SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RICHARD DON FOSTER,** Defendant and Appellant.	**CAPITAL CASE** S058025

Automatic Appeal from the Superior Court of the State of California
San Bernardino County Superior Court No. VCR5976
The Honorable Stanley W. Hodge, Judge

SUPREME COURT
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DEATH PENALTY

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STATEMENT OF THE CASE

In an amended information filed on January 5, 1996, the San Bernardino County District Attorney charged appellant Richard Don Foster (hereinafter "Foster") with the murder of Gail L. Johnson (count 1; Pen. Code, § 187, subd. (a));[1/] burglary (count 2; § 459); and second degree robbery (count 3; § 211). Additionally, the information alleged as a special circumstance that the murder was committed while Foster was engaged in the attempted commission of burglary and robbery, within the meaning of section 190.2, subdivisions (a)(17)(i) and (vii). The information also alleged, in counts 1 and 3, that Foster personally used a deadly and dangerous weapon, within the meaning of section 12022, subdivision (b), and causing the offenses to be a serious felony within the meaning of section 1192.7, subdivision (c)(23). Finally, the information alleged that in counts 1 through 3, that Foster had suffered a serious felony prior conviction for robbery, assault with intent to commit rape, and intentional infliction of great bodily injury, within the meaning of section 667, subdivision (a). (I CT 294-296.)

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1. Any subsequent statutory reference is to the Penal Code unless otherwise indicated.

Foster pled not guilty and denied all the allegations. (I CT 293.) On February 5, 1996, jury selection began. (II CT 309.) The jury was sworn on February 28, 1996, and the presentation of evidence began thereafter. (II CT 343-344.) The jury began their deliberations on April 4, 1996. (II CT 374.) On April 11, 1996, the jury found Foster guilty of all charges and all allegations true. (I CT 378-379, 466-474.)

The penalty phase of the trial commenced on April 15, 1996. (II CT 480.) On May 9, 1996, the jury returned a verdict of death. (II CT 506-507, III CT 705.)

On December 13, 1996, the court denied appellant's motions for a new trial, automatic modification of the verdict, and to strike the special circumstances findings. (III CT 741.) On the same date, the trial court imposed a sentence of death for count 1 and a determinate term of 10 years for the prior serious felony conviction enhancement and two years for the personal use of a weapon enhancement. The court also sentenced Foster to concurrent terms of two years on count 2 and three years on count 3, but stayed the execution of these sentences. (III CT 741, 749-752, Supp-A II CT 370-371.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

Introduction

In August 1991, 53 year old Gail Johnson was a volunteer at the High Desert Church of Religious Science in Apple Valley, California. On August 26, 1991, Foster stabbed her to death at the church. The facts and circumstances of her murder are detailed below. Johnson was murdered after being repeatedly stabbed with a knife.

Guilt Phase Evidence

Prosecutions Case-in-Chief

On Saturday, August 24, 1991, Minister Irma Plate was conducting a workshop at the High Desert Church of Religious Science in Apple Valley. (8 RT 1976-1977.) Around 2 p.m., Foster, who was not part of the workshop, entered the foyer of the church. (8 RT 1977-1978.) Foster was dirty and his hair was scraggly and it looked as if he had not had a bath in a while. (8 RT 1984.) He told Plate his name was Martin Jennings and his mother was sick and he wanted Plate to pray for her. (8 RT 1978-1979.) Plate told Foster to fill out a prayer request card and put it in the request box on the table in the foyer. (8 RT 1979.) Foster filled out the card, put it in the box and then left the church. (8 RT 1980) He was only at the church for about five minutes and never asked to use the phone. (8 RT 1984.)

On the prayer request card, Foster lied about his name and address. Instead of giving his own information, he wrote down that his name was Martin Jennings. Martin Jennings was Foster's step-brother, and the address Foster provided was Jennings. Foster also wrote down a phone number. At trial, Foster claimed he did not give his own information because he did not have a phone. (8 RT 1982.)

Two days later, on Monday, August 26, at 11:20 a.m., Loren West, an air conditioning repairman, went to the church to fix the air conditioning. (8 RT 2000-2003.) Johnson was working alone at the church. (8 RT 2007.) Only a blue mid-size sedan was parked in the parking lot. (8 RT 2009-2010.) West fixed the air conditioning and left at approximately 11:45 a.m. (8 RT 2009.) Everything was normal when he left. (8 RT 2014-2015.)

William Rosenthal, a delivery driver for Apple Valley Stationers, made a delivery at the church around 1 p.m. (8 RT 2025, 2028.) He walked into the minister's office and found Gail Johnson, a volunteer with the church, lying on

the ground. (8 RT 2032.) He did not approach her and immediately called 911. (8 RT 2035, 2043.)

Immediately thereafter, fire fighters were summoned. Fire fighter Mike Malloy and two other fire fighters arrived at the church and saw Johnson lying on the ground in minister's office. (8 RT 2047-2048.) Johnson, who was fully clothed, had blood on her shirt and her right leg was up on a bookshelf. (8 RT 2049, 2052, 2052.) Johnson's bracelet on her left wrist partially off. (9 RT 2216.)

Malloy pulled Johnson away from the bookshelf. (8 RT 2049.) She was warm and rigormortis had not set in, but she was not breathing and did not have a pulse. (8 RT 2049.) Malloy cut Johnson's top off. She had multiple stab wounds to her abdomen, chest and side. A piece of Johnson's lung was sticking out of her chest. Malloy hooked Johnson up to an EKG machine and it showed a flat line. (8 RT 2051, 2045.) Malloy noticed a white fluid on the ground all around Johnson's body. (8 RT 2052, 2054.) Moments later, the ambulance and police units arrived. (8 RT 2054-2055.)

Johnson's purse was discovered by the bookshelf in the minister's office. It had blood on the bottom and sides. (8 RT 2158-2159, 2179.) The blood drop on the bottom was unusual and indicated that blood had been dropped on the purse before it had been turned over. (8 RT 2149-2159.) Numerous items from Johnson's purse were discovered underneath the desk. (8 RT 2179; 11 RT 2977-2981.) Johnson's wallet was not among these items. (9 RT 2431.) The telephone in the minister's office was pulled out of the wall and one of the windows was broken. (8 RT 2182, 2163.) Two wires (phone wires?) were found on either side of the desk chair. (8 RT 2171.)

At 2:20 p.m., on the day of the murder, San Bernardino County Criminalist David Stockwell arrived at the church to assist in the collection of evidence and blood samples. (8 RT 2092.) Blood was found throughout the

minister's office. Johnson's body was lying in a pool of blood. Her pants and abdomen and the carpet around her body were covered in blood. A white lotion-type substance had been smeared on Johnson's pants and on top of the blood on Johnson's body and the surrounding carpet. (8 RT 2217-2218; 11 RT 2798.) There were also blood stains on Johnson's purse, the vertical window blinds, the bookshelf, the wall, Johnson's shoes, the doorjamb, the ottoman, the desk chair, the plastic floor mat and the top of the desk. (8 RT 2159, 2162-2163, 2166, 2171-2173, 2175, 2181, 2187-2188.) Stockwell opined that a lot of force must have been used by the attacker for blood to land on the window blinds. (8 RT 2164.) The blood stains on Johnson's shoe were very small, indicating that the attacker used a lot of force in stabbing Johnson. (8 RT 2176.) The white lotion had also been smeared on top of the plastic floor mat and on top of the desk. The blood on the floor mat had been there before the lotion was put on top of it. Stockwell believed that the blood had been there for about 15-20 minutes before the lotion was placed on top of it. (8 RT 2173-2174, 2181.) The blood stains on Johnson's shoes appeared to have been wiped through with something, using an up and down movement. (8 RT 2175.)

There was also a trail of blood between the office and the boutique. Stockwell was unable to determine whether the trail originated in the office or the boutique. (8 RT 2187.) Blood stains were also found on the door jamb in between the minister's office and the boutique. These stains were diluted with more of the lotion, making samples of the blood unuseable. (8 RT 2187-2188.) There was also blood in the entranceway to the secretary's office. (8 RT 2194.) The blood on the carpet in the boutique and in the boutique walkway was covered with a white spray resembling deodorant. (8 RT 2188-2189, 2194, 2197.)

Blood was also found on the drinking fountain in the foyer, concrete floor in the foyer, and the floor, sink, and wall of the men's restroom. (9 RT

2208-2209, 2211, 2213-2214.) The blood on floor from the boutique to the foyer and throughout the church was also covered with the white lotion. (8 RT 2202-2203; 9 RT 2208.) The handle of the drinking fountain and the door handle of the men's restroom were covered with white powder. (9 RT 2209, 2211.) White lotion was also put on the blood stains on the floor in the men's restroom. (9 RT 2211.) An empty bottle of white hand lotion and a can of Rightguard deodorant were found on the men's restroom counter. (9 RT 2212-2213.)

Stockwell obtained blood samples from Foster and Johnson. (9 RT 2220.) He used the genetic marker system to analyze the blood samples and compare them to the blood found throughout the church. (9 RT 2221-2223.) The blood stain on top of Johnson's purse was consistent with only Johnson's blood. (9 RT 2226.) The blood stain on the bottom of the purse was consistent with a mixture of Foster and Johnson's blood. (9 RT 2226-2227.) Stockwell explained that the mixture of Foster and Johnson's blood on the purse was consistent with Foster having cut his hand and having Johnson's blood on his hand also. (9 RT 2229.) Three other large blood drops on Johnson's purse were consistent with Foster's blood and not Johnson's. (9 RT 2228.) Another blood swipe on purse was consistent with Johnson's blood. (9 RT 2228.)

The blood found on the shelf above the ottoman was determined to be a mixture of Foster and Johnson's blood. Stockwell also determined that the blood found on the first and second shelves of the bookcase, the desk chair and the corner of the desk were a mixture of Foster and Johnson's blood. (RT 2230, 2233-2235.) Two blood spots on the mini blinds were consistent with Johnson's blood. (RT 2232-2233.) Blood found on Johnson's shoe next to her foot was consistent with Johnson's blood. (RT 2235.) The blood found on carpet between minister's office and boutique was a mixture of Johnson and Foster's blood. (RT 2237.) Another blood drop on the carpet was consistent

with Foster's blood only. (RT 2238.) Blood on the floor in the boutique was consistent with a mixture of Johnson and Foster's blood. (RT 2240.) The blood found on the drinking fountain was consistent with Foster's blood only. (RT 2245, 2287.)

Stockwell sent a sample of the blood stain found on the bottom of Johnson's purse and blood samples from Johnson and Foster to Cellmark Diagnostics in Maryland for DNA analysis. (9 RT 2348-2355.) Dr. Robin Cotton, the laboratory director at Cellmark Diagnostics, testified about DNA analysis performed by her lab, lab record-keeping procedures, lab quality control, error rates and test results. (10 RT 2478-2531, 2577-2595, 2695-2700.) Five DNA probes of the blood stain were prepared and compared to DNA probes prepared from Foster's blood and Johnson's blood. (10 RT 2603-2605.) On all probes, the DNA banding patterns of the stain from the bottom of Johnson's purse matched the DNA probes prepared from Foster's blood samples. (10 RT 2603-2624, 2701-2704.) According to Cotton, only 1 in every 24 million people would have bands common to the blood stain from the purse. (10 RT 2652-2654.) Additional searches of Cellmark's own database and population database containing 464 known banding patterns failed to reveal anyone else with banding patterns similar to Foster's and the blood stain from the purse. (10 RT 2646-2647.)

Dr. Frank Sheridan, the chief medical examiner for San Bernardino County, conducted the autopsy on Johnson. (11 RT 2728-2729.) Johnson had a number of defensive wounds on both of her hands, arms and body. (11 RT 2731-2745.) Johnson had bruising on her nose and jaw line consistent with being punched in the face several times. (11 RT 2760-2762.) Johnson had a bruise on the back of her head and in Sheridan's opinion the injury occurred when she fell backwards and hit her head on the floor or some other object. (11 RT 2763-2764.) Johnson also had been stabbed once in the neck. The wound

was 17 millimeters long and went into the neck and into the right side of the thyroid gland. (11 RT 2766-2768.) Sheridan believed that a single-edged knife was used to inflict the wound. (11 RT 2769.) Johnson had at least seven separate stab wounds to her torso. These wounds were all inflicted while Johnson was still alive and were the ultimate cause of her death. (11RT2765-2766.)

Two of the stab wounds were deep enough that they went all the way to the back of Johnson's rib cage, breaking one of her ribs. One of the wounds actually went right through Johnson's sternum and hit the sack surrounding her heart. Three of the wounds went through Johnson's lung and the arch of the aorta. Part of Johnson's lung was sticking out through the wound caused by the knife tearing off pieces of lung tissue. One other wound went into Johnson's chest cavity and under the surface of the pericardial sack surrounding the heart. Sheridan opined that Johnson was on her back at the time the wounds to her torso were inflicted. He believed that the wounds were inflicted in quick succession. (11 RT 2772-2789.)

