In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DOUGLAS E. DWORAK,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S135272

Ventura County Superior Court Case No. 2004016721
The Honorable Kevin J. McGee, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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STATEMENT OF THE CASE

In a two-count indictment presented by the Ventura County Grand Jury, appellant was charged with the murder (Pen. Code,[1] § 187, subd. (a); count 1) and rape (§ 261, subd. (a)(2); count 2) of Crystal Nichole Hamilton. As to count 1, a special circumstance was alleged that appellant committed the murder while engaged in the commission of a rape (§ 190.2, subd. (a)(17)(C)). As to both counts 1 and 2, it was alleged that appellant had suffered two prior serious and/or violent felony convictions within the meaning of the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). (1CT 1-4.) Appellant pleaded not guilt to the charges and denied the special allegations. (1CT 8; 4RT 450-451.)

Appellant withdrew his denial of the prior conviction allegations, waived his right to jury trial on the allegations, and admitted suffering convictions for rape (§ 261, subd. (a)(2)) and sexual penetration with a foreign object while using a weapon (§ 289, subd. (a)(1)). (3CT 684-691, 694-696; 8RT 1130-1141.)

Appellant was tried by jury. (See 3CT 711; 9RT 1628-1629.) Following the guilt phase, the jury found appellant guilty as charged and found the special circumstance to be true. (3CT 799-802, 823.1-823.2; 16RT 2917-2933.) Following the penalty phase, the jury returned a verdict of death. (4CT 995, 999.1; 18RT 3362-3365.) On count 1, appellant was sentenced to death. On count 2, appellant was sentenced to a term of 75 years to life in state prison, which was stayed pursuant to section 654. (4CT 1065-1068, 1075-1076; 17RT 3414-3416.)

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[1] Unless indicated otherwise, all further statutory references are to the Penal Code.

STATEMENT OF FACTS

I. GUILT PHASE EVIDENCE

A. The Prosecution's Case

1. Appellant's Prior Rape of Cynthia W.

On October 25, 1986, Cynthia W. lived at a home located off a private road in Napa, California. The home had a gravel driveway. (10RT 1856-1858; Peo. Exhs. 1-A, 1-B.) After she went shopping at a mall, Cynthia W. returned home in the afternoon. (10RT 1856-1857.) Cynthia W.'s husband and son were not at home. (10RT 1864-1865.)

Cynthia W. parked her car in her driveway and began putting away the items she purchased at the mall. After she put away the first load, Cynthia W. returned to the trunk of her car. Cynthia W. heard footsteps on the gravel driveway. She turned around and saw appellant. Appellant asked her whether she knew a person named "Nichols or something" that lived down the road. Cynthia W. replied that she did not know anyone by that name and turned around. (10RT 1857-1860.)[2]

Cynthia W. went back to the trunk of her car. Appellant then grabbed Cynthia W. from behind and put a large, hunting knife to her throat. Cynthia W. screamed. A brief struggle ensued. During the struggle, Cynthia W.'s glasses fell off and she sustained a cut on her thumb. Appellant took Cynthia W. to the back of her car. (10RT 1861-1864, 1871-1872; Peo. Exs. 1-C, 3.)

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[2] Although it appears that Cynthia W. did not recognize appellant before she was raped (see 10RT 1858-1860), appellant told police that he "had baby sat for and had a crush on" Cynthia W. (6CT 1798.) Appellant stated that Cynthia W. had been "in a sorority" with his mother and he "got all infatuated with her . . . ." (6CT 1773-1774.)

Appellant ordered Cynthia W. to lie down in the back seat of the car. Appellant entered the car with the knife. He got on top of Cynthia W. and told her to take off her pants. Appellant then took off Cynthia W.'s underwear and bra. Appellant ordered Cynthia W. to pull her sweatshirt over her face. Cynthia W. asked appellant whether he was going to kill her. Cynthia W. told appellant that she had a son and that her husband would be home soon. (10RT 1864-1866.)

Appellant unzipped his pants. Appellant told Cynthia W. to grab his penis and "make him hard." Appellant put his finger inside Cynthia W.'s vagina. Appellant then told Cynthia W. to put his penis inside of her. Cynthia W. complied. Appellant then raped Cynthia W. Appellant ejaculated inside of Cynthia W. (10RT 1867-1868.) During the rape, Cynthia W. was afraid. She thought she was going to die. (10RT 1868.)[3]

After appellant ejaculated, he ran the knife over Cynthia W.'s thigh and body. Appellant got off Cynthia W. He told her to "stay put" or else he would come back and hurt her. Appellant then asked Cynthia W. how to get off the private road. Cynthia W. gave appellant erroneous directions to get off the road that actually led appellant to drive in circles. (10RT 1869-1871.)

Appellant left. Cynthia W. stayed in the back seat of the car until she heard appellant's vehicle depart. Cynthia W. ran inside the house and called her husband. Cynthia W.'s husband told her to call 911, which she did. (10RT 1871-1873.) Cynthia W. provided a statement to the police about the rape and identified appellant as the perpetrator. (10RT 1873-1874.)

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[3] The actual sexual assault was not painful to Cynthia W.'s vaginal region. (10RT 1869.)

Appellant was 20 years-old when he raped Cynthia W. (6RT 1774.) Appellant was convicted of the rape. (10RT 1877.) He was sentenced to 18 years in state prison and spent 9 years, 3 months, and 18 days in prison before he was paroled at 30 years-old. (6CT 1653, 1774, 1798-1800; 7CT 1801.)

2. Appellant's Parole to Ventura and His Marital Problems in 2001

On September 18, 1996, appellant was paroled to Ventura County because Cynthia W. asked that appellant not be paroled to Napa. (6CT 1742, 1775, 1799.)[4] When appellant was first paroled, he lived in the Scandia Apartments (6CT 1750-1751) and "hung out" at the nearby bars (7CT 1825; see 6CT 1752-1753). Appellant lived in the Scandia Apartments for approximately one year. (6CT 1767.)

On October 17, 1999, appellant married Susannah Dworak ("Susannah"). (6CT 1775.) In 2001, they lived near Ventura, in Oak View. (6CT 1747.) That year, appellant and Susannah had a tumultuous relationship that almost ended in divorce. (6CT 1797.) They were fighting "all the time." (7CT 1819-1820.) They argued over money. (6CT 1772.) Moreover, Susannah had a difficult commute and was "just a raging bitch basically" when she got home. Susannah got on appellant's "case about everything" and would get mad at appellant when he went fishing with his friends. (6CT 1797; see 7CT 1818-1819.)[5]

Appellant and Susannah "were at a real bad state . . . ." (7CT 1810-1811.) Appellant was "sexually frustrated" and sought to have sex with

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[4] Appellant was on parole for three years. (7CT 1822.)

[5] Appellant and Susannah later went to counseling and worked through their problems. (6CT 1758, 1775; 7CT 1813-1814 .) Their relationship was a "lot better relationship" when appellant spoke to police in 2003. (7CT 1818-1819.)

prostitutes because there "just wasn't any sex happening." (7CT 1819-1820.) When appellant was sexually frustrated, he would go to Ventura to patronize prostitutes when he got off work at approximately 4:30 p.m. (6CT 1756, 1779; 7CT 1814-1815.)

3. Appellant's Whereabouts from April 19 to April 21, 2001

In April of 2001, Susannah was an employee at an oral surgery group in Thousand Oaks. (11RT 1936-1937.) From April 21 to April 22, 2001, Susannah was scheduled to attend a certification course to become an oral surgery assistant in Irvine. (11RT 1944-1945.) Susannah's employer had paid for the training. (11RT 1938, 1941-1942.) However, on Friday, April 20, 2001, Susannah called Betty Hosler, the director of administration at the oral surgery group, and informed her that she would not be going to work that day. Susannah was crying and upset. Hosler was concerned that Susannah would not attend the training. (11RT 1938-1942; see Peo. Exh. 11.)

Susannah attended the conference in Irvine. (11RT 1941, 1950-1951.) Beth Martin, a co-worker who also attended the conference, noticed that Susannah was very upset and emotional that weekend because she had "a rough day Friday." (11RT 1941, 1943-1946.)

At that time, appellant was employed at J.F. Da Pra, a general contracting company. On April 21 and 22, 2001, appellant was "on-call." However, he did not work on those days. (11RT 1952-1956; see 6CT 1748.)

Margaret Esquivel lived near appellant and Susannah. Esquivel would socialize with the couple. (11RT 1887-1888.) Appellant would regularly stop by Esquivel's home and talk to her. (11RT 1891.) Appellant often complained that Susannah nagged him. (11RT 1888-1889.) On the weekend that Susannah went to the conference, appellant stopped by and

spoke with Esquivel. (11RT 1903-1904.) Appellant told Esquivel that his wife was at a dental conference for the weekend. Appellant appeared to be "[g]lad, happy." (11RT 1894-1895.) Appellant stated that he was "out living it up and playing pool and -- at the local bars and going down to Ventura and staying out late." Appellant seemed to be in good spirits and stated, "[W]hen the cat's away, the mouse will play." (11RT 1895-1896.)

4. Crystal Hamilton's Whereabouts from April 19 to April 21, 2001

In April of 2001, Crystal Hamilton[6] was 18 years old. (11RT 2045.) She lived in Oxnard with her father, Air Force Lieutenant Colonel Michael Hamilton ("Lt. Colonel Hamilton"), sister Corianne ("Corianne"), and brother Robyn. (11RT 2044-2048.) Crystal had long brown hair. She was 5 feet, 6 inches tall, and weighed 117 pounds. (12RT 2214-2216.)[7] She often did not wear make-up (11RT 2089, 2099) and typically wore petite jewelry and rings (11RT 2089-2090).

Matt Zoeber and Crystal were good friends. They had gone to school together and had known each other for approximately five to six years. (11RT 2048-2049, 2095.) On Friday, April 20, 2001, there was a small gathering at Zoeber's home. (11RT 2101.) Zoeber lived in a condominium on Shenandoah Street in Ventura with his mother and sister. (11RT 2096-2097.) The Scandia Apartments were located nearby. (11RT 1971-1972; Peo. Exh. 6.)

That day, Crystal came over to Zoeber's home to attend the gathering. (11RT 2100-2101.) She was wearing overalls, a long-sleeve thermal shirt,

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[6] Because Crystal Hamilton shares the same last name with other witnesses in the case, respondent will refer to her as "Crystal" for purposes of clarity. (See 4RT 487 [the trial court's ruling that the prosecutor may refer to the victim as "Crystal" if the witnesses refer to her by that descriptor].)

[7] Appellant was six feet, four inches tall. (6CT 1776.)

a brown, fleece coat, and tan Puma tennis shoes. (11RT 2088-2089, 2097-2099.) Crystal was also wearing a couple of small bracelets. (11RT 2099-2100.) She was not wearing any makeup. (11RT 2089.) Crystal did not have any bruises on her face, body, or wrist. (12RT 2120.)

During the gathering, Zoeber, Crystal, and some of their friends smoked marijuana and used methamphetamines. (11RT 2101-2102.) It was common for methamphetamine to be present at Zoeber's home. (12RT 2112, 2134.) Ingesting methamphetamine gives the user an "incredible amount of energy" and may occasionally affect the user's judgment. (12RT 2122-2123.) Afterwards, Crystal spent the night at Zoeber's home. She did not leave the home that night. (11RT 2102-2104, 2055-2056, 2065.)

The next day, on Saturday, April 21, 2001, Crystal and Zoeber "hung out" for most of the day. (12RT 2112.) In the afternoon, Crystal called her father because she wanted a ride home. Crystal appeared to be frustrated. (11RT 2106-2109; 12RT 2113, 2125-2126.)[8] She wanted to go home to take a shower and change her clothes. (11RT 2105.) However, Lt. Colonel Hamilton and Corianne were in Corona visiting the family of Lt. Colonel Hamilton's girlfriend. Lt. Colonel Hamilton told Crystal that he could pick her up later that evening. (11RT 2056-2059.)

That evening, Zoeber fell asleep in his room. Crystal was awake. (12RT 2112.) At approximately 8 p.m. to 10 p.m., Zoeber woke up. Crystal was drawing a picture for him. Crystal told Zoeber that she would be leaving soon. Crystal was happy. Zoeber fell back asleep. (12RT 2113-2114.) This was the last time Zoeber saw Crystal. (11RT 2096.)

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[8] Telephone records for April 21, 2001, indicate that Lt. Colonel Hamilton received an incoming call at 3:10 p.m. (13RT 2405-2407; Peo. Exh. 21, 24.)

When Zoeber awoke, Crystal was gone. Zoeber did not know what time it was, but the news show was on television. (12RT 2118-2120.) Crystal left him the drawing. On the back of the drawing, Crystal wrote, "Hi, Matt. You're sleeping right now. I drew this for you. I even put a swing in. Crystal." (12RT 2114-2117; Peo. Exh. 22.)

At approximately 10:30 p.m.,[9] Crystal called Lt. Colonel Hamilton and asked him to pick her up. Lt. Colonel Hamilton was driving home and told Crystal that "that was fine, but since [he] was in Corona," he would pick her up later that evening. Crystal sounded frustrated and stated that she wanted to go home that night. (11RT 2056-2060; see 11RT 2091-2092.)

Lt. Colonel Hamilton stated that he would be able to pick Crystal up at about midnight. Crystal stated that she wanted to be picked up at the Ralph's grocery store ("Ralph's") that was approximately a block from Zoeber's home.[10] Lt. Colonel Hamilton insisted on picking Crystal up at Zoeber's home. However, Crystal did not want to be picked up there because everyone was going to be asleep. Crystal told Lt. Colonel Hamilton, "Daddy, I just want to go home." Lt. Colonel Hamilton relented and stated that he would pick her up at the Ralph's. (11RT 2061-2062.)

When Lt. Colonel Hamilton arrived at the Ralph's, Crystal was not there. Lt. Colonel Hamilton drove around the parking lot looking for Crystal. After waiting a short while, he went to Zoeber's home. All the lights were off at the home. Because it did not appear as if anyone was

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[9] Telephone records for April 21, 2001, indicate that Lt. Colonel Hamilton received an incoming call at 10:35 p.m. (13RT 2405-2407; Peo. Exhs. 21 & 23.)

[10] The walk from Zoeber's home to the shopping plaza where the Ralph's was located was under a mile. The walk would take approximately 11 to 15 minutes. (11RT 1973-1975.)

awake, Lt. Colonel Hamilton did not knock on the door. (11RT 2063-2065.)

Lt. Colonel Hamilton became concerned about Crystal and called his girlfriend. Lt. Colonel Hamilton then went home to look for Crystal. Crystal was not there. Lt. Colonel Hamilton called his girlfriend and informed her that Crystal was not at home. (11RT 2065-2070.)[11] Because Crystal had occasionally failed to meet up with him, Lt. Colonel Hamilton was not concerned with her safety and did not call the police. (11RT 2075-2076.)

Lt. Colonel Hamilton had never seen appellant prior to the trial. He had never seen appellant at his home. He did not know him from work. (11RT 2071-2072.) Corianne had never seen appellant with Crystal before, and Crystal never mentioned appellant by name. (11RT 2093.) Zoeber had never seen appellant. He did not know him by name. Appellant did not come over to his home that weekend. (11RT 2103.)

5. The Discovery of Crystal's Body

In the early morning hours of April 22, 2001, around dawn, Jorge Valdez went fishing at Mussel Shoals beach. (11RT 2006-2010, 2015-2016.) Valdez was the only person at the beach, although there was a van[12] parked nearby. (11RT 2010.) Approximately 20 minutes after arriving, Valdez spotted something "unusual" that "look[ed] like a body." Valdez gathered his belongings and went to a nearby fire station to report what he had seen. The firemen went to the area, but could not find the body. The firemen asked Valdez to accompany them to the scene. Valdez went back

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[11] Telephone records indicate that Lt. Colonel Hamilton received an incoming call from his girlfriend at 11:50 p.m. on April 21, 2001, and made an outgoing call to his girlfriend at 1:11 a.m., on April 22, 2001. (11RT 2069, 13RT 2406-2407; Peo. Exhs. 21, 24.)

[12] The van left before Valdez went to the fire station. (11RT 2018.)

to the beach and pointed out Crystal's body. (11RT 2009-2012, 2018; Peo. Exh. 27a.) Crystal's dead body was naked, lying face-up. There was no clothing or jewelry in the area. (11RT 2012-2013.)

Ventura County Fire Captain Fernando Jimenez worked at Fire Station 25, approximately one and a half miles from Mussel Shoals beach. (11RT 2026-2028.) At approximately 6 a.m., Valdez went to the fire station and reported that he had found a body on the beach. Valdez appeared to be "a little disturbed, shaken up." At approximately 6:08 a.m., Valdez took Captain Jimenez to where the body was located. (11RT 2029-2031, 2034.) Crystal's body was in the ocean. Her head was positioned towards the rocks. Because the waves were surging against the rock jetty, Captain Jimenez had Crystal's body taken out of the water. (11RT 2032-2034, 2041-2042.) It appeared to be close to high tide at the time. However, the tide was still coming in. (11RT 2034.)

Crystal's body was placed on the sand. The firemen did an assessment on her. Crystal was then placed on a backboard to remove her from the tide. Crystal showed signs of lividity, which is discoloration from pooling blood, and rigor mortis, which is the stiffening of the extremities. Crystal had a cut over her left eye and bruising around her hips. (11RT 2035-2037.) Captain Jimenez pronounced Crystal dead at 6:20 a.m. (11RT 2037-2040.) Captain Jimenez contacted the fire department's dispatch, which then notified the police department. (11RT 2042.)

Ventura County Sherriff's Detective James Panza received a call that a body had washed up on the shore in "the Rincon area, the Mobil Oil piers area." Detective Panza and his partner, Sergeant Larry Kelley, responded to the scene. (11RT 1983-1992; Peo. Exhs. 14, 15.) Additional units were dispatched to search the area. No article of clothing or any other item (including human tissue, hair, or bodily fluid) was found in the area that was connected to Crystal. (11RT 1991-1993, 1997.)

There was no evidence that Crystal was dragged or "pulled along" and thrown into the ocean. (11RT 1995-1996.) On April 22, 2001, at 2 a.m., it was low tide at Mussel Shoals beach. (12RT 2161-2165; Peo. Exh. 33.) During low tide, the beach area may have been dry. (12RT 2168: Peo. Exh. 14a.)

Appellant was an avid fisherman. (11RT 1889-1892; 6CT 1764.) He was familiar with, and liked to visit, the area in which Crystal's body was found. Appellant enjoyed fishing in the Mobil Oil piers area of Mussel Shoals beach. (11RT 1892-1893; 12RT 2152; Peo. Exh. 40 [photograph of beach].) He liked ocean-fishing at the kelp beds south of Mussel Shoals beach, and he would take his dogs to Mussel Shoals beach to let them run around because there were not many people at that beach. (13RT 2346-2350, 2359.) In fact, there were no lifeguards stationed at Mussel Shoals beach. (12RT 2152.)

Between midnight and 3:30 a.m., according to Detective Panza, Mussel Shoals beach is usually empty, although there may occasionally be a couple of cars parked there. (11RT 2004.) Appellant was also aware that the beach was empty in the early morning hours. He told his friend, Oxnard Police Officer Michael Bachich, that "if they went there early enough, nobody else would be [at Mussel Shoals beach.]" (13RT 2351.)

From the Ralph's shopping center, it is approximately an 18-minute drive to Mussel Shoals beach. (11RT 1976-1978.)

6. The Autopsy and DNA Evidence

On April 22, 2001, Crystal's body was transported from Mussel Shoals beach to the coroner's office. (12RT 2213-2214.) Dr. Ronald O'Halloran was the chief medical examiner for Ventura County. (12RT 2209-2210.) He performed an autopsy on Crystal. (12RT 2212.) Crystal had numerous injuries on her body, including injuries to her head, torso, arms and legs. (12RT 2216.) Dr. O'Halloran took biopsies of Crystal's

injuries. (12RT 2227.) Because Crystal was found dead on the beach, Dr. O'Halloran looked for evidence of whether her injuries were inflicted premortem (before death) or postmortem (after death). (12RT 2219.)

The presence of white blood cells is a factor in determining whether an injury was premortem or postmortem. (12RT 2227.) Underneath the skin, a biopsy of the area can reveal the presence of white blood cells. White blood cells protect the body and remove hemorrhage. (12RT 2220-2221.) In general, white blood cells start to appear within an hour after a trauma was inflicted. (12RT 2221.) If there is a significant number of white blood cells in an area of hemorrhage, an injury probably occurred at least an hour before death. (12RT 2221, 2233.) White blood cells would not migrate to an area postmortem because there is no circulation. (12RT 2222-2223.)

Another factor in determining whether an injury was premortem or postmortem is the presence of hemorrhage. A hemorrhage is a collection of blood underneath the skin. Active bleeding is evidence that an injury was sustained premortem. Thus, an abrasion with no hemorrhage could have been sustained postmortem. (12RT 2216-2219.) Although the absence of hemorrhage suggests that a trauma was sustained postmortem, it is not conclusive. (12RT 2222.) Being pushed up against the rocks postmortem would not cause bruises because there would be no blood pressure. (12RT 2269-2270.)

Crystal had a blunt-force trauma to the right side of her eyebrow. There was a visible bruising in the area and an abrasion with a "scraped or patterned appearance to it." A biopsy was taken from Crystal's right forehead area. There was hemorrhage in the area. Numerous white blood cells were present, including lymphocytes. The presence of lymphocytes suggests that the injury was probably sustained more than an hour before her death. (12RT 2235-2238, 2279-2280; see 12RT 2271-2272.) Crystal's

skull was not fractured, and she had no swelling to her brain. (12RT 2270-2271.)

Crystal had an injury between her eyebrows, just above the bridge of her nose. The injury was a "laceration, kind of an irregular tearing of the skin typical for blunt force injuries over the skull where the skin is squashed hard against the skull and the skin splits." The injury was caused by an impact against a hard, blunt object that hit Crystal in the head, such as a car or rock. A biopsy was not taken from the area to preserve Crystal's face for her funeral. (12RT 2239-2240.)

Crystal had abrasions on her left breast, right shoulder, ribs, and hips. The abrasions on her hips included "reddish ones" with "a little bit of hemorrhage underneath the skin." (12RT 2216-2219.) A biopsy of Crystal's left breast area showed slight to moderate amount of hemorrhage. There were "a few white blood cells" in the area. Dr. O'Halloran opined that this injury was inflicted premortem. (12RT 2228-2229.) A biopsy was taken from Crystal's right shoulder. The injured area had only red blood cells present, "although a lot of them." It was likely that this injury was inflicted premortem, but it was possible the injury was inflicted postmortem. (12RT 2229-2230.)

Crystal had a hemorrhage on top of her left hip bone and an abrasion next to that hemorrhage. (12RT 2222.) There was also large abrasion that started at her left hip and extended almost to her left knee. (12RT 2224.) A biopsy of Crystal's left hip showed no white blood cells and a little hemorrhage. It was unclear whether the injuries were premortem or postmortem. (12RT 2231-2232.) A biopsy was taken from the injury to Crystal's knee. There was a hemorrhage and a moderate amount of white

blood cells present. The injury was consistent[13] with being inflicted premortem. (12RT 2233.)

Crystal also had bruising on her left upper bicep, as well as abrasions. (12RT 2222.) A biopsy was taken from this area. There was a hemorrhage and white blood cells present. Dr. O'Halloran opined that this injury was inflicted premortem. (12RT 2229.) A biopsy was taken from a bruise on Crystal's left thigh. There was hemorrhage present, but no white blood cells. This injury was consistent with being inflicted either premortem or postmortem. (12RT 2232-2233.)

Crystal had "a lot" of abrasions and bruising on her left wrist and left hand. There were red areas on the top of her left wrist. There was also a bruise at the top of her right hand, at the base of her thumb and index finger. (12RT 2222-2224.) A biopsy of Crystal's wrist showed "a little bit of white blood cell infiltrate," which suggested that the injuries were premortem. (12RT 2230-2231.)[14] A biopsy of the back of Crystal's left hand showed the presence of a moderate amount of red blood cells and a minimal amount of white blood cell infiltrate. This injury was probably sustained premortem. (12RT 2233-2234.) The marks on Crystal's wrists were consistent with having a bracelet pressed against her skin. (12RT 2234-2235.)

Crystal also had three distinct, linear to slightly curved abrasions on her neck. The neck is a "relatively protected" area that is not usually injured when a person falls down. (12RT 2250-2251; Peo. Exhs. 28B,

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[13] Dr. O'Halloran explained that his use of the term "consistent with" meant a reasonable probability. (12RT 2268.)

[14] Dr. O'Halloran mistakenly testified that the biopsy suggested this injury was "postmortem." If recalled to testify, Dr. O'Halloran would say that he misspoke. He would correct himself and testify that the presence of white blood cell infiltrate indicated that the injury was most likely premortem. (14RT 2549; Peo. Exh. No. 58.)

28C.) Aside from the abrasions, Crystal had "fairly discreet" marks on her neck. "[I]n manual strangulations, fingernails often leave" such marks. (12RT 2251-2252; see 12RT 2267-2268.)

Crystal's eyes were examined. Crystal had petechial hemorrhages which are "little pinpoint hemorrhages in the whites of the eyes and in the conjunctival lining of the eyes." Petechial hemorrhages are consistent with a person being "manually strangled or strangled with some other object, something causing the neck to be compressed so the blood cannot drain out while blood is still being pumped into the head." Under such high pressure, the blood vessels in the eye can burst and cause petechial hemorrhages. They are "a very common finding in manual strangulations." (12RT 2247-2251; Peo. Exh. 28A.) Petechial hemorrhages are also common when someone vomits violently. (12RT 2274-2275.) There was no evidence that Crystal vomited, although it was a possibility. (12RT 2275, 2277.)

Crystal's lungs were examined. There was sand in her lungs as well as water. (12RT 2247.) When a person drowns, their body would generally sink, unless the person was very obese. (12RT 2278-2279.)

A blood sample was taken from Crystal. The blood sample was found to be positive for the following drugs in listed concentrations: "Methamphetamine 0.15 milligrams per liter. Amphetamine 0.03 milligrams per liter. And 11-nor9carboxydelta9-THC (marijuana) 0.04 milligrams per liter." (12RT 2244-2245; Peo. Exh. 32.) These substances affected Crystal's "brain function, that is, [Crystal] probably got high on it, maybe was hyperactive, maybe paranoid [and] probably . . . gave her a sense of euphoria . . . , but [it was] not [at] a level that generally is accepted to cause death." (12RT 2246-2247.)

Dr. O'Halloran determined that Crystal's cause of death was a homicide. (12RT 2257-2260; Peo. Exh. 50.) Dr. O'Halloran opined that

Crystal died from drowning, although the evidence also strongly indicated that she was also manually strangled. Specifically, Dr. O'Halloran opined,

> In my opinion the two most likely mechanisms for her to die would be, one, drowning, which is the one I think is the most likely, and the other would be that she was strangled. But to do that, she would have to be strangled intermittently in the water inhaling sandy water to get the sand into her lungs.
>
> So I suppose both actions could have been going on at the same time, but she was being strangled and she was being strangled while she was in seawater.

