In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL JOSEPH SCHULTZ, Defendant and Appellant.	CAPITAL CASE Case No. S114671

Ventura County Superior Court Case No. CR49517
Donald O. Coleman, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an amended information filed by the Ventura County District Attorney, appellant was charged with the murder of Cynthia Burger (Pen. Code,[1] § 187, subd. (a)), with the special circumstance allegations that appellant murdered Burger while engaged in the commission, or attempted commission, of the crimes of rape and burglary (§ 190.2, subd. (a)(17)). (7CT 1828-1831.) Appellant pled not guilty and denied the special-circumstance allegations. (6RT 957-959.)

Trial was by jury. (10CT 2535-2539.) The jury found appellant guilty of first degree murder, and found the special circumstances to be true. (10CT 2705-2708.) At the conclusion of the penalty phase, the jury fixed the penalty at death. (11CT 2932, 3040-3042.)

The trial court denied appellant's motion to reduce the penalty from death to life in prison without parole, found the special circumstance allegations to be true, and sentenced appellant to death, in accordance with the jury's verdict. (12CT 3101-3103, 3104-3107.)

This appeal is automatic following a judgment of death. (§ 1239, subd. (d).)

STATEMENT OF FACTS

A. Evidence Presented At The Guilt Phase

1. Prosecution

a. Fire discovered at Cynthia Burger's Residence

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[1] All further statutory references are to the Penal Code unless otherwise provided.

On August 5, 1993, Aaron Casper lived at 2589 Outlook Cove in Port Hueneme in the Marlborough condominium complex. Casper's condominium was "catty-corner" to Cynthia Burger's condominium.[2] (13RT 2284-2285.) At approximately 3:30 a.m., Casper backed out of his garage to head to work at Port Hueneme Navy base. As he began to leave, he noticed that Burger's garage door was open. This was unusual because nobody in the community left their garage door open overnight, and he had never seen Burger's open at that time. Unsettled by the open garage door, Casper sat in his car in front of Burger's garage for a few moments. Hearing and seeing nothing, Casper proceeded to go to work. (13RT 2285-2286.)

At 5:42 a.m., Port Hueneme Police Officer John Brisslinger was dispatched to a structure fire at Burger's residence. (13RT 2291-2292.) In the meantime, Kenny Dilldine, Burger's next door neighbor, awoke to the smell of smoke. When he went outside, he discovered that Burger's condominium was on fire. Dilldine and the first two police officers at the scene tried to enter Burger's residence, but the smoke was too thick. (13RT 2293-2296.)

Firefighters from Oxnard Fire Department, Ventura County Fire Department, and the Naval Construction Battalion Fire Department all responded to the fire. The fire, which had started near the bed and was mostly contained to the bedroom, was very hot and smoky. The fire was quickly extinguished. (12RT 2309; 13RT 2327, 2333.) Two firefighters searched Burger's residence. They found Burger's lifeless body floating face down in a half-filled bathtub on the first floor. Burger was wearing a nightshirt. (13RT 2347-2348.) Firefighters immediately pulled Burger out

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[2] Burger lived at 2598 Outlook Cove. (13RT 2297, 2287; 14RT 2463.)

of the tub and instituted resuscitation efforts. Firefighters noticed that rigor mortis had already set in, and that Burger was dead. (13RT 2349-2350, 2366, 2369-2370, 2376-2377.)

b. Investigation

Approximately 45 minutes after the original call had been received, officers from the Port Hueneme Police Department arrived to investigate the scene and to collect evidence. (14RT 2445-2446.) Police investigators found the wires for the first-floor smoke detector dangling from the ceiling and the smoke detector in the staircase dismantled. (14RT 2453, 2466.) Investigators found smoke-detector components on the floor in the downstairs hallway, on the staircase, and in the bedroom. (14RT 2419, 2421-2421.) There were no signs of forced entry. (14RT 2459.)

Authorities asked Sandra Woodward, Burger's older sister, to come to the scene to assist the detectives in determining whether any items were missing. (14RT 2468.) Woodward told police she could not locate Burger's purse. Burger's wallet and credit cards were missing. In addition, two rings Burger usually kept on a glass ring holder in the bathroom were missing. (14RT 2468-2470, 2473.)

Two weeks after the fire, James R. Allen, an expert in fire reconstruction, visited Burger's condominium to determine the fire's point of origin, characteristics, and duration. (14RT 2386-2387, 2390.) Based upon his reconstruction of the second-floor bedroom, Allen opined that the fire started when an open flame was applied to the synthetic bedclothes at the foot of the bed, erupted quickly, and was extinguished quickly. (14RT 2394-2396, 2396-2397, 2404, 2418, 2419.)

c. Burger's autopsy

On August 5, 1993, Dr. Ronald Louis O'Halloran, the Chief Medical Examiner for Ventura County, performed an autopsy on Burger. Dr.

O'Halloran concluded Burger died as a result of asphyxiation by strangulation, or in other words, she was strangled to death manually. (15RT 2648-2649, 2651, 2657-2658.) Burger had petechial hemorrhages all over the skin of her face, eyelids, and the whites of her eyes. The hemorrhages are caused by pressure on the neck that blocks the blood vessels, causing them to burst. (15RT 2655-2656, 2659-2660.) She also had abrasions on the skin under her chin and bruising in the neck. Her hyoid bone, a small bone above the Adam's apple, was fractured. (15RT 2657-2658.) Dr. O'Halloran opined Burger was dead at the time of the fire, because he found no evidence Burger had inhaled any smoke and there was no evidence of carbon monoxide in her blood. (15RT 2654.)

Dr. O'Halloran also examined Burger's vaginal area. (15RT 2665.) Dr. O'Halloran opined that Burger had been forcibly penetrated because he found three lacerations in the pubic area and bruising of the lower portion of the vagina. (15RT 2666-2668.) Dr. O'Halloran also swabbed and aspirated Burger's vaginal canal to remove any seminal fluid and released the swabs to the Port Hueneme Police Department. (15RT 2669-2670.)

Michael Parigian, Assistant Laboratory Manager of the Ventura County Sheriff's Department, received the swabs from Dr. O'Halloran. Parigian determined the swaps contained semen. He preserved the material for future testing. (15RT 2685.) In March 1996, Parigian sent some of the preserved swabs to Orchid Cellmark Laboratories in Germantown, Maryland, for deoxy-ribonucleic ("DNA") extraction and profiling. (15RT 2686.) Paula Yates, an Orchid Cellmark employee, extracted sperm and non-sperm cells from the samples, acquired DNA from both types of cells, and compiled a DNA profile on each of the two DNAs she had acquired. (15RT 2707, 2709.) Once Yates completed her examination, she returned the material to the Ventura County Sheriff's Department Crime Laboratory. (15RT 2687, 2709.)

d. Appellant admits involvement in Burger's murder to Mooney

In late July or early August 1993, appellant met Therresa Mooney. They began dating and became a couple. (14RT 2484, 2485-2486, 2526; 18RT 3228.) Mooney and appellant were still a couple when appellant was sentenced to prison in 1996 (14RT 2486) after he pled guilty to a number of charges stemming from a coin machine break-in in the student lounge on the Ventura campus of Cal State Northridge. (17RT 3042-3042.) Mooney and appellant continued their relationship while he was incarcerated, and Mooney regularly visited him. (14RT 2486.) While appellant was incarcerated, he reestablished a relationship with his mother, Brunhilde Loprieato.[3] Mrs. Loprieato and Mooney often visited appellant together. (13RT 2487; 14RT 2529; 15RT 2587.)

In August 1999, appellant was housed at the Mt. Gleason Fire Camp, a low-security incarceration facility. He and Mooney were engaged to be married. The couple expected he would be released in six months or less.[4] (14RT 2486-2487, 2490, 2491-2492, 2527; 15RT 2589.) Because his release was believed to be imminent, Mooney was in disbelief when appellant sought her help in implementing a plan to escape from Mt. Gleason. (14RT 2487, 2489, 2491.) According to appellant, he wanted to escape because prison authorities would soon take a DNA sample. Appellant feared that sample might link him to a murder a companion had

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[3] Brunhilde Loprieato and her husband Nickolas Loprieato both testified at trial. In order to avoid confusion, respondent will refer to Brunhilde Loprieato as Mrs. Loprieato and Nickolas Loprieato as Mr. Loprieato.

[4] The Department of Corrections had miscalculated the time for appellant's release, and it was later determined that appellant had to serve more time than he and Mooney had anticipated. (20RT 3726.)

committed many years earlier during a scuffle with a homeowner who had discovered appellant and his companion burglarizing his house. (14RT 2488-2489.) Mooney refused to help him with his escape plan. (14RT 2491, 2532.)

A week later, Mooney shared appellant's escape plan with Mrs. Loprieato as they drove to Mt. Gleason to visit appellant. (14RT 2493, 2533; 15RT 2587.) Mrs. Loprieato was as confused as Mooney had been; as soon as they reached the camp, she berated appellant for planning an escape. Mrs. Loprieato insisted neither she nor Mooney would assist appellant in any way. (14RT 2496; 15RT 2611.) In any event, Mooney doubted that the burglary story was true. When Mooney and appellant were alone, she shared her doubts about appellant's story. (14RT 2497.) Faced with Mooney's disbelief, and her reassurance nothing would change her feelings for him, appellant changed his story. Appellant told Mooney that he - not a companion - had killed someone. (14RT 2497-2498.)

After hearing appellant's new story, Mooney indicated that she had "a weird feeling" he had raped and killed a woman. (14RT 2498.) Appellant told Mooney to search for a story about the death of Burger and a fire in the Ventura newspapers printed on August 4, 1993, or August 5, 1993. (14RT 2499.) Mooney and appellant decided to keep the information about Burger to themselves. (14RT 2500.)

Sometime in the next few weeks, Mooney and her friend, Terry Kephart, found a newspaper article in the local library about the Burger murder. (14RT 2502-2503, 2538-2539.)

Mooney took the newspaper article with her when she visited appellant the following weekend. Appellant read the article and took exception to some of the statements contained in the article. (14RT 2504-2506, 2539.) Mooney asked appellant if he had strangled Burger. Appellant said he had smothered her with a pillow. (14RT 2506.)

Mooney continued asking appellant questions. (14RT 2544.) Appellant said he had taken a lot of methamphetamine earlier in the day. While wandering around alone between 2:30 and 3:00 a.m., he had stumbled across Burger's open garage door. (14RT 2508, 2528, 2542, 2543, 2549.) Appellant entered Burger's garage planning to steal something. Once inside the garage, he found a key that unlocked the door that separated the garage from the residence, opened the door, and went into the residence. (14RT 2507-2508.) Appellant looked around on the first floor for a while and then went upstairs where he found Burger in her bedroom. Appellant then raped and killed her. (14RT 2509.)

Mooney asked appellant why he had killed Burger. Appellant answered that he feared his distinctive appearance would make it easy for Burger to identify him. (14RT 2510, 2547.) When Mooney asked why Burger was found in the bathtub, appellant explained that he feared residual semen might identify him, so he carried Burger's body downstairs to the bathroom, placed it in the bathtub, and filled the tub with water, bleach, and household chemicals. (14RT 2511.) He then said that, fearing hair or sperm on the bedclothes might also identify him, he used a candle to ignite the bedclothes. (14RT 2511-2512, 2547.) Appellant told Mooney that he pilfered some things from the residence to make it appear that Burger had been burglarized. (14RT 2518, 2443-2554.)

Mooney told appellant that Kephart had a friend in the police department who would check the files to determine whether any DNA had been recovered at the Burger crime scene for $200. Mooney told appellant to put his escape plan on hold until she found out if DNA existed. (14RT 2513.) Sometime later, Mooney gave Kephart $100 to pay for the information regarding any DNA the police had found in the Burger case. Kephart reported back that the DNA from the Burger crime scene was "not

legible." (14RT 2514-2516.) Mooney told appellant what Kephart had said. (14RT 2518.)

During their next ride to Mt. Gleason to visit appellant, Mooney told Mrs. Loprieato about the Burger murder. (14RT 2519, 2614; 15RT 2595.) When Mrs. Loprieato asked appellant whether what Mooney had told her was true, appellant hung his head and walked away. (14RT 2521; 15RT 2595-2596.)

On August 29, 2000, Mooney made an anonymous call to the Ventura Police Department and reported she had information linking appellant to the Burger case. (14RT 2480-2481, 2522-2523, 2524.) The officer who took the call found out that Burger had been murdered in 1993 in Port Hueneme, and he provided the Port Hueneme Police Department and the Ventura County District Attorney's Office with Mooney's telephone number. (14RT 2481, 2482.)

e. Appellant's DNA matches DNA recovered from Burger

On September 26, 2000, Dennis Fitzgerald, an investigator in the Ventura County District Attorney's Office, obtained a blood and hair sample from appellant. (14RT 2556-2558.) The Ventura County Sheriff's Department Crime Laboratory bundled a blood sample taken from appellant with the vaginal swabs taken at Burger's autopsy and released them for delivery to Orchid Cellmark. (15RT 2688.)

In November 2000, Wendy Magee, a DNA analyst employed by Orchid Cellmark, extracted DNA from the blood sample known to have been obtained from appellant and developed a profile of that DNA. (15RT 2712-2713.) Magee compared appellant's DNA profile with the male profile Yates had developed in 1996 and concluded that the likelihood the sperm found at autopsy were the sperm of a Caucasian other than Schultz

was 1 in 24×10^{18}. (15RT 2713-2714.) In other words, appellant's DNA was a match to the sperm recovered from Burger. (15RT 2715.)

2. **Defense Evidence**

Appellant did not present any affirmative defenses. (16RT 2753.)

B. Evidence Presented At Penalty Phase

1. **Prosecution's Case In Aggravation**

a. Appellant's Prior Convictions

In 1992, appellant was convicted of residential burglary. He was initially granted probation; but probation was later revoked, and he served a short prison sentence. He was paroled on June 21, 1993. (17RT 3044-3045, 3048.)

In August 1996, appellant was apprehended trying to break into the coin box on a vending machine in the student lounge on the Ventura campus of Cal State Northridge. He pled guilty to second-degree burglary, felony battery resulting in serious bodily injury to a police officer, felony battery causing injury to another police officer, two counts of misdemeanor resisting or obstructing of a police officer in the performance of his duty, and misdemeanor being under the influence of a controlled substance. (17RT 3042-3043.)

b. Uncharged Conduct

In June 1989, Anthony Schultz, Sr., appellant's father, was operating a refrigeration repair business with Michael Hecht and his two sons, appellant and Anthony Schultz III ("Schultz III"). (18RT 3286, 3287-3289, 3297, 3303.) Schultz, Sr. abruptly demanded that Hecht leave his household and the business. (18RT 3289, 3297.) A fight broke out as Hecht was gathering his belongings. Schultz, Sr. enlisted appellant to help him wrestle Hecht to the ground and pummel him. (18RT 3295-3296.) Hecht retaliated by slashing at Schultz, Sr. and appellant with a

pocketknife. (18RT 3297-3298, 3318.) Hecht summoned the police. (18RT 3299.) When the police arrived, they arrested Hecht. He was incarcerated for three weeks and released when the charges were dropped. (18RT 3300.) Hecht suffered a swollen and dislocated jaw, a bloody nose, a concussion, and injuries to his ribs. (18RT 3300.) Appellant suffered knife wounds. (18RT 3298-3299.)

On April 14, 1991, Mr. Loprieato found appellant and his mother arguing about appellant's use of the washing machine in the Loprieato residence. (18RT 3190-3192, 3200.) When Mr. Loprieato chastised appellant for disrespecting his mother, appellant grabbed him and restrained him with a chokehold. (18RT 3192-3194.) Appellant released Mr. Loprieato unharmed when his mother demanded that he do so. (18RT 3198-3199.) A police report was filed. (18RT 3197.)

In early August 1993, three or four weeks after appellant and Mooney became a couple, they attended a beach party with friends. (18RT 3208-3209.) When Mooney spent time with a male friend, who was not part of their party, appellant became jealous. (18RT 3210.)

Appellant became angry when Mooney would not leave her companion and turn her attention toward him. In a jealous rage, appellant drove his car at Mooney's male companion, who picked up a metal pipe to protect himself. (18RT 3210-3212, 3214-3215.) Mooney's daughter, Missy Rodriguez, remembered the incident differently. According to Missy, Mooney taunted appellant, and when Mooney's male companion tried to assault appellant with a metal pipe, appellant drove his car at his attacker. (19RT 3271-3272.)

In 1994, during an argument over appellant's continued drug use, appellant kicked Mooney in the buttocks. (18RT 3219-3220.) In January 1995, Mooney was again angry with appellant because of his drug use. Mooney repeatedly poked appellant in the chest as she lectured him about

the need to stop using drugs. Appellant pushed his knee into her buttocks. (18RT 3220.) On another occasion when Mooney had broken off her relationship with appellant because of his continued drug use, he was forced to live in his truck. (18RT 3220.) On a rainy day, Mooney allowed him into her garage. After smoking methamphetamine, appellant took possession of Mooney's house and car keys and refused to give them back to her. An argument ensued. (18RT 3220.) When the police arrived Mooney and appellant were still arguing, and appellant was twisting Mooney's hand. The police separated Mooney and appellant and told both of them to calm down. (18RT 3221.)