Sheridan believed that a person inflicting these kinds of severe wounds would have difficulty holding onto the knife because the blood on the knife would make it slippery and the stabber might end up cutting himself with the knife. (11 RT 2766, 2772-2787.) Sheridan opined that the different angles of the stab wounds was due to the victim struggling and changing positions, the knife slipping and turning, or the amount of force being used causing the knife to slip. (11 RT 2788-2789.) Sheridan looked at pictures of the wounds on Foster's hands taken two weeks after the killing at the time of his arrest. In Sheridan's opinion, the wounds on Foster's hands were consistent with Foster cutting himself with the knife blade while stabbing someone with a knife due to the knife twisting in his hand. Sheridan also opined that Foster's hand injuries could have occurred two weeks before the photographs were taken. An

injury to Foster's fifth finger could also have occurred at the same time as the other hand injuries. (11 RT 2801-2802.)

On September 10, 1991, Detective Thomas Bradford went to Foster's house. Foster was living with his step father Arthur Jennings, about 7 or 8 miles out of Victorville, off of a power line. Foster had healing cuts on his hands and left arm. Bradford located a knife in a red pickup truck on the property. (11 RT 2887-2897.) Foster admitted to Bradford that he had been at the church two days prior to the murder, but denied killing Johnson. Foster told Bradford that at the time of the murder he was at the Lucky's shopping center, the shopping center where Johnson's car was discovered, searching for recyclables.

On January 18, 1992, in a mine shaft about two miles from Foster's residence and on the same exit as Foster's residence, Johnson's wallet was found. Also, in the mine shaft was Johnson's check card, change purse with a check bearing Johnson's daughter's name made out to Gilbert or Gail Johnson. A pair of Rustler blue jeans with a waist measurement of 33 and a length measurement of 30, and a light blue t-shirt, size large, were also found in the mine shaft. The jeans had large blood stains on knees, which matched Johnson's blood. (9 RT 2343-2344.) Foster was wearing Rustler blue jeans with a waist measurement of 33 and a length measurement of 30 and blue shirt when Bradford was at his house on September 10, 1991. (11 RT 2904, 2908.)

A trash bag liner with paper towels inside was also found in the mine shaft. The paper towels had blood on them which matched Foster's blood. (9 RT 2289, 2303-2304, 2343-2346; 11 RT 2910-2913, 2923-2930, 2936-2939, 2976.) The trash bag liner in the men's restroom at the church was missing. The trash can in the women's restroom still had a trash bag liner in it. (11 RT 2953.)

On August 26, 1991, police found Johnson's Honda at the north end of

a Lucky's store parking lot in Apple Valley, about a mile from the church. (12 RT 2987-2988.) A blood stain found on Johnson's car seat was a mixture of Johnson's and Foster's blood. (9 RT 2315-2316.) Johnson's husband testified that he did not recall any blood being on Johnson's car the last time he saw it. (11 RT 2981.) Johnson's husband also testified that Johnson usually had about $50 in cash in her wallet. (11 RT 2976.)

1972 Rape of Johnnie Clark[2/]

On May 23, 1972, at about 11:15 a.m., Foster entered Burns Photography Studio in Boise, Idaho. Johnnie Clark, the receptionist, was working alone at the time. Foster told her that he wanted to make an appointment to have his picture taken because he wanted to give the picture to his girlfriend. (7 RT 1795-1796.) After giving Clark his name and phone number and setting up an appointment time, Foster left. About five or ten minutes later, he returned to the studio. Clark was in the back room. Foster walked toward the back room. As he approached Clark, he told her that he was going to rob her. He told her to get her purse and give him her money. She told him that her purse was located in the cabinet where the cash drawer was located. (7 RT 1797-1798, 1805.) Foster went over the cabinet and got Clark's purse. He took out the cash, about five or six dollars. Foster then ordered Clark to sit on a stool. (7 RT 1799.) She complied and Foster walked over to her. He then touched Clark's breasts and thighs. She pushed him away, but he punched her in the face with his fist, knocking her to the ground. Every time she tried to get up, Foster punched her, causing her to fall back down. Foster then raped Clark. (7 RT 1800.) Foster was sentenced to life imprisonment for

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2. Evidence of Foster's 1972 rape of Johnnie Clark and 1982 robbery and assault with intent to commit rape of Cindy Makris was admitted into evidence pursuant to Evidence Code section 1101, subdivision (b), to show Foster's identity, intent and common plan. (2 RT 534-535.)

the rape of Clark after pleading guilty to two counts of rape. He was subsequently paroled from Idaho State Prison in 1982. (8 RT 1967-1974.)

1982 Robbery, Intentional Infliction of Great Bodily Injury, And Assault With Intent to Commit Rape of Cindy Makris

On March 29, 1982, Cindy Makris was working as a manager at a solar energy systems business in Apple Valley. (8 RT 1827, 1898.) Around 11 a.m., Foster walked into Makris' office and told her that he was waiting for a real estate agent to show him another office in the building and asked to use the telephone. 7 (RT 1910; 8 RT 1947-48.) He then asked Makris if he could wait in her office because it was cold outside. (7 RT 1913.) Foster stayed there until noon when Makris had to lock up the office while she went to lunch. (7 RT 1913, 1916.) Makris got back from lunch at 1:30 p.m. (7 RT 1922.) Foster returned and told Makris that he was still waiting for the realtor and asked if he could continue to wait in Makris' office. (7 RT 1922) Makris agreed.

While Foster was waiting, Makris walked into the hallway off of the main office. When she turned around, Foster was standing right next to her. He had a knife and picked up Makris' purse. He handed it to her, put the knife to her throat and told her to give him her money. Makris took out her wallet and gave him her money. He then told her to dump out the contents of her purse. Foster asked if there was any other money in the office. Makris told him that there was some money in the desk drawer. He told her that she better not be lying or he would kill her. He then told Makris to take off her clothes. Makris grabbed the hand holding the knife and pushed it away from her. A struggle ensued. Foster then hit and stabbed Makris. She fell down on the ground and he grabbed her hair and kneed her in the chin. He told her he would kill her if she tried that again. (8 RT 1930-1932.) Makris then yelled no and ran out to the front office. (8 RT 1933.) At this time, Richard Nester, a general contractor with the solar energy business, parked his truck outside of

Makris' office. He heard someone screaming. Nester went into Makris' office and Makris came running from the back screaming, "He's got a knife. He tried to rape me." Makris had blood running down her face and she was hysterical. Nester told Makris to run. (7 RT 1831-1832.) Makris ran to the office next door and hid in the bathroom until police arrived. (8 RT 1933.) Nester was still in the office when Foster came running out of the back room. He was holding a knife and slashing it at Nester. Foster had blood on the back of his hand. Nester got out of the office and shut the front door. He held the front door closed, trying to keep Foster from getting out. (7 RT 1833-1834, 1842-1843, 1875.) Nester then ran to another office and yelled for someone to call the police. As he did this, he saw Foster run out of Makris' office. Foster ran up to a white Datsun pickup truck and got in. (7 RT 1835.) Nester got in his truck and starting chasing Foster. (7 RT 1836.) During the chase, Nester saw a sheriff's car and flashed his lights. The sheriff pulled over Foster and Nester parked his truck in front of Foster's truck and told the sheriff that Foster tried to rape a lady. The sheriff then arrested Foster. (7 RT 1839-1842.)

Foster caused Makris to suffer a broken nose, stab wound on her nose that went through the roof of her mouth, two black eyes, two fractured teeth, and several bruises. (8 RT 1942.) Foster was convicted of robbery, intentional infliction of great bodily injury, assault with intent to commit rape and use of a knife for his attack on Makris. He was paroled on December 12, 1990. (8 RT 1967-1974.)

Escape

Foster escaped from Idaho State Prison while serving time for the rape of Johnnie Clark. (8 RT 1965.)

Defense Case

Dr. Laurence Mueller, Associate Professor at the University of

California, Irvine, Department of Ecology and Evolutionary Biology, testified that he specialized in population genetics and evolutionary biology. Mueller disputed Cellmark's methods and techniques for estimating matching probabilities. (12 RT 3027-3085.) He testified that the databases used by Cellmark were inadequate and Cellmark should have used 15 to 20 different databases. Mueller also objected to the product rule, match criteria, use of floating binns, and Cellmark's proficiency and error rate. In Mueller's opinion, Cellmark's error rate in its testing of actual DNA evidence at least through 1991 was 1 in 139. (12 RT 3070.) Mueller came up with a DNA frequency profile of 1 in 185 using additional population databases and the counting method. (12 RT 3085-3089.) Muller's own frequency estimate in this case, under the modified ceiling principle, was approximately a 1 in 3.6 million possibility that another person would have bands common to the blood stain in the single DNA sample tested by Cellmark. (12 RT 3089-3096.)

Foster testified that he had been convicted of two prior rapes in Idaho in 1973, an escape conviction from Idaho state prison, and convictions in 1982 for assault with intent to commit rape, armed robbery and infliction of great bodily injury. He also admitted having served a prior prison term and having used a weapon to commit the 1982 assault with intent to commit rape and armed robbery. (12 RT 3174.)

Foster admitted visiting the High Desert Church on August 24, 1991, and filling out a prayer request card. (12 RT 3180-3182.) He admitted that he misrepresented himself on to Minister Plate and on the prayer request card, giving his step brother's name instead of his own. He testified that he gave his step brother's name because Foster's trailer did not have a telephone. (12 RT 3184-3185.)

Foster testified that he got a drink from the drinking fountain while he was at the church. (12 RT 3185.) He also claimed that during his visit to the

church he went into the foyer of the church, the corner of the boutique and the minister's office. (12 RT 3186.) He denied going to the church on August 26, 1991, the day Johnson was murdered. Foster testified that on that day he was helping his stepfather collect recyclables around town. At one point during the day, Foster said he went to Lucky's to buy cigarettes. (12 RT 3189-3201; 13 RT 3436-3448; 14 RT 3462-3496.)

Foster testified that he received the cuts on his right hand on August 22, 1991, i.e., four days before the murder, while searching for recyclables in a dumpster. (12 RT 3202-3210.) Foster testified that he was left-handed and used the knife found in his step father's truck to open cans. (12 RT 3216-3217.)

Foster acknowledged wearing Rustler jeans, but denied that the Rustler jeans and t-shirt found in the mine shaft belonged to him. He denied putting clothing in the mine shaft. He claimed the last time he had been at the mine shaft was around August 16, 1991, i.e., 10 days before Johnson was murdered. The dead dog found in the mine shaft belonged to Foster. Foster testified that his step-father, Art Jennings, had put the dog's body in the shaft. (12 RT 3210-3215.)

Penalty Phase Evidence

Prosecution's Case

Lynne M. testified that in October of 1989 she lived with her husband and ten-year-old daughter Meagan and eight-year-old daughter Courtney in Apple Valley, California. (15 RT 3895-3896.) On October 25, 1989, around noon, Lynne received an obscene phone call from Foster. (15 RT 3897-3899.) He told her that he wanted to "fuck" her "pussy." (15 RT 3903.) Lynne hung up the phone. Foster called back. He told Lynne, "I know your daughter Meagan. Don't you dare hang up on me." He sounded very angry. Lynne was

terrified and assured him that she would not hang up again. (15 RT 3904.) Foster then began asking Lynne what she looked like. He asked her how tall she was and how much she weighed. Foster then asked her, "How big are your titties?" He also asked her, "Are your nipples pink?" Foster asked her, "Do you like to fuck?" He asked her, "Do you like it when your husband fucks you?" He asked, "Do you like to butt fuck?" Lynne then told Foster that she was sorry but she just could not answer any more questions and hung up. (15 RT 3908-3909.) Foster called Lynne right back. He told her, "You might as well just get Meagan out of town because you hung up on me and you'll never have a minute's peace now." Lynne apologized and Foster asked her what she was wearing. Foster then said, "Put your hand on your pussy." (15 RT 3910.) When she told him she was not going to do it, he yelled at her to do it. He then asked her if it felt good. When Lynne said no, Foster said, "I want you to put your hand in your panties." He then told her, "Put your fingers in your pussy." He asked her if it felt good and Lynne told him no. A little time passed and Foster told Lynne that he was going to get off the phone. (15 RT 3911.)

Lynne called her husband. After receiving the obscene phone calls from Foster, Lynne's husband called the sheriff's office and reported the calls. (15 RT 3912.) The sheriff's department put a phone tap on Lynne's phone. (15 RT 3913.)

