitutional errors infected every stage of the proceedings from the denial of a change of venue, to the jury selection error and judicial and jury misconduct. (AOB 322.) Appellant further argues that the death sentence is unconstitutionally excessive and unreliable in the present case given the early abuse he suffered as a child. Respondent has answered each of appellant's contentions individually. Specifically, respondent has argued that each of appellant's arguments lack merit, which signals a lack of error. Given the lack of error in this case, there cannot be cumulative error, justifying a reversal of his conviction and sentence. Appellant's argument is cumulative and, therefore, must fail.

XVII. CALIFORNIA'S DEATH PENALTY STATE IS NOT UNCONSTITUTIONAL

Without citing specific case law authority and acknowledging that this Court has already rejected the present argument, appellant asserts that California's death penalty statute as applied by this Court and as applied at his trial is too broad and violates the United States Constitution. (AOB 323-324.) Respondent disagrees.

"[T]he California death penalty statute is not impermissibly broad, whether considered on its face or as interpreted by [the California Supreme Court.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 813, citations omitted; see also *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Brady* (2010) 50 Cal.4th 547, 590.) Further, this Court has consistently ruled that

the death penalty law adequately narrows the class of death-eligible defendants. (See, e.g., *People v. Davis* (2009) 46 Cal.4th 539, 627; *People v. Vines* (2011) 51 Cal.4th 830, 891.)

Appellant fails to point to any authority in support of his claim that California's death penalty statute is unconstitutional for failing to narrow the field of people eligible. Rather, he acknowledges that this Court has consistently rejected his argument. (AOB 323.) Further, appellant cites to no specific instance where the application of the death penalty in his specific case was unconstitutional. Instead, appellant speaks in generalities without any supporting legal authority. As such, and given the relevant case law authority, appellant's claim must fail.

XVIII. SECTION 190.2 IS NOT IMPERMISSIBLY BROAD

Appellant argues specifically that the death penalty is invalid because section 190.2 is impermissibly broad. (AOB 325.) Appellant further argues that California's current death penalty scheme should be stricken as it is "so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." (AOB 326.) Respondent disagrees.

Section 190.2 lists the special circumstances that can make a defendant eligible for the death penalty. As applied in this case, section 190.2 provides, in part:

> (a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:
>
> > (18) The murder was intentional and involved the infliction of torture.

As this Court has consistently held, section 190.2, which sets forth the circumstances in which a sentence of death may be imposed, is not

impermissibly broad on its face or as interpreted by the California Supreme Court. (*People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Farley* (2009) 46 Cal.4th 1043, 1133; *People v. Virgil* (2011) 51 Cal.4th 1210.) Further, this Court has consistently held that the actual set of special circumstances that may qualify a first degree murder for capital sentencing, as listed in section 190.2 is not impermissibly broad. (*People v. Dykes, supra,* 46 Cal.4th at p. 813; *People v. Moore* (2011) 51 Cal.4th 386, 415.) This Court has also consistently held that California's death penalty statute is not impermissibly broad and does not violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (*People v. Verdugo, supra,* 50 Cal.4th at pp. 304-305; *People v. Dykes, supra,* 46 Cal.4th at p. 813.)

Contrary to appellant's attempts, baseless over-statement cannot be confused with constitutionality. While appellant now brashly states that "almost all felony-murders are now special circumstance cases," he cites absolutely no authority for such a bold statement. (AOB 326.) Appellant also appears to argue that this Court's construction of the lying-in-wait special circumstance has been extended to all intentional murders. (AOB 326.) Again, appellant provides absolutely no authority supporting this general attack. Based on established California Supreme Court authority, appellant's claim must fail.

XIX. CALIFORNIA'S DEATH PENALTY IS NOT UNCONSTITUTIONAL; IT DOES NOT RESULT IN ARBITRARY AND CAPRICIOUS SENTENCING

Appellant argues that California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing. He makes several sub-arguments: (1) his death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury (AOB 330); (2) failure to instruct the jury that they must be persuaded beyond a reasonable doubt that

aggravating factors exist and outweigh mitigating factors amounts to cruel and unusual punishment (AOB 340); (3) the fact that his death sentence was not presented on written findings by the jury made it unconstitutional (AOB 343); (4) California's death penalty forbids inter-case proportionality review resulting in arbitrary, discriminatory, or disproportionate sentences (AOB 345); (5) prosecution may not rely in the penalty phase on un-adjudicated activity and such activity may not serve as a factor in aggravation unless found true beyond a reasonable doubt (AOB 347); (6) use of restrictive adjectives in the list of potential mitigating factors barred actual consideration of these factors by the jury (AOB 348); and (7) failure to instruct that mitigating factors were relevant solely in mitigation resulted in an unfair sentence (AOB 348). As to each and every argument, respondent disagrees.

