IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **JOHN ALEXANDER RICCARDI,** Defendant and Appellant.	**CAPITAL CASE** S056842

Los Angeles County Superior Court No. A086662
The Honorable David D. Perez, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information, the Los Angeles County District Attorney charged appellant with two counts of murder in violation of Penal Code section 187, subdivision (a).[1/] It was further alleged as to both counts that the special circumstance pursuant to section 190.2, subdivision (a)(3), concerning multiple convictions for murder in the same proceeding, applied. It was also alleged as to both counts that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a), causing the charged crimes to be serious felonies pursuant to section 1192.7, subdivision (c)(8). Additionally, it was alleged as to both counts that the special circumstance pursuant to section 190.2, subdivision (a)(17), applied because appellant committed the murders while engaged in the commission of a burglary. (CT 60-62.) Appellant pled not guilty. (CT 97.)

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1. Unless stated otherwise, all further statutory references are to the Penal Code.

A jury found appellant guilty of murder in the first degree on both counts. The jury also found the special allegations that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a), and that appellant was convicted of more than one count of murder in this proceeding pursuant to section 190.2, subdivision (a)(3), to be true as to both counts. The jury further found the allegation that the murder was committed while appellant was engaged in a burglary pursuant to section 190.2, subdivision (a)(17), to be true in relation to Count 1. (CT 763-764, 769-770.)

At the penalty phase, the jury found that appellant shall suffer the death penalty. (CT 845-846.) Appellant's application to modify the death verdict was denied, and he was sentenced to death. (CT 845-846, 849-850, 1060-1061.)

Appellant filed a notice of appeal, although this appeal is automatic. (CT 1064; §1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase - Prosecution's Case-In-Chief

1. The Murder Scene

On March 4, 1983, James Navarro[2/] found the dead body of his ex-wife, Connie Navarro, shoved in a linen closet in Connie Navarro's condominium at 1655 Greenfield in Los Angeles. James had called Connie the prior day and no one had picked up the phone. James also had stopped by the condominium earlier in the day and no one had answered the door. James returned with a key, and let himself into the apartment. When he went to the second floor, James found Connie's body inside of the linen closet, and found the body of Connie's friend, Susan Jory, in the master bedroom. Connie's face had been covered

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2. James Navarro also went by the name "Mike." (RT 1842.)

with a pillowcase. James became "hysterical," and then went back downstairs and called the police. (RT 1792-1796.)

Los Angeles Police Officer Richard Parrott was the first person to respond to the call. He met James Navarro, who was "hysterical," and sealed the apartment until the detectives arrived. Detectives Richard DeAnda and Richard Ettings arrived at the condominium around 3:00 p.m. The detectives secured the scene. They found Connie's body with the upper torso in the linen closet. Connie's legs were bent and her arms were crossed on her chest. Jory was found lying face down in the master bedroom. The detectives found blood marks in a second bedroom, and found what they believed to be drag marks in the same room. (RT 1304-1319, 1635-1641.)

Detective DeAnda found no obvious points of entry. The skylight in the master bedroom was ajar, but DeAnda did not believe the skylight was a point of entry at the time of the investigation. It did not appear to be sitting squarely within the frame. There were no signs that the condominium had been ransacked. The victims' purses and jewelry were not taken, and the television was still present in the apartment. Both purses still contained credit cards and cash. (RT 1322-1333, 1456-1470.)

A bullet was removed from the doorframe of the master bedroom. That bullet, and a bullet removed from Connie's body, were examined by Patrick Slack. He determined that they were either .38 or .357 caliber bullets. The bullets also were lubaloy bullets, meaning that they were copper coated. They most likely were fired by a .38 Colt revolver. Slack was unable to determine if the two bullets were fired from the same gun because the bullets were too badly damaged. (RT 1853-1858, 1939-1941.)

On March 5, Detective DeAnda served a search warrant on appellant's apartment at 2308 Schrader Drive, #331, in Santa Monica. The

police recovered three handguns, a shotgun, and several rounds of ammunition. (RT 1423-1437.)

The victims' cars were not found at the condominium. Officer Parrott found Jory's red Fiesta two blocks west of the condominium at 1642 Bentley Avenue. Connie's white Honda Civic was found two blocks east at 1341 Kelton Avenue. (RT 1333-1337.)

A pillow, pillowcase, and the clothing of the victims were collected and booked. Robert Gollhofer, a retired consultant regarding explosives, performed a visual and microscopic examination of the pillow and pillowcase. He did not find gunshot residue on the pillow, but found possible residue on the pillowcase. However, when the pillowcase was tested by a laboratory, it tested negative for gunpowder residue. (RT 1337-1338.)

Lisa Rasmusson, a neighbor of Connie's, was home on March 3, 1983. She lived across the street from Connie's condominium and her bedroom faced the street. At approximately 10:30-10:45 p.m., she heard what sounded like two gunshots. (RT 1497-1502.)

Janet Rasmusson, Lisa's mother, told the police that she had not seen Connie's car on the morning after the murder. Connie usually parked the car in front of the condominium. (RT 1523-1524.)

Paul Bach, another neighbor, who lived at 1655 Greenfield Avenue, #16, was watching Hill Street Blues on the night of March 3, and heard three muffled thumps between 10:30 to 11:00 p.m. When Bach walked his dog around 11:00 p.m., he noticed the lights and television were on in Connie's apartment, but did not see anyone inside it. (RT 1537-1542.)

Haleh Farjah, another neighbor, also heard three gunshots between 10:30 and 11:00 p.m. She looked out of her window 15 to 20 minutes later and saw a large man in a white shirt or sweater run to Connie's car, which was parked in front of her window. (RT 1649-1654.)

On March 4, 1983, Sylvia Conrad Hill, a latent print expert from the Los Angeles Police Department's Special Investigation Division, searched Connie's condominium for latent fingerprints. She discovered appellant's fingerprints on the bottom of the linen closet where Connie's body had been placed, and on the doorjamb leading into the master bedroom. She did not find prints identifiable to anyone else on the linen closet, only unidentifiable smudges. (RT 1321, 1543-1588.)

No prints were located on Jory's red Ford Fiesta. Five latent prints were found in the white Honda, but they were either unidentified or belonged to Connie. (RT 1588-1591.)

Connie died from gunshot wounds. The first wound was to the left anterior chest, went through the left lung, and exited through her back. The second bullet entered through the right front of the chest, perforated the right lung, went through the aorta, perforated the thoracic spine and was recovered from the back of the left chest. Both wounds were fatal. She also had numerous bruises on her face and knees that appeared to have occurred within the last several days. (RT 1235-1244.)

Jory also died due to gunshot wounds. One shot entered her left jaw area, tearing the left cartoid artery, and exited through the back of her neck. She also had a wound to the back of her left hand at the base of her second finger, which appeared to be a defensive wound. Both wounds appeared to be due to the same bullet. (RT 1251-1261.)

Based on the liver temperature and the state of the bodies' rigor mortis and livor mortis, the coroner estimated that the time of death was between 10:30 and 11:00 p.m. (RT 1264-1265.)

2. Events Leading To The Murders

Connie and appellant began dating in 1980. Appellant had a "loving and trusting" relationship with David, the teenage son of James and Connie. Appellant kept his own residence, but often stayed at Connie's condominium.[3/] Around Christmas of 1982, Connie began to have "troubles" with appellant, and attempted to break off the relationship. Eventually, appellant was no longer welcome at her condominium. (RT 1356-1359, 1686-1690, 2307.)

Marilyn Young was good friends with both Connie and Susan Jory, and talked with Connie on a daily basis. She would socialize with Connie and appellant. Around Christmas of 1982, Connie's relationship with appellant began to deteriorate. Connie was attached to appellant, but did not want to stay in a relationship with him. Connie got back together with appellant at Christmas so he would not be alone for the holidays, but wanted to break up with him. However, appellant was persistent, saying, "Please, at least talk to me on the telephone and that makes me happy. I'm only happy when we're in contact." Young was present during at least 15 calls from appellant to Navarro during this period of time. (RT 1683-1689.)

A few weeks before the murders, appellant began to call Young. He would call at midnight and ask about Connie. Appellant was "consumed" with what Connie was doing, and wanted to know what she was eating. Appellant did not ask if she was dating anyone else, but said that "he would not be sort of responsible for what he would do if he ever saw her with anybody." Young told him to "let go," but he "couldn't control himself." (RT 1689-1690.)

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3. Appellant would stay at the condominium for four or five days a week. Occasionally, appellant would do his laundry at the condominium where the washer/dryer was located in the hallway between the two bedrooms. Appellant would put clothes on the shelf above the washer/dryer. David never saw appellant use the linen closet. (RT 1376-1379, 1774.)

Carl Rasmusson, a retired arson investigator for the Los Angeles County Fire Department, lived at 1648 South Greenfield, across from Connie's condominium. Rasmusson and his wife, Janet, knew both appellant and Connie, and were friendly with both of them. Janet worked for Connie as a sales girl at Connie's gift shop. The Rasmussons went on summer vacation with appellant and Navarro. Janet heard that Connie was having "problems" with appellant toward the end of 1982. In early 1983, Connie told Carl that she had broken up with appellant and that she was very upset and scared. Connie asked the Rasmussons to watch the condominium because she believed that she was being followed and that appellant had broken into the condominium. At one point, Carl told appellant that he was scaring Connie and that he should "be a man" and leave her alone. (RT 1502-1517.)

George Hoefer, and advertising executive, met Connie during the shooting of a commercial in November of 1982. Connie discussed getting a new job with Hoefer. In January of 1983,[4/] they met at a restaurant and had drinks. Afterwards, Hoefer gave Connie a friendly kiss on the cheek. The next day, he received a call from an angry man with a New York or New Jersey accent, who said, "This is Connie's boyfriend, and what the fuck are you doing with my girlfriend?" The man then said, "If Connie does not stop seeing you, I'm going to break her knees." Hoefer tried to calm the man down by saying that there was no affair between him and Connie. The angry man said that Connie had told him that Hoefer had offered her a job, and Hoefer said that while they had discussed employment for her, he had not offered her a job. The man said he saw Hoefer kiss Connie, and Hoefer explained that it was just a friendly kiss. Hoefer told the man, "Look, I'm a happily married man and I have no desire to get involved in a triangle with a jealous husband." Hoefer then ended the call. (RT 1614-1621.)

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4. Hoefer estimated it was between January 3 and 5.

Later that evening, Hoefer got another call in his hotel room. It was the same man, and he told Hoefer that he knew Hoefer was scheduled to be on the first American Airlines flight to New York, and Hoefer had better be on that flight. The man also said that he knew Hoefer lived in Westport, Connecticut, and asked how Hoefer would like it if he came to visit Hoefer's wife. Hoefer said that he had no intention of seeing Connie again, and the caller should "back off." The man then "softened" and asked Hoefer not to tell Connie about the calls. Hoefer later told Connie about the calls. He did not inform the police about the calls until after Connie had been murdered. (RT 1621-1624.)

Marilyn Young began to spend more time with Connie because Connie was scared. Appellant would appear at Connie's gym although he did not work out there. The gym had a large window and appellant would stand in front of the window and stare into the gym. Connie and Young went running one day and Young's daughter said that she saw appellant around Young's home. (RT 1693-1694.)

Once, Young and Connie went to a gym on Main Street and appellant was waiting by their car. Connie asked why he was there, and appellant said he had a meeting in a restaurant that was up the street. Young and Connie then went to a cantina for lunch, and appellant entered and sat down alongside them and just stared at Connie. He did not say anything and seemed enraged. Connie then asked him to sit with them. Young recalled four or five occasions where appellant would "show up" where Connie was. (RT 1694-1696.)

Craig Spencer worked out at the same gym with Jory and Connie. One morning, he had breakfast with Connie and Jory and appellant entered the restaurant. Connie said, "Oh, no, it's Dean."[5/] Defendant sat across from Spencer and stared at Connie for three or four minutes. Both Connie and Jory were agitated. Spencer introduced himself to appellant and tried to shake his

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5. Appellant went by the name "Dean." (RT 1357.)

hand, but appellant did not respond. Spencer said that appellant was making the women nervous. Appellant never said anything, but eventually got up and walked away. He positioned his fingers (forefinger extended) so that his hand looked like a gun and pretended to shoot Connie (brought his thumb down). (RT 1670-1675.)

A few weeks before the murders, Connie had her locks changed and invited Carl Rasmusson to come look at the lock on the upstairs sliding glass window. Connie said that appellant was breaking into the condominium through the second floor patio. The bolt that locked the door had been "sawed almost completely through." Connie asked Rasmusson to watch out for appellant. Connie had an alarm system installed. She wanted Rasmusson to make "his presence known" if appellant appeared. (RT 1506-1509, 1690-1691.)

Connie was afraid of appellant. On the Friday before the murders, Connie and Jory were supposed to come to a party with Young and her ex-husband, Sidney. Appellant called Connie and wanted to know where she was going. Connie said that she was late and did not want to tell him. Appellant went to Connie's condominium and watched her get into Young's car. Appellant later said, "When I saw it was Sidney, I didn't bother you, did I?" (RT 1691-1693.)

Approximately a month prior to the murders, Connie had agreed to meet appellant in a public place and was supposed to meet Young afterward. Young's daughter told her that Connie had called and said she was going away for the weekend with appellant. Connie called Young later and said that they were in Laguna, however appellant was on the line while the call was made. When Connie returned, she said that appellant had grabbed her arm, wanted her to get in the car, and go away for the weekend. She did not want to get into his car while he had the keys, so he gave her the keys. He then pulled a gun and

said she had to stay in the car. He then took her to a motel in Santa Monica and they stayed there until the next Monday. (RT 1696-1699, 1817.)

Approximately a week to ten days prior to the murders, David stayed home from school due to illness. Connie was jogging and not home. David heard a noise from his mother's bedroom and saw appellant standing on the second floor balcony outside the room. Appellant had removed the sliding glass door from its track. David hid in the shower because his mother had told him appellant was dangerous. David heard someone pass through the beads into his bedroom and then heard footsteps going down the stairs. David left the bathroom and heard someone listening to his mother's messages on the telephone answering machine. David said, "Hello, Dean, Mom, is anyone here? I think there's someone trying to break in." (RT 1368.) Appellant said that he was there. David went downstairs and appellant said that everything was fine, and nobody was trying to enter the condominium. They both went upstairs and David noticed that the glass door had been placed back on the track. They both went downstairs and watched television and waited for Connie to return. (RT 1356-1369, 1695.)

After about a half hour, appellant went back upstairs for about five minutes, and then came back down and told David he wanted to show him something. David went upstairs with appellant. Appellant said that Connie did not want to see him and that he was very upset and was going to kill himself. Appellant reached under the foot of the bed and pulled out a gun. Appellant repeated that he was going to talk to Connie and then kill himself and pointed the gun at David. David tried to run but appellant grabbed him. Appellant tried to handcuff David to the toilet bowl, but David begged him not to do it, and appellant handcuffed David's hands behind his back. Appellant said he was going to deal with David's mother and closed the door. David slid his legs

through the handcuffs so that his hands were in front of him. He did not leave the bathroom because he was scared. (RT 1369-1373, 1773-1774.)

David heard his mother come home. Connie asked, "Where's my son?" (RT 1374.) David heard yelling and then slapping sounds. The argument lasted between 20 to 30 minutes. Eventually, appellant came to the bathroom and released David. Appellant was crying and apologetic. He asked David not to tell anyone about what happened. David, appellant, and Connie went downstairs. David watched television while Connie and appellant spoke in the kitchen. David did not mention the incident to anyone until after his mother had been killed because he was scared appellant might kill himself or Connie. (RT 1373-1376, 1403-1412.)

Eventually, Connie became afraid to go to her condominium. One time after a party, she stayed with Young. The next morning, she heard that appellant was in a "rage" and she went with Young to Laguna. When they returned, Connie stayed in her ex-husband's house. Connie was later told that when she went to the condominium to get her clothing, appellant was watching her while hidden inside a closet. (RT 1699-1700.)

Connie wanted to get a restraining order when she started having "major" problems with appellant. James Navarro referred her to his attorney, Gerald Sherman, about obtaining a restraining order. (RT 1796-1797.)

James Navarro found a tape recording of Connie discussing getting a restraining order with a "legal support person." Connie stated that she was terrified of appellant on the tape. The tape was played to the jury. (RT 1799-1800, 1842.)

Appellant would appear during events that Connie planned with James Navarro. They would go to dinner with David and appellant would show up at Connie's condominium or at the restaurant. James Navarro wanted to

confront appellant, but Connie would not let him because she was scared of what appellant might do to her or David. (RT 1813-1815.)

On March 2, Connie was still staying with James Navarro. Young saw appellant watching her and Connie while they worked out that day. Appellant was wearing a white hat that he pulled down that made him look "goofy." Young and Connie went to breakfast and appellant walked into the restaurant. Connie was angry and asked, "Why did you disconnect my alarm? And why did you break into my house?" Appellant first denied it, then admitted that he had broken into the house. Appellant gave Connie a letter that she had written to him. The letter stated that Connie cared for appellant, that she "wanted him to be okay," and for him to leave her alone. Appellant said, "I could - - there are no locks that could keep me out of anyplace. If I wanted to hurt you, I could. I could hurt you right here and nobody would do anything. I could have hurt you on the street the other night. You were all alone and I didn't hurt you." (RT 1702.) Connie tried to get appellant to calm down. Appellant got "very sentimental" and told Connie to go home because he would leave her alone. (RT 1700-1703.)

Stephanie Currier Brizendine was a friend of appellant's. She had dated him for a year but remained friends with him after the break-up. On March 3, she met appellant at Tampico Tilly's on Wilshire along with one of her girlfriends. Appellant was supposed to meet her at 7:30 p.m., but arrived late and was agitated and sweating profusely. Appellant gave Brizendine a letter from a woman who was begging him to leave her alone. The woman said she was in fear for her life and looking behind her all of the time. Appellant told Brizendine that he broke into the woman's home. Brizendine told appellant to move on and leave the woman alone. Appellant acted "very nonchalantly" about the matter. (RT 1879-1889.)

Appellant asked Brizendine to help him make a phone call. They walked to the front lobby of the restaurant and appellant dialed the number. He told Brizendine that if a boy answered, to say that Dean "loved him." If a woman answered, she was supposed to ask for Dave. Nobody answered the call. Appellant became angry and said, "That fucking bitch, Connie, is not answering the phone." (RT 1889-1891.)

Appellant and Brizendine went to his brown Cadillac Seville. Appellant laid his jacket in the trunk. Appellant was wearing white sweater under his jacket. Brizendine thought she saw a gun in the trunk. Appellant left Tampico Tilly's by himself at 10:00 p.m.[6/] (RT 1891-1899.)

On March 3, Young was supposed to have dinner with Connie and Jory, but she canceled to have dinner with her cousin. Young called them at 7:00 p.m. and that was the last time she spoke to them. Young made another call to them later that night but nobody answered. (RT 1703-1704.)

John Jory, Susan Jory's ex-husband, got a call from his daughter telling him that Susan had not come home. John went to Susan's house and Connie's condominium and did not get an answer at the door. John picked up his daughter from school and then returned to Connie's condominium. James Navarro was there and he said, "He got them both." (RT 1871-1877.)

On March 4, Young called James Navarro because Connie did not meet her to work out. James went to Connie's apartment, and when Young called again in the afternoon, he answered the phone and said, "The son of a bitch killed them both." (RT 1705.)

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6. Tampico Tilly's was 4.1 miles from Connie's condominium. (RT 1939.)

3. The Investigation

Los Angeles Deputy District Attorney Richard Neidorf filed a complaint for the arrest of appellant for the two murders. Neidorf had appellant's father, Pat Riccardi, served as a material witness and had him testify before the grand jury. Appellant had given his father a power of attorney signed on March 11, 1983. (RT 1768-1772.)

Appellant was arrested pursuant to the California warrant by the FBI when he drove into the parking lot of his condominium in Houston eight years after the homicides on January 4, 1991. Appellant identified himself as William Failla[7/] and denied being John Riccardi for several days. He also denied being in California at the time of the killings. (RT 2020-2025, 2039-2040, 2054-2056.)

The FBI obtained five or six warrants to search appellant's condominium in Houston. The agents recovered several credit cards and a birth certificate in the name of William Failla. They also recovered various identification documents in the name of Jan Stuart Sonnenberg, Robert Kaye, Howard Leonard Silverman, Robert Reckmack and Michael Jordan. They also recovered a document entitled, "Free report, order within ten days, 'How to vanish, start life over again under a new identity.'" The document was found in an envelope dated March 3, 1983. (RT 2026-2046.)

FBI Special Agent Robert Lee recovered seven firearms and burglary tools. He recovered two Colt .38 revolvers, an Iver Johnson .38 revolver, a Smith & Wesson .38 revolver, a 9 millimeter Walther PPK, a Federal Arms .45 automatic pistol and a Colt .45 pistol. FBI Agent Richard Crum compared the two bullets recovered from the killings with each other and to bullets fired from the weapons recovered from appellant's condominium. Crum found that

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7. William Failla was a friend of appellant's whose identity was stolen by appellant. (RT 1955-1956, 2133-2137.)

based on rifling impressions, he could not exclude one of the Colt .38 revolvers as the source of the bullets, although he could not positively identify it as the source of the bullets either. (RT 2023, 2050-2054, 2137-2148.)

In April of 1991, after his motion to suppress evidence had been denied, appellant kicked a window out of the tenth floor of the federal building and perched himself on the tenth floor ledge. He remained on the ledge from approximately 3:30 p.m. until 10:00 or 11:00 p.m. After he came in, appellant made an agreement with the federal government whereby he pled guilty to being a convicted felon in possession of a firearm and interstate transportation of stolen property. (RT 2056-2058.)

Detective Charles Brown became the lead detective on the case when Detective DeAnda left the police force. He found out that appellant had been arrested in Houston on January 4, 1991. He brought appellant back to Los Angeles approximately a year later on January 31, 1992. (RT 1942-1943, 2054-2055.)

Samuel Sabatino was appellant's longtime burglary partner. When appellant was arrested on January 4, 1991, he called Sabatino and asked him for bail. He said that the authorities did not know his identity because he had been arrested under the name of William Failla.[8/] Sabatino gave $100,000 to young woman at the airport to bail appellant out of jail. Sabatino gave the money to appellant to keep him from helping the government to find Sabatino. However, appellant was not released on bail because the authorities found out his true identity. Sabatino was arrested on January 10, 1992, based upon information provided to the authorities by appellant. Appellant accused Sabatino of being the "mastermind" of the burglaries they committed together. Sabatino entered

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8. Contrary to appellant's statements to Sabatino, the authorities knew appellant's identity at the time they arrested him pursuant to the California warrant. (RT 2021-2023.)

into a plea agreement with the federal government and received a sentence of 57 months. One of the conditions of his agreement was that he had to testify against appellant. Sabatino admitted that he was testifying to "get even" with appellant. (RT 1948-1960.)

Sabatino knew appellant for 20 years. They met at a mutual friend's house in New York City. Sabatino had been a burglar since the 1960's. Sabatino had met Connie several times when he was in Los Angeles to do burglaries with appellant. Later, Sabatino met appellant in New York, and appellant said that Connie had left him and he was "going crazy over it." Appellant had a lot of girlfriends, but he really liked Connie. Appellant said the he "felt like he was going to kill himself and that he was going to kill her." Appellant would enter into Connie's condominium and listen to her answering machine to see if she was dating anyone else. Appellant was a jealous person, particularly in regard to Connie. Sabatino told appellant not to do anything "crazy." Sabatino was coming out to Los Angeles for some work, and he said appellant should wait before he did anything. Sabatino received a call from appellant a few weeks after the meeting in New York, and appellant said, "I did it. I did it." (RT 1952-1966, 2013.)

Sabatino met appellant at the Plaza Diner in New Jersey. Appellant told Sabatino that he had entered Connie's apartment through the skylight and waited for her. When Connie got home, she was with a friend. Appellant said he wanted her back, and they began to argue. Appellant took a pillow and "shot her a couple of times." The friend heard the shots from downstairs and came up. Appellant tried to "keep her quiet," but wound up shooting her. Appellant then moved the victims' cars from the front of the residence. Appellant seemed upset when he described the shootings. Appellant hid the gun on the roof of his apartment building. A month later, appellant went back to his apartment to get his personal belongings. Appellant gave his father a power of attorney so he

could pick up appellant's Cadillac El Dorado. Appellant let Sabatino know about the shootings so he would not come to appellant's residence when he was in Los Angeles. Sabatino thought the killings were "senseless," but did not disclose them to anyone else. (RT 1966-1972.)

Appellant and Sabatino continued to work together from 1983 through 1991. They would occasionally discuss the killings, and Sabatino called appellant a "sick man." They would sometimes do jobs in Los Angeles, but appellant did not like to go there. (RT 1969-1971.)

Rosemary Riccardi, appellant's stepmother, was married to appellant's father, Pat, at the time of the murders. In March of 1983, she received a call from appellant, asking to speak with Pat. Rosemary told Pat that appellant was on the phone and sounded upset. Pat took the call. The conversation lasted between 10 and 15 minutes. At the end of the conversation, Pat was in tears. Pat told Rosemary that appellant had shot and "killed two girls." Appellant's girlfriend was trying to break up with him, and appellant had gone to his girlfriend's apartment and shot her and her friend. Pat said that he had to go to California, and that appellant would wire him money. Pat put appellant's possessions into storage and sold his Cadillac. Pat showed Rosemary the power of attorney he received from appellant. (RT 2163-2175.)

The FBI visited Pat and Rosemary a few months later while they lived in New York, and again in May of 1984 after they had moved to Ohio. Appellant called Pat periodically. Rosemary often picked up the calls. She would tell appellant to give himself up. Appellant would get "angry and arrogant like somehow the girls deserved it." (RT 2175-2177.)

On cross-examination, Rosemary denied that she was writing a book about appellant's case. She also denied being in a argument with appellant about the fact that she had 25 cats, which appellant believed were a health hazard to his father. Rosemary also said that she had informed the FBI

of appellant's confession to Pat Riccardi in 1983 and possibly in 1985. (RT 2177-2179, 2181-2182, 2185-2189.)

B. Guilt Phase - The Defense Case

Supervising Criminalist Warren Loomis of the Los Angeles Police Department's Scientific Investigation Division went to the crime scene on March 4. He retrieved hair samples from the cuff of Connie's blouse, and from Jory's hands. Criminalist Doreen Music analyzed the hairs and determined that one of the hairs on Connie's blouse was from an animal, and the other hair was "dissimilar" from appellant's hair. The hair from Jory's hand was also "dissimilar" to appellant's hair. (RT 2233-2238.)

Mario Ragonesi, appellant's cousin, testified that Rosemary Riccardi and appellant did not have a relationship because they had "nothing in common." Appellant had a "problem" with Rosemary's cats, which he believed were a health hazard for his father. In the mid-1980's, Rosemary said she wanted to write a book and a movie about appellant. She discussed it between six and twelve times with Ragonesi and asked him to put her in touch with appellant. She said that appellant was innocent and she would use her friends in Hollywood to help him. She said that she wanted to be in the ending of the book. (RT 2260-2272.)

Richard Ervin, a retired LAPD officer, had been one of the investigating officers on Connie's case. Haleh Farjah told him that she saw an unidentified person driving Connie's car at approximately 11:00 p.m. (RT 2287-2290.)

FBI Special Agent Gary Steger testified that he had reviewed prior reports involving Rosemary Riccardi, and none of them indicated that she had told the agents that appellant admitted killing two women to his father. (RT 2293-2295.)

Appellant testified on his own behalf. Appellant met Connie through friends who owned the bakery across from Connie's gift shop. They began their relationship on Superbowl Sunday in 1980 and stayed together until 1982. Appellant became very friendly with David Navarro. (RT 2300-2310.)

Appellant would spend a lot of his time at Connie's condominium when they were together. He kept clothes there and did his laundry there. He estimated that he was in the linen closet on 40 to 45 occasions. (RT 2316-2319.)

Appellant and Connie began to have problems in the middle or later portion of 1982. Connie's gift shop was not making enough money. Appellant offered her $50,000 but she refused, "No, I don't want to be obligated." Connie closed the store, but was tense because she did not know what she would do once the store closed. (RT 2311-2313.)

Appellant and Connie broke up about six times. The break-ups would last between two days and a week, and then they would get back together. Appellant loved Connie and found the break-ups upsetting. After Christmas in 1982, they discussed not seeing each other "for a while." Appellant got "depressed" about the break-ups. In January of 1983, Connie and appellant were still friendly and saw each other 15 to 20 times. Appellant saw less of Connie in February because he went to New York for a week or two. Connie added a deadbolt to her condominium at the end of January. (RT 2313-2322, 2330-2331.)

Appellant never "barged into" Connie's home while James Navarro was there. Appellant was introduced to James Navarro, but James acted like he wished appellant was not there, so appellant went to a different part of the house until he left. Appellant only saw James Navarro when he came to pick up David. (RT 2309-2310.)

Appellant remembered talking to George Hoefer, but never threatened him. Appellant went to a restaurant with his friends where he saw Connie with Hoefer. He told his friends that they should leave because Connie was there and he did not want her to see him. He and his friends went to another restaurant. Appellant stopped by Connie's condominium afterwards, and let himself in. Appellant asked if she went out that night because she had told him she was staying home. She said that she went out with Hoefer who was a business contact. The telephone rang and appellant answered it, identifying himself as Connie's boyfriend. Hoefer was the person who had placed the call, and he said that "nothing was going on" between him and Connie. Appellant asked how Hoefer would like it if he called his wife and let her know that Hoefer was taking other women out. Appellant did not know where Hoefer was staying and did not call his hotel. Connie was angry that appellant spoke to Hoefer when the call was for her. (RT 2322-2326, 2328-2329, 2472-2481.)

Appellant denied kidnapping Connie in February of 1983. He met her at a restaurant, and she agreed to get in his car and go to his apartment so they could talk. Appellant did not pull a gun or threaten her. Connie made calls to Young and James Navarro. Connie had told appellant that James was suicidal during their divorce, and appellant told James "I know how you felt because I feel the same way with [*sic*] Connie sees me one day and doesn't want to see me the next day, wants to break up and doesn't want to break up, and I was really getting depressed." James said, "Well, you know, you're not going to do anything foolish, are you, like kill yourself." Appellant and Connie stayed at the apartment because Connie got "very affectionate." They went to a restaurant and then stayed at hotel in Santa Monica or the Marina. Connie returned on Sunday. (RT 2331-2340.)

On another occasion, appellant was in Venice to meet another woman, and to look at a restaurant. After visiting the restaurant, he walked by Gold's

Gym and a car pulled up. Connie rolled down the window and asked what appellant was doing. They had a conversation, and then appellant went off to have lunch. He wound up seated at a table next to Young and Connie. Appellant asked Connie if she was uncomfortable, and she said no. Young and Connie stayed while appellant ate, they had a pleasant conversation, and they all left together. Appellant did not follow Connie, but only encountered her by accident. (RT 2340-2349.)

Appellant denied Craig Spencer's testimony. Appellant said that he was jogging when he saw Connie and Susan Jory enter a restaurant. When he finished his jog, he checked to see if they were still there. Appellant walked to their table and greeted them and was introduced to Spencer. Connie asked him to sit, and appellant stayed for about ten minutes. Spencer's testimony that appellant did not speak and pointed his finger at Connie as if he were firing a gun was mistaken. (RT 2361-2362, 2367-2369, 2481-2488.)

Appellant followed Connie only one time. He was driving down Greenfield on his way home and he saw Connie getting into a car with Sid and Marilyn Young. Appellant would drive past Connie's home in hopes of seeing her. He was right behind them until they got on the freeway. Appellant did not intend to follow her because he knew it would annoy her. He did not mind seeing her with Marilyn or Sid. (RT 2362-2367.)

In February of 1983, appellant broke into Connie's condominium and found David there. Appellant was still in love with Connie and feeling suicidal. Appellant climbed a tree to get onto the second floor patio and entered through the sliding glass door, which had been left unlocked. David came into the room and said, "I thought someone was breaking into the house." Appellant said no, and asked where Connie was. David said she would be back shortly. Appellant and David went downstairs and watched television. When Connie's car pulled up, appellant told David to go to his room because he planned to kill himself.

Appellant walked David upstairs. David appeared to be in a good mood and was not frightened. (RT 2349-2358.)

When Connie came upstairs, she wanted to know what appellant was doing there. Appellant said he wanted to talk to Connie in private. Appellant told Connie that he wanted to kill himself and was "having a hard time living without her." Connie talked to him for about 20 minutes and calmed him down. Appellant did not hit Connie or handcuff David. Appellant and Connie then went to David's room and they told him appellant was "all right." (RT 2358-2360.)

Connie said he was calling her to the point of being a nuisance at one point. However, she later got upset with him when he went to New York without telling her. When appellant went to New York in February 1983, he and Connie kept in touch by phone. She would make the calls about half of the time. Appellant was confused and did not understand why she was calling him suddenly. (RT 2369-2372.)

A day or two prior to the killings, appellant had breakfast with Connie and Young. Appellant wanted to talk to Connie alone and they went to a table by themselves. Appellant discussed a "nice" letter that Connie had written and said that if he knew that she had felt that way, he would not have been as "bothersome." Appellant claimed that Connie had mailed the letter and he had not broken into her home to take it. Appellant was not angry at Connie, but he was suicidal. Appellant denied telling Connie that if he wanted to hurt her, he could have. (RT 2372-2376, 2379-2381, 2493-2495.)

Appellant met Stephanie Brizendine and Toni Natoli at Tampico Tilly's on the night of the murders. Appellant arrived late, and Brizendine and Natoli were already there. Appellant was "upset" that night, and he wanted to end the relationship. Appellant had Brizendine call Connie's home because he was afraid Connie would not pick up the telephone if she heard his voice. Appellant

denied giving Brizendine any instructions on what to do if David answered. Appellant denied that he put his jacket in the trunk of the car because he would have kept it next to him in the car. (RT 2381-2392, 2510-2519.)

After meeting Brizendine, appellant went home and made some calls. Appellant called Connie, but was unable to get in touch with her. He did not leave his home that night. At 6:30 a.m. the next day, he was picked up by a friend, Michael Hammerman, who drove him to the airport and he flew to New York. Appellant was married at the time and stayed with his wife, with whom he had a good relationship even though they had not lived together for years. (RT 2393-2397.)

Appellant found out that Connie was dead on the Saturday after the murders when he called Hammerman. Hammerman told appellant, "They're looking for you to talk to you. They think you have something to do with it." Appellant thought it was normal for the police to want to talk to him. However, after talking to other friends, he found out that he was the "prime" suspect and became scared that he would get convicted for something he did not do. Appellant had his father, Pat, go to California and "take care of things" for him. Appellant told Pat that the police were looking for him in relation to the deaths of two women, but never said that he had killed them. (RT 2397-2402.)

Appellant's got along with his father's wife, Rosemary, until the early 1980's. Appellant noticed that his father smelled like cats and had problems breathing. Appellant believed Rosemary's cats affected his father's health. Appellant raised the issue with Rosemary, and she said that appellant did not have to come to the house if he did not like it. Appellant never returned to their house after that day. (RT 2402-2407.)

Rosemary discussed writing a book about appellant approximately three years prior to his trial. Rosemary had appellant's cousin tell appellant to call her. Appellant called, and Rosemary told him that she knew he was not guilty

and she was happy he called. She mentioned writing a book and appellant told her that he had somebody else to write a book about him. Appellant did not communicate with her again until the trial. (RT 2407-2412.)