On December 3, 1989, around 11 a.m., Foster called Lynne again. (15 RT 3914.) He told her, "I'm going to fuck Meagan." (15 RT 3916.) Lynne hung up the phone and Foster called back. (15 RT 3917.) Lynne's husband, who was home, answered the phone. Foster told him, "Tell Lynne that Meagan's in real trouble now." Foster then hung up. (15 RT 3918.)

Foster called back on December 9, 1989. Lynne's husband had given her a tape recorder so as she was trying to turn it on she bumped the phone and it made a noise. Foster then said that he had the wrong number and hung up the

phone. (15 RT 3920-3921.) The call was traced to the residence of Art Jennings, Foster's step-father. (15 RT 3923.)

Lynne later identified Foster as the person who had made the calls based on his voice. (15 3927-3928.) Lynne again identified Foster as the caller after Foster spoke at trial on the current charges. (15 RT 3932.)

Lauren Richter and her mother Dinah Jackson testified that in 1972 Foster invaded their home and kidnapped Jackson at gunpoint. Prior to the kidnapping, Foster asked to use the family phone. After doing so, he left. Richter then saw Foster drive up and down in front of their house several times. At the time, Jackson's children and her mother were at home. Richter heard her mother screaming for her. Foster threatened to kill Jackson and her children. After kidnapping Jackson, Foster raped her twice and forced her to orally copulate him. (15 RT 3944-3999.)

Gail Johnson's daughter, Monica DiVencenzo, testified. She saw her mother on a daily basis before the murder. They were very close. Monica's daughter, Johnson's granddaughter, spent every Saturday with Johnson and went to church with her on Sundays. (15 RT 4000-4003.)

Defense Case

Foster's stepfather Art Jennings testified about his background, work history and his relationship with Foster's mother and her 10 children. Jennings began living with Foster's mother and her children in Wyoming in 1954. (16 RT 4031-4039.) Jennings denied ever disciplining or hitting Foster or any of his brothers or sisters. Jennings considered the children his wife's responsibility. (16 RT 4061, 4079.)

Neither Foster nor his brothers and sisters went to school. They moved frequently with Jennings and his wife as transients from state to state. Jennings believed the children just ran wild. (16 RT 4080, 4105.) Foster's sister Helen died while the family was en route to Salt Lake City in 1955. Jennings denied

having anything to do with her death. He said that Foster's brother Larry was responsible for her death. (16 RT 4036.) Jennings denied that he sexually abused the children. He also denied beating them. (16 RT 4079.) Foster and the other children were taken away from Jennings and his wife in 1957 while the family was living in McCook, Nebraska. Jennings did not have much knowledge or interest in where the children were or what they were doing. (16 RT 4063.) After the children were placed in an orphanage, Jennings and his wife did not have any contact with them until Foster went to live with them in Apple Valley after being paroled from prison in 1982. (16 RT 4035, 4063, 4064.)

Since 1973, Jennings and his wife lived in Apple Valley at various times. (16 RT 4054-4083.) When Foster came to live with Jennings and his mother after being paroled from prison in Idaho in 1982, he helped collect items for recycling, although Jennings thought he was lazy and did not do anything. (16 RT 4084.)

Foster's mother's sister Bessie Killebrew testified that she was from Nebraska, as was Foster's mother Pearl. Killebrew testified that Pearl began running away from home at age 15 and was placed in a girl's home. Pearl was then transferred to a mental hospital. (16 RT 4117-4118.) Pearl married Ray Foster in 1940. (16 RT 4119.) She had 11 children with Ray Foster. She also had two children with Jennings. (16 RT 4121.) Ray Foster was strict with the children and would spank them with his belt. Pearl swatted and spanked the children. (16 RT 4128, 4132.) Foster left the home when Foster's sister Franji accused Ray Foster of molesting her. (16 RT 4139-4140.) Pearl met Jennings in 1955 and began moving around the country with him. (16 RT 4147-4151.)

Rose Sanders, another sister of Foster's mother, testified that Jennings never had a job and the family was "dirt poor." (16 RT 4169-4170.) Foster and his brothers and sisters were removed from the home by Nebraska social

welfare authorities and sent to an orphanage. (16 RT 4152-4153.) Pearl never talked about the children to Rose and never visited them at the orphanage. (16 RT 4153-4154.)

Larry and Steven Foster, Foster's brothers, and Wilma Sharp and Franji Evans, Foster's sisters testified about the instances of sexual abuse by their father and Jennings, the beatings and whippings inflicted by their mother and Jennings, their wanderings and transient life and how Jennings trained the children to steal, their lack of schooling, and life at the orphanage. (18 RT 4632-4639, 4686-4687, 4690, 4714, 4723, 4734-4736, 4741, 4745-4749, 4754-4755, 4757, 4772-4773; 19 RT 4904-4905, 4908, 4915, 4920.)

Foster testified about his childhood and upbringing. (16 RT 4177-4220.) Jennings came into Foster's life when Foster was eight years old, living in Caldwell, Idaho. Foster was not enrolled in school at the time. When Foster first met Jennings, Jennings handcuffed him to a railing and left him there for several hours. (16 RT 4187-4188.) Foster's mother and the children left Idaho with Jennings, moving from place to place, including Iowa, California, Utah, Idaho, Washington, and Nebraska. (16 RT 4189-4190, 4201-4202.)

Jennings taught Foster and his brothers and sisters how to steal food and money from stores, homes, and farms. (16 RT 4191-4192, 4208-4211, 4232.) Both Jennings and Foster's mother routinely beat the children. (16 RT 4193-4194, 4206-4207, 4220-4221, 4234.) In 1955, Foster's sister, Helen, died while the family was on the road near Salt Lake City, Utah. (16 RT 4197.) For many years, Foster thought his mother had accused him of killing Helen. (16 RT 4198.) After Helen's death, Jennings began beating the children even more severely. (16 RT 4199-4201.) In 1955 or 1956, Jennings started molesting Foster's sister Wilma. (16 RT 4230.)

In 1957, when Foster was 10 years old, Foster and his brothers and sisters were taken away from their mother and Jennings while in Nebraska. (16

RT 4238-4242.) Foster recalled his mother telling the court at a court hearing to take the "bastard" because she did not want him. (16 RT 4249-4250.) Foster and his brothers and sisters were sent to an orphanage in Nebraska. (16 RT 4250.) Foster testified about his time at the orphanage and how he tried to run away. (16 RT 4253, 4258-4260, 4482.) He was beaten at the orphanage and severely punished. (16 RT 4261, 4264, 4268; 17 RT 4486.)

After a few months at the orphanage, only Foster and Wilma remained. All of Foster's other brothers and sisters had been sent to foster families or adopted. (16 RT 4257.) Foster never met or saw five of his brothers and sisters again. (16 RT 4257; 17 RT 4481.) At the time he entered the orphanage, Foster had only attended a few months of school. He was placed into first grade, which he ended up having to repeat. (16 RT 4262, 4269; 17 RT 4485.) Foster only completed three years of school while at the orphanage and never had any other formal schooling. (18 RT 4530.)

Foster had several potential foster family placements, but was never successfully placed. At 9 years old, Foster was introduced to sex by a potential foster mother. At age 12, he was sent from the orphanage to the Nebraska State Hospital after he attempted to molest his housemother. (17 RT 4487-4492.) Foster recalled that the hospital staff held boxing matches between children as punishment. (17 RT 4493-4495.) At the hospital, Foster was administered Thorazine, Stellazine, an other powerful anti-psychotic medications. (17 RT 4495.) In the hospital, Foster was forced to pull heavy padded wooden blocks about the size of railroad ties. (17 RT 4496.) Foster was also given hydrotherapy and electroshock treatments while in body restraints beginning when he was 12 or 13 years old. (17 RT 4493, 4497-4498.) The electroshock treatments were administered every two or three weeks for about a year. (17 RT 4499-4500.) Foster ran away from the mental hospital twice. (17 RT 4500, 4503.) Foster was returned to the orphanage when he was 14 years old. (17

RT 4479, 4503.)

Every time Foster ran away from the orphanage, he always tried to return to Nebraska. (17 RT 4506, 4512-4513.) He was told by the orphanage superintendent that his entire family was dead. (17 RT 4506.) After being returned to the orphanage, Foster was placed in solitary confinement for lengthy periods and beaten. (17 RT 4507.) After one escape in 1963, Foster was sent to the Kearney Boys School in Nebraska for troubled youths. He was there about a year. (17 RT 4516; 18 RT 4527.) While there, Foster was visited by his biological father and step mother. At age 17, Foster was paroled to his father in Idaho. (18 RT 4535.)

Foster stayed with his father for about a year. (18 RT 4533, 4536.) In October of 1965, Foster was arrested for car theft in Nevada and sentenced to an indeterminate term of 6 months to six years in federal prison. (18 RT 4541-4542.) He spent about 3 years at FCI Lompoc, including a subsequent parole violation for auto theft. Foster earned his general education degree while at Lompoc. (18 RT 4543, 4547.) Foster was released from federal custody on October 31, 1971. (18 RT 4547, 4563.)

Foster was arrested in 1972, convicted in 1973 and sentenced to two concurrent life terms after pleading guilty to two counts of rape in Idaho. (18 RT 4564-4565.) Foster believed that he was only going to have to serve 3 years before being considered for parole. After learning that he would have to serve 5 years, he escaped on October 25, 1973. He was shot in the hand and left buttock during the escape. (18 RT 4569-4572.) Foster was apprehended after the escape at a farm about 10 to 15 miles away. Foster pled guilty to the escape. (RT 4572-4574.)

While in prison in Idaho, Foster became a dental assistant. (18 RT 4577.) In 1979, Foster earned a two-year Associates Degree in sociology from Boise State University. (18 RT 4578-4579.) He remained in prison from 1974

until 1980 when he was sent to Pocatello, Idaho on a work release where he cooked for jail inmates and supervised trustees. (18 RT 4579-4580.) Foster adjusted to prison life. After the escape, there were no more problems and enjoyed working in the dental clinic. He was paroled on January 18, 1982. (18 RT 4581-4583.)

On March 29, 1982, Foster was arrested in Victorville for the Makris robbery and assault to commit rape charges. He had only been out of prison for two and a half months at the time. (18 RT 4583.) He was convicted after a jury trial and sentenced to 13 years in prison. He was placed in maximum security and sent to Folsom prison. He was later sent to Soledad prison in November of 1985. (18 RT 4583-4584.) Foster remained at Soledad for two and a half years and then transferred to Donovan in San Diego in November of 1987. He worked as a clerk at Donovan until he was released in March of 1989. (18 RT 4596-4593, 4601.) Foster violated parole in December of 1989, for making obscene and threatening phone calls. He was sent to a minimum security CMC-SLO until December of 1990, when he was again paroled. (18 RT 4602.) He was arrested and served one day in April of 1991 for being around a .22 rifle owned by Jennings. He was arrested for the murder of Johnson on September 10, 1991. (18 RT 4602.)

While in California prisons, Foster's work history and attitude were reported as good to excellent. Foster served as an inmate representative on the men's advisory counsel in Soledad. (18 RT 4593-4594, 4599.) In a 1988 report from Donovan, Foster was described as performing assignments efficiently with minimal supervision. He was described as exercising personal initiative by following through on many projects to insure accurate and timely completion. (18 RT 4594.) In a 1987 report, Foster was described as a dependable and excellent textile worker. (18 RT 4595-4596.) In another prison report, Foster's work was described as consistently high quality and he was

termed a good worker. In 1988, Foster was again described as an excellent worker with no supervisory problems. (18 RT 4596-4597.) In 1986, Foster was described as having an excellent work attitude. He was also described as level-headed and willing. (18 RT 4597.)

Samuel Zanderholm, his wife (Esther Zanderholm), Darlene Cummings and Daryld Schlereth all testified about their experiences at the same orphanage where Foster lived. They were all living at the same orphanage at the same time and both knew Foster and his sister Wilma. (16 RT 4278, 4328; 17 RT 4383-4384, 4397, 4448, 4463.) They all testified that the orphanage was highly regimented and the children were kept in a strictly controlled environment. (16 RT 4281, 4298, 4316; 17 RT 4385, 4395, 4401.) Mail was censored and correspondence from family members was kept from the children. (16 RT 4261; 17 RT 4377-4380, 4403, 4459.) There was a lot of staff turnover. (17 RT 4404.) There was no family warmth or affection. (16 RT 4291; 17 RT 4404-4405.) Family visits were monitored as though the children were in prison. (17 RT 4403.) Samuel Zanderholm, Esther Zanderholm), Cummings and Schlereth testified that they believed they were being punished by being sent to the orphanage. (17 RT 4417.) Many children at the orphanage tried to run away. (16 RT 4318-4319; 17 RT 4358, 4392, 4451.) Some children were paddled with a stick or rubber hose, slapped, spanked, or beaten. Others were forced to stand against a wall for hours. (16 RT 4283, 4303, 4333; 17 RT 4389-4391, 4399, 4425-4427, 4450-4452, 4460.) Schlereth recalled that Foster was "worked over" at least a few times as a child. (RT 4469.) Troublemakers were sent to a nearby mental hospital, like Foster. (17 RT 4461, 4465, 4468.)