(12RT 2252-2253; see 12RT 2260-2266.)[15]

Absent a witness to the death, there are several factors in determining time of death, although imprecise. (12RT 2253.) One factor is rigor mortis, which is a stiffening of the muscles. Crystal had "fairly weak rigor in her muscles" that indicated that she was "probably dead a couple of hours up to . . . maybe eight or so hours." (12RT 2253.)

Another factor is livor mortis, which is the pooling of blood to the lower body parts that result in a "purplish red discoloration." Livor mortis is usually noticeable after about four hours. Crystal had livor mortis present, which indicated that she was probably dead for four hours or more. (12RT 2253-2254.)

Yet another factor is body temperature. When a person dies, the body stops creating heat. Given the fact that Crystal was found in the ocean and the temperature of the water,[16] Dr. O'Halloran calculated that Crystal died between midnight to 3:30 a.m., but most likely around 2 a.m. (12RT 2254-2257; Peo. Exh. 26; see 12RT 2268-2269.)

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[15] There was no evidence that Crystal had any illness or disease. (12RT 2241.)

[16] The water temperature was approximately 53 degrees. (12RT 2274.)

A sexual assault exam was conducted. There was no evidence of injury to Crystal's vaginal region. (12RT 2242.) After a sexual assault, injuries to the vaginal area in older adolescents and young adults are "quite rare" because of the high presence of estrogen. When the vagina is touched by any object, a women's physiological response is to lubricate the area. The lack of genital injury does not correlate to whether a woman was raped. (12RT 2192-2198.) Although a non-injury to the vaginal area is also consistent with consensual sex (12RT 2199), the converse is also true as vaginal injuries may occur during consensual sex (12RT 2208). Seminal fluid was swabbed from Crystal's vagina. (12RT 2242-2243.) Sand and seaweed were also present inside Crystal's vagina. (12RT 2243.)

Dr. O'Halloran gave the sexual assault kit, which contained four vaginal swabs, a blood sample, right- and left-hand fingernail clippings, and an anal swab to Ventura County Sheriff's crime technician Debra Schambra. Schambra took the sexual assault kit to the Ventura County Sheriff's Crime Laboratory and booked it into the Sheriff's property room. (13RT 2410; Peo. Exh. 51.)

The items were transported to the Ventura County Sheriff's Crime Laboratory for analysis. Crystal's blood was analyzed for DNA using short tandem repeat (STR) analysis. An analysis of the vaginal swabs showed both sperm and non-sperm cellular material. The non-sperm cellular materials were analyzed for DNA using STR analysis. The DNA profile of the non-sperm cellular material matched that of Crystal. The sperm from the vaginal swabs was analyzed for DNA using STR analysis, and one male profile was obtained. The male DNA profile from the sperm portion of the vaginal swabs was submitted to the California Department of Justice Convicted Offender DNA data bank ("CODIS"). (13RT 2407-2408; Peo. Exh. 44; see 13RT 2335.)

On March 18, 2002, the California Department of Justice Bureau of Forensic Services sent the Ventura County Sheriff's Crime Laboratory a notice, notifying the lab that the DNA profile from the sperm portion of the vaginal swabs matched the DNA profile on file for appellant. (13RT 2408; Peo. Exh. 43, 45.) Based on population studies, appellant's DNA profile would occur in the following frequencies: one in 46 quadrillion African-Americans; one in 8.2 quadrillion Hispanics; and one in 924 trillion Caucasians. There are currently less than 6.5 billion people on the planet. (13RT 2409; Peo. Exh. 43.)

7. Appellant's Interviews with Police and Subsequent Investigations

Ventura County Sheriff's Detective Deborah Rubright was assigned to investigate Crystal's murder. (13RT 2333-2334.) Detective Rubright was informed that semen recovered from Crystal resulted in a CODIS hit for appellant. (13RT 2334-2336, 2342-2343.) Because appellant was a sex offender, Detective Rubright knew that he needed to register every year within seven days of his birthday.[17] Detective Rubright obtained appellant's address in Oak View and determined that appellant was required to register at the sheriff's records department. Detective Rubright asked the records technician at the records department to inform her when appellant came in to register. (13RT 2335-2337.)

On May 12, 2003, Detective Rubright was informed that appellant was at the records department to register. Detective Rubright approached appellant and asked appellant if she and her partner, Melissa Smith, could speak with him. Appellant agreed. The conversation was tape-recorded. (13RT 2337-2340, 2374-2376.)

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[17] Appellant was born on May 16, 1966. (6CT 1654.)

During the conversation, appellant was asked whether he had been intimate with a woman other than his wife. Appellant stated that he had been with three different prostitutes whom he had picked up on Thompson Boulevard. (6CT 1754-1755.)[18] The encounters occurred over "a year and a half or so, maybe two" years earlier. (6CT 1756.) Appellant stated that he picked up the prostitutes during the "daylight" hours. At approximately 3:30 p.m., appellant got off work and picked the prostitutes up on his way home. (6CT 1756-1757.) Appellant used a condom during each encounter. (6CT 1758, 1762-1763.)

One of the prostitutes was African-American. One of the prostitutes was "Mexican." One of the prostitutes was "White." (6CT 1757, 1759.) Appellant described the White prostitute as "[m]iddle aged, . . . maybe 20's, hard 20's." (6CT 1757.) She was approximately 5 feet, 4 inches tall and did not have tattoos. (6CT 1762, 1777.) She had wavy, shoulder-length hair that was "dirty brown, dirty blonde" in color. She was wearing makeup and looked "kind of hard – rode hard." (6CT 1777-1778.)

Appellant was then shown a picture of Crystal and asked if he recognized her. Appellant denied recognizing Crystal's picture. (6CT 1763; 13 RT 2379; Peo. Exh. 18.) Appellant also stated that he did not know Crystal by name. (6CT 1776.)

On June 11, 2003, Detective Rubright contacted appellant. Appellant agreed to be interviewed. Appellant was interviewed by Detective Rubright and her partner, Sergeant Ernie Montagna. The interview was video-recorded. (13RT 2340-2341, 2388-2391; Peo Exhs. 47A & 47B.)

Appellant was again asked about his prior encounters with the three prostitutes. (7CT 1802-1808.) Appellant described the White prostitute as

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[18] The area around Ralphs's was primarily residential and not an area known for prostitution. (13RT 2381-2386; Peo. Exh. 6.)

"[b]londe," [s]hort" and "[k]ind of ragged." (7CT 1808-1810.) Appellant stated that she was "[m]edium build" and was "mid-twenty something." Appellant further stated that the White prostitute's hair was like "a bleach blonde." (7CT 1815-1816.) Appellant also stated that the White prostitute was not wearing makeup and "looked pretty haggard and she wasn't really hiding it." (7CT 1823.) She was not wearing any bracelets. (7CT 1824.)

Appellant was again shown a picture of Crystal. Appellant again denied recognizing Crystal's picture. (7CT 1818; 13RT 2394-2395; 7CT 1818; Peo. Exh. 19.)

On July 22, 2003, Sergeant Montagna and other officers executed a search warrant on appellant's home and place of business. (13RT 2395-2398.) When the detectives were searching appellant's work, appellant spoke with Detective Montagna and Detective Albert Miramontes. The conversation was recorded and played for the jury. (13RT 2398-2401; Peo. Exhs. 52A & 52B [recording and transcript of conversation].)

During the conversation, appellant was again shown a photograph of Crystal. Appellant looked at the photograph and stated that he did not recognize the person depicted. (7CT 1849-1850; 13RT 2401-2401; Peo. Exh. 18 [photograph of Crystal shown to appellant].) Appellant was told that physical evidence implicated him in a sexual assault and was asked again if he recognized Crystal's picture. Appellant responded, "I don't mess with little kids" and again stated that he did not recognize Crystal's picture. (7CT 1850-1853.)

Appellant was then asked if it was possible that Crystal was a "one-nighter." Appellant replied, "I don't know her. And I don't remember doing anything to her." (7CT 1857.) Appellant was asked whether he had sexual relations outside of his marriage with anyone else besides the three aforementioned prostitutes. Appellant reiterated that he had only been with the three prostitutes. (7CT 1857-1859, 1865-1866.) Appellant stated that

he did not think that one of the prostitutes could have been Crystal. Appellant stated that he did not "mess with anyone that looks young." (7CT 1859-1860.)

Detective Montagne told appellant, "We know you had sex with [Crystal]. We just want to find out what happened." Appellant replied, "Nothing happened. I didn't do anything to this girl, okay." Appellant sadded, "She doesn't look like anybody I know. I don't recall having sex with her." (7CT 1863.) Appellant was further asked if Crystal could have been the White prostitute. Appellant answered, "She looked a lot worse than that." Appellant clarified that the White prostitute looked "a lot older." (7CT 1863-1864.)

Appellant was arrested at the conclusion of the interview. (7CT 1867.)

In July 29, 2003, appellant's truck was examined. A stain was found on the right side of the driver's seat. The stain was tested and the results indicated that it could be a blood stain. No DNA was found in the stain. (12RT 2294-2296, 2305; Peo. Exh. 7 [photographs of appellant's truck].)

On October 6, 2003, Cindy Lazenby, a qualified forensic scientist with the Ventura County Sheriff's Crime Laboratory, retrieved one of the vaginal swabs from Crystal's sexual assault kit. The swab was screened for the presence of semen. The swab tested positive for sperm. The swab tested negative for acid phosphatase[19] and P30.[20] (13RT 2410; Peo. Exh. 51.)

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[19] Acid phosphatase is an enzyme found in high quantities in semen that is used to find semen stains and evaluate the quality or the quantity of semen present. (13RT 2417.)

[20] P30 is another enzyme that is found in high concentrations in human semen that is used to identify semen and to evaluate the quantity of semen. (13RT 2417-2418.)

On October 6, 2003, Edwin Jones, a forensic scientist at Ventura County Sheriff's Department Laboratory of Forensic Sciences, examined a slide of the vaginal swabs taken from Crystal. There was no acid phosphate or P30 present. Jones opined that these enzymes were probably washed out by the ocean. (13RT 2441-2445.)[21] Jones described the amount of sperm in Crystal's vaginal swabs as "off the charts." (13RT 2445-2446.)

Jones opined that the semen[22] inside Crystal was deposited approximately one hour and fifteen minutes before her death. However, it was possible that the semen was deposited within two minutes before her death. (13RT 2446-2448.) These time estimates were based on the assumption that Crystal was ambulatory after intercourse. If Crystal was not ambulatory,[23] then the sperm present could have been deposited 11 to 12 hours before her death. (13RT 2458-2459.) After 48 hours, sperm becomes very difficult to find in a vaginal environment. (13RT 2428-2429.)

B. Appellant's Case

Scott Osler was one of appellant's best friends. On April 21, 2001, in the afternoon, Olser went to the Hilltop bar in Oak View with appellant. They went to shoot pool together. Appellant picked Osler up in his truck, which had a toolbox in the bed. Susannah was out of town. (15RT 2554-2556.) Osler was with appellant from 11 a.m. to 3 p.m. (15RT 2557-2558.)

Dr. Robert C. Bux was an associate medical examiner for El Paso County, Colorado. (14RT 2587.) He reviewed the autopsy photographs,

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[21] Acid phosphate and P30 are water soluble. (13RT 2419, 2422.)

[22] Semen is a complex body fluid which carries the male seed, the spermatozoa, and it is constituted from the testicular fluid. (13RT 2415.)

[23] Not ambulatory would mean that Crystal "laid down, and had semen ejaculated into her, [and] she never got back up[.]" (13RT 2459.)

the death investigation report, autopsy report, and Dr. O'Halloran's trial testimony. After review, Dr. Bux could not form an opinion to a medical certainty that Crystal's death was a homicide, rather than an accident. (15RT 2569-2470.)

Moreover, Dr. Bux opined that Crystal was not manually strangled because she lacked "congestion of the face," lacked bruising around her neck, and lacked fractures to her thyroid cartilage. Further, Crystal did not have petechiae on her lungs and the abrasions on her neck were horizontal, instead of vertical. (15RT 2576-2578.) To Dr. Bux, manually strangulation "implies a completed act and a cause of death." (15RT 2590-2591.) Dr. Bux also could not state Crystal's time of death to a scientific certainty because body cooling, liver mortis, and rigidity are crude and variable markers. (14RT 2575-2576.)

Dr. Bux also could not form an opinion to a medical or scientific certainty that Crystal had been raped. (15RT 2570-2572.) Absent an injury to the vaginal region or inner thighs, Dr. Bux could not opine that a person had been sexually assaulted. (15RT 2633-2635.) The toxicology report showed that Crystal was under the influence of methamphetamines. People under the influence of methamphetamines can be aggressive, agitated, and hyperactive. They can be confused and paranoid. Furthermore, they "can have great strength." Based on the report, Dr. Bux opined that Crystal would not have been a "passive individual" during a sexual assault, but would defend herself. (15RT 2585-2586.)

Dr. Bux opined that Crystal's postmortem injuries were consistent with being dragged on the ocean floor and being banged against the rocks and that her premortem injuries could have occurred during the act of drowning. (15RT 2578.) The laceration and abrasions on Crystal's face were not indicative of an assault, but rather "bouncing on the ocean and the rocks." (15RT 2583-2584.)

Dr. Bux further opined that the bruises and the laceration to the forehead appeared to be premortem. However, there was "no good way to establish the time" the injuries were inflicted. (15RT 2572-2573.) There was no indication that another person had hit or struck Crystal. (15RT 2679.) Dr. Bux opined that Dr. O'Halloran's attempt to estimate the time an injury occurred before death by white blood cell and hemorrhage analysis was not very precise. (15RT 2581-2583.)[24] Because death is a process, Dr. Bux could not form an opinion to a scientific certainty as to the time of Crystal's death. (15RT 2575-2576.)

Dr. Bux also opined that Crystal's injury to her right hip, the injury to her left bicep, one of the injuries on her shoulder, and the injury above her left thumb were premortem. (15RT 2605-2608.) The injury to Crystal's right thigh was indicative of a premortem injury. (15RT 2616-2617.) The wound on the center of Crystal's head was a blunt force injury against an object that was not flat, such as a rock. This injury was inflicted premortem. (15RT 2618-2620.) The injury to the right side of Crystal's forehead was inflicted premortem. (15RT 2620-2622.) Dr. Bux also opined that the linear laceration to Crystal's left wrist could have possibly been made by a metal bracelet. (15RT 2608-2610.)

Dr. Bux was not an expert on sperm. (14RT 2629-2631.) Dr. Bux believed that appellant's sperm deposited inside Crystal occurred "recently." However, he did not know, and was not aware, of anything that "can tell us the difference" of whether semen was deposited within minutes or a few hours. (14RT 2632.)

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[24] Dr. Bux explained that it is difficult to determine whether a wound is premortem or postmortem because there is "margination" at death. Margination is when hurt or dying cells attract white blood cells. (15RT 2573-2575.)

II. PENALTY PHASE EVIDENCE

A. The Prosecution's Evidence

On October 25, 1986, Allen Brambrink was employed at the Napa County crime lab. He collected evidence of appellant's rape of Cynthia W. After the rape, Cynthia W. was very sullen. She was frightened and confused. Brambrink hugged Cynthia W. He felt Cynthia W. shudder. Afterwards, Cynthia W. relaxed and stated that she felt better. (16RT 3041-3048.)

C. William Hamilton was Crystal's grandfather. Crystal was his first grandchild and was his "baby." Crystal was very close to her grandparents and travelled frequently with them. Crystal was bright. She loved music and liked to sing. Crystal also enjoyed playing sports and spending time outdoors. Crystal's grandfather thought about Crystal "all the time." (16RT 3007-3021.)

Crystal was Lt. Colonel Hamilton's first child. She had a brother, Robyn, and, sister, Corianne. Lt. Colonel Hamilton would often take his children hiking. They would play family football and baseball games on the weekends. Crystal was friendly and inquisitive as a child. She was active and loved the outdoors. Crystal was also interested in art and would paint. Crystal's death was very hard on Corianne. Corianne had one of Crystal's paintings hanging in her bedroom. Crystal loved animals and wanted to be involved in veterinary medicine. Crystal also talked of becoming a nurse. (16RT 3021-3034.)

Lt. Colonel Hamilton blamed himself for what happened to Crystal and felt that he let her down. The hardest part of Crystal's death was that Lt. Colonel Hamilton "wasn't there to stop it." (16RT 3034-3038.) For Lt. Colonel Hamilton, "Nothing will ever be the same." Crystal was taken away from him, and she could not be replaced. (16RT 3037.)

B. Defense Evidence

Tiffany Beck was appellant's niece. She had a close relationship with appellant. Appellant was a loving and playful uncle. Appellant never acted inappropriately with Beck. Beck would be upset if appellant were executed. (17RT 3059-3068.) However, Beck did not believe that appellant raped Cynthia W. or raped and killed Crystal. (17RT 3071-3073.)

Melvin Dworak ("Melvin") was appellant's brother. They had a close relationship. Appellant had a loving relationship with Melvin's three children. Appellant treated others with love and respect. (17RT 3074-3079.) Melvin did not want appellant to get the death penalty because "two wrongs [do not] make a right." Melvin believed that appellant could help people in prison. (17RT 3080.) Melvin had never seen appellant act aggressively towards women. (17RT 3082.) Melvin had been convicted of attempted extortion. (17RT 3082-3084.)

Melvin's wife, Shannon ("Shannon"), had known appellant since high school. Shannon had previously dated appellant. Shannon was later in an abusive marriage. She told appellant. Appellant went and moved Shannon to Napa to stay with his mother and family. Shannon did not want appellant executed because she believed that he was a good person. (17RT 3087-3094.)

Donna Woods ("Donna") was appellant's older sister. Appellant loved Donna's daughters. (17RT 3094-3099.) Donna had never seen appellant act aggressively towards another man or woman. (17RT 3102.) Donna sent Cynthia W. an anniversary card to commemorate the date that appellant raped Cynthia W. At the time, however, Donna believed that appellant was innocent. (17RT 3099-3101.) Donna wrote on the anniversary card,

> Happy Anniversary and <u>many, many</u> more. Just a little something for you to remember your <u>RAPE</u>. May you get

AIDS, bitch. Having your son lie to cover up your blindness of being able to see your true rapist!

(17RT 3105-3106; 6CT 1646, double underlines omitted.)

Steve Woods ("Steve"), Donna's husband, would hunt and fish with appellant. He did not want to see appellant executed because he believed that appellant had "too much to offer." Steve was never concerned about his daughters being around appellant. (17RT 3113-3118.) However, Steve was not concerned because he believed that appellant did not rape Cynthia W. If he had known that appellant was guilty of that rape, he would not have wanted appellant to spend time with his daughters. (17RT 3117-3118.)

James Esten was an expert on the California prison system. (17RT 3122-3124.) Esten opined that appellant would be an "above average" inmate with useful skills as a teacher's aide. (17RT 3137-3141.)

Marjorie Dworak ("Majorie") was appellant's mother. Appellant was "a loving, outgoing young man." Marjorie did not want to see appellant executed because he had "too much to offer." (17RT 3157-3161.)

Virginia Foster was appellant's mother-in-law. Appellant loved his family. Appellant was helpful to his friends and loved fishing. (17RT 3163-3171.) Foster was not aware that appellant had been convicted of rape. (17RT 3171-3272.) Foster was never afraid of appellant. She had never seen appellant act inappropriately with anyone. (17RT 3172-3173.)

Susannah was appellant's wife. She still loved appellant deeply. (17RT 3176, 3181-3182, 3187.) Appellant was very close with his family. (17RT 3186.) Appellant loved Susannah's parents. (17RT 3182.) Appellant had lots of friends and would stop what he was doing to help them. (17RT 3184-3185.) Susannah and appellant would argue about money. (17RT 3186-3187.) They went through marriage counseling at the end of 2001. Their marriage was getting better, and they were thinking

about starting a family. (17RT 3188-3189.) Susannah did not want appellant to be executed. (17RT 3192.) Appellant told Susannah that he had been wrongly convicted of raping Cynthia W. (17RT 3195.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING EVIDENCE OF ALLEGED THIRD-PARTY CULPABILITY EVIDENCE

Appellant contends that the trial court abused its discretion when it denied his motion to admit evidence of alleged third-party culpability. Specifically, appellant argues that the trial court prejudicially erred when it excluded evidence of his theory that either Danny Carroll or Jay Campbell was somehow involved in Crystal's death. This evidence included proposed testimony from one of Crystal's friends, Rachel Daniels, that Daniels had committed acts of prostitution with older men to establish Crystal's prior "activities." (AOB 75-111.) Respondent disagrees. The proposed third-party evidence did not actually link Carroll or Campbell to Crystal's murder. Thus, the evidence was irrelevant and was not capable of raising a reasonable doubt that appellant committed the rape and murder. In any event, any exclusion of third-party culpability evidence was harmless because the evidence against appellant was strong.

A. Relevant Proceedings

1. The Prosecution's Trial Brief

On January 3, 2005, the prosecutor filed her trial brief that contained various motions in limine, including a motion to exclude third-party culpability evidence. (1CT 109-251.) In the brief, the prosecutor anticipated that appellant would present a defense that either Danny Carroll or Jay Campbell was somehow responsible for Crystal's rape and murder. The prosecutor further anticipated that appellant would attack Crystal's character by attempting to show that Crystal was either promiscuous or

engaged in acts of prostitution to support a claim that appellant had consensual sex with Crystal. The prosecution sought to exclude such evidence as improper third-party culpability evidence and bad character evidence. (1CT 148.)

In a section titled "Miscellaneous People and Facts," the prosecutor provided background information and relevant facts on the various individuals relevant to appellant's anticipated third-party culpability defense. (1CT 135.) These individuals included Daniels, John Figueroa, Campbell, and Carroll. (1CT 135-147.)

a. Rachel Daniels and John Figueroa

Rachel Daniels was a teenager who was a part of Crystal's circle of friends. At one-time, she was one of Crystal's closest friends. Daniels was a heroin addict, who had exchanged sexual favors for drugs or money. Daniels had such a relationship with John Figueroa, a man who was 21 years her senior. (1CT 135-136.) Daniels told police that Crystal was not engaged in any prostitution activity. (1CT 137.) She had no personal knowledge that Crystal had ever engaged in any sexual activity. (1CT 138.)

A couple of months before her murder, Crystal smoked marijuana together at a Motel 6 with Daniels, Figueroa, Zoeber, and Jason Arney. A month before her death, Crystal and Daniels consumed drugs with a man named "Tye" at a Motel 6. A week before her murder, Crystal told her father that she "wanted nothing to do with" Daniels because of Daniels' drug abuse. Crystal did not use heroin. Rather, she used marijuana and methamphetamine. (1CT 135-136.)

Figueroa and Crystal were also friends. They did not have a sexual relationship. Shortly before her murder, Crystal accompanied Figueroa to a barbeque. When Crystal was murdered, Figueroa had been incarcerated in Ventura County Jail, where he was held from April 17, 2001, to April 24,

2001. Before Crystal went missing on Saturday April 21, 2001, she called Figueroa's cellular telephone, asking him for a ride home and left a voice message. (1CT 138.)

b. Jay Campbell

Jay Campbell was a friend of Robyn Jones, Zoeber's mother. On April 23, 2001, the police searched Jones's residence. A bucket in the carport contained a pair of wet, sandy jeans. The jeans belonged to Campbell, who had a date at the beach with Cindy Kinnaird. No evidence linked Campbell's jeans to Crystal's rape or murder. (1CT 139-140.)

c. Danny Carroll

Danny Carroll was a long-time drug user, drug dealer, and occasional boyfriend of Jones. About the time that Crystal went missing, Carroll stole Jones's car and hung out with Ginny Henry, Laura Zachelmeyer, and Campbell. He avoided Jones during the time of Crystal's murder because he had stolen Jones's car. (1CT 145.) Carroll admitted that he had stolen the car because Jones was unwilling to give him a ride. Carroll also admitted that he had broken the window of the car because he did not have the keys. (1CT 141, 144-145.)

One month after Crystal's murder, Steve Jacobsen called the police to inform them that Carroll was in violation of his parole. When the police arrived, Carroll ran into Jones's bedroom to hide. Brittney Mooney was at the home and was asked by police whether she knew of Carroll's whereabouts. Mooney did not inform the police of Carroll's whereabouts. Nevertheless, Carroll was arrested and sent to prison where he wrote several letters to Jones. In one letter, Carroll stated that Crystal was not dead, but "moved away." In another letter, Carroll thanked "Brittany" and told Jones "'don't worry about [Crystal] it will be taken care of.'" (1CT 143-144.)

Carroll testified before the grand jury. Carroll explained that he wrote the letters to Jones because he saw how hurt Jones was over Crystal's disappearance. As to the first letter, Carroll testified that he had heard from someone in prison that Crystal's father had taken Crystal away from her friends. Thus, Carroll wrote to Jones that Crystal was not dead. As to the second letter, Carroll testified that he was thanking Mooney for not telling the police of his whereabouts on the day of his arrest. (1CT 144.) Carroll also wrote several letters to Tom Young explaining why he had stolen Jones's car and stated that he was not at Jones's house during the time that Crystal went missing. (1CT 144-145.)

Approximately one year after Crystal's murder, Jones was interviewed by the police. Jones told police that she believed Carroll may have been involved in Crystal's murder. Jones stated that Carroll had shaved his mustache and pubic hair shortly after Crystal's murder. Carroll had stolen Jones's car before Crystal disappeared and did not return the car. The car was seen with a broken window after Crystal's death. (1CT 140-141.) However, Jones later admitted that Carroll had shaved his mustache and pubic hair at Jones's request. (1CT 140-141.) Jones later believed that Carroll had taken her car on April 5, 2001. (1CT 145-146.)

A year after Crystal's rape and murder, Zoeber was interviewed by police. Zoeber suspected that Carroll was involved in Crystal's rape and murder. Zoeber stated that Carroll had stolen Jones's car the night of Crystal's murder and kept the car for a week. When Carroll returned the car, there was sand on the floor and Carroll had shaven his mustache. Zoeber claimed that Carroll made a flirtatious comment about having a sexual relationship with Crystal and that he offered Crystal a ride home the night she disappeared. Zoeber later admitted that he did not actually hear these statements and was speculating as to what "'could have happened.'" (1CT 142.)

Zoeber later told police that Carroll was at Jones's residence on Friday, April 20, 2001. That day, Carroll was in the carport breaking the speakers in his truck. Zoeber then stated that he believed Carroll had stolen Jones's car that day. Zoeber stated that he did not see Carroll the night that Crystal disappeared. (1CT 142-143.)

The police subjected Carroll to a Computerized Voice Stress Analysis "CVTS" test. Based on the CVTS test, a sheriff's deputy concluded that Carroll had been deceptive in his answers to questions about Crystal's rape and murder. (1CT 146-147.)

No evidence connected Jones's stolen car with Crystal's rape and murder. There was no evidence that Carroll was with Crystal the night of the rape and murder. Carroll provided a DNA sample and was excluded as a source of the semen inside Crystal. (1CT 140-141.)

d. The Prosecutor's Argument

Citing *People v. Hall* (1986) 41 Cal.3d 826, the prosecutor argued that any evidence that Carroll was involved in Crystal's murder was inadmissible because there was no direct link that Carroll was involved in the rape and murder. Any evidence that Carroll had either a motive and/or opportunity to commit the crime was insufficient to be admissible, absent evidence of any link between Carroll and the crimes. (1CT 164-172.) Moreover, the prosecutor argued that the CVSA test was inadmissible absent an offer of proof that the test was accepted in the scientific community as reliable.[25] (1CT 169-170.)