A. Death Penalty Burden of Proof

Appellant argues that his death verdict is unconstitutional as it was not premised on findings beyond a reasonable doubt by a unanimous jury. (AOB 330) Specifically, in light of the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, and *Cunningham v. California* (2007) 549 U.S. 270, appellant argues that the jury had to be told that it was required to find any aggravating factor true beyond a reasonable doubt and that they had to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors before entering their verdict. (AOB 330.)

This Court has consistently rejected this argument. This Court has consistently held that California's death penalty statute is not unconstitutional because, as appellant argues, it does not require unanimity as to the truth of aggravating circumstances, or findings beyond a reasonable doubt that an aggravating circumstance other than prior

convictions or criminal activity involving violence has been proved. (*People v. Dement* (2011) 53 Cal.4th 1, 55; *People v. Lynch* (2010) 50 Cal.4th 693, 766, overruled on an unrelated point in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.) Further, there is no requirement that the jury find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors or that death is the appropriate sentence. (*People v. Dement, supra,* 53 Cal.4th at p. 55; *People v. Lynch, supra,* 50 Cal.4th at p. 766, overruled on an unrelated point in *People v. McKinnon, supra,* 52 Cal.4th at p. 637.) As this Court recently held:

> Nothing in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 536 U.S. 584, or *Apprendi v. New Jersey* (2000) 530 U.S. 466, affects our conclusions in this regard. No burden of proof is constitutionally required, nor is the trial court required to instruct the jury that there is no burden of proof.

(*People v. Dement, supra*, 53 Cal.4th at p. 55, citing *People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Smith* (2007) 40 Cal.4th 483, 526; *People v. Taylor* (2009) 47 Cal.4th 850, 899; *People v. Bennett* (2009) 45 Cal.4th 577, 632.) In light of this established precedent, appellant's claim must fail.

B. Duty to Instruct

In his second argument, appellant asserts that the trial court must instruct the jury in a capital case that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh the mitigating factors and that death is the appropriate remedy. (AOB 340.) As stated above, there is no requirement that the jury find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors or that death is the appropriate sentence. (*People v. Dement, supra,* 53 Cal.4th at p. 55; *People v. Lynch, supra,* 50 Cal.4th at p. 766, overruled on an unrelated point in *People v. McKinnon,*

supra, 52 Cal.4th at p. 637.) Further, this Court has made clear that the trial court is not required to instruct the jury that there is no burden of proof. (*People v. Dement, supra*, 53 Cal.4th at p. 55, citing *People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Smith* (2007) 40 Cal.4th 483, 526; *People v. Taylor* (2009) 47 Cal.4th 850, 899; *People v. Bennett* (2009) 45 Cal.4th 577, 632.) As such, appellant's claim fails on two principles, first the beyond a reasonable doubt standard is not appropriate in this situation, and second, the trial court is not required to instruct the jury as to the absence of this burden of proof. In light of this established precedent, appellant's claim must fail.

C. Written Findings

Appellant claims that California's death penalty statute is unconstitutional because it fails to require that the jury base its verdict on written findings regarding aggravating factors. (AOB 343.) This Court has consistently rejected this argument. As this Court has consistently held, a jury in a capital case does not need to make written findings unanimously agreeing on the existence of aggravating factors. (*People v. Clark* (2011) 52 Cal.4th 856, 1007.) Further, this Court has also found that the United States Supreme Court's decisions which interpret the Sixth Amendment right to jury trial do not require such a written finding. (*Id.* at p. 1007, citing *Ring v. Arizona* (2002) 536 U.S. 584, *Apprendi v. New Jersey* (2000) 530 U.S. 466; *People v. Davis* (2005) 36 Cal.4th 510, 572; *People v. Prieto* (2003) 30 Cal.4th 226, 262–265.) In light of this established precedent, appellant's claim must fail.