According to Cummings, it was common knowledge that the children who went to the mental hospital were given electroshock treatment. (17 RT 4400.) In Cummings' opinion, when children returned to the orphanage from the hospital, they acted strange and looked different. (17 RT 4399-4400.) In

Schlereth's opinion, when Foster returned from the hospital, it seemed as if he got worse. Foster was more rebellious and more violent. Foster did not like the treatment he received. (17 RT 4468-4469, 4477-4478.)

Orphanage children were not allowed to associate with children from the outside. (17 RT 4396.) For many years, even contact or social interaction between siblings and sexes was limited. (16 RT 4286; 17 RT 4368, 4458.) Because the orphanage was so regimented and governed by rules, it did not prepare the children for life on the outside. (17 RT 4381, 4431.) Cummings testified that her experience at the orphanage had a tremendous effect on her adult life. (17 RT 4430.) The former residents who testified became emotional when recalling life at the orphanage. (16 RT 4329-4340; 17 RT 4366, 4407.) Samuel Zanderholm became a housekeeping agent at a veterans hospital in Nebraska, Esther Zanderholm did not complete high school, Cummings worked in a laundry, and Schlereth was a janitor. (16 RT 4290; 17 RT 4355-4356, 4433, 4466.)

Dr. Edward Fischer, a clinical psychologist, administered psychological tests to Foster. (20 RT 5056-5072.) In Fischer's opinion, Foster did not suffer from organic brain damage. He was of normal intelligence, with excellent memory, and no brain dysfunction. Foster had an IQ of 112, which was at the lower end of bright-normal. (20 RT 5083-5084, 5100.)

Based on the MMPI and other tests, Fischer believed that Foster had an antisocial personality under the DSM-IV classification system. (20 RT 5180.) He got along in a structured environment, but needed to have his behavior controlled since he was unable to function in the absence of external controls. At age 12, Foster was diagnosed with virtually the identical character disorder, which was then called passive/aggressive personality. Formation of the disorder occurred in distorted childhood caring relationships, neglect, and physical and sexual abuse. Characteristics of the disorder included the inability

to relate to others and repeating dysfunctional patterns of behavior learned as a child, yet also acting as a perpetrator. (20 RT 5130-5131.) A person suffering from this disorder seeks out stimulation either from substance or alcohol abuse or activities without fully considering consequences. This type of person does not plan ahead. These types of people also rationalize anti-social behaviors. They are unable to learn from experience, do not learn from the aversive consequences of their acts, and punishment has no effect on extinguishing unwarranted behaviors. (20 RT 5121.) Fischer testified that the only way to get rid of Foster's behavior was "by extinction by preventing it from happening." (20 RT 5104-5134.)

In Fischer's opinion, Foster's family was extremely dysfunctional even before Jennings came into the picture. Jennings himself had a history of delinquency and legal troubles since 1935 and Foster's mother had been in reformatories. (21 RT 5360-5370.)

Fischer emphasized that Foster was able to function only in an extremely controlled or structured environment. (20 RT 5135.) He considered Foster an unlikely escape risk. Idaho records indicated that Foster's 1972 crimes involved unprotected females as victims, reinforcing his conclusion that Foster could not function outside of prison. He was surprised that Foster was paroled after only 10 years. Review of Nebraska records documented Foster's early behavioral problems. A report by the orphanage superintendent described acts by Foster such as sticking pins and scissors in his private parts, which Fischer believed documented the onset of unusual sexual activity. A 1965 orphanage summary described Foster as lazy. He was also described as dishonest, manipulative, pleasant unless denied something which caused him to be disobedient and become moody. Foster stretched rules to the limit at the orphanage. He was transferred to the mental hospital for participating in homosexual activity with some of the younger boys at the orphanage.

In Fischer's opinion, Foster did not appear very truthful and did not admit certain things, including wrongdoing, as a matter of principle. Fischer read and considered other reports about Foster from the orphanage and the reformatory. Foster was described as taking the attitude that anything was okay if he did not get caught. He was considered the aggressor in the homosexual relations and engaged in autoerotic self-abuse. (20 RT 5122-5125, 21 RT 5370-5375.)

From early reports, Fischer discovered that Foster continued to wet his bed even at the age of 14. He was an aggressive bully, physically dirty and by 1963, his orphanage superintendent noted that Foster could no longer be handled at the orphanage. In Fischer's opinion, Foster messed up all of his Foster placement so he never had any connection to other people or any enduring contacts in his life. Foster continued to go to the state hospital even after he was transferred back to the orphanage where they monitored his medication. Other documents from the period of 1961-1964 noted that Foster was still mad at the whole world and growled at everyone. In Fischer's opinion, the absence of any competent help from interested relatives, as well as the rejection, instability, and neglect suffered by Foster while at the orphanage and mental hospital, all took a toll on his personality. Even at an early age, questions were raised as to whether Foster could adjust to a non-institutional life. (21 RT 5375-5390.)

Fischer also reviewed other documents from the reformatory and the mental hospital. He noted that Foster was deemed both physically and verbally sexually demonstrative. A mental status examination from 1959 first concluded that Foster had a passive/aggressive personality. At that time, major tranquilizers were used to control his behavior. In Fischer's opinion, Foster was treated as a child with abusive medications. In Fischer's opinion, Foster was given electroshock and hydrotherapy treatments, isolation and medication. (21 RT 5385-5405.)

Fischer believed that Foster at about age 12 to 14 would have been classified as having oppositional defiant disorder, although still not bad enough to be a conduct disorder, yet manifesting many of the characteristics that later emerged as life-long patterns. The inception of Foster's criminal career and conduct disorder began at about age 13 or 14. he had moderate conduct disorder until sent to the reformatory and then was severe ever since. Foster's childhood conduct disorder was similar to psychopathy or antisocial personality. (21 RT 5405-5412.)

In Fischer's opinion, Foster could only be maintained in a controlled institution. He had the capacity to adjust very well to a penal institution. Women were usually his victims. Fischer opined that society erred when Foster was released from prison in Idaho. Fischer believed the physical abuse suffered by Foster during his early childhood affected his personality development and relations with women. He opined that early physical and sexual abuse eroticized his behavior. At some point, Foster became institutionalized which provided external behavior controls. He was productive in prison in the sense of being a good worker and got along with males. In Fischer's opinion, sociopaths like Foster were hard to treat as they did not get better and all that can be done is to maintain them in a controlled environment such as prison. (21 RT 5412-5425.)

On cross-examination, Fischer acknowledged that Foster probably killed Johnson. (21 RT 5425-5448.) He admitted that Foster was organized and able to plan a task and follow through. Foster was also aware of societal values, able to appreciate the criminality of his conduct, and was not a drug abuser, but possibly an alcoholic. In Fischer's opinion, Foster was able to control himself and not commit murder. He opined that Foster could not control conditioned emotional responses to certain situations with women however and in those situations would be reactive. Fischer acknowledged that he had seen nothing

that would indicate Foster could not control his behavior. In his opinion, Foster rewrites reality to conform to his vision of who and what he is. Foster's actions in covering up incriminating evidence after the Johnson killing demonstrated control over his behavior. Fischer acknowledged that not all abused children commit murder and that not all people sent to Foster's orphanage or reformatory committed murder. (21 RT 5425-5448, 5451-5492.)

Fischer also acknowledged that he had a limited background and training in forensic psychology. Fischer admitted that this was his third appearance in a criminal trial testifying for the defense. Fischer conceded that psychology does not know what causes people to commit certain crimes and conceded that he adopted his own eclectic theory, taking bits and pieces from other theories. Fischer acknowledged that excessive coffee drinking and nicotine withdrawal were also mental disorders under the DSM-IV. He also testified that he considered himself a part of the defense team and that he was trying to keep Foster from being sentenced to death. (22 RT 5514-5535.)

James Park, who was retired from the California Department of Correction testified regarding prison classification procedures. Park had participated in developing the prisoner classification manual for the state. He had served as an associate warden for administration at San Quentin from 1964 until 1972 and as an associate warden at Soledad. Park had administrative responsibilities for death row prisoners. He performed duties associated with the 1967 execution of Aaron Mitchell. (20 RT 5187-5195.)

Park discussed the levels of prisoner classification and that all prisoners serving a life without the possibility of parole sentence would be given classification 4, maximum security, which were extremely secure level of confinement. There were also special housing units for prisoners who were not suitable for level 4 classification. In level 4, prisoners may work and exercise, but Park indicated they were not given much freedom of movement. Privileges

were minimal for level 4 prisoners, although they could have a television or radio. (20 RT 5216-5231.)

Park explained that not all prisoners sentenced to life without the possibility of parole would remain in level 4 for the rest of their lives. After good behavior and good work, point reductions would permit reclassification of some prisoners sentenced to life without the possibility of parole to level 3. Parks opined there was not a big difference between level 3 and level 4 classifications. Both had the same type of security but prisoners in level 3 were given a little more freedom of movement. Of 1,500 prisoners serving life without the possibility of parole sentences at the time of trial, Park estimated only 200 or 300 were in level 3. (20 RT 5195-5200.) Based on Park's experience, he believed the older level 4 prisoners tended to be a stabilizing influence on younger prisoners. Parks opined that life prisoners were probably better workers. (20 RT 5216-5217.)

Reviewing Foster's prison records, Park was of the opinion that if Foster were sentenced to life without possibility of parole, he would be classified as a level 4 prisoner for many years and would possibly die in a level 4 institution. Because of his offense, Foster's contacts with females would be restricted. Foster was considered an excellent worker in state prisons. Were he still a prison supervisor, Park would want Foster as a clerk. Park had little expectation that Foster would be violent in a prison setting. In Park's opinion, Foster would probably pay his way through incarceration. He believed Foster would be useful and would contribute to the safe and good operation of a prison. (20 RT 5232-5241.)

ARGUMENT

I.

THE TRIAL COURT CONDUCTED A MEANINGFUL VOIR DIRE OF THE JURORS

Foster contends because the trial court's voir dire was allegedly deficient and defective due to the failure to address areas of juror bias and prejudice revealed in the juror questionnaire responses his rights to a fair trial, a fair and impartial jury, due process, and to a reliable determination of guilt in violation of his Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were abridged. (AOB 45-83.) Foster's contentions are meritless as voir dire was properly conducted, and even assuming arguendo any error, it would not rise to the level of a miscarriage of justice. Moreover, Foster has waived his claim.

A. The Trial Court Properly Conducted Jury Voir Dire

California Code of Civil Procedure section 223 states, in relevant part:

> The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

In discussing the principles of voir dire, this Court, quoting from the United States Supreme Court, explained:

> Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [101 S.Ct. 1629, 68 L.Ed.2d 22].)

(*People v. Bolden* (2002) 29 Cal.4th 515, 538.)

"Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal." (*People v. Holt*, (1997) 15 Cal.4th 619, 661, citing *Mu'Min v. Virginia* (1991) 500 U.S. 415, 425-426 [111 S.Ct. 1899, 114 L.Ed.2d].) The trial court's voir dire should "'closely follow the language and formulae for voir dire recommended by the Judicial Council in the [California Standards of Judicial Administration (Standards)] to ensure that all appropriate areas of inquiry are covered in an appropriate manner.'" (*People v. Bolden* (2002) 29 Cal.4th 515, quoting *People v. Holt* (1997) 15 Cal.4th 619.)

Foster contends that the trial court in this case abdicated its responsibilities in respect to the conduct of general voir dire and failed to conduct a meaningful voir dire likely to uncover juror bias or impartiality. He argues that the court should have asked follow up questions to the jurors about responses in the jury questionnaires which indicated areas of potential, possible, or actual bias. (AOB 67-71.) As Foster recognizes, the federal Constitution does not require that a state-court trial judge ask voir dire questions involving areas of prejudice. (*Ristaino v. Ross* (1976) 424 U.S. 589, 597-598 [96 S.Ct. 1017, 47 L.Ed.2d 258]. However, citing *Ristaino*, he maintains that in some cases more pointed questions are required. Foster contends that the present case is such a case. (AOB 66.) On the contrary, the jury questionnaire here was sufficient in and of itself to determine whether the jurors were biased. The comprehensive 29 page questionnaire probed a number of issues relating to potential bias including whether they were biased against either party, whether they had any personal reason why it would be difficult to pass judgment on another person, whether they could follow the court's instruction that a defendant is presumed innocent unless proven guilty beyond a reasonable

doubt, whether they would weigh the aggravating and mitigating factors before deciding guilt, and whether they could be fair and impartial jurors in the case and whether there was any reason why they could not be fair and impartial. (2 CT 512-540.) The jurors answers to these questions provided an adequate basis for the trial court and counsel to determine whether a prospective juror was biased or impartial. Additionally, both the prosecutor and defense counsel conducted follow-up voir dire examination, which the court heard. The questions posed by the prosecutor and defense counsel sufficiently inquired into the jurors biases and partiality. The court's conduct in conducting voir dire in this case therefore was not inadequate and the resulting trial was fundamentally fair. (See *People v. Holt, supra,* 15 Cal.4th at p. 661; *People v. Earp* (1999) 20 Cal.4th 826, 853-854; *Mu'Min v. Virginia, supra,* 500 U.S. at p. 430 ["[t]o be constitutionally compelled, . . . it is not enough that such questions be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."].)