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[25] "Under [*People v. Kelly* (1976) 17 Cal.3d 24], the proponent of evidence derived from a new scientific technique must establish that: (1) the reliability of the new technique has gained general acceptance in the relevant scientific community, (2) the expert testifying to that effect is qualified to give an opinion on the subject, and (3) the correct scientific (continued...)

The prosecutor also argued that any testimony from Daniels and/or Figueroa regarding Crystal's prior "activities" or sexual history was inadmissible. No evidence connected Daniels or Figueroa with Crystal's rape and murder. Although Daniels had committed acts of prostitution with older men, there was no evidence that Crystal engaged in such acts. Moreover, appellant denied knowing Crystal either by appearance or name and denied having sex with anyone who resembled Crystal. Thus, Crystal's prior sexual history with other men was irrelevant. (1CT 172-174.) The only information known about Crystal's sexual history in the months preceding her murder was that Crystal may have had relations with Zoeber, her good friend. Thus, the prosecutor argued that any evidence of Crystal's relationship with Daniels or Figueroa was inadmissible because such evidence would be improperly used as character evidence to portray Crystal as being either promiscuous or a prostitute based on her association with Daniels. (1CT 174-176.)

The prosecutor further argued that evidence of Campbell's jeans in Jones's carport was inadmissible because there was no evidence connecting Campbell with Crystal's murder. (1CT 139, 177.)

2. Appellant's Opposition to the Prosecution's Motion to Exclude Anticipated Third-Party Culpability Evidence

Appellant filed an opposition to the prosecution's motion to exclude third-party culpability evidence. (2CT 424-433.) Appellant argued that the evidence relating to Carroll, Campbell, and Daniels was relevant and admissible pursuant to *People v. Hall*, *supra*, 41 Cal.3d 826. (2CT 427.)

(...continued)
procedures were used. [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 445.)

Appellant asserted that the proposed evidence was capable of raising a reasonable doubt as to his innocence. Appellant detailed several facts that supported his theory that Carroll was responsible for Crystal's murder, including : (1) Carroll was in the same house as Crystal the night that she was raped and murdered; (2) Carroll made "admissions regarding knowledge as to the circumstances surrounding" Crystal's death; (3) the results of the CVSA test showed that Carroll was deceptive when answering questions relating to Crystal's death; (4) Carroll gave inconsistent statements to the police; and (5) Jones's car was "full of sand." (2CT 428-431.)

Appellant also argued that several facts supported his theory that Campbell was involved in Crystal's death, including the fact that Campbell was at Jones' house before Crystal disappeared and a pair of Campbell's sandy jeans was found in Jones's carport. (2CT 430-431.) Appellant further argued that Crystal's relationship with Daniels "establishes the fact that [Crystal] liked to party and would frequent hotel rooms to do so. This raises the question as to whether . . . [Crystal] went to a hotel room that night to party." (1CT 431.)

3. The Trial Court's Ruling

A hearing was held on the prosecution's motion to exclude evidence of Crystal's sexual history. Defense counsel asked to reserve ruling on the issue and stated that he was not prepared to respond to the motion. The prosecutor asked whether defense counsel "really believe[d] there [were] legitimate grounds" to oppose the motion. Defense counsel responded that Daniels stated that Crystal had "sex with a number of different people." The trial court stated that it would reserve ruling on the motion, but it was tentatively granting the motion. (4RT 530-532.) The prosecutor then stated for the record that Daniels did not state that Crystal had sex with "a lot of people." Rather, Daniels stated that she did not personally know

whether Crystal had ever sexual relations with anyone. However, Daniels believed Crystal may have had sex with a man named "Jason" and a man named "Travis." (4RT 530-534.)

Later, a hearing was held on the prosecution's motion to exclude third-party culpability evidence. The trial court stated that it was tentatively granting the motion. (4RT 551.) The trial court found that the evidence pertaining to Campbell, i.e., his wet jeans in Jones' carport, was insufficient to raise a reasonable doubt of appellant's guilt. The trial court found:

> And I've reviewed the proffered evidence concerning Mr. Campbell's jeans. Those jeans were found apparently on the Monday following the Saturday slash early Sunday morning commission of the crime in this case. They were simply a pair of wet jeans left in a bucket at the carport that had sand on them.
>
> There's been no showing that they in any way relate to the offense alleged here other than the fact that Crystal Hamilton's body was found floating in the surf off of Mussel Shoals beach. No evidence that Mr. Campbell was in any proximity to Miss Hamilton.

(4RT 552.)

The trial court further found that any evidence of Carroll's guilt also was insufficient to raise a reasonable doubt of appellant's guilt. The trial court found:

> There's been no evidence in Danny Carroll's situation of proximity to Crystal Hamilton other than testimony that was received from Matt Zoeber that placed Danny Carroll, if it's accepted, at the condominium or apartment complex on the day prior to the commission of the crime, but nothing that actually puts him in proximity to Crystal Hamilton.
>
> Mr. Carroll apparently wrote some letters from prison that suggested knowledge of circumstances concerning Miss Hamilton's death, but there's nothing about those letters that lead to the reasonable conclusion he somehow was involved in that death. It appears to be more in the nature of somebody

> trying to do his own investigation as to what occurred here and speculating and making musings about what might have occurred.
>
> There's evidence concerning Mr. Carroll having shaved his pubic region and mustache sometime after the commission of the crime. It suggested that somehow that's suspicious in a case of this nature. There's been an explanation proffered, even assuming it were to be considered suspicious. And also evidence of a voice stress analysis test given to Mr. Carroll that yielded somewhat questionable results in terms of his veracity. The Court sees no basis upon which to admit that kind of evidence.
>
> And there's been a suggestion that Mr. Carroll had been involved in a theft of the car belonging to Robyn Jones, who actually was the mother of Matt Zoeber, and who lived in that same apartment where Crystal was last seen, that that car had a broken window with sand inside of it sometime after the commission of the crime. Again, there's been no link to this offense itself, however.
>
> I'm relying strongly on the case of [*People v. Adams* (2004) 115 Cal.App.4th 243]. A case, interestingly enough, that also involved a prosecution as a result of DNA analysis submitted to the Department of Justice in the matter of 20-year-old murder charges that ultimately led to the filing against Mr. Adams in which the defense in that case also tried to admit third-party evidence that the victim who had also been sexually assaulted had a boyfriend who had made threats against her and she had complained of threats by him against her.
>
> My review of the evidence proffered in this case is that [the evidence of third-party culpability in this case] is weaker than what was proffered in the *Adams* case and is properly excluded as not meeting the threshold requirement that would reasonably create a doubt of [appellant]'s guilt in this matter.

(4RT 552-554.)

Defense counsel responded that the witnesses supporting his proposed third-party defense were not only relevant to third-party culpability, but also to explain possible actions taken by Crystal before her death.

Specifically, defense counsel argued that Daniels' testimony could establish that Crystal "[p]erhaps [contacted] another person . . . and [that person] offered to give her a ride, or perhaps such things as going to a party at a hotel room became more -- another possibility of an action for her to take." (4RT 554-555.) Defense counsel further argued, "It's not necessarily relevant to state that Rachel Daniels was -- had a part in the death of Crystal Hamilton, but Rachel Daniels's testimony is relevant to set the stage for possible alternatives [to Crystal going to Ralphs to wait for her father]." (4RT 555.)

With regard to Carroll, defense counsel argued that Carroll's testimony would show the circumstances surrounding Jones's home. (4RT 555-556.) Defense counsel then asserted that the jeans were "extremely relevant" because it showed that "yet another person that happened to go to the beach at the same time that this body was found at the beach, a person that had -- that had the proximity, which is not the only standard that we -- that the case law allows, but that this person went to the beach at some point, and that it was a person that was connected to the home of Robyn Jones which is where the decedent was last seen alive." (4RT 556.)

The prosecutor countered that appellant's attempts to explain possible actions taken by Crystal the night of the rape and murder was "really [asking] to speculate about what else might have happened of which we have no evidence." The prosecutor also noted that "[t]aking this out of the realm of third-party culpability . . . means that [the evidence is] not relevant anymore" because the "evidence is designed [to show that] somebody else could have" committed the crimes. (4RT 557.)

After hearing argument from counsel, the trial court stated, "I'm satisfied based on my review of the authorities and the offers of proof that are made that the tentative ruling as to each of these proposed witnesses is the correct one." (4RT 558.) The trial court concluded, "the evidence

proffered through Rachel Daniels, John Figueroa, Jay Campbell and Danny Carroll doesn't meet the test for admission of third-party culpability . . . ." (4RT 558.) The trial court further found, to the extent that the evidence was being offered "for a totality of circumstances," such evidence was inadmissible because it was speculation "on what others might think [Crystal] might have been doing." (4RT 558.)

Afterwards, appellant again argued that the evidence was capable of raising a reasonable doubt of appellant's guilt and asserted that such evidence was admissible even if it did not link "a third person to the actual perpetration of the crime." (4RT 564A-564F.)

The trial court then granted the prosecution's motion to exclude the evidence as follows:

> Again, I believe the *Adams* case does accurately state the law, and the standard that I'm applying in making the determination on this evidence is not the standard that the evidence must show substantial proof of a probability that a third person committed the act, rather, it only need be capable of raising a reasonable doubt of the defendant's guilt.
>
> As *Adams* notes, however, at the same time it is not required that any evidence, however remote, must be admitted to show a third party's possible culpability. Evidence of mere motive or opportunity to commit the crime and another person without more will not suffice to raise a reasonable doubt about a defendant's guilt. There must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.
>
> In assessing the admissibility of third-party culpability evidence, the trial court must consider whether the evidence could raise a reasonable doubt as to the defendant's guilt and whether it is substantially more prejudicial than probative under Section 352 of the Evidence Code.
>
> And I previously articulated my feelings about the evidence presented here. There basically are three separate sources of evidence proposed, Mr. Carroll, Mr. Campbell, Miss

Daniels. Mr. Campbell is the jeans that are recovered in the carport.

In the abstract, . . . [defense counsel's] argument . . . does have some plausibility that you find clothing that might contain a substance that would correspond with a very generic kind of substance found at a location where a crime victim is located. But that's not enough. That's speculation as to where that particular evidence came from.

And when I'm faced with what I know about all of this evidence in this particular case by virtue of the pleadings that have been filed, that is, that Mr. Campbell would say that he went to the beach with Miss Kinnaird and put those jeans in that bucket, which were not recovered until the Monday following the Saturday night, Sunday morning after the commission of this offense, it is putting this jury on a wild goose chase, frankly, over things that are simply speculation. And I don't believe the threshold has been met for the admission of that evidence under the third-party culpability evidence rules.

And even if it did, it seems to me it's quite clear that it is subject to 352 and there is an abundance of evidence that explains all of these suspicious circumstances. So when you get to the very end of the equation, if you will, all three of these potential witnesses offer evidence that in the Court's view does not add anything to the determination of [appellant]'s guilt or innocence of the charged offenses, [but rather the evidence] place[s] the jury on a course to go chasing after wild hairs.

And, frankly, because they each offer zero in the way of relevant evidence, adding three zeros together you still get zero.

So the Court would grant the motion to exclude the evidence that has been proffered through Miss Daniels, Mr. Figueroa, Mr. Campbell's jeans and Mr. Carroll.

(4RT 564F-564H.)

B. Standard of Review

It is a defense "against criminal charges to show that a third person, and not the defendant, committed the crime[s] charged." (*Hall*, *supra*, 41 Cal.3d at p. 832.) A criminal defendant has the right to present such

evidence if it is capable of raising a reasonable doubt about his or her own guilt. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) However, the admission of such evidence remains subject to the general requirement of relevance and the trial court's discretion to exclude unduly prejudicial or confusing evidence. As this Court explained in *People v. Hall*, *supra*, 41 Cal.3d 826:

> To be admissible, the third-party [culpability] evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. [¶] . . . [¶] [C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible [citation] unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion [under Evidence Code section 352].

(*Id.* at pp. 833-834; accord *People v. McWhorter* (2009) 47 Cal.4th 318, 367-368.) Accordingly, merely proving that a third party had a motive to commit the crime, lacks an alibi, and had the opportunity to commit the crime, will not warrant introduction of third party culpability evidence. (See, e.g., *People v. Pride* (1992) 3 Cal.4th 195, 237-238.) Rather, "there must be direct or circumstantial evidence linking the third person to the *actual perpetration* of the crime." (*People v. Hall*, *supra*, 41 Cal.3d at p. 833, italics added.)

"'In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352.' [Citations.]" (*People v.*

Elliott (2012) 53 Cal.4th 535, 580.) A trial court's discretionary ruling on the admission of third-party culpability evidence may not be disturbed absent a showing that its ruling was an abuse of discretion. (*Id.* at p. 581; *People v. Lewis* (2001) 26 Cal.4th 334, 372-373.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

C. The Trial Court Did Not Abuse Its Discretion Because There Was No Evidence Linking a Third Person to Crystal's Rape and Murder

Here, relying on *Adams*, the trial court found that appellant failed to make the requisite showing for the admission of third-party culpability evidence. (4RT 552-554; see *Adams*, *supra*, 115 Cal.App.4th 243.) In *Adams*, the victim was found dead inside her car, which was parked in her carport. (*Id.* at p. 247.) Semen was recovered from vaginal and rectal swabs. (*Ibid.*) DNA-typing was done on the swabs, and the DNA profile taken from the vaginal swab matched the defendant's DNA profile. (*Id.* at pp. 247-248.) "Based on the race of the donor, the estimates of the probability of a random match ranged from one in 320 billion to one in 5.5 trillion." (*Id.* at p. 248.)

On appeal, the defendant claimed that the trial court erred when it refused to allow evidence that Kallerup, the victim's "'off and on' boyfriend with mental problems," killed the victim. (*Adams*, *supra*, 115 Cal.App.4th at pp. 247, 250.) In addition to showing Kallerup and the victim had a "stormy and violent relationship," the defendant sought to elicit testimony that Kallerup had stated he was angry and frustrated with the victim, there had a been a physical "battle" between Kallerup and the victim, and Kallerup tried to kill the victim by choking her. (*Id.* at p. 250.) Cigarette butts "smoked way down to the end as if it might burn the smoker" were found in the victim's apartment and Kallerup's motel. (*Id.* at

251.) Two days after the murder, two crushed beer cans were found in the carport that looked similar to cans found in Kallerup's motel. (*Ibid.*)

The court of appeal found that the trial court did not abuse its discretion because there was no evidence directly linking Kallerup to the victim's murder. The court of appeal reasoned:

> The crushed beer cans found outside the carport were a different brand from the cans in Kallerup's motel room. The cigarette butts were found in the apartment, not at the crime scene which was in the carport. Furthermore, in the absence of fingerprint or DNA evidence linking the cigarette butts to an individual, they could have been left by any of the many individuals who had come to [the victim]'s apartment.

(*Adams*, *supra*, 115 Cal.App.4th at p. 253.)

Likewise, in the instant matter, the trial court did not abuse its discretion when it granted the prosecution's motion to exclude evidence of third-party culpability. Appellant presented no evidence that Campbell or Carroll had an actual motive to commit the crimes. Instead, appellant merely raised the possibility that Campbell or Carroll had an opportunity to rape and murder Crystal because of their "proximity" to her. (2CT 428-431.) Although defense counsel argued that there were "suspicious" circumstances involving Campbell and Carroll, counsel failed to make an offer of proof linking them to the actual perpetration of Crystal's rape and murder. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 176 [merely raising the possibility that others may have had plausible motives to commit the crimes was insufficient showing to admit third-party culpability evidence]; accord *People v. Edelbacher* (1989) 47 Cal.3d 983, 1018.)

At trial, appellant argued that third-party culpability evidence was admissible, even if there was no evidence linking the third person to the perpetration of the crime. (4RT 564A-564F.) Appellant now recognizes in his opening brief that mere evidence of motive or opportunity is not enough for admissibility. Rather, there must be direct or circumstantial evidence

linking the third person to the perpetration of the crime for third-party culpability evidence to be admissible. (AOB 97.) However, appellant again fails to identify any such evidence. (See AOB 94-102.)

Appellant argued that several facts also supported his theory that Campbell was responsible for Crystal's death, including the fact that Campbell was at Jones' house before Crystal disappeared and a pair of Campbell's sandy jeans was found in Jones' carport. (2CT 430-431.) The trial court was not persuaded and described the jeans as "simply a pair of wet jeans left in a bucket at the carport that had sand on them." (4RT 552.) The trial court then found, "There's been no showing that they in any way relate to the offense alleged here other than the fact that Crystal Hamilton's body was found floating in the surf off of Mussel Shoals beach. No evidence that Mr. Campbell was in any proximity to Miss Hamilton." (4RT 552.)

The trial court did not abuse its discretion when it found the jeans were not relevant and did not raise a reasonable doubt as to appellant's guilt. Clearly, evidence that Campbell was at Jones' house before Crystal disappeared and had a pair of jeans in a bucket of water in Jones' carport was insufficient to link him to Crystal's murder. (See *Adams*, *supra*, 115 Cal.App.4th at p. 253 [cigarette butts found both in the victim's home and the third party's home did not connect the third party to the murder because the cigarette butts were not found at the crime scene].) Campbell told an investigator that he and Kinnaird were on a date at the beach when he got his jeans wet. Kinnaird also told an investigator that she and Campbell went to the beach. (1CT 139.) In contrast to this innocent explanation for the sandy jeans, there was no offer of proof made by appellant that Campbell was in any way involved in Crystal's rape and murder. (4RT 564B-564D.)

Appellant merely argued that these were "very suspicious circumstances" that allowed an inference that was inconsistent with his guilt. (4RT 564D-564E.) However, these purported "suspicious" circumstances were insufficient to link Campbell to Crystal's rape and murder. Certainly, there was nothing unique about the sand in Campbell's jeans that somehow connected him to the crime scene or the crimes. Thus, the trial court did not abuse its discretion when it excluded such evidence. (See, e.g., *Bradford*, *supra*, 15 Cal.4th at pp. 1324-1325 [evidence that the victim was afraid of an individual other than the defendant, including statements to her mother that she was "running with a rougher crowd," that her boyfriend "carried knives and liked to cut people," that she was afraid of "a man," and that someone was "after her" was inadmissible third-party culpability because it did not link someone other than the defendant to the perpetration of the murder].)

Likewise, appellant failed to make a requisite showing that Carroll was somehow responsible for Crystal's rape and murder. Appellant detailed several facts that supported his theory that Carroll was responsible for Crystal's murder, including : (1) Carroll was in the same house as Crystal the night that she was raped and murdered; (2) Carroll made "admissions regarding knowledge as to the circumstances surrounding" Crystal's death in his letters; (3) the results of the CVSA test showed that Carroll was deceptive when answering questions relating to Crystal's death; (4) Carroll gave inconsistent statements to the police about shaving his pubic region; and (5) Jones's car was "full of sand." (2CT 428-431.) However, these circumstances fail to link Carroll to the actual perpetration of Crystal's rape and murder.

First, it was unclear whether Carroll was actually present at Jones's home when Crystal was last seen. Carroll's letters to Young stated that he was not at Zoeber's house during the time that Crystal went missing. (1CT

144-145.) Initially, Zoeber told police that Carroll had stolen Jones's car the night of Crystal's murder and kept the car for a week. (1CT 142.) Zoeber later stated that he did not see Carroll the night that Crystal disappeared. (1CT 142-143.) However, Campbell told an investigator that Carroll was present at Zoeber's home on the day that Crystal was last seen. (2CT 429-430.) Thus, it was unclear whether Carroll was at Jones' home before Crystal's rape and murder. (See 3RT 421-423.)

Even assuming that Carroll was present at the home, such evidence would not link him to Crystal's rape and murder. Crystal was not murdered at Zoeber's home. Rather, she was drowned many miles away at a beach north of Mussel Shoals. (10RT 1833-1834; 12RT 2165-2166.) As the trial court found, although Carroll may have been at Jones's condo, "nothing . . . actually puts [Carroll] in proximity to Crystal Hamilton" at the time of her death. (4RT 552.) Moreover, it was undisputed that appellant's DNA was inside Crystal (13RT 2409; Peo. Exh. 43) and that appellant's sperm was deposited shortly before Crystal's death (13RT 2446-2448; 14RT 2632). In contrast, there was no forensic evidence connecting Carroll to Crystal or the rape. "[E]xclusion of evidence that produces only speculative inferences is not an abuse of discretion." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684, 681-682.)

Second, the trial court properly found that Carroll's letters did not "lead to the reasonable conclusion that [Carroll] somehow was involved in" Crystal's death. (4RT 553.) Carroll did not make "admissions regarding knowledge as to the circumstances surrounding" Crystal's death in his letters. Rather, Carroll wrote to Jones that Crystal was "not dead but moved away . . . ." (1CT 143.) Carroll later wrote to Jones "don't worry about [Crystal] it will be taken care of." (1RT 143.) These letters do not contain any admissions regarding the circumstances surrounding Crystal's death. There was no mention about any of Crystal's injuries. There was no

statement about the fact that Crystal was completely nude. There no statement about appellant's sperm inside Crystal. Rather, the letters show Carroll's ignorance of those circumstances. In fact, Carroll's letters to Jones showed that Carroll thought Crystal was *alive*.

Carroll's letters to Young also do not show that Carroll was involved in Crystal's death. Carroll first wrote to Young that Cliff Charman was scared when he was questioned by police. (1CT 144; see 3RT 320.) Carroll later wrote to Young that he was not at Jones's home the night that Crystal went missing and speculated that Cindy Kinnaird knew where Crystal went that night. (1CT 144-145.) In other words, as the trial court found, the letters showed that Carroll was "trying to do his own investigation as to what occurred here and speculating and making musings about what might have occurred." (4RT 552.) Thus, Carroll's letters do not link him or any other third-party to the commission of Crystal's rape and murder. (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1018 [proposed third-party culpability evidence must identify a possible suspect other than the defendant or link a third person to the commission of the crime].)

Third, as to the CVSA test, appellant made no showing that the results of this test were admissible evidence. (See 4RT 553; see *People v. Doolin*, *supra*, 45 Cal.4th at p. 445.)

Fourth, the trial court properly found that Carroll's statements about shaving his mustache and pubic region did not link him to the perpetration of the rape and murder. (4RT 552-553.) Appellant argued that shaving these areas somehow linked Carroll to the murder because "there are sexual allegations." (2CT 430.) However, Carroll shaved these areas *a year after* Crystal was raped and murdered (1CT 140-141), Carroll was excluded as a source of the semen found in Crystal (1CT 146), and appellant did not contest that he was the source of the semen inside of Crystal (13RT 2408).

Thus, evidence regarding Carroll's shaving these areas was unquestionably irrelevant.

Last, as the trial court found, the fact that Carroll had stolen Jones's car and the car had sand in it was not relevant because the car was not linked to the crimes. (4RT 553.) Accordingly, the trial court did not abuse its discretion when it excluded appellant's proposed third-party culpability evidence and did not violate appellant's federal constitutional rights because the evidence was speculative and did not tend to prove or disprove a material fact in issue at appellant's trial. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 327 [126 S.Ct. 1727, 164 L.Ed.2d 503] [noting that evidence of third-part culpability may be excluded if such evidence did not sufficiently connect the other person to the crime]; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1243 ["'[w]e . . . reject defendant's various claims that the trial court's exclusion of the proffered [third-party culpability] evidence [under Evidence Code, §§ 350, 352] violated his federal constitutional rights to present a defense . . . . There was no error under state law, and we have long observed that, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [state or federal constitutional] right to present a defense."'"].)

D. The Trial Court Also Did Not Abuse Its Discretion When It Denied Appellant's Request to Admit Evidence of Daniels' Activities with Older Men and Testimony from Carroll About the Circumstances Surrounding Zoeber's Home

When arguing against the prosecutor's motion to exclude third-party culpability evidence, appellant also argued that Daniels' activities with older men and testimony from Carroll about the circumstances surrounding Jones's home explained "to the jury the possible actions taken by Crystal Hamilton at the time that this occurred." (4RT 554-556.) Specifically, defense counsel argued that Daniels' testimony could establish that Crystal

"[p]erhaps [contacted] another person . . . and [that person] offered to give her a ride, or perhaps such things as going to a party at a hotel room became more -- another possibility of an action for her to take." (4RT 554-555.) Defense counsel further argued, "It's not necessarily relevant to state that Rachel Daniels was -- had a part in the death of Crystal Hamilton, but Rachel Daniels's testimony is relevant to set the stage for possible alternatives [to Crystal going to Ralphs]." (4RT 555.)

However, any testimony that Daniels engaged in acts of prostitution or about the circumstances surrounding Jones's home to show that Crystal did not go to Ralph's leads to only speculative inferences. Thus, the trial court properly found that such evidence was irrelevant. (*People v. Morrison* (2004) 34 Cal.4th 698, 711 [evidence that only leads to speculative inferences is irrelevant].) There was no offer of proof that Crystal engaged in acts of prostitution with older men. Appellant did not argue that Daniels had anything to do with Crystal's rape and murder. Appellant merely wanted to question Daniels about her own activities in unrelated occasions so that the jury would speculate that Crystal did not go to Ralph's to wait for her father. (4RT 554-555.) Such speculation was not direct or circumstantial evidence that someone other than appellant raped and murdered Crystal. Moreover, the trial court's ruling did not deprive appellant of presenting some evidence that Crystal may not have gone to Ralph's to wait for her father. Defense counsel cross-examined Zoeber about whether Crystal was attempting to call older men who she "associated with" for a ride home the night she was raped and murdered. (12RT 2128-2129, 2132.)

Similarly, testimony from Carroll about the circumstances surrounding Zoeber's home was irrelevant. As stated above, it was unclear whether Carroll was at the home when Crystal was last seen alive. Any evidence regarding the circumstances surrounding Jones's home did not

identify a possible suspect other than appellant or link any third person to the commission of the crime. Thus, the trial court was well within its discretion to exclude such testimony. (See, e.g., *People v. Sandoval*, *supra*, 4 Cal.4th at pp. 176-177 [finding that the trial court properly excluded evidence that the murder victim was "the center of a violent criminal operation involving drugs and stolen cars and guns" because the defense only "raised the possibility that other had a motive" to kill the victims and noting that, although "the defense identified two persons with plausible motives, they had no direct evidence linking them to [the] actual perpetration of the crimes"]; *People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1017-1018 [the trial court properly excluded evidence concerning the victim's association with "Hell's Angel-type people" and drug dealers in order to prove that someone other than the defendant committed the crime because the proposed evidence did not "identify a possible suspect other than the defendant or link any third person to commission of the crime" and noting that the "evidence did not even establish an actual motive rather than a possible or potential motive"].)

E. Any Alleged Error Was Harmless

Because the trial court's ruling did not constitute a refusal to allow appellant to present a defense, but merely rejected certain evidence concerning the defense, "the proper standard of review is that enunciated in" *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Bradford*, *supra*, 15 Cal.4th at pp. 1325-1326.) Here, in light of the extremely strong evidence against appellant, it was not reasonably probable that the verdict against appellant would have been more favorable had the trial court admitted appellant's proposed third-part culpability evidence, which was extremely weak and speculative. Appellant had the propensity to commit assaultive sexual offenses, since it was uncontested that he had been previously convicted of the rape of Cynthia W. (10RT 1857-1877.)