D. Inter-Case Proportionality Review

Appellant argues that California's death penalty statute forbids inter-case proportionality review which renders arbitrary, discriminatory, or disproportionate impositions of the death penalty. (AOB 345.) First, this

Court has consistently held that California's death penalty statute is not unconstitutional for failing to require "inter-case proportionality review" or "disparate sentence review." (*People v. Verdugo* (2010) 50 Cal.4th 263, 305; *People v. Cox* (2003) 30 Cal.4th 916, 970, 135 Cal.Rptr.2d 272, 70 P.3d 277; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51; *Roper v. Simmons* (2005) 543 U.S. 551, 560–561.) Further, this Court has consistently rejected the contention that inter-case proportionality review is constitutionally required. (*People v. Dement, supra,* 53 Cal.4th at p. 58; *People v. Stevens* (2007) 41 Cal.4th 182, 212; see *Pulley v. Harris, supra*, 465 U.S. at pp. 50-51.) Additionally, this Court has consistently held that:

> The failure to require intercase proportionality does not guarantee "arbitrary, discriminatory, or disproportionate impositions of the death penalty," or violate the Fifth, Sixth, Eighth, and Fourteenth Amendments.

(*People v. Stevens* (2007) 41 Cal.4th 182, 221-222, quoting *Pulley v. Harris, supra*, 465 U.S. at pp. 50-51; *People v. Lynch, supra,* 50 Cal.4th at p. 767, overruled on an unrelated point in *People v. McKinnon, supra,* 52 Cal.4th at p. 637; *People v. Jennings* (2010) 50 Cal.4th 616, 690 [capital defendants and noncapital defendants are not similarly situated]; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1355.) In light of this established precedent, appellant's claim must fail.

E. Un-adjudicated Criminal Activity

Appellant argues that the prosecution may not rely on unadjudicated criminal activity during the penalty phase. (AOB 347.) In the alternative, appellant argues that if the prosecution is able to rely on unadjudicated criminal activity during the penalty phase, such practice is unconstitutional unless it is found to be true beyond a reasonable doubt by a unanimous jury. (*Ibid.*) Preliminarily, as argued above, this Court has consistently held that California's death penalty statute does not require unanimity as to

the truth of aggravating circumstances, or findings beyond a reasonable doubt that an aggravating circumstance other than prior convictions or criminal activity involving violence has been proved. (*People v. Dement, supra,* 53 Cal.4th at p. 55; *People v. Lynch, supra,* 50 Cal.4th at p. 766, overruled on an unrelated point in *People v. McKinnon, supra,* 52 Cal.4th at p. 637.) Again, there is no requirement that the jury find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors or that death is the appropriate sentence. (*People v. Dement, supra,* 53 Cal.4th at p. 55; *People v. Lynch, supra,* 50 Cal.4th at p. 766.) Further, this Court has consistently held that the prosecution may rely on evidence of prior un-adjudicated criminal activity during penalty phase of a capital case, even if prosecution for those acts would be barred by statute of limitations. (*People v. Price* (1991) 1 Cal.4th 324, 490; *People v. Robertson* (1989) 48 Cal.3d 18, 42–44.) In light of this established precedent, appellant's claim must fail.

F. Restrictive Adjectives

Appellant further argues that the use of adjectives such as "extreme" and "substantial" in the list of potential mitigating factors act as barriers to their consideration by the jury and, therefore, unconstitutional. (AOB 348.) This Court has repeatedly rejected this argument. Specifically, this Court held:

> The use of adjectives such as "extreme" in section 190.3, factors (d) and (g), or "substantial" in section 190.3, factor (g), do not serve as an improper barrier to the consideration of mitigating evidence.

(*People v. Jennings, supra*, 50 Cal.4th at p. 690, citation omitted; *People v. Castaneda, supra*, 51 Cal.4th at p. 1355.) In light of this established precedent, appellant's claim must fail.

G. Duty to Instruct as to Mitigating Factors

Appellant argues that the failure to instruct the jury that mitigating factors were relevant only as potential mitigating factors precluded the fair, reliable, and evenhanded administration of the death penalty. This Court has consistently rejected this argument. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *People v. Panah* (2005) 35 Cal.4th 395, 499–500.) Specifically,

> We have rejected the claim that "the phrase 'whether or not' in section 190.3, factors (d) through (h) and (j) allows the absence of a mitigating factor to be considered as an aggravating circumstance" and the claim that "the failure to instruct that statutory mitigating factors may be considered solely as mitigating precludes a reliable, individualized sentencing determination as required by the Eighth and Fourteenth Amendments.