B. Even Assuming Error, Foster Has Not Suffered Any Prejudice

Moreover, even if the court should have questioned the jurors more extensively than they already had been, Foster has not suffered prejudice. First, mere speculation that additional questioning might have disclosed a ground for challenge is insufficient to warrant relief. (See *People v. Holt*, *supra*, 15 Cal.4th at p. 705; *People v. Freeman* (1994) 8 Cal.4th 450, 487; *People v. Fauber* (1992) 2 Cal.4th 792, 846, fn. 17.) Moreover, none of the sitting jurors who survived voir dire showed that they could not be fair or impartial.[3/]

Foster however attempts to show that some of the sitting jurors were

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3. As Foster points out, the focus of the fairness here is on the sitting jurors, rather than the alternates because none of the alternates replaced a sitting juror during either the guilt or penalty phase of trial. (AOB 75, fn. 25.)

actually biased. For example, Foster argues that Juror No. 3 stated in his questionnaire that it would be difficult to follow the court's instruction that a defendant in a criminal case is presumed innocent unless proven guilty beyond a reasonable doubt. (CT 1116.) And in response to a question about psychiatric testimony, Juror No. 3 stated that "people can say anything for money." (CT 1089.) Foster maintains that Juror No. 3 even questioned his own ability to be fair and impartial when he stated in his questionnaire that "Only that my background in police training may make it very difficult." (CT 1125.) Foster also refers to Juror No. 3's question whether his "police atmosphere [could] be subdued." (CT 1125.) However, Juror No. 3 did state that he would not have a problem judging the guilt or innocence of another person. (CT 1107.) Also, while Juror No. 3 did state that his police training may make it difficult, he could be a fair and impartial juror. (CT 1125.) Additionally, in response to defense questioning at voir dire, Juror No. 3 reiterated that he thought he could be fair in this case. Juror No. 3 also stated that he agreed with the presumption of innocence, had an open mind, and agreed to listen to the entire case and to consider what both sides had to say. (6A RT 1717-1718.)

Foster also takes issue with Juror No. 8. (AOB 76-77.) In his questionnaire, Juror No. 8 indicated that he and his wife had been witnesses in a murder case. Juror No. 8 had been in a witness in that case after discovered his neighbor's body. (CT 1305.) Juror No. 8 also indicated that he had read something about the present case in a newspaper and recalled that one of Foster's attorneys had been involved in the murder trial to which Juror No. 8 was a witness. (CT 1318.) Foster claims that based on these answers the court should have inquired into Juror No. 8's ability to carry out his duties in the present case. (AOB 77.) However, in his questionnaire, Juror No. 8 stated that he did not see a problem being a juror in the present case. (CT 1305-1306.)

During voir dire, Juror No. 8 stated that remembered the defense attorney from another trial in which Juror No. 8 was a witness. He stated that being a witness in that case, however, would not affect his objectivity in determining Foster's guilt or innocence. (6 RT 1621-1622.) And when asked whether there was anything that would prevent him from being a completely fair and impartial juror, Juror No. 8 replied, "There is nothing at all." (6A RT 1698.)

Next, Foster claims that Juror No. 10's church affiliations could have caused her to be biased or impartial. (AOB 77-78.) Foster also refers to Juror No. 10's participation in an organization to promote law enforcement officers, unpleasant memories about prior juror experiences, and statement that defense attorneys in the O.J. Simpson murder case were "an embarrassment to the legal profession," to suggest that she was biased and impartial. However, Juror No. 10 stated that in the previous case she had served on as a juror she was treated professionally by the judge, prosecutor and defense attorney. (1372.) Juror No. 10 also stated that she would try to be non-prejudicial against defense attorneys after the O.J. Simpson trial. (CT 1378.) Juror No. 10 also stated that she could follow the court's instruction that a defendant is presumed innocent unless proven guilty beyond a reasonable doubt. (CT 1380.) Juror No. 10 also stated that she did not believe that the testimony of law enforcement officers would be more truthful or accurate than civilian testimony. (CT 1381.) When asked whether she could be a fair and impartial juror in this case, she responded yes. She also responded no when asked if there was any reason why she could not be a fair and impartial juror in the case. (CT 1389.) Also, in response to questioning by defense counsel, Juror No. 10 stated that she believed that people were presumed innocent and that the state had the burden of proving a person guilty beyond a reasonable doubt. She stated that she did not assume Foster was guilty simply because charges had been filed against him. She also stated that she could keep an open mind throughout the trial. Juror No. 10

stated that she could weigh all the evidence, listen to all the sides and not form any opinions until deliberations. (6A RT 1713-1714.)

Foster also refers to statements by Juror No. 11 to show that she was biased and impartial. (AOB 78-79.) Specifically, Juror No. 11's brother had been a witness in a drive-by shooting murder case and had testified about what he saw. (CT 1404, 1409.) Juror No. 11 worked in the central jail in Los Angeles in the 1970's. (CT 1412.) She indicated that she was acquainted with psychiatrists through her work in a hospital emergency room, but did not answer the question about how she valued psychiatric testimony. (CT 1397, 1415-1516.) However, she stated that she had no reason to be biased against criminal prosecutors or criminal defense attorneys. (CT 1411.) She responded yes when asked if she could follow the instruction that a defendant is presumed innocent until proven guilty beyond a reasonable doubt. (CT 1413.) When asked at voir dire whether she could be a fair and impartial juror in this case, Juror No. 11 responded yes. When asked if there was anything about the nature of the charge or possible sentence that would make her reluctant to sit as a juror on the case, she replied no. She also answered no when asked if there was any reason why she could not be a fair and impartial juror in the case. (CT 1422.)

Foster also refers to specific comments made by Juror No. 12 suggesting bias or impartiality. Juror No. 12 stated in his questionnaire that he was employed as a secretary by San Bernardino County. (CT 1431.) He had previously obtained warrant training. (CT 1429.) Juror No. 12 stated that five years ago his sister-in-law was a victim witness secretary for the San Bernardino County District Attorney's Office. (CT 1434.) Juror No. 12 had a bachelor's degree in biology. (CT 1443.) However, Juror No. 12 stated that he had no reason to be biased either for or against prosecutors or criminal defense attorneys. Juror No. 12 stated that it was important for people accused of crimes to be treated fairly. (CT 1444.) Juror No. 12 stated that he was also

a medic in the reserves for the United States Air Force. (CT 1432, 1445.) Juror No. 12 stated that he could be fair if called upon to do so. He responded yes when asked if he could follow the instruction that a defendant is presumed innocent until proven guilty beyond a reasonable doubt and would base his conclusion on the supporting evidence. (CT 1446.) Juror No. 12 stated that he was acquainted with several San Bernardino county police officers, sheriffs and other law enforcement personnel from work and the Air Force Reserve. He considered working for the Los Angeles Police Department and the San Bernardino County Sheriff's Department but was never recruited. (CT 1447-1448.) He stated that he believed law enforcement officer's testimony was more truthful or accurate than civilian testimony, but stated that "[i]t depends on the case and situation." (CT 1447.) Juror No. 12 stated that he was willing to weigh and consider all the aggravating and mitigating factors presented to him before deciding the penalty. (CT 1450.) When asked whether he could be a fair and impartial juror in this case, Juror No. 12 responded yes. When asked if there was anything about the nature of the charge or possible sentence that would make him reluctant to sit as a juror on the case, he replied no. He also answered no when asked if there was any reason why he could not be a fair and impartial juror in the case. (CT 1455.) During voir dire, Juror No. 12 also stated that he could give Foster the benefit of presumption of innocence and could hold the prosecutor to his burden of proving guilt beyond a reasonable doubt. Juror No. 12 also stated that he could be fair to both sides. (CT 1703.)

Thus, the jurors Foster focuses on do not support his claim that they were biased or impartial or that anything in their answers on the questionnaire or in follow up questioning at voir dire would cause the court to need to ask more extensive questions. Nor do any of answers of the sitting jurors show bias or impartiality. On the contrary, they all assured the court and the parties that they could in fact be impartial. Therefore, Foster has failed to show how he

was prejudiced by the court's alleged inadequate voir dire. Foster had the opportunity to challenge those prospective jurors for cause after follow-up questioning. Given that Foster declined to move that any of the above mentioned jurors be excused for cause or any of the other prospective jurors, Foster cannot demonstrate that he suffered prejudice. His claim must be denied.

II.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF FOSTER'S PRIOR CRIMES

Foster contends that the trial court abused its discretion and violated his rights to a fair trial, to present a defense, and due process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments and rendered the guilt and penalty determinations unreliable in violation of the Eighth Amendment of the United States Constitution when it allowed evidence of Foster's prior crimes. Specifically, Foster argues that because the prior crimes were sexually motivated while the present case was theft related, the prior crimes were not sufficiently similar to prove either intent, identity or common scheme or plan and were more prejudicial than probative. (AOB 84-111.) The trial court properly exercised its discretion in admitting evidence of Foster's prior crimes because they were relevant to prove intent, common scheme or plan, consciousness of guilt, and because their probative value was not substantially outweighed by the danger of undue prejudice. Moreover, even if the trial court had erred in admitting the evidence, no prejudice occurred.

The prosecutor charged Foster with first degree murder with burglary-murder and robbery-murder special circumstances. (CT 294-296.) The prosecutor proceeded on alternate theories of liability with respect to the murder charge: (1) the murder was deliberate and premeditated; and (2) the murder was committed during the course of a robbery or burglary. (14 RT 3619-3686.) Thus, the murder charge and special circumstance allegations required proof of,

among other things, an intent to kill, commit burglary, and commit a robbery. (Pen. Code, §§ 187, 189, 190.2, subds. (a)(17)(A), (a)(17)(G), (18).)

Prior to trial, the prosecutor filed a motion to admit evidence of Foster's 1972 rape conviction of Johnnie Clark in Idaho and 1982 robbery and assault with intent to commit rape convictions upon Cindy Makris in Apple Valley, California. The prosecutor argued that, under Evidence Code section 1101, subdivision (b), the evidence was admissible to show Foster's identity, intent, and common plan. The prosecutor also argued that the probative value of the prior convictions substantially outweighed any prejudice, confusion or likelihood that the jury would be misled. (Supp. A 1 CT 96-98, 110-140.)

In support of the motion, the prosecutor asserted that the facts surrounding the present crimes were almost a carbon copy of the facts surrounding his robbery and attack of Makris in 1982. Specifically, the prosecutor explained that both crimes took place less than a mile from one another, in a small rural area of Apple Valley; both crimes occurred at the same time of day, between noon and 1:30 p.m.; both occurred in a business office; both victims were working alone in an office; in both cases, Foster made two trips to the crime scene; in both cases, Foster gave a phony story for the purpose of his first visit; Foster emptied the contents of both victims' purses out on the floor; and in both cases, Foster moved the victims into a back room before committing the crimes. The prosecutor also asserted that, prior to stabbing Makris, Foster told her to take off her clothes and in the current crime, Johnson's shoe was taken off and placed on the desk before the stabbing. The prosecutor also noted that the current crime occurred shortly after Foster had been released on parole for the Makris crimes and the Makris crimes were committed shortly after Foster had been released on parole for his 1972 crime. (1 Supp. A CT 124-126; 2 RT 509.)

Foster argued evidence of the prior crimes should be excluded under

both Evidence Code sections 1101, subdivisions (a) and (b) and 352. (1 Supp A CT 73-95.)

After considering the written motions and hearing oral arguments from both parties (2 RT 508-534), the trial court granted the People's motion, ruling that the underlying facts of the prior crimes were sufficiently similar to the facts of the present crimes to be admissible and that the probative value of the evidence outweighed any prejudice. (2 RT 534-535.)

Prior to opening arguments, defense counsel renewed his objection to the admission of the prior crimes evidence. The trial court denied the motion, and noted defense counsel's continuing objection. (7 RT 1744-1745.)