Appellant had known Sabatino in the 1970's. Appellant never gave Sabatino his address in Houston because he did not trust him. Sabatino was wanted by the authorities and appellant believed that if Sabatino were caught, he would turn on appellant to get a shorter sentence. When they traveled together, Sabatino would charge their expenses and appellant would pay him in cash. Appellant did not want to use his credit cards because he believed it would make it easier for Sabatino to report him to the police. When appellant informed the FBI of Sabatino, he told them to track Sabatino based on his credit cards. Appellant never told Sabatino that he killed Connie and Susan Jory. (RT 2414-2418.)

The lock picks and guns found in appellant's apartment belonged to Sabatino. When they committed burglaries, Sabatino would pick the locks and appellant would act as a look-out to make sure that nobody was coming. Sabatino was the "mastermind" of the burglaries and appellant just "went along with the program." Sabatino tried to give appellant the lock picks and the jewelry so that appellant would have all of the incriminating items. (RT 2420-2425, 2441.)

Appellant went out onto the ledge of the Houston federal building because he was depressed and feeling suicidal. He had previously tried to kill himself in county jail but was taken to the hospital. (RT 2427-2431.)

On cross-examination, appellant denied that he asked Sabatino for bail money. Appellant also denied telling a bailiff that Sabatino was "really pissed off" about losing the $100,000 that he had given appellant for bail. On redirect, appellant said that his girlfriend called Sabatino for the bail money,

but appellant did not speak to him about the money. (RT 2442-2443, 2524, 2546-2551.)

Doctor Irving Root, a pathologist, had reviewed the coroner's testimony, the police reports, autopsy reports, coroner's photographs and photographs of the crime scene. Dr. Root opined that the livor mortis on Connie's body was consistent with the position of her body when it was found by the police. Livor mortis is a discoloration that appears on a body after an individual dies, which is caused by the blood settling to the lowest portions of the body. Dr. Root concluded that Connie's body had probably not been moved since it was placed in the closet shortly after her death. (RT 2561-2572.)

However, Susan Jory's body had livor mortis discolorations on both the front and back of the body. Dr. Root opined that Jory's body had been left on its back for four to six hours, and then moved into a face down position. (RT 2572-2579.)

Dr. Root also opined that the blood on carpeting belonged to Jory since Connie's body did not have any wounds that were bleeding externally. He also testified that since a bullet struck Jory in the cervical vertebrae in her neck, Jory should have been paralyzed after being shot. (RT 2579-2583.)

C. Guilt Phase - Prosecution's Rebuttal

Randoph Sato, the bailiff in the trial, testified that he had a conversation with appellant while transporting him after Sabatino had testified. Appellant told Deputy Sato, "I bet he's [Sabatino] still pissed off about the hundred thousand dollars." (RT 2627-2629.)

Dr. Eugene Carpenter testified that the livor mortis on both sides of Jory's body was due to the shift in body position that occurred while her body was being transported to the coroner's office. He also did not believe that Jory was necessarily paralyzed by being shot because the coroner's report

indicated that the bullet perforated the muscles and soft tissue of the neck. (RT 2716-2720.)

D. Penalty Phase - Prosecution's Case

Christianne Jory was 13 years old at the time of her mother's death. She lost her mother and her godmother (Connie) because of the murders. She had told Connie that if anything happened to her mother, Christianne wanted to live with Connie and David. She was forced to live with her father and stepmother which was "difficult." She did not get along with her stepmother and spent most of her time in her room for four years. Christianne would cry when she saw other people with their mothers. She went to therapy for six years. She wrote a letter to appellant asking how he could "be so selfish to think you have the right to fuck up everybody's life like this." (RT 3135-3139.)

David Navarro was 15 years old at the time of the murders. The murders "destroyed" his life. After the murders, David moved in with his father, who "fell apart" and became a "wreck." David was forced to take care of his father. David began smoking marijuana when he found out about the murders and later became a daily heroin user. He intentionally overdosed five times. He has been in rehabilitation seven times. He also has been in and out of therapy. He had nightmares about appellant and was afraid appellant would come after him or his father. David has lost two relationships with women due to his fear of intimacy. His friends think he is a pessimist because he is always "prepared for the worst possible thing." (RT 3139-3142.)

E. Penalty Phase - The Defense Case

Liz Brooks knew appellant for 15 years. He would visit her business, The Butterfly Bakery, which was across the street from Connie's store. Appellant would socialize and go to dinner with Liz and her husband. Liz saw appellant with David Navarro, and they were very close, "like father and son." Appellant appeared to love David and Connie. Appellant told her that Connie wanted out of their relationship and seemed very depressed about the break up. Appellant disappeared after the murders, but resumed contact a few years prior to the trial. Appellant called Liz from the county jail. Liz did not believe that appellant was a burglar. (RT 3145-3151.)

Henry Kaney was a pastor at Hope Chapel in Hermosa Beach. He became friends with appellant in 1978 or 1979. They became friends at the gym and appellant attended Kaney's wedding. When appellant and Connie broke up, appellant became very depressed and lost 20 to 30 pounds. Appellant said that he was desperate and filled with despair. Kaney asked for mercy on appellant's behalf. (RT 3154-3161.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S *WHEELER / BATSON* CLAIMS

Appellant contends that the trial court erred by denying his four motions pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*),[9/] which were made on the ground that the prosecution had exercised six of its peremptory challenges against Black jurors.[10/] Specifically, appellant contends that the trial court erroneously determined that he did not make a prima facie showing that the prosecutor exercised his challenges in a racially discriminatory fashion. He also contends that the prosecutor's stated reasons for removing the jurors were "unconvincing" and "pretextual," and that his questions to the prospective jurors were "virtual admission of an improper presumption of group bias." (AOB 65, 71.) As will be established, appellant's argument is meritless because

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9. In his Opening Brief, appellant characterizes his argument as being based both on this Court's decision in *Wheeler, supra,* 22 Cal.3d 258, and on the United States Supreme Court's decision in *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69](*Batson*). (AOB 31.) However, in the trial court, appellant only based his motions on *Wheeler, supra,* 22 Cal.3d 258. (RT 924, 927, 984, 1131.) While appellant arguably waived any argument that his federal constitutional rights were violated by the selection of the jury (see *People v. Heard* (2003) 31 Cal.4th 946, 958, fn. 8), respondent recognizes that this Court has held that an objection pursuant to *Wheeler* preserves a federal constitutional objection because the legal principle that is applied is ultimately the same. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

10. Being cognizant of changes in the law, as well as the policy of the courts regarding juror confidentiality, respondent would normally protect the identity of the jurors by referring to them by number or first name and last initial. Here, however, the trial occurred in 1994 - well before the recent changes in the law - and the jurors are referred to by name in the record. Appellant's opening brief also refers to the jurors by name. Given the state of the record, as well as for continuity in the briefs, respondent will likewise refer to the jurors by name.

there were plainly apparent, manifestly valid non-racial reasons to dismiss each of the jurors.

A. Applicable Law

It is well settled that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both the state and federal Constitutions. (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188 (*Box*); *People v. Turner* (1994) 8 Cal.4th 137, 164; abrogated on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; Wheeler, *supra*, 22 Cal.3d at pp. 276-277; see also *Batson*, *supra*, 476 U.S. at p. 89.) If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he or she must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, the party should make as complete a record of the circumstances as is feasible. Second, he or she must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case the moving party must show a strong likelihood or reasonable inference that such persons are being challenged because of their group association. (*People v. Farnam* (2002) 28 Cal.4th 107, 135; *Box, supra,* 23 Cal.4th at pp. 1187-1188; *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154; *People v. Turner*, *supra*, 8 Cal.4th at p. 164; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) When a trial court denies a *Wheeler* motion on the basis that the defense failed to make a prima facie case of group bias, the reviewing court reviews the entire record of voir dire. If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, the judgment must be affirmed. (*Box, supra,* 23 Cal.4th at p. 1188; *People v. Howard, supra,* 1 Cal.4th at p. 1155.)

If the trial court finds that the defendant has established a prima facie case, the burden shifts to the prosecution to provide a race neutral explanation related to the particular case to be tried for the peremptory challenge. (*People v. Turner, supra,* 8 Cal.4th at pp. 164-165.) However, the prosecutor's reason need not be sufficient to justify a challenge for cause, may be based on "hunches," and even "arbitrary" exclusion is permissible as long as the reasons are not based on impermissible group bias. (*Ibid*; see also *People v. Williams* (1997) 16 Cal.4th 635, 664; *People v. Arias* (1996) 13 Cal.4th 92, 136 ["trivial" reason sufficient as long as it is genuine and neutral].)

Appellant contends that this Court's practice of affirming a trial court's finding that no prima facie case exists when "the record suggests grounds upon which the prosecutor might reasonably have challenged the prospective jurors in question" (*People v. Yeoman, supra,* 31 Cal.4th at p. 116; *People v. Howard, supra,* 1 Cal.4th at p. 1155), violates the United States Supreme Court's practice under *Batson*. (AOB 69-70.) Appellant contends that the aforementioned statement conflicts with the United States Supreme Court's holding that step three of a *Batson* analysis requires the reviewing court to determine "whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834].) Because the United States Supreme Court stated that "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination" (*Purkett v. Elem, supra,* 514 U.S. at p. 768), appellant contends that the holdings of *Yeoman* and *Howard* are incorrect because "a race-neutral reason, standing alone, is not the end of the inquiry." (AOB 70.)

Appellant's complaint is based on a faulty analysis. Appellant is figuratively placing the cart before the horse by arguing that this Court's standard for reviewing the first step of a *Wheeler/Batson* claim

(the establishment of a prima facie case) is invalid because it does not comport with the standard of review for the third step (whether the defendant has carried his burden of proving purposeful discrimination). However, the United States Supreme Court, like this Court, has held that a reviewing court does not need to concern itself with the standard for determining whether the defendant carried his ultimate burden until after it has found a prima facie case of discrimination. (*Hernandez v. New York* (1991) 500 U.S. 352, 358-359 [111 S.Ct.1859, 114 L.Ed.2d 395]; *Batson, supra,* 476 U.S. at pp. 96-98.) Thus, contrary to appellant's contention, this Court's review of the prima facie case step does not violate federal authority because it happens to differ from the standard employed in a later step of the analysis.

B. Relevant Facts

During jury selection, the defense made four *Wheeler* motions to declare a mistrial and dismiss the existing jury panel.

1. First Motion

The first motion occurred on June 22, 1994, and was made on the following basis:

> [Defense Counsel]: Your Honor, I would like to make a motion under *Wheeler* and *Johnson*, et. al., for a mistrial on the grounds that the prosecution is exercising their challenges in a discriminatory fashion so that we do not have a cross section of the community. [¶] I am aware that he has effectively solicited trivial details on the first three black jurors that he kicked off, but Mr. Ferguson and Ms. Hammond, in my mind, would be ideal prosecution jurors were they not black. [¶] And I think there's a prima facie basis demonstrated because those two,

I believe were No. 4 and 5, and the court would be justified in asking for some explanation about why that is the situation at this time.

[The Prosecutor]: I don't understand the question of trivial details. If the court makes [*sic*] a prima facie case showing that has been made, I'm prepared to substantiate the position that Mr. Ferguson and Miss Hammond, the last two jurors that [defense counsel] believes I challenged for racial basis, I challenged because they were bad on death.

[The Court]: The court didn't hear any responses and cannot disagree with the People and the responses were such that Mr. Barshop reasonably exercised peremptory because of those concerns. Same concerns that I heard. So the motion will be denied.

(RT 924-925.)

2. Second Motion

The second motion also occurred on June 22, 1994, and defense counsel made the following objection:

[Defense Counsel]: Your Honor, we would again move under *Wheeler, Johnson,* et al., for mistrial based on systematic exclusion of minority people and deprivation of a cross section of the community for this trial.

[¶] Ms. Powell either is the fifth or sixth black juror to be excused, was up there after the People had accepted a half dozen times. There's nothing about her answers other than the skin color that would lead to her being challenged.

[The Prosecutor]: Other than the fact that she was arrested.

[The Court]: Motion will be denied.

(RT 927.)

3. Third Motion

On June 22, 1994, the counsel renewed his *Wheeler* motion as follows:

> [Defense Attorney]: Your Honor, I do make the motion following in the footsteps of jurors Craig, Powell, Hammond, and Ferguson, Mrs. Brooks, after being accepted a half a dozen times, has now been excused. [¶] I think there's more than a prima facie cause [*sic*] as to the systematic exclusion of minorities, and I find nothing in her questionnaire, in her answers, or in her conduct that occurs to me that would justify her excusal other than what I've indicated.
>
> [The Court]: The motion will be denied, but it's obviously on the record.

(RT 984.)

4. Fourth Motion

Defense counsel made his final motion on June 23, 1994, at the close of jury selection:

> [Defense Counsel]: Your Honor, on the *Wheeler* motion we would make a motion for mistrial based on the systematic exclusion of minorities, in particular, blacks or African-American or colored, Negro. I've been all of those things during my lifetime. [¶] Following jurors, Craig, Powell, Hammond, Ferguson, and Brooks, Mr. McFarlane was excused this morning. Based on the answers in his questionnaire, his answers to [defense counsel] and his answers to [the prosecutor], I see no good cause for him being excused. And I think there's a prima facie case established in the absence of any answers given by that juror that were out of the ordinary.
>
> [The Court]: Motion will be denied.

[The Prosecutor]: May I respond briefly to perfect the other side of the record? And I will be brief. [¶] Mr. McFarlane, if you want to discuss his answers, he said that - - his answer to [defense counsel]'s question in regard to that he wouldn't consider flight at all, I thought, was a bad answer for the People. I certainly didn't like his earring, as a basis for a challenge on a gut basis. [¶] The record should reflect, and I know the court has not made a finding that there was a prima facie showing that on this jury there are two blacks. There is a black alternate. So out of a total of exercising of challenges, it appears that there's a cross-section of the community, and that's all I've said. [¶] I did say earlier, and I reiterate, that my earlier challenges were based almost exclusively, even though not legally challengeable for cause, on the penalty phase. The majority of the minority challenges were based on my analysis of their ability to decide the death penalty or, alternatively, that they or someone close to them had some type of criminal record.

[Defense Counsel]: Judge, if I may respond briefly, and at this point I understand we're just perfecting our record and I'm not trying to beat a dead horse. [¶] Number one, what is up there in the jury box at this point has nothing to do with the propriety of the challenges exercised by the People. If there was an improper challenge based on race, that in and of itself is grounds for a mistrial and is reversible on appeal absent anything else. There's no harmless error or any other standard used. [¶] And more to the point, with respect to the earring, there is a white juror up there now who is wearing an earring, so I think that is a nonsequitur. [¶] And one excuse given for one of the other black jurors is that they had been arrested. In going over the questionnaires, there are white jurors up there with arrests. So I think we're still at a bottom line

here that the answers, the earring, the background was no different than the answers provided by other jurors. [¶] And the fact that there are black jurors up there only means to me that there are six less than there should be because those six people were excused, as far as I'm concerned, for no reason other than the color of their skin.

[The Prosecutor]: What about little earring versus big earring?

(RT 1131-1133.)

C. The Trial Court Applied The Correct Standard

Relying on authority from the federal Ninth Circuit Court of Appeals, appellant argues that the trial court applied an improper standard in determining that appellant did not make a prima facie case that the prosecutor exercised his peremptory challenges in a racially discriminatory fashion. (AOB 50-57.) In *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the Ninth Circuit found that the California state courts were employing an "impermissibly stringent" test when determining whether a defendant had made a prima facie case that the prosecution had exercised its peremptory challenges in a racially discriminatory fashion. (*Wade v. Terhune, supra,* 202 F.3d at p. 1197.) *Wheeler* discussed the standard for establishing a prima facie case with two different phrases; in one portion of the opinion it stated that the defendant needed to "raise an inference" of discrimination, while in another portion it stated that the defendant needed to "show a strong likelihood" of racial bias. (*Wheeler, supra,* 22 Cal.3d at pp. 280-281.) The Ninth Circuit noted that in a California Court of Appeal opinion subsequent to *Wheeler*, the two phrases "strong likelihood" and "reasonable inference" were held to mean the same thing, and a "fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias." (*People v. Fuller* (1982) 136 Cal.App.3d 403, 423 (*Fuller*).) However, a subsequent Court of Appeal opinion found that the two phrases did not mean

the same thing, and instead found that a defendant had to establish a "strong likelihood" as the standard for a prima facie case. (*People v. Bernard* (1994) 27 Cal.App.4th 458, 465 (*Bernard*).) The Ninth Circuit found that, after the holding in *Bernard*, the California courts applied a "strong likelihood" test, which was "impermissibly stringent" in comparison to the "reasonable inference" test that was adopted by the United States Supreme Court. (*Batson, supra,* 476 U.S. at p. 96.) Therefore, appellant argues that "the trial court is presumed to follow the controlling precedent at the time of appellant's trial, and therefore, under *Bernard*, the trial court applied the more stringent standard in concluding that appellant had not established a prima facie case." (AOB 57.)

In *Box, supra,* 23 Cal.4th at p. 1188, fn. 7, this Court stated that in California, "a 'strong likelihood' means a 'reasonable inference.'" This Court has reaffirmed in subsequent cases that "it has always been true" that "*Wheeler's* terms 'strong likelihood' and 'reasonable inference' state the same standard." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1313-1314; see also *People v. Yeoman, supra,* 31 Cal.4th at pp. 118-119 [*Wheeler* standard is identical to *Batson*'s].) However, in spite of this Court's holdings, the Ninth Circuit has maintained that during the period between the issuance of *Bernard* and this Court's decision in *Box*, the "California courts were applying an unconstitutionally relaxed standard of scrutiny." (*Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047.)

This Court's repeated holdings that the "strong likelihood" and a "reasonable inference" were, and always have been, different statements of the same standard should be sufficient to establish that the trial court did not erroneously apply the wrong standard in this case. (*People v. Boyette* (2003) 29 Cal.4th 381, 423; see also *People v. Yeoman, supra,* 31 Cal.4th at pp. 118-119; *People v. Johnson, supra,* 30 Cal.4th at pp. 1313-1314; *Box, supra,* 23 Cal.4th at p. 1188, fn. 7.) However, even were this Court to apply the

Ninth Circuit's holdings to this case, it would still have to reject appellant's argument that the trial court applied the holding of *Bernard* in this case. In *Wade v. Terhune,* the Ninth Circuit noted that prior to *Bernard*, the California courts applied the holding of *Fuller* which found the two standards to be the same, and it was only after *Bernard* that the California courts began to apply a "lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Wade v. Terhune, supra,* 202 F.3d at pp. 1196-1197; *Cooperwood v. Cambra, supra,* 245 F.3d at p. 1047.) The jury selection in appellant's case occurred on May 23, 24, 25, 26, 27, 31, and June 20, 21, and 22 in 1994. *Bernard* was published on August 3, 1994. (*Bernard, supra,* 27 Cal.App.4th at p. 458.)

Hence, the jury that heard appellant's case was chosen and sworn in prior to *Bernard* and any alleged "uncertainty" that it caused in the law. (*People v. Johnson, supra,* 30 Cal.4th at p. 1314.) If, as appellant argues, "the trial court is presumed to follow the controlling precedent at the time of appellant's trial" (AOB 57), that precedent is *Fuller* which correctly found the two standards to be the same, and not *Bernard.* (*Wade v. Terhune, supra,* 202 F.3d at pp. 1196-1197; *Cooperwood v. Cambra, supra,* 245 F.3d at p. 1047.) Thus, appellant's argument that the trial court applied the incorrect standard in rejecting appellant's claim that he made a prima facie showing that the prosecutor exercised his peremptory challenges in a discriminatory fashion must be rejected.

D. The Trial Court Properly Determined That Appellant Had Failed To Make A Prima Facie Case That The Prosecutor Exercised His Peremptory Challenges In A Discriminatory Fashion

At trial, appellant argued that the fact that the prosecutor exercised "six of his twenty peremptory challenges to exclude Black prospective jurors" raises an "inference of a discriminatory motive." (AOB 59; RT 923-926; 984;

1131-1132.) Trial counsel also argued that based on their answers to the voir dire, the dismissed Black jurors were "ideal prosecution jurors were they not Black." (RT 924.) Appellant's argument is meritless as none of the arguments raised by his counsel rebut the presumption that the prosecutor used his peremptory challenges in a constitutional manner. (*People v. Turner, supra,* 8 Cal.4th at p. 165; *People v. Crittenden* (1994) 9 Cal.4th 83, 114-115; *People v. Clair* (1992) 2 Cal.4th 629, 652.) Thus, the trial court properly found that appellant did not make a prima facie case that the prosecution exercised its peremptory challenges in a discriminatory fashion. (RT 924-925, 927, 984, 1131-1133.)

A prima facie case of discrimination cannot be made simply by arguing that a certain number of peremptory challenges were used against members of a cognizable group. (See *People v. Farnam, supra,* 28 Cal.4th at pp. 134-135 [assertion that use of peremptory challenges against four Black jurors did not demonstrate prima facie case]; *People v. Arias, supra,* 13 Cal.4th at p. 136, fn. 15 [assertion of group bias based solely on number and order of exclusion of protected group members and final jury composition not sufficient to establish prima facie case].) Similarly, an assertion of group bias based on exercising peremptory challenges against members of a protected class who in some respect appeared to favor the prosecution does not establish a prima facie case. (*People v. Turner, supra,* 8 Cal.4th at p. 167.) Hence, both of trial counsel's arguments fell well short of establishing a prima facie case of group discrimination, and nothing argued in the trial court shows that the trial court erred by finding that a prima facie case was not made.

Additionally, the Opening Brief fails to discuss the numerous factors that support the trial court's finding that defendant failed to make a prima facie showing. First, appellant is not African-American. (RT 833.) While a defendant does not have to be a member of the same group as the challenged

jurors, the defendant's membership in that group, or lack of membership, remains a proper consideration by the court. (*People v. Farnam, supra,* 28 Cal.4th at pp. 135-137; *People v. Crittenden, supra,* 9 Cal.4th at p. 115; *Wheeler, supra,* 22 Cal.3d at p. 281.) In the instant case, appellant was not a member of the group of jurors dismissed due to the prosecutor's alleged bias. Thus, this is a factor that supports the trial court's ruling that no prima facie case of bias existed.

Additionally, there were African-American jurors on appellant's jury panel. (RT 1132.) Two of the members of the jury, Earl Gist and Rosa Blake, identified themselves as Black or African-American. (CT 122, 502.) Moreover, one of the alternate jurors, Glen Steele, also identified himself as Black. (CT 1322.) "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate fact for the trial judge to consider in ruling on *Wheeler* objection." (*People v. Turner, supra,* 8 Cal.4th at p. 168; *People v. Snow* (1987) 44 Cal.3d 216, 225.)

Thus, the record supports the trial court's finding that appellant did not make a prima facie showing that the prosecutor was exercising his peremptory challenges in a discriminatory fashion. Appellant's argument, as made to the trial court, was not sufficient to meet his burden. Also, appellant has completely ignored the factors that support the trial court's ruling. As well be shown in the next section of this brief, there also were race-neutral reasons supporting the dismissal of each of the challenged jurors. Thus, appellant's contention fails.

E. Even If The Trial Court Erred By Finding That No Prima Face Showing Was Made, Appellant's Contention Fails

Further, even if the trial court erred by not finding that appellant established a prima facie case, appellant is not entitled to relief on his *Wheeler* motion because the prosecution presented adequate, race-neutral reasons for the dismissal of each of the six challenged jurors, Mark Ferguson, Denise Hammond, Diane Powell, Carolyn Brooks, Etta Craig, and Dwight McFarlane. (AOB 38-47.) "'[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams, supra,* 16 Cal.4th at p. 664, quoting *Batson, supra,* 476 U.S. at p. 97.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation omitted], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*People v. Williams, supra,* 16 Cal.4th at p. 664.) Peremptory challenges may be based on a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's answers on voir dire suggested potential bias. (*Wheeler, supra,* 22 Cal.3d at p. 275.) Peremptory challenges may be predicated on evidence suggestive of juror partiality that ranges from "the virtually certain to the highly speculative." (*Ibid.*)

1. Prospective Jurors Ferguson, Hammond, And Brooks Were Properly Dismissed Due To Their Doubts About The Death Penalty

Appellant contends that the prosecution's dismissal of Mark Ferguson was based on an impermissible group bias. (AOB 38-39, 65-66.) Ferguson wrote in his questionnaire that:

> I do not really like death penalty [*sic*]. But if crime by law is death so be it. As long as we have the right person to be place to death [*sic*].

(CT 56.) Ferguson also wrote that the death penalty was used too "seldom - because too many people are getting away with killing people without a true cause." (CT 56.) During voir dire, the prosecutor asked Mr. Ferguson to expand on the statement he made in the questionnaire. Ferguson stated:

> Well, what I mean by that is I'm a person that loves life, you know, and I really don't like - - I really don't like to see people put to death. [¶] Even though that's a reality, that's something we got to deal with, that's part of the law. I mean, even though a person do a crime, whatever, you know what I mean, you just don't like to see nobody get hurt. I'm like this, I like to live and let live.

(RT 833-834.) Ferguson later added that he used to be in the military, and while he did not always like his orders, he performed his orders. (RT 835.)

Similarly, the defense challenges the dismissal of Denise Hammond. In her questionnaire, Hammond wrote:

> I feel in some cases the death penalty is necessary - but if life sentencing is a possibility it should be enforced - to be made to think day in & day out of the action you caused is possibly punishment enough.

(CT 876.) She also later wrote that the death penalty was enforced "randomly - I don't understand why some are chosen, others are not." (CT 876.) When asked during voir dire to expand on the questionnaire answer, she stated:

> Well, I'm kind of at the same wavelength that he's [Ferguson] talking, that I'm not for death. I don't want to see anyone die. But I understand because it is the law and this is the case that would possibly go that way that I would be able to make that decision if it came to that.

(RT 836-837.) When asked if she would prefer to choose life without possibility of parole, she responded, "Yes." (RT 837.)

> Because I don't want to see anyone die. I feel that death is just final, that's it. And if a person was made to be incarcerated for the rest of

their life, that's punishment. They'll have to think about what they did for the rest of their lives.

(RT 837-838.)

The prosecutor stated that he challenged both Ferguson and Hammond because they were "bad on death." (RT 925.) The court agreed, stating that it "cannot disagree with the People and the responses were such that [the prosecutor] reasonably exercised peremptory challenge [*sic*] because of those concerns. Same concerns that I had." (RT 925.)

Ferguson's and Hammond's reservations about the death penalty were sufficient race-neutral reasons for the prosecutor to have exercised his peremptory challenges to remove them from the panel. This Court has repeatedly held that the prosecution does not violate *Wheeler* by exercising its peremptory challenges to excuse "death penalty skeptics - - i.e., prospective jurors who, although not excusable for cause nevertheless expressed reservations about the death penalty." (*People v. Davenport* (1996) 11 Cal.4th 1171, 1202; abrogated on other grounds by *People v. Griffin, supra,* 33 Cal.4th at p. 555, fn. 5; *People v. Crittenden, supra,* 9 Cal.4th at pp. 117-119; *People v. Pride* (1992) 3 Cal.4th 195, 229-231; *People v. Hayes* (1991) 52 Cal.3d 577, 603-606; *People v. Johnson* (1989) 47 Cal.3d 1194, 1218-1219, fn. 4.) In *People v. Crittenden*, this Court found that a prosecutor's challenge to a juror who made statements remarkably similar to the ones made by the two jurors in this case (expressing general distaste for the death penalty, but stating that they were capable of imposing it) was based on "legitimate race-neutral grounds. (*People v. Crittenden, supra,* 9 Cal.4th at pp. 117-118.) Thus, the prosecutor stated valid race-neutral reasons for challenging these jurors, and appellant's contention fails.

Similarly, while the record is less clear, it appears that prospective juror Brooks was also removed due to her views on the death penalty. As appellant

points out in his brief, in regard to Brooks "the record does not reflect the prosecutor's reasons, other than the reason that the minority jurors were excused 'based on my [the prosecutor's] analysis of their ability to decide the death penalty' or had an arrest in the family." (AOB 67.) Appellant appears to believe that Brooks was removed because her son had been arrested for an assault. (AOB 41-42, 67.) However, it appears more likely that she was removed due to her views on the death penalty.[11/]

In her questionnaire, Prospective Juror Brooks made the following somewhat confusing statement, "I do not believe death penalty [*sic*] is a punishment. The person is put to death and not to punishment to me." (Supp. CT 1456.) During voir dire, the prosecutor attempted to have Prospective Juror Brooks further explain this statement:

> Prospective Juror Brooks: I don't think that the death penalty should be for just because the crime, you know - - I don't think they should

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11. In the Reporter's Transcript at pages 805-807, there are statements that are attributed to Prospective Juror Brooks where she states that her son was arrested for six counts of assault. However, it appears that the court reporter erred by attributing these statements to Prospective Juror Brooks, and that they were really made by Prospective Juror Etta Craig. First, as recorded in the record, the prosecutor directed the question concerning the arrests to "Ms. Craig" even though the record identifies the answerer as "Prospective Juror Brooks." (RT 805.) Additionally, Prospective Juror Craig's questionnaire indicates that her son was arrested as a juvenile for six counts of assault (Supp. CT 92-93), while Prospective Juror Brook's questionnaire indicates that none of her relatives had been arrested (Supp. CT 1452-1453). Given that the question was directed to Prospective Juror Craig by name and the answers comport with the information contained in Craig's questionnaire and contradict the information in Brooks's questionnaire, it appears that the court reporter mistakenly substituted Brooks's name for Craig's name on pages 805 808. Thus, while appellant's impression that Prospective Juror Brooks had been dismissed because her son had been arrested for assault is understandable based on the record, it appears that the impression is mistaken.

have a death penalty just for a crime in itself. I think that it's different situations that a death penalty should be given.

[The Prosecutor]: Can you imagine where there are two females that are killed by a gunshot wound, a situation where you could conclude, based on the evidence that's adduced in the penalty phase, that the death penalty is appropriate?

Prospective Juror Brooks: Yes.

[The Prosecutor]: You are not saying by this that the death penalty isn't a punishment because living in jail for the rest of your life is worse?

Prospective Juror Brooks: No.

(RT 803-804.) Prospective Juror Brooks went on to reaffirm that the death penalty was a more serious penalty than life in prison and that she could be fair to both sides in this case. (RT 804-805.)

Prospective Juror Brooks' opinion regarding the death penalty was confusing at best. While her statement that she felt she could impose it in a situation where two women were shot to death indicates that she was not necessarily hostile to the death penalty, her comments that it was not really a punishment and should not be administered "just for a crime in itself" could reasonably give the prosecutor doubts about her ability to properly apply the death penalty laws. Thus, the prosecutor's dismissal of Brooks was most likely based on her vague and confusing views on the death penalty, which was a valid race-neutral reason to dismiss her.

Also, the circumstances of Brook's removal from the jury are suggestive that the prosecutor did not remove her due to her skin color. As pointed out by defense counsel, the prosecutor accepted the jury with Prospective Juror Brooks on it "a half a dozen times" prior to dismissing her. While the defense argued

that the fact that the prosecution had accepted a panel with her on it was further evidence of an improper motive, this Court has rejected that argument:

> Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel.

(*People v. Johnson, supra,* 47 Cal.3d at pp. 1220-1221.) The fact that the prosecutor accepted a panel with Prospective Juror Brooks on it several times prior to dismissing her undermines appellant's claim that his challenge was based on race. Clearly, if the prosecutor's motive to dismiss Brooks had been her skin color, which was undoubtedly obvious to him as soon as she appeared in the jury box, he would never have accepted a jury panel with her on it.

Also, the trial court's determination that the prosecution's reasons were genuine and sincere is entitled to great deference by this Court. "Because the trial court's assessment of these explanations rests largely upon evaluations of credibility, both this court and the high court generally give such assessments great deference." (*People v. Pride, supra*, 3 Cal.4th at 230, fn. 10.) Although the trial court found no prima facie case that the prosecution exercised its peremptory challenges in a racially biased manner, Prospective Jurors Ferguson's and Hammond's doubts about the death penalty were so obvious that even the trial judge stated that he had the same concerns as the prosecutor about their ability to hear this case. (RT 925.) Similarly, Prospective Juror Brooks's confused, and somewhat bizarre, views of the death penalty were clearly apparent based on her questionnaire and her answers to the prosecution's voir dire. Consequently, this record provides no ground upon which to challenge the correctness of the trial court's credibility determination.

2. Prospective Juror McFarlane Was Properly Dismissed Due To His Contradictory Statements Regarding The Flight Instruction

Appellant also argue that prospective juror McFarlane was improperly dismissed due to his race. (AOB 38-39, 44-47, 66-67.) Again, appellant's claim is meritless because the prosecution appropriately dismissed Mr. McFarlane due to his confusion regarding the flight instruction (CALJIC No. 2.52). Thus, prospective juror McFarlane was dismissed for race-neutral reasons.

During the course of the voir dire, defense counsel asked the prospective jurors if the fact that appellant fled from Los Angeles the morning after the double murder occurred would lead them to "automatically conclude" that appellant was guilty. (RT 1006.) Prospective juror McFarlane answered:

> That doesn't prove anything. That's not telling us anything. If I'm chosen as a juror or not, I would have to see whatever's presented and still I would be open-minded. It has nothing to affect me in any kind of way.
>
> [Defense Counsel]: So that's an issue that you can consider. Would you base the burden solely on one issue without considering all the other evidence in the case or would you consider all the evidence?
>
> Prospective Juror McFarlane: All the evidence. That's got nothing to do with anything. I would just be out of my mind basically. I'm not going to look at the individual and say, well, yeah, he tried to flee or something like that and base it on that. No, that wouldn't be right. That wouldn't be fair to him. So I would just base my judgment on the case itself.

(RT 1005-1006.) After this exchange, the prosecutor asked to approach the bench and requested that the court instruct the jurors with CALJIC No. 2.52[12/] since prospective juror McFarlane had stated that "he would give [appellant's flight] no effect at all, and it is clearly not the law." (RT 1007.) The court agreed and instructed the jury panel with CALJIC No. 2.52. (RT 1008.) Defense counsel then asked further questions of Prospective Juror McFarlane:

> [Defense Counsel]: And Mr. McFarlane, let me ask you. I'm trying to understand what you are saying. Is that something you were saying you wouldn't consider that at all or you won't use flight as your sole basis for rendering your verdict?
>
> Prospective Juror McFarlane: I wouldn't use flight as the sole basis. That's what I was mentioning before.
>
> [Defense Counsel]: If the judge instructs you that you may consider - - may consider flight as consciousness of guilt, would you consider it just as the judge tells you that you can?
>
> Prospective Juror McFarlane: Yes, sure, I guess.
>
> [Defense Counsel]: Okay. What I'm getting at, are you going to consider it solely on that or all the evidence in this case?
>
> Prospective Juror McFarlane: No, sir. All the evidence in the case.

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12. CALJIC No. 2.52 - Flight After Crime

> The [flight] [attempted flight] [escape] [attempted escape] [from custody] of a person [immediately] after the commission of a crime, or after [he] [she] is accused of a crime, is not sufficient in itself to establish [his] [her] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(RT 1009.) Later, when questioned by the prosecutor, Prospective Juror McFarlane stated that he would follow the court's instruction regarding flight. (RT 1038.)

The prosecutor justified his use of a peremptory challenge to dismiss McFarlane by citing to his statement that he would not consider appellant's flight. "Mr. McFarlane, if you want to discuss his answers, he said that - - his answer to [defense counsel]'s question in regard to that he wouldn't consider flight at all, I thought, was a bad answer for the People. I certainly didn't like his earring, as a basis for a challenge on a gut basis." (RT 1131-1132.)