(*People v. Lewis* (2009) 46 Cal.4th 1255, 1320, quoting *People v. Page* (2008) 44 Cal.4th 1, 61, citations omitted.) In light of this established precedent, appellant's claim must fail.

XX. SECTION 190.3, SUBDIVISION (A), DOES NOT ALLOW ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

Appellant claims that his death penalty sentence is invalid because section 190.3, subdivision (a), has been applied in such a "wanton and freakish manner" that it violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 327.) Specifically, appellant argues that the term "circumstances of the crime" contained in section 190.3, subdivision (a), is overly broad. (AOB 328.) Respondent disagrees.

This Court has consistently rejected this argument. Section 190.3 provides, in part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Section 190.3, subdivision (a), permits the jury to consider "the circumstances of the crime" in deciding whether to impose the death penalty. Both this Court and the United States Supreme Court have specifically held that section 190.3 does not impermissibly allow the arbitrary and capricious imposition of the death penalty. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-976; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308; *People v. Cruz* (2008) 44 Cal.4th 636, 680; *People v. Guerra* (2006) 37 Cal.4th 1067, 1165.)

Appellant's argument to the contrary is vague as applied to the present case. Appellant cites no specific instance in the present case where section 190.3, subdivision (a), allowed the arbitrary and capricious imposition of the death penalty. Rather, appellant speaks in generalities, without regard to facts of the present case. As demonstrated in earlier arguments, appellant's sentence was based on his conduct and his intent in torturing and murdering Lora Sinner. Appellant's claim must fail.

XXI. CALIFORNIA'S DEATH PENALTY SENTENCING SCHEME DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Appellant argues that California's death penalty sentencing scheme violates the Federal Constitution's Equal Protection clause because it denies procedural safeguards to capital defendants which are afforded to non-capital defendants. (AOB 351.) Respondent disagrees.

This Court has consistently held that California's death penalty law does not deprive capital defendants of equal protection by denying procedural safeguards to capital defendants that are afforded to noncapital

defendants. (*People v. Dement* (2011) 53 Cal.4th 1, 55; *People v. Hinton* (2006) 37 Cal.4th 839, 913.) Contrary to appellant's assertion, California's death penalty statute is not unconstitutional because it does not require

> unanimity as to the truth of aggravating circumstances, or findings beyond a reasonable doubt that an aggravating circumstance (other than § 190.3, factor (b) or (c) evidence) has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence.

(*People v. Lynch* (2010) 50 Cal.4th 693, 766.) This Court has consistently held that the Constitution does not require a burden of proof in this instance and the trial court is not required to instruct the jury that there is no burden of proof. (*People v. Taylor* (2009) 47 Cal.4th 850, 899; *People v. Bennett* (2009) 45 Cal.4th 577, 632.) Further this Court has consistently held that while certain non-capital sentencing proceedings may assign a burden of proof to the prosecutor, this does not mean that California's death penalty statute violates a defendant's rights to equal protection or due process. (*People v. Rogers* (2006) 39 Cal.4th 826, 893; *People v. Manriquez* (2005) 37 Cal.4th 547, 590.) Further, this Court has routinely held that the absence of a burden of proof in death penalty cases does not violate a defendant's right to be free from cruel and unusual punishment. (*People v. Dement, supra*, 53 Cal.4th 1, 56.) Appellant largely ignores California Supreme Court precedent as it completely rejects this argument. Appellant's claim must fail.

XXII. CALIFORNIA'S USE OF THE DEATH PENALTY IS CONSTITUTIONAL; IT DOES NOT FALL SHORT OF INTERNATIONAL NORMS OF HUMANITY OR DECENCY

In his closing argument, appellant claims that California's use of the death penalty as a regular form of punishment is in violation of the Federal Constitution and falls short of international norms of humanity and decency. (AOB 354.) Respondent disagrees.

As above, this Court has consistently rejected this argument.

> We again reject the argument that California's death penalty scheme is contrary to international norms of humanity and decency, and therefore violates the Eighth and Fourteenth Amendments of the United States Constitution. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements."

(*People v. Jennings* (2010) 50 Cal.4th 616, 690, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) This Court has also consistently rejected the argument that the use of capital punishment "as regular punishment" violates international norms of humanity and decency and hence violates the Eighth Amendment of the United States Constitution. (*People v. Jennings, supra,* 50 Cal.4th at p. 690.) Contrary to appellant's claim, the death penalty is imposed in only the most extraordinary situations.