In February 1995, Mooney and appellant were not dating. (18RT 3215.) One evening, as Mooney returned from a date with Darryl Allen, appellant rushed at their car in rage shouting that Mooney was his girlfriend. Once he reached the car, he assaulted Allen. Allen retrieved a sledgehammer handle he kept in the car and attempted to defend himself, but appellant wrested the handle from him and broke the windshield of Allen's car as Allen sped off. (18RT 3216-3217.) According to Allen, he came upon Mooney and appellant loudly arguing about their future in the street as he arrived to spend some time with Mooney. (18RT 3253.) Appellant rushed at Allen, grabbed his shirt, ripped it from his body, and punched him in the head. (18RT 3253.) Allen grabbed the sledgehammer handle from his car to defend himself, and appellant grabbed him. Appellant released him at Mooney's request. (18RT 3254.)

In April 1995, appellant became angry when Richard Bowens's girlfriend could not repay a $5.00 loan. (18RT 3176, 3177, 3185.) Bowens intervened when appellant shook her and she called for help. (18RT 3179.) After Bowens seemingly brokered a peaceful solution, appellant started to walk away. Then, appellant unexpectedly turned and aimed a punch at Bowens. Bowens tried to move out of the way, but the punch still grazed

his left cheek. (18RT 3180-3181.) As soon as Bowens told his girlfriend to call the police, appellant left. (18RT 3181.) The police eventually arrived and took a report. (18RT 3182.)

c. Victim Impact Evidence

Had Burger was Cynthia Burger's father. Mr. Burger learned his daughter had died when a sheriff's deputy notified him there had been a fire at her home. Mr. Burger had initially been told that his daughter had apparently drowned while taking refuge in the bathtub. (18RT 3164-3165.) When Mr. Burger contacted the coroner's office, he learned that his daughter had been strangled. (18RT 3165.) The first year after Burger's death was the most difficult one for her family. Mr. Burger visited the cemetery every week to talk to her. (18RT 3165, 3166.) Over time, Mr. Burger had reconciled himself to the idea that he would never know who had murdered his daughter. (18RT 3166.) Mr. Burger often said to others that he hoped the perpetrator would never be caught, because he did not want to go through the whole grieving process again. (18RT 3166.)

Virgie Burger was Cynthia Burger's mother. Mrs. Burger was heartbroken by her daughter's death and had never fully recovered. (18RT 3170.) For years after the incident, Mrs. Burger would look at every man she saw and wonder what would cause someone to harm her daughter. (18RT 3171.) When Mrs. Burger learned that her daughter's attacker had been found, she knew she would have to talk out loud about her daughter, and she dreaded doing so. (18RT 3171.)

Sandra Woodward was Burger's older sister. She always believed that Burger would outlive her. Woodward had a very difficult time accepting the fact Burger had predeceased her. (19RT 3322-3325, 3325, 3332.) During the seven years that Burger's murder remained unsolved, Woodward knew that the police believed Burger was the victim of someone she knew. (19RT 3325.) Woodward had provided police with the names

of many of Burger's friends and acquaintances. Woodward remained suspicious of people who were a part of her life. (19RT 3326.)

2. **Appellant's Case In Mitigation**

Appellant was the third and last child of Mrs. Loprieato and Schultz, Sr. (20RT 3525.) Appellant's father was seldom employed. So, when appellant was about two years old, his mother, who was born in Germany and had trained as a hairdresser there, became the sole income earner in the family. (19RT 3403; 20RT 3520, 3526-3529, 3531.) Her work kept her away from home from very early in the morning until late at night. (19RT 3348, 3349-3350, 3352, 3394, 3415-3416; 20RT 3528, 3530-3531, 3536-3537, 3547-3548.) As a result, appellant and his older brother were usually left in the care of their stepsister, Britta Anderson. Anderson was only five years older than appellant, and was not prepared to take on the responsibilities of caring for her brothers. (19RT 3342, 3344, 3363; 20RT 3528-3531.)

Inside the home, family members lived under the thumb of Schultz, Sr., who was an alcoholic, drug-addicted, under-employed martinet, and who maintained his position of authority in the family by inflicting fearsome physical abuse on his wife and children, sexually abusing his stepdaughter, and torturing his children with mind games they could not win. (19RT 3320, 3364-3369; 20RT 3536-3537, 3538.) Anderson described living with Schultz, Sr. as "like a hostage situation" and like living with a "sort of a terrorist" or a "monster." (19RT 3354; 20RT 3345, 3538.)

Although the children did not know when or how their father would punish them, they knew that the beatings and the cuffings would inevitably come whether they had done anything wrong or not. (19RT 3345, 3353-3354, 3413-3414; 20RT 3533, 3537.) Schultz, Sr. regularly beat on his wife and on his children. He made a point of striking his wife and his

children in areas of the body that would not be visible to individuals with whom they came into contact outside the home. (19RT 3346, 3353-3354.)

Schultz, Sr. forced his children to watch as he abused his wife. (19RT 3354-3356, 3416; 20RT 3529, 3533-3534.) At times, the children feared Schultz, Sr. would kill their mother. (19RT 3361-3362.) On occasion, Schultz, Sr. would hand appellant's mother a knife and demand that she kill herself so he would be free of her. (19RT 3356.) Whenever it was possible for her to escape from a thrashing, Mrs. Loprieato would grab her car keys and flee. Whenever she did escape, Schultz, Sr. would load all three children into the car and drive around searching for her. As the children kept a look-out for their mother, Schultz, Sr. would rant and rave about what he would do to her when he found her. The children feared their mother would be beaten if she was found, and they feared they would be left alone with their father if she was not found. (19RT 3362-3363, 3414-3415.)

Schultz, Sr. was an alcoholic and addicted to prescription and non-prescription drugs. (19RT 3359, 3361; 20RT 3531.) He made no effort to hide his abuse of alcohol or drugs from the family and made no effort to stash his paper sacks chock full of drugs or his alcohol in places where they would not be found by his children. In fact, he often asked his children to bring him his drugs and to join him in using cocaine. (20RT 3531, 3369-3370, 3420, 3422.) Schultz, Sr. introduced his sons to drugs when they were still in grade school. He had turned appellant into a regular drug user by the time he was in the third grade and into a regular user of cocaine, LSD, and marijuana by the time he was 11 years old. (19RT 3364, 3370, 3371, 3393-3394, 3420-3421.) After Schultz, Sr. and appellant's mother divorced, Schultz, Sr. used a portion of the settlement he obtained in the divorce to purchase a large quantity of cocaine. He enlisted appellant and

his brother to help him repackage his purchase into smaller bindles. (19RT 3427-3428.)

When appellant was about 10 or 11 years old, Anderson ran away from home after Schultz, Sr. attempted to sexually assault her in a particularly wrenching and brazen manner in front of the entire family. (19RT 3396-3399; 20RT 3557.) Schultz, Sr. desperately wanted Anderson to return home. Rather than bring Anderson back into the household, Mrs. Loprieato chose to leave the house and the marriage. (20RT 3537-3540.)

Kenneth Ross met appellant in 1990. In addition to sharing an addiction to methamphetamine, they shared a love of dogs. They both had dogs, and appellant's dog was one of the few who got along with Ross's Rottweiler. Ross and appellant often spent time playing with their dogs. (20RT 3473, 3474.) Ross, who was no longer addicted to drugs at the time of trial, testified that he became a "totally different" person when he was under the influence of methamphetamine. He described himself as a sort of Dr. Jekyll and Mr. Hyde, meaning he did things while under the influence of methamphetamine that he would never dream of doing when not under the drug's influence. (20RT 3474.)

Ross sold appellant the methamphetamine that appellant had snorted just before attempting to break into the coin machine in the student lounge on the Ventura campus of Cal State Northridge. (20RT 3481.) Ross often saw appellant under the influence of methamphetamine. He found appellant self-absorbed at such times. (20RT 3478.) When the high from methamphetamine began to wear off, Ross found that appellant became aggressive. Ross tried to avoid him during those times. (20RT 3479.)

Chad Hoffman and appellant were friends from 1993 to 1996. (20RT 3458.) They were both methamphetamine addicts, and Hoffman saw appellant use drugs on numerous occasions. Appellant would binge for days on methamphetamine and stop only when he became too exhausted to

go on. (20RT 3460, 3462.) When appellant was under the influence of methamphetamine, he was talkative and happy. When the methamphetamine would begin to leave his system, he would become quiet, grumpy, and aggressive. (20RT 3463.)

Anderson saw appellant under the influence of some drug in 1993 and 1994. (19RT 3404-3405.) In 1993, appellant lived with his mother and her third husband, Mr. Loprieato, on an occasional basis. When his drug use became too intolerable, his mother asked him to leave the house. (20RT 3546.)

Mooney testified to appellant's repeated drug use from 1993 to 1996 including instances in which he would continue to smoke or snort methamphetamine for days and days. (18RT 3219-3227, 3230, 3238-3242, 3244-3245, 3247-3250.) In August 1996, when appellant was arrested for the breaking at the Ventura campus of Cal State Northridge, a blood sample demonstrated that he was heavily intoxicated with methamphetamine. (18RT 3263.)

Dr. Bruce Gladstone testified as an expert on the effect of abuse on children. (21RT 3760.) He opined that, because appellant grew up in an atmosphere of abuse, one would expect he would suffer from low esteem and exhibit poor impulse control, a proclivity for anti-social behaviors, a tendency to substance abuse, and social awkwardness. (21RT 3769-3770.)

Dr. Alex Stalcup, an expert in addictive medicine and clinical toxicology, testified as an expert on drugs of abuse. (20RT 3567.) Dr. Stalcup described "drugs of abuse" as chemical compounds that over stimulate neuroreceptors in the brain so that those neuroreceptors trigger the brain to release excessive amounts of dopamine and endorphins, the two chemicals that produce a feeling of pleasure in human beings. Repeatedly over stimulating these receptors permanently damages them, blunts the pleasure centers in the brain, and changes the physiology of the brain, so

that the brain of an addicted person differs from the brain of a non-addicted person. (20RT 3574-3576, 3579, 3582.)

Dr. Stalcup opined that addiction is a disease. (20RT 3590.) Statistically, most people will try a drug of abuse at some time in their lives; but 80 percent of those who try a drug of abuse will not become addicted to that drug. (20RT 3583.) Individuals with specific risk factors are more likely to become addicted to a drug of abuse. Appellant demonstrated several of those risk factors: (1) he had a family history of addiction, (2) he grew up in a household where violence, verbal abuse, and shocking physical abuse were regular occurrences, and (3) drugs were available to him and used by him when he was very young. (20RT 3602, 3618-3619.)

Anthony Casas testified as an expert on penology. (21RT 3674-3677.) Casas reviewed appellant's prison records and found that when appellant was incarcerated in 1996, he was initially housed in a high-security facility. (21RT 3683-3684.) With hard work, academic achievement, and good behavior, appellant worked himself up to a position of trust on the inmate fire crews. He was based in one of the lowest security facilities operated by the Department of Corrections. (21RT 3683-3684, 3687.) Casas opined appellant's record of good behavior and sociability was an indication he could serve out a life sentence as an obedient and peaceful inmate. (21RT 3693, 3696-3698.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCUSED TWO PROSPECTIVE JURORS FOR CAUSE

Appellant contends that the trial court erred when it excluded prospective jurors A.A. and M.M. for cause. (AOB 54-83.) Appellant's contention must be rejected because the trial court properly exercised its discretion in excusing the two prospective jurors.

A. Underlying Proceedings

Prior to voir dire, prospective jurors were asked to fill out a juror questionnaire. The questionnaire included a brief synopsis of the facts and asked prospective jurors 93 questions, including questions regarding their beliefs concerning the death penalty. (1JQ – 15JQ.)

1. Juror A.A.

A.A.'s questionnaire revealed that he was 55 years old, and lived in Ventura County for 24 years. He was married with a 10-year-old son. (2JQ 516.) When asked if he agreed whether a person charged with a crime should not have to prove his innocence, A.A. answered that he did not agree, and wrote, "He also needs to justify what he say." (2JQ 526.) A.A. also stated that he thought the criminal justice system was fair. (2JQ 528.) In responding to a question regarding his feelings about the death penalty, A.A. noted, "The death penalty to me is unbiblical." (2JQ 534.) When asked to rank whether we should have the death penalty on a scale of 1-10, A.A. chose "3" and noted he was "kind of against but not sure what I gonna do." A.A. further answered that he believed life in prison was worse for a defendant and that his religion influenced his feelings about the death penalty. (2JQ 535.) Finally, A.A. responded affirmatively to the question, "Do you have feelings against the death penalty which are so strong that you would always vote against the death penalty" (2JQ 536), and then specifically noted that he was "against death penalty." (2JQ 537.) A.A. concluded that he was willing to weigh and consider all evidence before deciding on an appropriate punishment. (*Ibid.*)

During oral questioning, A.A. was asked if he could be a fair and impartial juror. A.A. answered, "I'm pretty sure, your Honor, I could be fair in the first phase. But the second phase -- you know, I kind of don't believe in the death penalty." (11RT 1900.) When asked if he could

impose the death penalty in the appropriate case, A.A. merely stated that he "could try." (11RT 1901.) Defense counsel again asked A.A. if he had doubts as to whether he could be fair. A.A. reiterated he had doubts he could be fair in the penalty phase of the case. (11RT 1902.) After defense counsel made sure A.A. understood the difference between the guilt phase and the penalty phase, he once again asked A.A. if he was opposed to the death penalty. A.A. answered, "Kind of because I – kind of serious Catholic, you know." When pressed further on his religion, A.A. stated that some Catholics were for the death penalty, "but [his] family is kind of pretty deep-rooted Catholic." (11RT 1903.)

The following colloquy between defense counsel and A.A. occurred:

> Q [Defense counsel]: Okay. As you sit here now, you think you'll be all right to try and be fair to both sides?
>
> A [A.A.]: Maybe I can do it, you know.
>
> Q. Maybe you can do it?
>
> A. Maybe.
>
> [Defense counsel]: Fair enough. Thank you, sir. Appreciate your honesty.

(11RT 1905.)

The prosecution then asked A.A. if he still felt as he did when he filled out the questionnaire. A.A. responded, "It seems to me that the question in there – the question is, like it says, in your own view, you know. So in my view, you know, I -- I'm against death penalty. And -- but, you know, inside this court, you know, I will follow the instruction, you know." When asked to clarify if he was still against the death penalty, A.A. answered, "I think so." (11RT 1918.) The following questioning then occurred:

> Prosecution: . . . Now, when I read that at the same time I'm reading you're against the death penalty and you'd always vote

against it, I'm wondering if that means that your mind is closed to considering the death penalty as an option and that you would simply always vote for life in prison without the possibility of parole. Is that true? Would you just always vote for life in prison without the possibility of parole?

A. I think I could -- you know, I could -- as I said, I could follow the instruction, you know. I would -- I will try, you know, to be fair, you know, and follow the judge instructions. That's all I can do, you know.

Q. Could you actually sign a verdict form -- at the end of the case you're going to be given verdict forms, and it will have written on the form your decision. And then the foreperson will be asked to sign that form saying what the jury's decision is. And if the jury -- if the jury decides that death is the appropriate penalty, there will be a form for you to sign. Could you sign that verdict form saying that this man should be put to death as his punishment?

A. Well, after considering probably all -- what the other jurors -- jurors, you know, find, you know, probably I could -- I could do that, you know.

Q. Well, it would have to be your individual decision though. It's –

A. Deciding --

Q. You can't just go along with everyone else.

A. Yeah, but –

Q. You have to decide for yourself.

A. Yeah, I could sign.

Q. You could sign to take someone else's life?

A. (Inaudible response.)

Q. If you have a choice between life in prison and the death penalty as the two punishments, would you always pick life in prison?

A. Well, if I have a choice, you know, I would always pick life in prison.

Prosecution: Okay. All right. Thank you, sir.

(11RT 1919-1920.)

The court then excused A.A. for cause. (11RT 1923.) Defense counsel objected and informed the court that A.A. had said he could follow the court's instructions and he could consider both penalties. (11RT 1965.) The court responded:

> The standard is whether a person's views on capital punishment would prevent or substantially impair the performance of their duty as a juror in accordance with the juror's instructions and the oath.
>
> Based on the answers made in the questionnaire and, in particular, based on the questions made by Mr. Frawley and the answer to the direct question -- if given the choice between life without possibility of parole and the death penalty, would you always choose life without possibility of parole. The juror answered yes.
>
> And it seems to me that based upon that, the equivocal responses to his question -- to his questions in court, his deeply held religious convictions, that that prospective juror was not able to consider imposition of the death penalty as a reasonable possibility or, quite frankly, as any possibility based upon his answer to the question if always given the choice he would choose life without possibility of parole.

(11RT 1965-1966.)

2. **Juror M.M.**

According to her jury questionnaire, M.M. was a 23-year old who had lived in Ventura County for 12 years with her parents. (9JQ 2290-2291.) M.M. had recently graduated from college with a sociology degree, and had taken classes in psychology and criminal justice. She had worked as a claims adjuster for an insurance company for the past three months. (9JQ 2292, 2294.) When asked whether she thought the jury system worked,

M.M. answered that she was not sure. (9JQ 2296.) M.M. indicated that she had close friends who had drug or alcohol problems and attended a treatment program. (9JQ 2301.) M.M. had taken classes on substance abusers, and had a sister-in-law who was a psychiatrist who worked with "speed" addicts. (9JQ 2302.)