Appellant's contention must fail because the prosecutor's peremptory challenge was clearly based on a valid race-neutral reason and was specifically related to the case. Appellant's flight immediately after the double homicide was a powerful indicator of his guilt, which appropriately could be considered by the jury. (CALJIC No. 2.52.) Prospective juror McFarlane's initial statements that appellant's flight "doesn't prove anything" and has "nothing to do with anything" reasonably gave the prosecutor concerns about whether McFarlane would be a favorable juror for the prosecution. (RT 1006.) The fact that prospective juror McFarlane later changed his position in response to defense counsel's leading questions does not change what, to the prosecutor, was the troubling nature of his prior comments. Further, even his statement that he would obey the instruction, "Yes, sure, I guess," is equivocal and grudging. A prosecutor may dismiss a juror whose answers on voir dire suggest a potential bias. (*Wheeler, supra,* 22 Cal.3d at p. 275.) Thus, the prosecutor offered a legitimate non-racial justification for dismissing Mr. McFarlane.

Additionally, the fact that McFarlane wore an earring was a valid race-neutral reason to dismiss him. Trivial reasons, such as a juror's manner of dress or a prosecutor's "hunch" are legitimate reasons to dismiss a juror with a peremptory challenge. (*People v. Williams, supra,* 16 Cal.4th at p. 664;

Wheeler, supra, 22 Cal.3d at p. 275.) Thus, the prosecutor's "gut" feeling based on prospective juror McFarlane's earring was also a legitimate race-neutral reason to dismiss him from the jury panel.

3. The Prosecutor Properly Dismissed Prospective Jurors Powell And Craig Due To Their Arrests, Or The Arrests Of Their Relatives

Appellant also challenges the dismissal of prospective jurors Diane Powell, Carolyn Brooks[13] and Etta Craig. (AOB 35-43, 62-66.) Appellant's challenge is easily disposed of because all of these jurors had been arrested, or were related to people who had been arrested. Thus, there were legitimate race-neutral reasons for the prosecutor to exercise his peremptory challenges against all of these perspective jurors.

Prospective juror Craig's son had been arrested for six counts of assault. (Supp. CT 92-93.)[14] Prospective juror Powell had been arrested in a protest. (Supp. CT 953; RT 832-833.) This Court has repeatedly upheld the use of peremptory challenges based on a prospective juror's negative experience with law enforcement, or the negative experience of a prospective juror's close relative. (*People v. Turner, supra,* 8 Cal.4th at p. 171; *People v. Walker* (1988) 47 Cal.3d 605, 625-626; *Wheeler, supra*, 22 Cal.3d at pp. 275, 277, fn. 18; *People v. Allen* (1989) 212 Cal.App.3d 306, 312 [bias may be properly inferred from a prospective juror's arrest, or the arrest of a close

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13. Allegedly, prospective juror Brooks's son had been arrested for six counts of assault as well, but that assertion appears to be based on an error in the Reporter's Transcript. (RT 805-808; Supp. CT 1452-1453.)

14. In his Opening Brief, appellant claims that Craig also was personally arrested for robbery. (AOB 42.) However, it appears that Craig was not arrested for robbery, but was a victim of a robbery. (Supp. CT 91.)

relative].) Hence, the prosecutor cited accepted race-neutral reasons to dismiss all three of these jurors.

For the first time on appeal, appellant also argues that the prosecutor's questioning of prospective juror Powell was tantamount to "race baiting" and showed that the prosecutor's motive for dismissing her was discriminatory. (AOB 63-66.) Again, appellant's claim is meritless. Ms. Powell stated in her questionnaire that she had been arrested in a student demonstration at Cal State Northridge while a member of the Black Student Union. She and 300 to 400 others were arrested for protesting the university's lack of a African American Studies Department. (Supp. CT 953; RT 832-833.) After hearing prospective juror Powell's description of the arrest, the prosecutor asked:

> [The Prosecutor]: I want to discuss an issue that shouldn't be an issue. The victims in this case are white. The defendant is white. This is not a racial case. Do you have a problem with that?
>
> Prospective Juror Powell: No, I do not.
>
> [The Prosecutor]: Not at all?
>
> Prospective Juror Powell: Not at all.

(RT 833.)

Given that this was a death penalty case, and that Ms. Powell had been a member of an organization whose membership was based on racial lines and was arrested for protesting an issue that was based on race, the prosecutor had a legitimate interest in informing her that this case did not raise racial issues. The death penalty has been criticized as being applied in a racially biased fashion (see *McCleskey v. Kemp* (1987) 481 U.S. 279 [107 S.Ct. 1756, 95 L.Ed.2d 262]), and given that Ms. Powell had been arrested for protesting in support of a racial issue, the prosecution was entitled to inquire about how her racial views affected this case. The questioning was brief and the prosecutor did not belabor the point. (RT 833.) It certainly does not "constitute[] a virtual

admission[] of an improper presumption of group bias" as argued by appellant. (AOB 71.)

Appellant points out that the prosecutor did not ask similar questions of any of the white jurors. (AOB 64.) However, what is more telling is the fact that the prosecutor appears to have not asked any similar questions of any of the other Black jurors. This shows that the prosecutor's comments were not prompted by prospective juror Powell's skin color, but by her involvement in a group whose membership was based on race and her strong feelings on race-related issues.

The prosecution provided legitimate, race-neutral reasons for his dismissal of all of the challenged jurors. Appellant has given this Court no reason to challenge the sincerity of the prosecution's reasons. Thus, appellant's argument fails.

4. Comparative Analysis Does Not Prove That The Prosecutor's Peremptory Challenges Were Based On An Impermissible Bias

Appellant argues that this Court should engage in a comparative analysis of the prosecutor's stated reasons for dismissing the challenged jurors by comparing those jurors to the white jurors that remained on the panel. (AOB 57-59, 62-68.) Because defense counsel did perform a cursory comparative analysis, it does appear that it is appropriate to review this issue on appeal. However, the comparative analysis only reinforces the fact that the prosecutor did not exercise his peremptory challenges in an unconstitutional fashion.

This Court stated that while an appellate court should not engage in comparative analysis of jurors for the first time on appeal, if comparative analysis evidence was presented in the trial court, the reviewing court must consider it along with all other relevant evidence. (*People v. Johnson, supra,*

30 Cal.4th at pp. 1318-1325.) However, this Court has recognized that comparative analysis is a limited tool, and should not be used to undermine the deference granted to the trial court:

> "use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box." (*People v. Johnson, supra,* 47 Cal.3d at p. 1220, 255 Cal.Rptr. 569, 767 P.2d 1047.) We found it apparent "that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. [Attempting] to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected. It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose." (*Id.* at p. 1221, 255 Cal.Rptr. 569, 767 P.2d 1047.)

(*People v. Johnson, supra,* 30 Cal.4th at p. 1319.) While recognizing that comparative analysis "is not irrelevant," this Court has also noted that "comparative analysis is 'largely beside the point' because of the legitimate

subjective concerns that go into selecting a jury." (*Id.* at p. 1323.) As will be shown, the comparative analysis evidence in this case has very limited impact.

Appellant attacks the prosecutor's justification for exercising peremptory challenges against prospective jurors Powell and Craig[15] due to their arrests, or the arrests of their relatives, by pointing out that "[o]f the sitting white jurors, four of the ten jurors checked 'yes' when asked if they or a . . . family member had been arrested." (AOB 62.) Appellant claims that jurors Marilyn Young, David Forrest, Ghislaine Brassine, and Suzette Harrison had all indicated that they, or a relative, had been arrested. This contention is meritless because there are substantial differences between the arrests relating to the dismissed jurors and the arrests relating to the remaining white jurors.

First, appellant's argument is factually wrong. Of the four persons appellant cites as examples of white jurors with arrests, only three of them were actually on the jury. Prospective juror Suzette Harrison, who appellant claims was an actual juror, was dismissed by the defense through a peremptory challenge. (RT 1093-1094.) Thus, there were only three white jurors who stated that they, or a relative, had been arrested.

Further, a review of the arrests suffered by the white jurors and their relatives shows that the arrests were exclusively for traffic violations and minor property crimes. Juror Young's husband had been accidentally arrested on a warrant for outstanding traffic tickets that was issued for another person with the same name. (Supp. CT 13.) Juror Forrest had pleaded no contest for driving under the influence and his son had been arrested for vandalizing personal property. (Supp. CT 553.) Ghislaine Brassine checked "yes" on her questionnaire in response to the question regarding whether she or any relative

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15. Appellant argued that prospective juror Brooks was also dismissed due to an alleged arrest of her son for assault. (AOB 41-42, 67.) However, as previously explained, that contention appears to be based on an error in the Reporter's Transcript.

or close friend had been arrested. (Supp. CT 1112.) However, her questionnaire does not indicate who suffered the arrest, or the nature of the offense that they were arrested for. (Supp. CT 1112-1113.) Neither the defense or prosecution questioned her regarding her entry on the questionnaire during voir dire.[16/] (RT 996-997, 1002, 1013, 1022, 1027, 1037-1038.)

In contrast, prospective juror Craig's son was charged and prosecuted for six counts of assault. (RT 805-807, Supp. CT 92-93.) Clearly, based upon what is in the appellate record, his arrest was for significantly more serious crimes than the arrests of any of the white jurors. Thus, the comparative analysis does not prove that the prosecutor's dismissal of prospective juror Craig due to her son's arrest was a sham.

Further, prospective juror Powell's arrest also was significantly different than that of any of the white jurors. Powell was arrested for protesting the lack of an African-American Studies department at her university. Her arrest indicates a commitment to challenge authority and a lack of deference to public institutions. Given that the prosecutor is a representative of law enforcement, prospective juror Powell's willingness to challenge authority would raise reasonable concerns in his mind that she might not be a favorable prosecution

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16. Appellant repeatedly faults the prosecutor for not "even bother[ing] to ask who in her family had been arrested." (AOB 62-64.) However, it is appellant's burden to create as thorough a record as feasible, not the prosecutor's. (*People v. Farnam, supra,* 28 Cal.4th at p. 135; *Box, supra,* 23 Cal.4th at pp. 1187-1188; *People v. Howard, supra,* 1 Cal.4th at pp. 1153-1154; *People v. Turner, supra*, 8 Cal.4th at p. 164; *Wheeler, supra*, 22 Cal.3d at pp. 280-281.) Thus, the absence of any statement concerning the nature of the arrest suffered by juror Brassine or her relative should be held against appellant, not respondent.

juror.[17] Similar concerns were not raised by the arrests for traffic violations or minor property crimes related to the white jurors.

Because the arrests related to the challenged prospective jurors were qualitatively different from the arrests related to the white jurors, appellant's comparative analysis fails to establish that the prosecutor exercised his peremptory challenges in a discriminatory fashion. Thus, the trial court's ruling should be upheld.

Appellant also argues that comparative analysis demonstrates that the prosecution's reason for dismissing prospective juror McFarlane was a sham because his "answers regarding flight did not set him apart from the other jurors." (AOB 66-67.) However, appellant provides no factual support for his conclusory statement. Because the Opening Brief does not cite any portions of the record where jurors that were allowed to remain on the panel stated that they would completely disregard the flight evidence, appellant's comparative analysis in regard to Prospective Juror McFarlane fails.

Similarly, appellant conclusorily states that the prosecutor's reasons for removing prospective jurors Ferguson and Hammond were "similarly unconvincing." (AOB 65-66.) Again, the Opening Brief is completely devoid of any citation to the record to establish that any of the remaining jurors expressed doubts about the death penalty similar to Ferguson's or Hammond's. Thus, appellant's comparative analysis must be rejected.

Appellant's comparative analysis evidence does not undermine the trial court's finding that the prosecution did not exercise its peremptory challenges in violation of *Wheeler*. Thus, the trial court's ruling should be upheld.

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17. Appellant contends that prospective juror Powell "worked for law enforcement." (AOB 65.) In fact, Powell was a parking enforcement officer for UCLA. (Supp. CT 943, RT 831.) Respondent contends that this does not make her a "law enforcement" official as the term is normally understood.

II.

THE TRIAL COURT PROPERLY ADMITTED MARILYN YOUNG'S STATEMENT TO THE POLICE AS A PRIOR CONSISTENT STATEMENT AND PURSUANT TO EVIDENCE CODE SECTION 356

Appellant contends that the trial court violated his rights to confrontation and due process by allowing the jury to hear during redirect testimony a tape of Marilyn Young's statement to the police. (AOB 73-97.) Appellant's argument is meritless. The statement was admissible as a prior consistent statement pursuant to Evidence Code sections 1236 and 791. Further, because appellant introduced a portion of the taped statement in his cross-examination of Young, the prosecution was allowed to admit the entire statement pursuant to Evidence Code section 356.

A. Relevant Facts

Marilyn Young, Connie Navarro's close friend, testified, during direct testimony as a prosecution witness, concerning appellant's relationship with Connie. Her testimony mentioned numerous incidents where appellant stalked Connie Navarro, broke into her apartment, or threatened her. (RT 1683-1763.)

On cross-examination, defense counsel made sure that Young had reviewed copies of two statements that she gave to the police. One was a written statement. The second was a transcript of a taped interview she had with Detective Purcell. (RT 1715.) Defense counsel's strategy throughout his cross-examination of Young was to suggest that she had fabricated, or exaggerated, parts of her testimony based on her failure to inform the police of certain facts in her statements that she later mentioned during her testimony. For example, defense counsel highlighted an alleged discrepancy between Young's testimony and her prior statements to the police regarding appellant breaking into Connie's condominium:

[Defense Counsel]: And let me ask you about that. You said that [Connie] found out that [appellant] was in the closet. What she told you was that a friend of hers had told you that; correct?

[Young]: That he was watching, yes. And I think that he admitted it to her, too. I think that she told me that.

[Defense Counsel]: That's not what you told the police, was it, ma'am? Didn't you tell the police that a friend name [*sic*] Don Clapp had told Connie - -

[Young]: That he was - - first - - he first told Connie that she should get out of town because he thinks that [appellant] is - - he asked her if she has a skylight.

[Defense Counsel]: Let me ask you about that. [¶] What Connie told you is that Don Clapp had read an astrology chart and in the astrology chart - -

[Young]: This was a different story. There was a woman named Sue Johnson who was an astrologer. I didn't know that Donnie had anything to do with that. And she told Connie that she should also get out of town because [appellant] was in a rage, too. And so that's why we went to Laguna. [¶] And also that Donnie Clapp said that [appellant] was breaking into her house and that he was in a rage and that she should get out of town.

[Defense Counsel]: All right. Did you tell the police back in March the 5th in that tape-recorded conversation that Connie went to Laguna because she was afraid that [appellant] might go crazy this weekend because a friend of hers told her that, you know, her friend is an astrologer and told her that [appellant's] sign's showing that he's going to erupt this weekend and she got frightened and wanted to go away? Did you tell the police that?

[Young]: Yes, I did. That was one of the friends.

[Defense Counsel]: The friend, the astrologer, talked to her; correct?

[Young]: That was one of - - also Donnie Clapp told her that [appellant] was there, though, and not to tell [appellant]. He also told Connie not to tell [appellant], that he wanted to protect Connie. And he asked her if she has a skylight in her house. I'm not sure when this happened, but I know this also happened, that Donnie wanted to tell Connie that Dean was breaking into her house.

[Defense Counsel]: Let me ask you this. When did Don mention the skylight?

[Young]: I'm not sure. It may have been - - I can't tell you, but I know he mentioned it to her. She told me that. It might have been right before the murder and it could have been a few weeks before that.

[Defense Counsel]: What you told the police about that in the written statement is that on the Wednesday or Thursday before Connie died that Don Clapp told her that [appellant] had entered the apartment through a skylight and was hiding in a closet when she went back for her clothes on Tuesday; correct?

[Young]: Right. That was one thing. But then there was another time that Donnie told her that [appellant] was in a rage and that she should get out of town.

(RT 1734-1736.)[18/]

Later, defense counsel again suggested that Young was altering her story at the trial regarding a noise that Connie heard the day before her death:

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18. The portion of the prior statement used by defense counsel to impeach Young on this point is at pages 29-30, and 58-59 of the Supplemental II Clerk's Transcript (hereinafter cited as Supp. II CT.)

[Young]: That night she went home. The next morning she told me that she heard a loud bang on her patio and she just thought that it might have been [appellant].

[Defense Counsel]: That's something you didn't tell the police during any of the conversations you had, either the one they recorded or the one where the detective took notes; correct?

[Young]: No, that's not correct. I think I did say it.

[Defense Counsel]: You didn't see it in your statement; right?

[Young]: I may not have said it in a statement. I was pretty shook up.

(RT 1747.)[19/]

Later, the defense again raised a discrepancy between Young's prior statement and her testimony regarding a comment appellant made to Connie:

[Young]: Correct. That was after - - when he came in and he did say, "I could hurt you if I wanted to, but I - - you know, and nobody would be able to do anything and I could - - no locks could keep me out of anywhere."

[Defense Counsel]: What you told the police back in March of '83 was that, "I don't want to hurt you, but if I wanted to, I could do it right here?"

[Young]: He did say that. I'm - - yes.

(RT 1750.)[20/]

Defense counsel also raised Young's failure to report a conversation she had with appellant to the police:

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19. Defense counsel was incorrect in asserting that Young did not mention the loud noise to the police. On page 57 of the Supplemental II Clerk's Transcript, Young stated Connie "heard a big, loud bang" the night before the murders.

20. It appears that counsel impeached Young with statements contained on page 39-40 of the Supplemental II Clerk's Transcript.

[Young]: And I remember there was a phone call that - - he called me. And I can't remember exactly when it was, but he wanted Connie. He said he left Connie a message that he was going to leave her alone and he called me and he was - - had this unbelievably breathless voice saying, "Marilyn, um, it's [appellant]. I left a message for Connie and I wanted her to known [*sic*] that I'm going to leave her alone, but she didn't get back to me and so call me back later." [¶] And I was afraid to call him back. I was afraid to call him. So I didn't call.

[Defense Counsel]: You didn't mention that call to the police?

[Young]: I did. I'm sure I did.

[Defense Counsel]: That's something you never saw in your statement; correct?

[Young]: There was a recorded statement.

[Defense Counsel]: Let me show you a transcript of that. I'll show you both statements. You want to look through them, please.

[Young]: Which one is the recorded statement? Because I had forgotten about that conversation.

[Defense Counsel]: That's the one that said Detective Purcell, Marilyn Young, and it has questions and answers on it. [¶] What we're looking for is a statement you made to the police how [appellant] called you breathlessly telling you how he was going to leave Connie alone and how he left this message and she hadn't called him back.

[Young]: That's not in here?

[Defense Counsel]: Why don't you look, please, and see if its in there.

[Young]: Well, I listened to it, of course, and I heard - - I remembered saying that I heard it on the recorder. So if it's not in here, I don't know why.

[Defense Counsel]: You heard a recording of you telling the police that [appellant] called you and you all had the conversation you just described for this jury, you actually heard a tape of you telling the police that?

[Young]: I heard - - I listened to my testimony.

[Defense Counsel]: How many tapes did you hear?

[Young]: Just my testimony.

[Defense Counsel]: Just one tape of you and Detective Purcell?

[Young]: I heard what I said that night.

(RT 1753-1754.)[21]

After the defense completed its cross-examination of Young, the prosecutor moved to admit the tape of Young's tape recorded statement to the police made on March 4, 1983. "It's my desire under 1236 of the Evidence Code, which is prior consistent statement on a claim of both fabrication and on a claim that it is inconsistent with her now statement, to play the tape itself." (RT 1764.) The defense stated that it believed "the only part [of the tape] that could be proper is a portion that's deals [*sic*] with the specific point, and I asked her about whether or not it's contained in her statement. I don't think that opens the door to put in her entire tape recorded statement because of that one point." (RT 1765.) The prosecution responded that counsel had gone through each of the incidents that Young testified about, and "it is clear that he has indicated that by his cross-examination that they are either recent fabrication or that, in fact, they are outright lies." (RT 1766.) The defense then responded that they "didn't dispute everything in her testimony. We're just pinpointing the sequencing of the times, which we have." (RT 1767.)

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21. Respondent has reviewed the transcript of the prior statement and did not find any statements from Young regarding such a phone call. However, Young did state that appellant had said that he would leave Connie alone after a breakfast they had shortly before the murders. (Supp. II CT 29-30.)

The court ruled in favor of the prosecution:

> I'm going to allow the People to replay the tape in its entirety because I do believe in the cross-examination of the witness just about every phone conversation gone into, every firsthand conversation gone into. In other words, her whole spectrum of the statement she said she gave to the police department was a matter of cross-examination.

(RT 1779.)

During the playing of the tape, the defense renewed its objection to playing the whole tape to the jury:

> [Defense Counsel]: Excuse me, Your Honor. Your Honor, I think this tape about 30 minutes ago went far beyond any purpose envisioned by the Evidence Code. [¶] We're now at a place here where the officer and witness are theorizing what happened, why it happened, and all of the surrounding circumstances. He had plenty of opportunities, he must have gone beserk, and so forth and so on. [¶] All of that may be fine for penalty phase from a defense standpoint, but at this point it's just totally hearsay, it's totally prejudicial, and it has nothing to do with rehabilitating this witness based on what [defense counsel] asked her about. [¶] This is not consistent with anything that they've brought out as inconsistent. This is just two hours of theory, speculation, innuendo.

(RT 1782.)

The prosecutor responded that he would support the trial court giving the jurors an instruction to ignore the speculation between the officer and Young, but stated that if "we don't play the entire tape, we're left in the middle of this tape for the purposes of the jury and for the purposes of completing the prior consistent statement." (RT 1782.)

The court ruled that they would complete playing the tape. "I agree we should finish it at this point in time." (RT 1783.) However, the court gave the jury the following admonition:

> Before we do, I want to make a comment about the tape. When you hear the participants, that is, the witness and the investigating officer, talking and theorizing about what they think went on and things like that, you're not to consider that at all, all right? That's pure speculation on their part. We're only interested in what the witness indicates she told the police officer.

(RT 1784.)

B. Admission Of The Tape Did Not Violate Appellant's Right To Confrontation Under The Sixth Amendment Of The United States Constitution

Appellant argues that the admission of Young's statement to the police violated his right to confrontation under the Sixth Amendment of the United States. (AOB 83.) Appellant's argument fails because Young was present at the trial and was subjected to cross-examination. This Court has held that the Sixth Amendment right to confrontation "does not forbid the use of out-of-court statements by a declarant who testifies at trial and is subject to full cross-examination in regard to the prior statement." (*People v. Hayes, supra,* 52 Cal.3d at p. 610.) The United States Supreme Court agrees, "we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Crawford v. Washington* (2004) __ U.S. __, 124 S.Ct. 1354, 1369, fn. 9 (*Crawford*); *California v. Green* (1970) 399 U.S. 149, 162 [90 S.Ct. 1930, 26 L.Ed.2d 489].)

In the instant case, Young testified in person at the trial. She was subjected to extensive cross-examination by appellant's counsel. (RT 1705-

1757, 1761-1762.) Further, she was specifically questioned regarding the prior statement that was played to he jury. (RT 1734-1736, 1747, 1750, 1753-1754.) Thus, the admission of the prior consistent statement does not violate the Confrontation Clause. (*People v. Hayes, supra,* 52 Cal.3d at p. 610; *Crawford, supra,* 124 S.Ct. at p. 1369, fn. 9; *California v. Green, supra,* 399 U.S. at p. 162.)

1. *Crawford* Does Not Alter The Result On This Issue

Appellant filed a Supplemental Brief discussing the United States Supreme Court's recent case, *Crawford, supra,* 124 S.Ct. 1354, and its application to the admission of the tape of Marilyn Young's interview. In *Crawford*, the Supreme Court altered the analysis to be used when applying the Confrontation Clause to the admission of hearsay statements. However, *Crawford* does not affect the outcome of this case.

Crawford held that testimonial hearsay statements generally could not be admitted at a trial unless the hearsay declarant was subjected to cross-examination. The Supreme Court held that the Confrontation Clause "reflects an especially acute concern" with testimonial statements. (*Crawford, supra,* 124 S.Ct. at p. 1364.) The Court defined testimony as "typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." (*Ibid.*, quoting 1 N. Webster, An American Dictionary of the English Language (1828).) The Court provided three "formulations" of the "core class of 'testimonial' statements":

> 1) "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,"

(*Ibid.*)

2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and

(*Ibid.*)

3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

(*Ibid.*)

While the Court did not definitively define the whole class of statements that qualify as testimonial, Young's taped statement appears to qualify since it was made in a formal setting to a police officer in the course of a criminal investigation. "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." (*Crawford, supra,* 124 S.Ct. at p.1364.) However, its admission did not violate the Confrontation Clause because Young appeared at appellant's trial and was subjected to extensive cross-examination by appellant's counsel. (*Id.* at p. 1369, fn. 9.) "[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Ibid.*)

C. Young's Statement To The Police Was Properly Admitted As A Prior Consistent Statement Pursuant To Evidence Code Sections 1236 And 791

The trial court admitted Young's prior statement to the police as a prior consistent statement pursuant to Evidence Code sections 1236 and 791. (RT 1764, 1779.) As will be shown, appellant's repeated attempts to impeach Young based on her alleged failure to include in her prior statements to the police certain facts contained in her testimony raised an inference that she had recently fabricated her trial testimony. Further, during his closing argument,

defense counsel charged that Young altered her testimony because she was biased against appellant because he had been charged with the murder of her best friend. Under these circumstances, the trial court properly admitted Young's statement as a prior consistent statement to rebut the defense's charges of recent fabrication and bias.

1. Relevant Statutes

Evidence Code section 1236 provides:

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

Evidence Code section 791 states:

> Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

California has been described as one of the most liberal states in allowing the admission of prior consistent statements to rehabilitate the credibility of impeached witnesses. (*People v. Gentry* (1969) 270 Cal.App.2d 462, 474; see also *People v. Sanders* (1977) 75 Cal.App.3d 501, 508 [California is

"supra-liberal in permitting the rehabilitation of witnesses by prior consistent statements"].)

2. Young's Prior Consistent Statement Was Admissible To Rebut The Defense's Implied Charge Of Recent Fabrication And Bias

The defense's cross-examination repeatedly implied that Young's testimony at trial had been recently fabricated because it differed in minor ways from her prior statements to the police. The mere asking of questions by the defense may raise an implied charge of bias or fabrication thereby invoking the exception of Evidence Code section 791, subdivision (b). (*People v. Noguera* (1992) 4 Cal.4th 599, 629-630; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1209.) The "offering of a prior inconsistent statement necessarily is an implied charge that the witness has fabricated his testimony since the time the inconsistent statement was made." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1015.) The defense repeatedly contrasted Young's testimony at trial with the statements she made to the police, pointing out omissions or discrepancies between the two. Clearly, the defense was implying that Young was fabricating.

In its closing argument, the defense moved beyond implications and explicitly charged that Young's testimony was fabricated and tainted by bias against appellant:

> What does your human experience tell you about people? If a close friend or family member of yours was killed, *somebody was charged with the murder, you think you might go out of your way to be helpful in the prosecution*? I don't know. Maybe subconsciously, maybe if you start thinking about little things that you think you should have seen, little things that maybe should have told you something but didn't. Started looking and trying to remember things that *maybe didn't happen*

but seems that, yeah, maybe - - maybe those incidents were worse than I thought, and you start to make yourselves believe were true?

(RT 3008, emphasis added.) Thus, the defense clearly stated its position that Young was biased against defendant because he was the person that was charged with her friend's murder. Also, the defense clearly stated its argument that Young recently fabricated her testimony because she had been reflecting on the incidents involving appellant since the time of the murders.[22/]

Further, the defense's strategy of pointing out omissions in Young's prior statements clearly shows that they were suggesting her trial testimony was a fabrication. "It is elementary that recent fabrication may be inferred when it is shown that a witness did not speak about an important matter at a time when it would have been natural for him to do so." (*People v. Manson* (1976) 61 Cal.App.3d 102, 143.)

> In this scenario, the evidence of consistent statement becomes proper because "the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story."

(*People v. Williams* (2002) 102 Cal.App.4th 995, 1012, quoting *People v. Gentry, supra,* 270 Cal.App.2d at p. 473.)

In the trial court and on appeal, appellant argues that he was not attempting to impeach Young's credibility, but was only attempting to establish the timing of events. (AOB 85; RT 1767.) However, review of the defense questions to Young immediately undermine the argument that counsel was only attempting to establish the sequence of events. The defense's strategy

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22. The fact that appellant spent a large portion of his testimony disputing Young's allegations that he was stalking Connie Navarro further demonstrates that the defense's position was that Young was biased against appellant and her testimony was recently fabricated. (RT 2313-2322, 2331-2349, 2362-2367, 2372-2381.)

of pointing to omissions in the statement to the police did not help clarify the timing of the events under discussion, but only emphasized that Young had not mentioned them to the police. The rational conclusion to be drawn by the defense's focus on her omissions is that she recently contrived portions of her testimony. (*People v. Williams, supra,* 102 Cal.App.4th at p. 1012; *People v. Manson, supra,* 61 Cal.App.3d at p. 143; *People v. Gentry, supra,* 270 Cal.App.2d at p. 473.) Therefore, the defense's claim that it only used the prior statements to establish the sequence of events is not supported by the nature of the cross-examination. Further, it is undermined by the claims of bias and recent fabrication made by the defense in its closing arguments.

Thus, the statement is admissible pursuant to Evidence Code section 791, subdivision (b) as long as it was made "before the bias, motive for fabrication, or other improper motive is alleged to have arisen." In the instant case, appellant claimed that Young was biased against appellant because he had "been charged" with the murder of her friend. (RT 3008.) Young's statements, which were made the day after the homicides, predates appellant being charged with the murders. Thus, her statements were made before the date that appellant claims her bias arose.

Also, the statements were admissible, regardless of their timing, because the defense impeached Young with a claim of recent fabrication "by negative evidence," i.e. the alleged failure to provide the statements at an earlier time. The timing of the statement "loses significance" where, as here, the witness was impeached with her failure to mention a fact before when it would have been natural for her to speak of it. (*People v. Williams, supra,* 102 Cal.App.4th at p. 1011; *People v. Gentry, supra,* 270 Cal.App.2d at p. 473.) Where the witness's prior silence is alleged to be inconsistent with their trial testimony, "the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch

as the witness did speak and tell the same story." (*People v. Williams, supra,* 102 Cal.App.4th at p. 1011; *People v. Manson, supra,* 61 Cal.App.3d at p. 143; *People v. Gentry, supra,* 270 Cal.App.2d at p. 473.) Thus, given that the claim of recent fabrication was based on "negative evidence," the prior consistent statement is admissible pursuant to Evidence Code section 791, subdivision (b), because it was made prior to Young's allegedly fabricated testimony at trial.

Appellant contends that to the extent any of the tape was admissible, it should only be the portions related directly to specific incidents upon which the defense impeached Young. In *People v. Ainsworth, supra,* 45 Cal.3d 984, this Court held that where one party used a portion of a witness's statement to the police to impeach the witnesses credibility, the other party was entitled to introduce the rest of the statement to rebut the charge of bias and recent fabrication. In *Ainsworth*, the prosecution impeached one of the co-defendants with portions of his statement to the police. The defense then introduced the co-defendant's statement in its entirety. This Court found by offering the portions of the statement that were inconsistent with the co-defendant's testimony, the prosecution made an "implied charge of recent fabrication or improper testimonial motive for purposes of Evidence Code section 791." (*Id.* at p. 1015.) Thus, the co-defendant's "*entire pretrial statement* to [the police], which was consistent with his trial testimony, . . . was properly admitted under Evidence Code section 791, subdivision (b) as relevant to rebutting the prosecution's implied charge of recent fabrication." (*Ibid.*, emphasis added.)

In the instant case, the defense did not limit its implication of bias and recent fabrication only to portions of Young's testimony, but directed it to her testimony as a whole. As stated by the prosecutor, the defense "went through each of the incidents," and "it is clear that he has indicated that by his cross-examination that they are either recent fabrication or that, in fact, they are

outright lies." (RT 1766.) The trial court agreed, finding that the defense's cross-examination covered the entirety of Young's testimony, and the implication of bias and recent fabrication was applicable to the entirety of her testimony, not just the isolated sections where the defense specifically used the prior statements to impeach Young. (RT 1779.) Further, the defenses charge of bias in its closing argument was not limited only to the incidents where it explicitly impeached Young, but to her entire testimony. (RT 3008.) Thus, the entire statement was properly admitted. (See *People v. Ainsworth, supra,* 45 Cal.3d at p. 1015.)[23/]

D. The Entire Statement Was Also Admissible Pursuant To Evidence Code Section 356

Further, because the defense introduced portions of Young's taped interview with the police, the prosecution was entitled to admit it pursuant to Evidence Code section 356, which provides:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

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23. Appellant contends that the fact the oral statement was made on an audio tape entitles it to "no more sanctity than the oral testimony of a witness recounting the same extrajudicial statements." (AOB 88.) Appellant further argues that to be admitted, the taped statements must "comply with exceptions to the hearsay rule." (AOB 88-89, citing *People v. Sundlee* (1977) 70 Cal.App.3d 477, 484; *People v. Webb* (1956) 143 Cal.App.2d 402.) Respondent agrees that Young's statement is not admissible merely because it was taped. Respondent does not seek admission of the statements because they are taped, but because they are admissible as prior consistent statements pursuant to Evidence Code sections 1236 and 791.

"It is well settled that where part of a conversation is put in evidence, the adverse party is ordinarily entitled to introduce the remainder of the conversation." (*Long v. California-Western States Life Insurance Co.* (1955) 43 Cal.2d 871, 881.) The purpose of this section is to prevent the use of selected aspects of a conversation "so as to create a misleading impression on the subjects addressed." (*People v. Arias, supra,* 13 Cal.4th at p. 156.) Thus, when one party has introduced only a portion of a conversation, "the opposing party may admit any other part necessary to place the original excerpts in context." (*People v. Pride, supra,* 3 Cal.4th at p. 235.)

As an initial matter, because the prosecution did not explicitly rely on Evidence Code section 356, appellant is likely to argue that this argument cannot be raised on appeal. However, the prosecutor's repeated insistence that the jury should hear the entirety of the interview in order to correct the defense's assertion that her testimony is fabricated (RT 1765-1766, 1782) was plainly an invocation of that section even though the statute itself was never mentioned. Regardless, assuming arguendo that the trial court erred by admitting the statement as a prior consistent statement, to preclude review of the court's admission of the tape under this clearly applicable code section would be contrary to the rule that a correct decision of the trial court must be affirmed on appeal even if it is based on erroneous reasons. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 138-139; *People v. Braeseke* (1979) 25 Cal.3d 691, 700; *People v. Hobbs* (1987) 192 Cal.App.3d 959, 963.)

In the instant case, the defense selectively chose portions of Young's interview with the police to suggest that she had subsequently embellished and falsified her testimony at trial. However, the vast majority of her statement comported with her testimony at trial. Thus, the prosecution was entitled to enter the entire statement under Evidence Code section 356 to "correct th[e]

misimpression" that Young's testimony substantially differed from her prior statements to the police.

Appellant will likely argue, as he did in his argument regarding prior consistent statements, that Evidence Code section 356 did not authorize the admission of the entire statement, but only the portions directly related to the subjects of the statements that the defense used impeach Young with. (AOB 86-91.) However:

> In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. "In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence...."

(*People v. Hamilton* (1989) 48 Cal.3d 1142, 1174, quoting *Rosenberg v. Wittenborn* (1960) 178 Cal.App.2d 846, 852, emphasis in original.) Where a defendant introduces portions of a conversation in order to demonstrate that a witness's prior testimony differed from later testimony before the jury, the People are entitled to "introduce the remainder of [the statement] for the purpose of placing [the] allegedly inconsistent statements in their proper context, provided that the remaining testimony had 'some bearing upon, or connection with' the inconsistent statements introduced by defendant." (*People v. Zapien* (1993) 4 Cal.4th 929, 959.)