Appellant had no alibi. Appellant only presented evidence of his whereabouts before 3 p.m. on April 21, 2001, the day that Crystal went missing. (15RT 2557-2558.) Although appellant was "on-call" on April 21, and 22, 2001, he did not work on those days. (11RT 1952-1956.)

Appellant had the opportunity to rape and murder Crystal. Susannah was out of town that weekend. (11RT 1945.) Crystal had been waiting for her father at the Ralph's parking lot when she disappeared between 10:30 p.m. and midnight. (11RT 2061-2062.) Appellant had previously lived nearby the Ralph's. (11RT 1971-1972; 7CT 1825.)

Crystal last spoke to her father at approximately 10:30 p.m. on April 21, 2001. (11RT 2056-2060; see 11RT 2091-2092; 13RT 2405-2407.) Crystal died between midnight to 3:30 a.m. on April 22, 2001. (12RT 2254-2257.) At approximately 6 a.m. (11RT 2029-2031, 2034), Crystal's naked, dead body was found at a beach south of Mussel Shoals in the Mobil Oil piers area. (11RT 1983-1987).

It was uncontested that appellant's semen was inside Crystal. (13RT 2407-2409.) It was also uncontested that his semen was deposited "recently" before her death. (14RT 2632.) The only evidence presented was that appellant's semen was deposited within two minutes to an hour and fifteen minutes before Crystal's death. (13RT 2446-2448.)[26] In addition to the fact that Crystal was naked, bruised, and strangled, this evidence strongly suggested that the killer had raped Crystal and that appellant was the rapist.

Appellant offered no innocent explanation for the presence of his semen in Crystal, who did not know appellant, and his statements to the

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[26] However, Dr. Bux, who testified that he was not an expert on semen (14RT 2629-2631), stated that he was not aware of anything that "can tell us the difference" of whether semen was deposited within minutes or a few hours (14RT 2632).

police indicated a consciousness of guilt. Appellant told police in three separate interviews that he did know Crystal by name and did not recognize her picture. (See 6CT 1743-1800; 7CT 1801-1832, 1848-1868.) Appellant stated that he had sex with three prostitutes, but was adamant that Crystal did not resemble any of them (6CT 1863-1864) and conceded that Crystal was not one of the prostitutes whom he had patronized (see 14RT 2598).

Appellant was intimately familiar with the area where Crystal body was found. Appellant was an avid fisherman and would go fishing in that area. (11RT 1892; 13RT 2346-2350, 2359.) Appellant also knew that, in the early morning hours, nobody would be at Mussel Shoals beach. (13RT 2351.)

Dr. O'Halloran opined that Crystal died from drowning and the evidence strongly suggested that she was also manually strangled. (12RT 2252-2253; see 12RT 2260-2266.) It was uncontested that Crystal suffered multiple, significant injuries before her death. Dr. Bux, the defense expert, conceded that Crystal's injuries to her right hip, left bicep, one of the injuries on her shoulder, and the injury above her left thumb were inflicted before Crystal died. (15RT 2605-2608.) It was further uncontested that the wound on the center of Crystal's head and the injury to the right side of Crystal's forehead were inflicted before Crystal died. (15RT 2618-2622.)

Appellant had a strong motive to kill Crystal after he raped her because he had spent over nine years in prison and would not wanted to go back to prison. (See 6CT 1780.) The jury deliberated for only 16 hours and 33 minutes (including breaks) before finding appellant guilty as charged. (3CT 783, 786, 800.) Thus, given the slight probative value of appellant's proposed third-party culpability evidence and the strong evidence against appellant, any alleged error was harmless.

Moreover, any alleged error did not affect the jury's determination at the penalty phase. (AOB 110-111.) Appellant did not seek to admit any

third-party culpability evidence at the penalty phase. As explained above, the evidence was speculative and would not have raised a lingering doubt as to appellant's guilt. Furthermore, the jury deliberated for less than seven hours (including breaks) before returning a verdict of death. (4CT 994-995; see 3CT 872-873.)

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST TO ADMIT A BOOKING PHOTOGRAPH OF CRYSTAL

Appellant contends that the trial court abused its discretion when it denied his request to admit a booking photograph of Crystal. (AOB 112-128.) Respondent disagrees. Appellant sought to admit Crystal's booking photograph to show what she may have looked like when she was under the influence of drugs. As the trial court found, there was no indication that Crystal was under the influence of drugs in the booking photograph. Thus, the photograph was irrelevant.

A. Relevant Proceedings

The prosecution filed a motion to admit three photographs of Crystal while she was alive. (2CT 361-378.) The first photograph ("photograph 1") was "the last known photograph of Crystal" that was taken "weeks before her death." (2CT 363.)[27] Photograph 1 was shown to appellant during his interview with Detective Rubright on May 12, 2003 (13RT 2379; 6CT 1763; Peo. Exhs. 18, 46B) and during his interview with Sergeant Montagna and Detective Miramontes on July 22, 2004 (13RT 2401; 7CT 1849-1852; Peo. Exhs. 18, 52B). Each time appellant was shown this photograph of Crystal, he stated that he did not recognize her. (2CT 363; see 6CT 1763; 7CT 1849-1852, 1858.)

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[27] Lt. Colonel Hamilton testified that photograph 1 was taken within 12 months of Crystal's rape and murder. (11RT 2047.)

The second photograph ("photograph 2") was taken several months before photograph 1. (2CT 363.)[28] Photograph 2 was shown to appellant during his interview with Detective Rubright and Sergeant Montagna on July 11, 2003. (13RT 2394-2395; 7CT 1818; Peo. Exh. 19.) When shown photograph 2, appellant stated that he did not recognize Crystal. (2CT 363; 13RT 2394; 7CT 1818.)

The third photograph ("photograph 3") was taken approximately two years before Crystal's murder, when she was 16 years old. (See 1RT 41-42.) Photograph 3 depicted Crystal holding a cat while standing in front of a fireplace with family photographs behind her. (2CT 377; see 4RT 536.) In the picture, Crystal was wearing the type of jewelry that she normally wore. (2CT 363.)

The prosecutor argued that photographs 1 and 2 were relevant to several issues in the case. The photographs showed appellant's identity as the person who raped and murdered Crystal. Appellant, who unquestionably had sexual intercourse with Crystal, viewed photographs 1 and 2, and denied recognizing Crystal. These denials indicated a consciousness of guilt. (2CT 366-367.) The photographs were further relevant to show that Crystal did not resemble any of the prostitutes whom appellant described patronizing. (2CT 368.) The photographs were also relevant to show appellant's motive to commit the rape and murder, i.e. because Crystal was an attractive, young woman. (2CT 368.)

Photograph 3 was relevant to show the type of bracelet that Crystal normally wore. Crystal's autopsy revealed bruises on her wrists that indicated "something had wrapped around her wrist and pushed against it." A photograph of the bracelet was relevant to show that these bruises were

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[28] Lt. Colonel Hamilton testified that photograph 2 was taken "a little bit before" photograph 1. (11RT 2047.)

inflicted when Crystal was "pinned or held" during either the rape or murder. (2CT 368-369; see 12RT 2234-2235; 14RT 2609-2610.)

Appellant opposed the motion. (2CT 416-433.)[29] Appellant argued that the photographs would arouse an excessively emotional response. First, appellant argued that the photographs would "presumably reflect what . . . [Crystal] looked like when she was not using drugs" and were irrelevant "as to how . . . [Crystal] appeared when she was using drugs and . . . 'on the street.'" (2CT 418-419.) Second, appellant asserted that photograph 3 was irrelevant because the type of jewelry was not in dispute. Appellant also argued that photograph 3 would elicit sympathy because it depicted Crystal when she was much younger and holding a cat. (2CT 419.) Appellant then sought to introduce a booking photograph of Crystal because it "more accurately reflects how she appeared when she was using drugs" and when appellant "came into contact with her." (2CT 419-420, 423; see 4RT 539.)

A hearing was held on the motion. (4RT 535-540.) The trial court found that photographs 1 and 2 were "clearly admissible since they were photographs shown [to appellant] during the course of this investigation, and he denied knowing the person depicted in those photographs." (4RT 536-537.) The trial court ruled that photograph 3 was relevant to show the type of jewelry that Crystal typically wore and ordered the photograph be modified to obscure or remove the cat and family photographs. (4RT 537-538.) The court then denied appellant's motion to admit Crystal's booking photograph because there was no showing made that Crystal was under the influence of drugs in the photograph. (4RT 538-540.)

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[29] Appellant does not renew his challenge to the prosecutor's photographs on appeal. (See AOB 112-128.)

B. Standard of Review

The test to determine the admissibility of photographs of murder victims while alive is whether the photographs are relevant, not necessary. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1230 [the possibility that a photograph of the murder victims while alive "generated sympathy for the victims is not enough, by itself, to compel its exclusion if it was otherwise relevant"].) "'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210 .) This standard is very broad, and the trial court has broad discretion in determining the relevance of evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 13-16; accord *People v. Boyette* (2002) 29 Cal.4th 381, 424.) It is immaterial for purposes of determining the relevance of evidence that: (1) "other evidence may establish the same point;" (2) the defense offers to stipulate to the relevancy of the matter; (3) or the evidence was not challenged by the defense. (*People v. Scheid, supra*, 16 Cal.4th at pp. 16-17; see *People v. Weaver* (2001) 26 Cal.4th 876, 933 ["[t]he state is not required to prove its case shorn of photographic evidence merely because the defendant agrees with a witness or stipulates to a fact"]; see also *People v. Lewis* (2001) 25 Cal.4th 610, 641 ["the absence of a defense challenge to particular aspects of the prosecution's case or its witnesses does not render victim photographs irrelevant"].)

Admission of relevant evidence is, of course, subject to Evidence Code section 352 ("section 352"). (*People v. Scheid, supra*, 16 Cal.4th at p. 18.) The trial 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." (Evid. Code, § 352.) Evidence may be unduly

prejudicial if it """uniquely tends to evoke an emotional bias against a party as an individual,""" or if it may cause the jury to """prejudg[e] a person or cause on the basis of extraneous factors."""" (*People v. Cowan* (2010) 50 Cal.4th 401, 475, quoting *People v. Gurule* (2002) 28 Cal.4th 557, 624.) This Court has recognized that

> "'[c]ourts should be cautious in the guilt phase about admitting photographs of murder victims while alive, given the risk that the photograph will merely generate sympathy for the victims. [Citation.] But the possibility that a photograph will generate sympathy does not compel its exclusion if it is otherwise relevant. [Citation.] The decision to admit victim photographs falls within the trial court's discretion, and an appellate court will not disturb its ruling unless the prejudicial effect of the photographs clearly outweighs their probative value. [Citation.]'"

(*People v. Rogers* (2009) 46 Cal.4th 1136, 1163, quoting *People v. Harris* (2005) 37 Cal.4th 310, 331-332; see *People v. Boyette*, *supra*, 29 Cal.4th at p. 424; accord *People v. Suff* (2014) 58 Cal.4th 1013, 1072.)

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. (*People v. Brady* (2010) 50 Cal.4th 547, 558.) An abuse of discretion requires 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.)

C. The Trial Court Did Not Abuse Its Discretion When It Excluded Crystal's Booking Photograph Because It Was Irrelevant

No abuse of discretion occurred here. Appellant stated that Crystal's booking photograph was relevant because it may have reflected the way Crystal looked when she was under the influence of drugs, as follows:

> Well, it appears at the time of the death of Crystal Hamilton, that she was again utilizing controlled substances as was evidenced by the blood analysis and the testimony of others, and this photo would reflect perhaps another way that [Crystal] might have

> appeared either in general or to [appellant] at any time, and it – it's relevant in that it gives a better total view of the appearances that [Crystal] could make and would be relevant in that regard.

(4RT 538-539; see 2CT 419-420, 423.) However, appellant made no offer of proof that Crystal was under the influence of drugs when the booking photograph was taken. (4RT 538-540; see *People v. Foss* (2007) 155 Cal.App.4th 113, 126 ["When a trial court denies a defendant's request to produce evidence, the defendant must make an offer of proof in order to preserve the issue for consideration on appeal."].) Thus, it was mere speculation that Crystal's booking photograph was taken while she was under the influence of drugs. Accordingly, the trial court did not abuse its discretion. (*People v. Morrison*, *supra*, 34 Cal.4th at p. 724 [evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence]; see *People v. Cornwell* (2005) 37 Cal.4th 50, 81 ["'exclusion of evidence that produces only speculative inferences is not an abuse of discretion'"], disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

Appellant's reliance on *People v. Williams* (1988) 44 Cal.3d 883, for the proposition that "the jury was perfectly capable determining whether" Crystal looked intoxicated in the photograph is misplaced. (AOB 120-121.) In *Williams*, the defendant argued that a detective and a correctional officer were not qualified as experts to opine that the defendant was not "strung out." (*People v. Williams*, *supra*, 44 Cal.3d at pp. 914-915.) This Court found that no opinion was offered by the witnesses. (*Id.* at p. 915.) Instead, the witnesses merely testified to their observations. (*Id.* at pp. 915-916.) This Court did not find that a jury can opine whether a person was under the influence of drugs simply by looking at a photograph. Rather, this Court stated that lay opinion testimony with regard to drug-induced intoxication would be admissible if rationally "based on the perception of

the witness." (*Id.* at p. 914; accord *People v. McAlpine* (1991) 53 Cal.3d 1289, 1308 [when a lay witness offers an opinion that goes beyond the facts he personally observed, it is held inadmissible].)

Moreover, this Court has ruled that a non-expert witness may give an opinion regarding drug intoxication, if a foundation of knowledge is established. (*People v. Navarette* (2003) 30 Cal.4th 458, 493-494; see Evid. Code, § 800.) At the time of appellant's motion, there was no indication that every member of the jury would have had a sufficient foundation of knowledge to form an opinion as to whether Crystal was under the influence of methamphetamine at the time of the booking photograph. (See, e.g., *People v. Navarette*, *supra*, 30 Cal.4th at pp. 493-494 [defense counsel attempted to establish a foundation regarding drug intoxication by asking the witness whether she had "seen people on drugs before?"].) Appellant made no offer of proof that a witness, with a foundation of knowledge, would opine that Crystal was under the influence of drugs at the time of the booking photograph. (4CT 539-540 [after the prosecution argued that there was no evidence that Crystal was under the influence of drugs in the booking photograph, defense counsel offered to crop the photograph to eliminate the booking information].) Absent any such foundation, the booking photograph was clearly irrelevant. (*People v. Riggs* (2008) 44 Cal.4th 248, 289 [a court lacks discretion to admit irrelevant evidence]; see Evid. Code, § 350.)

Appellant's argument that he did not need to prove that Crystal was under the influence of drugs in the booking photograph, because it was "sufficient for admissibility that it was a photograph of [Crystal] at another time that presented a different image" than the prosecution's photographs, is misplaced. (AOB 121-122.) Appellant stated that the photograph was relevant to show how Crystal looked when she was under the influence of drugs. (4RT 538-539.) As the proponent of the booking photograph,

appellant had the burden of showing that Crystal was on drugs in the photograph. (See Evid. Code, § 403, subd. (a)(1) [the proponent of proffered evidence has the burden showing the existence of a preliminary fact, when the relevancy of the proffered evidence depends on the existence of that preliminary fact].)

Further, appellant's argument that the trial court abused its discretion when it denied appellant's request to admit Crystal's booking photograph, because it was relevant to explain why he did not recognize Crystal's picture when he spoke to police and to show that Crystal may have been the "White" prostitute that appellant described to police, is without merit. (AOB 122-124.) Appellant did not state that the booking photograph was relevant for these reasons. (4RT 538-539; see 2CT 419-420, 423.) Thus, appellant failed to apprise the trial court of the "substance, purpose and relevance" of the booking photograph that he now argues on appeal. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53 [an offer of proof must be specific and "should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice"], citing *People v. Whitt* (1990) 51 Cal.3d 620, 648; Evid. Code, § 354, subd. (a) [a verdict or judgment shall not be set aside for the erroneous exclusion of evidence unless the error resulted in a miscarriage of justice and the "substance, purpose and relevance of the excluded evidence was made known to the court"].) In addition, there was no offer of proof that Crystal was disheveled, committed acts of prostitution, or more closely resembled the booking photograph at the time of her rape and murder. (See 14RT 2598 [appellant's closing argument stating that, "Nobody from the defense table and nobody from our side of the room and certainly nobody from the People's side of the room is saying that Crystal Hamilton was a prostitute."].)

Moreover, appellant adamantly denied that Crystal looked anything like the "White" prostitute and stated that he did not know whether the White prostitute was on drugs. In his interview on July 22, 2003, appellant was asked whether Crystal "[c]ould be that White prostitute?" Appellant replied that the White prostitute looked "a lot worse than that." Appellant was then asked whether the White prostitute could have been on drugs. Appellant replied, "I have no idea." (6CT 1863-1864.) Appellant further stated that there was no reason that he would not recognize Crystal because he did not "go out and get drunk." (7CT 1867.) Also, there was no offer of proof that appellant would have recognized Crystal from the booking photograph if it had been shown to him. Accordingly, appellant's claim that the trial court abused its discretion when it denied his request to admit Crystal's book photograph based on his newly asserted grounds must be denied.

Appellant's claim that the exclusion of the booking photograph denied his federal right to due process must be denied. (AOB 117-119.) Because the booking photograph failed to meet the threshold requirement of relevance, its exclusion under sections 350 and 352 does not implicate any due process concerns. (*People v. Babbitt*, *supra*, 45 Cal.3d at p. 685.) Likewise, "[a]lthough the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) In addition, any constitutional claim has been forfeited because appellant failed to argue those grounds at trial. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 424 [finding that the defendant did not preserve his claim that the admission of photographic evidence violated his federal constitutional rights because he did not object to the evidence on those grounds].)

D. Any Alleged Error in Excluding Crystal's Booking Photograph Was Harmless

Even if the trial court erred in excluding the proffered evidence, the error was harmless. (Evid. Code, § 354 [a verdict shall not be set aside by reason of the erroneous exclusion of evidence unless the alleged error resulted in a miscarriage of justice].) "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001, quoting *Watson, supra*, 46 Cal.2d at p. 836.)

Even if the booking photograph was admitted to show how Crystal looked when she was disheveled, it is not reasonably probable that the jury would have found appellant not guilty of Crystal's rape and murder. There was no evidence that Crystal was the White prostitute. Appellant conceded that Crystal was not the White prostitute. (See 14RT 2598.) Appellant was adamant that Crystal did not resemble the White prostitute. (6CT 1863-1864.) There was no offer of proof that Crystal's booking photograph resembled the White prostitute or that appellant would have said so if he was shown this photograph. Appellant told police that he had picked up three prostitutes after work at approximately 4:30 p.m. (7CT 1814-1815; see 6CT 1756.) Crystal was last seen by Zoeber late Saturday night, on April 21, 2001. (11RT 2109-2114.) Although appellant was "on-call" on April 21, and 22, 2001, he did not work on those days. (11RT 1952-1956.) Thus, Crystal could not have been one of the prostitutes that appellant picked up in the afternoon after he got off work.

There was no evidence that Crystal was disheveled the night she was raped and murdered. To the contrary, when Zoeber last saw Crystal, he described her as "happy." (12RT 2114-2115.) Moreover, neither Dr.

O'Halloran nor Dr. Bux testified that Crystal would have appeared "disheveled" based on the methamphetamine in her system. Dr. O'Halloran testified that the level of methamphetamine in Crystal's system would have given her a "sense of euphoria." (12RT 2245-2246.) Dr. Bux testified that the amount of methamphetamine in Crystal's system would have made her "stimulated" and not passive. (13RT 2585-2586.)

Moreover, as detailed above, the evidence against appellant was strong. (*See People v. Boyette*, *supra*, 29 Cal.4th at p. 424 [any error in admitting photographs of the victim while alive was harmless in light of the "strong" evidence against the defendant].) Thus, given the slight, if any, probative value of Crystal's booking photograph and the strong evidence against appellant, any error was harmless.

Furthermore, any alleged error did not affect the jury's determination at the penalty phase. (AOB 127-128.) Appellant did not seek to admit Crystal's booking photograph at the penalty phase. As explained above, the evidence was speculative and would not have raised a lingering doubt as to appellant's guilt. There was no showing that appellant would have shown remorse or admitted guilt if shown the booking photograph. Additionally, the jury only deliberated for less than seven hours before returning a verdict of death. (4CT 994-995; see 3CT 872-873.)

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO INTRODUCE LOCAL NEWSPAPER ARTICLES ABOUT THE DISCOVERY OF CRYSTAL'S BODY

Appellant contends that the trial court abused its discretion when it denied his motion to admit into evidence three local newspaper articles about the discovery of Crystal's body on the beach south of Mussel Shoals. Specifically, appellant argues that the articles showed that Crystal's death was common knowledge throughout Ventura County and were relevant to rebut the prosecution's argument that his statement to the police about a

deceased victim was an admission. (AOB 129-140.) Respondent disagrees. There was no foundation or offer of proof that appellant's statement to the police referred to those articles. Thus, the trial court properly denied appellant's motion to admit based on a lack of foundation. In any event, any alleged error was harmless.

A. Relevant Proceedings

On May 12, 2003, appellant was interviewed by Detectives Rubright and Smith. (13RT 2337-2340, 2373-2376.) A video of the interview was played for the jury. (13RT 2378; Peo. Exh. 46a.) During the interview, Detectives Rubright and Smith told appellant that they were investigating a crime that occurred two years ago that involved a vehicle that matched a description of his car. (6CT 1744-1745.) The detectives showed appellant a picture of Crystal and asked whether he recognized her or had seen her in April of 2001. After viewing Crystal's picture, appellant asked, "How old is she?" Detective Smith replied, "I think she's 19. She would have been." Appellant then stated, "She would have been." (6CT 1763.) Shortly thereafter, Detective Rubright stated that there were going to continue investigating into the crime. (6CT 1766.) At this point, appellant interjected, "Well, yes it is if you have a deceased victim. Yeah, it something you guys are gonna [sic] continue as long as it takes." (6CT 1766.) The detectives did not state previously that they were investigating a murder. (See 6CT 1744-1766; see also 13RT 2339.)

After appellant presented his evidence, he moved to introduce into evidence four newspaper articles from the Ventura Star about Crystal's death. (14RT 2649.) The articles were published from April 23 to April 25, 2001. The articles reported that a body had been found on a stretch of beach south of Mussel Shoals, the body was identified as Crystal, Crystal had drowned, and investigators had not determined whether she had

drowned accidentally or criminally. None of the articles stated that the drowning was homicide. (5CT 1316-1319; Court's Special Exh. 4.)

Appellant argued that the evidence was relevant to show that "after the coroner changed his death certificate to reflect homicide, it was published throughout the newspaper, and throughout the county, it became a matter of notoriety, such a matter of notoriety that one can reason [appellant] would have known about it." (14RT 2650.) Appellant further argued the articles were needed to analyze appellant's statement to Detectives Rubright and Smith that the victim was deceased because it was a "matter of common knowledge that" Crystal had died and that the coroner "ruled . . . it was . . . a homicide." (14RT 2652.)

The prosecutor objected to the admission of the articles and argued that the articles did not state the coroner had changed the death certificate and that there was no foundation the articles "factored" into the admission made by appellant to the detectives. The prosecutor further argued it was mere speculation that the articles explained appellant's admissions. (14RT 2651-2653.)

Appellant did not make an offer of proof or lay a foundation connecting the articles to him. Rather, appellant argued that:

> . . . I don't believe the People would be prejudiced by it because the coroner has already testified that post July 27, I believe, when he changed the death certificate, that the matter would have been public knowledge and would have been published in the newspapers.[30]

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[30] On direct examination, Dr. O'Halloran was asked, "Had you ruled it a homicide right away, the death certificate would have been made public and any information that the Sheriff's Department would have otherwise been trying to get may have been compromised." Dr. O'Halloran answered, "It's possible. I don't know if it would have, but it possibly could have been." (12RT 2259.) However, it does not appear that Dr.

(continued...)

> So I don't really believe there's any palpable prejudice. I believe there's -- there is relevance that a crime is known or a death is known to have occurred. And it's obvious -- well, I don't know what's obvious. I just think it should be admitted, and I'd submit on that.

(14RT 2653.) The trial court denied appellant's request to admit the articles into evidence on the ground that there was a lack of foundation. (14RT 2653.)

B. The Trial Court Did Not Abuse Its Discretion When It Denied Appellant's Motion to Admit the Newspaper Articles into Evidence

The trial court did not abuse its discretion when it denied appellant's motion to admit the newspaper articles into evidence. (*People v. Brady*, *supra*, 50 Cal.4th at p. 558.) Appellant argued that the articles were needed to explain his statement to Detectives Rubright and Smith that the victim was deceased because it was a "matter of common knowledge that" Crystal had died and that the coroner "ruled . . . it was . . . a homicide." (14RT 2652.) Thus, the proffered newspaper articles would only be relevant if: (1) appellant had read the articles before he was interviewed by the detectives; and (2) appellant was also later aware that the coroner determined Crystal's drowning was a homicide. However, appellant never made any attempt to lay a foundation that he was aware of the articles and that he was aware that the Crystal's drowning was later found to be a homicide. (See Evid. Code, § 403.) Absent such foundation, the trial court did not abuse its discretion in excluding evidence that had not been shown to have any probative value. (Evid. Code, § 352.)

(...continued)
O'Halloran testified that modifying the death certificate would have been public knowledge.

Appellant also argued below that the newspaper articles were relevant to show that "a crime is known or a death is known to have occurred." (14RT 2653.) Now, appellant is apparently arguing that, because there were articles in the newspaper two years before his interview with the detectives about a drowning and the cause of that drowning was undetermined at the time the articles were published, *everyone* in the community knew about the drowning and that the drowning was a homicide. (See AOB 134.) Appellant's reasoning is flawed. The fact that there were newspaper articles reporting that Crystal had drowned and her body was found on a beach north of Mussel Shoals would show that *some* people were aware of this incident, i.e. the people who read the article. However, the newspaper articles would not show that *everyone* in the community knew about it. (See 9RT 1166 [prospective juror stating that she had not read anything about Crystal's rape and murder]; 9RT 1244-1246 [prospective juror stating that he searched appellant's name on the internet and then read a newspaper article about the facts of the case].) Further, because the articles did not state whether the drowning was accidental or criminal, the articles had no tendency to prove that everyone knew the drowning was a homicide.

Again, appellant stated below the relevance of the articles was to explain his statements to the detectives indicating that he knew the investigation involved a deceased victim. (14RT 2652.) Accordingly, the articles would only be relevant if *appellant* read the proffered articles. There was no showing that he did so. Any inference that appellant read the articles would be pure speculation and conjecture. In fact, when responding to the prosecutor's objection on foundation and speculation grounds, appellant merely argued that the evidence was not prejudicial to the prosecution. (14RT 2653.) Thus, the trial court did not abuse its discretion when it sustained the prosecution's objection to the articles on ground that

there was a lack of foundation. (*People v. Morrison*, *supra*, 34 Cal.4th at p. 724; see, e.g., *People v. Babbit* (1998) 45 Cal.3d 660, 684 [the trial court did not err when it denied the defendant's motion to admit a copy of the channel 40 program log because the defendant was unable to make an offer of proof that the inference concerning his state of mind drawn from the program log was anything but speculative].)