When M.M. responded to the question regarding her feelings about the death penalty, she wrote that if she believed someone could be "treated or helped" then she would not vote for the death penalty. M.M.'s answers indicated that she used to be "strongly against the death penalty," but now believed life without parole might be worse for a defendant. (9JQ 2309.) Last, her questionnaire showed that M.M. thought she could be fair. (9JQ 2311-2312.)

The court then inquired into M.M.'s questionnaire. The court asked M.M. if she could think of any reason why she could not be a "fair and impartial" juror. M.M. stated, "I think I could be fair in the first phase, but when it came to penalty, I've been thinking about it for the last week and I know that I can't put someone to death." (11RT 1875.) The court then stated, "All right. So you're saying that regardless of the evidence and regardless of the weighing in aggravation and mitigation in the penalty phase, because of certain principles you hold, you could never impose the death penalty. Is that what you're saying?" M.M. responded that that was indeed what she was saying. The court then excused M.M. for cause. (11RT 1875-1876.)

B. Applicable Law

A prospective juror may be excused for cause when the juror's views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.3d 622].) A prospective juror is substantially impaired within the meaning of *Witt* and may properly be

excused for cause if he or she is unable to follow the trial court's instruction and "conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. McWhorter* (2009) 47 Cal.4th 318, 340.) Prospective jurors "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 425.) Accordingly, "deference must be paid to the trial judge who sees and hears the juror" and must determine whether the "prospective juror would be unable to faithfully and impartially apply the law." (*Id.* at p. 426; see also *Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014] ["Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors"].)

A trial court's ruling "will be upheld if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous. [Citations.]'" (*People v. Thomas* (2011) 51 Cal.4th 449, 462.)

> "In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts [Citations.]."

(*Id.* at pp. 462-463.)

C. The Record Reveals Ample Grounds For The Excusal Of Both Jurors For Cause

The record reveals ample grounds for both challenges. First, there was sufficient evidence that A.A. would have been substantially impaired in the performance of his duties as a penalty phase juror. In responding to his questionnaire, A.A. repeatedly stated that he did not believe in the death penalty. For instance, in responding to a question regarding his feelings about the death penalty, A.A. noted, "The death penalty to me is unbiblical." (2JQ 534.) When asked to rank whether we should have the death penalty on a scale of 1-10, A.A. chose "3" and noted that he was "kind of against" but was unsure how he would proceed. A.A. also stated that he believed life in prison was worse for a defendant and that his religion influenced his feelings about the death penalty. (2JQ 535.) Finally, A.A. responded affirmatively to the question, "Do you have feelings against the death penalty which are so strong that you would always vote against the death penalty" (2JQ 536), and then specifically noted that he was "against death penalty." (2JQ 537.)

When questioned by the defense, A.A. reaffirmed his questionnaire answers. When asked if he could be fair, A.A. stated that he "could try" (11RT 1901), and then reiterated he had doubts he could be fair in the penalty phase of the case. (11RT 1902.) After defense counsel made sure A.A. understood the difference between the guilt phase and the penalty phase, he once again asked A.A. if he was opposed to the death penalty. A.A. answered, "Kind of because I – kind of serious Catholic, you know." When pressed further on his religion, A.A. stated that some Catholics were for the death penalty, "but [his] family is kind of pretty deep-rooted Catholic." (11RT 1903.)

Appellant contends that since A.A. eventually responded that he could keep an open mind and follow the courts instructions, the trial court erred in excusing him for cause. (AOB 71-72.) However, throughout the entire voir dire, A.A. expressed doubt about being able to impose the death

penalty. When the prosecutor finally pressed him to say he would not automatically vote for life without the possibility for parole, A.A. replied, "Well, if I have a choice, you know, I would always pick life in prison." (11RT 1919-1920.) Thus, even if A.A. had also stated that he would follow the court's instructions, he unquestionably provided equivocal answers about his ability to consider and impose the death penalty. When the trial court has conducted voir dire and observed a prospective juror's responses to counsel's questioning, deference is given to that court's evaluation of the juror's true state of mind. This is especially true when a prospective juror provides equivocal or conflicting answers, such as A.A. (*People v. Thomas*, *supra* 51 Cal.4th at pp. 462-463; *People v. Lynch* (2010) 50 Cal.4th 693, 728-733.) Thus, the evidence was sufficient to justify A.A.'s excusal for cause. (See *People v. Souza* (2012) 54 Cal.4th 90, 123–126; *People v. Griffin* (2004) 33 Cal.4th 536, 559–560.)

There is also sufficient evidence that M.M. would have been substantially impaired in the performance of her duties as a penalty phase juror. Although defense counsel's failure to object to M.M.'s removal did not forfeit this claim on appeal based on the then-applicable law, by failing to question M.M., defense counsel relinquished "the opportunity to rehabilitate [M.M.] in an effort to show [she was] not excludable" (*People v. Mills* (2010) 48 Cal.4th 158, 188), and impliedly suggested that "counsel concurred in the assessment that the juror was excusable" (*People v. Cleveland* (2004) 32 Cal.4th 704, 735). In any event, substantial evidence supports the trial court's finding that M.M.'s views on capital punishment would substantially impair her ability to perform the duties of a juror. M.M. wrote in her questionnaire that she used to be "strongly against the death penalty," but now believed life without parole might be worse for a defendant. (9JQ 2309.) In addition, her answers during voir dire reflected that she still had strong feelings against the death penalty. When the trial

court asked M.M. if she could be fair, she responded, "when it came to penalty, I've been thinking about it for the last week and I know that I can't put someone to death." (11RT 1875.) The court then followed up by asking, "All right. So you're saying that regardless of the evidence and regardless of the weighing in aggravation and mitigation in the penalty phase, because of certain principles you hold, you could never impose the death penalty. Is that what you're saying?" M.M. responded that that was indeed what she was saying. (11RT 1875-1876.) These responses reflect not only a strong opposition to the penalty of death, but a complete inability to consider and impose the death penalty, even in an appropriate case.

Appellant contends that the trial court's inquiry was ineffective, and thus, there was no substantial evidence that M.M.'s views impaired her ability to perform her duty as a juror. (AOB 77-82.) This claim must be rejected.

In *People v. Souza*, a juror wrote in his questionnaire that he was moderately in favor of the death penalty, and that his religious and personal views would not affect whether he would actually vote for it. (*People v. Souza, supra*, 54 Cal.4th at p. 127.) During a limited oral voir dire, in which neither the prosecutor nor defense counsel asked any questions, the juror indicated that he would "sway" in favor of leniency, regardless of the evidence. The trial court then asked for clarification of the juror's position, where the juror reaffirmed his previous statement. The trial court then excused the juror for cause. (*Ibid.*) This Court held that this was substantial evidence to support the trial court's excusal of the juror for cause. (*Ibid.*)

Similarly, herein, after responding to a 93-question juror questionnaire in which she stated that she had previously been heavily against imposing the death penalty, the trial court specifically asked M.M. if she could be fair. As previously provided, M.M., after a week of

thoughtful self-deliberation, stated that she could not "put someone to death." (11RT 1875.) The court then asked for clarification. M.M. indicated that regardless of the evidence and the factors in aggravation and mitigation, she could never impose the death penalty. (11RT 1875-1876.) As this Court stated in *Souza*, "Those answers, in combination with the trial court's firsthand observations, could give rise to a definite impression that [her] views on the death penalty would substantially impair the performance of [her] duties." (*People v. Souza, supra*, 54 Cal.4th at p. 127, quoting *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007.) Under the circumstances, there was no need for the trial court to conduct further inquiry into M.M.'s inability to consider the death penalty.

Thus, the record supports the trial court's findings that Prospective Jurors A.A. and M.M. were indeed substantially impaired, and hence the trial court did not err in granting the excusals for cause.

D. In Any Event, Any Error Was Harmless

Assuming this Court were to find that any prospective jurors had been erroneously excluded, the error was harmless. As the Chief Justice of this Court recently observed, in *Gray v. Mississippi* (1987) 481 U.S. 648, 666 [107 S.Ct. 2045, 95 L.Ed. 2d 622], the United States Supreme Court examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*.[5] (*People v. Riccardi* (2012) 54 Cal.4th 758, 840-846 (conc. opn. of Cantil-Sakauye, C.J.).) The majority in *Gray* rejected only one of those theories, however; that is, it rejected the contention that an erroneous *Witherspoon-Witt* exclusion had no effect on the composition of the jury. *Gray* found that the exclusion necessarily had an effect on the

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[5] *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776].

jury composition, even if one assumed that the prosecutor in any circumstance would have exercised a peremptory challenge against the death-scrupled prospective juror. Thus, as the Chief Justice concluded in *Riccardi*, "*Gray* stands for the proposition that *Witherspoon-Witt* error is reversible per se because the error affects the composition of the panel '"as a whole"' [citations] by inscrutably altering how the peremptory challenges were exercised [citations]." (*Id.* at p. 842 (conc. opn. of Cantil-Sakauye, C.J.).) But as the Chief Justice also noted in *Riccardi*, one year after *Gray*, the high court in *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80], rejected the *Witherspoon-Witt* remedy as well as the rationale developed for it in *Gray*, as applied to a wrongly included pro-death juror, explaining that the Sixth Amendment is not implicated simply by the change in the mix of viewpoints held by jurors (be they death penalty supporters or skeptics) who are ultimately selected. (*People v. Riccardi*, *supra*, at pp. 842-844 (conc. opn. of Cantil-Sakauye, C.J.).)

Notwithstanding the Chief Justice's observations in *Riccardi*, this Court felt "compelled to follow that precedent that is most analogous to the circumstances presented here[,]" which was *Gray*, as opposed to *Ross*. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 845 (conc. opn. of Cantil-Sakauye, C.J.).) Respondent respectfully asks this Court to revisit this conclusion in light of the observation that in *Gray*, the State (as well as the dissent) had argued the error had *no effect* on the case. Here lies "a reasoned basis" (*id.* at p. 844, fn. 2), for the different results in these cases. The "no-effect" rationale for adopting a harmless error rule only went so far, and allowed the *Gray* Court to reject it so long as there was some effect on the jury composition. The state's proffered rationale therefore never required the Court to account for the nature of a *Witherspoon-Witt* violation. Here, however, the People now ask the Court to do so. The appropriateness of harmless error analysis, we submit, should take into

account the "differing values" particular constitutional rights "represent and protect[.]". (*Chapman v. California* (1967) 386 U.S. 18, 44 [87 S.Ct. 824, 17 L.Ed.2d 705] (conc. opn. of Stewart, J.).)

Witherspoon protects capital defendants against the State's unilateral and unlimited authority to exclude prospective jurors based on their views on the death penalty. Accordingly, "'*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . .' [Citation.]" (*Wainwright v. Witt, supra*, 469 U.S. at p. 423.) Beyond this protection is the simple misapplication of the *Witherspoon-Witt* standard because it does not grant the prosecution the unilateral and unlimited power to exclude death-scrupled jurors, and as this Court has recognized, no cognizable prejudice results simply from the absence of any viewpoint or the existence of any particular balance of viewpoints among the jurors. (*People v. Riccardi, supra*, 54 Cal.4th at pp. 843-844 (conc. opn. of Cantil-Sakauye, C.J.); *Lockhart v. McCree* (1986) 476 U.S. 162, 177-178 [106 S.Ct. 1758, 90 L.Ed.2d 137].) Thus, exclusion of a juror through misapplication of the *Witherspoon-Witt* standard results in mere "technical error that should be considered harmless[.]" (*Gray v. Mississippi, supra*, 481 U.S. at p. 666.)

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING BURGER'S VOICE MESSAGE INTO EVIDENCE

Next, appellant contends that the trial court erred by admitting the taped message Burger left on an answering machine the night of her death. Specifically, appellant contends that her statements were irrelevant and prejudicial inadmissible hearsay. (AOB 83-125.) Appellant's contention must be rejected as the trial court properly exercised its discretion when admitting the evidence.

A. Underlying Proceedings

Prior to trial, in a written motion, the prosecutor moved to introduce a voicemail message Burger had left on her dance partner's answering machine hours before she was murdered. (7CT 1927-1931.) The message was as follows:

> Hi, Larry. This is Cindy. And it's about 9:15 on Wednesday night. Give me a call back if you can, uh, or at work tomorrow. I'd like to meet a little early before class and go over the step from last week. Um, I just hope I don't get too lost tomorrow. But anyway, I had a real good trip, uh, trip. Look forward to seein' ya, and give me a call when you get a chance. Bye-Bye.

(7CT 1939.) The prosecution argued that the statement was not inadmissible hearsay because it was not offered to prove the truth of the matter asserted (7CT 1928-1929), was admissible under Evidence Code section 1250 as a statement of intent or plan (7CT 1930), and was admissible as circumstantial evidence that Burger intended to stay home, thereby corroborating Mooney's testimony regarding appellant's admissions (7CT 1930-1931).

At the hearing on the motion, the prosecutor argued that it had the burden to prove appellant committed the offense and that the statement was relevant to help prove appellant's intent. The prosecutor argued that appellant's "intent upon entering this residence is everything to this case." According to the prosecutor, the fact that Burger planned to stay home that evening showed that appellant was not an invited guest and "this [wasn't] some pickup or date that went awry." (8RT 1321-1322.) Defense counsel contended the statement was not relevant on any disputed issue, was hearsay, was the equivalent of improper victim impact evidence during guilt phase, and was more prejudicial than probative. (8RT 1319-1320.) The trial court admitted the statement as follows:

All right. I concur that it is admissible for both a nonhearsay and a hearsay purpose. And the Court finds that its probative value outweighs

any prejudicial impact whatsoever, and the Court will allow introduction of the evidence.

(8RT 1322.)

B. The Trial Court Properly Admitted Burger's Voicemail Message

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Because an out-of-court statement is not made under oath and cannot be tested by cross-examination, hearsay is not admissible unless it qualifies under an exception to the hearsay rule. (Evid. Code, § 1200, subd. (b); *People v. Davis* (2005) 36 Cal.4th 510, 535; *People v. Cudjo* (1993) 6 Cal.4th 585, 608.) However, "[e]vidence of an out-of-court statement is . . . admissible if offered for a nonhearsay purpose - that is, for something other than the truth of the matter asserted - and the nonhearsay purpose is relevant to an issue in dispute." (*People v. Davis*, *supra*, 36 Cal.4th at pp. 535–536.) An out-of-court statement that is not offered for the truth of the matter does not present a hearsay problem because the trier of fact may consider the evidence on a relevant issue without needing to determine whether the facts contained in the statement are true or false. (See *People v. Turner* (1994) 8 Cal.4th 137, 189, disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

Evidence Code section 1250, which authorizes the admission of out-of-court statements to prove the declarant's state of mind, permits the admission of such evidence only if the declarant's state of mind "is itself an issue in the action" or if the evidence "is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a)(1)-(2).) "[R]elevant 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.'" (*People v. Jablonski* (2006) 37 Cal.4th 774, 821, quoting Evid. Code, § 210.) Evidence that "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive" is generally admissible. (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) A trial court's relevance determination is reviewed under the abuse of discretion standard. (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 821.)

The trial court properly exercised its discretion in finding Burger's voicemail message relevant and thereby admissible either as non-hearsay or Evidence Code section 1250 hearsay of Burger's state of mind. Burger's message showed that she planned to stay home the evening of the crime, did not invite appellant into the house, and did not have consensual sexual relations with appellant. Appellant first contends that these were not disputed facts, and thus, the evidence was not relevant. (AOB 91-95.) Appellant is mistaken.

While it is true that whether a defendant gains entry into a residence with an invitation or without one is irrelevant with regards to the burglary special circumstance (AOB 93-101), burglary was not the only special circumstance that was alleged. In addition to alleging that appellant murdered Burger while committing a burglary, the information also alleged he murdered Burger while engaged in the commission of a rape or attempted rape. (7CT 1828; 16RT 2812.) Rape requires "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator against the person's will by means of force or violence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130.) Therefore, the prosecutor had the burden to prove beyond a reasonable doubt that appellant forced Burger to have sexual intercourse against her will. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1290.)

Even if arguably hearsay, Burger's message was admissible under Evidence Code section 1250 as evidence of her intent to stay home the

night of the murder and not to have any invited guests. In turn, the fact that Burger stayed home that night and did not invite appellant over tends to show that appellant was inside Burger's home for improper reasons and that any sexual activity between appellant and Burger was not consensual. Thus, the evidence was relevant with respect to disputed facts necessary to prove the rape-murder special circumstance.