In the instant matter, with the exception of some introductory information (Supp. II CT 24-26), Young's statement to the police exclusively focused on appellant's relationship with Connie, and particularly focused on his behavior between the time that she ended her relationship with him and the

homicides. (Supp. II CT 24-60.) The defense impeached Young's testimony at trial in regard to her descriptions of incidents involving appellant's behavior to Navarro after the breakup by using portions of her statement to the police. Specifically, the defense impeached Young's descriptions of: 1) an incident where appellant broke into Connie's home (RT 1734-1736), 2) a noise Connie heard outside her home which she believed may have been appellant breaking in (RT 1747), 3) a threatening statement appellant made to Connie (RT 1750), and 4) a phone call appellant made to Young before the homicides (RT 1753-1754). The rest of Young's statement to the police also involved descriptions of appellant's behavior in relation to Connie and, thus, it had "some bearing upon, or connection with" the statements introduced by the defense. (*People v. Zapien, supra*, 4 Cal.4th at p. 959; *People v. Hamilton, supra*, 48 Cal.3d at p. 1174.) Consequently, the rest of Young's statement was also admissible pursuant to Evidence Code section 356.

E. The Admission Of The Investigator's Statements

Appellant contends that the trial court erred by playing the portions of the tape where Detective Purcell gave his opinion that "appellant was the murderer and was dangerous, and might come to kill Young next." (AOB 73.) Appellant also contends that it was error to allow in the portions of the tape where Young expressed concern for her safety. (AOB 73-74, 91.) Appellant's claim is meritless. First, the statements were not admitted for their truth, and therefore, were not hearsay. Further, the record does not contain a single instance where Detective Purcell stated an opinion on appellant's guilt. To the contrary, the detective repeatedly stated that the did not have sufficient facts to have a reliable opinion. While the tape does contain statements from Young that she was scared of appellant, the court cured any problem by giving the jury a limiting instruction.

First, Detective Purcell's statements were not hearsay because they were not admitted for the truth of the matter asserted. (Evidence Code section 1200, subd. (a).) Detective Purcell's comments and questions were admitted because they gave context to Young's answers. When hearsay comments or statements are admitted to give context to the responses of another hearsay declarant, they are admitted for a non-hearsay purpose. (*People v. Turner, supra,* 8 Cal.4th at p. 190.) The trial court emphasized that the tape was being played so the jury could evaluate Young's testimony, not Detective Purcell's statements. (RT 1784.) Hence, those statements fall outside the hearsay rule. (*People v. Turner, supra,* 8 Cal.4th at pp. 190-191; Evid. Code, § 1200.)

Appellant, relying on numerous federal and state cases,[24/] argues that he was prejudiced because Detective Purcell stated that he was guilty. Appellant's argument fails because his characterization of the record is distorted. Respondent has reviewed the entire statement and cannot find a single instance where Detective Purcell indicated that he believed appellant was guilty. Tellingly, appellant fails to support his assertion that Detective Purcell offered an opinion of appellant's guilt with any cite to a specific portion of the record. (AOB 73-97.) The closest appellant comes to providing factual support for this assertion is a generalized cite to the entire transcript of Young's statement. (AOB 73, citing Supp. II CT 24-60.) Rule 14(a) of the California Rules of Court requires that counsel "support any reference to a matter in the record by a citation to the record." Because appellant has failed to cite to any evidence in the record to factually support his claim that the detective stated an opinion

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24. *United States v. Young* (1985) 470 U.S. 1, 18-19; *United States v. Harber* (9th Cir. 1995) 53 F.3d 236, 241; *United States v. Gutierrez* (9th Cir. 1993) 995 F.2d 169, 172; *United States v. Molina* (9th Cir. 1991) 934 F.2d 1440, 1444; *United States v. Espinosa* (9th Cir. 1987) 827 F.2d 604, 612 ; *United States v. McKoy* (9th Cir 1985) 771 F.2d 1207, 1211; *People v. Torres* (1995) 33 Cal.App.4th 37; *People v. Sanders, supra,* 75 Cal.App.3d 501.

regarding appellant's guilt, respondent asserts that he has failed to comply with Rule 14(a) and requests that this Court summarily dismiss this factual assertion. Further, because the tape contains no opinion from the detective regarding appellant's guilt, appellant's authority is inapplicable and the claim must be rejected.[25/]

The statement does contain portions where Young expressed her fear of appellant to Detective Purcell and her hesitancy to help the police due to concerns for her own safety. Despite appellant's assertions to the contrary, Detective Purcell never indicated that he believed appellant was a threat to Young, but instead stated that appellant would likely be captured by the police and that Young's cooperation with the police would not place her in any further danger. (Supp. II CT 25, 39, 43-44, 48-52, 59.) At one point, Purcell suggested that Young not return home that night, not because appellant was threat, but "for [her] own peace of mind." (Supp. II CT 25.) Thus, appellant's suggestions, which lack any citations to the record, that Purcell identified appellant as a threat to Young are also unfounded.

Further, the court instructed the jury to ignore the portions of the tape where Young and Detective Purcell discussed her fear of appellant, and only focus on "what the witness indicates she told the police officer." (RT 1784.) In the absence of contrary evidence, the jury is presumed to have followed the trial court's admonition. (See *People v. Morris* (1991) 53 Cal.3d 152, 194; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374; *People v. Williamson*

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25. When asked by Young if the police had other suspects, Detective Purcell refused to answer the question because the investigation was in an early stage. (Supp. II CT 36.) Detective Purcell's refusal to confirm that appellant was the only suspect in the case rebuts appellant's argument that he suggested that appellant was guilty.

(1985) 172 Cal.App.3d 737, 750.)[26] Thus, the introduction of this evidence did not violate any right of defendant's.

To the extent that Young and Detective Purcell did discuss matters other than appellant's behavior, the conversation consisted of Purcell trying to assuage Young's fears. When asked questions concerning the investigation, the detective repeatedly stated that the investigation was at a "very early stage," and the police did not have all of the information yet. (Supp. II CT 31-32, 36.) When asked if the police had other suspects, Detective Purcell stated that he did not know and it was too early in the investigation for him to disclose information like that. (Supp. II CT 36.) Further, when the detective did discuss the threat that appellant might represent to Young, he was careful to qualify his statements:

> I mean, it's hard to figure out a mind like his, you know. But I mean, I'm just - - *I'm throwing these ideas out to you and, I mean, I don't know whether they're valid or not*, but that's what makes sense to me right off the bat.

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26. Appellant argues that the limiting instruction was insufficient to protect his rights based on *People v. Coleman* (1985) 38 Cal.3d 69 (*Coleman*). The case is easily distinguishable. In *Coleman*, the trial court allowed the prosecution to introduce letters from the dead victim. This Court found that the introduction of the letters were prejudicial and the trial court's limiting instructions were ineffective. (*Id.* at p. 94-95.) However, the letters were found prejudicial largely because the victim was dead and the "veracity of the contents of the letter cannot be tested by the conventional method of rigorous cross-examination." (*Id.* at p. 82.) Thus, there was a "danger that the hearsay declarations will be regarded as true in spite of a complete absence of legally recognized indicia of their trustworthiness." (*Id.* at p. 85.) Unlike in *Coleman*, the hearsay declarant in this case was present at trial and subject to cross-examination. In fact, the challenged statements were admitted because the defense used portions of her interview to impeach her during its rigorous cross-examination. Thus, *Coleman* is distinguishable from the instant case and has no application.

(Supp. II CT 48, emphasis added.) Thus, the detective himself admitted that his statements were speculative, and not based on any concrete knowledge. Even in the absence of the limiting instruction, it is unlikely that the jurors would have relied on any of these statements in finding appellant guilty.[27/]

In his Supplemental Brief, appellant contends that the admission of Purcell's comments violated the Confrontation Clause pursuant to *Crawford.* (Supp. AOB 4-6.) Appellant's contention fails because the statements were not admitted for the truth of the matter asserted. Most of Purcell's comments were questions that were admitted, not for the truth of the matter asserted, but for the non-hearsay purpose of giving context to Young's answers. (See *People v. Turner, supra,* 8 Cal.4th at pp. 189-191.)[28/] "The [Confrontation] Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford, supra,* 124 S.Ct. at p. 1369, fn. 9; see also *People v. Turner, supra,* 8 Cal.4th at pp. 189-191.) Thus, the admission of Purcell's comments raise no Confrontation Clause issue. (*People v. Turner, supra,* 8 Cal.4th at pp. 189-191.)

Appellant chose to impeach Young with her prior interview with the police. "It was the defendant's counsel who first asked for this conversation and he, therefore, cannot complain that the full conversation was brought out." (*People v. Howard* (1958) 166 Cal.App.2d 638, 649-650.)

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27. Further, the statements of Young's fear and hesitancy to help the police appear to have relevance to this case. To the extent that the defense argued that Young's testimony was biased by a desire on her part to "be helpful in the prosecution" (RT 3008), her obvious hesitancy to assist the police during their investigation was relevant to undermine that assertion.

28. To the extent that the comments did not clarify Young's comments, the jurors were directed by the court to ignore them as speculation. (RT 1784.)

F. Any Error In Admitting Young's Statement Was Harmless

Assuming arguendo that the trial court erred by admitting any portion of Young's statement to the police, the error was harmless. At the guilt phase, the erroneous admission of a prior consistent statement is subject to the state standard of harmless error stated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Andrews* (1989) 49 Cal.3d 200, 211, disapproved on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237, 1240-244.) Thus, unless it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error, the judgment must be affirmed. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

The evidence against appellant was strong. His burglary partner testified that appellant admitted to the murders. (RT 1966-1969.) Similarly, his stepmother testified that appellant confessed that he committed the murders to his father. (RT 2163-2175.) Appellant's fingerprints were found around the linen closet where Connie Navarro's body had be left. (RT 1323, 1543-1588.) Appellant's pattern of breaking into Connie's apartment and stalking her was compelling evidence of his motive and ability to enter the apartment and kill her. Appellant was seen with a gun immediately before the murders. (RT 1892.) Appellant was unable to produce any evidence other than his own self-serving testimony to support his alibi, and he fled Los Angeles the morning after the killings. Thus, the evidence of appellant's guilt was overwhelming.

Further, Young's tape recorded statement "was substantially similar to [her] testimony at trial, and thus was largely cumulative." (*People v. Andrews, supra,* 49 Cal.3d at p. 211.) Thus, the statement itself had limited prejudicial impact.

Additionally, the trial court gave the jury a limiting instruction regarding the portions of the tape where Young expressed concerns about her safety to Detective Purcell. In the absence of contrary evidence, such instructions are

presumed to have been followed and are sufficient to cure any potential prejudice. (See *People v. Morris, supra,* 53 Cal.3d at p. 194 [trial court's admonition, which the jury is presumed to have followed, cured any prejudice resulting from witness' improper statement]; *People v. Olguin, supra,* 31 Cal.App.4th at p. 1374 [jurors are presumed to adhere to the court's instructions absent evidence to the contrary]; *People v. Williamson, supra*, 172 Cal.App.3d at p. 750 ["We presume that the jury heeded the admonition and any error was cured."].)

Thus, given the trial court's curative instruction, the overwhelming evidence of appellant's guilt, and the fact that the statement was largely cumulative of other evidence, there was no reasonable probability that the introduction of Young's prior consistent statement affected the verdict. (See *People v. Andrews, supra,* 49 Cal.3d at p. 211.)

III.

THE TRIAL COURT PROPERLY EXERCISED ITS AUTHORITY UNDER EVIDENCE CODE SECTION 352 TO LIMIT THE DEFENSE FROM CROSS-EXAMINING JAMES NAVARRO ON A TANGENTIAL POINT

Appellant next contends that trial court violated his right to confrontation under the Sixth Amendment by precluding his attorney from cross-examining James (Mike) Navarro concerning a taped message from his answering machine. (AOB 98-132.) The trial court properly exercised its power under Evidence Code section 352[29/] to preclude the defense from cross-examining James Navarro, who was a witness of minor importance, on a point that was tangential to appellant's guilt or innocence. Thus, the judgment should be affirmed.

A. Relevant Facts

Connie Navarro's ex-husband, James Navarro, testified that he discovered Connie's and Susan Jory's bodies the day after the murders. He testified that Connie's face was covered with a pillow case when he discovered her body. (RT 1792-1796.) James testified that Connie had begun having problems with appellant since 1982. He had wanted to confront appellant, but Connie told him not to. Appellant would show up at events James and Connie had planned. Appellant would also drive by Connie's condominium, pause in front of it, and rev his engine. (RT 1788.) Connie told James that in mid-February of 1983, appellant had pulled a gun on her and forced her to go to a

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29. Evidence Code section 352 states:
The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

motel. Connie stayed with James for approximately a week prior to the murders. James referred Connie to his attorney to get a restraining order when she began having "major" problems with appellant. (RT 1786-1797, 1813-1828.)

After Connie's death, James collected her personal items from her condominium. James looked through her items prior to trial and found a tape from his telephone answering machine which contained a conversation between Connie and an unidentified woman discussing the procedure for obtaining a temporary restraining order. Navarro's answering machine "would pick up on a first ring" and someone who was "picking up the call in another room . . . might not realize they were being recorded." James produced a tape of that conversation. James testified that Connie was seeking an order against appellant. The defense did not make any objections to the tape or argue that there had been any sort of discovery violation. (RT 1797-1800.)

The day after James testified about the tape, the defense complained about a letter that was provided to them that day:

> There's also a letter that's being provided today, I believe, for the first time, which, I suppose, we're supposed to utilize in the cross-examination of Mr. Navarro, who has once again come up with some document at the twelfth hour.

(RT 1810.) The defense requested that James be ordered to bring all of Connie's items to court so that the items were not provided "piecemeal." The trial court suggested that the defense could make a motion to exclude the items because of the late discovery, but the defense said that it wanted to review the information first. The defense never complained about the phone machine tape or its late disclosure. (RT 1810-1813.)

The defense cross-examined James about the tape. James said that the tape was from his answering machine from 1983. While he knew that he had

the tape, he had not listened to the tape until the day before he gave it to the prosecutor, which was "maybe a week or so" earlier. James did not want to listen to it at the time of the murders because it caused "me and my son pain to hear her voice," but kept it, "thinking maybe [at] some future time I would want to hear it because it would have her voice on it." James did not give the tape to the police at the time of the murders because he did not know what was on it. Defense counsel discussed the contents of the tape with James, noting that it stated that appellant was harassing and annoying Connie, but that Connie said that appellant had not threatened or harmed her. James responded that he did not remember the words, but suggested that defense counsel play the tape. The defense chose not to do so. (RT 1832-1833.)

On redirect, the prosecutor chose to play the tape to the jury:

[The Prosecutor]: All right. I'm going to play the tape now. [¶] Now, the tape is something that you brought to court that you got from her personal effects?

[James Navarro]: No. That was from my answering machine.

(RT 1847.) The cassette was played with no objection from the defense. (RT 1848.) At the close of the prosecution's case, the defense did not object to the admission of the tape (People's Exhibit 71) into evidence. (RT 2207-2216.)

On Friday, June 15, 1994, the defense had an ex parte meeting with the trial court concerning the tape. Counsel said that since the tape was discovered during trial, they had not received a copy of it. Counsel checked the tape out of evidence two days prior to the ex parte meeting, and had it viewed by two record store employees, who said that the type of tape the conversation was contained on was not manufactured until the 1990's. Counsel called the TDK tape company, who informed counsel that based on the serial and lot numbers, the tape was manufactured in 1992. The company had indicated that

it could send a representative to testify and bring supporting documentation, but they could not do so that day. (RT 2252-2254.)

Counsel said that the tape sounded like a telephone answering machine, but seemed more like a wire tap based on the fact that there are times when the receiver is picked up and there is a dial tone as if somebody is about to place a call, and then the tape is cut off. (RT 2254.)

Counsel indicated that he had located a tape expert that he wanted to have examine the tape, but did not want to take the tape to him without informing that court. TDK had informed counsel that it had an office in Gardena, and that if he brought the tape to them, they might be able to determine where it was manufactured. Counsel requested that after the conclusion of evidence that day, that the court recess until Tuesday morning or afternoon so the tape could be examined. The court agreed to recess the trial until Tuesday morning. (RT 2554-2556.)

Counsel indicated that he would make a copy of the tape to preserve the conversation if the original was destroyed. The people viewing the tape indicated that they would not tape, erase, or delete anything on the tape, but would be doing microscopic analysis to see if things had been added or deleted. (RT 2556-2557.)

On Monday, July 18, 1994, defense counsel again had an ex parte meeting with the court. Counsel indicated that he had taken the tape to Anthony Pellicano, a forensic tape analyst. Pellicano indicated that he wanted to perform a microscopic analysis of the tape because there were more conversations on the tape and because the recording had been "cut on and off at various times and even paused during the conversation." (RT 2671.) Pellicano indicated he would need a week to perform the analysis. The defense requested a continuance for a week so Pellicano could complete the analysis. (RT 2670-2674.)

The court expressed concerns that the analysis may, at best, be of limited relevance:

> What goes through my mind at this point in time is that Mr. Navarro's testimony was obviously, I think, just a part of the testimony the People are going to argue to the jury as evidence that your client, in fact, did the shooting. [¶] The record shows that we have evidence from other friends of Connie Navarro detailing specific instances close to the period of time that, you know, the crime took place, detailing specific acts on the part of your client, which show a pattern of harassment, intimidation, threats, things like that. [¶] The phone is only one small portion of it because Navarro had testified that his wife relayed to him - - his ex-wife, I should say, relayed to him that she was fearful of your client and, in fact, was trying to see how she would get a restraining order. And he then mentioned his attorney might be able to assist her.

(RT 2674-2675.)

The defense claimed that the tape was important because it was "manufactured" and a lie. (RT 2677-2678.) They also argued that James Navarro was not "an insignificant witness." (RT 2675-2679.)

The court stated that it need "some specific preliminary indication" from Pellicano "as to what he's done" to show that there are "problems with the tape." (RT 2679.) The court indicated that it would like an affidavit from Pellicano, and if the court had "a sense that there is something there," it would grant the defense a continuance. Defense counsel indicated that he would drive to Pellicano's office, obtain the affidavit, and return to the court within two hours. (RT 2679-2680.)

The next day, in a hearing held in open court, the prosecutor indicated that he had spoken to James Navarro and that Navarro had recorded the relevant conversation from the tape in his phone machine onto the tape that was brought

to court. The prosecutor further indicated that if the defense had mentioned their concerns about the tape being tampered with, he could have called Navarro and resolved the issue sooner. The prosecutor indicated his willingness to stipulate that the tape that was played in court was manufactured in 1992. He also indicated that he was willing to allow the defense to take the original tape from the phone machine to their expert. The prosecutor stated that the defense had told him that they were taking the position that the call related to 1975 and the restraining order that the defense had previously used to impeach Navarro. However, the prosecutor stated that the fact that Navarro had copied the relevant conversation "impeaches nothing," and was "collateral" and "irrelevant." (RT 2694-2695.)

Defense counsel stated that Navarro's withholding of the original tape created an obligation to investigate the tape. The defense indicated that Pellicano indicated that he could perform a preliminary inspection of the original tape that morning. Counsel asked for a "couple hours" to get the tape to him. Defense counsel stated that if he had known that there was an original tape two weeks prior, they could have performed the tests then. (RT 2695-2698.)

The prosecutor again indicated that he would stipulate that the tape played in the case was manufactured in 1992, but stated that if the defense was going to argue that the original tape and its conversation related to 1975 and the restraining order used to impeach Navarro, he would have to call a "half dozen people that are reflected on the tape that would testify to conversations that they had with Mike Navarro."[30/] The prosecutor cited the time that would be required to call all of these witnesses as an additional ground to bar presentation of this issue pursuant to Evidence Code section 352. He also indicated that he

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30. Defense counsel stated that he had not told the prosecutor that the tape related to 1975. (RT 2699.)

would only enter the stipulation after the court ruled that it was admissible under Evidence Code section 352. (RT 2698-2699, 2701-2703.)

The defense argued that they wanted to impeach Navarro with the fact that the tape was manufactured in 1992, arguing that it was inconsistent with his testimony. The prosecutor responded that if the defense wished to do that, it would place the entire tape into issue, and he would put Navarro on the stand that day and then play the entire original tape. "[I]f they want this entire tape in evidence and played to this jury, I'm prepared to do that and have Mr. Navarro testify to it." However, the prosecutor stated that he believed this was a "nonissue" and they should wait until the defense got Pellicano's opinion before they entered a stipulation. The prosecutor again emphasized he would enter a stipulation regarding the date that the tape was manufactured if the court first ruled that it was not collateral impeachment under Evidence Code section 352. (RT 2703-2706.)

The original tape was marked as People's Exhibit 113. (RT 2700.)

The court indicated that it would not require the prosecution to enter a stipulation until after they heard the expert's opinion and the court had found that the issue of the tape was not collateral under Evidence Code section 352. (RT 2706-2708.)

During subsequent questioning regarding any other items related to Connie and appellant that he might possess, James Navarro made the following statement regarding the phone audiotape:

> In terms of the tape, I never said the tape that I presented was the original. I said that this was a conversation from my answering machine from 1983, which was accurate. [¶] The actual tape contains many messages, some personal for me, some others between Mrs. Hopkins and her grandson, some personal. And what I did was simply transfer what I felt was pertinent to another tape and that's what I brought here.

I never said that was the original tape. I said those were the original conversations.

(RT 2712.) James Navarro further stated:

To me, it was as a very innocent thing. It was to transfer the part that means something and bring that. The tape does have conversation between my son and his mother that I consider very personal and that I wanted to keep and I didn't want to bring something that might - - it has nothing to do with this case.

(RT 2712.)

Later that afternoon, the defense indicated that they wanted to enter the stipulation regarding the date that People's Exhibit 71 was manufactured. The prosecution objected that it was irrelevant and requested that defense counsel to identify any testimony from James Navarro where he stated that People's Exhibit 71 was the original tape. (RT 2741.)

Defense counsel conceded that the "words 'original' were never spoken," but after reading Navarro's testimony regarding the tape, argued that Navarro never stated that the tape was copied. Counsel argued that Navarro "indicated that this was the tape from his answering machine" and "lied." (RT 2741-2745.)

The court issued the following ruling:

Under 352 I think the point that counsel wants to make on this issue, the court finds is a minor point. It's clear from hearing his testimony that - - in fact, I question whether it's impeachment because nowhere does he indicate - - the essence of this testimony is the conversation, the statement. The words that are on the tape are his wife's words speaking to another individual. [¶] I don't think there's any evidence to show that at this point in time that that's not accurate. All we have is that the particular cassette that was presented to the court and as People's 71 was

not, in fact, the cassette on which this conversation was recorded because this particular cassette was not manufactured until 1988. The conversation took place in 1983. [¶] I just don't think that's an issue that would sway the jury one way or the other as to any material point in this trial. That one particular statement, I think, or that one particular area of evidence that was offered by Mr. Navarro as to the conversation that's on this tape is a very small part of what the court sees as the People's case in chief. [¶] Under the Evidence Code, I just don't think it has that much probative value. So the objection will be sustained then. Everybody's position is on the record.

(RT 2746-2747.) Thus, the court found that James Navarro's explanation was credible, was not contradicted by any evidence, and had only minor impeachment value.

In regard to whether they would attack the original tape, the defense indicated that Pellicano had stated that he could not conduct a thorough investigation given the limited time they had. The prosecutor indicated that if the defense challenged the original tape, he would send the tape to an FBI expert in Quantico, Virginia, who indicated he would need two days to form an opinion. (RT 2747-2748.)

The court also rejected the defense's argument that Navarro was a significant witness in the case:

Well, on that aspect, I mean, I don't think this jury is going to place great emphasis or look at, quote, credibility of Mike Navarro. He didn't offer, as far as this court's concerned, relevant testimony as to things that happened. It was neutral quite frankly.

(RT 2750.) The court indicated that the jury was much more likely to focus on the witnesses that testified that they personally saw appellant commit the acts of stalking:

I think much more important, and counsel for the People will probably argue, is the testimony from the one witness who says he was in the restaurant with the victim, Connie Navarro, and another individual, and that the defendant came in, sat down unannounced, sat there for a few minutes while they were talking, and in an awkward pause he identified himself, shook hands. [¶] And then he claims that your client stood up, pointed his finger at Connie Navarro as if he had a gun, and then put the thumb down as if he was shooting off a gun. I mean that to me is much more damaging than anything that Mr. Navarro testified to.

(RT 2751.)

B. The Trial Court's Ruling Did Not Violate Appellant's Rights Under The Confrontation Clause Or The Due Process Clause

The trial court properly exercised its discretion under Evidence Code section 352 to preclude defense counsel from trying to impeach an unimportant witness on a collateral matter which the witness did not actually lie about. Further, the trial court's decision to do so did not violate appellant's rights to confrontation or due process.

The 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." (*People v. Cooper* (1991) 53 Cal.3d 771, 817, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 89 L.Ed.2d 674].) The trial court has "wide latitude" to exclude cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Ibid.*; see also *People v. Hernandez* (2003) 30 Cal.4th 835, 859; *People v. Hines* (1997) 15 Cal.4th 997, 1047.) In order to establish a violation of the Confrontation

Clause, appellant must first show two facts: 1) "that he was prohibited from engaging in otherwise appropriate cross-examination" (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680), and 2) "the prohibited cross-examination might reasonably have produced 'a significantly different impression of [the witness's] credibility . . ." (*People v. Cooper*, *supra*, 53 Cal.3d at p. 817, quoting *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.) Because appellant's argument fails under both prongs, the judgment must be affirmed.

The trial court properly exercised its discretion by limiting counsel's cross-examination of Navarro on the grounds that the proposed cross-examination was irrelevant, or at best, marginally relevant. (RT 2746-2747.) As pointed out by the trial court, Navarro never stated that the tape he brought to court was the original tape, and all of his testimony was consistent with his stated belief that he was only referring to the conversation on the tape as being from his phone machine, not the actual tape itself. (RT 2746-2747.) Therefore, allowing cross-examination on the topic of whether the actual tape or a copy had been brought to court would not catch Navarro in a falsehood, and the court properly precluded counsel from engaging in cross-examination in an area of such marginal relevance.

In his opening brief, appellant cites the following passage as proof that Navarro lied:

[The Prosecutor]: All right. I'm going to play the tape now. [¶] Now, the tape is something that you brought to court that you got from her personal effects?

[James Navarro]: No. That was from my answering machine.

(RT 1847; AOB 104.) This exchange falls woefully short of showing that Navarro "clearly lied" about the origins of the tape itself, as opposed to its content, as claimed by appellant. (AOB 111.) Navarro stated that in his testimony that he was referring to the conversation as being from his answering

machine, not the physical tape itself. (RT 2712.) The trial court found that Navarro's explanation was credible and consistent with his testimony. (RT 2746-2747.) As even defense counsel admitted (RT 2741), there is no place in Navarro's testimony where he stated that the tape that was brought to court was the original tape. Thus, the defense was incapable of impeaching Navarro with the challenged evidence, even if the court had allowed them to try.

Further, appellant can satisfy neither of the two prongs of the test to determine if the Confrontation Clause was violated announced in *Delaware v. Van Arsdall, supra,* 475 U.S. at p. 680. Under the first prong, appellant was not seeking to engage in "otherwise appropriate cross-examination." (*Ibid.*) It is clear from the record that Navarro never stated, as the defense asserted, that the tape he brought to court was the actual tape from his phone machine. As previously argued, since Navarro never made the statements that the defense attributes to him, the trial court did not prevent the defense from impeaching him in any conventional sense of the practice. Thus, appellant cannot establish the first prong of the test.

As for the second prong, the jury would not have had a significantly different impression of Navarro's credibility even if the defense had been allowed to cross-examine him regarding the tape. (*People v. Cooper*, *supra*, 53 Cal.3d at p. 817, quoting *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.) As previously stated, Navarro never testified that the tape he brought to court was the same tape that he took from his machine. He testified that he was referring to the conversation on the tape as being from his answering machine, and the trial court found that explanation to be both credible and consistent with Navarro's testimony. (RT 2746-2747.) Thus, given the existence of this credible, reasonable explanation and that there was no

inconsistency, the jury's perception of Navarro would not have been significantly different.

Also, Navarro's explanation for why he did not bring the original tape to court was convincing. The original tape did contain 16 other messages, one of which was a very long personal conversation between James, David, and Connie, that were not related to appellant's case. (See CT 64-81.) Thus, as found by the trial court, James's statement that he did not produce the original tape because he did not want those unrelated conversations exposed to the public in the trial was credible. (RT 2746-2747.)

Because Connie did not specifically name the person she was seeking a restraining order against on the tape, appellant argues that the taped conversation may have been from the time period in 1975 when Connie was divorcing James Navarro and may be a recording of Connie seeking a restraining order against James. Appellant further speculates that James may have altered the tape to remove any reference to himself. (AOB 116-118.) This argument fails on many levels. First, this was never argued in the lower court. At one point, the prosecutor speculated that this may have been the defense's position (RT 2695, 2699), but the defense denied taking that position, "Well, I don't know where [the prosecutor] got the idea that this tape relates back to 1975 because I never discussed that with him." (RT 2699.)

Additionally, the defense could have argued that the tape referred to James Navarro, and not appellant, even in the absence of the cross-examination that they were precluded from performing. The fact that the tape did not specifically name appellant, and the fact that Connie had obtained a restraining order against James (RT 1828), were in evidence, and appellant could have made the same argument based on those facts. However, appellant's lawyers appear to have rejected that argument in favor of a different tactic. During closing argument, the defense took the position that Connie was

referring to appellant on the tape, and argued that the tape was inconsistent with the testimony of the prosecution witnesses who testified that appellant had been threatening Connie:

> Maybe [the prosecutor] can come up and explain to you why on the tape recording that James Navarro claims that he held so close to his breast for 11 years hoping one day that he'd have the strength to listen to it, why back on March 1st of '83, the day that Connie Navarro was going to see Gerald, the lawyer, did she tell somebody on the telephone, either from the D.A.'s office or from a support group of some sort, why did she tell them, well, I have an appointment to see a lawyer later today about a restraining order? It's not that he has threatened me with my life or even to hurt me, but he bothers me.

(RT 2892.) Thus, it appears that trial counsel believed the tape was more useful as a means of disputing the stalking testimony than it would have been as a tool to attack James Navarro.

On appeal, appellant also appears to take the position that the tape could have been used to suggest that James was the killer. (AOB 113, 117.) The evidence would not have been admissible for that purpose. A defendant may present evidence of third-party culpability if the evidence is capable of raising a reasonable doubt about his or her guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 264). However, this does not mean that any evidence, no matter how remote, must be admitted to show a third party's possible culpability. (*People v. Hall, supra*, 41 Cal.3d at p. 833.) There must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime for such evidence to be admissible. (*People v. Pride, supra,* 3 Cal.4th at pp. 237-238; *People v. Clark* (1992) 3 Cal.4th 41, 131; *People v. Hall, supra*, 41 Cal.3d at p. 833; *People v. Von Villas, supra*, 10 Cal.App.4th at pp. 264-265.) Assuming that the defense

was able to prove that James Navarro altered the tape, it still would not link him to the killing of Connie Navarro. Thus, to the extent that appellant wanted to use the tape as evidence of James' third party culpability, it was properly excluded.

For the same reasons, appellant's argument that his right to due process was violated also fails. Application of the normal rules of evidence, including the application of Evidence Code section 352, do not infringe on a defendant's right to due process. (*People v. Frye* (1998) 18 Cal.4th 894, 948.) A reviewing court will disturb a trial court's exercise of discretion under Evidence Code section 352 only if the court acted in "an arbitrary, capricious or patently absurd manner." (*Ibid.*) For the reasons stated above, the trial court did not abuse its discretion by finding that the proposed cross-examination would divert the jury's attention to extraneous matters and necessitate undue consumption of time. (Evid. Code § 352; *People v. Frye, supra,* at p. 948.)

Additionally, the impeachment would have "necessitate[d] undue consumption of time." (Evid. Code, § 352.) The defense had requested an additional week to continue their testing, and the prosecution indicated it would need time to have the tape reviewed by the FBI and that it would call a "half dozen" additional witnesses to verify the tape. Given that the tape was of limited relevance to begin with, and that allowing impeachment of Navarro would necessitate the consumption of a considerable amount of time, the court did not abuse its discretion under Evidence Code section 352 by precluding that impeachment.[31/]

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31. Appellant repeatedly attempts to blame the prosecution for failing to turn over the tapes to the defense "with the normal discovery," asserting that the late introduction of the tape as a "discovery violation." (AOB 121-122.) However, trial counsel did not fault the prosecutor for the late disclosure:

> I'm not saying that [the prosecutor] did it at the last minute. I'm sure he gave it to us the minute he got it. But this witness made the decision of when to bring it in and when not to bring it in.

Thus, appellant's rights to confrontation and due process were not violated by the trial court's decision to preclude them from cross-examining James Navarro about People's Exhibit 71. Since Navarro never testified in the first instance, or ever, that People's Exhibit 71 was the original tape from his answering machine, the defense would not have been able to impeach him with a falsehood. Further, Navarro had an explanation for why he did not bring the original tape to court, which the trial court found to be credible. (RT 2746-2747.) The defense was not precluded from arguing that Connie was referring to someone other than appellant on the tape. Finally, the evidence was not admissible as evidence of James Navarro's third party culpability for the murders. Because the defense was not precluded from conducting otherwise appropriate cross-examination, and the jury would not have had a significantly different view of Navarro if the proposed cross-examination had occurred, appellant's constitutional rights were not violated.

C. Any Error Was Harmless

Before there can be a reversal of a conviction based upon improper admission or exclusion of impeachment material under state law, the reviewing court must be able to conclude that it was reasonably probable that a result more favorable to appellant would have occurred in the absence of error. (*People v. Steele* (2000) 83 Cal.App.4th 212, 224-225; see also *People v. Frye, supra,* 18 Cal.4th 894, 946; *People v. Watson, supra,* 46 Cal.2d at p. 836.) Errors under the federal Constitution require reversal unless the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall, supra,*

(RT 2679.) The record does not indicate that the defense moved for sanctions against the prosecution due to the late disclosure of the tapes. Consequently, this Court should not be swayed by appellant's implied argument on appeal that the prosecutor violated the discovery rules.

475 U.S. at p. 684, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Whether such an error is harmless in a particular case depends upon a host of factors, including: 1) the importance of the witness' testimony in the prosecution's case, 2) whether the testimony was cumulative, 3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, 4) the extent of cross-examination otherwise permitted, and 5) the overall strength of the prosecution's case. (*Id.* at p. 684.) In this case, assuming arguendo that the trial court erred in limiting the cross-examination of James Navarro, any resulting error was harmless under both the state and federal standards. (See *People v. Steele, supra,* 83 Cal.App.4th at pp. 224-225.)

James Navarro was not an important witness in this case. While he did give some testimony concerning appellant's stalking behavior, the only events of which he had first hand knowledge was the fact that appellant would drive by Connie's home on his motorcycle when James was there, and that appellant would show up at events that Connie and James had planned. (RT 1788.) In and of themselves, these two events were relatively minor. As pointed out by the trial court, the testimony of Marilyn Young, George Hoefer, and Craig Spencer, all of whom stated that they had personally seen appellant threaten, or act in a threatening way toward Connie, were more important witnesses than James Navarro. (RT 2750-2751.) To the extent that James testified about the incident where appellant forced Connie to go to a motel, which occurred only during the defense cross-examination, his testimony was duplicative of Marilyn Young's testimony. (RT 1696-1699.) Thus, James's testimony regarding the stalking did not make him an important witness.