Moreover, the trial court's denial of appellant's motion did not violate his right to present a defense. See (AOB 132-133.) Although a criminal defendant has a Sixth Amendment right to present a defense to the charges against him, including his version of the facts, he "does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." (*Taylor v. Illinois* (1988) 484 U.S. 400, 410 [108 S.Ct. 646, 98 L.Ed.2d 798, 811]; *People v. Lucas* (1995) 12 Cal.4th 415, 464 [the ordinary rules of evidence do not impermissibly infringe on a defendant's right to present a defense]; see *People v. Morrison*, *supra*, 34 Cal.4th at p. 724 [states are free to formulate and apply reasonable foundational requirements for the admission of evidence].)

C. Any Alleged Error Was Harmless

In any event, any alleged error was harmless. (Evid. Code, § 354; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As detailed above, even if admitted, the newspaper articles were irrelevant because there was no evidence that appellant was aware of the articles. Even without the articles, appellant was able to argue that the detectives' statements to appellant, including that the victim "would have been" 19 years old, made it clear that the victim was dead. (15RT 2815-2818.) Moreover, as detailed above, the evidence against appellant was strong. (See *People v. Robinson* (2005) 37 Cal.4th 592, 627 [any error in excluding proffered was harmless in light of the "strong" evidence linking defendant to the crimes].) Thus, given the

slight, if any, probative value of the newspaper articles and the strong evidence against appellant, any error was harmless. For the same reasons, appellant's conclusory claim that the alleged error was prejudicial as to the penalty phase lacks merit, even if such a claim had not been forfeited for appellate purposes. (See AOB 139.)

IV. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED EVIDENCE OF APPELLANT'S PRIOR CONVICTION FOR THE RAPE OF CYNTHIA W. PURSUANT TO EVIDENCE CODE SECTION 1108

Appellant contends that the trial court erred and violated his constitutional rights when it admitted evidence of his prior rape of Cynthia W. pursuant to Evidence Code section 1108 (section 1108").[31] (AOB 141-171.) Appellant argues that the trial court erred for three reasons. First, appellant claims section 1108 is unconstitutional and asks this Court to reconsider its holdings in *People v. Falsetta* (1999) 21 Cal.4th 903, 917 and *People v. Story* (2009) 45 Cal.4th 1282. (AOB 150-155.) Second, appellant asserts that the trial court abused its discretion under section 352 when it admitted the evidence. (AOB 156-163.) Last, appellant claims that the trial court erred when it instructed the jury with CALJIC No. 2.50.01 because it allowed the jury to rely on appellant's propensity to commit sexual offenses as proof that he committed murder. (AOB 163-167.) Respondent disagrees and submits that the trial court properly admitted evidence of appellant's prior rape of Cynthia W. and properly instructed the jury on the use of that evidence.

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[31] Section 1108, subdivision (a) provides, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

A. Relevant Proceedings

The prosecutor moved to admit evidence of appellant's prior convictions for the rape and penetration with a foreign object of Cynthia W. pursuant to Evidence Code sections 1101 and 1108. The prosecutor argued that the evidence was admissible to show appellant's disposition to commit sex offenses and to show the improbability that he was mistakenly accused. (1CT 116-120, 149-154; see 4RT 504-505.)[32] Appellant opposed the motion. (2CT 379-400; see 4RT 506-508)

A hearing was held. (4RT 504-513.) At the start of the hearing, the trial court tentatively ruled that evidence of appellant's sexual offenses against Cynthia W. were admissible pursuant to section 1108 and not precluded by section 352. The court found that the evidence was relevant to help the "jury to make a rational assessment of this case including the probability or improbability that [appellant] has been falsely accused of a sex offense in this matter in addition to the murder charge that has been brought." In its analysis under section 352, the court stated that the prior sexual offenses were not remote, the commission of the sexual offenses had been proven beyond a reasonable doubt, the evidence was not misleading or confusing, the sexual offenses against Cynthia W. were less inflammatory because they did not involve a murder, and that appellant admitted to committing the offenses to the police. (4RT 505-506.)

Afterwards, appellant objected to the admission of the evidence based a lack of similarity, because his rape of Cynthia W. occurred at her home,

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[32] The prosecutor also sought to admit an alleged attempted rape of Amy W. (1CT 115-116.) Appellant objected to the admission of the evidence. (2CT 379-400.) The trial court sustained the objection and excluded the evidence pursuant to section 352, noting that appellant was not prosecuted for the attempted rape, Amy W. never identified appellant as the perpetrator, and that admission of this evidence would "turn this trial into a trial on" the attempted rape. (4RT 499-504.)

Cynthia W. was older than Crystal, and he used a knife against Cynthia W. Appellant argued that the lack of similarity would "confuse the jury" and would "cause the jury to naturally assume that . . . the charges in this case did occur and were committed by" appellant. (4RT 506-507.)

Appellant further argued that his statements admitting the sexual offenses against Cynthia W. were "basically a script which needed to be followed to be able to have a successful parole . . . ." (4RT 507.) At this point, the trial court interjected and clarified that appellant's statements admitting the offenses were made during the investigation of Crystal's rape and murder, not while in prison. The court also noted that, even after appellant had been convicted of raping Cynthia W., he continued to maintain his innocence. Appellant even insisted on having DNA samples from Cynthia W. tested. The DNA samples were tested and confirmed appellant's guilt. (4RT 508-509.) The court then stated:

> So it would appear that not only is there evidence through [appellant]'s own statements to sheriff's investigators of having committed that offense, there's also scientific evidence that was obtained that showed he was in fact the perpetrator of that offense.
>
> So it would appear to me -- obviously, this is not a situation where an [Evidence Code section] 1101 analysis alone is something that really carries the day in terms of whether or not this evidence is admissible. It's really admissible under [section] 1108 precisely for the reason that it only makes sense that a jury, when being called upon to make the decision on the charges in a case like this, would obviously find it helpful to know that the person who is charged with having used force and violence in an effort to have sexual intercourse with a nonconsenting victim in fact has a previous conviction for such an offense under circumstances that were milder than the offense for which he's charged.
>
> I think that's precisely what [section] 1108 is designed to address, and the [section] 352 analysis is obviously what saves it pursuant to *Falsetta* from being unconstitutional.

(4RT 509.)

Appellant then raised "one additional point." Appellant stated that section 1108 "is applicable only in cases in which a defendant is accused of a sexual offense." The court responded that appellant was charged with rape. Appellant then asserted that his prior rape could not be admitted in a prosecution for a murder because it was a "nonsexual offense" and requested that the trial be bifurcated. (4RT 509-513.) The prosecutor responded:

> There's no authority to suggest that just because a rapist kills off his victim he gets to escape his past rape convictions. I believe the law is quite clear. [Section] 1108 says that this prior rape comes in, especially given the circumstances of the rape that we have of Cynthia W. comparing that to the current facts. There's very little risk of prejudice, and the statute was designed exactly to cover this type of situation.

(4RT 513.)

The court subsequently granted the prosecution's motion to admit evidence of appellant's rape of Cynthia W. and denied appellant's motion to bifurcate the charges, as follows:

> The arguments you've made . . . are understandable. They're appropriate for [appellant], but I do believe they're legally incorrect based on the current state of the appellate decisions in the matter.
>
> And the Court would deny the request to bifurcate these charges, that is, the homicide with the special circumstance allegation and the rape charge. It would appear, obviously, that these are part and parcel of the same activity and would be inappropriate to bifurcate the charges. [Section] 1108, pursuant to the [section] 352 analysis that is required here, preserves [appellant]'s due process rights. And accordingly, the evidence of the rape of Cynthia W. would be permitted by the Court for the reasons previously expressed.

(4RT 513.)

B. This Court Should Not Reconsider Its Holding That the Admission of Prior Acts Evidence to Infer Criminal Propensity Is Constitutional

In his opening brief, appellant contends that his conviction must be reversed because the admission of evidence of his prior sex offenses under section 1108 deprived him of his rights to a fair trial, due process, and reliable guilt and penalty determinations. Specifically, appellant urges this Court to reconsider its decisions in *Falsetta* and *Story*. (AOB 150-155.)[33]

Appellant asks this Court to reconsider its holding in *Falsetta* that section 1108 does not violate the due process clause of the United States Constitution because sexual propensity evidence is so prejudicial that it rendered his trial fundamentally unfair. (AOB 153-154.) In *Falsetta*, this Court found that section 1108 does not violate a defendant's due process rights. Acknowledging the general rule against admitting such evidence due to its great potential to unduly prejudice the defendant, this Court held that, "in light of the substantial protections afforded to defendants in all cases to which section 1108 applies, we see no undue unfairness in its limited exception to the historical rule against propensity evidence." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 915.) More recently, in *People v. Loy* (2011) 52 Cal.4th 46, 62, this Court reaffirmed section 1108's constitutionality. In so doing, this Court explained the value of such evidence:

> Evidence of previous criminal history inevitably has some prejudicial effect. But under section 1108, this circumstance alone is no reason to exclude it. "[S]ection 1108 affects the practical operation of section 352 balancing "because admission and consideration of evidence of other sexual offenses to show character or disposition would be no longer treated as

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[33] Appellant recognizes that it is unlikely that this Court will reverse these holdings and raises the claims to preserve them for federal review. (AOB 153, fn. 22.)

> intrinsically prejudicial or impermissible. Hence, evidence offered under [section] 1108 could not be excluded on the basis of [section] 352 unless 'the probability that its admission will . . . create substantial danger of undue prejudice' . . . substantially outweighed its probative value concerning the defendant's disposition to commit the sexual offense or offenses with which he is charged and other matters relevant to the determination of the charge. As with other forms of relevant evidence that are not subject to any exclusionary principle, *the presumption will be in favor of admission.*" ' (Historical Note, 29B pt. 3, West's Ann. Evid. Code [(1998 pocket supp.)] foll. § 1108, p. 32.)" [Citation,] italics added.)

(*People v. Loy*, *supra*, 52 Cal.4th at p. 62.) Because appellant has failed to provide a persuasive reason for this Court to reconsider its holding in *Falsetta*, appellant's claim should be denied.

Similarly, this Court should deny appellant's request to reconsider this Court's holding in *Story* that a murder during the course of a rape is a sexual offense. (AOB 154-155.) Appellant argues that this Court's reasoning was "circular" because "evidence about prior sex crimes was admitted based on the conclusion that the charged felony murder was a sexual offense, even though the primary proof that the underlying sexual assault had occurred was that same evidence of prior sex crimes." (AOB 154-155, citing *People v. Story*, *supra*, 45 Cal.4th at p. 1294.) Appellant is mistaken. This Court reasoned that "the Legislature did not intend that section 1108 would apply when a sexual assault victim survives but not when the defendant kills the victim" and held that "murder committed during the course of a rape [is] a sexual offense under section 1108." (*People v. Story*, *supra*, 45 Cal.4th at pp. 1293-1294.) This Court further reasoned that, it would be an "'absurd result,'" if section 1108 applied only if the victim survived and not when the victim was murdered. (*Ibid.*) Such reasoning was not circular.

Moreover, in *Story* as well as the instant case, there was independent evidence of a sexual offense against the victim. Here, appellant had sexual intercourse with Crystal, and she was found shortly thereafter bruised, naked, strangled, and drowned at a local beach. Because appellant has failed to provide a persuasive reason for this Court to reconsider its holding in *Story*, appellant's claim should be denied.

C. The Trial Court Did Not Abuse Its Discretion under Section 352 When It Admitted Evidence of Appellant's Prior Sex Crimes against Cynthia W.

The trial court did not abuse its discretion when it found that section 352 did not preclude evidence of appellant's sexual offenses against Cynthia W. Evidence of prior conduct is generally admissible only to show some fact other than the defendant's disposition to engage in criminal conduct, such as common plan and absence of mistake. (Evid. Code, § 1101, subd. (b).) Section 1108, however, expands the admissibility of character evidence in sex offense cases, specifically permitting such evidence to be introduced and considered on the issue of a defendant's disposition or propensity to commit sex offenses. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 915.) In enacting section 1108, the Legislature recognized the "'serious and secretive nature of sex crimes and the often resulting credibility contest at trial,'" and intended to relax evidentiary restraints in sex offense cases "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 911.)

A defendant's challenge to the admissibility of evidence of his prior sexual offenses as a violation of section 352 is analyzed under an abuse of discretion standard. (*People v. Loy*, *supra*, 52 Cal.4th at p. 61.) In performing the balancing test under section 352, to determine the

admissibility of prior sexual offenses proffered under section 1108, a trial court must,

> [r]ather than admit or exclude every sex offense a defendant commits . . . consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.

(*People v. Falsetta, supra*, 21 Cal.4th at p. 917.) However,

> as [this] Court has repeatedly . . . reaffirmed, "when ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state that it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 213, citing *People v. Lucas* (1995) 12 Cal.4th 415, 448-449.) Nothing in *Falsetta* indicates the Supreme Court intended either to reverse this well-established precedent on the proper standards for section 352 analysis, or to require a trial court to articulate its consideration of each of a list of particular factors of probability and prejudice in making a decision under section 352.

(*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315.)

Here, the record demonstrates that the trial court understood and fulfilled its responsibilities under section 352. The trial court listened to the prosecutor's and defense counsel's arguments. After their arguments, the trial court expressly weighed the relevant factors, articulated its findings, and ruled on the motion. (4RT 504-516.) Thus, appellant cannot show that the trial court did not understand or fulfill its responsibility under section 352. (*People v. Jennings, supra*, 81 Cal.App.4th at p. 1315.)

In any event, looking to the relevant factors in the present case, it is clear that the trial court did not abuse its discretion in determining that appellant's prior rape and sexual penetration of Cynthia W. were admissible. The admission of the evidence did not consume an undue amount of time as the testimony about the prior sexual offenses against Cynthia W. consisted of approximately 22 pages of transcript. (10RT 1855-1877; see, e.g., *People v. Cabrera* (2007) 152 Cal.App.4th 695, 706 [testimony, which consisted of 97 pages of reporter's transcript, was not unnecessarily time consuming]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 42 [evidence of uncharged offense that consumed 27 percent of trial transcript did not dwarf the trial of the current offense as to unfairly prejudice the defendant].)

Appellant's prior rape of Cynthia W. was probative of his propensity to commit sexual offenses, as the crime of rape was an enumerated sexual offense under section 1108. (See Evid. Code, § 1108, subd. (d).) "[E]vidence of a 'prior sexual offense is indisputably relevant in a prosecution for another sexual offense.'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282-283, quoting *People v. Fitch* (1997) 55 Cal.App.4th 172, 179.) Thus, the prior crimes were highly probative on the issue of appellant's propensity to commit assaultive sexual offenses. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 532, fn. 9 ["The legislative history of section 1108 suggests an underlying psychological abnormality that makes such evidence especially probative: 'The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim's testimony.' (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 882, (1995–1996 Reg. Sess.) as amended July 18, 1995, p. 8.)"]; *People v. Yovanov* (1999)

69 Cal.App.4th 392, 406 [the Legislature decided that evidence of uncharged sexual offenses "is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101"].)

Moreover, the prior sexual offenses against Cynthia W. and the charged offenses were sufficiently similar to be admitted as propensity evidence. "Under Evidence Code section 1108, subdivision (d)(1)(A) through (F), the prior and charged offenses are considered sufficiently similar, for admissibility in this manner, if they are both the type of sexual offenses enumerated there." (*People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1099.) The section 1108 evidence involved appellant's conviction for rape (§ 261, subd. (a)(2)) and sexual penetration with a foreign object while using a weapon (§ 289, subd. (a)(1)) against Cynthia W. (3CT 684-685.) In the instant case, appellant was charged with rape (§ 261, subd. (a)(2)) and murder (§ 187, subd. (a)). (1CT 1-4.) Thus, the prior crimes were not simply other sex crimes enumerated in section 1108, but both cases involved an identical charge, i.e. rape. (See *People v. Frazier*, *supra*, 89 Cal.App.4th at pp. 40-41 ["The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108."].) Moreover, as case law has recognized, "'[m]any sex offenders are not 'specialists,' and commit a variety of offenses which differ in specific character,'" meaning the acts need not be identical. (*People v. Soto* (1998) 64 Cal.App.4th 966, 984; see *People v. Loy*, *supra*, 52 Cal.4th at p. 63 [concluding that, even if defendant's claim was true that prior sex offenses "'bore no similarity to'" the crime for which defendant was on trial, "this

circumstance, although relevant to the trial court's exercise of discretion, is not dispositive"].)

Additionally, appellant's prior sexual offenses against Cynthia W. were not remote. "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. [Citation.]" (*People v. Branch, supra*, 91 Cal.App.4th at p. 284 [30-year-old prior sexual offenses not remote]; *People v. Pierce* (2002) 104 Cal.App.4th 893, 900 [23-year-old rape conviction not remote].) Appellant's rape and sexual penetration of Cynthia W. occurred on October 25, 1986. (10RT 1855.) The charged rape and murder of Crystal was committed on April 22, 2001. (12RT 2254-2257.) A large portion of this gap in time, almost 10 years, was due to appellant's prior prison sentence. (6CT 1653, 1774, 1798-1800; 7CT 1801.) Appellant was paroled on September 18, 1996. (6CT 1742, 1775, 1799.) Thus, appellant committed the rape and murder of Crystal less than five years after his release from prison. Therefore, appellant's sexual offenses against Cynthia W. were not remote. (Se, e.g., *People v. Frazier, supra*, 89 Cal.App.4th at p. 41 [15–or 16-year gap is not remote]; *People v. Soto, supra*, 64 Cal.App.4th at pp. 977, 991-992 [more than 20-year gap is not remote].)

Furthermore, because there was no issue regarding the degree of certainty of the commission of the prior rape and sexual penetration of Cynthia W., the prejudicial impact would be reduced. The prior offenses were supported by the identification testimony of the victim and DNA evidence. In fact, appellant was convicted and punished for the prior offenses. (3CT 684-691, 694-696; 6CT 1653, 1774, 1798-1800; 7CT 1801; 8RT 1130-1141; see *People v. Falsetta, supra*, 21 Cal.4th at p. 917.)

There was also little chance of confusing, misleading, or distracting the jury. The prior sexual offenses were of the same nature as the current offense, rape. And as noted above, appellant had been convicted and

served a prison sentence for the prior sexual offenses. (6CT 1653, 1774, 1798-1800; 7CT 1801.) Thus, the jury was not required to determine whether the previous crime was committed or tempted to punish appellant for the prior sexual offenses against Cynthia W. (*People v. Falsetta, supra*, 21 Cal.4th at pp. 916-917 ["the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses"].)

The jury was instructed on reasonable doubt and that the prosecution was required to prove each element of the charged offenses. (See *People v. Frazier, supra*, 89 Cal.App.4th at p. 42 [the risk that a jury might punish a defendant for uncharged crimes is counterbalanced by instructions on reasonable doubt and the necessity of proof as to each of the elements of the charged offense].) These instructions included: CALJIC Nos. 2.90 (5CT 1373; 15RT 2676 [reasonable doubt]), 3.31 (1CT 1374; 15RT 2676-2677 [murder during the commission of a rape]), 8.10 (1CT 1375; 15RT 2677 [murder]), and 10.00 (1CT 1392-1393; 15RT 2687-2688 [rape]).

Here, as outlined above, the factors in favor of admitting the evidence of the prior sexual offenses included that: (1) the prior sexual abuse was of the same nature or similar enough to the charged rape; (2) the prior sexual abuse was highly probative; (3) the prior sexual abuse was not remote; (4) the commission of the prior sexual abuse was certain; (5) evidence of the prior sexual abuse was not likely to confuse, mislead, or distract the jurors from their main inquiry; and (6) the evidence was not likely to have a prejudicial impact on the jurors. The "prejudice" presented by the challenged evidence, which showed appellant's disposition to commit sexual assaultive offenses "is the type inherent in all propensity evidence

and does not render the evidence inadmissible." (*People v. Soto, supra*, 64 Cal.App.4th at p. 992.) Therefore, appellant has failed to show that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner when it admitted evidence of appellant's prior rape and sexual penetration of Cynthia W. (*People v. Falsetta, supra*, 21 Cal.4th at pp. 917-918, quoting *People v. Fitch, supra*, 55 Cal.App.4th at p. 183 [the determination of whether the probative value of propensity evidence is outweighed by the prejudice to the defendant "'is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.]'"].)

D. The Trial Court Did Not Err When It Instructed the Jury with CALJIC No. 2.50.01 Because Murder under the Special Circumstance That the Murder Was Committed During a Rape Is a Sexual Offense

Appellant argues that the trial court erred when it instructed the jury with CALJIC No. 2.50.01. According to appellant, this Court held in *Story* that the use of section 1108 evidence was limited solely to situations where a defendant is prosecuted on a felony-murder theory with rape as the underlying felony and is inapplicable to "malice-murder" because it is not a sexual offense. Thus, appellant asserts that CALJIC No. 2.50.01 was erroneous as applied to this case because it allowed the jury to infer from his disposition to commit sexual assaults that he committed, not only rape but also murder. (AOB 163-167.)

Appellant is mistaken. This Court's holding was not so limited. Rather, this Court concluded that section 1108 applies to all murders committed during the course of sexual offenses, including murders under the special circumstance that it was committed during a sexual offense. For example, in *People v. Avila* (2014) 59 Cal.4th 496, a "jury convicted [the] defendant of kidnapping, committing two counts of lewd and lascivious acts on, and then murdering Samantha Runnion under the special

circumstances of murder while kidnapping and murder while committing lewd and lascivious acts on a child under the age of 14." (*Id.* at p. 499.) This Court found that the defendant was charged with a sexual offense within the meaning of 1108, as follows:

> [The d]efendant was charged with a sexual offense *both* because he was charged with committing lewd and lascivious acts on a child under the age of 14 *and* because he was charged with murder under the special circumstance of murder while committing the lewd and lascivious acts. [Citation.] Accordingly, evidence of other sexual crimes, such as the evidence admitted in this case, is admissible under Evidence Code section 1108.

(*People v. Avila*, *supra*, 59 Cal.4th at p. 515, emphasis added, citing *People v. Story*, *supra*, 45 Cal.4th at pp. 1290-1292.)

Likewise, here, appellant was charged with a sexual offense *both* because he was charged with rape *and* because he was charged with murder under the special circumstance that the murder was committed while engaged in the commission of a rape. (1CT 1-4; see 5CT 1374, 1387.) Because all of the crimes charged were sexual offenses, the jury was permitted to infer from his disposition to commit sexual assaults that he committed the rape and murder. Accordingly, the trial court did not err when it instructed the jury with CALJIC No. 2.50.01.

To the extent appellant claims CALJIC No. 2.50.01 was misleading because it could apply to the prosecutor's theory of malice-murder, he did not ask any modification of the standard instruction on this point, and thus, has forfeited the issue. (*People v. Riggs* (2008) 44 Cal.4th 248, 309; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) In any event, as noted above, appellant was charged with a murder in the commission of a rape and, consequently, the instruction properly allowed the jury to consider the propensity evidence as to the murder. That the prosecutor also relied on the alternative theory of malice murder did not change the fact

that a rape-murder was charged in this case. Furthermore, the jury was not instructed that, even if appellant was not guilty of rape-murder, the propensity evidence was nevertheless relevant to whether he killed the victim with malice. Instead, CALJIC No. 2.50.01 clearly dealt with appellant's disposition to commit sexual offenses, as opposed to a nonsexual murder. Thus, there was no error.

As to the claim of instructional error, appellant could not possibly show any prejudice. The jury found him guilty of rape and found the rape-murder special circumstance to be true. Thus, the jury necessarily found him guilty of felony-murder. In turn, as explained above, the jury was entitled to consider appellant's disposition or propensity to commit sexual offenses in deciding whether he committed the rape and murder of Crystal during the commission of the rape. Any speculation as to whether the jury ever considered the alternative theory of malice-murder or the applicability of CALJIC No. 2.50.01 to this theory is immaterial or moot and certainly does not warrant appellate relief.

E. Any Alleged Errors Were Harmless

In any event, any error was harmless and did not result in a miscarriage of justice. In general, "the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution" and claims of error are reviewed under the "'reasonable probability' standard of *Watson*." (*People v. Marks* (2003) 31 Cal.4th 197, 227.) Pursuant to this general rule, courts have applied *Watson* to the erroneous admission of unduly prejudicial sexual offense propensity evidence. (See *People v. Jandres* (2014) 226 Cal.App.4th 340, 357 [citing cases].)

As explained above, the evidence against appellant was strong. In addition, the jury was instructed that appellant was presumed innocent (5CT 1373; 15RT 2675), that evidence of the prior rape and sexual

penetration were admitted for the limited purpose and that the juries "may, but are not required to, infer that [appellant] had a disposition to commit sexual offenses" and that the evidence of appellant's prior sexual offenses were only one factor to consider along with other evidence and was not sufficient to prove the charged offenses (5CT 1363; 15RT 2671-2672). It is presumed that the jury understood the instructions and followed them, and there is nothing in the record showing otherwise. (See, e.g., *People v. Callahan,* (1999) 74 Cal.App.4th 356, 372.) Accordingly, appellant's challenge to the evidence of uncharged offenses lacks merit and does not warrant any appellate relief.

As to appellant's conclusory claim that the evidentiary error was prejudicial as to the penalty phase (AOB 170-171), appellant ignores the obvious fact that the prior crimes were admissible at the penalty phase as an aggravating factor (§ 190.3, subd. (c)). And, as noted above, the jury was aware that appellant had already been punished for the prior crimes.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT OVERRULED APPELLANT'S OBJECTION TO TESTIMONY FROM SUSANNAH DWORAK'S COLLEAGUES ABOUT HER DEMEANOR AROUND THE TIME OF CRYSTAL'S RAPE AND MURDER

Appellant contends that the trial court prejudicially erred and violated his constitutional rights when it overruled his objection to testimony about Susannah's demeanor around the time of Crystal's rape and murder. Specifically, appellant argues such evidence was irrelevant. (AOB 172-179.) Respondent disagrees. In his interviews with police, appellant stated that, when he and Susannah were not getting along, he would become sexually frustrated and would seek out prostitutes to patronize. Proof that appellant was sexually frustrated and sought out sexual relations with women outside his marriage was relevant to appellant's state of mind and

motive to commit the rape. In any event, any error herein was unquestionably harmless.

A. Relevant Proceedings

Appellant was interviewed on May 12, 2003. Appellant stated that he had visited three prostitutes "probably over the last year, year and a half or so, maybe two." (6CT 1756.) Appellant also stated that he and Susannah "went to a bunch of counseling a year and a half ago or so . . . ." (6CT 1758.) Detective Smith later asked appellant why he felt that he needed to visit prostitutes. (6CT 1779-1780.) Appellant replied that he unsed the services of the prostitutes when he was "[s]exually frustrated, and wanted to have sex with somebody, and my wife and I weren't getting along at the time so . . . [¶] ... [¶] . . . and it was easier to go do that. I'm sure not gonna [sic] go rape somebody and spend another 20 years in prison." (6CT 1780.) An audiotape of this interview was played for the jury. (13RT 2378.)