Next, appellant contends that Burger's voice message was not admissible as nonhearsay circumstantial evidence of Burger's state of mind. (AOB 101-104, 111-113.) Once again, appellant's contention must be rejected because Burger's voicemail message was relevant as circumstantial evidence for something other than the truth of the matter asserted. None of the statements in the voicemail were admitted for the truth of the specific statement uttered by the victim. Instead, the voicemail, in its entirety, was circumstantial evidence of the victim's plan or state of mind on the night of her murder. In turn, the message was relevant to corroborate Mooney's testimony. According to Mooney, appellant admitted to her that he entered Burger's residence with the intent to steal something, he discovered Burger, and raped and murdered her, and then attempted to cover the crime up. "In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168–1169.) The corpus delicti rule "generally requires the prosecution to prove 'the body of the crime itself' independent of a defendant's extrajudicial statements." (*People v. Sapp* (2003) 31 Cal.4th 240, 303.) Here, the entirety of the voice message was circumstantial evidence of the victim's plans for the night in question, which corroborated appellant's confession or admission that he was not invited to Burger's residence for a legitimate purpose. Thus, contrary to appellant's assertion (AOB 102-104), there was a rational connection

between Mooney's testimony and Burger's voicemail message. Accordingly, this claim must be rejected.

Next, appellant contends that the statements were not admissible under Evidence Code section 1250 because none of the individual statements within Burger's voicemail message could reasonably be interpreted to infer that she intended to stay home on the night of her murder. (AOB 105-110.) Individually, the statements may not permit such an inference. However, when looked at in their entirety and in context, the statements do in fact raise the inference that Burger was at home alone after 9:15 p.m., that she was going to stay home, and that she was not planning to have visitors because she was free to take Larry's return call that evening. Nevertheless, appellant contends that the trial court erred by admitting the entire statement. (AOB 111-114.) However, as just provided, the entirety and context of the statements as opposed to any specific statement, raise the inference that Burger was going to be at home alone after 9:15 p.m. the night of her murder. Thus, the entire voicemail was admissible, either under Evidence Code section 1250 or as non-hearsay circumstantial evidence, to show Burger's state of mind on the night of her murder.

Appellant also contends that the evidence was more prejudicial than probative under Evidence Code section 352. (AOB 114-121.) This claim also fails.

Evidence Code section 352 states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

"On appeal, the ruling is reviewed for abuse of discretion." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) Thus,

> [w]here . . . a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised it discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.

(*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Additionally, in order for "undue prejudice" to exist within the meaning of Evidence Code section 352, it must be likely that the evidence at issue will "'arouse the emotions of the jurors'" or "'be used in some manner unrelated to the issue on which it was admissible.'" (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 610, quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1016.) Consequently,

> [t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' 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. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]

(*People v. Karis* (1988) 46 Cal.3d 612, 638; accord, *People v. Scheid* (1997) 16 Cal.4th 1, 19.)

Here, the trial court did not act in an arbitrary or capricious manner. The trial court entertained defense counsel's objections to the admission of the evidence and reasonably found the probative value of the evidence was not substantially outweighed by the risk of prejudice. As previously discussed above, the voicemail message was very relevant to prove the rape-murder special circumstance and to corroborate Mooney's testimony about appellant's confession. Furthermore, the admitted evidence was not

of the type to "'arouse the emotions of the jurors.'" (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 610, quoting *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1016.) As the trial court found, there was nothing inflammatory about the introduction of the evidence. The message itself was rather innocuous. It was very short, did not mention any emotional or inflammatory matters, and did not mention appellant at all.

Appellant contends that the message was "extremely prejudicial" because it amounted to a "voice from the grave." (AOB 116-117.) However, arguably emotional testimony is not necessarily inflammatory. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 298–299; *People v. Roybal* (1998) 19 Cal.4th 481, 516-517 [admission of 911 tape showing husband's distress in finding dead wife's body not an abuse of discretion under Evidence Code section 352].) This Court upheld the admission of a 911 tape wherein a 16-year-old girl reported that two men had just entered her house and shot both her and her mother in the back of the head. The girl survived the attack but could be heard screaming hysterically when she discovered her mother's body. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 101-103.) The voice message introduced in the instant case was far less damaging than the recordings that were introduced in *Hawthorne* and *Roybal*. As previously discussed, the message was very brief and did not contain inflammatory or emotional dialogue. Although the message may have been damaging to the defense, it was not unduly prejudicial. Accordingly, the trial court did not abuse its discretion when it admitted Burger's voicemail message.

Appellant further contends that the trial court should have come up with alternatives to lessen the impact of the evidence. (AOB 118-121.) This Court has stated that trial courts should consider the "availability of less prejudicial alternatives" before admitting uncharged misconduct evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) Such

alternatives might include admitting some but not all of the defendant's other offenses, or excluding irrelevant and inflammatory details surrounding the offenses. (*Ibid.*) However, that rule is driven by the policy disfavoring propensity evidence. (*Id.* at pp. 915–916.) Here, appellant cites no authority requiring the trial court to come up with evidentiary alternatives on its own in the context presented here. Accordingly, the burden is on the party seeking alternative measures to apprise the trial court of the possible alternatives. "Otherwise, the trial court will not be fully apprised of the basis on which exclusion is sought; nor can the trial court conduct a balancing analysis which involves weighing the probative value of the alternative." (*People v. Holford* (2012) 203 Cal.App.4th 155, 170.) This claim fails.

C. Any Error Was Harmless

Even if the trial court erred, the alleged error was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 36 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Any prejudice appellant might have suffered from the introduction of the voicemail was minimal, and there is nothing to suggest this evidence would have posed an intolerable "'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724, quoting *People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.) First, there was nothing to suggest this evidence was, in any way, inflammatory or that it posed a risk to appellant's chance for a fair trial. In fact, the message itself was rather innocuous. It was very short, did not mention appellant at all, and did not provide any inflammatory details of the murder.

Moreover, ample evidence supported the jury's guilt phase verdict. The record reflects that appellant, while in custody for another crime, told Mooney that he wanted to plan an escape to avoid giving a DNA sample that may link him to a prior murder. (14RT 2487-2491.) Because appellant

was only a few months away from his release, Mooney was disturbed by appellant's desire to escape. Appellant then admitted to Mooney that he raped Burger and then killed her. (14RT 2497-2498.) When Mooney pressed appellant for more details, appellant told her to search for a story about the death of Burger and a fire in the Ventura newspapers printed on August 4, 1993, or August 5, 1993. (14RT 2499.) After Mooney found the article, appellant explained that he entered Burger's garage planning to steal something. Once inside the garage, he found a key that unlocked the door that separated the garage from the residence, opened the door, and went into the residence. (14RT 2507-2508.) Appellant looked around on the first floor for a while and then went upstairs where he found Burger in her bedroom. Appellant then raped and killed her. (14RT 2509.)

When Mooney asked appellant why he had killed Burger, he said that he feared his distinctive appearance would make it easy for Burger to identify him. (14RT 2510, 2547.) When Mooney asked why Burger was found in the bathtub, appellant explained that he feared residual semen might identify him; so he carried Burger's body downstairs to the bathroom, placed it in the bathtub, and filled the tub with water, bleach, and household chemicals. (14RT 2511.) He then said that, fearing hair or sperm on the bedclothes might also identify him, he used a candle to ignite the bedclothes. (14RT 2511-2512, 2547.) Appellant told Mooney that he pilfered some things from the residence to make it appear that Burger had been burglarized. (14RT 2518, 2443-2554.) Mooney then told Mrs. Loprieato about appellant's confession. When Mrs. Loprieato confronted appellant about whether what Mooney had told her was true, appellant hung his head and walked away. (14RT 2521, 15RT 2595-2596.)

In addition, appellant's confession to Mooney was consistent with the circumstances of the crime and the forensic evidence. In fact, appellant's DNA was a match to the sperm recovered from Burger. (15RT 2715.) In

other words, Mooney's testimony about appellant's confession was reliable and corroborated by independent evidence. Accordingly, any error in the admission of the evidence was unquestionably harmless.

Appellant also contends introduction of the voicemail was prejudicial error because was used to gain sympathy for the victim. (AOB 121-125.) The voicemail, though perhaps painting a sympathetic picture of Burger, was nonetheless an "ordinary" one not likely to produce a prejudicial impact. As indicated previously, in light of the overwhelming evidence presented against appellant, this was not a "close" case on the issue of guilt.

Accordingly, any error in the admission of the evidence was harmless.

III. THE TESTIMONY REGARDING THE DNA REPORT DID NOT VIOLATE THE CONFRONTATION CLAUSE

Appellant contends that his state and federal confrontation rights were violated because the testifying DNA analyst's testimony was partly based on a non-testifying analyst's DNA analysis and report. (AOB 126-184.) However, the confrontation clause was not violated by testimony regarding the DNA report for the reasons discussed below.

A. Applicable Law

The confrontation clause protects the right of a criminal defendant "to be confronted with the witnesses against him . . . ." (U.S. Const., 6th Amend.) It prohibits "testimonial" hearsay from being admitted into evidence against a defendant in a criminal trial. In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*), the United States Supreme Court held that the Sixth Amendment's confrontation clause prohibits admission of out-of-court "[t]estimonal statements of witnesses absent from trial [unless] the declarant is unavailable," and "only where the defendant has had a prior opportunity to cross-examine." (*Id.* at p. 59.) *Crawford* did not delineate "a comprehensive definition" of what constitutes testimonial evidence, but

held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.) Nevertheless, *Crawford* stated the "core class" of testimonial statements included "'ex parte in-court testimony or its functional equivalent," including, for example, affidavits, custodial examinations and prior testimony that the defendant was unable to cross-examine, and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id.* at pp. 51-52.)

In *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 183 L.Ed.2d 89], the United States Supreme Court produced a fractured opinion providing limited guidance to lower courts. *Williams* involved a rape case where the high court considered a forensic DNA expert's testimony that an independent laboratory's DNA profile of semen found on the victim matched a DNA profile derived from the suspect's blood, which was produced by the state police laboratory. The four-justice plurality opinion of Justice Alito, with Justice Thomas concurring in the judgment only, concluded that the expert's testimony did not violate the defendant's confrontation rights. The plurality reasoned that the independent laboratory report, which was not admitted into evidence (*id.* at pp. 2230, 2235), was "basis evidence" to explain the expert's opinion and was not offered for its truth, and therefore did not violate the confrontation clause. (*Id.* at pp. 2239-2240.)

Alternatively, the plurality explained, even if the report had been offered for its truth, its admission would not have violated the confrontation clause because the report was not a formalized statement made primarily to accuse a "targeted individual." (*Williams, supra,* 132 S.Ct. at pp. 2242-2244.) That is, under the "primary purpose" test, because the defendant was neither in custody nor under suspicion at the time of the DNA analysis,

no one at the laboratory could have known that its profile would inculpate the defendant, thereby eliminating the prospect for fabrication and the incentive for developing an unscientific profile. (*Id.* at pp. 2243-2244.) Justice Thomas concurred on a different rationale -- that the report lacked the requisite formality and solemnity to be testimonial. (*Id.* at p. 2255 (conc. opn. of Thomas, J.).)

Recently, this Court synthesized the high court's post-*Crawford* decisions in *People v. Lopez* (2012) 55 Cal.4th 569, *People v. Dungo* (2012) 55 Cal.4th 608, and *People v. Rutterschmidt* (2012) 55 Cal.4th 650. The *Lopez* court explained that the United States Supreme Court's *Crawford* jurisprudence identified a two-part inquiry to determine whether a challenged statement is testimonial for confrontation clause purposes. "First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity." (*People v. Lopez, supra,* 55 Cal.4th at p. 581.) "Second, all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be."[6] (*Id.* at p. 582.) "It is now settled in California that a statement is not testimonial unless both criteria are met." (*People v. Holmes* (2012) 212 Cal.App.4th 431, 438.)

In *Lopez*, this Court held that admission of a laboratory report containing test results as to the defendant's blood-alcohol concentration (BAC) did not violate the defendant's right to confrontation, even though the criminalist who did the testing and authored the report did not testify. (*Lopez, supra,* 55 Cal.4th at pp. 582-585.) As the *Lopez* court explained,

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[6] The *Lopez* court did not consider the primary purpose inquiry because "the critical portions of [the non-testifying criminalist's] report were not made with the requisite degree of formality or solemnity to be considered testimonial." (*Lopez, supra,* 55 Cal.4th at p. 582.)

neither the report nor a notation by the non-testifying criminalist linking the defendant's name to the blood sample was made with the requisite degree of formality or solemnity to be considered testimonial under the *Crawford* line of cases. (*Id.* at pp. 584-585.) Additionally, this Court found the admission of evidence harmless beyond a reasonable doubt because the testifying criminalist offered his independent BAC opinion as to the defendant's sample. (*Id.* at p. 585.)

The *Dungo* decision found no confrontation clause violation where a forensic pathologist testified concerning the cause of the victim's death, based on facts taken from an autopsy report prepared by a non-testifying pathologist. *Dungo* held that neither the formality component nor the primary purpose component for identifying testimonial statements was satisfied: first, the statements in the autopsy report (which was not introduced into evidence) referenced by the testifying pathologist did not include the report's conclusions as to the cause of death. Rather, the testifying pathologist offered his own independent opinion as to the cause of death, based on the non-testifying pathologist's anatomical and physiological observations as contained in the report. (*Dungo, supra,* 55 Cal.4th at pp. 618-619.) "Such observations are not testimonial in nature." (*Id.* at p. 619.) Second, a "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes." (*Id.* at p. 621.)

Finally, in *Rutterschmidt, supra,* 55 Cal.4th at page 661, this Court did not reach the merits of the confrontation claim, finding any error harmless beyond a reasonable doubt. "In light of the overwhelming evidence against defendant Golay, exclusion of the laboratory director Muto's trial testimony in question would, beyond a reasonable doubt, not have affected the outcome of Golay's trial." (*Ibid.*)

B. Magee's Testimony Referencing the DNA Report Prepared by a Non- Testifying Analyst Did Not Violate Appellant's Confrontation Rights

Appellant contends that Magee's testimony regarding the DNA report prepared by non-testifying analyst Paula Yates violated the confrontation clause because the report was testimonial. Specifically, appellant argues that the report was testimonial because Yates knew the vaginal washing contained sperm that would identify the perpetrator at a later time, the DNA profile was the functional equivalent to in-court testimony, and the profile was not raw data. (AOB 132.)

Appellant's *Crawford* claim fails. As in *Williams*, since the 1996 DNA report was not itself admitted into evidence, it is important to note the precise testimony that Magee offered that referenced the 1996 DNA report. (*Williams v. Illinois, supra,* 132 S.Ct. at pp. 2230, 2236.) The report was referenced during Magee's testimony as follows:

> Q. And do your records show that a sperm extraction did take place that it could be compared at a later time?
>
> A. The DNA was isolated from the sample nonsperm and sperm fractions, and that DNA could be used for future testing.
>
> Q. Now, do your records also show that the evidence was preserved and sent back to the Ventura County Sheriff's Department crime laboratory so that it would still be available for any additional testing?
>
> A. Yes, it was.
>
> Q. And do your records show who performed the extraction at that time?
>
> A. Yes, they do.
>
> Q. And is that person trained and qualified to extract DNA?
>
> A. Yes, she is.
>
> Q. Who is that?

A. Her name is Paula Yates, Y-a-t-e-s. She is now Paula Clifton.

Q. Now, when she performed this extraction, was she trained and qualified to do that?

A. Yes, she was.

Q. Do the records show that the results of the extraction were recorded?

A. The records show Paula's lab notes for the DNA extraction procedure.

Q. And so any later evidence could be compared with the extraction that was done; is that correct?

A. That's correct.

Q. Were the methods used to extract the DNA approved by your laboratory?

A. Yes, they were.

Q. And are they generally accepted in the scientific community?

A. Yes.

Q. And is that method that was used in 1996 by Paula Yates, now Paula Clifton, still an accepted method in the scientific community today?

A. Yes, it is.

Q. Now, back in 1996, did your laboratory have a blood sample or a known sample from a Michael Schultz to compare it to in '96?

A. No, we did not.

* * *

Q. And when you perform the analysis on the blood sample labeled Michael Schultz, did you compare it with anything else?

A. I compared it to the results I obtained when I tested the extracts from 1996.

Q. Okay. And were results obtained?

A. Yes, they were.

Q. And did both you and Mr. Maddox agree?

A. Yes, we did.

Q. And did all the controls show the tests were performed properly?

A. Yes.

Q. Did you maintain the proper chain of custody of the evidence?

A. Yes.

Q. And did you perform the tests according to your training and experience and laboratory testing procedures that you've been trained in?

A. Yes, I did.

Q. And what were the results of the tests in this case?

A. For the nonsperm fraction, the DNA obtained was from a female, and Michael Schultz was excluded as the source of the DNA obtained from that sample. With respect to the sperm fraction, the DNA obtained from that particular fraction was from a male, and the DNA profile obtained from that sample matched the DNA profile obtained from the blood card labeled Michael Schultz.

Q. And did you calculate estimates for their frequency of the profile that you found?

A. Yes, I did.

Q. And what are those estimates?

A. For the African-American population, the frequency was one in 48 times ten to the 18 unrelated individuals. For the

> Caucasian population, one in 24 times ten to the 18th unrelated individuals. And for the Hispanic population, one in 80 times ten to the 18 unrelated individuals.

(4RT 2711-2714.)