Appellant contends that James was an important witness because he was the only witness who testified that Connie's face was covered with a pillowcase

at the time her body was discovered. (RT 1795; AOB 115.) Again, this was a minor point. While the prosecutor did mention this fact in his closing argument (RT 2828), the fact that Connie's face was covered did not directly implicate appellant as the killer. Further, the case against appellant would have been just as strong even if James's testimony on that point had been impeached or even excluded.

James' testimony was largely cumulative. Marilyn Young, George Hoefer, and Craig Spencer all testified concerning appellant's stalking behavior. The two incidents of stalking of which James had personal knowledge were relatively minor. Additionally, his testimony concerning the crime scene was corroborated by the police investigators who responded to the scene. Again, the point about Connie's face being covered was inconsequential. Further, to extent that James' testimony was cumulative, it was well-supported by the testimony of the other witnesses in the case, thus satisfying the third, as well as the second, prong of the test for harmlessness.

The defense was given free rein to cross-examine James on any topic other than the audiotape. (RT 1814-1842.) In fact, the court overruled the prosecutor's objection when defense counsel impeached Navarro with the restraining order that Connie had sought against him in 1975. (RT 1825-1828.) Thus, with the exception of this one topic, the defense was allowed extensive cross-examination of James Navarro.

Finally, the evidence of appellant's guilt was overwhelming. His fingerprints were found in the immediate vicinity of Connie's body. (RT 1323, 1543-1588.) His prior acts and statements established that he had the motive to kill her. The prosecution proved through the testimony of Stephanie Brizendine that he was armed immediately before her death, and that he left Tampico Tilly's with sufficient time for him to get to Connie's condominium by the estimated time of Connie's and Jory's deaths. (RT 1892.) Appellant's

step-mother and burglary partner both testified that he had admitted his culpability for the crimes. (RT 1966-1969, 2163-2175.) Further, appellant had no support for his alibi and fled the day after the murders. Appellant argues that the case against him was entirely circumstantial (AOB 119), but the fact that the prosecution presented two witnesses to testify concerning appellant's admission of guilt undermines that assertion.

All five of the factors for evaluating harmless error are in favor of the prosecution's case. Thus, any error in limiting appellant's cross-examination of Navarro was harmless.

D. The Trial Court Properly Denied The Defense's Request For Another Continuance

Appellant makes the related contention that the trial court erred by denying him a continuance to have Pellicano further test the original tape for evidence of falsification. (AOB 122-131.) Again, appellant's claim is meritless. Given that the trial court had ruled that the audiotape from the telephone was an immaterial collateral matter, appellant did not have had good cause for a continuance.

The decision whether to grant a continuance in the midst of trial traditionally rests within the sound discretion of the trial judge "who must consider not only the benefit which the moving part anticipates but also the likelihood that such benefit will result, the burden on the witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1125-1126; *People v. Zapien, supra,* 4 Cal.4th at p. 972.) In order to be entitled to a reversal of his conviction, appellant must show both an abuse of discretion and resulting prejudice. (*People v. Barnett, supra*, 17 Cal.4th at p. 1126.)

The trial court did not abuse its discretion by denying the defense a continuance to pursue a minor issue of impeachment regarding a minor prosecution witness. As pointed out by the court, Navarro was not an essential witness for the prosecution. Most of Navarro's testimony was cumulative of other witnesses. Further, the alleged impeachment was on a minor point. Navarro never claimed that the tape he first brought to court was the original tape, and the trial court indicated that it found Navarro's explanation to be credible. Thus, given the minor importance of the witness and the nature of the impeachment, substantial justice was not denied by denying the defense a continuance. (*People v. Barnett, supra,* 17 Cal.4th at p. 1126; *People v. Zapien, supra,* 4 Cal.4th at p. 972.)

Appellant contends that the "preliminary testing showed that the tape had been altered." (AOB 129.) The record does not substantiate that point. The court indicated to defense counsel that it wanted a declaration from Pellicano substantiating defense counsel's statements that the tape, or more importantly, the conversation contained on the tape had been altered. (RT 2679-2680.) Even though defense counsel indicated that he would obtain such a declaration, nothing in the record indicates that he ever provided it to the court. Therefore, on this record, the defense never substantiated its claims that the preliminary examination of the tape showed that it was manufactured or tampered with. Consequently, the trial court did not abuse its discretion denying the continuance since there was nothing aside from counsel's self-serving statements to show that the preliminary testing demonstrated that the tapes were altered or tampered with.

Also, appellant has not shown that he was prejudiced by the denial of the continuance. Nothing in the record indicates that further testing would have proven that Navarro altered or manufactured the tapes. (See *People v. Barnett, supra,* 17 Cal.4th at pp. 1125-1126; *People v. Zapien, supra,* 4 Cal.4th at

pp. 972-973.) Consequently, there is "no basis for concluding, therefore, that the defense's proposed testing would have produced relevant evidence." (*People v. Barnett, supra,* 17 Cal.4th at p. 1126.)

IV.

THE TRIAL COURT PROPERLY ADMITTED HEARSAY STATEMENTS CONCERNING CONNIE'S FEAR OF APPELLANT AND ANY ERROR IS HARMLESS

Appellant contends that his Sixth Amendment right to confrontation was violated by the admission of statements concerning Connie Navarro's fear of him. (AOB 133-149.) The statements were relevant and properly admitted pursuant to Evidence Code section 1250 because Connie's state of mind was brought into issue by appellant. Further, any error was harmless.

A. Relevant Proceedings

The prosecution moved to introduce evidence of appellant's stalking behavior in regard to Connie Navarro pursuant to Evidence Code section 1101, subdivision (b). (CT 514-527.) The prosecution indicated that it wanted to introduce evidence of appellant's behavior and relationship with Connie immediately before the murders to demonstrate motive and intent. (CT 515-517.) The court granted the motion. (RT 1150.)

The defense filed an In Limine Motion To Exclude Evidence Concerning The Victim's Alleged Fear Of The Defendant. (CT 358-364.) Appellant argued that the evidence of Connie's fear of appellant was not relevant to any fact in dispute in the case and should be excluded. (CT 360-363.)

The prosecution filed a Response To Motion To Exclude Evidence Of Victim's Fear Of Defendant Riccardi. (CT 530-537.) The prosecution argued that the evidence of Connie's fear was admissible to show her behavior in conformity with her fear pursuant to Evidence Code section 1250. The prosecution also argued that the statements would be relevant to prove that Connie did not allow appellant into her condominium on the night of the

murder. (CT 531-532.) The prosecution also argued that hearsay statements regarding specific instances of conduct were not hearsay because they were not being admitted to show the truth of the matter asserted, but to circumstantially prove Connie's fear. (CT 532.)

The trial court denied the defense's motion to exclude these statements. It held that the evidence was relevant to show that Connie took actions in conformity with her fearful state of mind. Further, the court found that the probative value of the evidence outweighed any prejudicial effect it might have. (RT 1155-1156.)

1. Stalking Evidence

The prosecution introduced evidence that after Connie broke off her relationship with appellant, he began to follow and harass her. Marilyn Young testified that appellant would call her and ask about what Connie was doing. He said that he would not be "responsible" for what he would do if her saw her with someone else. (RT 1689-1690.)

Carl and Janet Rasmusson testified that Connie was having "problems" with appellant toward the end of 1982. In early 1983, Connie told Carl that she had broken up with appellant and that she was very upset and scared. Connie asked the Rasmussons to watch her condominium because she believed that she was being followed and that appellant had broken into the condominium. At one point, Carl told appellant that he was scaring Connie and that he should "be a man" and leave her alone. (RT 1502-1517.)

A few weeks before the murders, Connie had her locks changed and invited Carl Rasmusson to come look at the lock on the upstairs sliding glass window. Connie said that appellant was breaking into the condominium through the second floor patio. The bolt that locked the door had been

"sawed almost completely through." Connie asked Rasmusson to watch out for appellant. Connie had an alarm system installed. (RT 1506-1509, 1690-1691.)

George Hoefer testified that after he had drinks with Connie, an angry man with a New York accent called him. The man identified himself as Connie's boyfriend and threatened to break Connie's knees if he saw her with Hoefer again. During a second call, the man told Hoefer to fly out of Los Angeles and asked how Hoefer would like it if the man visited Hoefer's wife. (RT 1614-1624.)

Marilyn Young testified that appellant would appear at Connie's gym and stand in front of the window and stare at her. Young testified that on four or five occasions, appellant would just "show up" at events where Connie was. One time, appellant showed up at Connie's condominium and watched her leave with Young and her husband. On another occasion, while Young was eating with Connie, appellant appeared at the restaurant and stared at Connie until she invited him to join them. (RT 1691-1696, 1700-1703.)

Craig Spencer testified that when he had breakfast with Connie and Sue Jory one morning, appellant entered the restaurant and sat across from Spencer and stared at Connie for three to four minutes. Appellant positioned his hand like it was gun, and gestured like he was shooting Connie. (RT 1670-1675.)

David Navarro testified that appellant broke into Connie's condominium with a gun, and handcuffed David in the bathroom. Appellant said that he was very upset and that he was going to talk to Connie and then kill himself. (RT 1356-1376.)

2. Appellant's Testimony

During the defense case, appellant gave a very different account of his relationship with Connie after their breakup and before her murder. Appellant testified that in January 1983 (after the breakup), he and Connie were still

friendly and saw each other 15 to 20 times. Appellant saw less of Connie in February because he went to New York for a week or two. (RT 2313-2322, 2330-2331.)

Appellant denied that he ever "barged into" Connie's home while James Navarro was there. Appellant was introduced to James Navarro, but James acted like he wished appellant was not there, so appellant went to a different part of the house until he left. Appellant only saw James Navarro when he came to pick up David. (RT 2309-2310.)

Appellant remembered talking to George Hoefer, but never threatened him. Appellant went to a restaurant with his friends where he saw Connie with Hoefer, but he left the restaurant when he saw Connie was there. Appellant stopped by Connie's condominium afterwards. Hoefer called, and appellant answered the phone and asked how Hoefer would like it if he called his wife and let her know that Hoefer was taking other women out. Appellant did not know where Hoefer was staying and did not call his hotel. (RT 2322-2326, 2328-2329, 2472-2481.)

Appellant denied kidnapping Connie in February of 1983. He met her at a restaurant, and she agreed to get in his car and go to his apartment so they could talk. Appellant did not pull a gun or threaten her. Connie made calls to Young and James Navarro. Appellant and Connie stayed at the apartment because Connie got "very affectionate." They went to a restaurant and then stayed at a hotel in Santa Monica or the Marina. (RT 2331-2340.)

On another occasion, appellant was in Venice to meet another woman, and to look at a restaurant. After visiting the restaurant, he walked by Gold's Gym and a car pulled up. Connie rolled down the window and asked what appellant was doing. They had a conversation, and then appellant went off to have lunch. He wound up seated at a table next to Young and Connie. Appellant asked Connie if she was uncomfortable, and she said no. Young and

Connie stayed while appellant ate, they had a pleasant conversation, and they all left together. Appellant did not follow Connie, but only encountered her by accident. (RT 2340-2349.)

Appellant denied Craig Spencer's testimony. While he was jogging, appellant saw Connie and Susan Jory enter a restaurant. When he finished his jog, he checked to see if they were still there. Appellant walked to their table and greeted them and was introduced to Spencer. Connie asked him to sit, and appellant stayed for about ten minutes. Appellant did not point his finger at Connie as if he were firing a gun. (RT 2361-2362, 2367-2369, 2481-2488.)

Appellant followed Connie only one time. He was driving down Greenfield on his way home and he saw Connie getting into a car with Sid and Marilyn Young. Appellant would drive past Connie's home in hopes of seeing her. He was right behind them until they got on the freeway. Appellant did not intend to follow her because he knew it would annoy her. (RT 2362-2367.)

Appellant admitted breaking into Connie's condominium in February of 1983. Appellant was still in love with Connie and feeling suicidal. David came into the room and said, "I thought someone was breaking into the house." Appellant said no, and asked where Connie was. David said she would be back shortly. Appellant and David went downstairs and watched television. When Connie's car pulled up, appellant told David to go to his room because he planned to kill himself. Appellant walked David upstairs. David appeared to be in a good mood and was not frightened. Appellant denied handcuffing David. (RT 2349-2358.)

Connie said he was calling her to the point of being a nuisance at one point. However, she later got upset with him when he went to New York without telling her. When appellant went to New York in February 1983, he and Connie kept in touch by phone. She would make the calls about half of the

time. Appellant was confused and did not understand why she was calling him suddenly. (RT 2369-2372.)

A day or two prior to the killings, appellant had breakfast with Connie and Young. Appellant wanted to talk to Connie alone and they went to a table by themselves. Appellant discussed a "nice" letter that Connie had written and said that if he knew that she had felt that way, he would not have been as "bothersome." Appellant claimed that Connie had mailed the letter and he had not broken into her home to take it. Appellant was not angry at Connie, but he was suicidal. (RT 2372-2376, 2379-2381, 2493-2495.)

3. The Arguments Of Counsel

In his opening statement, the prosecutor argued that appellant's motive to kill Navarro would be proven by appellant's stalking of her prior to the murders. (RT 1192-1198.) The defense disputed this characterization of appellant's relationship with Connie, stating:

> But what the evidence is going to show is that there was no stalking of Connie Navarro. You'll hear, you'll see, that what there was was a sincere and genuine effort of a man who loved a woman very much to try to salvage a relationship that was important to him.

(RT 1205.) Counsel argued that the evidence would show that Connie and appellant mutually called and saw each other in January of 1983. He argued that when appellant left for New York in February of 1983, Connie became concerned and they met. "There were not plans to get back together, but the possibility was left open to him that one day they would get back together." (RT 1212.) Counsel argued that as late as March 2, 1983 (the day before the murders), Connie had not "close[d] the door immediately on closing the relationship." She said that she needed "time to assess where I am and what

I want." (RT 1204-1214, 1223.) Thus, defense counsel argued that appellant had no motive to kill Connie Navarro the next day.

During closing argument, the defense argued that appellant and Connie's relationship was not hostile. He argued that in January "Connie and [appellant] are having breakfast, lunch, dinner, movies. [Appellant] was over at the house for dinner." (RT 2923-2924.) The defense argued that Connie was not frightened of appellant:

> [The prosecutor] can say, well, she was just too frightened to say no. She was just too upset. Well, come on. If a man has threatened to hurt you that bad and he's threatening to kill the people that are around you, are you going to see him 13, 14, times within 27, 26 days? That's a lie.

(RT 2924.) Based on Connie's letters, counsel argued that they had a "close relationship." (RT 2925.)

The defense then went on to dispute that appellant was "stalking" Connie and that Connie was scared of appellant. Counsel argued that the appellant's relationship to Connie was "dysfunctional," but there was interest on the part of both appellant and Connie. Counsel stated that many of the alleged stalking incidents were Connie's attempts "to justify her contact with appellant." (RT 3010.) Counsel went on to argue that the stalking incidents testified about by prosecution witnesses were exaggerated. (RT 3003-3015, 3021-3033.)

4. The Testimony Challenged On Appeal[32/]

a. Testimony Of Marilyn Young

Marilyn Young testified that Connie changed her locks because she had been informed that appellant had broken into her condominium. Connie discovered that the lock to the door on her patio had been cut and she was "frightened." (RT 1691.) The Friday prior to the murders, Connie stopped staying at her condominium. (RT 1683-1691.)

Young testified that Connie made an appointment to meet appellant. Young was supposed to pick Connie up after the appointment, but Connie was not there. Connie called Young's home, and told Young's daughter that she was going with appellant to Laguna for the weekend. Connie later told Young that appellant grabbed Connie, took her to his car, produced a gun, and took her to a motel. (RT 1696-1698.)

Connie said that she got a restraining order against appellant. (RT 1698.) Connie stayed with Young on the Friday before the murder because she did not want to go home. Connie and Young stayed in Laguna for the weekend. When they returned, Connie began to spend the night at her ex-husband's house. Connie had said that appellant had been watching her from one of her closets when she went home to pick up her clothes. (RT 1698-1700.)

On the day before the homicides, Connie and Young had breakfast. Appellant entered the restaurant, and Connie became angry and asked, "Why did you break my alarm? Why did you disconnect my alarm? And why did you break into my house?" (RT 1702.) Appellant initially denied breaking into her home, but then admitted he had. Appellant showed her a letter he took

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32. Appellant only discussed the following testimony in his Opening Brief. Thus, Respondent assumes that this is the only testimony he is challenging on appeal. (AOB 135-137.)

from the house where Connie told him she cared about him. Appellant got "sentimental" and told Connie that he would leave her alone. (RT 1701-1702.)

b. Trial Testimony Of James Navarro

James Navarro testified that Connie was having problems with appellant, and asked him if he knew an attorney who could help her obtain a restraining order. Under cross-examination, Navarro testified that Connie told him appellant had kidnapped her at gunpoint. (RT 1797, 1849.)

B. Connie's Fear Of Appellant Was At Issue In The Case

Connie's fear of appellant was a relevant issue in the case. The nature of appellant's relationship with Connie, and whether she feared him, was a major issue in contention from the beginning of the trial.

The prosecution introduced evidence of appellant's behavior in relation to Connie prior to the homicides pursuant to Evidence Code section 1101, subdivision (b).[33/] The prosecution argued that the evidence was relevant to

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33. Evidence Code section 1101 states:
(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

showing appellant's motive and intent. In a murder case where the defendant had a romantic relationship with the victim, the defendant's stalking or threatening behavior is admissible pursuant to Evidence Code section 1101, subdivision (b) to show motive, intent, and identity. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 576 [admitting evidence of appellant's prior relationship with and stalking of the victim as evidence of motive]; *People v. Cartier* (1960) 54 Cal.2d 300, 311; *People v. De Moss* (1935) 4 Cal.2d 469, 473 ["quarrels and separations of the parties, together with the threats of defendant, establish sufficient motive for the killing . . ."]; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1610-1614; *People v. Zack* (1986) 184 Cal.App.3d 409, 413-416.) The prosecution introduced the evidence to show that appellant was terrorizing and stalking Connie Navarro because she had ended her relationship with him. The prosecution argued that this showed appellant's motive and intent to kill her. (CT 515-517.) Thus, the evidence of appellant's actions toward and relationship with Connie Navarro in the months leading up to her murder were properly admitted.

During its opening statement, the defense made it clear that it would dispute the evidence of appellant's stalking behavior. Where the prosecution painted a picture that appellant was stalking and terrorizing Connie, the defense argued that their encounters were consensual and that Connie sought appellant's attention. In fact, the defense argued that Connie had indicated to appellant that she was considering getting back together with him the day before the murder. The defense stated that this demonstrated that appellant had no motive to kill Navarro. (RT 1204-1214, 1223.)

Thus, Connie's fear of appellant was an issue in dispute in this case. In *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, another case where the

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(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

defendant had a prior romantic relationship with the victim, the court held that evidence of the victim's fear of the defendant was admissible because "the nature of the relationship" prior to the murder was in issue. (*Id.* at p. 593.) The plaintiff contended that the victim and the defendant were "engaged in a deeply emotional, tense, angry conflict in the weeks leading up to the killing," while the defense "denied all of this conduct" and argued that the relationship was not "acrimonious." (*Id.* at pp. 592-593.) Because the defendant was contesting the nature of his relationship with the victim, the victim's state of mind was relevant and statements concerning her state of mind were admissible pursuant to Evidence Code section 1250. (*Id.* at pp. 592-596.) Thus, by arguing that Connie was consensually seeing appellant, calling him on her own volition, and considering reentering a relationship with him at the time immediately before the homicides, the defense made Connie's state of mind a relevant issue in the case.

C. Connie's Statements Of Fear Were Properly Admitted Pursuant To Evidence Code Section 1250

Connie's statements to her ex-husband and Marilyn Young[34/] that she feared appellant were admissible as declarations regarding her state of mind pursuant to Evidence Code section 1250.[35/] "[A] statement of the declarant's

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34. As previously noted, these are the only statements appellant appears to be challenging on appeal, since they are the only ones discussed in the Opening Brief.

35. Evidence Code section 1250 provides:
(a) 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:

then-existing mental state is admissible only if the declarant's state of mind is an issue in the case, or if the statement is relevant to prove or explain acts or conduct of the declarant." (*People v. Arcega* (1982) 32 Cal.3d 504, 526-527.) In the instant case, Connie's state of mind, and her actions in conformity with that state of mind, i.e. her fear, were in dispute.

The prosecution admitted two types of evidence concerning Connie's fear of appellant. There were direct statements made to witnesses where Connie stated that she was afraid of appellant. (RT 1691.) The prosecution also admitted statements concerning actions Connie took which circumstantially showed her fear of appellant. (RT 1683-1698, 1797.) The former statements of Connie's fear were admissible pursuant to Evidence Code section 1250 as statements concerning her state of mind. The second type of evidence was not hearsay, because they were not admitted for the truth of the matter asserted, but to prove her fear inferentially. (See *Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 591.)

Appellant challenges the admission of Connie's statements of her fear of appellant to Marilyn Young and James Navarro. (AOB 135-137.) Appellant contends that the evidence was inadmissible because "no conduct of Connie Navarro 'in conformity with her fear' of appellant was in dispute.'"

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(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.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

(AOB 139.)[36] Because Connie's state of mind was placed in issue by appellant's contentions that his relationship with her was not hostile, the statements were admissible "without limitation." (*People v. Cox* (2003) 30 Cal.4th 916, 962.) Appellant cites to numerous cases where a victim's statements of fear regarding the defendant were held to be inadmissible. (See *People v. Noguera, supra,* 4 Cal.4th 599; *People v. Ruiz* (1988) 44 Cal.3d 589; *People v. Armendariz* (1984) 37 Cal.3d 573; *People v. Arcega, supra,* 32 Cal.3d 504; *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*).) In all of the those cases, the evidence was held to be inadmissible because the victim's state of mind was not a contested issue. Unlike the instant case, the defendants in those cases were not contesting the nature of their relationships with the victims. (See *Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 595 [finding *Ireland, Arcega, Armendariz, Ruiz,* and *Noguera* inapplicable].) Thus, the evidence is relevant to the instant case in a way it was not in those cases.

Appellant also challenges the statements concerning Connie's actions that circumstantially showed her fear. Appellant contends that the prosecutor argued for admission of the statements to prove that Connie "changed the locks on her residence, moved temporarily to reside with her ex-husband, went to Laguna Beach, talked to someone about a restraining order, and wrote a letter to appellant about her fear." (AOB 139.) Appellant has inverted the

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36. At the pretrial hearing, the prosecution argued that Connie's fear was admissible to show that she did not consensually allow appellant to enter her condominium on the night of the murders. (RT 1151-1153.) In his Opening Brief, appellant rejects this as a ground for admission of Connie's statements of fear because the defense did not contest that the condominium was broken into by the murderer. (AOB 139.) At the time of the hearing regarding admission of Connie's statements of fear, defense counsel argued that he most likely would not argue this theory at the trial. (RT 1151-1152.) However, he did leave the door open for the defense to argue this point depending on how the evidence evolved during the trial, and the issue was never completely abandoned by the defense. (RT 1154-1155.)

prosecution's argument. The prosecution argued that it was offering "statements that [Connie] was going to start locking her door, change her locks and seek a Temporary Restraining Order . . . not . . . to prove that she actually did lock her door etc. Rather, it constitutes circumstantial evidence of her state of mind, through which certain reasonable inferences can be drawn regarding her subsequent conduct." (CT 532.) The prosecution was not admitting the statements to prove these facts, but was using these statements to inferentially prove Connie's state of mind. Therefore, the statements were not hearsay. (See *Rufo v. Simpson, supra,* 86 Cal.App.4th at p. 591.)

Appellant contends that the evidence was admitted so "the jury would use evidence of the victim's mental process to prove appellant's state of mind, and to prove that the appellant acted in conformity with that state of mind." (AOB 146.) This is untrue. The prosecution was able to prove appellant's threatening behavior through the direct testimony of Marilyn Young, David Navarro, James Navarro, George Hoefer, and Craig Spencer. They did not need to introduce Connie's statements of fear to prove that appellant was threatening her. Instead, the statements were admitted to rebut appellant's claim that their relationship was not hostile, and that she was still considering getting back together with appellant on the day before the murder. (RT 1204-1214, 1223.)

Because Connie's state of mind was placed in issue by the parties' dispute over the nature of her relationship with appellant, the evidence of her fear of appellant was admissible. Therefore, contrary to appellant's contention, the trial court did not err by admitting the evidence.

D. Appellant's Right To Confrontation Was Not Violated By The Admission Of Connie's Statements Concerning Her Fear Of Appellant

Appellant contends that his right to confrontation under the Sixth Amendment of the United States Constitution was violated by admission of Connie's statements that she feared appellant. (AOB 147; Supp. AOB 7-9.) Appellant contends that the statements were testimonial and could not be admitted without the declarant being subjected to cross-examination under *Crawford, supra,* 124 S.Ct. 1354. (Supp. AOB 7-8.) Appellant also contends that the statements were unreliable under *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 25, 65 L.Ed.2d 597]. (AOB 147.) Appellant's argument is meritless. Navarro's statements to her friend and ex-husband were not testimonial. Further, the statements fell within a firmly rooted hearsay exception and, therefore, had sufficient indicia of reliability to be admitted.

Appellant contends in a conclusory fashion that Connie's statements were testimonial because "an objective observer would reasonably expect her statements to be available for use in a prosecution." (Supp. AOB 7.) However, appellant does not bolster his argument with any analysis.

It is clear based on the criteria listed in *Crawford* that Connie's statements to her best friend, Young, and ex-husband, James Navarro, concerning her fear of appellant were not testimonial. Connie did not make the statements to the police or government officials in the course of a criminal investigation. (*Crawford,* 124 S.Ct. at p. 1364.) "[A]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquantance does not." (*Ibid.*) Further, Connie did not prepare her statements in an affidavit or by another method indicating that she expected to have them used in later litigation. (*Id.* at p. 1364.) Thus, these statements made to Connie's intimate acquaintances were not testimonial under *Crawford.* (See *People v. Griffin* (2004) 33 Cal.4th 536,

579, fn. 19 (statement made by the victim to a friend was not testimonial hearsay).)

The statements about Connie's actions that showed her fear inferentially also were not testimonial. Because the statements were not admitted for the truth of the matter asserted, they involved no hearsay and the rule limiting the admission of testimonial hearsay evidence is inapplicable to these statements. (*Crawford, supra,* 124 S.Ct. at p. 1369, fn. 9.)[37/]

The United States Supreme Court has not clarified how the Confrontation Clause should be applied to non-testimonial hearsay statements, such as these. (*Crawford, supra,* 124 S.Ct. at p. 1370.) One possibility is that the Confrontation Clause does not apply to non-testimonial statements. (*Ibid.*) Under those circumstances, the admission of Connie's statements of fear do not violate appellant's right to confrontation since the Sixth Amendment has no application to such statements.

The other option is that these statements are governed by the procedures in *Ohio v. Roberts, supra,* 448 U.S. 56. Under *Ohio v. Roberts*, a hearsay statement is admissible if it fits within a "firmly rooted" hearsay exception or bears "particularized guarantees of trustworthiness." (*Ohio v. Roberts, supra,* 448 U.S. at p. 66; see *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174-175.) Under this scenario, the statements were

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37. Appellant contends that the trial court erred by not giving a limiting instruction directing the jury to only consider the statements as circumstantial evidence of Connie's fear and not to show that appellant committed threats. (AOB 154.) However, the defense did not request such an instruction. "'When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose,' a trial court is not required to exclude the evidence, but rather 'upon request' is required to give a limiting instruction 'restrict[ing] the evidence to its proper scope.'" (*People v. Griffin, supra*, 33 Cal.4th at p. 579.) In the absence of a request, the trial court did not err by not giving a limiting instruction regarding this evidence. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1050, fn. 6.)

admissible because a statement of a declarant's then existing mental state is a firmly rooted hearsay exception. While respondent has not been able to find a case from a California state court finding that a statement of the declarant's mental state is firmly rooted, there is abundant authority from the federal courts on this point. (See *Hayes v. York* (4th Cir. 2002) 311 F.3d 321, 324-326; *Moore v. Reynolds* (10th Cir. 1998) 153 F.3d 1086, 1107; *Terrovona v. Kincheloe* (9th Cir. 1988) 852 F.2d 424, 427; *Barber v. Scully* (2d Cir. 1984) 731 F.2d 1073, 1075; *Lenza v. Wyrick* (8th Cir. 1981) 665 F.2d 804, 811.) Thus, because the statements fell within a firmly rooted hearsay exception, reliability could be inferred without any further showing. (*Ohio v. Roberts, supra,* 448 U.S. at p. 66.)

Appellant's right to confrontation was not violated by the admission of Connie's statements concerning her fear of appellant. The statements were not testimonial, and they fell within a firmly rooted hearsay exception. Consequently, their admission did not violate the Sixth Amendment.

E. Any Error In Admitting The Statements Was Harmless

Finally, any error in admitting Connie's statements that she feared appellant were harmless. This Court has applied the *Chapman*[38] standards when determining whether the admission of victim statements of fear were harmless. (*People v. Noguera, supra,* 4 Cal.4th at p. 623 [finding error harmless under the *Chapman* standard].) Assuming there was error, it was harmless under any standard.

The admission of Connie's statements of fear in this case was not prejudicial. The jury heard testimony that appellant repeatedly followed Connie, threatened men that were seen with her, broke into her home and

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38. *Chapman, supra*, 386 U.S. at p. 24.

handcuffed her son, pointed his finger at her like it was a gun and gestured as if shooting her, and appeared uninvited at her home. The only evidence produced to controvert the prosecution's damning evidence of stalking was appellant's own self-serving denials. In light of all this evidence of appellant's threatening behavior, hearsay statements to the effect that Connie was afraid of appellant were unremarkable at best. In fact, based on the evidence, the jury almost certainly inferred her fear prior to ever hearing the statements expressly stating her fear. Because the statements of Connie's fear were largely cumulative of other properly admitted evidence to the same effect, the admission of these statements was harmless. (See *People v. Noguera, supra,* 4 Cal.4th at pp. 622-623 [error harmless where much of erroneously admitted testimony was heard by the jury through other witnesses].)[39]

Further, as previously stated, the evidence of appellant's guilt was overwhelming. The prosecution proved that appellant had stalked the victim for months prior to the murder. Appellant's fingerprints were found in the immediate vicinity of her body. Appellant was seen with a gun shortly before the homicides. Appellant had no evidence to support his alibi other than his own self-serving testimony. Appellant fled Los Angeles the day after the murders. Finally, appellant admitted his guilt to his burglary partner and his father. Given these facts, the admission of Connie's statements of fear were harmless under the *Chapman* standard.

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39. Appellant argues that the statements were not cumulative of other evidence in his harmless error argument concerning the erroneous admission of these statements under the hearsay rules and the Confrontation Clause. (AOB 149.) However, appellant contradicts himself in the next section of his brief where he argues that the trial court erred pursuant to Evidence Code section 352 by admitting the statements because they were cumulative of other properly admitted evidence. (AOB 152.)

V.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 IN REFUSING TO EXCLUDE THE STATEMENTS OF CONNIE NAVARRO'S FEAR BECAUSE ITS PROBATIVE VALUE OUTWEIGHED ITS PREJUDICIAL EFFECT

Appellant argues that the trial court erred by not excluding Connie's statements of fear pursuant to Evidence Code section 352 because their prejudicial effect outweighed their probative value. Appellant argues that this error under the state evidence code also violated his federal right to due process. (AOB 150-154.) Appellant's current argument fails for the same reason his prior argument failed. By stating in his opening statement that his relationship with Connie was not hostile and that she was mutually agreeing to see him, appellant placed her state of mind in relation to him at issue. Thus, the probative value of her statements of fear outweighed any prejudicial effect.

Appellant's argument is premised on the theory that Connie's "conduct and state of mind were not in dispute." (AOB 152.) As previously discussed, the defense made her conduct and state of mind relevant in their opening statement when defense counsel argued that Connie was seeing appellant consensually and was considering getting back into a relationship with him on the day before the homicides. (RT 1204-1214, 1223.) Given that appellant was contesting the nature of his relationship with Connie, the evidence of her often stated fear was very much in dispute and relevant to the proceedings. (See *Rufo v. Simpson, supra,* 86 Cal.App.4th at pp. 591-596.) "Appellant was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship and their parting were peaceful and friendly." (*People v. Zack, supra,* 184 Cal.App.3d at p. 415.)

In asserting that the statements of Connie's fear were not probative, appellant argues they were cumulative of other evidence and "not necessary to

the prosecutor's proofs." (AOB 152.)[40/] Merely because there was additional evidence supporting the prosecution's version of the facts does not make Connie's statements inadmissible under Evidence Code section 352. "Evidence may be relevant even though it is cumulative." (*People v. Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.) "[T]rial courts are not required to exclude all cumulative evidence and if evidence has substantial relevance to prove material facts which are hotly contested and central to the case, it is not 'merely cumulative.'" (*People v. Lang* (1990) 49 Cal.3d 991, 1016.) Here, the nature of appellant's relationship was relevant to appellant's motive for killing Connie, and the defense chose to contest the prosecution's evidence concerning the relationship. Consequently, the evidence went to a material fact which was hotly contested and central to the case.

Appellant contends that the evidence of Connie's fear was prejudicial because the jury might "consider [the victim's] statements as evidence not only of her mental state but also of that of defendant i.e. of the fact that he actually threatened to kill her." (AOB 153, quoting *People v. Green* (1980) 27 Cal.3d 1, 26.) As previously stated, the prosecution proved by other evidence that appellant had threatened Connie. The jury heard of appellant's persistent stalking of Connie, the fact he pointed his finger at her as if he were shooting her, the fact that he broke into her condominium and handcuffed her son in the bathroom, and the fact that he threatened to break her legs if he saw her with George Hoefer. Given this evidence, Connie's statements that she feared appellant were hardly shocking or particularly prejudicial under Evidence Code section 352. This Court acknowledged in *Green* that the admission of statements of a victim's fear are not unduly prejudicial when they are "cumulative of other properly admitted evidence to the same effect."

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40. Interestingly, appellant took a contrary position in the prior section of his brief and argued that the evidence was not cumulative. (AOB 149.)

(*Id.* at p. 27.) Thus, because (as appellant admits) the evidence was cumulative of other evidence, it was not unduly prejudicial.

Appellant's argument that the admission of the statement violated due process must also be rejected. This Court has recognized that a trial court's proper exercise of its discretion pursuant to Evidence Code section 352 does not result in a violation of the defendant's right to due process under the federal constitution. (See *People v. Yeoman, supra,* 31 Cal.4th at pp. 141-142; *People v. Jones* (1998) 17 Cal.4th 279, 304-305.) "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Jones, supra,* 17 Cal.4th at p. 305.) Thus, appellant's claim of a due process violation must also be rejected.

Appellant's claim of prejudice is identical to his claim in Argument IV of his brief. Because Evidence Code section 352 is a state evidentiary rule, the harmless error standard applied in relation to this contention is the standard from *People v. Watson, supra*, 46 Cal.2d at p. 836. (*People v. Green, supra,* 27 Cal.3d at pp. 26-27.) However, for the same reasons stated in the harmless error section of the prior argument, appellant's contention must be rejected.

VI.