> The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to "regular punishment" for felonies.

(*People v. Demetrulias* (2006) 39 Cal.4th 1, 43–44, citations omitted; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1356.) Appellant's arguments otherwise have been consistently rejected by this Court. Appellant's claim must fail.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the conviction and penalty be affirmed.

Dated: January 31, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California

ANGELO S. EDRALIN
Deputy Attorney General
Attorneys for Respondent

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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 99,801 words.

Dated: January 31, 2012

KAMALA D. HARRIS
Attorney General of California

ANGELO S. EDRALIN
Deputy Attorney General
Attorneys for Respondent

ATTACHMENT A

TABLE B-3

TOTAL POPULATION OF CALIFORNIA COUNTIES AS OF JULY 1 a/

County	1970	1980	1990	2000	2001	2002	2003	2004	2005	2006
California	20,039,000	23,782,000	29,828,000	34,098,740	34,784,382	35,392,960	35,990,107	36,522,026	36,981,931	37,444,385
Alameda	1,073,000	1,109,500	1,276,100	1,453,173	1,477,928	1,488,369	1,493,187	1,497,809	1,502,703	1,514,909
Alpine	500	1,100	1,090	1,205	1,249	1,256	1,255	1,270	1,216	1,256
Amador	11,900	19,500	30,450	35,327	35,896	36,688	36,974	37,379	38,023	38,377
Butte	102,500	144,900	183,200	203,921	206,184	208,751	211,237	212,712	214,722	216,961
Calaveras	13,700	20,900	32,450	40,738	41,621	42,420	43,537	44,240	45,272	45,928
Colusa	12,400	12,900	16,300	18,928	19,249	19,661	20,061	20,743	21,275	21,766
Contra Costa	557,500	658,500	806,300	956,328	977,321	989,161	1,002,651	1,014,971	1,025,627	1,034,874
Del Norte	14,600	18,300	24,450	27,502	27,597	27,917	28,229	28,961	29,115	29,328
El Dorado	44,100	86,500	127,300	158,531	162,432	165,663	168,777	172,015	175,525	177,909
Fresno	413,800	517,400	670,200	804,342	820,382	837,367	857,480	874,730	891,134	909,399
Glenn	17,500	21,500	24,850	26,625	26,810	27,185	27,673	27,909	28,314	28,767
Humboldt	100,200	108,900	119,400	126,849	127,297	128,591	129,776	130,676	131,022	131,361
Imperial	74,400	92,500	110,100	143,589	146,230	149,981	154,828	159,458	164,293	169,888
Inyo	15,600	17,900	18,200	18,199	18,268	18,493	18,522	18,550	18,378	18,327
Kern	331,100	406,100	548,000	665,376	681,880	699,228	720,825	744,401	768,928	796,331
Kings	66,700	74,200	101,900	130,090	132,484	135,196	139,343	143,513	146,112	149,758
Lake	19,800	36,800	51,000	58,601	60,217	61,238	62,152	62,824	63,302	64,018
Lassen	16,900	21,800	27,700	33,980	33,845	33,951	34,412	35,562	35,740	36,515
Los Angeles	7,055,800	7,500,300	8,860,300	9,579,022	9,748,152	9,912,154	10,049,244	10,155,810	10,229,226	10,292,723
Madera	41,700	63,900	88,500	124,544	127,116	129,749	134,669	139,322	143,250	147,201
Marin	207,000	222,700	229,900	248,247	249,721	250,472	251,180	251,500	252,988	254,769
Mariposa	6,100	11,200	14,400	16,985	17,215	17,407	17,746	17,794	18,045	18,156
Mendocino	51,300	67,000	80,600	86,562	87,463	88,243	89,039	89,562	89,825	89,961
Merced	105,000	135,500	179,400	211,231	218,071	224,485	231,093	237,270	243,457	249,116
Modoc	7,500	8,700	9,675	9,527	9,477	9,472	9,582	9,907	9,894	9,910
Mono	4,100	8,700	10,100	12,924	13,177	13,330	13,410	13,536	13,649	13,755
Monterey	247,800	292,100	356,800	403,976	410,437	415,580	421,146	423,054	422,925	423,478
Napa	79,400	99,300	111,000	124,993	127,206	129,393	131,187	132,420	133,574	135,228
Nevada	26,500	52,500	79,000	92,378	94,360	95,584	97,134	98,235	99,236	99,584