In this case, there is nothing in the record to suggest that the 1996 DNA report contained solemn or formal declarations or affirmations of accuracy akin to the out-of-court statements at issue in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 2543, 174 L.Ed.2d 314] and *Bullcoming v. New Mexico* (2011) 564 U.S. __ [131 S.Ct. 2705, 180 L.Ed.2d 610]. In *Melendez-Diaz*, the laboratory report was sworn to before a notary and was essentially an affidavit. (*Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at p. 323; *id.* at p. 330 (conc. opn. of Thomas, J.).) In *Bullcoming*, the Supreme Court had little difficulty equating the certificate of analysis in that case to the report in *Melendez-Diaz* because although it was unsworn, it was signed and referenced New Mexico's rules for admitting the document into evidence. (*Bullcoming v. New Mexico, supra*, 131 S.Ct. at p. 2717.) In contrast, a majority of the justices in *Williams* concluded that the DNA report at issue in that case did not have the indicia of solemnity like the reports in *Melendez-Diaz* and *Bullcoming*. (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2242; *id.* at p. 2276 (conc. opn. of Thomas, J.).) Similarly here, the record does not show that the 1996 DNA report was sworn, notarized, or contained solemn affirmations of fact.

While appellant argues (AOB 138-145) that the DNA report was testimonial because it was intended to be used at trial like the reports in *Melendez-Diaz* and *Bullcoming,* it is noteworthy that, in both of those cases, the reports were admitted into evidence and served as a substitute for trial testimony. (*Bullcoming v. New Mexico, supra,* 131 S.Ct. at p. 2713; *Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at p. 311.) In this case,

the 1996 report was not admitted into evidence, and the record does not suggest that the report was in a form that made it function as the equivalent of in-court testimony like the reports in *Melendez-Diaz* and *Bullcoming*. Further, as this Court has recognized, the "intended to be used at trial" language is part of the primary-purpose test, and a majority of the United States Supreme Court justices has not adopted that particular language as the test for determining whether an out-of-court statement is testimonial. (*People v. Lopez, supra,* 55 Cal.4th at p. 582.) Indeed, given the result in *Williams* upholding an expert's reliance on a non-testifying analyst's report, an expert's mere reliance on an out-of-court document does not render the document within the reach of the confrontation clause.

In addition, here as in *Williams*, admission of the DNA report would not have violated "the Confrontation Clause, because the report was not a formalized statement made primarily to accuse a targeted individual." (*Williams v. Illinois, supra,* 132 S.Ct. at pp. 2242–2244.) Applying an objective test in which the court looks "for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances" (*id.* at p. 2243), the high court found that the primary purpose of the outside lab report "was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time." (*Ibid.*) Further, the high court found that no one at the outside laboratory could have possibly known that the profile that it generated would result in inculpating the defendant, and there was therefore no prospect for fabrication and no incentive for developing something other than a scientifically sound profile. (*Id.* at pp. 2243–2244.) Similarly, herein, at the time of the testing by the outside laboratory, appellant was not a suspect. So there was "no prospect for fabrication and no incentive for

developing something other than a scientifically sound profile." (*Id.* at pp. 2243–2244.)

In sum, there was no confrontation violation under the rationales employed by both the plurality and Justice Thomas's concurring opinion in *Williams*. Justice Thomas would likely affirm because the DNA report created by Yates for this case was not a sworn or certified declaration of fact that attested to its accuracy and reliability, and was therefore not sufficiently formal or solemn enough to invoke the protections of the confrontation clause. (*Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas, J.).) In addition, the plurality would likely affirm because the report herein did not have the primary purpose of targeting an accused individual and therefore was not testimonial. (*Id.* at pp. 2242-2243 (plur. opn. of Alito, J.).)

Appellant contends that *Williams* is distinguishable because Magee's testimony went beyond answering a single "hypothetical question" with regards to whether there was a match between the DNA found from the vaginal swap and the defendant (AOB 146-148), and that Magee adopted Yates's opinion about the DNA profile of the sperm and was not a proper surrogate for Yates's opinion (AOB 152-153, 172-177). This distinction, however, is not compelling. The *Williams* plurality reasoned that even if the report itself had been offered for its truth, the confrontation clause had not been violated because the Cellmark report was prepared for the primary purpose of finding a dangerous rapist who was still at large, not for the primary purpose of targeting an accused individual. (*Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2243 (plur. opn. of Alito, J.).) As previously discussed, herein, the 1996 DNA report was prepared for the same primary purpose of finding an unknown assailant or rapist. In addition, Magee was a qualified expert who could offer her opinion as to the match between the DNA recovered from Burger's vaginal wash and appellant's DNA. (*People*

v. Geier (2007) 41 Cal.4th 555, 607.) Moreover, as in *Williams* and *Geier*, the accusatory opinions that the DNA evidence matched appellant "were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, [Magee]." (*Ibid.*) Thus, the testimony was admissible whether or not Magee answered more than a single question regarding the match or whether she was a proper surrogate to testify about the 1996 report.

Appellant also contends that *Williams* is distinguishable because the high court limited its holding to cases tried before a judge rather than a jury. (AOB 157-160.) In *Williams*, the high court set forth two independent grounds why the expert's testimony did not violate the confrontation clause. In the first of these, Justice Alito said that the testimony was not admitted for its truth. Instead, the prosecution expert's references to the underlying DNA reports had the limited purpose of explaining the basis of the expert's independent conclusion that Williams's DNA from the state police lab profile matched the profile that Cellmark produced from the victim's vaginal swabs. (*Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2228 (plur. opn. of Alito, J.).) Because this was a bench trial, it was far more likely that the trial judge was able to evaluate this evidence for this limited purpose. (*Id.* at pp. 2236–2237.) The plurality's alternative ground rested on the conclusion that the Cellmark DNA report was not testimonial for purposes of confrontation clause analysis. The *Williams* plurality reasoned that the confrontation clause had not been violated because the Cellmark report was prepared for the primary purpose of finding a dangerous rapist who was still at large, not for the primary purpose of targeting an accused individual. (*Id.* at p. 2243 (plur. opn. of Alito, J.).)

With regards to the first alternative, the *Williams'* court clarified,

> We do not suggest that the Confrontation Clause applies differently depending on the identity of the factfinder. Cf. *post*, at 2271-2272 (opinion of KAGAN, J.). Instead, our point is that the identity of the factfinder makes a big difference in evaluating the likelihood that the factfinder mistakenly based its decision on inadmissible evidence.

(*Williams v. Illinois, supra,* 132 S.Ct. at p. 2237, fn. 4.) Thus, the holding in *Williams* is not limited to bench trials. Nevertheless, even if *Williams* was limited to bench trials under the first alternative, it is still applicable to the instant case under the second theory. As previously discussed, introduction of Magee's testimony did not violate the confrontation clause because the 1996 report did not have the primary purpose of targeting an accused individual and therefore was not testimonial. (*Williams v. Illinois*, *supra*, 132 S.Ct. at pp. 2242-2243.) In addition, the DNA report created by Yates for this case was not sworn and did not contain certified declarations of fact that attested to their accuracy and reliability. The report was therefore not sufficiently formal or solemn enough to invoke the protections of the confrontation clause. (*Id.* at p. 2260 (conc. opn. of Thomas, J.).) Thus, this claim fails.

Accordingly, for the reasons discussed above, Yates was not a "witness" within the meaning of the confrontation clause, Yates's report was not testimonial, and Magee's reference to (or reliance on) Yates's report did not violate *Crawford* and its progeny. (See *Williams v. Illinois, supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas, J.) [the DNA report is not a statement by a witness as contemplated by the confrontation clause because it is not "a sworn []or certified declaration of fact."].)

C. Even If the Admission of Testimony Regarding the DNA Report Violated the Confrontation Clause, It Was Harmless

Even if Magee's reliance on statements from Yates's DNA report violated appellant's right to confrontation, any error was harmless.

Confrontation clause violations are subject to federal harmless error analysis under *Chapman v. California, supra*, 386 U.S. at page 24. (See *People v. Jennings* (2010) 50 Cal.4th 616, 652 [*Crawford* error does not require reversal of a conviction if it was harmless beyond a reasonable doubt]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674] [otherwise valid conviction should not be set aside for confrontation clause violations if, on the whole record, the constitutional error was harmless beyond a reasonable doubt].)

Any error herein was harmless beyond a reasonable doubt because Magee properly testified to her independent opinions based mostly on her own testing and expertise and was available for cross-examination. (See *People v. Lopez, supra*, 55 Cal.4th at p. 585.) There is no showing that the "missing" cross-examination of Yates would have elicited any evidence favorable to appellant. Additionally, the jurors were properly instructed that an opinion was only as good as the facts and reasons on which it was based, it was their duty to decide what weight to give any opinion expressed by Magee, and they could disregard any opinion they found to be unreasonable. (16RT 2804-2805.) It is presumed that the jurors followed the instruction, in the absence of any indication they were unwilling or unable to do so. (*People v. Lewis* (2008) 43 Cal.4th 415, 461; *People v. Taylor* (2001) 26 Cal.4th 1155, 1173-1174.)

Aside from the DNA evidence, overwhelming evidence supported appellant's conviction. As previously detailed in the Statement of Facts and Argument II, *ante*, appellant confessed to the rape and murder of Burger to his girlfriend. (14RT 2497-2499, 2507-2512, 2518, 2543-2554.) He also displayed consciousness of guilt in front of his mother. (14RT 2521; 15RT 2595-2596.) His confession was very detailed and consistent with the physical and forensic evidence found at the crime scene. In other words, Mooney's testimony about appellant's confession was very credible

and corroborated. Moreover, appellant did not dispute at trial that he was the perpetrator of the rape and murder of Burger.

Because of the overwhelming evidence of appellant's guilt, the exclusion of the reference to Yates' DNA report would not have changed the verdict. (*People v. Pearson* (2013) 56 Cal.4th 393, 463.) This claim must be rejected.

IV. THE DNA EVIDENCE WAS PROPERLY ADMITTED INTO EVIDENCE

Appellant contends the trial court erroneously admitted Yates's report under Evidence Code section 1271. (AOB 185-206.) This claim must be rejected. As previously discussed, Magee's testimony was properly admitted under *Williams* and this Court's recent jurisprudence. (See Arg. III, *ante*.) This is especially true since Yates's report was never admitted into evidence (the report itself would have been the business record, not the testifying technician's testimony). To the extent the trial court admitted the testimony under the business records exception to the hearsay rule, it is a case of "right ruling, wrong reason." (*People v. Jones* (2012) 54 Cal.4th 1, 50; *People v. Smithey* (1999) 20 Cal.4th 936, 972 ["'a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'"].) Thus, this claim must be rejected.

V. THE TRIAL COURT PROPERLY DENIED THE CHALLENGE TO THE DNA EVIDENCE BECAUSE *KELLY*'S THIRD PRONG WAS MET; EVEN IF THE COURT ERRED, ANY ERROR WAS HARMLESS

Next, appellant claims the trial court erred in failing to strike the DNA evidence for its alleged failure to satisfy the third prong of the test set forth in *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*). (AOB 207-224.) The court

properly denied the challenge because *Kelly's* third prong was met based on the People's trial evidence. Even if the court erred, any error was harmless given the overwhelming evidence of appellant's guilt independent of the DNA evidence.

A. Underlying Facts

The prosecution filed a motion to admit DNA evidence. On December 12, 2002, appellant filed a motion to exclude all DNA evidence and testimony that had not been shown to be tested and interpreted according to generally accepted scientific procedures (*Kelly* prong three). (9CT 2422-2429.) In that motion, he requested that a *Kelly* prong three hearing be held concurrently with trial testimony and sought to be allowed to reserve the right to assert an objection to admissibility during trial. (9CT 2422-2423.)

On December 13, 2002, the court and the parties discussed the admission of the DNA evidence. (8RT 1286-1288.) The trial court indicated that it was troubled by the prosecution not calling the technician who completed the 1996 DNA testing. (8RT 1286.) The prosecution explained that it was common practice to have a representative from the lab testify, not the actual lab technician. (8RT 1286-1287.) The representative would testify to the procedures or protocols in place for DNA testing and that the proper procedures were followed in this case. (8RT 1288.) The trial court ruled as follows: "All right. I'm going to deny the People's motion and require that they call as witnesses the technicians who performed the extraction and testify as to their manner and method and how they did it." (*Ibid.*)

On December 20, 2002, the People filed a motion to reconsider the trial court's ruling on presentation of DNA evidence. (9CT 2481-2484.) After hearing additional argument by the parties, the trial court reversed its previous decision, and held that the expert representative may testify. (8RT

1387.) As shown in more detail below, Magee then testified regarding the DNA results as well as the procedures utilized in obtaining the results. (15RT 2692-2716, 2719-2728.) During Magee's testimony, appellant renewed his objections to the introduction of the evidence under *Kelly*. (15RT 2698.)

B. Applicable Law

Kelly established a three-prong test that governs the admissibility of scientific evidence in California:

> Admissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) the reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]

(*People v. Kelly*, *supra*, 17 Cal.3d at pp. 30-32.) In contrast to the general acceptance inquiry, the third-prong inquiry is case-specific. "[I]t inquires into the matter of whether the procedures actually utilized in the case were in compliance with that methodology and technique, as generally accepted by the scientific community." (*People v. Venegas* (1998) 18 Cal.4th 78, 81; see also *People v. Roybal* (1998) 19 Cal.4th 481, 504, 505.)

> The *Kelly* third-prong inquiry involves further scrutiny of a methodology or technique that has already passed muster under the central first prong of the *Kelly* test, in that general acceptance of its validity by the relevant scientific community has been established. The issue of the inquiry is whether the procedures utilized in the case at hand complied with that technique. Proof of that compliance does not necessitate expert testimony anew from a member of the relevant scientific community directed at evaluating the technique's validity or acceptance in that community. It does, however, require that the testifying expert understand the technique and its underlying theory, and be thoroughly familiar with the procedures that were in fact used in the case at bar to implement the technique.

(*People v. Venegas*, *supra*, 18 Cal.4th at p. 81.)

The third-prong hearing has been described as a "limited" showing. (*People v. Barney* (1992) 8 Cal.App.4th 798, 825 ["All that is necessary in the limited third-prong hearing is a foundational showing that correct scientific procedures were used"].) Moreover, *Kelly*'s third-prong inquiry does not "cover all derelictions in following the prescribed scientific procedures" such as "mislabeling, mixing the wrong ingredients, or failing to follow routine precautions against contamination." (*People v. Venegas*, *supra*, 18 Cal.4th at p. 81.) Such missteps "amount only to '[c]areless testing affect[ing] the weight of the evidence and not its admissibility.'" (*Ibid.*) Instead, the focus is on the correctness of the procedures that were used as opposed to the quality of the analyst's performance of those procedures. (*People v. Morganti* (1996) 43 Cal.App.4th 643, 667.)

On appeal, the trial court's determination that proper scientific procedures were used is reviewed for abuse of discretion. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 91.) In doing so, the appellate court "accept[s] the trial court's resolutions of credibility, choices of reasonable inferences, and factual determinations from conflicting substantial evidence." (*Ibid.*) Further, the erroneous admission of DNA analysis results under *Kelly* requires reversal only if it is reasonably probable the verdict would have been more favorable to the defendant in the absence of the error. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 93, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

C. The Court Properly Denied the Challenge Because *Kelly's* Third Prong Was Met Based on the People's Evidence

Appellant properly acknowledges (AOB 215) that the STR subtype of PCR methodology, the procedure on which Yates relied in her 1996 DNA test, is generally accepted in the scientific field. (See *People v. Nelson*

(2008) 43 Cal.4th 1242, 1258.) Appellant, however, contends the court's determination that the People's expert understood the technique and its underlying theory and was thoroughly familiar with the procedure used by Yates to implement the technique was error. (AOB 217-218, citing *People v. Venegas*, *supra*, 18 Cal.4th at p. 81.) This claim must be rejected.

After describing her extensive educational background (15RT 2692-2694, 2705), Magee testified that there were two methods used for forensic DNA typing, RFLP and PCR. Magee had used PCR testing in the past (15RT 2695), and she explained in detail the three steps involved in PCR testing. (15RT 2696-2697.) Magee was also thoroughly familiar with the three separate controls used by Cellmark to verify the testing was done properly. According to Magee,

> A control is a sample or a tube that is processed alongside the evidence in a case. And in the type of testing done at Cellmark, we use three different types of controls. The first is called a reagent blank or extraction control, and that is simply a tube that is set up during the DNA isolation process that contains all the chemicals used for the isolation of DNA but no sample is added. It is carried through the entire testing procedure and we would expect to see no results from that sample.
>
> The other two controls that we use relate to the PCR reaction. One of those is a negative control, and that contains all of the chemicals used for the PCR reaction, and again, we would expect to see a negative result.
>
> The other PCR control is called a positive control. It contains not only the chemicals used in the PCR reaction, but we add DNA of known type, and when that goes through the rest of the analysis, we look at what the types are, and the types have to be correct in order for the test to be valid.

(15RT 2701-2702.)

Magee further explained that when a PCR test was done, there were three possible results. The first was no result, which meant that no types were obtained from a sample. The second was an exclusion, which meant a

known sample profile does not match an unknown sample profile. The third possibility was a match or an inclusion, which occured when an unknown sample profile would match a known sample profile. (15RT 2702.) Cellmark took great precautions to eliminate contamination of a sample. In addition, there were controls in place to determine if any contamination had already occurred. (15RT 2703-2705.)