At trial, to testify about the prior crimes, the prosecutor called Johnnie Clark (7 RT 1794-1816), Richard Nestor (7 RT 1826-1877), and Cindy Makris (7 RT 1897-1925; 8 RT 1925-1948). The prosecutor also introduced into evidence a certified copy of Foster's rape conviction of Clark and a certified copy of Foster's conviction for robbery and assault with intent to commit rape of Makris, which included a sentence enhancement for using a knife during the commission of the robbery and assault. (8 RT 1967.)

Subsequently, the court instructed the jury with CALJIC No. 2.50 on the limited purpose that the evidence of Foster's prior crimes could be used and that it could not be used as evidence of Foster's propensity to commit crimes.[4/]

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4. CALJIC No. 2.50 provides:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial, to wit: the crimes against Cindy Makris and Johnnie Clark. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [¶] A characteristic method, plan or scheme in the commission of

(14 RT 3592-3593; CT 412.) During closing arguments, defense counsel reminded the jury that the evidence of Foster's prior crimes could only be considered in deciding common scheme or plan and could not be used for any other purpose such as to show Foster's propensity to commit crimes. (14 RT 3689-3690.)

A. The Trial Court Properly Admitted the Evidence

Under section 1101, subdivision (a), evidence of a person's character is inadmissible to prove his conduct on a specific occasion. (*People v. Catlin* (2001) 26 Cal.4th 81, 145.) Subdivision (b) of section 1101, however, authorizes admission of evidence of uncharged offenses when relevant to prove a fact other than a defendant's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, superceded by statute on other grounds in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) For instance, section 1101, subdivision (b), permits the introduction of evidence that a person committed a crime or wrongful act when relevant to prove a fact such as intent, common scheme or plan, or identity.[5/]

The highest degree of similarity between the charged and uncharged

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> criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.

(CT 412.)

5. Evidence relevant to prove motive, opportunity, preparation, and knowledge are also admissible under section 1101, subdivision (b).

offenses is required when the uncharged offense is offered to prove identity. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) "[A] lesser degree of similarity is required to establish relevance to prove common design or plan, and the least similarity is required to establish relevance to prove intent." (*Ibid.*)

To prove identity, the uncharged crimes "must be highly similar to the charged offenses." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a "pattern and characteristics . . . so unusual and distinctive as to be like a signature." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.) "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1194, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 121.) For common scheme or plan, "'the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.'" (*People v. Kipp* (1998) 18 Cal.4th 349, 371, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

Trial court rulings under Evidence Code section 1101 are reviewed under the deferential abuse of discretion standard. (*People v. Cole, supra,* 33 Cal.4th at p. 1195; *People v. Lewis* (2001) 25 Cal.4th 610, 637.) Under this standard, "[a]buse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner . . . ." (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) The trial court did not abuse its discretion in admitting evidence of Foster's 1972 and 1982 crimes.

The prior offenses and the current offense were similar in several respects. All three crimes occurred at the same time of day between mid-morning and early afternoon; all three crimes occurred in a business office; all

three victims were women working alone in an office; in all three cases, Foster made two visits to the offices; in all three cases, Foster gave phony stories about his reason for being there; in all three cases, Foster robbed his women victims of items from their purses; in all three cases, and the women were moved into a back room[6].

With respect to the robbery and attack of Makris and the current murder of Johnson, the following additional similarities were present: Foster told Makris to take her clothes off and in Johnson's case, her shoe was found on the desk. In both cases a knife was used and a struggle ensued. In both cases, Foster punched Makris and Johnson in the face. Foster also stabbed Makris in the face and stabbed Johnson in the neck. Additionally, as the prosecution's offer of proof pointed out, both Makris's office and the church where Foster killed Johnson were located in a small rural area of Apple Valley less than a mile from each other. Moreover, Foster killed Johnson a short time after being released from parole for the Makris robbery and attack. Similarly, Foster committed the robbery and attack on Makris shortly after being released on parole for the attack on Clark.

The similarities between the prior and current crimes supported an inference that Foster harbored the same intent on all three occasions, i.e., an intent to burgle, rob, and kill. (See e.g., *People v. Yeoman, supra,* 31 Cal.4th at p. 121 [where prosecutor had to prove intent to kill victim before robbing her for robbery-murder special circumstance, court did not err in admitting evidence of prior robbery; "good Samaritan" ploy in prior robbery and attempted kidnap

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6. When Loren West saw Johnson before her murder, she was walking around the secretary's office. West testified that he set the invoice on the desk in the room Johnson was in. West never went into the minister's office. Johnson's body was later found in the minister's office, which appears to be a different office than the one she had previously been in. (8 RT 2006, 2008-2010, 2019, 2032.)

was similar to conduct in charged offense]; *People v. Steele* (2002) 27 Cal.4th 1230, 1244 [evidence of prior murder admissible to prove mental state where victims resembled one another, both were stabbed in chest and abdomen about eight times and manually strangled, and defendant admitted culpability when confronted by police while providing similar excuses].)

The similarities between the three incidents also supported an inference that Foster was acting pursuant to a common plan or design to rob and murder is victims. (See e.g., *People v. Ewoldt, supra*, 7 Cal.4th at p. 403 [other-crimes evidence relevant to prove common plan in child molestation case where victims of both uncharged and charged offenses were defendant's stepdaughters, victims were residing in defendant's home, victim's were of similar age when acts occurred, molestations occurred in an almost identical fashion, and defendant proffered similar excuses when discovered].)

Foster, however, argues that there were dissimilarities between the prior crimes and the current crimes, namely that the prior crimes were sexually driven while the present case was burglary and robbery driven. (AOB 91-95.) While it is true that Foster raped Clark and ordered Makris to take off her clothes, in the present case, Johnson's shoe had been removed and placed on the desk. This supports a reasonable inference that Foster was in the process of attempting to commit a sexual crime in addition to the robbery. Just as Makris avoided being raped or taking off her clothes because she fought Foster off, Johnson might very well have been resisting the same demand as Makris when Johnson was killed. The crimes are not dissimilar simply because Johnson did not live to testify about Foster's specific words and actions that preceded her being physically attacked.

Moreover, while there are dissimilarities between the three crimes, as explained above, the common features between them were sufficient to support the admission to prove either identity, intent or common scheme or plan. In

short, the trial court properly exercised its discretion in admitting evidence of Foster's two prior crimes under Evidence Code section 1101, because they were relevant to prove identity, intent, or common scheme or plan.

Foster also argues that even if Clark and Makris' testimony was admissible, Nestor's was not. At trial, defense counsel objected to the prosecutor calling Nestor to testify. (7 RT 1828.) The prosecutor argued that Nestor's testimony was admissible to show Foster's identity as the man who attacked Makris.[7] He maintains that Nestor's testimony was inadmissible because Foster's identity in the prior crimes had already been established by prison and court records and Nestor's testimony was prejudicial. (AOB 97-105.) Foster's escape after the attack on Makris was admissible to show his consciousness of guilt. Also, the trial court had ruled that the incident was admissible as prior crimes evidence, but never limited the prosecutor to calling only certain witness. Additionally, as part of his offer of proof, the prosecutor included Nestor's testimony from the preliminary hearing relating to Foster's attack on Makris. Moreover, Nestor's testimony was not prejudicial. As stated below, the trial court instructed the jury on the limited use of the evidence and defense counsel's argument reaffirmed that limitation. Moreover, the evidence in the present case was so overwhelming that any inferences drawn from Nestor's testimony necessarily paled in comparison. Thus, the trial court did not abuse its discretion in allowing the prosecutor to question Nestor about Foster's flight after attacking Makris.

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7. Foster claims that the prosecutor informed the court in his in limine motion that only Makris would be testifying. (AOB 98.) On the contrary, in his written motion, the prosecutor set forth Nestor's role in the crime (CT 116) and attached as an exhibit Nestor's testimony at the preliminary hearing from the case that led to Foster's conviction for crimes against Makris is clear. (CT 155).

B. The Trial Court Properly Exercised Its Discretion in Admitting Evidence of Foster's Prior Crimes Under Evidence Code Section 352

Evidence that qualifies for admission under Evidence Code section 1101, must still satisfy the admissibility requirements of other evidentiary rules, including Evidence Code section 352. (*People v. Cole, supra,* 33 Cal.4th at p. 1195.) "Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Ibid.*) Factors relevant to the determination of whether uncharged offenses should be admitted under this section include: the tendency of the evidence to demonstrate a material fact other than character; whether the source of the information regarding uncharged crime is independent of the source of the charged crime; whether the uncharged crime resulted in a conviction; whether the uncharged crime is more serious or inflammatory than the charged crime; the time lapse between the charged and uncharged crimes; and whether the information is cumulative. (*People* v. *Ewoldt, supra*, 7 Cal.4th at pp. 404-407.) A trial court's rulings under Evidence Code section 352 are reviewed on appeal for an abuse of discretion. (*People v. Cole, supra,* 33 Cal.4th at p. 1195; *People v. Lewis*, *supra*, 25 Cal.4th p. 637.)

The probative value of the prior crimes evidence in this case was strong because, as discussed above, the similarities between the prior crimes and the current crime supported an inference that Foster was the same person who committed all three crimes, harbored the same intent on all three occasions, that the offenses were all committed according to a common plan. The probative value of the evidence was further enhanced by the fact that it came from completely independent sources. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 404-405; *People v. Balcom* (1994) 7 Cal.4th 414, 427.)

As for the prejudicial impact of the evidence, the evidence of Foster's prior crimes was not stronger or more inflammatory than the evidence relating directly to the current offenses. Foster's act of raping Clark and stabbing Makris was clearly disturbing, but Clark and Makris survived their ordeals. Foster's act of punching Johnson in the face, stabbing her in the neck and then stabbing her in the chest as she lay defenseless on the ground was more disturbing because it was an un-relentless attack that continued after the victim could no longer resist and did not stop until the victim was fatally wounded. This circumstance decreased the potential for prejudice because it was unlikely the jury disbelieved the prosecution's evidence regarding the Johnson murder but nevertheless convicted Foster based on the evidence of Foster's prior crimes, or that the jury's passions were inflamed by the evidence of the other crimes.

Foster's past crimes were not remote for purposes of weighing probative value versus prejudice. Ten years passed between the time Foster robbed and attacked Makris and robbed and killed Johnson. During the time between these crimes, Foster was in prison for nearly almost all of the time between the crimes. Accounting for the time he spent in prison and could not attack vulnerable female victims, the intervals between crimes take on a different context in terms of remoteness. Foster robbed and attacked Makris two and a half months after he was paroled for the Clark attack. Foster then killed Johnson approximately nine months after he was paroled for the crimes he committed upon Makris. (CT 138.) "[T]he prior convictions were not remote in time because [Foster] essentially was in prison during the time between the convictions, and thus his convictions had not '"been followed by a legally blameless life"'[.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 607, quoting *People v. Beagle* (1972) 6 Cal.3d 441; see also *People v. Ing* (1967) 65 Cal.2d 603, 607, 612 [holding trial court properly admitted evidence of uncharged

misconduct committed even though one of the prior offenses was committed 15 years before the charged offenses].

With respect to determining whether the other-crimes evidence was cumulative, this was not a case where "if the jury found that defendant committed the act alleged, there could be no reasonable dispute that he harbored the requisite criminal intent." (*People v. Balcom, supra,* 7 Cal.4th at p. 422.) Finally, the court reduced the risk of prejudice by instructing the jury that it could only consider the prior offenses for a limited purpose, and not as evidence of Foster's disposition to commit crimes. (*People* v. *Johnson* (1991) 233 Cal.App.3d 425, 446.) Under these circumstances, the trial court properly exercised its discretion in rejecting Foster's Evidence Code section 352 objection.

C. Any Error Was Harmless

Even assuming the trial court erred in admitting evidence of Foster's prior crimes, no prejudice ensued. Foster asserts the court's erroneous ruling here rendered his trial fundamentally unfair and thereby violated his right to due process. (AOB 105-111.) He contends the admission of the other-crimes evidence was prejudicial under both the federal harmless beyond a reasonable doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, which is used for errors of federal constitutional magnitude, and the state miscarriage of justice standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 835-836, which is used for assessing whether state law errors require reversal. (AOB 157-158.)

When the erroneous admission of evidence renders a trial fundamentally unfair, a due process violation occurs. (*People v. Holloway* (2004) 33 Cal.4th 96, 128.) For the reasons detailed below, any error did not render Foster's trial fundamentally unfair. Thus, any error would involve only the misapplication of Evidence Code sections 352 and 1101. Because the "application of ordinary

rules of evidence . . . does not implicate the federal Constitution," this Court has reviewed "allegations of error under the 'reasonable probability' standard of *Watson*." (*People v. Marks* (2003) 31 Cal.4th 197, 227.) While *Watson* is applicable here, regardless of whether the alleged error is reviewed under *Watson* or *Chapman*. Foster cannot sustain his burden of showing prejudice.