APPELLANT'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE INTRODUCTION OF HIS ADMISSION OF GUILT TO HIS FATHER

Appellant contends that the trial court violated his rights to confrontation and due process by allowing his stepmother to testify that he admitted to his father that he killed Jory and Navarro. Appellant contends that the statement did not fit within any exception to the hearsay rule and lacked independent indicia of reliability. (AOB 155-172.) In his Supplemental Brief, appellant also contends that this statement was "testimonial" under *Crawford, supra,* 124 S.Ct. 135. (Supp. AOB 8-9.) The claim is meritless. Double hearsay statements are admissible as long as both levels of the statement fit into a hearsay exception. As both levels of the disputed statement fit within firmly rooted hearsay exceptions, its admission violated none of appellant's constitutional rights. Further, the statement was not testimonial within the meaning of *Crawford.*

A. Relevant Proceedings

1. The Evidence Code Section 402 Hearing

On July 11, 1994, the trial court held a hearing regarding whether it would admit the testimony of Rosemary Riccardi, appellant's stepmother. Rosemary testified that in March of 1983, she was living in Riverdale, New York with Patrick Riccardi (Pat), appellant's father. Appellant would often call Pat and was very close to his father. Rosemary usually answered the phone. She would often banter and joke with appellant before giving the phone to Pat. (RT 2095-2096.)

In March of 1983, she received a call "very late" one night from appellant.[41] Rosemary, who was in her library on the lower level of the house, picked up the phone. Appellant said, "Go get my pop." (RT 2097.) Rosemary went up the stairs and woke Pat up. She returned downstairs and hung up the phone. She was very concerned because the call sounded "urgent," and she waited by the staircase so she could hear when the call ended. When the call ended, she "ran" upstairs "right away." (RT 2100.) Pat was sitting on the edge of the bed and tears were "streaming down his face." (RT 2099.) In the 23 years that she had known Pat, Rosemary had never seen him cry. Pat had difficulty speaking, but he said, "Jackie killed two girls." (RT 2099.) Rosemary thought that appellant had been in a car accident and asked Pat what had happened. Pat said that appellant had gone to his girlfriend's apartment and shot her and the girl with her. (RT 2096-2101, 2122.)

On cross-examination, the defense had Rosemary admit that she had discussed writing a book about appellant. She wanted to show appellant's "pain as he was growing up and his pain behind that that enabled him to do what he did." (RT 2103-2104.)

Rosemary denied the defense's suggestion that she did not get along with appellant because he felt that she was jeopardizing his father's health by owning 20 to 30 cats. She did not believe the cats had any negative effect on Pat's health. (RT 2104-2106.)

Rosemary had told Pat that she believed appellant ought to turn himself into the authorities. Pat "adamantly" disagreed. She believed this disagreement drove a "terrible wedge" into their marriage. She also blamed appellant's "coldness." (RT 2107-2108.)

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41. Rosemary knew appellant as "Jackie." (RT 2096.)

Rosemary said that she told two FBI agents from Yonkers about appellant's admission to his father "several months" after they were made. She again told members of the FBI about the admission in 1985. (RT 2108-2111.)

The prosecutor was willing to stipulate that he had not received any FBI reports indicating that Rosemary had informed the FBI about appellant's admission to his father. (RT 2117.)

The defense argued that the statements were inadmissible hearsay, lacked indicia of credibility, and their admission would violate his right to confrontation. (RT 2126-2131.)

The trial court found that the statements met "the elements of trustworthiness and reliability," and fit within the admission and spontaneous statement exceptions to the hearsay rule. (RT 2131.)

2. Trial Testimony

In March of 1983, Rosemary received a late night telephone call from appellant, who asked to speak with Pat. Rosemary told Pat that appellant was on the phone and sounded upset. Pat took the call. The conversation lasted between 10 and 15 minutes. At the end of the conversation, Pat was in tears. Rosemary had never seen Pat cry during the 23 years she had known him. Pat told Rosemary, "Jackie killed two girls." Rosemary thought appellant had been in a car accident, but Pat said, "He shot them." (RT 2171.) Appellant's girlfriend was trying to break up with him, and appellant had gone to his girlfriend's apartment and shot her and the woman with her. Pat said that he had to go to California, and that appellant would wire him money. Pat put appellant's possessions into storage and sold his Cadillac. Pat showed Rosemary the power of attorney he received from appellant. (RT 2163-2175.)

FBI Special Agent Gary Steger testified that he had reviewed prior reports involving Rosemary Riccardi, and none of them indicated that she had

told the agents that appellant admitted killing two women to his father. (RT 2293-2295.)

B. The Double Hearsay Statement Was Admissible Because Both Levels Of The Statement Fit Into Firmly Rooted Exceptions To The Hearsay Rule

Appellant contends that the statement his father made to his stepmother was inadmissible. (AOB 160-172.) Appellant's contention is meritless. Double hearsay is admissible as long as both hearsay levels of the statement fit within a hearsay exception. (*People v. Arias, supra,* 13 Cal.4th at p. 149; *People v. Zapien, supra,* 4 Cal.4th at pp. 951-52.) The first level of hearsay, appellant's statement to his father that he killed two women, was an admission of a party which is admissible pursuant to Evidence Code section 1220. The second level of the statement, appellant's father's statement to his wife, was a spontaneous utterance admissible pursuant to Evidence Code section 1240. Thus, because both levels of hearsay met a recognized exception to the hearsay rule, the statement was admissible.

1. Appellant's Statement To His Father Was An Admission Of A Party Pursuant To Evidence Code Section 1220

The trial court found that the first level of the disputed statement, appellant's statement to his father that he killed two women, was an admission of a party under Evidence Code section 1220. Appellant contends that his statement is not an admission because Pat Riccardi merely stated, "Jackie killed two girls," instead of testifying that "Jackie said he killed the two girls." (AOB 161.) Thus, appellant contends that "there is nothing in the record as to what appellant may have said," and Pat Riccardi's statement was only an improper opinion.

The challenged testimony was admissible as an admission of a party pursuant to Evidence Code section 1220.[42/] The evidence established that immediately prior to Pat Riccardi stating that appellant had killed two women, appellant had called and spoken to Pat for approximately ten to fifteen minutes. After he had spoken to appellant, Pat unequivocally stated, "Jackie killed two girls." (RT 2171.) Later, when Rosemary inquired as to what happened, Pat amplified on his statement, stating, "He shot them." (RT 2171.) Given the context of the statements, it is unmistakably clear that Pat was relaying what appellant had admitted to him during the telephone conversation and, therefore, the only reasonable conclusion is that the statement by Pat reflected an admission by appellant.

Appellant argues, without citation to any relevant authority, that these statements were not admissions because Pat did not specifically state that appellant "said" that he had shot two women. (AOB 161.) Appellant's argues that Pat's statement that appellant shot the two women may have been based on a statement that appellant "feared the police believed he killed the two girls" or "appellant told his father that he feared that he was going to be charged with killing the two girls." (AOB 162.) This is pure speculation on the part of appellant and inconsistent with the facts and circumstances. Pat was unequivocal in stating, with tears running down his face, that appellant committed the murders, not that appellant was afraid he was being unfairly blamed or charged for killing the two women. Appellant's father, with whom appellant claimed to have had a close relationship (RT 2402), had absolutely no

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42. Evidence Code section 1220 states:
Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

incentive to overstate or exaggerate appellant's involvement in the crimes. Thus, appellant's argument that the statement does not reflect an admission from appellant because Pat did not explicitly state that appellant "said" he had killed the two women must be rejected.

Similarly, appellant's argument that the statement was an improper lay opinion that was inadmissible pursuant to Evidence Code section 800 must be rejected as pure speculation that is at odds with the facts. (AOB 162.) Pat's statement was not that it was his "opinion" or that he "thought" that appellant had killed two women, but it was an unequivocal and unambiguous statement that appellant had killed two women. Under the circumstances, it is plain that Pat was not expressing an opinion as to appellant's actions, but clearly was relaying what he had been told. Thus, appellant's characterization of Pat's statement as an opinion must be rejected.

2. Pat's Statement To Rosemary That Appellant Killed Two Women Was A Spontaneous Statement Pursuant To Evidence Code Section 1240

Pat's statement to Rosemary was a spontaneous statement under Evidence Code section 1240.[43] Before a statement is admitted as a spontaneous statement, the trial court must determine whether or not the statement was made under circumstances qualifying it as a spontaneous utterance. "The determination that the facts exist to permit admission of a spontaneous declaration as a hearsay exception is vested in the trial court. Its ruling should

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43. Evidence Code section 1240 states:
Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

not be disturbed unless those facts are not supported by a preponderance of the evidence." (*People v. Jones* (1984) 155 Cal.App.3d 653, 659; also see *People v. Tewksbury* (1976) 15 Cal.3d 953, 966, fn. 13; *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468-469.) When reviewing the admissibility of such a statement, "[t]he crucial element in determining whether the declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker." (*People v. Farmer* (1989) 47 Cal.3d 888, 903-904, abrogated on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690.)

> "To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it."

(*People v. Poggi* (1988) 45 Cal.3d 306, 318, quoting *Showalter v. Western Pacific R.R. Co., supra,* 16 Cal.2d at p. 468.)

In the instant case, the trial court found that Pat's statement to Rosemary was a spontaneous utterance. (RT 2131.) The evidence established that the statement was made after an "occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting." (*People v. Poggi, supra,* 45 Cal.3d at p. 318.) Pat made the statement after his son informed him that he had killed to women. Appellant's admission of the crime of murder to his father was a startling act or event for purposes of Evidence Code section 1240. (*People v. Arias, supra,* 13 Cal.4th at p. 150.) "Nothing in the words or purpose of the 'spontaneous declaration' exception

makes it inapplicable when the 'act' or 'event' perceived and recounted is a statement implicating its declarant in another crime." (*Ibid.*) Given that the declarant in this case was Pat's son, the effect of appellant's admission was even more startling to him. Therefore, the first element of the spontaneous statement exception was proven.

The statement was made within minutes of the end of Pat's conversation with appellant. Rosemary indicated that she "ran" upstairs as soon as she no longer could hear Pat talking to appellant. (RT 2100.) Appellant contends that "minutes" was too long of a time period for the statement to have been spontaneous. (AOB 164.) "The lapse of time between the event and the statement is only one factor among many, and widely varying quantities of time lapse have been permitted." (*People v. Jones, supra,* 155 Cal.App.3d at p. 661.) Length of time is important "solely as an indicator of the mental state of the declarant . . ." (*People v. Roybal* (1999) 19 Cal.4th 481, 516, quoting *People v. Farmer*, *supra*, 47 Cal.3d at pp. 903-903.) Statements made within a couple of minutes up to 30 minutes have routinely been found to be spontaneous. (See *People v. Jones*, *supra*, 155 Cal.App.3d at pp. 661-662 and authorities cited therein.) Statements made as long as two days after the stressful event have been found to be spontaneous when the circumstances surrounding the statement demonstrate by a preponderance of the evidence that the declarant had the proper mental state at the time the statement was made. (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234-1235.) Therefore, the momentary passage of time that occurred in this case presents no barrier to the admission of this statement as a spontaneous utterance.

Also, other circumstances indicate that Pat was under stress of the event at the time that he made the statements to Rosemary. Rosemary testified that when she arrived in Pat's room, he was crying. Rosemary further testified that she had never seen Pat cry in the 23 years she had known him. (RT 2099.)

Pat's crying, which was out of character for him, was further evidence that he was under the effect of the startling event when he informed Rosemary that appellant had killed the two women.

Further, Pat's statement relates to the startling event that preceded it. (*People v. Poggi, supra,* 45 Cal.3d at p. 318.) Pat's statement that appellant shot two women relates to appellant's admission during the phone call that he killed the women. Thus, the final element of a spontaneous statement was proven.

Appellant contends that the fact that Pat's statements were in response to questioning from Rosemary deprived them of the necessary spontaneity to qualify under Evidence Code section 1240. Whether the statement was made in response to questioning is one factor to look at in determining whether or not a statement was made deliberately, but "it does not ipso facto deprive the statement of spontaneity." (*People v. Farmer*, *supra*, 47 Cal.3d at p. 904.) In *Farmer*, this Court held that statements made in response to "extensive questioning" were admissible as spontaneous statements. (*Ibid.*; also see *People v. Roybal, supra,* 19 Cal.4th at pp. 516-517.) The main inquiry is whether or not the statements were made while under the stress of an exciting event. (*People v. Farmer*, *supra*; *People v. Roybal*, *supra*.) The evidence as stated above supports a finding that Pat's comments were made while "under the stress of excitement" caused by appellant's admission to killing two women. (See *People v. Roybal, supra.*)

As previously stated, Pat was crying at the time he made the statements, which shows that he was under the stress of the exciting event at the time that he made the statements. (RT 2099.) Further, there is nothing indicating that Rosemary's questions affected the content of Pat's answer. Since Rosemary was not privy to the conversation, there is no realistic way that her questions could have led Pat to state that appellant killed two women. Thus, the mere fact

that Pat made these statements in response to questioning does not make them inadmissible under Evidence Code section 1240. (*People v. Farmer*, *supra*, 47 Cal.3d at p. 904.)

The prosecution proved that the Pat's statement to Rosemary met all three elements of a spontaneous utterance. Therefore, the trial court did not abuse its discretion by finding that statement to be admissible.

C. Appellant's Right To Confrontation Was Not Violated By Admission Of This Double Hearsay Statement

Appellant further claims that his right to confrontation under the Sixth Amendment of the United States was violated by the admission of this double hearsay statement. (AOB 165-172; Supp. AOB 8-9.) Appellant contends that the statement was "testimonial" as defined in *Crawford, supra,* 124 S.Ct. 1354, and therefore, the admission of the statement violated his Sixth Amendment rights because he was unable to confront Pat. (Supp. AOB 8-9.) Further, under the prior law as stated in *Ohio v. Roberts*, *supra*, 448 U.S. 56, appellant argues that the statements lacked adequate indicia of reliability to avoid violating the Sixth Amendment. (AOB 165-171.)

Appellant's claim that the statement was testimonial within the definition of *Crawford, supra,* is clearly erroneous. Appellant asserts, without citation to directly relevant authority or significant analysis, that Pat's statement to Rosemary was testimonial because an "objective observer would reasonably foresee that this statement would be used in a prosecution." (AOB 9.) By characterizing this statement as testimonial, appellant is trying to place the proverbial square peg in a round hole.

While the United States Supreme Court declined to specifically define what constitutes "testimonial" statements, it is clear that the instant statements do not fall within the definition. In *Crawford*, the Court stated that the

"principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." (*Crawford, supra,* 124 S.Ct. at p. 1363.) The civil-law mode of criminal procedure often involved justices of the peace or other government officials examining witnesses and suspects before trial, and introducing the examinations at trial in the place of live testimony from the witnesses. (*Id.* at pp. 1359-60.)

The Court held that the Confrontation Clause "reflects an especially acute concern" with testimonial statements. (*Crawford, supra,* 124 S.Ct. at p. 1364.) The Supreme Court defined testimony as "typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Ibid.*, quoting 1 N. Webster, An American Dictionary of the English Language (1828).) As previously stated, the Court provided three "formulations" of the "core class of 'testimonial' statements:"

> 1) "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,"
>
> 2) "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,"
>
> 3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

(*Ibid.*)

The Court expressed a special concern for statements made to police officers and other government officials in the course of interrogations or

investigations, as those statements resembled the *ex parte* examinations that were abused in the civil-law mode of criminal prosecution. (*Id.* at p. 1365.)

> An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

(*Id.* at p. 1364.) However, an "offhand, overheard remark" has "little resemblance to the civil-law abuses the Confrontation Clause targeted." (*Ibid.*) Thus, testimonial statements appear to be statements made to government officials in a structured environment in the course of an investigation, or similar statements that approximate the use of "*ex parte* examinations as evidence against the accused." (*Id.* at p. 1363.)

Because neither appellant's statement to Pat, nor Pat's statement to Rosemary, resemble the civil law abuses targeted by the Confrontation Clause, they do not qualify as testimonial. The statements were not made in response to questioning by government authorities in the course of a criminal investigation. (See *Crawford, supra,* 124 S.Ct. at p. 1364.) Appellant was confiding his secrets to his father, and Pat merely relayed the conversation to his wife. Thus, the statements resemble the "casual remark[s] to an acquaintance" that do not raise Confrontation Clause considerations. (*Ibid.*; *People v. Griffin, supra,* 33 Cal.4th 579, fn. 19.)

Similarly, none of the declarants reasonably believed that the statements would be used at trial. Appellant's statement, which was a son confiding in his father, clearly was not made with the intention that it would be used against him at a future trial. Pat's statement to Rosemary, which was a husband discussing a personal matter with his wife, also was not the sort of statement that one would expect to be used in future litigation. This is particularly true because

Pat's statement was made while he was under the emotional stress created by the discovery that his son was a double murderer. (See *People v. Moscat* (N.Y. 2004) 777 N.Y.S.2d 875, 878-880 [911 call found not to be testimonial partially because it was a spontaneous statement that was made without reflection].) Thus, neither statement fits within the definition of "testimonial," and appellant's contention to the contrary must be rejected.

However, the fact the statements are not testimonial does not end the Confrontation Clause analysis. The Court in *Crawford* did not resolve what limitations, if any, the Confrontation Clause imposes on non-testimonial statements. However, as previously stated in Argument IV(D), the Court suggested either that the Confrontation Clause may not apply to non-testimonial statements, leaving them to be regulated by "hearsay law," or that the prior standard of *Ohio v. Roberts, supra,* 448 U.S. 56, may still govern these statements. (*Crawford, supra,* 124 S.Ct. at pp. 1370, 1374.) Under either standard, the instant statements do not violate appellant's rights.

Applying the first possibility, that only hearsay law governs non-testimonial statements, the admission of the instant statement does not violate appellant's Sixth Amendment rights. If the Confrontation Clause imposes no limits on the admission of non-testimonial statements, then the admission of these statements cannot violate the Sixth Amendment. Further, as previously shown, the statements fell into hearsay exceptions, and were clearly admissible under the California Evidence Code.

Using the second possibility, that *Ohio v. Roberts, supra,* 448 U.S. 56, still governs non-testimonial statements, the admission of the double hearsay statement does not violate the Confrontation Clause because both hearsay levels of the statement fit within firmly rooted exceptions to the hearsay rule. Under *Ohio v. Roberts, supra*, the Court held that the Confrontation Clause does not bar admission of an unavailable witness's

statement against a defendant if the statement bears "adequate 'indicia of reliability.'" (*Id.* at p. 66.) To meet this test, statements must fit within a "firmly rooted" hearsay exception or bear "particularized guarantees of trustworthiness."

As previously discussed, appellant's statement to his father was an admission of a party pursuant to Evidence Code section 1220. Admissions of parties are a firmly rooted exception to the hearsay rule. (*Lilly v. Virginia* (1999) 527 U.S. 116, 127 [119 S.Ct. 1887, 144 L.Ed.2d 117]; *People v. Silva* (1988) 45 Cal.3d 604, 624.) "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." (*Ohio v. Roberts, supra,* 448 U.S. at p. 66.) Thus, this level of the statement did not violate the Confrontation Clause.

The second level fits within the spontaneous statement exception in Evidence Code section 1240. This also is a firmly rooted hearsay exception. (*Lilly v. Virginia, supra,* 527 U.S. at p. 126; *White v. Illinois* (1992) 502 U.S. 346, 355, fn. 8 [112 S.Ct. 736, 116 L.Ed.2d 848]; *Idaho v. Wright* (1990) 497 U.S. 805, 820 [110 S.Ct. 3139, 111 L.Ed. 638]; *People v. Dennis* (1998) 17 Cal.4th 468, 529.) Thus, the admission of this level of the hearsay statement was not violative of the Confrontation Clause under *Ohio v. Roberts, supra,* 448 U.S. at p. 66.)

While acknowledging that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception" (AOB 166, 167), appellant still argues that the instant statement was not admissible because "any inferred reliability was rebutted by the testimony at the 402 hearing." (AOB 168.) Specifically, appellant contends that Rosemary Riccardi recently fabricated her testimony regarding the statement and that she was biased against appellant. (AOB 167-171.) Appellant's argument is specious. For purposes of the Confrontation Clause, the mere fact that the

statements fit within firmly rooted hearsay exceptions is sufficient to allow for their admission. (*Ohio v. Roberts, supra,* 448 U.S. at p. 66; *People v. Gallego* (1991) 52 Cal.3d 115, 176.)

Further, appellant is confusing Rosemary Riccardi's credibility as a witness with the requirement that the hearsay statements have adequate indicia of reliability. Indicia of reliability concern the "circumstances that surround the making of the [hearsay] statement" (*Idaho v. Wright, supra,* 497 U.S. at p. 820), not the credibility of the witness who testifies about the hearsay statement to the jury. Because the hearsay declarant is not available for cross-examination, the statements attributed to the declarant must have indicia of reliability which "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." (*Ohio v. Roberts, supra,* 448 U.S. at pp. 65-66, quoting *California v. Green, supra,* 399 U.S. at p. 161.) However, because the witness testifying to the hearsay statement appears at the trial, he can be confronted by the defendant through cross-examination, the traditional means of satisfying the Confrontation Clause. Thus, the credibility of the witness is a separate issue from whether the hearsay statements bear adequate indicia of reliability, and Rosemary's alleged lack of credibility is not a proper basis upon which to find that challenged statements should not have been introduced at trial. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 608-609 [trial court erred in failing to focus on the indicia of reliability of the hearsay statement, and instead focusing on whether the live witness was a liar who should be precluded from testifying about the statement].)

The jury, not the trial judge, is the exclusive judge of a witness' credibility. (*People v. Cook* (1983) 33 Cal.3d 400, 408, overruled on a different ground in *People v. Rodriguez* (1986) 42 Cal.3d 730, 765-66.) "Except in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution; such doubts do not

afford a ground for refusing to admit evidence under [a] hearsay exception." (*People v. Cudjo, supra*, 6 Cal.4th at p. 609.) All of appellant's concerns about the credibility of Rosemary Riccardi were raised by defense counsel before the jury. The jurors were instructed that they were the "exclusive judges as to whether the defendant made an admission," and if they found that the defendant did not make the admission, they must "reject it." (CALJIC No. 2.71; CT 708.) In spite of appellant's concerns, the jury chose to believe Rosemary Riccardi. Thus, appellant's concerns about her credibility have been rejected by the only fact finder that matters, the jury.

D. Any Error Was Harmless

Further, any error was harmless. Appellant contends that his federal right to confrontation was violated, and therefore, his conviction must be reversed unless the error was harmless beyond a reasonable doubt. (AOB 171, quoting *Chapman v. California, supra,* 386 U.S. at p. 25; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1313-1314 [*Chapman* standard applies to erroneous introduction of an admission into evidence].) Assuming that the *Chapman* standard is appropriate, the error is harmless.

The evidence against appellant was strong. His burglary partner testified that appellant admitted to the murders. Appellant's fingerprints were found around the linen closet where Connie Navarro's body was discovered. Appellant's pattern of breaking into Connie's apartment and stalking her was compelling evidence of his motive and ability to enter the apartment and kill her. Appellant was seen with a gun at a restaurant in the vicinity of Connie's condominium shortly before the murder. Further, he had no support for his alibi during the time period in which the murders occurred, and his flight immediately after the murder was compelling evidence of his guilt. Thus, due

to the overwhelming evidence of appellant's guilt, the admission of this statement was harmless.

Most significantly, Rosemary's testimony that appellant admitted the crimes was merely duplicative of Sabatino's testimony that appellant admitted his guilt. Therefore, the admission of the statement was also harmless because it was cumulative of other properly admitted statements by appellant. (See *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1442-1446 [erroneous admission of statements harmless where evidence was cumulative and the evidence of guilt was overwhelming].)

VII.

APPELLANT'S RIGHT TO DUE PROCESS WAS NOT VIOLATED BY PUBLICITY FROM THE O.J. SIMPSON TRIAL, AND THERE IS NO EVIDENCE THAT THE JURY WAS AFFECTED BY ANY INFORMATION REGARDING DOMESTIC VIOLENCE RECEIVED FROM SOURCES OTHER THAN THE COURTROOM

Appellant claims that his right to an impartial jury was violated due to media coverage of the O.J. Simpson trial and that the trial court erred by not granting him a continuance. (AOB 173-180.) The record does not support appellant's contention. While appellant did file a number of newspaper articles and affidavits from members of the defense bar in support of his claim, he has failed to show that his jury was affected by the Simpson coverage or that he received an unfair trial.

When pretrial publicity creates a reasonable likelihood that the defendant cannot receive a fair trial, the trial court can continue the case until the threat of prejudice subsides or transfer the case to another county. (*People v. Martinez* (1978) 82 Cal.App.3d 1, 13, citing *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383; see also *People v. Richardson* (1968) 258 Cal.App.2d 23, 28.) The factors to be considered are 1) the nature and gravity of the offense; 2) the size of the community; 3) the status of the defendant in the community; 4) the popularity and prominence of the victim; and 5) the nature and extent of the news coverage. (*People v. Martinez, supra*; see also *People v. Dennis, supra,* 17 Cal.4th at p. 523; *People v. Sanders* (1995) 11 Cal.4th 475, 505; *People v. Proctor* (1993) 4 Cal.4th 499, 523.)[44/] The defendant, as the moving party,

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44. The issue of pretrial publicity appears to be most frequently raised in relation to motions to change venue and the list of factors is most often used in relation to motions to change venue. However, the few cases concerning motions to continue due to pretrial publicity appear to also rely on the same factors. (*People v. Martinez, supra,* 82 Cal.App.3d at p. 13.)

bears the burden of proving that there was a reasonable likelihood that the jurors had formed such fixed opinions as a result of pretrial publicity that they could not judge the case impartially. (*People v. Sanders, supra.*) On appeal, the defendant also must prove prejudice, "i.e., that it is reasonably likely that a fair trial was not in fact had." (*People v. Proctor, supra,* 4 Cal.4th at p. 523.)

In the instant case, the factors almost entirely weigh in favor of the trial court's rejections of appellant's request for a continuance. While the nature of the charges in this case weigh in favor of granting the continuance, every capital case presents a serious charge and this factor is not dispositive. (*People v. Dennis, supra,* 17 Cal.4th at p. 523; *People v. Sanders, supra,* 11 Cal.4th at p. 506.)

Moreover, the other factors all weigh against appellant's position. The second factor, the size of the community, weighs heavily against appellant. Los Angeles County is "the largest and most populous metropolitan area in the state." (*People v. Sanders, supra,* 11 Cal.4th at p. 506.) This Court has recognized that the "adversities of publicity are considerably offset if trial is conducted in a populous metropolitan area." (*Ibid.*)

Also, the third (status of the defendant in the community) and fourth (status of the victims in the community) factors weigh against appellant's position. The record contains no evidence that appellant, Connie Navarro, or Susan Jory occupied positions of special or extraordinary status in Los Angeles. Thus, these two factors support the court's denial of the motion. (*People v. Proctor, supra,* 11 Cal.4th at p. 506; *People v. Gallego, supra,* 52 Cal.3d at p. 167.)

Finally, the nature and extent of the publicity also weighs against appellant's position. The alleged prejudicial media coverage was not of appellant's case, but of the criminal trial of another defendant. In *People v. Hisquierdo* (1975) 45 Cal.App.3d 397, the court found that the defendant was

not prejudiced by publicity that did not refer "to his particular case." (*Id.* at p. 407.) Similarly, the media coverage of an unrelated case is not sufficiently prejudicial to warrant the relief appellant requested. "In the case at bench, the record discloses no such massive and pervasive publicity about defendant or his trial." (*Ibid.*) Thus, the media coverage of a different case is insufficient to justify postponing appellant's case, and this factor has to be held in favor of the trial court's ruling.

Appellant argues that he was prejudiced due to the similarities between his case and the Simpson case:

> both the O.J. Simpson case and the present case were out of West L.A., both involve stalking, both were double homicides, in both an attractive blond woman and her companion were killed, both had no eye witnesses, no confession, no weapon, both involve flight, a manhunt, capture, TV coverage, alleged threats to kill, and attempted suicide.

(AOB 175, 179.) However, none of the above listed facts are particularly unique to either the Simpson trial or the instant case. Further, the superficial similarities listed in appellant's brief are not what created the alleged "media frenzy" appellant complains about. It was the mix of race and celebrity that made the Simpson trial of such interest to the public. As admitted by appellant, he has no "celebrity status" (AOB 177), and this case did not raise any racial issues because both the victim and appellant were of the same race. (RT 833.) Thus, any similarities between this case and the Simpson case are, at best, minor and not prejudicial.

Also, the evidence that appellant submitted in the trial court in support of his motion does not substantiate that the public's exposure to the Simpson publicity was actually prejudicial to appellant's chance to receive a fair trial. Appellant supported his motion with copies of news articles concerning the Simpson case and with declarations from members of the local defense bar who

opined that the media coverage was prejudicial to appellant's case. (CT 562-610.) However, none of this evidence shows that the jury pool was actually tainted by the media exposure. The articles merely show that there was media coverage of the Simpson trial, but does not prove the relevant issue in this case, which was that the media was prejudicial to appellant. Similarly, the affidavits filed by the members of the defense bar[45/] merely opine in a conclusory fashion that the publicity was prejudicial. In most cases, but not in this case, attorneys moving to continue a trial or change venue due to publicity support their motions with some sort of survey of the local community that attempts to determine the population's exposure to the media coverage, and the effect of the coverage upon the population's ability to judge the case. (See *People v. Maury* (2004) 30 Cal.4th 342, 390; *People v. Proctor, supra,* 4 Cal.4th at pp. 524-525; *People v. Howard, supra,* 1 Cal.4th at pp. 1167-1169.) Here, none of the attorneys based their opinion on any sort of objective evidence that the jury pool had been affected, but just assumed that given the alleged similarities between the two cases, prejudice occurred. Thus, appellant did not present any objective evidence in this case showing that he was prejudiced by the media coverage of the Simpson case.

Similarly, the defense could have substantiated their claim that the jury pool was tainted by the Simpson publicity during voir dire but did not do so. Reviewing courts frequently view the record of voir dire to determine if pretrial publicity has prejudiced the defendant. (See *People v. Proctor, supra,* 4 Cal.4th at pp. 527-528; *People v. Howard, supra,* 1 Cal.4th at pp. 1168-1169; *People v. Jacla* (1978) 77 Cal.App.3d 878, 886-887.) However, the defense chose not to question the jurors about the publicity from the Simpson case. (AOB 177.)

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45. Louise B. Galartie, Fritzie Galliani, Joel Issacson, Ray Clark, Michael Nasatir, Victor Sherman, David Elden, and Stanley Greenberg. (CT 595-610.)

Thus, the voir dire in this case does not support appellant's position, and appellant's failure to question jurors on this topic is fatal to his ability to show the required prejudice to obtain relief.

Similarly, there are numerous cases involving defendants far more notorious than appellant where the courts of California denied legal relief to those defendants on their claims that they did not receive fair trials due to pretrial publicity. (See *People v. Bonin* (1988) 46 Cal.3d 659, 672-679; overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823; *People v. Harris* (1981) 28 Cal.3d 935, 948-950; *People v. Manson, supra,* 61 Cal.App.3d at pp. 174-192; *People v. Manson* (1977) 71 Cal.App.3d 1, 26-29.) If infamous murderers such as Charles Manson, William Bonin, and Robert Alton Harris were not deprived of their right to a fair trial by the extensive pretrial publicity that occurred in their own cases, certainly John Riccardi was not deprived of his right to a fair trial due to the publicity that occurred in the unrelated Simpson case.

In sum, the defense did not meet their burden of establishing that the Simpson publicity was prejudicial to appellant's right to receive a fair trial. Four of the five factors that are used to evaluate the effects of pretrial publicity were in favor of the trial court's ruling. The defense chose not to conduct a survey of the local community, question the jurors during voir dire about the Simpson case, or submit any evidence showing that the jury pool was prejudiced against appellant due to the Simpson trial. Instead, they relied exclusively on conclusory affidavits that assumed prejudice, but did not prove it. Consequently, appellant failed to meet his burden of showing that the pretrial publicity prejudiced him and this argument should be rejected.

VIII.

APPELLANT'S CLAIM OF CUMULATIVE ERROR IS MERITLESS

Appellant argues that even if no single guilt-phase error acted to deprive him of a fair trial, the many errors, when accumulated, must have done so. (AOB 181-182.) Respondent submits that adding up the row of alleged errors which appellant has presented does not enhance their value.

As respondent has demonstrated, none of appellant's contentions have merit. Moreover, appellant has failed to establish prejudice as to any of the claims he raises. Accordingly, his contention of cumulative error must be rejected. (*People v. Lewis* (1990) 25 Cal.4th 610; 635; *People v. Staten* (2000) 24 Cal.4th 434, 464.)

SPECIAL CIRCUMSTANCES ISSUES

IX.

THE BURGLARY SPECIAL CIRCUMSTANCE WAS SUPPORTED BY THE EVIDENCE AND ANY ERROR WAS HARMLESS

Appellant contends that the evidence did not support the burglary special circumstance (Pen. Code, § 190.2, subd. (a)(17)(G)) because the burglary was merely incidental to the murder. (AOB 183-187.) Respondent contends that the evidence supports the burglary special circumstance in this case. Regardless, any error was harmless because there was a valid multiple murder circumstance alleged and found to be true.

A. Relevant Proceedings

Appellant was charged with two counts of murder, and with special circumstances for having committed multiple murders (§ 190.2, subd. (a)(3)) and for murder committed while engaged in the commission of a burglary (§ 190.2, subd. (a)(17)(G); CT 71-74.) The prosecution informed the judge that he was not seeking convictions of the underlying murder charges on a felony-murder theory, but was only arguing that the murder occurred during a burglary strictly in relation to the special circumstance allegation:

> I noticed that in the court's instructions the court included the underlying felony of burglary. I am proceeding only on one theory and I'm doing that strictly in the abundance of caution. I'm going to argue the burglary theory for the special circumstance, but I'm not going to argue it for the theory of the case.

(RT 2684.) The prosecutor indicated that he was going to argue that the murders were "willful, deliberate, premeditated murder." (RT 2684.) The

court indicated that it would alter CALJIC No. 8.10 to indicate that "[t]he killing was done with malice aforethought." (RT 2684.)

Later, the prosecutor indicated that his theory for the burglary special circumstance was that appellant entered the condominium with the intent to commit assault with force likely to produce great bodily injury or with a deadly weapon. (RT 3044.)

The prosecutor argued this theory to the jury as follows:

> You could say, okay, Riccardi breaks into the Greenfield apartment - - and we'll discuss that, we'll discuss the evidence. Once inside, his intention wasn't necessarily to kill Miss Navarro and Miss Jory, and then he either was going to kill them and commit suicide, he either was going to assault them and at the time of the assault it got carried away and there was an argument and he shot both of the two women.

(RT 2810.) The prosecutor later reiterated that appellant's intent when he entered the condominium was to commit "assaultive conduct" upon the victim. (RT 2816.)

B. There Was Sufficient Evidence To Support The Finding That The Burglary Was Not Incidental To The Burglary, And Any Error Was Harmless

The prosecutor's theory to support the burglary special circumstance was that appellant entered the condominium with the intent to assault Connie, and only formed the intent to commit the murders of Connie and Jory after he had entered the condominium. (RT 2810.) There was sufficient evidence to support this theory. Under these circumstances, the burglary would not have been incidental to the murders as appellant argues. (AOB 183-187.)

David Navarro testified that appellant broke into the condominium approximately a week to ten days before the murders with a handgun. During that break in, David heard noises that sounded like appellant was slapping

Connie. (RT 1359-1376.) Based on this prior incident where appellant broke into the condominium and assaulted Connie without killing her, the jury could have reasonably believed that appellant's intent when he broke into the condominium on the night of the killing was to assault her again, not to murder her and Jory, and the intent to kill was formed after his initial entry. Under those circumstances, the burglary would not have been incidental to the murder as appellant argues.