According to Magee, Cellmark employees followed specific written protocols when testing. The protocols covered everything from the receipt of evidence to the writing of the reports. (15RT 2706-2707.) These protocols were followed when Yates tested the vaginal wash. (15RT 2708.) Cellmark's records showed that on March 29, 1996, it received evidence labeled "Vaginal wash pellet Cynthia Burger" for purposes of extracting DNA. (15RT 2706-2707.) The records further showed that the vaginal wash pellet was separated into a sperm and nonsperm fraction or portion, that DNA was extracted from each, and that a DNA profile was obtained for each. (15RT 2707-2708.) Magee pointed out Yates was trained and qualified to perform the extraction, and entered notes as to the DNA extraction on the sample. (15RT 2709.) Magee also testified that the methodology approved by Cellmark and used by Yates was generally accepted by the scientific community in 1996 as well as at the time of trial. (15RT 2709-2710.)

Magee proceeded to discuss the importance of population frequencies in DNA typing. Magee then prepared the DNA report comparing appellant's DNA with that taken from Burger's vaginal wash. Further, Magee personally analyzed and compared the DNA profiles and concluded that the samples taken from Burger matched appellant. (15RT 2712-2713.)

Contrary to appellant's claim (AOB 217-218), the above evidence clearly reflects that Magee understood "the technique and its underlying theory, and [was] thoroughly familiar with the procedures that were in fact

used in the case at bar to implement the technique." (*People v. Venegas*, *supra*, 18 Cal.4th at p. 81.) Magee testified in detail to the same procedures that were followed by Yates back in 1996. (15RT 2708-2710, 2713.)

Moreover, appellant's claim is purely one of speculation. No evidence was presented at trial that Yates did not follow the correct procedures in performing the tests or that there were any problems with the procedures. In fact, appellant did not present any evidence whatsoever to challenge the 1996 test and did not question Magee about the issue. (15RT 2719-2728.) Ultimately, any deficiency in not having Yates testify went to the weight of the evidence.

The foregoing evidence reflects there was no disagreement among the parties about the testing used in the instant case. In fact, no evidence was presented regarding any disagreement with regards to anything Cellmark did during testing. The evidence before the trial court established the People's expert (Magee) understood the pertinent DNA technique and its underlying theory, reviewed the DNA testing performed in 1996, and was thoroughly familiar with the procedures used in this case both in 1996 and 2000 to implement the technique. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 81.) "All that is necessary in the limited third-prong hearing is a foundational showing that correct scientific procedures were used." (*People v. Barney*, *supra*, 8 Cal.App.4th at p. 825.) The People met that foundational showing with Magee's trial testimony.

In light of the foregoing evidence, appellant's claim must be rejected.

D. Even If the Court Erred, Any Error Was Harmless

Even if the court erred, any error was harmless given the overwhelming evidence of appellant's guilt. As previously discussed, appellant confessed to Mooney and his mother that he raped and murdered Burger. His confession was consistent with the forensic evidence and the circumstances of the crime, which corroborated Mooney's testimony.

Accordingly, based on the foregoing, even if the trial court erred, any error was harmless. (See Statement of Facts and Arg. II-III, *ante*.) Despite appellant's claim to the contrary (AOB 223-224), it is not reasonably probable he would have received a more favorable result if the court had struck that evidence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Venegas*, *supra*, 18 Cal.4th at p. 93.) Hence, appellant's claim must be rejected.

VI. THE TRIAL COURT PROPERLY ADMITTED REBUTTAL EVIDENCE OF APPELLANT'S CORRESPONDENCE WITH A LEADER OF THE SKINHEAD DOGS

Appellant contends that the trial court erred when it admitted evidence that he was corresponding with Justin Merriman, who was once a leader of the Skinhead Dogs, a racist gang in Ventura County. Specifically, appellant contends the evidence was irrelevant, prejudicial, and infringed on his right to freedom of association. (AOB 224-279.) Appellant's contention, however, must be rejected as the trial court properly admitted the evidence.

A. Applicable Facts

During the presentation of defense evidence at the penalty phase, defense counsel produced testimony that appellant could live out a life term in prison in an obedient and cooperative manner. Not only was testimony presented that appellant was respectful and obedient to prison officials and held down an important job on the fire crew, a penology expert testified that appellant was the "crème de la crème" of the prison inmate population and that he could be an obedient and peaceful inmate for a life term. (21RT 3674-3698, 3746-3747, 3757-3758.) In anticipation that the prosecution would introduce evidence that appellant was corresponding through the mail with Justin Merriman, a one-time leader of the Skinhead Dogs,

defense counsel asked for an offer of proof prior to any rebuttal testimony. (21RT 3808.) The prosecution argued that evidence would be offered to rebut appellant's penology expert's testimony. Specifically, testimony would be presented that appellant had received "White pride" tattoos since he had been incarcerated. In addition, testimony would be presented that appellant was now communicating by mail with Merriman, and they addressed each other as "homey." Finally, the prosecutor indicated that he wanted to introduce the letters between the two men. (21RT 3808-3809.)

Defense counsel objected that the admission of the letters would be prejudicial and would violated appellant's right to a fair trial. (21RT 3809-3810.) The trial court ruled the contents of the letters were inadmissible, but the fact that the two communicated and referred to each other by "homie" was admissible. The court stated, "I think it's classic rebuttal because you did call an expert to testify [appellant] would adapt well to life in prison." (21RT 3811.)

Thereafter, former police investigator Dennis Fitzgerald testified that appellant had been in custody, either in the county jail or state prison system since his arrest in 1996 for breaking into a change machine. At the time of appellant's incarceration in 1996, he did not have any tattoos. Based on that evidence, Fitzgerald opined that appellant received his "White pride" tattoo while he was custody. (21RT 3813-3814.) In addition, Fitzgerald testified that he had previously investigated Justin Merriman, who was once a leader of a Ventura County gang called the Skinhead Dogs. The Skinhead Dogs embraced a White-supremacist philosophy. (21RT 3814-3815.) While both Merriman and appellant were in prison, Merriman wrote a letter to appellant. Merriman referred to appellant as "brother." He ended the letter with valediction, "With respect." (21RT 3817-3818.) Two months later, Merriman sent another letter to appellant. Merriman referred to appellant as "Big Mike" and

"brother." (21RT 3818-3819.) Appellant wrote back to Merriman and referred to Merriman as his "homie." Appellant ended the letter with "Long respects." (21RT 3817.)

B. The Evidence Was Properly Admitted During Rebuttal

Rebuttal evidence is relevant and admissible if it tends to disprove a fact of consequence on which the defendant has introduced evidence. (*People v. Loker* (2008) 44 Cal.4th 691, 709.) The scope of proper rebuttal depends on "the breadth and generality of the direct evidence." (*Ibid.*) "[E]vidence presented or argued as rebuttal must relate directly to a particular incident or character trait [the] defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24.) When a defendant places his character at issue during the penalty phase of a capital trial, the prosecution may respond by introducing character evidence to undermine the defendant's claim that his good character weighs in favor of mercy and to present a more balanced picture of the defendant's personality. (*People v. Loker*, *supra*, 44 Cal.4th at p. 709.) The trial court has broad discretion to determine the admissibility of rebuttal evidence and, absent palpable abuse, an appellate court may not disturb the trial court's exercise of that discretion. (*People v. Gurule* (2002) 28 Cal.4th 557, 656.)

Here, the trial court did not abuse its discretion in determining that Fitzgerald's testimony was admissible rebuttal evidence. As noted above, during the penalty phase, appellant introduced evidence regarding how he had respected and obeyed prison officials, and held down an important job on the fire crew. In addition, a penology expert testified that appellant was the "crème de la crème" of the prison inmate population and that he could be a obedient and peaceful inmate for a life term. (21RT 3674-3698, 3746-3747, 3757-3758.)

The trial court reasonably found that, to counter this evidence and to present a more balanced picture of appellant's personality, the prosecution

could introduce through Fitzgerald's testimony evidence that, while incarcerated, appellant had been communicating with Merriman, a member of a Ventura County gang called the Skinhead Dogs. In addition, in the three letters that were exchanged, the two referred to each other in endearing terms that indicated a close relationship and respect for each other. Thus, appellant's relationship with Merriman, in addition to getting White supremacist tattoos, tended to show that appellant would not be the ideal inmate he portrayed. In other words, the tattoo and Merriman evidence raised a reasonable inference that appellant was not going to be an ideal inmate because he was actively involving himself with prison gang members and racial intolerance.

The closing argument of defendant's counsel at the penalty phase reinforces this conclusion. Counsel argued that "some of the most significant accomplishments that [appellant] ever achieved happened in prison." (22RT 3946.) Counsel explained:

> He completed training in fire fighting, and then he was certified to actually fight forest fires.
>
> And then he was certified to operate a chain saw, and he became first saw on Captain Bailey's crew and fought the Catalina Goat fire. And he did well and he demonstrated leadership abilities and he was the first saw and he was a hard worker.

(*Ibid.*) To reinforce his argument, counsel stressed that the prosecution had offered no evidence appellant was involved in any sort of gang. Thus, Fitzgerald's testimony enabled the prosecution to counter appellant's argument for mercy based on his positive prison performance. On this record, the trial court did not abuse its discretion in admitting Fitzgerald's testimony, since the rebuttal evidence had a probative value that was not substantially outweighed by any sort of undue prejudice, as shown below.

Next, appellant contends that the trial court erred by admitting the words "homie" and "brother," and the phrase "with respect" because they

were all inadmissible hearsay. (AOB 258-262.) Appellant forfeited any objection by failing to interpose a timely and specific hearsay objection in the trial court. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Wheeler* (1992) 4 Cal.4th 284, 300.) Appellant only objected that the admission of the letters would be prejudicial and would violated his right to a fair trial. (21RT 3809-3810.) Appellant never specifically raised a hearsay objection. In addition, when the trial court ruled the prosecutor could reference the word "homie" and the salutations, appellant merely said that he objected to it and nothing else. (21RT 3812-3813.) Appellant's reliance on the futility exception (AOB 258) to forfeiture (*People v. McDermott* (2002) 28 Cal.4th 946, 1001–1002; *People v. Hill* (1998) 17 Cal.4th 800, 820–822) is unavailing. The trial court willingly entertained and even invited objections to its evidentiary rulings (21RT 3809). (See *People v. Redd* (2010) 48 Cal.4th 691, 730, fn. 19.) Appellant forfeited the right to raise this claim.

In any event, this claim has no merit. Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) For purposes of the hearsay rule, a "[s]tatement" is defined as an "oral or written verbal expression" or "nonverbal conduct of a person intended . . . as a substitute for oral or written verbal expression." (Evid. Code, § 225; *People v. Lewis* (2008) 43 Cal.4th 415, 497–498.) Hearsay is not admissible unless it qualifies under some exception to the hearsay rule. (Evid.Code, § 1200, subd. (b); *People v. Lewis*, *supra*, at pp. 497–498.) A statement is not hearsay if it is relevant to an issue in the case " 'merely because the words were spoken . . . , and irrespective of the truth or falsity of any assertions contained in the statement." (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068; *People v. Smith* (2009) 179 Cal.App.4th 986, 1003.) Here, the words and salutation

were not offered for the truth of the matter asserted, that is, to prove appellant and Merriman were actually "brothers" and "homies." Instead, they were offered as rebuttal evidence to establish that appellant was communicating or establishing a relationship with another inmate who was a gang member and the this relationship tended to show appellant was not going to be the model prisoner he said he was. Even if the words and salutation were arguably hearsay, this evidence was admissible under the state of mind exception to the hearsay rule, as it was relevant to show appellant's intent to establish a relationship with a reputed White supremacist gang member while in prison. (See Evid. Code, § 1250.) Accordingly, this claim must also be rejected.

Next, appellant contends that admission of his association with Merriman was more prejudicial than probative under Evidence Code section 352. (AOB 262-271.) As previously provided, Evidence Code section 352 gives the trial court the discretion to exclude evidence that is otherwise admissible if the court determines that the probative value of the evidence is "substantially outweighed" by the probability that its admission will "create substantial danger of undue prejudice." (Evid. Code, § 352.) The trial court's ruling on a section 352 objection "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Appellant has not made the appropriate showing here as the trial court did not act in an arbitrary or capricious manner. The trial court entertained defense counsel's objections to the admission of the evidence. In fact, the trial court properly limited the admission of appellant's relationship with Merriman to the fact that the two had written to each other and referred to each other by friendly names. The trial court reasonably found that this

information was probative. (21RT 3808-3811.) As discussed above, this evidence was very relevant and admissible rebuttal evidence. As the trial court stated, during the penalty phase, appellant's relationship with Merriman was "classic rebuttal because [appellant] did call an expert to testify [he] would adapt well to life in prison. (21RT 3811.) Thus, appellant's relationship with Merriman tended to show that appellant would not be the ideal inmate he portrayed.

Furthermore, the admitted evidence was not of the type to "'arouse the emotions of the jurors.'" (*People v. Cudjo*, *supra*, 6 Cal.4th at p. 610, quoting *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1016.) There was nothing inflammatory about the introduction of the evidence. The trial court limited admission of the evidence to include only that they wrote each other, and they used two friendly terms. The testimony was very short, did not mention any emotional or inflammatory matters, did not mention that appellant was a member of the Skinhead Dogs, and did not imply appellant was guilty by association of any crime or misconduct. Thus, the evidence was more probative than prejudicial. Appellant's claim must be rejected.

C. The First Amendment claim has been forfeited and lacks merit

Citing *Scales v. United States* (1961) 367 U.S. 203, 228-230 [81 S.Ct. 1469, 6 L.Ed.2d 782], appellant asserts that the prosecution used this testimony to prove him "guilty by association," in violation of his First Amendment right to freedom of association. (AOB 233-257.) As appellant concedes (AOB 233), he did not object on freedom of association grounds in the trial court. Therefore, this contention is forfeited because appellant did not raise this distinct claim below. (*People v. Ervine* (2009) 47 Cal.4th 745, 783.)

In any event, appellant's claim is without merit. A capital defendant is entitled to introduce any relevant mitigating evidence that he proffers in

support of a sentence less than death. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 114 [102 S.Ct. 869, 876, 71 L.Ed.2d 1]; *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973]. But just as the defendant has the right to introduce any sort of relevant mitigating evidence, the State is entitled to rebut that evidence with proof of its own. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720] ["the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in"] (internal quotation marks omitted).)

Indeed, the United States Supreme Court has permitted the admission of evidence of a defendant's beliefs and associations. (See *United States v. Abel* (1984) 469 U.S. 45, 54 [105 S.Ct. 465, 83 L.Ed.2d 450].) In *Abel*, the Supreme Court held the prosecution could impeach a defense witness with evidence that the witness and defendant were both members of the Aryan Brotherhood, and, as such, were sworn to lie for each other. (*Id.* at pp. 54-55.) In so holding, the Supreme Court stated: "Whatever First Amendment associational rights an inmate may have to join a prison group, those rights were not implicated by [introduction of such evidence]." (*Id.* at p. 53, fn. 2.) Similarly, here, there was no constitutional violation. As previously discussed, the trial court properly admitted the testimony to impeach witness testimony that appellant could serve out a peaceful term of life in prison. The evidence was not presented to prove any "guilt by association" as to any crime or misconduct, but as circumstantial evidence that appellant would not be an ideal inmate because he was already involved with gang members and displaying racist prison tattoos. Accordingly, this claim must be rejected. (*Id.* at p. 54 ["Assessing the probative value of common membership in any particular group, and weighing any factors counseling against admissibility is a matter first for the [trial] court's sound judgment . . . and ultimately, if the evidence is admitted, for the trier of fact."].)

Appellant relies upon *Dawson v. Delaware* (1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309], to support his contention that his First Amendment rights were violated. (AOB 252-257). In *Dawson*, the defendant was convicted of first degree murder. Both the defendant and his victim were White. Before the penalty phase began, the prosecution gave notice that it intended to call an expert witness to testify about the origin and nature of an organization called the Aryan Brotherhood. The prosecution also intended to introduce evidence that the defendant had the words "Aryan Brotherhood" tattooed on his hand and had a number of swastikas tattooed on his back, and also that the defendant had painted a swastika on the wall of his prison cell. (*Dawson v. Delaware*, *supra*, 503 U.S. at pp. 161-62, 166.) In order to preclude the testimony of the state's expert, the defendant agreed that, in lieu of that testimony, the prosecution could submit the following stipulation to the jury: "'The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.'" (*Id.* at p. 162.)

During the penalty phase, the prosecution read the stipulation to the jury and also introduced evidence of the defendant's "Aryan Brotherhood" tattoo. However, the trial court excluded all the prosecution's swastika evidence. The prosecution introduced no other evidence that linked the defendant's Aryan Brotherhood membership to any conduct on the defendant's part or that demonstrated the specific beliefs of the Delaware prison branch of the Aryan Brotherhood. (*Id.* at pp. 162, 165-67.) At the conclusion of the penalty phase, the jury recommended the death penalty and the trial court imposed it. The Delaware Supreme Court affirmed. (*Id.* at 163.) The United States Supreme Court vacated and reversed the ruling, holding that "[the defendant]'s First Amendment rights were violated by

the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than [the defendant]'s abstract beliefs." (*Id.* at p. 167.)