The trial court advised the jurors during the final charge that the other crimes evidence could only be used for a limited purpose. (14 RT 3592-3593.) The jury is presumed to have abided by the court's instructions. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1014.)

Also, defense counsel reinforced the principals contained in the court's instructions. During closing arguments, defense counsel reminded the jury that the evidence of Foster's prior crimes could only be considered in deciding common scheme or plan and could not be used as evidence of Foster's propensity to commit crimes. (14 RT 3689-3690.)

Moreover, the evidence of Foster's guilt was overwhelming. Two days after Foster went to the church and lied about his name, Johnson's body was discovered. (8 RT 1977, 1982, 2032.) While at the church, two days earlier, Foster never left the foyer and never went into the minister's office. (14 RT 3513-3540.) Johnson had been stabbed to death in the chest and neck and was found lying in a pool of blood. (8 RT 2045, 2051; 11 RT 2765-2766.) Her purse was found dumped upside down and her wallet, coin purse, check card, and car were missing. (8 RT 2149-2159, 2179; 9 RT 2431.) Using a genetic marker system, it was determined that one of the blood stains on the purse was a mixture of Foster and Johnson's blood. (9 RT 2221, 2226-2227.)

Foster needed money. He had to share the money he made from recycling with Jennings. Foster's girlfriend also asked if she could borrow $800 from Foster. Foster did not have enough money to give her. (12 RT 3177-3178; 13 RT 3401-3402.)

Blood was found all throughout the church and on Johnson's purse. (8 RT 2158-2159, 2162-2163, 2166, 2171-2173, 2175, 2179, 2181, 2187-2188; 9 RT 2217-2218; 11 RT 2798.) Stockwell and Sheridan testified that the mixtures of the Foster and Johnson's blood was consistent with Foster having cut his hand on the knife while stabbing Johnson and then also got Johnson's blood on his hand. (9 RT 2229; 11 RT 2766, 2772-2787.) Three other blood stains on the purse were Foster's blood. (9 RT 2228.) A trail of Foster's blood was also found on carpet between minister's office and the boutique, on the boutique carpet, and the drinking fountain in the foyer. (9 RT 2238, 2240-41, 2245, 2287.) A mixture of Foster and Johnson's blood was found on the shelf above the ottoman, the first and second shelf of bookcase, the desk chair, and the corner of the desk. (9 RT 2230, 2233- 2235.) One of the blood stains on the purse consistent with Foster's blood was also analyzed for DNA. It was determined that the blood matched Foster's and only 1 in 24 million people would share Foster's DNA. (10 RT 2603-2604, 2652-2654, 2701-2704.) There is no explanation for Foster's blood being combined with Johnson's on her purse at the crime scene that is consistent with innocence.

Johnson's car had been stolen from the church and was discovered in the Lucky parking lot in Apple Valley, about a mile from the church and about a mile from Foster's house. (10 RT 2987-2988.) A mixture of Foster's and Johnson's blood was on the car seat. (9 RT 2315-2316.) Johnson's wallet, check card and change purse were found in a mine shaft about two miles from Foster's residence and located on the same exit as Foster's residence. A pair of Rustler blue jeans with a waist measurement of 33 and a length measurement of 30, and a light blue t-shirt were also found in the mine shaft. The jeans had blood stains on them. One of the stains was Johnson's. When Foster was arrested, he was wearing Rustler blue jeans with a waist measurement of 33 and a length measurement of 30. A trash bag liner with paper towels inside was

also found in the mine shaft. Foster's blood was on the paper towels. (9 RT 2289, 2303-2304, 2344; 11 RT 2910-2913, 2923-2930, 2936-2939, 2976.) The trash bag liner in the men's restroom at the church was missing, but not the women's. (11 RT 2953.) When arrested two weeks after the murder, Foster had healing cuts on his hands consistent with being cut with a knife. (11 RT 2801-2802.)

White lotion and powder were covering up many of Foster's and Johnson's blood stains in the church. And when the police interviewed Foster, he lied about his whereabouts around the time of the crime. (9 RT 2208, 2211; 11 RT 2181, 2187-2189, 2194, 2203.) His actions and lies showed a consciousness of guilt. (CALJIC No. 2.03.) Thus, given the overwhelming evidence in this case, any error in admitting the evidence of Foster's prior crimes was harmless beyond a reasonable doubt.

In his claim that the evidentiary error was prejudicial, Foster argues the evidence before the jury permitted only one inference, i.e., that he was more likely to have committed the crime in this case because he was a bad or evil person, the prosecutor devoted too much time to introduction of the prior crimes evidence and further prejudiced him by calling Nestor to testify about the Makris crimes. (AOB 107-111.) The evidence, as admitted, was relevant to identity, intent and consciousness of guilt. The prosecutor informed the court that Nestor's testimony was relevant to show Foster was the man he chased down after Foster attacked Makris. (7 RT 1830.) Moreover, Foster's argument requires this Court to reject the presumption that the jury abided by the court's instructions not to consider the evidence of Foster's prior crimes as disposition evidence. (*People v. Yeoman, supra,* 31 Cal.4th at p. 139 [noting presumption].) Nothing in the record contradicts the presumption the juror's followed the trial court's instructions regarding the proper and limited use of the other crimes evidence.

Accordingly, in view of the court's instructions, the argument by defense counsel, and the overwhelming evidence of Foster's guilt, any error in admitting the other-crimes evidence was harmless under either the *Watson* or *Chapman* standard.

III.

THE TRIAL COURT DID NOT INDUCE FOSTER INTO WAIVING HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND PROPERLY ALLOWED THE PROSECUTOR TO QUESTION FOSTER ABOUT HIS PRIOR CRIMES

Foster claims that by allowing the prosecutor to expand the scope of cross-examination to include details of Foster's prior crimes, the trial court induced him into waiving his privilege against self-incrimination and violated his rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and rendered the guilt and penalty determinations unreliable in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 112-134.) The trial court did not induce Foster to waive his privilege against self-incrimination and the trial court properly allowed the prosecutor to ask Foster about his prior crimes.

After Mueller testified for the defense, the court asked defense counsel how much longer he would need to present his case. Counsel replied, "Well, Mr. Foster will take the stand tomorrow morning." (12 RT 3151.) Defense counsel informed the court that the defense would rest after Foster's testimony. (12 RT 3152.) Defense counsel then asked for an offer of proof as to which prior convictions the prosecutor intended to use to impeach Foster's credibility. (12 RT 3152-3153.) The prosecutor informed the court and defense counsel that he intended on impeaching Foster with the crimes against Clark and Makris and a felony auto theft, another rape in Idaho, Foster's escape from prison, and

an uncharged misdemeanor act of making obscene phone calls. (12 RT 3153-3157.) Defense counsel objected to all the crimes and acts, but stated "well, the Idaho and California felony convictions are already before the jury." (12 RT 3155.)

During the impeachment discussion, defense counsel again objected to all of Foster's prior convictions being used for impeachment. With respect to the crimes involving Clark and Makris, defense counsel specifically stated:

> [The prosecutor] has already been permitted to introduce evidence of two very serious felonies which admittedly do involve moral turpitude, and it's a matter of an overkill type situation. The Court does have under the Castro case discretion under Section 352 as to just how far this can go.

(12 RT 3162.)

Defense counsel then stated:

> Now, the rules are you can be asked, if you're a witness, whether you've been convicted of this offense and that's it. You can't go into evidence on it. It's just the fact of the conviction.

(12 RT 3163.)

The court replied, "Right." (12 RT 3163.) After further argument by the parties, the court ruled that the prosecutor could impeach Foster's credibility with the evidence surrounding the Clark and Makris crimes, one other rape conviction in Idaho and the escape conviction. (12 RT 3168-3169.)

Subsequently, Foster testified. (12 RT 3173.) During direct examination, Foster admitted that he had been convicted of two prior rapes in Idaho. Foster also admitted he had escaped from the Idaho state prison, and had been convicted of assault with intent to commit rape, armed robbery, infliction of great bodily injury, had served a prior prison term, and used a weapon in the commission of the assault, robbery, and infliction of great bodily injury. (12 RT 3174.) During direct examination, Foster denied all involvement in Johnson's murder. (12 RT 3189-3218; 13 RT 3226-3228.)

During a recess in Foster's direct examination and outside of the jury's presence, the prosecutor stated to the court that Foster had not been questioned about his prior offenses. Defense counsel argued that he had asked Foster about the prior crimes. (13 RT 3220.) The following exchange then occurred:

> THE COURT: Well, he's been asked about his prior convictions.
>
> [THE PROSECUTOR]: Well, okay. Okay. Well, the – he hasn't been questioned about any of the details of his prior – the prior similar acts that were admitted into evidence. [¶] And the legal authority I have is on the issue of cross-examination on those subjects even though he hasn't talked about them on direct.
>
> THE COURT: Okay. So we – [¶] Any objection to [Foster] being questioned about those?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: The ground for the objection is?
>
> [DEFENSE COUNSEL]: Okay. First of all, it will be beyond the scope. And, secondly, I'll object on the basis of relevancy. [¶] The district attorney has had free reign to introduce his version. I think this will only prolong the trial and lead to other issues. The court, under Evidence Code section 1101B, agreed with the district attorney that he could introduce evidence of the priors at the pretrial hearing. [¶] I don't think the court – considered that the court was giving [Foster] the opportunity – or [the prosecutor]'s – [the prosecutor] the opportunity to examine [Foster] on it. He's got what he wanted in so I think we've gone far enough.
>
> THE COURT: Well, in terms of the objection of beyond the scope, I believe the law is with regard to cross-examination that when there's a denial by a Defendant while testifying, that that opens up every issue with regard to his guilt of this offense and also credibility. You agree with that?
>
> [DEFENSE COUNSEL]: You mean, denial to the present charge?
>
> THE COURT: Yeah.

[DEFENSE COUNSEL]: No, I don't.

THE COURT: You don't agree with that?

[DEFENSE COUNSEL]: No.

THE COURT: I think that's the law. Okay. What I would – I will, during the course of the examination of [Foster], look at that issue myself in the Evidence Code, but what about relevance?

[THE PROSECUTOR]: I've got two cases just right on point.

THE COURT: They are?

[THE PROSECUTOR]: California Supreme Court, People versus Ing.

THE COURT: What?

[THE PROSECUTOR]: I-n-g, 1967 case. It's never been overruled, 65 Cal. 2nd 603. It's the same issue here. The prosecution presented evidence of prior similars [sic] to show MO, intent, identity. The Defendant didn't talk about them on direct and the court said those priors are within the proper scope of scope of cross-examination even though the Defendant didn't talk about them, because when he denies the offense, he's essentially saying it's not his MO – it's not his method of operation, and it's not his intent. [¶] And there's another case right after Ing exactly on point, People versus Perez, 65 Cal. 2nd 615. It's just the next case after Ing, 1967 holds the exact same thing, exact same issues, that we're confronted with, and I need to – I would like to have this resolved before I begin my cross-examination, if we could, because I want to go through it chronologically.

. . . . . .

THE COURT: In terms of relevance, though, I was going to ask – what is the relevance?

[THE PROSECUTOR]: Well, we have to prove those issues. We have to prove by a preponderance of the evidence those things occurred and the defense attorney told the jury already he didn't do the one in '82; he made that statement in opening statement; he was wrongfully convicted so it's very relevant.

THE COURT: Okay.

[DEFENSE COUNSEL]: That was opening statement; it was not evidence. Needless to say, I was not under oath. I have not and I intentionally have not asked [Foster] about that. [¶] If the district attorney wishes to pursue this, I would request this, I think the district attorney is going to be quite extensive or exhaustive, as he tends to be, with [Foster]. I'd ask that that matter go over until our next session so that I can research the matter.

(13 RT 3221-3224.)

The court then agreed to research the issue itself and gave defense counsel time to also research the claim. (13 RT 3223-3224.)

Following the recess, the court stated that it had read and shepardized the cases the prosecutor had provided and commented that *Ing* was cited to by a more recent case, *People v. Thornton* (1974) 11 Cal.3d 738. (13 RT 3230-3231.) Defense counsel stated that he had read the cases and they were distinguishable from the present case. (13 RT 3230, 3232.) The following discussion then resulted:

THE COURT: Well, the problem that [defense counsel] is pointing out is that with regard to the 1982 case, [Foster] did not – pled not guilty, went to trial, and I don't know if he testified in that case. You were there?

[THE PROSECUTOR]: Yes, he did.

THE COURT: He did and denied complicity in that incident as well?

[THE PROSECUTOR]: Yes, he did.

THE COURT: So his point is that where one of the priors is one in which the Defendant did not admit to committing the crime but was convicted.