On July 11, 2003, appellant was interviewed a second time. During the interview, appellant told Sergeant Montagna that he and Susannah were married on October 17, 1999, and had troubles that almost resulted in their divorce. Appellant stated:

> [Susannah] was driving from Ojai to Simi Valley everyday and coming home from that traffic just a raging bitch basically. She got on my case about everything 'cause [sic] I get home at 3:30; she'd get off work at 5:50. By the time she got home . . . [¶] . . . [¶] . . . she's all stressed out. I've been hanging with my buddies up there in Ojai and playing. She'd call, what are you doing? I'm fishing. She rode my case a lot.

(6CT 1797.)

Later, Detective Montagna asked appellant about the "timeline between" his visits to the prostitutes. Appellant told Detective Montagna that he had visited the prostitutes when he and Susannah "were at a real bad state . . . ." (7CT 1810-1811.) Appellant stated that he and Susannah went

through "a lot of counseling" at a church. (7CT 1813-1814.) Appellant stated that he and Susannah had a "lot better relationship now." Appellant explained that Susannah had a job she did not like and would "be ragging on [him] from the minute she got home . . . ." (7CT 1818-1819.)

Appellant reiterated that he would be "sexually frustrated" when he had marital problems and sought to have sex with prostitutes. Appellant stated that he and Susannah "were fighting all the time" and there "just wasn't any sex happening." Appellant stated that the discord in his marriage lasted "[p]robably a year or so." (7CT 1819-1820.) Detective Rubright then asked appellant "when you're having problems with your wife [Susannah] around . . . April of 2001, were you going to any bars on Thompson [Boulevard] or doing that kind of stuff?" Appellant answered that he "usually stayed in the bars on this end of town" with his friends. (7CT 1825.) A videotape of this interview was played for the jury. (13RT 2391.)

At trial, Esquivel testified that, in 2001, appellant regularly complained that Susannah nagged him and that she was "riding his case." (11RT 1888.) Susannah's co-worker, Betty Hosler, testified that Susannah called her on Friday, April 20, 2001. Susannah told Hosler that she would not be coming in to work. Susannah was upset and crying. Appellant objected to the testimony on relevancy and section 352 grounds. The objection was overruled. (11RT 1940-1941.) Another co-worker, Beth Martin, testified that Susannah was "very upset, very emotional" on April 20, 2001. Appellant objected to the testimony on relevancy and section 352 grounds. The objection was overruled. (11RT 1945-1946.)

During opening argument, the prosecutor argued that appellant's statements about his marriage in his interviews with police were relevant to appellant's motive and state of mind. The prosecutor argued:

Now, you heard him say in his interview that he and his wife had a pretty bad marriage. He talked about that. And what you heard about the [appellant]'s relationship with his wife helps you. It helps you understand his state of mind as we're rolling into April 2001. You heard him talk about how his wife rides his case all the time, how she nags him and how he calls her a name, "a raging bitch," how he couldn't even drink. She won't let him drink. He doesn't get to go camping. He doesn't get[] to do anything he wants to do.

Now, your first reaction to hearing these complaints that the defendant has about his wife and about his life during these -- this time right after he gets married is "Grow up." You know, he sounds like a selfish brat. He spends only nine and a half years of an 18-year sentence for a heinous knifepoint rape in prison. He gets out and what? The world owes him something? He gets to do whatever he wants?

But your second reaction should be, put this in context of what it means about his state of mind and what it means in relation to Crystal Hamilton.

He's angry around the time Crystal Hamilton is murdered. He's angry at what he thinks is this leash on him. He's angry at his wife. He's angry at his life. And he blames his wife a lot for what he thinks is a pretty rotten lot, that he doesn't get to do much.

He says himself that he's sexually frustrated. And you know that he and his wife got in a huge fight that weekend.

You have the time sheets of Susannah's employer in evidence. You know that she did not show up at work on Friday, April 20th, the day before that weekend. She called in to work, crying and upset.

You heard Betty Hosler testify to that. She remembered that phone call because she was worried Susannah wasn't going to make it to the conference.

Beth Martin told you that that whole weekend Susannah was upset and they were trying to cheer her up. You know what all that means. You know that that means she and the defendant

got in a huge fight that weekend. That Friday, they got in a fight.

And suddenly, [appellant]'s anger at his wife, his complaints about how he doesn't get to do anything and his glee about his wife being out of town, talking to Peggy Esquivel about how when the cat's away, the mouse can play, suddenly, that all makes much more sense. He's got the motive. He's got the desire. And now he's got the opportunity to do what he did to Crystal Hamilton. He's in Ventura that weekend. He's angry, he's unsupervised and he's frustrated. He's going to rape someone. That weekend, everything converged.

(15RT 2709-2711.)

B. Appellant Has Forfeited His Claim That the Trial Court's Ruling Violated His Federal Constitutional Rights

At trial, appellant objected to testimony regarding Susannah's demeanor on relevance and section 352 grounds. (11RT 1940-1941, 1945-1946.) Appellant did not object to the testimony on federal constitutional grounds. Thus, to the extent that appellant claims the trial court's ruling to his objection to testimony about Susannah's demeanor violated his federal constitutional rights for a reason different than the evidence was not relevant or more prejudicial than probative, the claim has been forfeited. (See, e.g., *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7 [objection on grounds of section 352 does not preserve a constitutional objection]; see *People v. Partida* (2005) 37 Cal.4th 428, 437 ["if a defendant who objected on section 352 grounds argues on appeal that the court erred in admitting the evidence for a reason different than that it was more prejudicial than probative, an additional trial invocation of due process or some other general principle that did not reasonably apprise the trial court of the analysis it was being asked to undertake would not be sufficient to preserve the argument"].) In any event, as discussed below, there was no error.

C. The Trial Court Did Not Abuse Its Discretion When It Admitted Evidence That Appellant and Susannah Were Having Marital Problems

Appellant contends that the trial court abused its discretion when it overruled his objection to testimony regarding Susannah's demeanor at the time of Crystal's rape and murder. Appellant argues that such evidence was irrelevant because it was not probative of any disputed fact. (AOB 175.) Appellant is mistaken.

The trial court's ruling was within the broad scope of its discretion to determine relevance. (See *People v. Cash* (2002) 28 Cal.4th 703, 727.) Appellant told police that he and Susannah were having martial problems around the time of Crystal's rape and murder. (6CT 1744-1800; 7CT 1801-1832.) Appellant stated that he was "sexually frustrated" when he and Susannah were not getting along and would solicit prostitutes because he wanted to have sex with somebody. (6CT 1780; 7CT 1819-1820.) Susannah's demeanor on April 20, 2001, tended to show she had a fight with appellant and did not have sex with him. In turn, whether appellant was sexually frustrated and wanted to have sex with someone was probative of appellant's motive to rape Crystal. (See, e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 758 [observing that the defendant's previous frustrated attempt to obtain sexual gratification inferably provided a motive for the rape committed shortly thereafter].)

Appellant nevertheless argues that there was no evidence as to the reason why Susannah was upset. Thus, the prosecutor was able to "create an untenable and unsupported inference that [Susannah] and [appellant] had fought." (AOB 175.) Again, the trial court was well within its broad discretion to determine relevance. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1260.) As stated above, appellant told police that he and Susannah were having martial problems around the time of Crystal's rape and

murder. (6CT 1744-1800; 7CT 1801-1832.) Appellant told police that, at the time, Susannah was "just a raging bitch basically" (6CT 1797) and that they were fighting "all the time" (7CT 1819-1820). Esquivel testified that appellant regularly complained that Susannah nagged him and that she was "riding his case." (11RT 1888.) From this evidence, the jury could rationally infer that Susannah was upset because she had a fight with appellant. (*People v. Morris* (1988) 46 Cal.3d 1, 21 ["A reasonable inference . . . 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.'"], overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5; *People v. Herrera* (2006) 136 Cal.App.4 th 1191, 1205 [a legal inference can only be drawn from a fact actually established].)

The instant matter is distinguishable from this Court's decision in *People v. Clark* (2011) 52 Cal.4th 856. In *Clark*, the prosecutor asked Donna Kellogg when she last had sexual relations with the defendant. (*Id.* at p. 923.) Kellogg testified that "it was 'a couple of weeks' earlier." Kellogg also testified that appellant did not state he was having sexual relations with any other person. The defendant contended on appeal that his sexual inactivity two weeks prior to the rape and murder had no tendency to prove the charge of attempted rape or the rape-murder special-circumstance. (*Ibid.*) This Court found that to "infer from such testimony that at the time of the crimes defendant was sexually frustrated and thus motivated to rape [the victim] was highly speculative and thus irrelevant." (*Id.* at p. 924.)[34]

[34] This Court did not decide whether such evidence was probative of motive or intent in the case, because the evidence was speculative and irrelevant. (*People v. Clark*, *supra*, 52 Cal.4th at p. 924.)

In contrast, in the instant matter, the jury did not have to speculate whether appellant was sexually frustrated and thus motived to rape Crystal because appellant told police that he was "[s]exually frustrated, and wanted to have sex with somebody" when he and Susannah were not getting along. (6CT 1780.) Appellant stated that, around April 2001, he was having marital problems with Susannah and that they were at a real "bad state" (7CT 1810-1811) and were "fighting all the time" (7CT 1819-1820). Thus, the trial court did not abuse its discretion when it overruled appellant's objection on relevancy grounds to testimony about Susannah's demeanor.

Moreover, the trial court did not abuse its discretion when it denied appellant's objection to the evidence on section 352 grounds. Appellant argues that the evidence had "zero probative value" and was unduly prejudicial because it allowed the jury to speculate that appellant and Susannah had fought. (AOB 175-176.) As explained above, the evidence was relevant to show appellant's motive and state of mind at the time of Crystal's rape and murder, and such an inference was reasonably based on the evidence. Therefore, appellant's claim that the trial court abused it discretion when it overruled his objection pursuant to section 352 must be denied.

D. Any Alleged Error Was Harmless

In any event, any alleged error was harmless because there is no reasonable probability that defendant would have obtained a more favorable outcome had the evidence been excluded from trial. (*People v. Clark*, *supra*, 52 Cal.4th at pp. 923-924 [applying the *Watson* harmless error standard to a claim that evidence that was irrelevant and speculative was erroneously admitted]; *People v. Watson*, *supra*, 46 Cal.2d at pp. 836–837.) Even if the challenged testimony from Susannah's colleagues had been excluded, there was ample evidence that appellant and Susannah were having marital problems and that appellant was sexually frustrated. The

prosecution played the recordings of appellant's police interviews to the jury. (13RT 2378, 2391.) During the interviews, appellant told police that he had patronized three prostitutes around the time of Crystal's rape and murder because he was having marital problems and was sexually frustrated. (6CT 1744-1800; 7CT 1801-1832.) Esquivel also testified that appellant regularly complained that Susannah nagged him and that she was "riding his case." (11RT 1888.) Moreover, as detailed above, the evidence against appellant was strong. In addition, the challenged testimony consisted of merely five lines of transcript. (11RT 1941, 1946.) Thus, given the evidence of appellant's statements to the police, the strong evidence against appellant, and the brief nature of the challenged testimony, any error was harmless. For the same reasons, appellant's conclusory allegations of prejudice as to the penalty phase (AOB 178-179) should be rejected.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED TESTIMONY FROM LT. COLONEL HAMILTON ABOUT CRYSTAL'S FUTURE PLANS

Appellant contends that the trial court prejudicially erred when it overruled his objection to Lt. Colonel Hamilton's testimony about statements Crystal made concerning her future plans. Specifically, appellant argues that such testimony was hearsay and was inadmissible pursuant to Evidence Code section 1250,[35] as a statement of her existing

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[35] Evidence Code section 1250, subdivision (a), provides "Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

state of mind. (AOB 180-191.) Respondent disagrees and submits that the testimony was not hearsay because it was not admitted for the truth of the matter asserted. Rather, Crystal's statements to her father were admitted to show that she was not suicidal. In any event, any alleged error was harmless.

A. Relevant Proceedings

During opening statement, defense counsel argued that the evidence would show that Crystal was not raped or murdered. (10RT 1849.)

During Lt. Colonel Hamilton's testimony, the following exchanged occurred:

> [The prosecutor:] Now, in April of 2001, you said Crystal was 18 years old; is that right?
>
> [Colonel Hamilton:] Correct.
>
> [The prosecutor:] Had she been talking to you about her future?
>
> [Colonel Hamilton:] Yes, ma'am, she had.
>
> [The prosecutor:] What did she say to you in that regard?
>
> [Defense counsel:] Objection. Relevance and hearsay.

(11RT 2049.)

A hearing was held on the objection. (11RT 2050.) The prosecutor explained the relevance of testimony about Crystal's future plans as follows:

> Yes. Based on the content of the opening statement, it appears as though the defense may be -- and also the text of cross-examination, it appears as though there will be an implication that this could have been either a suicide or an accidental death wherein Crystal wandered off out into the ocean or did something to – that amounts to taking her own life.
>
> The defense has made it very clear that they are going to attempt to prove this was no murder. Well, she's clearly dead.

> It's either accident or suicide other than that. And I think we are entitled to present evidence that this is not a girl who's planning on taking her own life. She made plans about going to college, getting a job, joining the military. She was a normal, happy kid.

(11RT 2050.)

Defense counsel responded that such testimony was hearsay. The prosecutor replied that the testimony was a "[s]tatement of intention." (11RT 2050.) Defense counsel then stated:

> It's not statement of intention. That deals with a statement of present intention to do a future act such as a decedent going to -- such as -- I think the classic case is the decedent says, "I'm going to leave, and I'm going to go to Ralphs." That would be a statement of a decedent that's admissible under the hearsay rule, not a statement of general intentions as to what one wants to do in the future, I intend to go to medical school, I intend never to commit suicide, I intend never to have an accident.

(11RT 2050.)

The trial court overruled the objection, as follows:

> Well, it would certainly be probative if in fact she is discussing with her dad future plans to either continue her education or other career-related activities, things of that nature which would suggest that she would not be a person, as far as [Lt.] Colonel Hamilton might know, that might be inclined to do something to hurt herself.
>
> So the objection would be overruled. I'd permit it.

(11RT 2050-2051.)

Afterwards, defense counsel stated that it was "never the intent of the defense in this matter to raise any kind of issue that this young lady committed suicide, never." The trial court then stated that it did anticipate the testimony on Crystal's future plans would be brief. The prosecutor agreed and stated that the testimony would be "very brief." (11RT 2051.)

Lt. Colonel Hamilton was again asked whether, "in April of 2001," Crystal spoke of her intentions in the "near future." Lt. Colonel Hamilton answered:

> There were a couple of things she was looking at. One longer range was college. A shorter range, something in the medical field, and she thought perhaps the Air Force, air evacuation, flight nurse basically.

(11RT 2054-2055.)

B. Lt. Colonel Hamilton's Testimony about Crystal's Future Plans Was Not Hearsay

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question [citation]." (*People v. Waidla, supra*, 22 Cal.4th at p. 725.) A "trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

Here, the trial court did not abuse its discretion when it overruled appellant's hearsay objection.[36] Crystal's statements about her future plans were not hearsay as they were not received for the truth of the matter stated, i.e. that she planned to go to college or become a nurse in the Air Force.

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[36] The record is unclear whether the trial court admitted the testimony as non-hearsay or under Evidence Code section 1250. However, this Court may uphold the trial court's evidentiary ruling as long as the evidence was admissible under some lawful ground. (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [""""No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that 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."""].)

Rather, they were received to show that Crystal was not suicidal. (*People v. Riccardi* (2012) 54 Cal.4th 758, 822-824 [finding the victim's indirect declarations of her state of mind were not hearsay "to the extent that they were admitted to prove circumstantially" the victim's state of mind and finding trial court did not err for failing to give, on its own motion, a limiting instruction on those statements]; *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389-390 [a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay]; see, e.g., *People v. Harris* (2013) 57 Cal.4th 804, 842-844 [the victim's letters describing her future plans was not hearsay because they were offered "solely as circumstantial evidence of her then state of mind, specifically, her feelings for Hill, and were not offered to prove the truth of what she wrote"].)[37]

Crystal's statements were relevant because the prosecution was required to prove that she had been killed unlawfully. (§ 187, subd. (a) [the elements of a charge of murder are an unlawful killing with malice aforethought].) Appellant did not offer to stipulate that there was an unlawful killing. (See 10RT 1849; 15RT 2797; see AOB 177 ["There was no clear evidence of homicidal manner, since drowning can be accidental or suicidal"].) Thus, the trial court did not abuse its discretion when it

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[37] Because Crystal's statements were not hearsay, respondent has not addressed appellant's argument that the statements were inadmissible pursuant to Evidence Code section 1252 because the circumstances indicated a lack of trustworthiness. (See *People v. Riccardi*, *supra*, 54 Cal.4th at pp. 821-822 [Evidence Code section 1252 applies "'to the statement made by the hearsay declarant . . . not to the testimony of the witness who relates the hearsay statement to the trier of fact.'"]; AOB 186-188.) Instead, this alleged lack of trustworthiness went to the weight of the evidence, and it was for the jury to decide the weight or credibility of the testimony.

overruled appellant's hearsay objection to Lt. Colonel Hamilton's testimony about Crystal' statements about her future plans.

C. Any Error Was Harmless

In any event, any alleged error was harmless under any standard. (See *Watson, supra*, 46 Cal.2d at p. 836 [whether it is reasonably probable that a result more favorable to the appellant would have resulted in the absence of the error]; see also *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [whether the error was harmless beyond a reasonable doubt].) As detailed above, the evidence against appellant was strong. Moreover, the challenged testimony consisted of merely four lines of transcript. (11RT 2055.) Thus, given the strong evidence against appellant and the brief nature of the challenged testimony, any error was harmless. For the same reasons, appellant's conclusory allegations of prejudice as to the penalty phase (AOB 190-191) should be rejected.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.03

Appellant contends that the trial court erred when it instructed the jury with CALJIC No. 2.03.[38] Specifically, appellant argues that the instruction is unnecessary, impermissibly argumentative, establishes an irrational presumption of guilt, and intrudes on the jury's fact finding function. (AOB 192-202.) Appellant acknowledges the long line of cases in which this Court has upheld the language of CALJIC No. 2.03 against various due process challenges and asks this Court to reconsider those prior decisions.

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[38] The jury was instructed with CALJIC No. 2.03, which stated: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." (4CT 917; 15RT 2667)

(AOB 193, fn. 23; see *People v. Schmeck* (2005) 37 Cal.4th 240, 303 [to preserve routine claims that have been repeatedly considered and rejected by this Court for federal review, a defendant need only identify the claim in context of the facts, note that the claim has been previously rejected, and ask that the decision be reconsidered], abrogated on another grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

This Court has repeatedly rejected appellant's challenges to CALJIC No. 2.03. (See, e.g., *People v. Jones* (2013) 57 Cal.4th 899, 971 [rejecting the defendant's arguments that CALJIC No. 2.03 was "duplicative, argumentative, 'unfairly partisan,' and permitted the jury to draw unwarranted or even irrational inferences about his state of mind]; *People v. Hartsch* (2010) 49 Cal.4th 472, 505 [rejecting the defendant's argument that CALJIC No. 2.03 was unnecessary, argumentative, and allowed the jury to draw irrational difference]; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 220-221 [rejecting argument that CALJIC No. 2.03 violated the defendant's right "not to be convicted of a crime on a standard less than beyond a reasonable doubt"]; *People v. Geier* (2007) 41 Cal.4th 555, 589 [declining to reconsider the defendant's argument that CALJIC No. 2.03 was "impermissibly 'partisan and argumentative' and . . . authorized the jury to draw 'irrational permissive inferences'"], overruled on another point by *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314]; *People v. Holloway* (2004) 33 Cal.4th 96, 142 [rejecting the defendant's arguments that the consciousness of guilt instructions were argumentative, fundamentally unfair, and unconstitutionally lightened the prosecution's burden of proof]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [rejecting claim that CALJIC No. 2.03 is " impermissibly argumentative and improperly allowed the jury to make irrational inferences regarding his mental state during the commission of the offenses"]; *People v. Crandell* (1988) 46 Cal.3d 833, 870-871, overruled on

other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

VIII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Appellant contends that the prosecutor committed misconduct during closing argument by "repeatedly disparaging the defense expert," Dr. Bux. Specifically, appellant argues that the prosecutor's references to Dr. Bux's fee for his services disparaged defense counsel, appellant, and Dr. Bux. Appellant further argues that such argument accused "the defense team of fabricating a defense or [suggested] perjury or subornation of perjury." (AOB 203-220.) Respondent disagrees and submits that appellant has forfeited his misconduct claim. In any event, the trial court did not abuse its discretion when it found that the prosecutor did not commit misconduct.[39]

A. Standard of Review

Under federal law, to support a claim of prosecutorial error or misconduct, appellant has the burden to demonstrate that the prosecutor's alleged misconduct "'comprise[d] a pattern of conduct "so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process."'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Harris* (1989) 47

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[39] Because there is no evidence the prosecutor intentionally or knowingly committed misconduct, appellant's claim should be characterized as one of prosecutorial "error" rather than "misconduct." (ABA House of Delegates, Resolution 100B (August 9-10, 2010) [adopting resolution urging appellate courts to distinguish between prosecutorial "error" and "misconduct"]; see *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [noting prosecutorial transgression is more aptly described as "error" than as "misconduct"], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Cal.3d 1047, 1084, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642–643 [94 S.Ct. 1868, 40 L.Ed.2d 431]; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *People v. Benavides* (2005) 35 Cal.4th 69, 108.) But conduct by a prosecutor that does not render a criminal trial fundamentally unfair under federal law, is prosecutorial error or misconduct under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] The ultimate question to be decided is, had the prosecutor refrained from the misconduct, is it reasonably probable that a result more favorable to the defendant would have occurred.'" (*People v. Haskett* (1982) 30 Cal.3d 841, 866, quoting *People v. Strickland* (1974) 11 Cal.3d 946, 955; see also *People v. Gray* (2005) 37 Cal.4th 168, 215-216.)

When the claim of prosecutorial error focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) When conducting this inquiry, a reviewing court "'do[es] not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*Ibid.*, citations omitted.)

Moreover, an appellate court reviews a trial court's ruling on prosecutorial error or misconduct for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) An abuse of discretion occurs when there has been an "'arbitrary, capricious or patently absurd [ruling] that resulted in a manifest miscarriage of justice.'" (*People v. Sanders* (1995) 11 Cal.4th 475, 512.)

B. Relevant Proceedings

During opening statement, the prosecution's articulated its theory of the case that appellant raped Crystal and committed the murder "in the vain

hope that a dead victim would not testify against him the way his last rape victim did." (10RT 1777.) Appellant's counsel argued that the evidence would not show that there was a rape or murder. (10RT 1839.) Defense counsel specifically stated, "Testimony of the coroner will not show that Crystal Hamilton was murdered or raped, and the coroner's testimony will lack scientific certainty." (10RT 1844.) Counsel further stated, "Dr. Robert Bux, who was the associate coroner of El Paso County, State of Colorado, will testify that Crystal Hamilton in his opinion was not murdered. He will also testify that Crystal Hamilton in his opinion was not raped." (10RT 1849.)

The prosecution's expert, Dr. O'Halloran was not asked and did not offer an opinion as to whether Crystal had been raped. (See 12RT 2240-2244.)

Edwin Jones, a forensic scientist at Ventura County Sheriff's Department Laboratory of Forensic Sciences, testified for the prosecution. Jones had worked at the crime lab for 22 years and was assigned to "serology," the study of bodily fluids, and "trace evidence." Jones had a bachelor of science degree from West Virginia Wesleyan College, a master of science degree from Marshall University with a thesis in biochemistry, and a master's degree in forensic chemistry from the University of Pittsburgh. In addition to his experience at the Ventura County Sheriff's Department Laboratory of Forensic Sciences, Jones had worked for one year as a microanalyst for the Georgia State Crime Laboratory and had "seven years working as a one-man crime laboratory doing an entire range of forensic science duties." (13RT 2412.)

Jones then described his training in the field of serology. Jones also testified that he taught a class in serology called "Microscopy of [R]ape [E]vidence" and had recently published an article in the Handbook of Forensic Sciences titled "Identification of Semen and Other Body Fluids."

(13RT 2412-2415.) Jones then explained the composition and properties of semen. (13RT 2415-2420, 2424-2428.) Jones explained that, after 48 hours sperm is "very difficult to find" in a woman's vagina because of "gravity and drainage." In order for gravity to take effect, a woman must be in an "upright position." Jones then described the scale to measure the amount of sperm visible under a microscope created by a "Garlo study." (13RT 2428-2440.)

Jones then testified that he examined a slide from a vaginal swab taken from Crystal. The amount of sperm present was at the top of the Garlo scale. Jones described the amount of sperm as "off the charts" and stated that he had "never seen sperm numbers this high before." Jones then opined that, based on the quantity of sperm and the Garlo study, the sperm was deposited a relatively short period of time before death, "within an hour and 15 minutes." Jones further stated that the sperm could have been deposited within two minutes of Crystal's death. (13RT 2440-2448.)

On direct examination, the defense's expert, Dr. Bux, testified that he could not form an opinion to a medical or scientific certainty that Crystal had been raped. Specifically, Dr. Bux was asked whether he could "form an opinion as to the degree of medical or scientific certainty that the decedent in this case was raped?" The prosecutor objected to the question on the foundation grounds and on the ground that the question called for a legal conclusion. (15RT 2570-2571.) The trial court overruled the objection. Dr. Bux then testified:

> Well, from the perspective of a forensic pathologist, I cannot come to the conclusion that she was raped. In order for me to get there, I would need to have genital trauma, and typically there's an assaultive pattern that you'll see also. There may be bruises along the inner thighs, evidence that the deceased was held or that was pinned, bruises and abrasions to that kind of a pattern like on the back of the shoulder that would

be typical that -- that may be typical of an injury that was occurred antemortem.

So if you don't have those kinds of things and all you have is the presence of semen or sperm, then the only conclusion that I can make is that the person had intercourse, and I can't state that she was either assaulted or not assaulted.

(15RT 2571-2572.)

During the prosecutor's cross-examination of Dr. Bux, the following exchange occurred:

[The prosecutor:] Were you provided any serology reports provided by Ed Jones from the Ventura County Crime Lab?

[Dr. Bux:] I'm not sure. I had something from the Ventura Crime Lab, but it dealt with the drugs.

[The prosecutor:] Toxicology?

[Dr. Bux:] Toxicology, yes, ma'am. There was another list that I think that I have, but that name doesn't ring a bell. I don't know what he did.

[The prosecutor:] Okay. And were you provided any testimony of Ed Jones from what he opined during this case?

[Dr. Bux:] No.

[The prosecutor:] And you are aware that forensic serology exists as a discipline; correct?

[Dr. Bux:] Yes, sure.

[The prosecutor:] And you're also aware I'm assuming given your status in the coroner's office and your experience with regards to forensic analysis of evidence for criminal trials that in fact semen can be examined for a tremendous amount of useful information; correct?

[Dr. Bux:] Sure.