Dawson is distinguishable from the instant case. In *Dawson*, the Supreme Court specifically framed the issue before it as "whether the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding." (*Id.* at p. 160.) Throughout its opinion, the Court emphasized that the Aryan Brotherhood evidence, standing alone, was not relevant to any other issue before the jury. The Court stated:

> "Even if the Delaware group to which [the defendant] allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim. Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance. In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future. But the inference which the jury was invited to draw in this case tended to prove nothing more than the abstract beliefs of the Delaware chapter [of the Aryan Brotherhood].

(*Id.* at p. 166.) The Court concluded that, because the prosecution introduced no evidence that made the defendant's membership in the Aryan Brotherhood relevant, the First Amendment "prevent[ed] Delaware from employing evidence of a defendant's abstract beliefs at a sentencing hearing

when those beliefs ha[d] no bearing on the issue being tried." (*Id.* at p. 168.)

As is clear from the above-quoted passages from *Dawson*, the admission in a death-penalty proceeding of evidence that concerns a defendant's belief in White supremacy does not violate the First Amendment if such evidence is relevant to the determination of an issue before the jury. Appellant argues that, because his beliefs had nothing to do with the murder of Burger, evidence concerning those beliefs was not relevant during the penalty phase of his trial. (AOB 256-257.) That argument is incorrect because, even under *Dawson*, the admissibility of the type of evidence at issue here is not limited merely to its relevance to a defendant's guilt of the charged crime. Rather, the evidence also may be admissible if it is relevant "to help prove any aggravating circumstance." (*Id.* at p. 166.)

As this Court has stated before, "[T]he prosecutor may not present expert evidence of future dangerousness as an aggravating factor, but he may argue from the defendant's past conduct, as indicated in the record, that the defendant will be a danger in prison. [Citations.]" (*People v. Tulley* (2012) 54 Cal.4th 952, 1054, quoting *People v. Zambrano* 92007) 41 Cal.4th 1082, 1179.) The evidence herein concerning appellant's specific, hostile beliefs, and his relationship with Merriman were relevant to the jury's determination of whether appellant will be a danger in prison, a question appellant himself put into play.

The situation here is different, therefore, than that before the Supreme Court in *Dawson*. In that case, the prosecution introduced abstract evidence concerning the Aryan Brotherhood that was not relevant to any issue before the jury. In contrast, herein, the prosecution presented evidence of appellant's racist tattoos and association with a racist gang that was probative of his threat to be dangerous in prison as opposed to an

"ideal" inmate. Consequently, under *Dawson*, the trial court's admission of the evidence at issue here did not violate appellant's First Amendment rights.

Thus, this claim must be rejected.

D. Any Error In Admitting The Rebuttal Evidence Was Harmless

Error in the admission of aggravating or rebuttal penalty-phase evidence is subject to harmless error review. (*People v. Martinez* (2003) 31 Cal.4th 673, 694-695; *People v. Pinholster* (1992) 1 Cal.4th 865, 962 [noting that admission of irrelevant aggravating evidence is rarely reversible error].) The standard is whether there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Wright* (1990) 52 Cal.3d 367, 428; accord *People v. Avena* (1996) 13 Cal.4th 394, 439.) In the instant case, there is no such reasonable possibility because the challenged evidence was not a significant part of the penalty-phase case and the penalty verdict was supported by overwhelming evidence of aggravation.

Here, the challenged evidence was not a significant part of the People's case. In rebuttal, the prosecution offered only the brief testimony of Fitzgerald (totaling five reporter's transcript pages, including cross-examination) as to appellant's relationship with Merriman. The prosecutor's argument focused mainly on the defense penalty-phase evidence and the evidence adduced at trial. The prosecutor spent only three paragraphs discussing appellant's contact with Merriman compared with 48 pages of argument in total. (21RT 3861-3909.) In addition, the challenged evidence was just part of other rebuttal evidence, which included appellant's "White pride" tattoo. The letter evidence was not more inflammatory or prejudicial than the tattoo, which was not challenged during trial or on appeal.

Second, the properly admitted aggravating evidence in this case was simply overwhelming. From that evidence, the jury found that appellant was consistently involved in a pattern of violence and disregard for the lives of other people. Fitzgerald's testimony about the letters appellant exchanged with Merriman paled in comparison to the seriousness and excessive violence of the charged offense which also was supported by overwhelming evidence, and to other factors in aggravation. As appellant's counsel emphasized to the jury during cross-examination and closing argument, there was no evidence appellant was a gang member. Thus, the jurors no doubt viewed the letter evidence the same way as appellant's counsel characterized it in closing argument. (See *People v. Hart* (1999) 20 Cal.4th 546, 653 [any error in admitting evidence of unwanted advances made by capital murder defendant to his sister-in-law for purposes of rebuttal during penalty phase, after defendant offered character evidence suggesting that he was a good and loving husband, was not prejudicial, where defendant stood convicted of committing one brutal murder, in addition to multiple sexual assaults, and guilt phase evidence overwhelmingly established defendant's culpability].)

Thus, any error in the admission of the rebuttal evidence was harmless. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 962 [admission of irrelevant aggravating evidence rarely reversible error].)

VII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL

Appellant contends that the trial court erred when it denied his motion for a mistrial. Specifically, appellant contends that because the prosecution committed misconduct when he allegedly asked Fitzgerald whether Merriman had offered to send appellant a "manual from San Quentin," he should have been granted a new trial. (280-301.) Appellant's contention,

however, must be rejected because the trial court properly exercised its discretion when it denied his motion for a mistrial.

A. Underlying Facts

As previously discussed, over appellant's objection, the prosecution sought to introduce three letters where appellant had communicated with Merriman. The trial court ruled the contents of the letters were inadmissible, but the fact that the two communicated and referred to each other by "homie" was admissible. (21RT 3811.) While questioning Fitzgerald, the prosecutor asked Fitzgerald, "And does he also offer to send him a manual from San Quentin?" To which Fitzgerald replied, "Yes, he does." (21RT 3818.) Defense counsel immediately objected and moved to strike the testimony. The trial court sustained the objection, struck the answer, and admonished the jury to disregard the question. (*Ibid.*)

Immediately following the cross-examination of Fitzgerald, appellant moved for a mistrial based upon the prosecutor's misconduct. (21RT 3821.) During argument on the issue, the prosecutor admitted that he had committed an error, but that it was not prejudicial. He explained that any mention of the prison "pales" in comparison to the fact that appellant might be a Skinhead Dog member. (21RT 3824.) Appellant argued that reference to the manual could have had any of several meanings, including how to get into a prison gang. (21RT 3825.) The trial court noted that the issue was whether appellant was prejudiced by the asking of the question. The court ruled,

> I sure don't like it, and I can understand Mr. Lipson's concern completely. But it does seem to the Court the jury's already aware that at a minimum the defendant's going to spend the rest of his life in prison without possibility of parole.
>
> And I do believe and give credence to the theory that -- and I think the reality that the jurors are not foolish, stupid idiots but

> do indeed follow the law as the Court instructs and will do so in this case.
>
> So I don't find that the prejudicial effect, if any, inures to [appellant]. I believe the jury will comply with the Court's instructions.

(21RT 3826.)

B. The Trial Court Properly Denied Appellant's Motion for a Mistrial

> A trial court should grant a motion for mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, that is, if it is apprised of prejudice that it judges incurable by admonition or instruction. Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion.

(*People v. Avila* (2006) 38 Cal.4th 491, 573, internal quotation marks omitted; accord, *People v. Dement* (2011) 53 Cal.4th 1, 39–40.) No such manifest and unmistakable abuse of discretion clearly appears here.

The court did not abuse its discretion in denying appellant's mistrial motion. There is no showing the prosecutor's conduct prevented appellant from having a fair trial. While it is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Silva* (2001) 25 Cal.4th 345, 373), a defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839; *People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

Here, the alleged misconduct was slight at best and was not sufficient to reduce appellant's sentence to life without the possibility of parole under the circumstances. The prosecutor asked Fitzgerald one improper question

in what was more than five pages of questioning. The mere mention of San Quentin or any prison for that matter was hardly prejudicial since appellant was going to prison no matter what. Moreover, the trial court immediately struck the question and answer and admonished the jury to disregard them. (21RT 3818.) The court later reminded the jury not to consider the stricken evidence for any purpose. (21RT 3822-3823.) Absent any indication to the contrary, it must be presumed the jury followed the trial court's admonitions and disregarded the question and answer. (See *People v. Bennett* (2009) 45 Cal.4th 577, 595 ["When a trial court sustains defense objections and admonishes the jury to disregard the comments, we assume the jury followed the admonition and that prejudice was therefore avoided."].) In light of the admonition and the aggravating evidence, the alleged misconduct was cured by the trial court and ultimately was harmless. This claim must be rejected, as the trial court acted within its discretion in denying the mistrial motion.

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

In *Payne v. Tennessee, supra*, 501 U.S. at pp. 826-827, the United States Supreme Court held the Eighth Amendment erects no bar to the admission of evidence about the impact of the murder on the victim's family. As outlined earlier, the prosecution presented such evidence at appellant's penalty phase. (See Statement of Facts, *ante*.)

Appellant contends that a portion of the victim impact evidence admitted in this case was unduly prejudicial and inflammatory (AOB 302-322), and that the scope of victim impact evidence must be limited to the facts or circumstances known to appellant when he committed his capital crime (AOB 322-337). No reversal is required here because no error occurred in the admission of the victim impact evidence.

A. Applicable Law

In *Payne v. Tennessee*, *supra*, 501 U.S. at page 825, the nation's high court overruled *Booth v. Maryland* (1987) 482 U.S. 496, 509 [107 S.Ct. 2529, 96 L.Ed.2d 440], insofar as *Booth* had barred states from admitting evidence of the "specific harm" the defendant had caused by his or her capital crime, namely, the loss to society and to the victim's family of a "unique" individual. The *Payne* court opined that the prosecution has a legitimate interest in counteracting the relevant mitigating evidence introduced by the defendant. (501 U.S. at p. 825.) The federal Constitution bars victim impact evidence only if it is "so unduly prejudicial" as to render the trial "fundamentally unfair" in violation of the defendant's due process rights. (*Ibid.*)

In *People v. Edwards* (1991) 54 Cal.3d 787, 835-836, this Court construed state law consistent with the principles of *Payne*, and held that unless the victim impact evidence invites a purely irrational response from the jury the devastating effects of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a). (Accord, *People v. Sanders* (1995) 11 Cal.4th 475, 549-550 [*Payne* only encompasses evidence that logically shows the harm caused by the defendant and does not mean there are no limits on emotional evidence and argument].) The *Edwards* court directed trial courts to weigh the probative value of the victim impact evidence against its prejudicial effect. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.)

Appellant calls *Edwards* "so stretched it has reached its breaking point" and invites this Court to reconsider it. (AOB 322-324.) As *Payne v. Tennessee* makes clear, the loss to society and to a victim's family from the defendant's murder of a unique individual is a "specific harm" caused by the defendant and is something for which the defendant is personally responsible and something that is related to his or her moral culpability.

States "may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." (501 U.S. at p. 825.) In any event, as appellant concedes (AOB 322), this Court has "repeatedly rejected this argument." (*People v. Jones* (2012) 54 Cal.4th 1; *People v. Carrington* (2009) 47 Cal.4th 145, 196-197.) Appellant has provided no reasonable basis for this Court to revisit this issue. Therefore, the claim must be rejected.

Appellant also contends that the scope of victim impact evidence must be limited to the facts or circumstances known to him when he committed his capital crime. (AOB 322-337.) However, this Court has specifically rejected the claim that such evidence is limited to matters within the defendant's knowledge. (*People v. McKinnon* (2011) 52 Cal.4th 610, 690; *People v. Carrington*, *supra*, 47 Cal.4th at pp. 196-197; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.) This claim must be rejected once again.

B. The Trial Court Acted Well Within Its Discretion In Admitting The Victim Impact Evidence

Appellant claims the victim impact evidence was more prejudicial than probative. Specifically, he contends some of the victim impact testimony "crossed the boundary set by *Payne*" (AOB 306-322), the trial court should have granted the defense request that only one family member testify (AOB 330-332), and the trial court failed to curb cumulative, gutrenching testimony (AOB 333-337).

First of all, this Court previously has rejected the argument "that victim impact evidence must be confined to what is provided by a single witness. (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 690; *People v. Zamudio* (2008) 43 Cal.4th 327, 364.) Thus, that claim must be rejected.

Second, the type of victim impact evidence admitted herein fell within the scope of *Payne*, *Edwards*, and their progeny, as the prosecution was

entitled to present the full impact of the victim's death on her survivors. (See, e.g., *People v. Scott* (2011) 52 Cal.4th 452, 466-467, 494-495 [victim's father testified he could not stop thinking about what the victim endured before she died; victim's sister, brother and brother-in-law testified to their residual fear following the murder]; *People v. Booker* (2011) 51 Cal.4th 141, 193 [testimony by victim's mother about her suicide attempt and hospitalizations "was relevant victim impact evidence"]; *People v. Cowan* (2010) 50 Cal.4th 401, 485 [testimony by victims' daughter and granddaughter about what they imagined the last moments of victims' life were like "was relevant to the witnesses' own states of mind and the effect that the murders had upon them personally, and therefore was permissible victim impact testimony"]; *People v. Ervine* (2009) 47 Cal.4th 745, 793 [victim impact testimony is not limited "to expressions of grief" but "encompasses the spectrum of human responses, including anger and aggressiveness [citation], fear [citation], and an inability to work [citation]"].) Similarly, herein, Burger's family testified to the effect her murder had upon them.

Appellant contends that portions of Mrs. Burger's and Woodward's testimony crossed the boundary set by *Payne*. (AOB 306-322.) Specifically, appellant contends that the witnesses improperly characterized him (AOB 308), improperly discussed the crime (AOB 309-311), improperly discussed Burger's life difficulties (AOB 315-318), improperly discussed Burger's religious convictions (AOB 318-320), and improperly discussed their connection with Burger (AOB 320-322.) Appellant did not object to Mrs. Burger's or Woodward's testimony on any of these grounds below. Appellant therefore forfeited his right to complain on appeal that their testimony was improper. (See *People v. Cowen* (2010) 50 Cal.4th 401, 485; *People v. Pollock* (2004) 32 Cal.4th 1153, 1181.)

Nevertheless, this testimony fell within the proper scope of *Payne* and *Edwards*. First, Mrs. Burger's and Woodward's testimony did not constitute impermissible characterizations and opinions about the crime. (AOB 308-311.) Their testimony was relevant to the witnesses' own state of mind and the effect that the murders had upon them personally, and therefore was permissible victim impact testimony. (*People v. Cowen*, *supra*, 50 Cal.4th at p. 485; see *People v. Pollock*, *supra*, 32 Cal.4th at p. 1181 [testimony by son of murder victims that he imagined his parents must have suffered greatly during their final minutes was admissible to show the harm caused by the killings].) In addition, their testimony about religion (*People v. Pollock*, supra, 32 Cal.4th 1153, 1181 [Bible class evidence "relevant to demonstrate the direct effect of defendant's crime on persons close to victim"]), Burger's difficult life beginning at birth (*People v. Dykes* (2009) 46 Cal.4th 731, 784 [evidence that humanizes victim admissible]), and Mrs. Burger's and Woodward's psychic connection with Burger all fell within the proper scope of *Payne* and *Edwards*. To the extent any of this testimony was improper, as discussed below, it was harmless beyond a reasonable doubt.

There is also no merit to appellant's claim that the testimony of the three members of Burger's family should have been excluded as "cumulative" and "repetitive." Victim impact evidence is commonly provided by several family members, colleagues, or friends. Here, each witness was entitled to provide his or her own personal experience about the victim, finding out about her death, and the impact of her murder. (*People v. Scott*, *supra*, 52 Cal.4th at p. 494.)

Indeed, the victim impact evidence was far from being unduly inflammatory and prejudicial, "[t]he evidence admitted here was 'typical' of the victim impact evidence '[this Court] routinely [has] allowed.'

[Citation.]" (*People v. Scott*, *supra*, 52 Cal.4th at p. 494.) This claim must be rejected.

C. Any Error In Admitting Victim Impact Evidence Was Harmless

In any event, any error in the admission of the victim impact evidence was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) As discussed above, the victim impact evidence presented in this case was not overly prejudicial as it involved the type of testimony expected from a murder victim's family members. Moreover, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence in aggravation. (*People v. Russell* (2010) 50 Cal.4th 1228, 1265.) Aside from the despicable nature of the charged murder, evidence was presented that appellant suffered two prior convictions (17RT 3042-3043, 3044-3048), and that he repeatedly engaged in violence against other persons throughout his life (18RT 3176-3177, 3190-3198, 3208-3215, 3215-3217, 3219-3221, 3286-3289, 3295-3298).