Similarly, the evidence also supports the theory that appellant may have broken in with the intention to assault or kill Connie, but that he did not expect to encounter Jory or kill her. Under those facts, the murder of Jory would have been independent of the burglary committed with the intent to assault or kill Connie. Plainly, the special circumstance as to Jory should be affirmed.

Although not cited by appellant, respondent is aware of this Court's rulings that the merger doctrine of *People v. Ireland, supra,* 70 Cal.2d 522, prevents a jury from returning a verdict of felony murder when it based upon a theory that the murder occurred during a burglary committed with the intent to assault the victim with a deadly weapon. (*People v. Sears* (1970) 2 Cal.3d 180, 187-189; *People v. Wilson* (1969) 1 Cal.3d 431, 437-442.) The felony murder rule operates to "posit the existence of malice aforethought" in homicides which are the direct causal result of the perpetration of felonies that are inherently dangerous to human life. (*Ireland, supra,* at p. 538.) This Court reasoned that because assault is an "integral part of the homicide," applying the felony murder rule where the prosecution argues that the homicide occurred during a burglary with the intent to commit assault with a deadly weapon would "preclude the jury from considering the issue of malice aforethought in all cases wherein a homicide has been committed as a result of a felonious assault - a category that includes the great majority of homicides." (*People v. Wilson, supra,* 1 Cal.3d at p. 437, citing *People v. Ireland, supra,* 70 Cal.2d

at p. 538.) This rule has been held to apply not only to situations where the underlying murder is prosecuted on a felony murder theory, but also to situations where the felony murder is argued as a special circumstance. (*People v. Seaton* (2001) 26 Cal.4th 598, 646; *People v. Sanders* (1990) 51 Cal.3d 471, 509-510, 517; *People v. Garrison* (1989) 47 Cal.3d 746, 778-779, 788-789.)

While understanding that the instant case appears to fall within the holding of the above-cited cases, respondent submits that the instant case is distinguishable from these cases because the underlying murder conviction was not obtained on a felony murder theory. The aforementioned cases all involved cases where the prosecution sought the conviction on the underlying homicide charge under a felony murder theory. (*People v. Sanders, supra,* 51 Cal.3d at pp. 509-510; *People v. Garrison, supra,* 47 Cal.3d at pp. 778-779; *People v. Sears, supra,* 2 Cal.3d at pp. 184-186; *People v. Wilson, supra,* 1 Cal.3d at pp. 437-438; *Ireland, supra,* 70 Cal.2d at pp. 525, 538.) Therefore, in these cases, the prosecution was able to avoid proving the required element of malice aforethought based on the felony murder theory. However, in the instant case, the prosecutor did not argue that appellant was guilty of the underlying murder charge under a felony murder theory, but instead solely relied on the theory that the underlying murders were "willful, deliberate, and premeditated." (RT 2684.) The jury was specifically instructed that in order to find appellant guilty of first degree murder, it had to find that the killings were committed with malice aforethought. (CT 718-719.) Thus, the error that occurred in the aforementioned case, did not occur here because the use of the felony murder theory solely as a special circumstance did not preclude the jury from finding that appellant acted with malice aforethought.

Additionally, concern was expressed in the foregoing cases that the prosecution's theory that the defendant entered the structure with an intent to

commit an assault that was actually separate from the murder might not be sincere, but was merely a clever ruse to avoid proving malice aforethought by charging that the defendant had the intent to commit a necessarily included offense to the homicide:

> We therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and *which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged.*

(*People v. Sears, supra,* 2 Cal.3d at pp. 186; *People v. Wilson, supra,* 1 Cal.3d at pp. 438-439; *People v. Ireland, supra,* 70 Cal.2d at p. 539, emphasis added.) However, in the instant case, there was evidence to support the prosecution's theory that appellant entered the condominium with an intent to only commit an assault, and the intent to commit murder only occurred later. As previously stated, there was evidence that appellant had previously broken into Connie's condominium and committed an assault upon her without killing her. (RT 1359-1376.) Thus, unlike the previous cases, the prosecution's theory that the murder occurred during a burglary where appellant had the intent to only commit an assault is based on actual evidence, and was more than just a clever trick to avoid proving a necessary element of the homicide.

However, assuming this Court strikes the true finding regarding the burglary special circumstance, the error was harmless. Appellant argues that the "guilt verdict and the second special circumstance must be reversed." (AOB 186.) Appellant does not explain how the alleged erroneous finding of the burglary special circumstance should lead to the reversal of the guilty verdicts regarding the two murders. As previously stated, the prosecution did not seek to convict appellant of the underlying murders on a felony murder theory, but only argued it as a special circumstance. (RT 2684.) Thus, the

allegedly erroneous felony murder special circumstance could not have affected the jury's determination that appellant was guilty of the two murders. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1102 [errors involving additional special circumstances do not undermine the verdict in the guilt phase].)

Similarly, even if the burglary-murder special circumstance were invalid, it does not change the fact that appellant was still eligible for the death penalty. This Court has repeatedly held that a determination that a defendant was death eligible will not be reversed due to a true finding regarding one or more invalid special circumstances as long as there were still valid special circumstances to support that the defendant was death eligible. (*People v. Sanders, supra,* 51 Cal.3d at p. 520-521; *People v. Wade* (1988) 44 Cal.3d 975, 998.) "A single valid special-circumstance finding is sufficient to determine that defendant was eligible for the death penalty." (*People v. Bittaker, supra,* 48 Cal.3d at p. 1102; *People v. Hamilton* (1988) 45 Cal.3d 351, 364, fn. 7.) Because, as will be shown later, there was a valid special circumstance due to appellant's multiple murder convictions, appellant's eligibility for the death penalty must be upheld.

Appellant also argues that the imposition of the death penalty during the penalty phase must be reversed due to the jury's consideration of the burglary-murder special circumstance. (AOB 186-187.) However, the prosecution did not argue that appellant deserved the death penalty because of the burglary-murder special circumstance, but instead argued that the aggravating factors in this case weighed in favor of the death penalty. (RT 3183-3189.) The prosecutor argued that appellant's prior conviction (RT 3184), the age of the defendant (RT 3185), and the effect of the murders on the victim's family (RT 3184) justified the penalty. The prosecutor emphasized that the jury had to weigh the mitigating and aggravating factors:

> What you do is weigh and consider individualized to the particular defendant, what is aggravating, what is mitigating, and then you determine what is appropriate under he facts that have presented.

(RT 3186.)

The prosecutor only mentioned the special circumstances allegations once:

> One of the factors and the major factor that you can consider is the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. [¶] So you consider, you do not put aside what you've heard in the guilt phase in considering what the appropriate penalty that the defendant should receive.

(RT 3184.)

This Court has repeatedly found a jury's consideration of an invalid special circumstance to be harmless where the arguments of counsel focus on the "presence or absence of mitigating circumstances and whether they outweighed the aggravating circumstances" and do not "heavily rely on" or emphasize the invalid special circumstance. *People v. Sanders, supra,* 51 Cal.3d at pp. 520-521; *People v. Silva, supra,* 45 Cal.3d at p. 635.) The prosecutor never specifically mentioned the burglary-murder special circumstance, and only mentioned the two special circumstances in passing. (RT 3184.) Even then, he equated them with "the circumstances of the crime." (*People v. Silva, supra,* 45 Cal.3d at p. 634.) This Court has found "an isolated reference" to an invalid special circumstance to be harmless where it is not "emphasized as an aggravating factor." (*Id.* at p. 635.)

Further, the fact that appellant broke into Connie Navarro's condominium would have been made known to the jurors even if the burglary-murder special circumstance had not been charged. Where the

evidence underlying the invalid special circumstance would have been admissible, the consideration of the invalid special circumstance has been found harmless. (*People v. Bittaker, supra,* 48 Cal.3d at p. 1102; *People v. Wade, supra,* 44 Cal.3d at p. 998.) The only effect that the burglary-murder finding could "have had on the jury was thus merely a consequence of the statutory label 'special circumstance.' We find that such possibility could not have affected the jury's verdict." (*People v. Wade, supra,* 44 Cal.3d at p. 998.) Similarly, the burglary-murder special circumstance was not prejudicial in this case.

X.

ANY ERROR IN THE USE OF CALJIC NO. 8.81.17 WAS HARMLESS

Appellant contends that the trial court erred by instructing the jury with the version of CALJIC No. 8.81.17 that was given in this case. (AOB 188-193.) The court instructed the jury as follows:

> To find that the special circumstance, referred to in these instructions as murder in the *commission of theft* or other felony to wit: Assault with intent to commit great bodily injury or with a deadly weapon, a handgun, is true, it must be proved:
>
> 1. The murder was committed while the defendant was engaged in the commission of a theft or other felony to wit, assault with intent to commit great bodily injury or with deadly weapon, a handgun.
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of theft or other felony, to wit, assault intent to commit great bodily injury or with deadly weapon, a handgun, or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the theft or other felony to wit, assault with intent to commit great bodily injury or with deadly weapon, a handgun, was merely incidental to the commission of the murder.

(CALJIC No. 8.81.17; CT 736-737, emphasis added.) The instruction, which appears to have been meant to support the murder during a burglary special circumstance, erroneously discussed the crime of murder during the commission of a theft. While the trial court appears to have erred by referring to the crime of theft instead of burglary, the error is clearly harmless in this case.

As discussed in the prior section of this brief, the prosecution alleged that the murder was committed during a burglary where the appellant had the intent to commit an assault. (CT 60-62; RT 2684.) However, the challenged instruction discusses the crime of murder during a theft. (CT 736-737.) Appellant correctly contends that murder during a theft is not a recognized special circumstance in California. (See § 190.2.) Thus, the instruction, as worded, discusses a non-existent special circumstance.

Regardless, the error in this case is clearly harmless. "[A]n erroneous instruction that omits an element of a special circumstance is subject to harmless error analysis pursuant to *Chapman v. California, supra*, 386 U.S. 18. (*People v. Prieto* (2003) 30 Cal.4th 226, 256.) Because the error in this case was harmless beyond a reasonable doubt, appellant is entitled to no relief.

Appellant contends that it is "reasonably likely that [the jury] considered the special circumstance of murder in the commission of theft." (AOB 191.) However, a review of the record makes it clear that the jury was made aware that the prosecution was claiming that the murder occurred during a burglary, not a theft.

The prosecutor specifically disavowed that appellant had broken in with the intent to commit a theft:

> A classic burglary would imply that at the time of entry, it was to commit theft. It is not the position of the People that at the time of the entry the thought process - - and it has to be the thought process at the time of entry of Mr. Riccardi - - was to steal. It was not.

(RT 2815-2816.) The prosecution also stated that there was no "ransacking" of the apartment, and there was "nothing taken." (RT 2807, 2825.) Additionally, the prosecutor explicitly stated that it was his theory that the murder occurred during a burglary, not a theft. (RT 2815-2816.) Thus, the prosecution never attempted to argue that appellant committed the murders

during a theft and specifically stated that the evidence did not support such a finding.

The verdict forms indicated that the jury was required to make a finding that the murder occurred during a burglary, not a theft. (CT 763-764.) Also, the jury was instructed concerning the elements of burglary, not theft, so contrary to appellant's claims (AOB 190), the jury was required to find all of the elements of burglary. (CT 739.) Thus, based on the record, the jury was clearly informed that the prosecution was not claiming that the murder occurred during a theft, and was further informed that the evidence did not support such a theory.

Further, for the same reasons stated in the previous section of this brief, even if the burglary special circumstance must be stricken due to this improperly worded instruction, the jury's finding that appellant is death eligible, as well as its ultimate decision to recommend that he suffer the death penalty, are not subject to reversal. The multiple murder special circumstance is still valid, thus still making appellant death eligible. (*People v. Sanders, supra,* 51 Cal.3d at p. 520-521; *People v. Bittaker, supra,* 48 Cal.3d at p. 1102; *People v. Hamilton, supra,* 45 Cal.3d 364, fn. 7; *People v. Wade, supra,* 44 Cal.3d at p.998.) Further, assuming the jury actually considered a murder during theft theory, it did not affect the jury's imposition of the death penalty. (*People v. Sanders, supra,* 51 Cal.3d at pp. 520-521; *People v. Bittaker, supra,* 48 Cal.3d at p. 1102; *People v. Silva, supra,* 45 Cal.3d at pp. 634-635; *People v. Wade, supra,* 44 Cal.3d at p. 998.)

XI.

ANY ERROR REGARDING THE CHARGING OF TWO MULTIPLE MURDER SPECIAL CIRCUMSTANCES IS HARMLESS

Appellant contends that the trial court erred by alleging two multiple murder special circumstances, one for each murder, pursuant to Penal Code section 190.2, subdivision (a)(3). (AOB 194-198.) Appellant is correct that it is error to allege more than one multiple murder circumstance in a single proceeding. (*People v. Hardy* (1992) 2 Cal.4th 86, 191; *People v. Diaz* (1992) 3 Cal.4th 495, 565; *People v. Caro* (1988) 46 Cal.3d 1035, 1051.)

However, the error is harmless. Appellant contends that the jury's penalty verdict should be set aside because it considered the additional multiple murder special circumstance in its verdict. (AOB 196-198.) However, this Court has "repeatedly held that the consideration of such excessive multiple-murder special-circumstance findings where, as here, the jury knows the number of murders on which they were based, is harmless error." (*People v. Clark, supra,* 3 Cal.4th at pp. 167-168; see also *People v. Marshall* (1996) 13 Cal.4th 799, 855; *People v. Sanders, supra,* 11 Cal.4th at p. 562.) Appellant offers no new argument or authority on the point. Thus, the error should be found harmless.

PENALTY PHASE ISSUES

XII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE PENALTY PHASE DURING HIS QUESTIONING OF WITNESSES

Appellant contends that the prosecutor committed misconduct which violated his rights to a due process and a fair trial. (AOB 199-207.) Prosecutorial conduct violates the federal Constitution when it "comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Hill, supra,* 17 Cal.4th at p. 819, quoting *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Prosecutorial misconduct occurs under state law if the prosecutor uses "'deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*People v. Hill, supra*, 17 Cal.4th at p. 819, quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) In order to preserve the issue for appeal, the appellant must have objected to the misconduct and requested that the court give a curative admonition to the jury. (See *People v. Boyette* (2002) 29 Cal.4th 381, 432.) As will be shown, the prosecutor did not engage in any form of misconduct, and appellant cannot show any prejudice from the challenged conduct.

A. Relevant Facts

Appellant first contends that the prosecutor committed misconduct through the following questions he asked of defense witness Henry Kaney:

[The Prosecutor]: Mr. Kaney, I have talked to you on the telephone?

A: Yes.

[The Prosecutor]: And, in fact, I asked you, I think, do you believe that John Riccardi killed Connie Navarro and Sue Jory. I asked you that question on the telephone.

A. Yes.

[The Prosecutor]: And you said that - -

[Defense Counsel]: Objection, Your Honor. It's irrelevant.

The Court: Objection sustained.

[The Prosecutor]: Well, doesn't that have an effect on your ability to decide whether or not what the appropriate punishment is - -

A. No.

[The Prosecutor]: - - what your mental set is as to whether or not he did the crime?

A. No.

[The Prosecutor]: Doesn't make any difference to you?

A. It always makes a difference, yet that is not in my hands right now. In my hands right now is to share with the court that I love this man and that if it was up to me, I would be merciful. But I don't believe it's up to me.

[The Prosecutor]: Do you believe he was merciful when he killed Sue Jory and Connie Navarro?

[Defense Counsel]: Your Honor, I object. It's argumentative, it's inappropriate, and misconduct.

The Court: Objection overruled on the latter grounds, but sustained on the other grounds.

(RT 3161-3162.)

B. The Prosecutor Did Not Engage In Misconduct By Questioning Kaney About His Opinion Of Appellant's Guilt

Appellant argues that the prosecutor committed misconduct by giving "unsworn testimony" and by asking Henry Kaney about his opinion of appellant's guilt. (AOB 201-203.) Both claims are meritless.

First, appellant's claim that the prosecutor acted as "his own unsworn witness" by asking Kaney about a conversation they had on the telephone. (AOB 200.) This claim was not preserved for appellate review. Counsel objected to the prosecutor's asking Kaney's opinion of appellant's guilt, not to his asking about whether they had spoken on the phone. (RT 3162.) Further, appellant only objected on the ground that Kaney's opinion was irrelevant, not that the prosecutor was acting as his own witness. (RT 3162.) Because appellant did not object on this ground, the issue is not preserved for review. (*People v. Clair, supra,* 2 Cal.4th at p. 662.) Further, "simply to object or make an assignment of misconduct without seeking a curative admonition is not enough." (*People v. Poggi, supra,* 45 Cal.3d at p. 335.) Appellant did not seek a curative admonition from the trial court. (RT 3162.) Thus, appellant's current contention that the prosecutor was acting as his own witness is not preserved for review.

Further, appellant's assertion is meritless. Appellant does not cite any authority that supports his proposition that the prosecutor committed misconduct by asking Kaney about the conversation that he had with the prosecutor. Both of the cases cited in Appellant's Opening Brief, *People v. Whitehead* (1957) 148 Cal.App.2d 701, 705-706, and *United States v. Prantil* (1985 9th Cir.) 756 F.2d 759,[46/] concern situations where the prosecutor made statements of a factual nature during closing argument that were from his

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46. This opinion was superseded by *United States v. Prantil* (1985 9th Cir.) 764 F.2d 548.

personal experience and not part of the trial record. In the instant case, the prosecutor was trying to put these matters into the record through Kaney's testimony, not his own. Appellant has cited no authority for the proposition that a prosecutor is precluded from asking a witness about a subject of inquiry merely because he has some personal knowledge of those facts. Thus, appellant's contention of misconduct is lacking in merit.

Appellant also argues that the prosecutor committed misconduct by asking Kaney about his opinion of appellant's guilt. (AOB 202.) Because appellant only registered an objection and did not seek a curative instruction, this claim of misconduct is also not preserved for appellate review. (*People v. Clair, supra,* 2 Cal.4th at p. 662; *People v. Poggi, supra,* 45 Cal.3d at p. 335.)

Appellant contends that the question was misconduct because it was "irrelevant." (AOB 202.) While recognizing that the trial court sustained appellant's objection on this point, respondent believes that the trial court was in error. Kaney testified that appellant was not deserving of the death penalty. (RT 3160-3161.) Kaney's belief in appellant's guilt or innocence was a relevant subject in evaluating Kaney's bias as a witness, as well as his belief that appellant should not suffer the death penalty. Kaney admitted as much during his testimony when he said that appellant's guilt or innocence "always makes a difference." (RT 3162.) Certainly, if Kaney believed that appellant was innocent of the crime, his opinion that appellant should not receive the death penalty would be significantly less compelling to the jury that had found appellant guilty. Thus, the prosecutor's question was relevant and did not constitute misconduct.

Appellant contends that the prosecutor was asking about Kaney's opinion in order to "waft an unwarranted innuendo into the jury box." (AOB 202.) Apparently, appellant believes that Kaney believed that he was guilty, and that the prosecutor was implying "that even appellant's close friend

did not believe appellant, but was hiding it from the jury." (AOB 205.) The record does not support such an innuendo and appellant's argument is pure speculation. In fact, to the extent the record reveals anything, it suggests that Kaney believed that appellant was innocent, and the prosecutor was attempting to undermine his opinion regarding the death penalty by pointing out that it was based on a belief that had been rejected by the jury. (RT 3162.) Whatever Kaney's actual belief regarding appellant's guilt, the record does not support appellant's contention that the prosecutor asked the question in bad faith in order to obtain the death penalty through an inference that Kaney believed that appellant was guilty.

Finally, appellant contends that the prosecutor committed misconduct by continuing to "engage in a forbidden line of questioning after the trial court indicated that this line will not be permitted." (AOB 203.) Again, the contention is not preserved for appellate review because the defense did not object to the prosecution's continued line of questioning or request a curative instruction. (*People v. Clair, supra,* 2 Cal.4th at p. 662; *People v. Poggi, supra,* 45 Cal.3d at p. 335.)

Further, the prosecutor did not again ask Kaney for his opinion of appellant's guilt, the question in regard to which the court sustained the defense's objection. The prosecutor instead inquired to what extent Kaney's opinion regarding the crime affected his opinion regarding the death penalty. (RT 3162.) The prosecutor was clearly entitled to inquire into the basis of Kaney's opinion on the penalty since the defense had called Kaney as a witness solely to have him to express that opinion.

C. The Prosecutor Did Not Engage In Misconduct By Asking Kaney If Appellant Had Been Merciful When He Killed The Victims

Appellant also argues that the prosecutor committed misconduct by asking Kaney if appellant had been merciful when he killed Connie Navarro and Susan Jory. (AOB 203-204.) Again, the claim lacks merit.

First, the issue is not preserved for appellate review. While the defense did object to the question, it did not seek a curative admonition from the court. (RT 3162.) Thus, the issue is waived on appeal. (*People v. Clair, supra,* 2 Cal.4th at p. 662; *People v. Poggi, supra,* 45 Cal.3d at p. 335.)

Additionally, the trial court expressly rejected appellant's claim that this statement constituted misconduct. (RT 3162.) An appellate court reviews a trial court's ruling on prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) Appellant argues that the prosecutor was trying to "inflame the jury" against appellant, however Kaney's beliefs regarding mercy were relevant. Kaney testified that he wanted "to share with the court that I love this man and that if it was up to me, I would be merciful." (RT 3162.) Given that Kaney based his opinion regarding the death penalty on mercy, the prosecutor was entitled to inquire concerning Kaney's standards on the topic. Thus, the trial court did not abuse its discretion by finding that the challenged comment was not misconduct.

Further, in *People v. Poggi, supra,* 45 Cal.3d at pp. 335-336, this Court found that it was appropriate for the prosecutor to argue that in light of the defendant's crimes, the jury should not show the defendant sympathy and spare his life. The prosecutor's question was meant to explore the same theme. Thus, it was not misconduct for the prosecutor to explore this theme in his questioning.

D. Appellant Was Not Prejudiced

Appellant also has failed to show any prejudice due to the challenged comments. (AOB 205-207.) The prosecutor's comments were harmless if there is no reasonable possibility that the jury would have returned a different sentence in their absence. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) Stated another way, reversal is unnecessary if any error was harmless beyond a reasonable doubt. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479 [stating that state harmless-error analysis in the penalty phase is the equivalent of the test under *Chapman v. California, supra,* 386 U.S. at p. 24; accord, *People v. Jones*, *supra*, 29 Cal.4th at p. 1264, fn. 11.)

Appellant argues that the prosecution's question to Kaney concerning his opinion on appellant's guilt was prejudicial because it raised the "implication that even appellant's close friend did not believe appellant, but was hiding it from the jury . . ." (AOB 205.) As previously explained, the record does not disclose what opinion Kaney held of appellant's guilt. In fact, to the extent the record implies anything in this regard, it seems to suggest that Kaney believed appellant was innocent. Thus, appellant's claim of prejudice must be rejected.

Appellant also argues that the "argument that appellant did not deserve mercy because he had not shown mercy was designed to appeal to the jury's passion or bias in order to prejudice appellant." (AOB 205-206.) First, the alleged misconduct consisted of one question which was never answered because the court sustained the defense objection to it. (RT 3162.) This one isolated question court did not suffice to prejudice appellant. (See *People v. Sully* (1991) 53 Cal.3d 1195, 1250.) Also, when faced with a claim of misconduct for a similar comment, this Court rejected it by stating that "[w]e fail to see, however, how this statement could realistically have

subjected [defendant] to prejudice." (*People v. Poggi, supra,* 45 Cal.3d at p. 336.) Similarly, the comment in this case was not prejudicial.

XIII.

THE ADMISSION OF VICTIM IMPACT EVIDENCE DID NOT VIOLATE APPELLANT'S STATE OR FEDERAL RIGHTS

Appellant next contends that his federal and state rights to due process and a "fair penalty determination." (AOB 208.) Appellant also contends that the admission of the evidence was a violation of the constitutional prohibition against ex post facto application of the law. (AOB 213-219.) Again, the arguments are meritless. First, appellant waived this argument by not objecting to the admission of the victim impact evidence. Further, the United States Supreme Court and this Court have approved the admission of victim impact evidence and found it relevant to the jury's penalty determination. Additionally, the rule against ex post facto application of the law does not apply to this evidence.

A. Relevant Facts

Christianne Jory testified that she lost her mother and her godmother (Connie) because of the murders. She was forced to live with her father and stepmother which was "difficult." She did not get along with her stepmother and spent most of her time in her room for four years. Christianne would cry when she saw other people with their mothers. She went to therapy for six years. She wrote a letter to appellant asking how he could "be so selfish to think you have the right to fuck up everybody's life like this." (RT 3135-3139.)

David Navarro testified that the murders "destroyed" his life. After the murders, David moved in with his father, who "fell apart" and became a "wreck." David was forced to take care of his father. David began smoking marijuana when he found out about the murders and later became a daily heroin user. He blamed himself for the murders because he did not inform anyone that

appellant had handcuffed him during the break-in. He also intentionally overdosed five times and had been in rehabilitation seven times. He had nightmares about appellant and was afraid appellant would come after him or his father. David has lost two relationships with women due to his fear of intimacy and his friends think he is a pessimist because he is always "prepared for the worst possible thing." (RT 3139-3142.)

The prosecutor argued that the effect the murders had on Christianne and David was an aggravating fact that supported the death penalty. (RT 3186-3188.)

B. Appellant's Claim Is Waived

First, appellant failed to preserve his claims by making a timely and specific objection to the victim impact evidence at trial. Appellant did not object to any of the testimony by the victims' family members. (RT 3130-3143.) Accordingly, he has failed to preserve the issues for appeal. (See Evid. Code, § 353; *People v. Hines, supra,* 15 Cal.4th at p. 1047 [defendant's failure to object to victim impact evidence waived issue on appeal]; *People v. Sanders, supra,* 11 Cal.4th at p. 549 [nonspecific objections to victim impact evidence failed to preserve claim for review]; *People v. Montiel* (1993) 5 Cal.4th 877, 934 ["Counsel's failure to object and/or request an admonition waives any direct appellate challenge to [victim impact] evidence and argument."]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245 [same]; see also *People v. Gurule* (2002) 28 Cal.4th 557 [stipulation to admit victim impact evidence generally waives challenge to evidence on appeal].)

Even if appellant had made appropriate objections at trial, however, his claims here would fail.

C. Victim Impact Evidence Is Generally Admissible As A Circumstance Of The Offense

In California, victim impact evidence is admissible under section 190.3, subdivision (a). (*People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172; *People v. Johnson*, *supra*, 3 Cal.4th at p. 1245; *People v. Raley* (1992) 2 Cal.4th 870, 916; *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Consideration of victim impact evidence as a circumstance of the crime does not render that factor, section 190.3, subdivision (a), unconstitutionally vague. (*Payne v. Tennessee* (1991) 501 U.S. 808, 826 [111 S.Ct. 2597, 115 L.Ed.2d 720] (*Payne*); *People v. Boyette*, *supra*, 29 Cal.4th at p. 445, fn. 12.) The constitutional limits of victim impact evidence were outlined in *Payne, supra*, 501 U.S. 808. (See generally, Annot., Victim Impact Evidence in Capital Sentencing Hearings– Post *Payne v. Tennessee* (2003) 79 A.L.R.5th 33.)

In *Payne*, the United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] (*Booth*) and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876] (*Gathers*), which generally barred admission of victim impact evidence and related prosecution argument during the penalty phase of a capital trial. The court held that the Eighth Amendment does not bar the admission of victim impact testimony in the sentencing phase of a capital trial. Victim impact evidence is designed to show the victim's uniqueness as an individual human being and "whatever the jury might think the loss to the community resulting from his death might be." (*Id.* at p. 823.)

In *Payne*, the defendant was convicted of the first degree murder of a mother and her two-year-old daughter and first degree assault with intent to murder her three-year-old son. The capital sentencing jury heard that defendant was a caring and kind man who went to church and did not abuse drugs or alcohol. He was a good son and suffered from low intelligence.

The prosecution presented testimony from the three-year-old victim's grandmother that he missed his mother and baby sister. Her testimony "illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." (*Payne*, *supra*, 501 U.S. at p. 826.) Thus, the evidence is admissible to show the harm caused:

> Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.

(*Id.* at p. 825.) The *Payne* Court concluded that a state may properly determine that for the jury meaningfully to assess the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.

> [T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. [Citation.]

(*Id.* at p. 825.) Turning the victim into a faceless stranger at the penalty phase of a capital trial deprives the State of the "full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." (*Ibid.*) Thus, if a state chooses to permit the admission of victim impact evidence, the Eighth Amendment erects no *per se* bar:

> A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the

jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

(*Id.* at p. 827.)

D. The Rule Against Ex Post Facto Application Of The Law Does Not Apply To Victim Impact Evidence

Appellant argues that the use of victim impact evidence against him violated the state and federal constitutional prohibitions against the application of ex post facto laws. (AOB 213-219.) Appellant's claim is meritless. Laws that make previously inadmissible evidence admissible are not barred by either the state or federal constitutions. Thus, appellant's claim must be rejected.

1. The Admission Of Victim Impact Evidence Did Not Violate Ex Post Facto Principles

Appellant first claims that victim impact evidence was inadmissible at the time of the murders in 1983, so its admission here violated ex post facto principles. (AOB 213-216.) Respondent submits ex post facto principles were not violated because the law at the time of appellant's offense and at the time of his trial allowed the admission of victim impact evidence.[47] Moreover, any change in the decisional law was not unexpected. Finally, the application of a rule of evidence in a sentencing procedure does not violate ex post facto principles.

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47. The murders occurred in 1983 and appellant's trial occurred in 1994. *Booth, supra*, 482 U.S. 496 and *Gathers, supra,* 490 U.S. 805, which barred the use of victim impact evidence, were not decided until 1987 and 1989 respectively. In 1991, the Supreme Court overruled the short lived holdings of *Booth* and *Gathers*. (*Payne*, *supra*, 501 U.S. at p. 826.) Thus, the offenses occurred before victim impact evidence was barred by *Booth* and *Gathers*, and the trial occurred after those decisions had been overturned.

First, ex post facto principles do not apply here because the law in California, at the time of appellant's trial and offense, permitted victim impact testimony. In *People v. Edwards* (1991) 54 Cal.3d 787 (*Edwards*), this Court addressed the impact of *Payne* on California law. The Court found that prior to *Booth* and *Gathers*, which is when the murders in this case occurred, the Court had approved of argument addressing victim impact in *People v. Haskett* (1982) 30 Cal.3d 841, 863-864 (*Haskett*). (*Edwards*, *supra*, 54 Cal.3d at p. 834.) After *Haskett*, this Court approved of victim impact evidence, although usually in the context of the actual murder victim's suffering. (See *People v. Heishman* (1988) 45 Cal.3d 147, 195 [proper for prosecutor to comment on effect defendant's crimes had on victims]; *People v. Allen* (1986) 42 Cal.3d 1222, 1278 [prosecutor argument about victim suffering caused by crimes].)

The Court found that the assumption, in other cases, that victim impact evidence was inadmissible was based on *Booth* and *Gathers*. (*Edwards*, *supra*, 54 Cal.3d at p. 835; see *People v. Gordon* (1990) 50 Cal.3d 1223, 1266-1267 [improper to comment on impact crimes had on victim's family]; *People v. Marshall*, *supra*, 50 Cal.3d at pp. 928-929 [improper to comment on impact on family but harmless].) After *Booth* and *Gathers* were decided, this Court did not overrule *Haskett* but instead often found any error harmless. (See *People v. Frank* (1990) 51 Cal.3d 718, 735-736 [any error under *Booth* and *Gathers* harmless]; *People v. Lewis* (1990) 50 Cal.3d 262, 284 [any error under *Booth* and *Gathers* harmless]; *People v. Hovey* (1988) 44 Cal.3d 543, 577 [assuming *Booth* applied, any error was harmless].) But the cases excluding victim impact evidence, based on *Booth* and *Gathers*, were no longer binding in light of *Payne*. (*Edwards*, *supra*, 54 Cal.3d at p. 835; accord, *People v. Raley*, *supra*, 2 Cal.4th at p. 915.) Thus, California law returned to the law under *Haskett*, and victim impact evidence was admissible.

This Court has since held that *Edwards* and *Payne* are fully retroactive. (*People v. Catlin* (2001) 26 Cal.4th 81, 175; *People v. Clair*, *supra,* 2 Cal.4th at p. 672; see *People v. Thomas* (1992) 2 Cal.4th 489, 535 [*Payne* was decided while appeal was pending]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063 [same].) In fact, in *People v. Howard, supra,* 1 Cal.4th 1132, the same procedural circumstances occurred as in this case. There, the court rejected a claim under *Booth* and *Gathers* where those decisions had been decided after the defendant's trial and had been overruled by *Payne* while the appeal was pending. (*Id.* at p. 1189, accord, *People v. Catlin*, *supra*, 26 Cal.4th at pp. 98, 175 [victim impact evidence admissible in case where crimes occurred before *Booth* and *Gathers*].)

Thus, as this Court has already decided, *Payne* and *Edwards* are applicable to appellant's case. *Payne* did not represent a departure from prior law in California; *Booth* and *Gathers* did. Also, since victim impact evidence was admissible at the time of appellant's trial and crimes, there is no ex post facto issue.

Appellant's citation to *People v. Love* (1960) 53 Cal.2d 843, is inapposite. (AOB 213.) The court in *Love* did conclude it was error for the prosecutor to admit evidence for the purpose of showing the victim suffered. (*People v. Love*, *supra*, at pp. 854-857.) But the *Love* decision has never been followed on this point and it was decided before it became clear that the circumstances of the crime were constitutionally relevant at the penalty phase. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) Subsequent cases, such as *Haskett*, made clear that evidence of the victim's suffering was a relevant circumstance of the offense. Moreover, this Court has characterized *Love* as simply holding that *unduly prejudicial* victim impact evidence is inadmissible. (*People v. Taylor*, *supra*, 26 Cal.4th at p. 1172.)

To the extent *Love* holds victim impact evidence is per se inadmissible, it has not been good law since *Haskett*.

Second, even if the law in California has changed since the time of appellant's trial and offense, the change was not "unexpected and indefensible." (*Rogers v. Tennessee* (2001) 532 U.S. 451, 457 [121 S.Ct. 1693, 149 L.Ed.2d 697]; *People v. Davis* (1994) 7 Cal.4th 797, 811.) The decision in *Haskett* signalled the Court would allow victim impact evidence, not exclude it. The decisions in *Booth* and *Gathers* were the unexpected departure, not *Payne*. Indeed, the United States Supreme Court found that *Booth* and *Gathers* were "wrongly decided" (*Payne, supra*, 501 U.S. at p. 830), implying *those* decisions were "indefensible" or, at the very least, the overruling of those decisions was not "indefensible." Thus, any decisional change in allowing victim impact evidence did not implicate ex post facto principles because the change was not "unexpected and indefensible."

Third, any change here did not violate ex post facto principles. There are four categories of laws that may violate ex post facto principles:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender."

(*Carmel v. Texas* (2000) 529 U.S. 513, 522 [120 S.Ct. 1620, 146 L.Ed.2d 577] (*Carmel*), quoting *Calder v. Bull* (1798) 3 U.S. 386, 390 [1 L.Ed. 648].) In *Carmel*, the statute at issue allowed conviction of sexual assault based on the victim's testimony alone, whereas prior law required the victim's testimony *and*

corroboration. (*Carmel, supra*, 529 U.S. at pp. 530-531.) The statute violated the ex post facto clause because it "authoriz[ed] a conviction on less evidence than previously required . . . ." (*Id.* at p. 531.) But the court was careful to explain, "Ordinary rules of evidence . . . do not violate the Clause." (*Id.* at p. 533, fn. 23.) The Court noted that usually changes to rules of evidence are evenhanded and may benefit the prosecution or the defendant. In addition, and "[m]ore crucially, such rules, by permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption." (*Ibid.*)

Unlike the statute at issue in *Carmel*, a change in the admissibility of victim impact evidence does not alter the rules "in order to convict" someone. That is, the fourth category re-affirmed in *Carmel* does not apply to a sentencing proceeding after someone already has been convicted. Victim impact evidence is only admissible at the *penalty* phase. Thus, the defendant is already convicted and the fourth category of *Carmel* is inapplicable.