Orange	1,431,900	1,944,800	2,412,000	2,863,706	2,918,791	2,963,394	3,005,043	3,037,949	3,062,275	3,083,894
Placer	78,000	118,400	174,900	252,076	265,100	277,108	290,777	302,377	313,133	322,428
Plumas	11,700	17,400	19,800	20,719	20,830	20,884	20,988	21,087	21,161	21,093
Riverside	461,600	669,800	1,188,300	1,558,824	1,621,757	1,685,987	1,766,831	1,845,524	1,924,881	2,004,608
Sacramento	636,700	787,900	1,046,900	1,233,386	1,271,471	1,302,397	1,332,269	1,357,617	1,378,068	1,396,353
San Benito	18,400	25,200	36,900	53,794	55,227	56,212	56,872	57,203	57,490	57,534
San Bernardino	685,300	902,200	1,432,100	1,722,573	1,771,386	1,815,631	1,869,704	1,923,610	1,974,206	2,016,277
San Diego	1,367,200	1,873,300	2,504,900	2,836,171	2,892,601	2,949,916	2,995,580	3,031,679	3,058,026	3,084,634
San Francisco	713,200	680,500	723,200	781,028	786,766	790,716	791,778	793,601	796,150	802,651
San Joaquin	292,100	350,200	481,900	568,932	591,307	608,337	626,513	645,645	662,008	674,323
San Luis Obispo	106,600	156,600	217,800	248,105	252,149	254,473	256,596	259,462	261,572	263,824
San Mateo	557,100	588,100	648,200	710,836	713,958	715,763	717,538	720,063	723,762	729,366
Santa Barbara	265,800	300,000	369,000	400,943	405,539	409,309	413,865	416,385	418,639	421,656
Santa Clara	1,072,600	1,300,200	1,495,300	1,693,040	1,709,645	1,721,297	1,732,582	1,747,991	1,765,604	1,791,869
Santa Cruz	124,500	189,100	229,300	256,510	257,805	258,255	258,568	259,713	261,295	263,385
Shasta	78,000	116,600	148,000	164,659	168,312	171,689	174,743	177,061	178,898	180,757
Sierra	2,400	3,100	3,320	3,632	3,613	3,600	3,591	3,521	3,489	3,495
Siskiyou	33,200	40,000	43,650	44,495	44,575	44,797	45,108	45,446	45,789	45,941
Solano	172,500	237,200	342,500	397,187	406,088	411,601	415,134	418,383	420,246	423,033
Sonoma	206,500	301,400	389,500	461,464	468,038	470,039	473,238	477,047	478,547	480,805
Stanislaus	195,800	267,700	373,600	450,982	466,344	479,105	490,078	499,693	510,164	519,276
Sutter	42,100	52,600	64,800	79,524	80,895	82,953	85,438	87,661	90,206	93,142
Tehama	29,600	39,100	49,850	55,931	56,646	57,530	58,658	59,620	60,548	61,424
Trinity	7,600	12,000	13,000	12,984	13,030	13,238	13,488	13,667	14,066	14,196
Tulare	189,400	247,400	313,100	369,727	376,313	384,718	394,836	405,579	415,820	425,600
Tuolumne	22,300	34,200	48,700	54,728	55,568	56,257	56,824	56,892	57,176	57,347
Ventura	381,400	532,200	669,100	758,657	774,264	787,886	799,781	808,657	814,262	821,698
Yolo	92,700	113,900	141,800	170,001	175,399	179,817	182,924	186,525	188,788	192,285
Yuba	44,400	49,800	58,600	60,433	61,680	63,066	64,413	66,235	68,892	71,938

a/ Totals may not add due to independent rounding.

Department of Finance, Demographic Research Unit, (916) 322-4651
http://www.dof.ca.gov

DECLARATION OF SERVICE

Case Name: **People v. Smith** No.: **S112442**

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; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 31, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

Kathy Moreno
Attorney at Law
P.O. Box 9006
Berkeley, CA 94709

Attorney for Appellant (2 Copies)

The Honorable Stephen Carlton
District Attorney
Shasta County District Attorney's Office
1525 Court Street, Third Floor
Redding, CA 96001-1632

CCAP
Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

The Honorable James Ruggiero
Shasta County Superior Court
1500 Court Street
Room 201
Redding, CA 96001-1629

On January 31, 2012, I caused an original and thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-4797 by U.S. Mail Delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 31, 2012, at Sacramento, California.

_____
Declarant