IX. SECTION 190.3, SUBDIVISION (B) DOES NOT VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Section 190.3, subdivison (b) provides that, in determining whether to sentence a defendant to death or life imprisonment without the possibility of parole, the jury may consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Appellant contends that the use of an unadjudicated act involving limited use of force as an aggravating factor violates the Eighth Amendment ban on cruel and unusual punishments. (AOB 347-393.) This Court has routinely rejected this claim and should continue to do so. (See *People v. Bivert* (2011) 52 Cal.4th 96, 122 [admission of prior juvenile conduct pursuant to

section 190.3, subdivision (b), does not violate prohibition against cruel and unusual conduct]; *People v. Tafoya* (2007) 42 Cal.4th 147, 198; *People v. Anderson* (2001) 25 Cal.4th 543, 584; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1024.) "Evidence of prior violent conduct is admitted under Penal Code section 190.3, factor (b), 'to enable the jury to make an individualized assessment of the character and history of the defendant to determine the nature of the punishment to be imposed.'" (*People v. Davis* (1995) 10 Cal.4th 463, 544, citation omitted.) So long as the penalty phase jurors are not materially misled about the nature and degree of the defendant's individual culpability, they are entitled to know about other incidents involving the use of force for which the defendant is shown to be criminally liable beyond a reasonable doubt. (*People v. Ray* (1996) 13 Cal.4th 313, 351.) Thus, there was no constitutional violation.

X. THE ADMISSION OF UNADJUDICATED ACTS DOES NOT RENDER THE PENALTY PHASE UNRELIABLE

Next, appellant contends admission of the unadjudicated acts evidence violated the Eighth Amendment's requirement of "heightened reliability" in capital cases. (AOB 394-396.) This Court has rejected this claim and should continue to do so. (*People v. Tulley* (2012) 54 Cal.4th 952, 1029-1030; *People v. Jenkins* (2000) 22 Cal.4th 900, 1054 [rejecting the defendant's claim that "use of evidence of unadjudicated criminal activity in aggravation pursuant to section 190.3, factor (b), renders his death sentence unreliable and violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal Constitution"].) Clearly, the trial court did not err in submitting the evidence to the jury. Whether appellant's use of force was legally justified and the weight, if any, to be given to these incidents for purposes of the individualized assessment of his character and history were matters for the jury to decide in light of the instructions given to it. (*People v. Tulley, supra*, 54 Cal.4th at pp. 1029-1030.) Thus, there is no

violation of appellant's federal constitutional rights under the Eighth Amendment.

XI. CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Appellant contends California's death penalty scheme is unconstitutional for various reasons. (AOB 396-437.) However, as he concedes, this Court has previously rejected each of his claims (AOB 397) and respondent submits this Court should do so once again.

A. The California Sentencing Scheme Is Not Impermissibly Broad

Appellant contends that the California sentencing scheme "is so broad in its definitions . . . and so lacking in procedural safeguards" that it does not provide a "meaningful or reliable basis" for determining who is subject to capital punishment. (AOB 398-410.) Appellant's claims must be rejected.

1. Section 190.2 Is Not Impermissibly Broad

Appellant first contends his death penalty is invalid because section 190.2 is impermissibly broad. (AOB 398-407.) This Court has repeatedly rejected such arguments and should continue to do so. (*People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Snow* (2003) 30 Cal.4th 43, 126-127; *People v. Anderson*, *supra*, 25 Cal.4th at p. 601.)

2. Section 190.3, Subdivision (A), Is Not Being Applied In An Arbitrary Or Capricious Manner

Next, appellant contends that the "circumstances of the crime" factor in Penal Code section 190.3, subdivision (a), "has been applied in such a wanton and freakish manner that almost all features of every murder" have been used as "aggravating" factors by prosecutors, amounting to a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 407-410.) Once again, this Court has repeatedly rejected claims such as this. (See,

e.g., *People v. Elliot, supra,* 37 Cal.4th at p. 487; *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Turner* (2004) 34 Cal.4th 406, 438.) In doing so, this Court has noted that the "seemingly inconsistent range of circumstances" that "can be culled from death penalty decisions" shows "that each case is judged on its facts, each defendant on the particulars of his offense. Contrary to defendant's position, a statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances." (*People v. Brown* (2004) 33 Cal.4th 382, 401; *see also People v. Jenkins, supra,* 22 Cal.4th at pp. 1052-1053.) Therefore, appellant's claim must be rejected.

B. The Constitution Does Not Require That The Jury Find Any Aggravating Factors True Beyond A Reasonable Doubt Or Find That The Aggravating Factors Outweighed The Mitigating Factors Beyond A Reasonable Doubt

1. There is no constitutional requirement for findings beyond a reasonable doubt

Appellant contends his constitutional right to a jury determination beyond a reasonable doubt was violated because the jury was not instructed that it had to find any aggravating factors true beyond a reasonable doubt or that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt before deciding whether to impose the death penalty. Appellant further argues that recent decisions by the United States Supreme Court have rejected this Court's prior determinations on these issues. (AOB 410-413.) These claims are of no avail because they have all been rejected previously by this Court. (*People v. Elliot, supra,* 37 Cal.4th at p. 487; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Vieira* (2005) 35 Cal.4th 264, 300.) And as noted previously, the Supreme Court's decisions in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531,

159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], have not changed this Court's analysis on this issue. (See, e.g., *People v. Elliot, supra*, 37 Cal.4th at p. 487; *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Stitely, supra*, 35 Cal.4th at p. 573; *People v. Morrison, supra*, 34 Cal.4th at p. 730; *People v. Danks* (2004) 32 Cal.4th 269, 316 ["trial court did not err in failing to require the jury to make unanimous separate findings of the truth of specific aggravating evidence" and "[n]othing in *Ring* . . . or *Apprendi* . . . affects our conclusions in this regard"]; *People v. Crew* (2003) 31 Cal.4th 822, 860; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 275.) Thus, there was no error.

2. The Sixth, Eighth and Fourteenth Amendments Do Not Require the State to Bear the Burden of Persuasion at the Penalty Phase

This Court has specifically rejected appellant's claim (AOB 414-416) that the constitutional guarantees of equal protection and due process and Evidence Code section 520, which imposes the burden of proof on the prosecution, require the prosecution to bear the burden of persuasion in the penalty phase of a capital trial. (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1135-1136.) Because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of penalty. (*People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected. This Court should decline appellant's invitation to revisit this conclusion. Nor does the federal or state Constitution require an instruction explaining that there is no burden

of proof in the penalty phase. (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.)

3. The Constitution Does Not Require Unanimous Jury Findings

a. The Constitution Does Not Require That The Jury Find Any Aggravating Factors True Beyond A Reasonable Doubt Or Find That The Aggravating Factors Outweighed The Mitigating Factors Beyond A Reasonable Doubt

Appellant contends his constitutional right to a unanimous jury determination was violated because the jury was not instructed that it had to find any aggravating factors true unanimously. Appellant further argues that *Ring v. Arizona*, *supra*, 536 U.S. 584 mandates jury unanimity. (AOB 416-418.) These claims are of no avail because they have all been rejected previously by this Court. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Panah*, *supra*, 35 Cal.4th at p. 499; *People v. Vieira*, *supra*, 35 Cal.4th at p. 300.) And as noted previously, the Supreme Court's decision in *Ring v. Arizona* has not changed this Court's analysis on this issue. (See, e.g., *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Ward*, *supra*, 36 Cal.4th at pp. 221-222; *People v. Stitely*, *supra*, 35 Cal.4th at p. 573; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Danks* (2004) 32 Cal.4th 269, 316 ["trial court did not err in failing to require the jury to make unanimous separate findings of the truth of specific aggravating evidence" and "[n]othing in *Ring* . . . or *Apprendi* . . . affects our conclusions in this regard"].) Thus, there was no error.

b. The Use of Appellant's Unadjudicated Criminal Activity Did Not Violate His Constitutional Rights

Appellant also claims that instructing the jury that it could consider unadjudicated criminal activity as an aggravating factor violated his rights

to due process, trial by an impartial jury, a reliable determination of guilt, and equal protection. He also argues that the failure to require a unanimous jury finding on the unadjudicated acts of violence violated his right to a jury trial and absent a requirement of jury unanimity on the unadjudicated acts of violence, the instructions allowed jurors to impose the death penalty on unreliable factual findings that were never deliberated, debated or discussed. (AOB 419-422.)

"This claim, too, is one this Court has rejected many times. The jury may properly consider evidence of unadjudicated criminal activity involving force or violence under factor (b) of section 190.3 and need not make a unanimous finding on factor (b) evidence." (*People v. Brown*, *supra*, 33 Cal.4th at p. 402; citing *People v. Anderson*, *supra*, 25 Cal.4th at p. 584; *People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) Neither *Ring v. Arizona* nor *Apprendi v. New Jersey* affects California's death penalty law. (*People v. Smith* (2003) 30 Cal.4th 581, 641-642; *People v. Prieto*, *supra*, 30 Cal. 4th at p. 272 ["*Ring* does not apply to California's penalty phase proceedings"]; *People v. Navarette* (2003) 30 Cal.4th 458, 520-521.)

4. The Jury Instructions Were Not Impermissibly Broad

Next, appellant challenges the instruction that, "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." He asserts that the phrase "so substantial" is impermissibly broad. (AOB 422-423.) This Court has routinely rejected this contention. (*People v. Page* (2008) 44 Cal.4th 1, 55–56; *People v. Breaux* (1991) 1 Cal.4th 281, 316.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected.

5. The Jury Instructions Properly Informed The Jury That The Central Determination Concerned Whether Death Was The Appropriate Punishment

Next, appellant complains that the instructions failed to inform the jurors that the central determination entrusted to them was whether the death penalty was the appropriate punishment, not merely an authorized punishment. (AOB 423-424.) In rejecting this claim, this Court has explained, however,

> [b]y advising that a death verdict should be returned only if aggravation is "so substantial in comparison with" mitigation that death is "warranted," the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty. [Citations.]

(*People v. Arias* (1996) 13 Cal.4th 92, 171; see also *People v. Taylor* (2009) 47 Cal.4th 850, 899–900; *People v. Griffin* (2004) 33 Cal.4th 536, 593.) Having offered no persuasive reason why this Court should not follow its prior decisions, appellant's claim should fail.

6. The Trial Court Properly Instructed The Jury On The Weighing Of Factors

Appellant also contends that the trial court failed to inform the jury that if it found the factors in mitigation outweighed the factors in aggravation, it was required to impose a sentence of life imprisonment without the possibility of parole. (AOB 424-426.) This Court has rejected this contention as follows:

> [CALJIC No. 8.84.2] clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life [imprisonment] without [the possibility of] parole was the appropriate penalty).

(*People v. Duncan* (1991) 53 Cal.3d 955, 978; *People v. Souza*, *supra*, 54 Cal.4th at p. 141.) Similarly, here, the jury was instructed with CALJIC No. 8.88, which provides, "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that they warrant death instead of life without parole." (3CT 480-481.) Having offered no persuasive reason why this Court should not follow its prior decision, appellant's claim should fail.

7. The Instructional Errors Did Not Violate the Sixth, Eighth, and Fourteenth Amendments

Appellant contends that all the instructional errors violated the Sixth, Eighth, and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and the lack of need for unanimity as to mitigating instructions. (AOB 426-428.) Not so. As this Court has stated,

> "'The Eighth and Fourteenth Amendments do not require that a jury unanimously find the existence of aggravating factors or that it make written findings regarding aggravating factors.' [Citations.] '[N]either the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. [Citations.]'" [Citation.] Moreover, the statute "'is not unconstitutional because it does not contain a requirement that the jury be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination.' [Citation.]"

(*People v. Cowan* (2010) 50 Cal.4th 401, 508–509.) In addition,

> [n]othing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., Cunningham v. California (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; Ring v. Arizona (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Apprendi v. New Jersey* (2000)

530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]) compels a different answer to these questions.

(*People v. Cowan, supra*, 50 Cal.4th at p. 509.) Having offered no persuasive reason why this Court should not follow its prior decisions, appellant's claim should fail.

8. The Trial Court Need Not Instruct The Jury Regarding A Presumption Of Life

Next, appellant contends that the trial court should have instructed on the presumption of life. (AOB 428-430.) Not So. The trial court need not instruct that there is a presumption of life. (*People v. Gamache* (2010) 48 Cal.4th 347, 407.) Having offered no persuasive reason why this Court should not follow its prior decisions, appellant's claim should fail.

C. Written Findings For The Death Verdict Were Not Required

Appellant invites this Court to reconsider its previous ruling that a capital jury is not required to submit written findings for its death verdict. (AOB 430-431.) Because this Court has repeatedly declined such an invitation, it should do so again here. (See *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Martinez, supra*, 31 Cal.4th at p. 701; *People v. Yeoman* (2003) 31 Cal.4th 93, 164-165; *People v. Smith* (2003) 30 Cal.4th 581, 641-642.)

D. The Instructions On Mitigating and Aggravating Factors Were Constitutional

1. The Inclusion Of Restrictive Adjectives Did Not Violate The Constitution

Appellant contends the use of restrictive adjectives acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 431.) This Court has repeatedly rejected this claim, finding the use of restrictive adjectives, such as "extreme" and

"substantial" in the list of mitigating factors (§ 190.3), "does not act unconstitutionally as a barrier to the consideration of mitigation." (*People v. McDowell* (2012) 54 Cal.4th 395, 444; *People v. Hoyos* (2007) 41 Cal.4th 872, 927.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected.

2. The Jury Instructions Did Not Fail To Delete Inapplicable Language

Next, appellant contends that the trial court erred in failing to delete inapplicable sentencing factors. (AOB 432.) This argument has been repeatedly rejected by this Court. (*People v. Turner*, *supra*, 8 Cal.4th at pp. 207–208; *People v. Clark* (1992) 3 Cal.4th 41, 169.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected.

3. The Trial Court Is Not Constitutionally Required to Instruct the Jury That Certain Sentencing Factors Are Relevant Only To Mitigation

Appellant also contends the trial court was required to instruct that statutory mitigating factors were relevant solely as potential mitigators. (AOB 433-434.) This Court has previously rejected this contention and should also do so here. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Panah*, *supra*, 35 Cal.4th at p. 500; *People v. Smith*, *supra*, 35 Cal.4th at pp. 373-374; *People v. Kraft* (2000) 23 Cal.4th 978, 1078-1079.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected.

E. Intercase Proportionality Review Is Not Constitutionally Required

Appellant contends that the lack of intercase proportionality review violates the Eighth and Fourteenth Amendments. (AOB 434-435.) This Court has repeatedly rejected this contention and should do so here. (See,

e.g., *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Smith, supra*, 35 Cal.4th at p. 374; *People v. Burgener* (2003) 29 Cal.4th 833, 885; *People v. Anderson, supra*, 25 Cal.4th at p. 602.)

F. The California Sentencing Scheme Does Not Deny Equal Protection

Appellant contends California's sentencing scheme violates the equal protection clause because it denies certain procedural safeguards to capital defendants that are afforded non-capital defendants. (AOB 435-436.) This Court has previously rejected this contention and should also do so here. (*People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Smith, supra*, 35 Cal.4th at p. 374; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

G. California's Death Penalty Procedure Does Not Violate International Law

Appellant contends that California's death penalty scheme violates international law. (AOB 436-437.) This Court has rejected this contention and has specifically rejected the argument that California's scheme violates the International Covenant of Civil and Political Rights. (See, e.g., *People v. Roldan, supra*, 35 Cal.4th at p. 744; *People v. Ramos* (2004) 34 Cal.4th 494, 533-534; *People v. Brown, supra*, 33 Cal.4th at p. 404.) Therefore, appellant's claim must be rejected here, as well.

XII. NO CUMULATIVE ERROR RESULTED

Appellant contends the cumulative effect of the alleged errors discussed in the previous arguments requires reversal. (AOB 438-440.) The claim is without merit because the foregoing arguments demonstrate "there was no error . . . to cumulate" (*People v. Phillips* (2000) 22 Cal.4th 226, 244), or there was no prejudice from any alleged error (*People v.*

Jenkins, *supra*, 22 Cal.4th at p. 1056 ["trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred"]; accord, *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Sapp* (2003) 31 Cal.4th 240; 287; 316; *People v. Jones*, *supra*, 29 Cal.4th at p. 1268). A defendant is entitled to a fair trial, not a perfect one. (*People v. Welch* (1999) 20 Cal.4th 701, 775.) Appellant received a fair trial.

CONCLUSION

Respondent respectfully requests that the judgment and sentence be affirmed.

Dated: July 10, 2013

Respectfully submitted,

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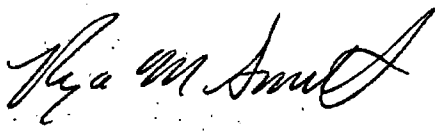

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 27,331 words.

Dated: July 10, 2013

KAMALA D. HARRIS
Attorney General of California

RYAN M. SMITH
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Attorneys for Defendant and Appellant

DECLARATION OF SERVICE

Case Name: *People v. Schultz* **(CAPITAL CASE)**
Case No.: **S114671 (Ventura County Superior Court Case No. CR 49517)**

I declare:

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

On **July 11, 2013**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On **July 11, 2013**, I caused 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 by OnTrac Messenger Service.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 11, 2013**, at Los Angeles, California.

Maria P. Navarro
Declarant

Signature

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