Moreover, a change in the admissibility of victim impact evidence is a change in the ordinary rules of evidence that does not implicate the concerns in *Carmel*. The United States Supreme Court has made a distinction between changes in the rule of evidence that affect that amount of evidence necessary to convict which affect the presumption of the defendant's innocence, and rules that merely allow the admission of a new kind of evidence that was previously inadmissible:

> If persons excluded upon grounds of public policy at the time of the commission of an offense, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be ex post facto which does nothing more than admit evidence of a particular kind

> in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed.

(*Thompson v. Missouri* (1898) 171 U.S. 380, 387 [18 S.Ct. 922; 43 L.Ed. 204].) Indeed, the Tenth Circuit Court of Appeals, relying on *Thompson*, found that a new state statute allowing victim impact evidence at the penalty phase did not alter the rules of evidence in a way that conflicted with *Carmel* because the statute did not change the evidence necessary to obtain a death sentence, even though the change only benefitted the prosecution. (*Neill v. Gibson* (10th Cir. 2001) 278 F.3d 1044, 1051-1053.) Such rules "by simply permitting evidence to be admitted at trial, do not subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption." Similarly here, admitting victim impact evidence did not change the requirements for the evidence necessary for the prosecution to obtain a death sentence.

Appellant alternatively contends that this Court should hold the retroactive application violates the state constitutional provision against ex post facto laws. (AOB 216.) This Court has consistently held that the state constitutional provision (Cal. Const. art. I, § 9) provides the same degree of protection as the federal constitution. (*People v. Frazer* (1999) 21 Cal.4th 737, 754, fn. 15, overruled on other grounds in *Stogner v. California* (2003) 539 U.S. 607 [123 S.Ct. 2446, 156 L.Ed.2d 544]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295-296.) Appellant provides no persuasive reason for deviating from these past decisions.

E. Appellant's Right To Due Process Was Not Violated By The Admission Of The Victim Impact Evidence In This Case

Appellant contends that the victim impact testimony violated his right to due process because the "prosecutor's entire presentation and argument in the penalty phase in this case was based on victim impact evidence" and the evidence caused the jury to impose the death penalty based on "emotion" and not reason. (AOB 219-223.)

In *Edwards,* a post-*Payne* case, this Court found that "evidence of the specific harm caused by the defendant" is generally a circumstance of the crime admissible under factor (a) of Penal Code section 190.3. (*Edwards, supra,* 54 Cal.3d at p. 833.) This Court explained that the word "circumstance" under factor (a) means the immediate temporal and spatial circumstances of the crime, as well as that "which surrounds materially, morally, or logically" the crime. (*Ibid.*) Factor (a) therefore allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. (*Id.* at p. 835; see *People v. Johnson, supra,* 3 Cal.4th at p. 1245.) This holding "only encompasses evidence that logically shows the harm caused by the defendant." (*Edwards, supra,* 54 Cal.3d at p. 835.)

This Court in *Edwards* expressly refused to explore the "outer reaches" of evidence admissible as a circumstance of the crime, but did hold that "emotional" evidence was allowable. (*Edwards, supra,* 54 Cal.3d at pp. 835-836.) This Court quoted the limitation expressed in the "leading pre-*Booth* case" (*id.* at p. 834) of *Haskett, supra,* 30 Cal.3d 841. Although emotional evidence is permissible, "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Edwards, supra,* 54 Cal.3d at p. 836, quoting *Haskett, supra,* 30 Cal.3d at p. 864.)

In the twenty years since *Haskett* was decided, this Court has not specifically defined what might constitute "inflammatory rhetoric" which diverts the jury's attention from its "proper role." The jury's proper role, simply put, is to decide between a sentence of death and life without the possibility of parole. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) A penalty phase jury "performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if life or death is the appropriate penalty for that particular offense and offender." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192, internal quotations omitted.) The jury is therefore making a "moral assessment," not a mechanical finding of facts. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268, quoting *People v. Brown* (1985) 40 Cal.3d 512, 540.) In deciding which defendants receive a death sentence, states must allow an "*individualized* determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235], emphasis in original.) That determination, however, should be based not on abstract emotions, but should instead be rooted in the aggravating and mitigating evidence. (See *California v. Brown* (1987) 479 U.S. 538, 542 [107 S.Ct. 837, 93 L.Ed.2d 934][discussing limitations on verdict on based on "mere sympathy"].)

It is true that the court must "strike a careful balance between the probative and the prejudicial." (*People v. Lewis* (1990) 50 Cal.3d 262, 284.) However, in the penalty phase of a capital trial, a trial court has less discretion to exclude evidence as unduly prejudicial than in the guilt phase, because the prosecution is entitled to show the full moral scope of the defendant's crime. (*People v. Anderson* (2001) 25 Cal.4th 543, 591-592.) As part of the jury's normative role, it must be allowed to consider any mitigating evidence relating to the defendant's character or background. (*Lockett v. Ohio, supra,* 438 U.S.

at p. 604.) There is nothing unconstitutional about balancing that evidence with the most powerful victim evidence the prosecution can muster, because that evidence is one of the circumstances of the crime. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017; *Edwards, supra,* 54 Cal.3d at pp. 833-836.)

In the context of the penalty phase, "emotional evidence" and "inflammatory rhetoric" are different concepts. The limitation against "inflammatory rhetoric" is similar to the federal limitation against evidence which is "so unduly prejudicial that it renders the trial fundamentally unfair." (*People v. Howard, supra,* 1 Cal.4th at pp. 1190-1191.) But as the United States Supreme Court has stated in *Payne*, victim impact evidence is not unfair in any way.

Because of the penalty phase jury's particular duties, even highly emotional victim impact evidence will not divert it from its proper role. An improper diversion might occur if, for example, the prosecution were to urge that a death sentence should be imposed on the basis of the victim's or defendant's race. (*Booth, supra,* 482 U.S. at p. 517, dis. opn. of White, J. [victim impact evidence should be held constitutionally permissible, but "the State may not encourage the sentence to rely on a factor such as the victim's race in determining whether the death penalty is appropriate"]; *Gathers, supra,* 490 U.S. at p. 821, dis. opn. of O'Connor, J. ["It would indeed be improper for a prosecutor to urge that the death penalty be imposed because of the race, religion, or political affiliation of the victim"]; *Furman v. Georgia* (1972) 408 U.S. 238, 242 [92 S.Ct. 2726, 33 L.Ed.2d 346], conc. opn. of Douglas, J. [death penalty "unusual" if imposed on the basis of "race, religion, wealth, social position, or class"].) Here, however, the prosecutor did not urge a death sentence on an unconstitutional basis, and so the jury was not diverted from its proper role.

Appellant presented two witnesses, Liz Brooks and Henry Kaney. Brooks testified that she had known appellant for 15 years. He would visit her business, The Butterfly Bakery, which was across the street from Connie's store. Appellant would socialize and go to dinner with Liz and her husband. Liz testified that appellant was very close to David Navarro, "like father and son." Appellant appeared to love David and Connie. Appellant told her that Connie wanted out of their relationship and seemed very depressed about the break up. Appellant disappeared after the murders, but resumed contact a few years prior to the trial. (RT 3145-3151.)

Henry Kaney was a pastor at Hope Chapel in Hermosa Beach. He became friends with appellant in 1978 or 1979. They became friends at the gym and appellant attended Kaney's wedding. When appellant and Connie broke up, appellant became very depressed and lost 20 to 30 pounds. Appellant said that he was desperate and filled with despair. Kaney asked for mercy on appellant's behalf. (RT 3154-3161.)

Thus, appellant was allowed to have a sympathetic older woman testify on his behalf about what a loving boyfriend he had been to the murder victim, and how he was practically a father to the victim's 13-year-old son. Similarly, he was allowed to have a pastor testify to the jury about how appellant suffered due to Connie's breaking up with him, and to plead for mercy on his behalf. In light of appellant's sympathetic witnesses, the prosecution's victim impact evidence was necessary to allow the jury to meaningfully assess appellant's moral culpability. (See *Payne*, *supra*, 501 U.S. at p. 809.)

Contrary to appellant's claim that the victim impact evidence was extensive, the prosecution presented only two victim impact witnesses, the children of the two women murdered by appellant. (RT 3135-3142.) They testified solely on the permissible subject of how the murders had affected their lives and the lives of their families. (*People v. Raley*, *supra*, 2 Cal.4th at p. 915;

People v. Johnson, *supra*, 3 Cal.4th at p. 1245.) While undoubtedly powerful, the evidence was not so inflammatory that it diverted the jury from its proper role. (*Payne*, *supra*, 501 U.S. at p. 809; see *Edwards*, *supra*, 54 Cal.3d at p. 836.) The trial court did not err by admitting this evidence.

The specific harm caused by appellant when he murdered Navarro and Jory -- the impact on their families -- was relevant to the jury's meaningful assessment of appellant's "moral culpability and blameworthiness." (See *Payne*, *supra*, 501 U.S. at p. 809.) Evidence of the impact of appellant's crimes on the victims' families advanced the State's interest in "counteracting the mitigating evidence which the defendant is entitled to put in[.]" (*Id.* at p. 825.) Fairness demands that evidence of the victims' personal characteristics, and the harm suffered by their families, be considered along with the "parade of witnesses" praising the "background, character, and good deeds" of the defendant . . . without limitation as to relevancy[.]" (*Id.* at p. 826; see also *People v. Dennis, supra,* 17 Cal.4th at p. 498 [capital defendant in penalty phase presented evidence from his friends and associates as to his childhood difficulties, his shyness and loneliness due to his hearing problem, his friendly and easygoing nature, his pride and love for his son and his devastation at his son's death, his honesty, thoughtfulness, and sensitivity, his good record at Lockheed, and his compassion for others. Defendant's mother presented a pictorial biography of defendant's life and their relationship and spoke of awards he won. The jury also heard a tape recording of defendant and his son].)

Appellant killed two human beings, Connie Navarro and Susan Jory. Though he may not have known the precise dimensions of the tragedy his actions left behind, the profound harm to the survivors was "so foreseeable as to be virtually inevitable." (*Payne, supra,* 501 U.S. at p. 838, conc. opn. of Souter, J..) Thus, the jury was properly allowed to hear evidence concerning the full impact of appellant's actions.

F. The Jury Was Not Required To Find The Existence Of Aggravating Factors Beyond A Reasonable Doubt

Appellant contends his constitutional rights were violated by the failure of section 190.3 to require that the jury find the existence of aggravating factors unanimously and beyond a reasonable doubt as a prerequisite to the imposition of the death penalty. (AOB 223-224.) Appellant is incorrect.

This Court first rejected this claim in *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779, and has done so ever since. (See, e.g., *People v. Cox*, *supra*, 30 Cal.4th at pp. 971-972; *People v. Snow* (2003) 30 Cal.4th 43, 125-127; *People v. Burgener* (2003) 29 Cal.4th 833, 884, fn. 7; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150-1151; *People v. Clair, supra,* 2 Cal.4th at p. 691.) As this Court recently stated:

> "The Constitution does not require the jury to find beyond a reasonable doubt that a particular factor in aggravation exists, that the aggravating factors outweighed the mitigating factors, or that death was the appropriate penalty."

(*People v. Cox, supra*, 30 Cal.4th at p. 971, quoting *People v. Burgener, supra*, 29 Cal.4th at p. 884, fn. 7.)

Appellant, however, asks this Court to reconsider this position in light of the United States Supreme Court's recent decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] (*Ring*). Specifically, appellant argues that the cases mandate that the aggravating factors necessary for the jury's imposition of the death penalty be found beyond a reasonable doubt. (See AOB 223-224.) This Court rejected this argument recently in *People v. Snow, supra*, 30 Cal.4th at page 126, footnote 32:

> We reject that argument for the reason given in *People v. Anderson, supra*, 25 Cal.4th at pages 589-590, footnote 14, . . . : "[U]nder the

California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole. (§ 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi.*" The high court's recent decision in *Ring v. Arizona* (2002) 536 U.S. 584 . . . does not change this analysis. Under the Arizona capital sentencing scheme invalidated in *Ring*, a defendant convicted of first degree murder could be sentenced to death if, and only if, the trial court first found at least one of the enumerated aggravating factors true. (*Id.* at [pp. 602-603].) Under California's scheme, in contrast, each juror must believe the circumstances in aggravation substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist. The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt.

(Accord *People v. Cox, supra*, 30 Cal.4th at pp. 971-972; *People v. Smith* (2003) 30 Cal.4th 581, 642; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) Accordingly, appellant's claim should be rejected.

G. Appellant Was Not Prejudiced By The Admission Of The Testimony

Even if the court had erred in admitting the victim impact evidence, any error was harmless in light of the record. The victim impact evidence was limited to the two victims' children. The entire presentation, concerning two victims, spanned only eight pages of reporter's transcript. The witnesses testified about their relationships with the victims and the impact their deaths had on them personally. The testimony gave context to the stark facts of the senseless murders. Thus, the evidence gave the jury a "quick glimpse" (*Payne, supra,* 501 U.S. at p. 830, O'Connor, J., concurring) of the two lives that appellant chose to extinguish. None of the witnesses expressed any opinion regarding appropriate punishment.

The testimony was not inflammatory. That the families were aggrieved was an "obvious truism." (*People v. Sanders, supra,* 11 Cal.4th at p. 550.) Even if the testimony aroused emotions and evoked sympathy, "it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.) Additionally, the trial court's instructions told the jury not to be swayed by prejudice against appellant (CT 780) and that they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." (CT 785.) The jury is presumed to have followed these instructions. (*People v. Rich* (1988) 45 Cal.3d 1036, 1102.) Defense counsel also urged the jury not to sentence appellant to death based on sympathy for the victims' families. (RT 3198-3199.) Defense counsel told the jury:

> Now, it is clearly uncomfortable to listen to Christy Jory and David Navarro on the - - what is called victim impact. It's heart rendering, it's - - it was disturbing. We asked no questions in order not to make it even

> worse. [¶] But what I would ask you to consider is we are having a penalty phase and a trial with twelve jurors who promised, and actually took an oath, that they would be fair. Because we don't let children decide whether [appellant] is to die by execution or to be in prison forever, we not only don't let children do it, we don't let relatives do it because of the emotions and the sentiment. [¶] What we ask[] is not that children decide, not that relatives decide, not even that prosecutors or defense lawyers decide, but that jurors will look at the value of life and understand that they have the freedom to vote that [appellant] should not be executed because that is the decision, the request of a government official.

(RT 3108-3199.)

Additionally, the jury heard evidence of the callousness and brutality of the murders: that Jory was shot while defending herself (RT 1258), that Jory's body laid in a pool of blood, and that Navarro's body had been shoved into a linen closet (RT 1308-1317). (See *Payne, supra*, 501 U.S. at p. 831.)

In light of the relatively few number of victim impact witnesses, the defense's argument against the jury being overly swayed by the evidence, the court's instructions, and the abundance of evidence which overwhelmingly established that appellant committed a heinous and brutal crime against two innocent women, any error in allowing the witnesses to testify was harmless. As this Court has observed, "among the most significant considerations [in the jury's assessment of punishment] are the circumstances of the underlying crime." (*People v. Mitcham, supra,* 1 Cal.4th at p. 1062.) The admission of the challenged testimony "did not undermine the fundamental fairness of the penalty-determination process." (*Id.* at p. 1063.) The admission of the witnesses' testimony did not violate appellant's federal or state rights to due

process, a fair trial, or a reliable penalty determination. Appellant's claims should be denied.

XIV.

THE TRIAL COURT CORRECTLY RESPONDED TO THE JURY'S NOTE REGARDING THE PENALTY

Appellant contends that the trial court improperly answered a jury question regarding the number of votes necessary to determine the penalty. Appellant argues that the questions suggests that the jury was "speculat[ing] whether a hung jury might require a retrial of the guilt phase as well, or otherwise result in the release of [appellant] back into society." (AOB 233-234.) The contention lacks merit. First, the trial court properly answered the jury's question, and the question does not suggest that the jury was concerned that appellant might be released back into society. Additionally, assuming that the question did raise such concerns, the trial court had no obligation to address those concerns. Thus, this Court should deny relief to appellant.

A. The Relevant Facts

On the morning of their second day of deliberations regarding the penalty, the jurors sent the trial court the following note:

> Your Honor: The instructions state quite explicitly that all 12 jurors must agree in order to render a verdict. The question is, does that apply only for the death sentence, and if so does any one or more dissenting votes automatically set the sentence to life imprisonment without chance of parole, or does the "life imprisonment" sentence have to have the unanimous vote of the 12 jurors also.

(CT 774; RT 3217-3218.)

The court indicated that it intended to answer "no" to the questions regarding whether the unanimity requirement only applied to the death penalty, and whether one or more dissenting votes automatically set the sentence to life imprisonment without chance of parole. The stated that it would answer "yes"

to the question about whether the life imprisonment sentence requires a unanimous vote. (RT 3218.) The prosecution concurred with the court's proposed answer. (RT 3218.)

The defense objected to the trial court's answer to the third question:

> I think it is misleading. It does not approach the status of half truth, but I think it's misleading in the sense of telling them that life imprisonment sentence requires a unanimous vote of twelve jurors because that is not necessarily so. [¶] If one juror favors life without parole, then it becomes the People's option to retry the case or let the current sentences stand.

(RT 3218.)

The court questioned whether the jury's question encompassed the point that defense counsel was making:

> That's all they are asking me as far as I can determine. If they are to vote as to the life imprisonment sentence and that's going to be their verdict, do all twelve have to agree to that, and the answer is yes.

(RT 3219.)

The defense continued to insist that the answer was incomplete:

> I think if you're going to answer the question, that there's an obligation to give them the complete answer, which is life imprisonment may result from a unanimous verdict of twelve jurors or the life imprisonment may result if there's a hung jury and the district attorney declines to proceed on the penalty phase retrial or a life imprisonment sentence may result after retrial if that is the verdict of the jury. [¶] I think what you propose is a partial answer and for that reason it is misleading.

(RT 3219.)

The court reaffirmed that it would answer the questions in the fashion that it had previously indicated. Defense counsel then suggested that the court

either refer the jurors back to the jury instructions instead of answering the questions directly, or alternatively, reopen argument so that the attorneys could address this issue. The court denied both requests. (RT 3220.)

The court answered the questions as indicated. (CT 774.)

B. The Court Correctly Answered The Jury's Questions

Contrary to appellant's contention, the trial court properly answered the jury's question. The unanimity requirement applies to the penalty verdict, whether it be death or life imprisonment without the possibility of parole. (See CALJIC No. 8.88; § 190.4, subd. (b); *People v. Weaver* (2001) 26 Cal.4th 876, 988; *People v. Breaux* (1992) 1 Cal.4th 281, 315.) Further, the failure to unanimously agree on the death verdict did not lead, by default, to a verdict of life imprisonment. (§ 190.4, sudb. (b).) Thus, the trial court's answers to the jury's questions were correct.

C. There Is No Reasonable Likelihood That The Jury's Question Indicated A Concern That Appellant's Guilt Phase Would Be Retried If The Jury Deadlocked Regarding The Penalty

Appellant argues that the jury's question regarding the unanimity requirement for the penalty phase indicated a concern that "a hung jury might require a retrial of the guilt phase as well, or otherwise result in the release" of appellant. (AOB 233-234.) The question asked by the jurors was strictly limited to whether the life imprisonment sentence required a unanimous vote or become a default sentence in the event of a deadlock. Nothing in the question indicates that the jury was concerned that appellant would be released if they deadlocked regarding the penalty. If the jurors were concerned about appellant's potential release, they undoubtedly would have asked about his custody status if they were unable to reach a penalty verdict. However, the

question asked did not mention appellant's custody status, and it cannot be reasonably inferred the question was motivated by a concern about appellant's potential release.

Further, defense counsel's only objection in the trial court was that the trial court's answer was incomplete because it did not inform the jury that the district attorney's office could decide not to retry the penalty phase. (RT 3218-3219.) Defense counsel never suggested that the jury was concerned about appellant's custody status in the event of a deadlock or that the court should instruct the jury that appellant would not receive a new guilt phase trial. (RT 3218-3219; CT 1034.) Thus, appellant's current argument that the jury should have been informed that appellant would not receive a new guilt phase trial was not preserved for appellate review. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1189-1192; *People v. Price* (1991) 1 Cal.4th 324, 448.)

D. The Court Had No Duty To Inform The Jury About The Consequences Of A Deadlock Or Inform The Jury That Appellant Would Not Be Released As A Consequence Of A Deadlock

Appellant contends that the trial court erred by not informing the jury that a deadlocked jury in the penalty phase would not result in appellant receiving a new guilt phase trial and potentially being released from custody. (AOB 233.) Assuming that the jury's inquiry could somehow be interpreted to somehow raise the concerns that appellant suggests in his opening brief, the trial court was not required to address those alleged concerns.

This Court has previously held that a trial court has no obligation to instruct a penalty phase jury about the consequences of a deadlock. (*People v. Wader* (1993) 5 Cal.4th 610, 664; *People v. Morris* (1991) 53 Cal.3d 152, 227, overruled on a different issue by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *People v. Rich* (1988) 45 Cal.3d 1036, 1114-1115.) Similarly, this Court has repeatedly ruled that a trial court has no obligation to inform the jury that

a defendant will not be released back into society if they are unable to decide on a penalty. (*People v. Musselwhite, supra,* 17 Cal.4th at p. 1271; *People v. Arias, supra,* 13 Cal.4th at pp. 172-173; *People v. Rich, supra,* 45 Cal.3d at pp. 1114 -1115; *People v. Kimble* (1988) 44 Cal.3d 480, 515-516.) Thus, assuming the jury was concerned that appellant might be released as a consequence of its inability to reach a verdict, the court had no duty to instruct on that issue.

Appellant cites various cases from the Ninth Circuit Court of Appeals in support of his argument. (AOB 235-236.) None of these cases are applicable to the instant case. In *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, the trial court erred by failing to give the jury guidance on the issue of whether it could consider eight potentially mitigating factors. (*McDowell v. Calderon, supra,* 130 F.3d at pp. 836-841.) The Ninth Circuit found it was error because the court's failure to answer the jury's question regarding the mitigating factors prevented the jury from considering that evidence. (*Id.* at p. 837.) However, the Ninth Circuit did not address whether the trial court has to inform the jury about the consequences of a deadlock in the penalty phase. Further, the Ninth Circuit has acknowledged that *McDowell* was overruled by the United States Supreme court in *Weeks v. Angelone* (2000) 528 U.S. 225 [129 S.Ct. 727, 145 L.Ed.2d 727]. (*Morris v. Woodford* (9th Cir. 2001) 273 F.3d 826, 839.) Thus, *McDowell* offers no support to appellant's position.

Appellant's reliance on *McLain v. Calderon* (9th Cir. 1998) 134 F.3d 1383, is also misplaced. In *McLain*, the jury was erroneously instructed that the California governor had the unilateral authority to commute the defendant's sentence. (*McLain v. Calderon, supra,* 134 F.3d at pp. 1385-1386.) The Ninth Circuit found that the penalty had to be reversed because the instruction was erroneous, and also because the instruction concerning the governor's power to commute the sentence "improperly focused the jury's attention on

commutation procedures rather than on the question of mitigation." (*Id.* at p. 1386.) In the instant case, the trial court's answer was not erroneous. Also, by failing to inform the jury about the district attorney's ability to refuse to retry the penalty phase, the trial court avoided "improperly" focusing the jury's attention irrelevant procedures instead of on mitigation. Therefore, *McLain* is similarly inapplicable to the instant case.

Thus, the trial court did not err by not informing the jury concerning the consequences of a deadlock and the district attorney's ability to refuse to retry the penalty phase.

E. Appellant Was Not Prejudiced By Any Alleged Error

Further, there was no reasonable possibility that the jury would have returned a different sentence if the trial court had informed them further about the consequences of a deadlock. (*People v. Jones, supra,* 29 Cal.4th at p. 1264, fn. 11; *People v. Jackson, supra,* 13 Cal.4th at p. 1232.) The question asked did not suggest that the jury was concerned about appellant's custody status in the event of a deadlock, but only whether the life imprisonment sentence required a unanimous verdict. Thus, the concerns that appellant raises do not appear to have been shared by the jurors.

Also, given the abundance of evidence which overwhelmingly established that appellant committed a heinous and brutal crime against two innocent women, any error in not informing the jurors about the consequences of a deadlock was harmless. As this Court has observed, "among the most significant considerations [in the jury's assessment of punishment] are the circumstances of the underlying crime." (*People v. Mitcham, supra,* 1 Cal.4th at p. 1062.) The court's failure to further instruct concerning appellant's custody status in the event of a penalty deadlock "did not undermine

the fundamental fairness of the penalty-determination process." (*Id.* at p. 1063.) Thus, appellant's claims should be denied.

XV.

CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Appellant "raises a number of . . . constitutional objections to the death penalty statute identical to those [the Court has] previously rejected." (*People v. Welch* (1999) 20 Cal.4th 701, 771; AOB 242-319.) To the extent appellant alleges alleged statutory errors not objected to at trial, the issue is waived on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589.) Similarly, any complaints relating to instructions that were not erroneous but only incomplete are waived unless appellant requested clarifying or amplifying language. (*People v. Lewis, supra,* 25 Cal.4th at p. 666.) Respondent will not "rehearse or revisit" the numerous claims previously and regularly rejected by this Court. (*People v. Ayala* (2003) 24 Cal.4th 243, 290 [internal quotation marks excluded].) Respondent simply identifies appellant's complaint and notes the Court's applicable opinions.

A. The Special Circumstances Enumerated In Penal Code Section 190.2 Perform The Narrowing Function

Appellant argues that the special circumstances enumerated in California's death penalty law (§ 190.2) fail adequately to narrow the class of persons eligible for the death penalty. (AOB 244-249.) The United States Supreme Court has found that California's requirement of a special circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstance that it fails to perform the narrowing function required under the Eighth Amendment. (*People v. Barnett,*

supra, 17 Cal.4th at p. 1179; *People v. Ray* (1996) 13 Cal.4th 313, 356; *People v. Arias* (1996) 13 Cal.4th 92, 186-187.) Nor have the statutory categories been construed in an unduly expansive manner. (*People v. Barnett, supra*; *People v. Ray*, *supra*; *People v. Arias, supra.*)

B. Penal Code Section 190.3, Subdivision (a) Does Not Violate The Federal Constitution

Section 190.3, factor (a), allows the jury to consider the circumstances of the crime and special circumstances in determining the appropriate penalty. While acknowledging its facial validity (see *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S Ct. 2630, 129 L.Ed. 2d 750]) appellant contends the provision "has been applied in . . . a wanton and freakish manner" resulting in the arbitrary and capricious imposition of death sentences. (AOB 249-257.) This Court has rejected and should continue to reject this claim. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 192; *People v. Cain* (1995) 10 Cal.4th 1, 68.)

C. Unanimous Jury Agreement

Appellant contends that the jury must unanimously agree on which aggravating factors warrant death. (AOB 272-278.) This Court has held otherwise and appellant provides no reason to revisit those decisions. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Osband* (1996) 13 Cal.4th 622, 710.)

D. Absence Of Reasonable Doubt Standard

Appellant argues the jury must be required to find beyond a reasonable doubt that aggravating factors are true and that aggravation outweighs mitigation. (AOB 258-272, 279-284.) Although the Court has consistently

rejected identical claims (see, e.g., *People v. Mendoza*, *supra*, 24 Cal.4th at p. 191; *People v. Sanchez* (1995) 12 Cal.4th 1, 80-81), appellant contends that *Apprendi, supra,* 530 U.S. 466 and *Ring, supra,* 536 U.S. 584, compel a different result.

This Court has already rejected such a claim. (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-264, 275.) As the Court said, "the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. [Citation.]" (*Id.* at p. 275; accord, *People v. Nakahara* (2003) 30 Cal.4th 705, 721-722; *People v. Smith*, *supra*, 30 Cal.4th at p. 642; *People v. Navarette* (2003) 30 Cal.4th 458, 520.) Appellant's claim should again be rejected.

E. Evidence Code Section 520 Requires Some Lesser Burden Of Proof

Relying on Evidence Code Section 520, appellant also contends that if aggravating factors does not need to be found beyond a reasonable doubt, the prosecution should at least be required to meet a preponderance of the evidence test. (AOB 284-287.) This Court recently reaffirmed the holding of *People v. Hayes, supra,* 52 Cal.3d at 643, and reiterated that there was no burden of proof and no burden of persuasion in the penalty phase. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1135-1136.) This Court also specifically rejected the idea that a burden of proof or persuasion was necessary to break a tie. "The jurors cannot escape the responsibility of making the choice by finding the circumstances in aggravation and mitigation to be equally balanced and then relying on a rule of law to decide the penalty issue." (*Id.* at p. 613.) This Court further rejected the claim that Evidence Code section 520 was applicable to the penalty phase. (*Ibid.*) Thus, this claim is meritless.

F. Instruction On The Lack Of Burden Of Proof Was Not Required

Appellant argues that even if there is no burden of proof, the trial court erred by not so instructing the jury. (RT 288-289.) As this Court pointed out in *People v. Lenart, supra,* 12 Cal.Rptr.3d at p. 613-614, in the context of an ineffective assistance of counsel claim, because there is no constitutionally or statutorily required burden of proof, there is no requirement that the jury be so instructed.

G. Written Jury Findings Are Not Necessary

Appellant argues the jury should be required to return written findings identifying the aggravating factors supporting the death verdict. (AOB 289-293.) This Court has previously rejected identical arguments. (*People v. Lucero* (2000) 23 Cal.4th 692, 741; *People v. Osband*, *supra*, 13 Cal.4th at p. 710.) Appellant provides no basis for rejecting those cases.

H. Intercase Proportionality Review Is Not Necessary

Appellant next asserts that the Court should conduct intercase proportionality review. (AOB 294-299.) Both the United States Supreme Court (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29]) and this Court (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Millwee* (1998) 18 Cal.4th 96, 168; *People v. Stanley* (1995) 10 Cal.4th 764, 842) have rejected identical claims. The Court should continue to do so.

I. The Prosecution Could Introduce Evidence Of Appellant's Unadjudicated Criminal Activity

Appellant contends the use of unadjudicated criminal activity as aggravating evidence in the penalty phase violates various constitutional rights.

(AOB 294-299.) The Court should reject this argument as it has in the past. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Carpenter, supra*, 21 Cal.4th at p. 1061; *People v. Cain* (1995)10 Cal.4th 1, 69-70.)

Also, for the reasons stated previously in sections XIII (F) and XV (D) of this brief, appellant's argument that the conduct needed to be found true beyond a reasonable doubt must be rejected.

J. The Use Of The Adjectives "Extreme" And "Substantial" Did Not Act As Barriers To The Jury's Consideration Of Mitigation Evidence

Appellant argues that the use of the adjective "extreme" in regard to factors (d) and (g), and the use of the adjective "substantial" in relation to factor (g), acted as a "barrier[s]" to the jury's consideration of those factors in violation of several constitutional provisions. (AOB 300.) This Court has rejected this argument in several prior cases. (*People v. Turner* (1994) 8 Cal.4th 137, 208-209 [rejecting the argument in relation to factor (d)]; *People v. Wright* (1990) 52 Cal.3d 367, 444 [rejecting the argument in relation to factor (g)]; *People v. Morales* (1989) 48 Cal.3d 527, 568 [same]; *People v. Adcox* (1988) 47 Cal.3d 207, 270 [same]; *People v. Ghent* (1987) 43 Cal.3d 739, 776 [rejecting the argument in relation to factor (d)].) Further, even if the factors were inappropriately worded, appellant did not argue that he was entitled to mitigation due to "extreme mental or emotional disturbance" (factor (d)) or "extreme duress or under substantial domination of another person" (factor (g)). (RT 3189-3206.) Thus, appellant was not prejudiced.

K. The Jury Was Not Likely To Have Found That The Absence Of A Mitigating Factor Constitutes An Aggravating Factor

Appellant contends that the use of the phrase "whether or not" in factors (d), (e), (f), (g), (h), and (j) could have led the jury to believe that the

absence of any of these mitigating factors could constitute an aggravating factor. (AOB 302-303.) This Court has previously found that a "jury properly advised about the broad scope of its sentencing discretion is unlikely to conclude that the *absence* of [mitigating factors] is entitled to aggravating weight." (*People v. Livaditis* (1992) 2 Cal.4th 759, 784-785.) Appellant has provided this Court with no reason to alter this rule. (See also *People v. Prieto, supra,* 30 Cal.4th at p. 276; *People v. Coddington* (2000) 23 Cal.4th 529, 639-640, overruled on other grounds *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn. 13; *People v. Gonzalez* (1991) 51 Cal.3d 1179, 1234.)

L. The Alleged Absence Of Procedural Safeguards Does Not Violate Appellant's Right To Equal Protection

Appellant asserts the state statute violates equal protection because certain procedures, such as disparate sentence review, utilized in non-capital cases do not apply to capital cases. (AOB 303-314.) The Court has explicitly rejected such arguments. (*People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen, supra,* 42 Cal.3d at pp. 1286-1287.) Appellant's complaint should be rejected.

M. California's Death Penalty Statutes Do Not Violate International Law

Appellant argues that his death sentence violates international law. (AOB 314-318.) The Court should reject this argument as it has in the past. (*People v. Bolden* (2002) 29 Cal.4th 515, 567; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055; *People v. Ghent, supra,* 43 Cal.3d at pp. 778-779; see also *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 370-376 [upholding Ohio's death penalty scheme against claims that it violated international law].)

XVI.

THERE WERE NO CUMULATIVE ERRORS REQUIRING REVERSAL OF APPELLANT'S JUDGMENT OF DEATH

Appellant contends the cumulative effect of the penalty phase errors requires reversal of the judgment of death. (AOB 319-322.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2003) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at p. 1214.) The record shows appellant received a fair trial. His claims of cumulative error should be rejected.

CONCLUSION

Accordingly, respondent respectfully asks that the judgment be affirmed.

Dated: September 7, 2004

Respectfully submitted,

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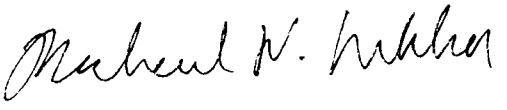

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Brief** uses a 13 point Times New Roman font and contains **57,348** words.

Dated: September 7, 2004

Respectfully submitted,

BILL LOCKYER
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Deputy Attorney General

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DECLARATION OF SERVICE BY U.S. MAIL

CAPITAL CASE

Case Name: **People v. John Alexander Riccardi**

California Supreme Court No. **S056842**

Los Angeles County Superior Court No. **A086662**

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 that same day in the ordinary course of business.

On **September 7, 2004**, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Los Angeles, California 90013, addressed as follows:

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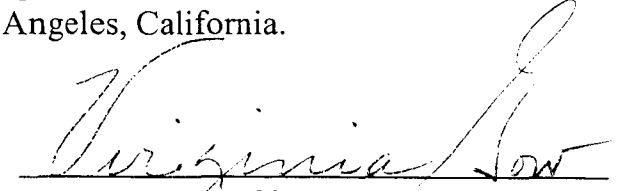
I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **September 7, 2004**, at Los Angeles, California.

Virginia Gow
Declarant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