[The prosecutor:] Not just the donor of the semen, but also the timing of when the semen was deposited; correct?

[Dr. Bux:] You can make some generalities about that, yes, ma'am.

[The prosecutor:] Certainly. And there have been studies that have been done that talk about how long sperm in certain concentrations are likely to stay in a vaginal environment. Are you familiar with that?

[Dr. Bux:] Yes.

[The prosecutor:] And would it be important for you to know, sir, in coming to any opinion as to whether or not Crystal Hamilton was sexually assaulted that the quantity of sperm found in Crystal Hamilton was such an extreme that Mr. Jones opined that the sperm was most likely deposited within minutes of death?

[Dr. Bux:] I don't know how you would know that.

[The prosecutor:] Because that's not your area of expertise; correct?

[Dr. Bux:] Well, it's not my area of expertise, but sperm sticks around for quite a while, particularly in the vaginal areas, so I don't see how you could get it down to minutes.

[The prosecutor:] But, again, sir, you just said that's not your area of expertise; correct?

[Dr. Bux:] It's not, but I know something about sperm, and I also know something about people that have sperm in their vaginas and how long it stays.

[The prosecutor:] Okay. And there are studies that talk about how long sperm can stay in the vaginal environment; correct?

[Dr. Bux:] Sure.

[The prosecutor:] And, in fact, there's one study in particular that talks about the highest concentration of sperm that have ever been found to stay in a vaginal environment is a Garlo study that was published in 1986. Are you familiar with that study?

[Dr. Bux:] No, I'm not.

(15RT 2629-2631.)

Later, Dr. Bux was asked:

[The prosecutor:] Dr. Bux, you believe that it would be impossible then for somebody to come to any meaningful opinion as to when the sperm was likely deposited in Crystal based on the quantity that was observed?

[¶] . . . [¶]

[Dr. Bux:] No, I think that it has happened recently. My question is whether that's minutes or a few hours, and I don't know how – I've never seen anything that can tell us the difference.

[¶] . . . [¶]

[The prosecutor:] And so you would concur, though, at a minimum that the semen was deposited recently; correct?

[Dr. Bux:] Sure.

[The prosecutor:] And the existence of a recent semen deposit and the existence of injuries that we've established are premortem, that is consistent with a victim having been sexually assaulted. Would you agree?

[Dr. Bux:] No, I can't agree to that. I can agree that there's evidence of intercourse, but I have no pathological trauma that would tell me that there was -- that it was an assault.

(15RT 2631-2632.)

Afterwards, Dr. Bux testified that he was "not going to conclude that this is a sexual assault, just like Dr. O'Halloran opined." The prosecutor asked Dr. Bux whether Dr. O'Halloran had changed his opinion on whether Crystal was a victim of a sexual assault. Dr. Bux stated that he believed that Dr. O'Halloran made a "preliminary" determination that Crystal was not sexually assaulted." (15RT 2634-2635.) Subsequently, Dr. Bux was again asked whether Dr. O'Halloran had opined whether Crystal had been a

victim of sexual assault. Dr. Bux acknowledged that Dr. O'Halloran was never asked to offer his opinion on the matter. Dr. Bux then acknowledged a forensic pathologist is not in "position to make a legal conclusion such as whether or not somebody was raped" because that is a "jury function." (15RT 2640-2642.)

The prosecution also questioned Dr. Bux about the compensation for his services. Dr. Bux stated that he charged "$250 an hour for review and consultation" and "$1,600 a day in court, plus expenses." Dr. Bux stated that he had spent eight hours reviewing and preparing for testimony and that he was charging "$1,600 for" his testimony in court. (15RT 2635-2636.)

During the prosecutors opening argument, the following exchanged occurred:

> [The prosecutor:] The defendant's defense, apparently, based on the opening statement is that Crystal Hamilton wasn't raped and Crystal Hamilton wasn't murdered. That's apparently the defense.
>
> Now, we're going to talk about that as we go through the evidence, how the evidence that you heard proves that she was, in fact, raped, and she was, in fact, murdered.
>
> But I don't think anybody in their right minds could say that this young girl, the photographs that you saw, what you know about her, was not the victim of rape and murder. That just defies common sense, and it defies all the evidence that you have.
>
> Crystal Hamilton was raped and murdered.
>
> A young girl with her whole life ahead of her who's thinking about joining the Air Force, going off to college, waiting for her dad to pick her up, who reaches her dad, does make plans to get picked up, to go home, doesn't beat herself up, inject some complete stranger's semen into her -- in that order, by the way, after she's beaten herself up -- a stranger who just happens to be a convicted rapist, who she doesn't know, a man

who's angry and sexually frustrated and whose wife is out of town, doesn't strip herself naked, take off all jewelry, dispose of all of her property somewhere far away from where her body is found and then somehow drown herself 16 miles away from where she was supposed to be picked up. That just doesn't happen.

And again, we're going to talk about all the details that prove rape and murder occurred here. But don't check your common sense at the door, and don't be misled by the defendant's lawyers into thinking that Crystal Hamilton was not the victim of a rape and murder.

[Defense counsel]: Objection. Improper argument.

THE COURT: Sustained.

[Defense counsel]: Move to strike.

THE COURT: The last comment will be disregarded by the jury.

(15RT 2698-2699.)

Afterwards, the following exchange occurred:

[The prosecutor:] The defense elicited an opinion from their paid witness, Dr. Bux, that Crystal wasn't raped.

Now, when it comes to an expert in forensic pathology, really all such an expert can testify to is were there injuries on the body? If so, where? What was the likely cause of these injuries? When did these injuries likely occur? What was the approximate time of death?

These are the sorts of things a forensic pathologist can testify to. No expert can take the witness stand and tell you whether or not Crystal was raped. No expert can tell you whether or not Crystal was murdered. That's your job. That's what juries are for.

All the witnesses are allowed to do is tell you what they saw, what they heard, what they know about a discrete area of the case. You are the one who accumulates all of the evidence, all of the facts and puts a legal label on those, what it all means.

Now, I submit to you that Dr. Bux has no idea whether or not Crystal Hamilton was a victim of a rape. He shouldn't have even been asked the question. The fact that he even offered an opinion just makes him a hired mouthpiece, really, who would say what they pay him to say.

Dr. O'Halloran never testified to any --

[Defense counsel]: Objection. Improper argument.

THE COURT: Counsel is given wide latitude in argument. That objection is overruled.

[The prosecutor:] Dr. O'Halloran never offered any such opinion. It wasn't asked of him.

So what was bought by the defense in hiring Dr. Bux was someone who would offer an opinion without having all of the information that you have.

Now, wouldn't it be nice if we could just give a case to a Dr. Bux. We could do away with juries altogether. We could just send everything to Dr. Bux and let him decide for us. But it doesn't work that way.

And he didn't have, ladies and gentlemen, any information about the forensic serology report. He didn't review Ed Jones's testimony. You heard Ed Jones testify. He doesn't know about any studies that talk about the timing of semen deposits. He didn't even think you could do such a thing.

Well, he should learn. Ed Jones is published in the Handbook of Forensic Science, sort of the bible of the forensic science field. He's the sole author of an entire chapter on that field, and Dr. Bux claims he doesn't know anything about it.

Dr. Bux doesn't know anything about the defendant's background and whether or not he even knows Crystal Hamilton. In fact, when I asked him whether or not that would be important for him to know whether or not Crystal knew the defendant, he said it may or it may not be. That's what he said. You can pull the transcripts if you want to rehash any of that. That was his answer to that question. And that's outrageous. I mean, that's a huge factor for you. She did not know this man.

There's no reason why his semen would be inside of her. She didn't know him.

But according to Dr. Bux, a woman is only raped if she has vaginal injuries, if she has bruising on the inner thigh. For $3,600, the defendant bought an outrageous, antiquated and preposterous opinion about rape.

[Defense counsel]: I'm going to object to the form of the argument, your Honor, purchasing.

THE COURT: Overruled. Again, counsel is given wide latitude in argument.

You may proceed.

[The prosecutor:] It's absurd to think that women are only raped if they have vaginal injuries. That's insulting. Tell that to Cynthia, whose only injury was a nearly severed thumb. Tell that to the hundreds of women that Natalie Erickson has seen where they were beaten up on the outside but had no vaginal trauma. Tell that to the law that makes no such requirement.

You heard during the course of Natalie Erickson's testimony that in only 25 percent of rape cases are there ever visible vaginal injuries. No vaginal injury does not mean no rape. Only a quarter percent of the time are you going to see any vaginal trauma at all with the naked eye. That's what she testified to.

(15RT 2733-2736.)

The prosecutor again mentioned Dr. Bux's compensation for his services to the defense as follows:

And Dr. Bux agreed that Crystal suffered all of these injuries premortem, yet he said he did not see evidence of a violent struggle. Well, I guess for $3,600, people will say contradictory things. But that opinion, ladies and gentlemen, defies all common sense. It defies all logic. She is bruised and battered and has been beaten literally from head to toe.

(15RT 2748-2749.)

During his closing argument, appellant responded to the prosecutor's statements about Dr. Bux's compensation as follows:

> Just a moment for a side thought. Okay. I know that the prosecution did not mean to imply that Mr. Farley, Ms. Duffy or I committed a grade one felony when we called Dr. Bux on the phone and said, "Dr. Bux, for $3,600, would you please come out from Colorado to Ventura to spoon-feed perjury to a jury?" Ladies and gentlemen, that's a serious felony, suborning perjury. And we don't do that.
>
> To say that the defense has paid for an erroneous opinion is wrong. It's wrong because it's so easy to point an accusatory finger like that, and I don't think [the prosecutor] meant to do it, but she did it. And it's something that bothered me then, and it bothers me now. But we don't do that. Okay. We're lawyers. We take what we have. It is what it is.
>
> Now, Dr. Bux came out here, and $3,600 for a medical doctor's time for a day in court plus preparation and working on the case to come to some meaningful conclusions is not a princely sum.
>
> And I think that it is not an unreasonable inference for you to realize something, and that is as follows: Ed Jones also was paid for his testimony. Ed Jones works as -- he works for the sheriff in the sheriff's crime lab. He did not take a vacation day to come over here and testify. Okay. He got paid for it.
>
> Now, I'm not going to say the prosecution bought and paid for Ed Jones's testimony, because I think that's wrong. And I'm not going to say that Dr. O'Halloran, who's under salary appropriate to a doctor, who also works for the County of Ventura, was bought and paid for by the prosecution. I'm not going to do that.
>
> I don't believe for a second that Ms. Temple called them on the phone and said, "Let me buy your opinion. Let me tell you what I want it to be," or else she would have done a much better job of it, because, number one, she wouldn't do it; number two, the opinions that you saw given by Ed Jones and Dr. O'Halloran are woefully in- -- are a woefully inadequate basis upon which to conclude anything beyond a reasonable doubt.

I in my entire life have never heard more maybes, consistent withs, likelies, probablies and complete lack of certainty as I heard during the testimony of Coroner O'Halloran.

(15RT 2827-2829.)

Later, the following exchange occurred:

[Defense counsel:] Now, when you get to that point, you can see that the People's rape case on a circumstantial evidence basis falls apart because you have a conclusion consistent with non-rape, that is, consensual sexual intercourse.

Think about the entire testimony of the coroner, that is to say, O'Halloran. His testimony didn't prove that she was raped. It didn't prove that she was murdered.

Again, the attack upon Dr. Bux by the People is curious and funny because from time to time, they would -- the People in their argument with regard to Dr. Bux called him basically a hired gun who will say anything for $3,600. And yet at other times, they refer to Dr. Bux as being credible in terms of his analysis of injuries.

We're going to come back to Dr. Bux's testimony on the issue of rape because the -- in point of fact, a coroner is able to come to a scientific conclusion as to whether a sexual assault has occurred upon a person.

[The prosecutor:] Objection. Misstates the law.

THE COURT: Can I see counsel at bench for a moment.

[Defense counsel:] Yes.

(The following proceedings were held at the bench outside the hearing of the jury.)

THE COURT: All right. These proceedings are at bench.

Do you wish to elaborate on your objection?

[The prosecutor:] Yes. I believe there's a Penal Code section that specifically states that no witness can offer any opinion as to the ultimate issue that's before the jury, and that includes whether or not a sexual assault occurred.

I objected to the elicitation of this opinion from the coroner during his testimony. It was improperly elicited, it was improperly given, and now it's being improperly argued. And forensic pathologists cannot opine as to whether or not anyone was the victim of a sexual assault, period. There is a Penal Code section that prohibits any such opinion on the ultimate issue which is before the jury.

THE COURT: And what Penal Code section are you referring to?

[The prosecutor:] I think it's either 2930, -31 or -32. It talks about the ultimate issue not being subject to presentation of evidence from the witness stand. The ultimate issues in this case are was she raped, was she murdered, was she the victim of a sexual assault, was she murdered. Those are for the jury to decide.

THE COURT: And I think the Penal Code section that you're relying on actually relates to some amendments that occurred relative to mental state/diminished capacity and the disallowance of an expert giving testimony on those issues as to whether or not a particular defendant had the capacity to form a particular mental state, not whether or not a medical examiner could offer an opinion as to whether or not a particular decedent was the victim of a sexual assault or not. So the objection is going to be overruled.

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

THE COURT: All right. Mr. Powell, if you'd please continue.

[Defense counsel:] Thank you.

A forensic pathologist is able to offer an opinion as to whether a decedent has been subject – or subjected to a sexual assault. Indeed, Dr. Bux testified that he has offered such opinions in the past while on the stand.

And of course, if you find a situation in which you have evidence of beating, you have evidence of vaginal trauma, you have evidence of such import, it doesn't require any quantum

leap for a forensic pathologist to say, "Yes, in my opinion, the decedent suffered a sexual assault."

And you never heard that. And it's admissible evidence. And it's proper evidence. In fact, you heard the opposite from Dr. Bux, and you didn't hear from Dr. O'Halloran that in his opinion, the decedent had suffered any sexual assault, although, of course, he did opine that she was indeed the victim of a homicide.

(16RT 2840-2843.)

When concluding his closing argument, defense counsel stated:

I leave you with this, which is to say the continuing sense of sorrow for the loss of Miss Hamilton. I leave you with apologies if anything I have said has appeared to not be based on the evidence, because I haven't attempted to mislead you. And I leave you with appreciation for your thought and consideration in this case.

Do the right thing. Don't let the [S]tate, don't let the prosecution bully you into finding a man guilty based on a prosecution that is flimsy and is primarily the outgrowth of animosity towards my client for what he did in the past. Don't be fooled.

Thank you, folks.

(16RT 2877-2878.)

During rebuttal argument, the prosecutor stated:

Now, Dr. Bux was, as I pointed out yesterday, a hired witness. He was paid to come in here and testify for you, and he was called because the defendant wanted him to say something helpful for his case. He's not a county employee like Ed Jones or Dr. O'Halloran who is getting paid a salary to do his job and come in here and testify. And I guarantee you there's no county employee making $1,600 a day. If they do, you all should start writing your board of supervisors. That is a . . . princely sum I believe was the language. He got paid for his opinion. That's just it is what it is. It's just a fact, like it or not.

I don't think, and I'm not arguing to you, that Dr. Bux committed perjury. No one is suggesting that that's the case. It's just that in some areas he clearly doesn't know what he's talking about. Like the manual strangulation. He's just wrong. Dr. O'Halloran has far more experience in that field. Dr. O'Halloran has actually published in that field. Dr. O'Halloran gave a very solid opinion that this was very likely a manual strangulation case. He almost put that down as the manner of death I believe he testified.

Dr. Bux is also just flat wrong when he said that neutrophils and lymphocytes don't matter when you're looking at injuries. They do. The body works in certain ways, and you can't necessarily put a time limit on when neutrophils and lymphocytes arrive. And Dr. O'Halloran said, no, you would never try to do that.

But you can make some general observations such as an hour or very likely more, or premortem, meaning while she's still alive versus postmortem. It's just a matter of degree like Dr. O'Halloran said.

Now, the coroner again cannot testify whether or not Crystal Hamilton was raped. That is your job. That includes a tremendous number of facts besides the fact that Crystal didn't have vaginal injuries. The fact that she did not have vaginal injuries and so, therefore, she was not raped, it's almost offensive when you think about it.

(16RT 2900-2901.)

C. Appellant's Claim of Misconduct Has Been Forfeited

Appellant has forfeited his contention that the prosecutor committed error or misconduct when she made references to Dr. Bux's fee for his services because the statements disparaged defense counsel, appellant, and Dr. Bux. Appellant failed to timely object to the purported improper statements on the ground of prosecutorial error and request an admonition that the jury disregard the impropriety. (*People v. Hinton* (2006) 37 Cal.4th 839, 863; *People v. Earp* (1999) 20 Cal.4th 826, 858.) Although appellant twice objected to the prosecutor's argument, he did not object on the

ground of error or misconduct or otherwise make an assignment of error or misconduct relating to each challenged argument. (15RT 2698-2699, 2733-2736.) Rather, he merely objected to the prosecutor's argument as improper. Furthermore, appellant did not request that the jury be admonished to disregard the impropriety. Accordingly, appellant did not make a sufficient objection to preserve for appeal the claim of prosecutorial error or misconduct. Therefore, lacking both a timely objection on the specific ground of prosecutorial error or misconduct and a timely request for a curative admonition, appellant has forfeited this contention on appeal that the prosecutor committed misconduct.[40]

D. In Any Event, the Prosecutor Did Not Commit Misconduct by Denigrating Defense Counsel and the Defense's Expert Witness

A prosecutor is given wide latitude in argument, which may be vigorous as long as it amounts to fair comment on the evidence and reasonable inferences drawn therefrom. (*People v. Gamache* (2010) 48 Cal.4th 347, 370-371.) However, a prosecutor may err if he or she misstates or mischaracterizes the evidence or asserts facts that are not in evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 823; *People v. Wharton* (1991) 53 Cal.3d 522, 566.)

Here, appellant contends that the prosecutor erred when she stated: (1) that Dr. Bux was "a hired mouthpiece, really, who would say what they pay him to say" (15RT 2734); (2) that Dr. Bux "was bought by the defense" (15RT 2743); (3) that for "$3,600, [appellant] bought an outrageous, antiquated and preposterous opinion about rape" (15RT 2736); and (4) that

[40] Because appellant does not argue that an admonition could not have cured the harm caused by the alleged prosecutorial misconduct, respondent has not addressed the question whether an objection and admonition would have been futile. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.)

for "$3,600 people will say contradictory things" (15RT 2748-2749). Appellant argues that these statements were erroneous because there was no evidence that defense counsel "'bought'" Dr. Bux's opinion. (AOB 211.)

However, it is not misconduct or even error for a prosecutor to "remind the jurors that a paid witness may accordingly be biased and [a prosecutor] is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent 'lie.'" (*People v. Arias* (1996) 13 Cal.4th 92, 162.) "[H]arsh and colorful attacks on the credibility of opposing *witnesses*" is permissible. (*Ibid.*, citing *People v. Sandoval*, *supra*, 4 Cal.4th at pp. 180, 184 and *People v. Cummings* (1993) 4 Cal.4th 1233, 1302.)

This Court has found no error where a prosecutor commented that a defense expert had been paid significant fees to "'come[ ] up with something that excuses [the defendant's] responsibility.'" (*People v. Cook* (2006) 39 Cal.4th 566, 613.) This Court in *Cook* rejected the claim that the prosecutor's argument implied that the expert had given "'false testimony for a fee,' thereby impugning defense counsel's integrity for having, in effect, bought the expert's testimony." (*Id.* at pp. 613-614; see also *People v. Spector* (2011) 194 Cal.App.4th 1335, 1407 [no error where prosecutor referred to the defense experts as "'paid-to-say witnesses'" and arguing that the experts were "'willing, for a price . . . to come and say [the death was] a suicide"]; *People v. Monterroso* (2004) 34 Cal.4th 743, 783-784 [no error where prosecutor referred to the "industry of these defense experts that bounce around from trial to trial, state to state, collecting good money for testimony"].)

Likewise, here, the prosecutor's comments about Dr. Bux being paid to give a favorable opinion for the defense were "within the bounds of proper argument." (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 784.) The challenged remarks were in reference to: (1) Dr. Bux's testimony that

Jones could not opine that appellant's semen could have been deposited within minutes before Crystal's death, even though Dr. Bux had not reviewed Jones's testimony, did not review any of Jones's reports, and was not an expert on sperm or serology (15RT 2629-2631); and (2) Dr. Bux's testimony that Crystal had not been raped because she did not have any genital trauma and lacked an "assaultive pattern" of injuries, even though Dr. O'Halloran never provided an opinion as to whether a sexual assault had occurred (15RT 2571-2572; see15RT 2640-2642). Thus, the prosecutor did not err by reminding the jury that Dr. Bux had been paid and arguing that his testimony was biased, while challenging the substance of Dr. Bux's testimony.

Moreover, to the extent that appellant argues that the prosecutor's argument denigrated defense counsel, such a claim also fails. "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Hill*, *supra*, 17 Cal.4th at p. 832; *People v. Frye* (1998) 18 Cal.4th 894, 978 [a prosecutor's argument that denigrates defense counsel "directs the jury's attention away from the evidence and is therefore improper"], overruled on other grounds *by People v. Doolin*, *supra*, 45 Cal.4th at pp. 833-834.) In evaluating claims of such prosecutorial error, a reviewing court determines "whether the prosecutor's comments were a fair response to defense counsel's remarks" (*People v. Young* (2005) 34 Cal.4th 1149, 1189), and whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion (*People v. Cash*, *supra*, 28 Cal.4th at p. 733).

Here, the focus of the prosecutor's comments was on Dr. Bux's potential bias as a paid expert witness, not on counsel's integrity. It was not improper for the prosecutor to attack the expert's credibility. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 978 [the prosecutor's characterization of defense counsel's challenge to the witness's credibility

as "'ludicrous' and 'a smoke screen'" was not objectionable]; see *People v. Chatman* (2006) 38 Cal.4th 344, 387 [it is not error for a prosecutor to denigrate the defense case, including the defense evidence]; *People v. Gionis*, *supra*, 9 Cal.4th at p. 1218 [it is not error to remind the jury "it should not be distracted from the relevant evidence"].) Moreover, it was not reasonably likely the jury interpreted the remarks as an attack of defense counsel's integrity or as asking the jury to find appellant guilty on this improper factor.

Appellant's reliance on *People v. McLain* (1988) 46 Cal.3d 97 is misplaced because that case is inapplicable. (AOB 212-216.) This Court's decision in *McLain* did not address the issue of whether a prosecutor commits misconduct or error by reminding the jury that a defense expert was paid and may be biased. Rather, *McLain* involved a claim that the prosecutor's remarks were improper because they implied that the defense had presented perjured testimony from a lay witness. (*McLain*, *supra*, 46 Cal.3d at pp. 112-113.) Thus, appellant's reliance on *McLain* is inappropriate. (See *People v. Sandoval*, *supra*, 4 Cal.4th at pp. 179-180 [no error when the prosecutor called the defense expert a "liar"].)

In any event, appellant was not prejudiced by any alleged misconduct by the prosecutor. The jury instructions made it clear that the prosecutor's argument was not evidence (5CT 1348; 10RT 1758; 15RT 2662) and that the jury was responsible for evaluating the credibility of the expert witnesses (5CT 1369; 10RT 1759; 15RT 2673-2674). Appellant "offers no reason to believe the jury failed to follow [these] instruction[s]. [Citation.]" (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 784.) Further, defense counsel had the opportunity to clarify that he did nothing wrong or illegal in his argument and that the prosecutor did not imply that counsel had done so. (15RT 2827-2829.) Moreover, as detailed above, the evidence against appellant was strong. Thus, appellant's claim of misconduct must be

denied. For the same reasons, appellant's conclusory allegations of prejudice as to the penalty phase (AOB 220) should also be rejected.

IX. THE JUDGMENT AND SENTENCE NEED NOT BE REVERSED FOR CUMULATIVE ERROR

Appellant contends that the cumulative effect of errors during the guilt phase requires reversal of the death verdict. (AOB 221-226.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton* (2001) 26 Cal.4th 598, 691-692; *People v. Caitlin* (2001) 26 Cal.4th 81, 180.) The uncontested evidence at trial was strong. It was uncontested that appellant had previously committed a rape. (10RT 1857-1877.) It was uncontested that appellant had the opportunity to commit the crimes because Susannah was out of town that weekend. (11RT 1945.) It was uncontested that appellant frequently visited the beach where Crystal's body was found. (11RT 1892; 13RT 2346-2350, 2359.) It was uncontested that appellant was shown Crystal's picture on three different occasions and denied knowing Crystal by name and denied recognizing her picture. (See 6CT 1743-1800; 7CT 1801-1832, 1848-1868.) It was uncontested that appellant's semen was inside Crystal. (13RT 2407-2409.) It was uncontested that appellant's semen was deposited "recently" before Crystal's death. (14RT 2632.) It was uncontested that Crystal suffered multiple injuries before her death, including injuries to her right hip, left bicep, shoulder, and left thumb. (15RT 2605-2608.) It was uncontested that the wound on the center of Crystal's head and the injury to the right side of her forehead were inflicted before she died. (15RT 2618-2622.) It was uncontested that Crystal was found naked at Mussel Shoals beach and her possessions were not at the scene. (11RT 1991-1993, 1997, 2012-

2013.) Thus, given the strong uncontested evidence presented at trial, the cumulative effect of any alleged error was harmless.

Moreover, even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009.) The record shows appellant received a fair trial. His claims of cumulative error or prejudice should, therefore, be rejected.

X. RESPONDENT DOES NOT OBJECT TO APPELLANT'S REQUEST THAT THIS COURT INDEPENDENTLY REVIEW THE SEALED MATERIAL RELATING TO WITNESS MARGARET ESQUIVEL'S PSYCHOLOGICAL AND PSYCHIATRIC RECORDS

Appellant contends that the trial court abused its discretion when it denied his request for Esquivel's psychological and psychiatric records from Vista Del Mar Hospital and requests that this Court independently review sealed records pertaining to the trial court's ruling. (AOB 227-234.) Respondent does not object to appellant's request. However, based on the trial court's comments, respondent expects that the sealed portion of the record will show that the trial court did not abuse its discretion when it denied appellant's request, because appellant was seeking to impeach Esquivel on a collateral matter that was of minimal relevance.

A. Relevant Proceedings

Before trial, the prosecution filed a motion to exclude evidence regarding Esquivel's treatment at Vista Del Mar Hospital in November of 2004, where she was treated for 18 days for an addiction to Vicodin. However, the prosecution did not move to exclude evidence that Esquivel was taking Vicodin at the time she made the observations in April of 2001 and that she was taking Vicodin when she was interviewed by police. (3CT 636-342; 4RT 629-630.) Appellant subpoenaed all of Esquivel's psychological and psychiatric records from Vista Del Mar Hospital, to be returned to the trial court under seal. Appellant wanted the trial court to

determine whether the severity of Esquivel's addiction would affect her ability to perceive and recollect and whether Esquivel suffered from delusions. (3CT 643-647, 666-667; 4RT 630-631.) The court agreed that such evidence would be relevant, stating:

> Obviously, the need to review those records in camera -- here I'll just suggest, for example, if those records contain some statement by Miss Esquivel to the effect of "my memory has been totally shot since I've been using Vicodin," that's impeachable material in the context of this case. Obviously, I don't know that those records contain anything like that at all.
>
> But it seems to the Court to be a fair request that the Court examine in camera those records to see if there are indicators of concerns because of her Vicodin use that might have affected her ability to perceive and recollect what in fact occurred here. And the Court is inclined to grant the request to review the records in camera once they're received to see if in fact anything like that exists.
>
> Frankly, I doubt it, and I understand the need for the defense to cover all the bases in this regard to make sure that they've done a thorough and comprehensive investigation here to make sure that indeed Miss Esquivel's memory is reliable and not subject to being impeached because of her Vicodin use.
>
> But I don't see any extensive inquiry into her hospitalization, even assuming that there is something in there like that. It would appear to the Court unless there is some other information that would suggest that her ability to perceive and recollect has indeed been affected on this particular issue by the use of Vicodin or any other substance, that that treatment at the hospital for the period of 19 days really doesn't offer the jury much at all.
>
> Obviously, she's going to be cross-examined about the fact that she was taking Vicodin when this happened and that she had taken it when she was being interviewed by the district attorney's investigator and so forth.
>
> So the fact that she was perhaps under the influence -- maybe too strong a term -- but had consumed Vicodin at or about the time of the events in question will certainly be

> something the trier of fact will know about. But without something further to suggest that her capacity to perceive and recollect has been impacted as a result, I don't see us going into any major examination of her time at Vista Del Mar Hospital.

(4RT 631-633.)

Later, the trial court received and reviewed the records from Vista Del Mar Hospital. The trial court ruled that, pursuant to *People v. Hammon* (1997) 15 Cal.4th 1117, 1127, appellant was not entitled to pretrial discovery of the records. The court stated that the records may be relevant, depending on where defense counsel "propose[d] to go with [his] cross-examination of Miss Esquivel, and what [he said] in [during] opening statement . . . ." (10RT 1770-1772.)

During the cross-examination of Esquivel, defense counsel asked, "With regard to the Vicodin that you were taking at the time that you had this conversation with Mr. Dworak in which he stated that he had been out in Ventura in 2001, with regard to the strength of the Vicodin, do you recall what the strength was, the milligrams?" (11RT 1917.) Esquivel replied, "Five milligrams, between five and 7.5." (11RT 1918.) Defense counsel later requested the court for Esquivel's medical records as follows:

> The jury not being present, with regard to the medical records on Miss Esquivel, your Honor, I don't believe that Vicodin comes in the strength of five milligrams and/or 7.5 milligrams. I believe it comes in 500 milligrams and 750-milligram dosages, and I believe that I need records to confirm the fact that those were the prescriptions that she had.
>
> Moreover, the Court having seen the witness, I believe the Court is called upon now to make an independent determination as to whether there is anything discoverable in those materials.
>
> The witness was -- has been inconsistent in her statements. The witness equivocated on the stand. I have some concerns as to the issues of her credibility that I believe that the records could possibly shed light on.

> The Court having done an independent inquiry, I would ask the Court to please divulge the information requested.

(11RT 1947.)

The trial court denied the motion as follows:

> Just so it's clear, the records have to do with [Esquivel's] hospitalization last November and into December at a local hospital and do not, in my recollection, necessarily contain information about prescriptions that she may have had at or about the time of the events that we're talking about here. So I don't believe there's any such information concerning the strength of those prescriptions, Mr. Powell, in the records themselves.
>
> And having heard the testimony of the witness now and also the opening statements of both sides, the Court's view is that the material that is contained in the records themselves is of such slight value to the defense in terms of cross-examination of the witness that it is not -- that in balancing the right of the defense to [Esquivel's] right of privacy, it is not something that would be discoverable under the facts of this case since it is apparently the stipulation between the parties that there was, in fact, sexual intercourse between [appellant] and the decedent in this matter.
>
> So that the information that I alluded to yesterday -- and I'll make a record of this out of the presence of counsel, and it will be sealed for the record on appeal if there is a conviction -- is of such slight probative value that it is not something that would justify breaking the privilege of her confidentiality, her rights of privacy concerning that treatment.
>
> There may be other matters . . . or other avenues for you to explore in terms of potential impeachment on the milligram dosage apart from the records themselves, obviously . . . .

(11RT 1948-1949.)

Afterwards, the trial court held an in-camera hearing outside the presence of the jury and counsel regarding Esquivel's records from Vista Del Mar Hospital, the transcript of which was ordered sealed. (11RT 1981.)

B. Based on the Trial Court's Comments, It Is Clear That the Court Did Not Abuse Its Discretion When It Balanced Appellant's Need for Esquivel's Psychological and Psychiatric Records with the Policy of Keeping Such Records Private

Under the subpoena duces tecum procedure contained in section 1326, when a criminal defendant has requested records of a nonparty, "the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents." (§ 1326, subd. (c).) If the records are privileged, the trial court is not required at the pretrial stage of the proceedings to review or grant discovery of the information in the hands of a third party, but may later review records and disclose information at trial if necessary to preserve the defendant's right to confrontation. (See *People v. Hammon*, *supra*, 15 Cal.4th at p. 1127; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 30, fn. 6.) As this Court explained in *Hammon*:

> When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon . . . to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. [Citation.] Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily.

(*People v. Hammon*, *supra*, 15 Cal.4th at p. 1127.)

Here, appellant does not dispute that the trial court properly reviewed the psychological and psychiatric records in camera. (See AOB 232-234; see generally *People v. Gurule*, *supra*, 28 Cal.4th at pp. 591-595; *People v. Hammon*, *supra*, 15 Cal.4th p. 1124.) However, appellant asks this Court to independently review the trial court's ruling by examining the sealed records and comments. (AOB 234.) Based on the trial court's comments, it is clear that it did not abuse its discretion when it balanced appellant's need for Esquivel's psychological and psychiatric records to cross-examine

her with the policy for keeping her records private. (See *People v. Avila* (2006) 38 Cal.4th 491, 606 ["Parties who challenge on appeal trial court orders withholding information as privileged or otherwise nondiscoverable 'must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record.'"], quoting *People v. Price* (1991) 1 Cal.4th 324, 493.) Esquivel's psychological and psychiatric records are highly private and privileged documents. (See Evid. Code, §§ 994, 1014; *People v. Stritzinger* (1983) 34 Cal.3d 505, 511 [psychotherapist patient privilege is an aspect of the constitutional right to privacy].) Appellant's need for the privileged documents was minimal, as the record reflects that appellant merely wanted the records to impeach Esquivel's testimony with a collateral matter, i.e. whether her Vicodin "comes in the strength of [5] milligrams and/or 7.5 milligrams." (11RT 1947-1948; see AOB 232-233.)

A trial court has discretion to exclude impeachment evidence if it is collateral. (*People v. Price*, *supra*, 1 Cal.4th at p. 412; see *People v. Wheeler* (1992) 4 Cal.4th 284, 296 ["the latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues"].) "A collateral matter has been defined as 'one that has no relevancy to prove or disprove any issue in the action.' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) However, "[a] matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue . . . ." (*Ibid.*) Whether Esquivel's Vicodin prescription was measured in 5 or a 7.5 milligram dose clearly had no relevancy to prove or disprove any issue in the case, and was thus collateral.

In this case, such evidence had marginal impeaching value. Appellant did not make an offer or proof that Vicodin cannot be prescribed in such doses. In fact, contrary to appellant's assertion, it appears that Vicodin prescriptions can be measured in 5 or 7.5 milligram increments, instead of 500 milligram or 750 milligram doses. (See, e.g., *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1303 ["defendant told Kolaskey that he had taken two 5-milligram prescription Vicodin pills at his home earlier that day"]; see also *People v. Smith* (2010) 191 Cal.App.4th 199, 201 [the victim "had taken medication for polymysotitis, a disease which causes her immune system to attack her muscles, and included . . . 10 milligrams of hydrocodone"[41]].) Moreover, whether Esquivel could accurately remember the dosage of her Vicodin prescription did not have any bearing on her veracity. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 350 ["[e]xclusion of impeaching evidence on collateral matters which has only slight probative value on the issue of veracity does not infringe on the defendant's right of confrontation].) Thus, the trial court's exclusion of such collateral evidence was not an abuse of discretion. (See *People v. Quartermain* (1997) 16 Cal.4th 600, 625 [trial court did not abuse discretion by excluding impeachment on collateral matter].)

Furthermore, to the extent that appellant contends that the trial court's ruling could have violated his right to confront witnesses against him (AOB 228), appellant had abundant evidence with which to impeach and challenge Esquivel's credibility, and he had wide latitude in cross-examining her about her observations.[42] (See 11RT 1897-1918, 1926-

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[41] *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 656 [hydrocodone is the generic form of Vicodin].

[42] Respondent notes that, in *People v. Abel* (2012) 53 Cal.4th 891, this Court stated that there was uncertainty whether the right to confrontation "embraces a right to discover information necessary to make

(continued...)

1928.) "'[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [106 S.Ct. 1431, 89 L.Ed.2d 674]; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 53 [107 S.Ct. 989, 94 L.Ed.2d 40] ["Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses"]; see also *People v. Cornwell*, *supra*, 37 Cal.4th at p. 95 [confrontation clause permits trial courts to retain wide latitude to impose limits on cross-examination concerning matters of marginal relevance].)

C. In Any Event, Respondent Does Not Object to Appellant's Request That this Court Review the Sealed Records

In any event, respondent does object to this Court reviewing the sealed records to determine whether the trial court abused its discretion when it did not provide appellant with Esquivel's psychological and psychiatric records. Although respondent expects that the sealed portion of the record will show that the trial court did not abuse its discretion, respondent requests leave to further brief the issue if this Court finds that the trial court should have provided the discovery. (See, e.g., *People v. Abel*, *supra*, 53 Cal.4th at pp. 930-935 [finding that the sealed records did not render the trial fundamentally unfair because there was no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different].)

(...continued)
cross-examination effective." (*Id.* at p. 931.) For purposes of this argument, respondent assumes, but does not concede, that the right to confrontation applies to such discovery.

XI. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant briefly presents several challenges to the constitutionality of California's death penalty statute to urge reconsideration of the claims and to fairly present the issues for federal review pursuant to *People v. Scheck*, *supra*, 37 Cal.4th at pp. 303-304. (AOB 235-245.)

First, appellant claims that California's death penalty statute, as construed by this Court, fails to perform the narrowing function required by the Eighth Amendment. (AOB 236-237.) This Court has held "'California's death penalty law "adequately narrows the class of murderers subject to the death penalty" and does not violate the Eighth Amendment.'" (*People v. Tully* (2012) 54 Cal.4th 952, 1067, quoting *People v. Blacksher* (2011) 52 Cal.4th 769, 848; accord *People v. Loker* (2008) 44 Cal.4th 961, 755.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Appellant argues that capital punishment per se violates the Eighth Amendment's proscription against cruel and unusual punishment because it "no longer comported with contemporary values nor served a legitimate penalogical purpose." (AOB 237-238, quoting 1CT 35.) This Court has rejected this claim in *People v. Moon* (2005) 37 Cal.4th 1, 47-48. Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

Appellant contends that the failure to provide intercase proportionality review violates his constitutional rights. (AOB 238.) The United States Supreme Court has held that intercase proportionality review is not constitutionally required. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has held that "[c]omparative intercase proportionality review by the trial or appellate

courts is not constitutionally required." (*People v. Snow* (2003) 30 Cal.4th 43, 126; accord *People v. Demetrulias* (2006) 39 Cal.4th 1, 44; *People v. Moon*, *supra*, 37 Cal.4th at p. 48; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Anderson* (2001) 25 Cal.4th 543, 602.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Appellant claims that permitting the jury to consider the circumstances of the crime as a factor in aggravation within the meaning of section 190.3, factor (a) is impermissibly vague and results in an arbitrary and capricious imposition of the death penalty. (AOB 239.) This Court has repeatedly rejected this contention. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 831; *People v. Harris*, *supra*, 37 Cal.4th at p. 365; *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Lewis*, *supra*, 26 Cal.4th at p. 394; see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 2637, 129 L.Ed.2d 750].) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Appellant next contends the trial court erred when it failed to instruct the jury that it had to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors. (AOB 240-242.) This Court has rejected the argument that the reasonable doubt standard applies to capital penalty phase proceedings. (*People v. Whalen* (2013) 56 Cal.4th 1, 90 ["[t]here is no requirement under either the Sixth Amendment's jury trial guarantee, or the Eighth Amendment's proscription against cruel and unusual punishments, or the Fourteenth Amendment's due process clause, that the jury unanimously find beyond a reasonable doubt the existence of aggravating factors or that the aggravating factors outweigh the mitigating factors or that death is the appropriate penalty"], citing *People v. Clark*, *supra*, 52 Cal.4th at p. 1007, and *People v. Blair*, *supra*, 36 Cal.4th at p.

753; *People v. Bivert* (2011) 52 Cal.4th 96, 123-124; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 208 [reiterating the holding that that the jury is not required to find beyond a reasonable doubt that (1) the aggravating factors have been proved, (2) the aggravating factors outweigh the mitigating factors, or (3) death is the appropriate sentence]; *People v. Harris*, *supra*, 37 Cal.4th at p. 365; see *People v. Prieto*, *supra* 30 Cal.4th at p. 275; *People v. Hillhouse* (2002) 27 Cal.4th 469, 510–511.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Appellant next argues that CALJIC No. 8.85 was constitutionally deficient because it failed to delete inapplicable sentencing factors, failed to delineate between aggravating and mitigating factors, contained vague and ill-defined factors, and limited some mitigating factors with adjectives such as "extreme" and "substantial." (AOB 242-245.) This Court has repeatedly found that "'CALJIC 8.85 is both correct and adequate.'" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1248, quoting *People v. Valencia* (2008) 43 Cal.4th 268, 309.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Appellant argues that the use of the death penalty violates international law. (AOB 245.) This Court has repeatedly rejected the claims that the death penalty violates international law. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Lewis* (2008) 43 Cal.4th 415, 537-538.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

XII. THE ADMISSION OF VICTIM-IMPACT EVIDENCE DID NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant also presents three challenges to the admission of victim-impact evidence at the penalty phase of trial to urge reconsideration of the

claims and to fairly present the issues for federal review pursuant to *People v. Schmeck*, *supra*, 37 Cal.4th at p. 303. (AOB 246-263.) First, appellant claims that the victim-impact testimony should have been limited to witnesses who were present at the crime. (AOB 247.) As appellant recognizes, this Court has rejected the argument that victim-impact testimony is limited to witnesses present during the crime. (AOB 247; *People v. Tully*, *supra*, 54 Cal.4th at p. 1031; *People v. Pollack* (2004) 32 Cal.4th 1153, 1183.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Next, appellant argues that victim-impact testimony regarding the victim's personal characteristics, such as her relationship with her family and potential as an artist and musician, were facts unknown to appellant at the time of the crime and, thus, improperly admitted. (AOB 247, 256-258.) As appellant recognizes, this Court has previously rejected this claim. (AOB 247; *People v. Myles* (2012) 53 Cal.4th 1181, 1219; *People v. Thomas* (2011) 51 Cal.4th 449, 508; *People v. Pollack*, *supra*, 32 Cal.4th at p. 1183; see, e.g., *People v. Boyette*, *supra*, 29 Cal.4th at pp. 443-445.) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

Last, appellant argues that the victim-impact testimony should have been restricted to evidence relating to the victim of the capital crime. Specifically, appellant argues that victim-impact evidence of appellant's prior crimes was improperly admitted. (AOB 247-248, 258-260.) As appellant recognizes, this Court has rejected this argument. (*People v. Martinez* (2010) 47 Cal.4th 911, 913 [impact of the defendant's prior assaults was relevant and admissible as "'evidence of the emotional effect'" of the defendant's other violent criminal acts]; *People v. Davis* (2009) 46 Cal.4th 539, 618 [this Court has "repeatedly held that the Eighth Amendment des not prohibit the admission of testimony by a defendant's

prior victims concerning the impact of his violent crimes against them."].) Because appellant provides no persuasive reason for departing from these precedents, his claim should be rejected.

XIII. EVIDENCE AND ARGUMENT THAT APPELLANT LACKED REMORSE DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends that the trial court erred when it allowed the prosecutor to argue that appellant lacked remorse for the crimes when the police interviewed him two years after the rape and murder of Hamilton. (AOB 264-273.) Specifically, appellant argues that evidence of lack of remorse must be limited to acts at "the scene of the crime or in temporal proximity of the crime" (AOB 271) and that the prosecutor's argument that appellant lacked remorse during the two years between his commission of the crimes and his arrest violated his "right to remain silent, as well as his rights to a fair trial, due process of law, a reliable penalty determination, and deprived him of his state-created liberty interest regarding statutory aggravating factors" (AOB 264). This contention lacks merit.

A. Relevant Proceedings

Defense counsel moved to preclude the prosecution from arguing that appellant lacked remorse. (3CT 824-828.) Relying on *People v. Lewis, supra,* 25 Cal.4th 610, the trial court denied the motion (16RT 2951-2953).

Virginia Foster, appellant's mother-in-law, was asked whether she knew that appellant had been previously convicted of rape. Foster stated she did not know. Foster was then asked if it changed the way she felt appellant. Foster answered, "No." Foster was subsequently asked if her feelings about appellant would change because he was found guilty of Crystal's rape and murder. (17RT 3171-3172.) Foster answered,

> I really cannot equate the two people. Um, I know [appellant] as my son-in-law, the man who came to our home, had dinner with us, shared holidays with us, laughed and joked with us. It does

not compute in my mind that this is the same person that has been convicted.

(17RT 3172.)

During cross-examination, the following exchange occurred:

[The prosecutor:] You just testified that one of the memories you have of your son-in-law, the defendant, is that you have frequently laughed with him, joked with him, had him over to your home; is that correct?

[Foster:] That's correct.

[The prosecutor:] He's been a member of your family really for years now.

[Foster:] Yes, he has.

[The prosecutor:] And . . . after April of 2001, since that time period, you've seen him on a regular basis; right?

[Foster:] I visit once a week and write letters.

[The prosecutor:] And he's been laughing and joking and having a great time with his family since April 2001, hasn't he?

[Foster:] Well, up until the point he was arrested. I don't think you could say we've been laughing and joking about it.

[The prosecutor:] You did see him laugh and joke and be happy between April of 2001 and July of 2003, did you not?

[Foster:] Yes, I did.

[Defense counsel:] Objection. Relevance.

THE COURT: Overruled.

(17RT 3173-3174.)

On cross-examination, Susannah was asked if appellant picked her up from Beth Martin's house, two days after he raped and murdered Crystal. (17RT 3203-3204.) Susannah testified that they would go to barbeques with their neighbors and family dinners. At these events, appellant "would

laugh and joke" with Susannah. According to Susannah, appellant and Susannah were happy since April of 2001 until he got arrested. (17RT 3204-3205.) After the rape and murder, appellant's behavior did not change. Appellant even took Susannah and their friends to Mussel Shoals beach, where he had murdered Crystal. (17RT 3206.) The prosecutor then asked Susannah, "Did you ever in between April 22nd of 2001 and July of 2003 see any sign of what you would call remorse in your husband?" Defense counsel objected to the question on speculation grounds. The trial court sustained the objection. (17RT 3206.)

During closing argument, the prosecutor began by discussing the lack of mitigating factors, stating:

> We're going to talk about possible mitigating evidence, the mitigating factors.
>
> Now, let's start with (d), whether or not the defendant committed the crime while he was under the influence of extreme mental or emotional disturbance. You heard in this case absolutely no evidence to support any kind of mitigation under this factor. The defendant was not under any extreme or emotional disturbance. In fact, just the opposite. Both his wife and his mother-in-law, who we're going to be talking about more in just a moment, they both testified for you just how wonderful and happy-go-lucky the defendant was. Susannah Dworak said she was very happy with her husband in the weeks and months after April 22nd, 2001. I asked her, "Happy at that time?" She said, "I was happy even before then." He was wonderful.
>
> This factor, then, is not applicable. No mitigation whatsoever exists under factor (d).

(18RT 3231-3232.)

The prosecutor again mentioned appellant's demeanor after Crystal's rape and murder to show a lack of mitigating circumstances:

> He is a manipulative sociopath, completely indifferent to how he hurts people. That is his character.

You heard Virginia Foster talk about the happy times she's had with the defendant, up until he was arrested in July of 2003, that is, after he snatched Crystal Hamilton up off the street, beat her up, raped her, drowned her in the Pacific Ocean. He was just a pleasure for Virginia Foster to be around, even after committing that deed. Never once did he appear not to be happy and jovial and helpful.

While Crystal Hamilton's nude, battered body is being carried up out of the ocean on a backboard and while her family is wracked in grief over what this defendant did to her, the defendant goes back to Oak View to play checkers with his mother-in-law. How charming. What a wonderful person. What a wonderful son-in-law.

(18RT 3236-3237.)

The prosecutor further stated:

And then while Crystal Hamilton is drifting along in the Pacific Ocean here where her body was found the next morning, he goes back to his life. While she's being carried up on the backboard out of the ocean and being cut open at an autopsy to see what happened to her, the defendant goes and picks up his wife from that conference. And while Crystal Hamilton's father is making that awful phone call to her grandparents telling them what had happened to her, the defendant's in Oak View playing checkers with his mother-in-law telling jokes.

He took someone else's precious little girl, a daughter, a granddaughter, an artist, a pianist, a young lady full of life and promise with her whole life ahead of her and he soiled her just because he wanted to. He raped her and beat her and brutalized her and drowned the life out of her like he was stomping on a beautiful flower. He wasn't fazed by it at all.

Two years later when the police talk to him about this crime, when they show him a picture of her, what does he do? Does he break down sobbing and apologizing for what he's done? For what happened that night? Does he admit everything that we know he did to her but explain it in some way, give some explanation that in any way mitigates what he did to her? No, no, no, no. He lies. He lies and lies. Turns on the manipulation, turns on the charm, 'cause that's his character.

And those are the circumstances of this crime, and that's what you must consider in determining what penalty to now impose on the defendant.

(18RT 3274-3275.)

Later, the prosecutor argued that appellant's ability to "thrive" in prison was not a mitigating factor, as follows:

You do know, though, that this defendant will thrive in prison. He'll be just fine. It won't faze him at all. He's not the kind of person who will be beating himself up over the commission of his crimes. No way. What did Mr. Esten say to you? "The best predictor of future behavior is past behavior." Well, he didn't beat himself up over his last crime. He engaged in a campaign to convince everybody he was innocent. He told jokes, he got visits, manipulated another woman into marrying him.

(18RT 3221.)

During closing argument, defense counsel argued:

As Mr. Esten told us, [appellant] will live in a cell that is roughly the size of the area occupied by six of you. He will live in a two-man cell. He'll have yard privileges in the morning or the afternoon, not the weekends. He'll live with another person who is also in prison for life without possibility of parole. He'll basically, ladies and gentlemen, live in a toilet until he dies. They don't have lavatories in state prison from which prisoners are released to relieve themselves –

(18RT 3287.)

During rebuttal argument, the prosecutor stated:

You do know, though, that this defendant will thrive in prison. He'll be just fine. It won't faze him at all. He's not the kind of person who will be beating himself up over the commission of his crimes. No way. What did Mr. Esten say to you? "The best predictor of future behavior is past behavior." Well, he didn't beat himself up over his last crime. He engaged in a campaign to convince everybody he was innocent. He told jokes, he got visits, manipulated another woman into marrying him.

(18RT 3318.)

B. The Trial Court Did Not Err When It Permitted the Prosecutor to Argue Appellant Lacked Remorse

Appellant recognizes that this Court has held a prosecutor's argument about lack of remorse does not amount to a direct or indirect comment on a defendant's right to remain silent. (AOB 269; *People v. Lewis*, *supra*, 25 Cal.4th at pp. 673-672 [finding that a prosecutor's reference to a defendant's lack of remorse when the defense did not present penalty phase evidence of the defendant's remorsefulness was proper and did not amount to a comment on the defendant's right to remain silent].) However, appellant asks this Court to reconsider its prior holdings. (AOB 268-2699, 273; *People v. Scheck*, *supra*, 37 Cal.4th at pp. 303-304.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

C. The Prosecutor Did Not Argue That Appellant's Lack of Remorse Was an Aggravating Factor

Appellant also argues that the trial court erred when it allowed the prosecutor to argue that appellant's failure to show remorse was an aggravating factor. (AOB 270-272.) Appellant is mistaken.

The prosecutor did not ague that appellant's lack of remorse was an aggravating factor. Rather, the gist of the prosecutor's argument was that, because appellant had shown no remorse, the jury should take his mitigating evidence, which amounted to a plea for mercy from his family, with a grain of salt, and should be less inclined to grant him mercy. The prosecutor began her argument with a discussion of the lack of mitigating factors. During this portion of her argument, the prosecutor argued that appellant's lack of remorse was not a mitigating factor. (18RT 3221-3259.) Later, during the portion of the prosecutor's argument discussing the aggravating circumstances (18RT 3261-3284), she once mentioned

appellant was playing cards with his mother-in-law while Crystal's family was dealing with her death (18RT 3274-3275). This was a comment on the victim-impact evidence. Thus, from the context of the prosecutor's argument, it is clear that she did not argue that appellant's lack of remorse was an aggravating factor. Accordingly, appellant's claim to the contrary must bed denied. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 356-357 ["The gist of the prosecutor's argument throughout . . . was that because [the defendant] had shown no remorse, the jury should take his mitigating evidence, which amounted to a plea for mercy from his family, with a grain of salt, and should be less inclined to grant him mercy. We have consistently approved similar arguments."]; *People v. Jurado* (2006) 38 Cal.4th 72, 141 [a prosecutor may argue that a lack of remorse is relevant in evaluation of mitigating factors]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1184-1185 [the prosecutor may stress that remorse is not a mitigating factor]; *People v. Lewis*, *supra*, 25 Cal.4th at p. 673 [""the presence or absence of remorse is a factor "'universally' deemed relevant to the jury's penalty determination.'"], quoting *People v. Marshall* (1996) 13 Cal.4th 799, 855; *People v. Mendoza* (2000) 24 Cal.4th 130, 187 ["[a] prosecutor may properly comment on a defendant's lack of remorse, as relevant to the question of whether remorse is present as a mitigating circumstance, so long as the prosecutor does not suggest that lack of remorse is an aggravating factor."].) Thus, the claim should be denied.

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CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: October 2, 2014

Respectfully submitted,

KAMALA D. HARRIS
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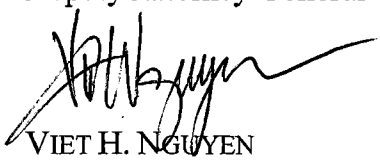

VIET H. NGUYEN
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 40,778 words.

Dated: October 2, 2014

KAMALA D. HARRIS
Attorney General of California

VIET H. NGUYEN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: *People v. Dworak*

No.: **S135272**

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 October 2, 2014, 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 October 2, 2014, I caused **one** original and **eight** copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **Federal Express, Tracking # 8040 9828 6670.**

On October 2, 2014, I caused one electronic copy of the **RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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 October 2, 2014, at Los Angeles, California.

Marianne A. Siacunco
Declarant

Signature

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