[THE PROSECUTOR]: The issue is we have to prove these crimes. Really, the only issue is, is it within the scope of cross? Yes, it is. The cases are clear. We have to prove them. The jury isn't told they need to accept that before I prove that.

THE COURT: There is a 352 issue as well.

[THE PROSECUTOR]: We have to prove these by preponderance of the evidence and they've been told he didn't do one, and it's properly within the scope. And I don't think under 352, that it's going to waste any of the court's time. I think it is very relevant. [¶] His priors, his MO, and intent and identity is an issue in the case. This goes directly to that. It's crucial.

[DEFENSE COUNSEL]: He has proven by the preponderance of the evidence; he introduced all the evidence he wanted to. We have not refuted it.

THE COURT: Well, a denial was entered; right? I think that's the point, though, that's raised in Thornton that he does place the matter of identity squarely at issue, and the prosecutor's attempt to establish on cross-examination his involvement of offenses with similarity to the charge [sic] offenses indicating malefactor which is proper. [¶] So I think that's this case and so I'm going to deny the motion to go over until Monday on this issue. I think that the law seems to me to be clear that it's appropriate so we'll allow it.

(13 RT 3232-3234.)

On cross-examination, the prosecutor asked Foster about his prior offenses. (13 RT 3234-3295, 3304-3352, 3355-3377.)

The Fifth Amendment to the United States Constitution provides a privilege against self-incrimination:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The California Constitution provides a similar privilege: "Persons may not . . . be compelled in a criminal cause to be a witness against themselves . . . .

(Cal. Const., art. I, § 15.)

The Fifth Amendment does not prevent the accused from being prosecuted; i.e., it does not prevent the criminal trial from taking place. Rather, it protects the accused from the state's exertion of power to compel the accused to supply the proof from his or her own mouth. (*People v. Badgett* (1995) 10

Cal.4th 330, 346.)

The Fifth Amendment privilege is a personal privilege. It resides with the person and not abstractly in the information which the person knows. Thus, a party is privileged from being required personally to produce the evidence, but the privilege inhering in the person does not proscribe producing the same evidence by other means or through other sources. (*Couch v. United States* (1973) 409 U.S. 322, 327 [93 S.Ct. 611, 615, 34 L.Ed.2d 548, 553-554].)

If a defendant takes the stand and testifies in his own behalf, however, the defendant has waived his privilege against self-incrimination. (*Johnson v. United States* (1943) 318 U.S. 189 [63 S.Ct. 549, 87 L.Ed. 704]; *People v. Mayberry* (1975) 15 Cal.3d 143, 160].)

Several California cases have espoused the "scope of cross-examination" rule. (See, e.g., *People v. Saddler* (1979) 24 Cal.3d 671, 679 [defendant who testifies waives the privilege "to the extent of the scope of relevant cross-examination"]; see also *People v. Eaton* (1969) 275 Cal.App.2d 584, 590 ["where a defendant takes the stand and testifies, he thereby waives his Fifth Amendment privilege *only* to the extent of the permissible scope of cross-examination" (italics original)]; accord *People v. Crudgington* (1979) 88 Cal.App.3d 295, 302; *People v. Tealer* (1975) 48 Cal.App.3d 598, 604.)

The testifying defendant "cannot artificially limit that scope by limiting his direct testimony (*People v. Teshara* (1904) 141 Cal. 633, 638 . . . ." (*People v. Lynn* (1971) 16 Cal.App.3d 259, 271), and if the import of the defendant's testimony is generally to deny commission of the charged crime,"' . . . the permissible scope of cross-examination is very wide.' [Citations.]" (*People v. Saddler, supra,* 24 Cal.3d 671, 679.)

Aside from other-crimes evidence which relate merely to matters of credibility, evidence of other offenses may be made admissible, and the defendant's election to testify will act as a waiver of the privilege, if there is a

necessary or logical connection between the charged offense and the other evidence showing criminal activity. (See, e.g., *People v. Thornton*, *supra,* 11 Cal.3d at pp. 760-761 [defendant's testimony was essentially a denial of guilt as to all charged crimes of kidnapping, robbery and sexual offenses, and put his identity in issue as to each. Cross-examination on uncharged similar offenses showing distinctive marks of a common plan or scheme was proper, even though the defendant did not testify about these uncharged incidents on direct examination].) The accused who testifies may be cross-examined and impeached with that matter, even if it tends to incriminate the accused, because the accused has opened the door and made the interconnected matter relevant by his or her direct examination. (*Ibid.*)

In the case of *People v. Tarantino* (1955) 45 Cal.2d 590, the defendant was convicted of one count of conspiracy to commit extortion and three counts of extortion. (*Id.* at p. 592.) He testified on direct examination that he did not commit the charged extortions. (*Id.* at p. 594.) He argued on appeal that it was improper for the prosecutor to cross-examine him about other similar offenses to which he had not referred in direct examination. (*Ibid.*) This Court rejected the contention, holding that the cross-examination "was directed primarily to matters implicit in Tarantino's general denial, i.e., his purpose and motive, his general plan and scheme." (*Ibid.*)

People v. Ing, supra, 65 Cal.2d at page 603, is similar to *Tarantino*. In *Ing*, this Court allowed cross-examination on prior uncharged offenses but stated the cross-examination was limited to a few relevant matters for which evidence of uncharged offenses is admissible under section 1101. In *Ing*, a doctor was convicted of three counts of rape by administering a narcotic or an anaesthetic substance that prevented the victim from resisting. (*People v. Ing, supra,* 65 Cal.2nd at pp. 606-607.) The prosecutor introduced evidence of prior similar offenses to show a common scheme or plan. (*Id.* at p. 608.) On direct

examination, the defendant testified solely about the charged offenses and did not refer to the prior offenses. (*Id.* at p. 609.) On cross-examination, the prosecutor was allowed to ask the defendant a question about one of the prior offenses. (*Ibid.*) In closing argument, the prosecutor commented on the defendant's failure to deny or explain the evidence of the uncharged offenses. (*Ibid.*)

Relying on *Tarantino*, this Court in *Ing* held that because the defendant made a general denial of the charged offenses when testifying on direct examination, the prosecutor was permitted to cross-examine him on uncharged offenses since the uncharged offenses were relevant to show common scheme or plan, thereby rebutting the defendant's denial. (*People v. Ing, supra,* 65 Cal.2d at pp. 610, 611.)

Other cases come to similar results, holding that cross-examination of the defendant about uncharged offenses was proper because the evidence of the uncharged offenses tended to rebut the defendant's general denial on direct examination by establishing one or more of the matters listed in Evidence Code § 1101, subdivision (b). (See, e.g., *People v. Schrader* (1969) 71 Cal.2d 761, 771; see also *People v. Perez* (1967) 65 Cal.2d 615, 621-622 [cross-examination about uncharged offenses was permissible because these offenses disclosed a plan, pattern and modus operandi that were similar to the charged offenses]; *People v. Lynn, supra,* 16 Cal.App.3d at pp. 271-272 [cross-examination proper because the uncharged offenses were part of the plan or scheme that involved the charged offenses].)

Foster claims that the trial court induced him into pleading guilty by expanding the scope of the permissible cross examination after he took the stand and testified. (AOB 118-123.) He also argues that the trial court improperly allowed the prosecutor to cross examine him about the details of his prior crimes. (AOB 123-129.)

Foster has failed to show that the trial court induced him into testifying. The record shows that Foster had decided he was going to testify regardless of the scope of the cross examination. He informed the court that he would be testifying prior to any discussion about impeachment including the alleged discussion about the permissible scope of cross examination. (12 RT 3152-3153.) Thus, Foster freely elected to testify in his own behalf. Even assuming Foster had not already decided to testify before the impeachment discussion, the court did not make an express ruling on defense counsel's comment about the scope of cross examination. The court merely responded "[r]ight" when defense counsel made his comment about the scope of cross examination. (12 RT 3163.) Certainly the trial court did not specify and was not asked what questions the prosecutor might ask appellant about the prior crimes. Further proof that the court did not make a ruling on the scope of cross examination is shown by the prosecutor's later request to cross examine Foster about the details of the prior crimes. Based on the discussion that ensued, neither the court nor the prosecutor was aware of any ruling on the scope of cross examination. Most telling was defense counsel's lack of reminder to the court of the allegedly prior ruling on the scope of cross examination. Had counsel and Foster been acting under such an impression at the time Foster took the stand, they surely would have pointed this out to the court. (13 RT 3219-3225, 3229-3234.) Moreover, any comment by the court was ambiguous at best and was not a ruling by the trial court; and certainly not something Foster relied upon or should have relied upon in taking the stand in his own defense. Or if it was to be construed as a ruling did not alert the prosecutor as to how little or how much detail of the prior crimes he could ask Foster about. Such a ruling should be deemed insufficient for purposes of limiting the scope of cross examination. (See e.g., *People v. Mason* (1991) 52 Cal.3d 909, 939, fn. 7 [trial court must "expressly" rule on whether defendant had made a prima facie case

of group bias and a ruling by implication would be insufficient on such an important issue].)

Foster also argues that the trial court improperly allowed the prosecutor to cross examine Foster about the details of his prior crimes. The trial court's express ruling granting the prosecutor's request to ask Foster about the details of his prior crimes was supported by well settled law at the time of trial. Foster denied any involvement in the current crimes and the prosecutor was properly allowed to cross-examine Foster about his prior offenses because the evidence tended to rebut Foster's denial by proving his identity at the crime scene, his intent and his common plan. The evidence therefore was relevant for purposes other than credibility impeachment. Thus, the trial court properly allowed the prosecutor to cross examine Foster about the prior crimes involving Clark and Makris. (See e.g., *People v. Saddler, supra,* 24 Cal.3d at p. 679; *People v. Thornton, supra,* 11 Cal.3d at pp. 760-761; *People v. Schrader, supra,* 71 Cal.2d at p. 771; see also *People v. Perez, supra,* 65 Cal.2d at pp. 621-622; *People v. Lynn, supra,* 16 Cal.App.3d at pp. 271-272.)

In any event, any error was harmless. In order for a defendant to show that he was prejudiced by an "erroneous or subsequently modified ruling by a trial court, there must be some showing or reasonable inference that he did in fact rely upon the decision." (*U.S. v. Hearst* (1977) 563 F.2d 1331, 1343, citing *Johnson v. U.S.* (1943) 318 U.S. 189, 197, 63 S.Ct. 549, 87 L.Ed. 704.) Whereas in the present case, the defendant does not base his actions on the trial court's ruling, there is no prejudicial error. (*Id.*) As stated above, the record clearly shows that Foster had decided he was going to testify before the discussions about the scope of his cross examination. (12 RT 3152-3153.) Moreover, the evidence in this case irrespective of Foster's testimony was overwhelming. Also, because the evidence in this case was overwhelming, Foster needed to testify about his activities on the day of the murder. Thus,

even if the court had not allegedly limited the scope of cross examination, Foster presumably would have still testified. Additionally, evidence regarding the details of Foster's prior crimes was introduced through proper independent testimony by Clark, Makris, and Nestor. Thus there can be no reasonable doubt that the verdict would not have been different if the trial court informed Foster of the broad scope of cross examination it was going to allow the prosecution. (*People v. Wells* (1968) 261 Cal.App.2d 468, 481 [adopted the *Chapman* rule, stating "Some incursions on the guarantee against self-incrimination may turn out to be so harmless in the setting of a particular case that they do not warrant reversal".]) For these reasons, Foster's claim should fail.

IV.

THIRD PARTY CONTACTS WITH TWO OF THE JURORS DID NOT TAINT THE JURY AND THE TRIAL COURT ADEQUATELY INQUIRED INTO THE INCIDENTS

Foster contends that third party contacts with two of the jurors tainted the jury and the trial court held an inadequate inquiry into the contacts thereby violating his right to a fair trial, trial by an impartial jury, due process and to a reliable guilt and penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 134-159.) The contacts did not taint the jurors and the court held an adequate inquiry into the third party contacts and properly determined that the jurors' ability to perform their duties had not been affected.

A. Foster Has Waived His Claim by Failing to Request That the Jurors Be Excused

Foster has waived this claim by failing to request that the court excuse these jurors or otherwise object to the court's course of action. If Foster had made a request at the time the incidents were brought to the court's attention,

the court could have cured any problems by excusing the juror and substituting an alternative or by conducting a more thorough inquiry into the events. Failing to express his desire to have the jurors discharged at the time and not expressing any concern the jurors had engaged in prejudicial misconduct or would be unable to perform their duties, Foster cannot now make that claim for the first time on appeal. (*People v. Holloway, supra,* 33 Cal.4th at p. 124; *People v. Majors* (1998) 18 Cal.4th 385, 428.)

B. The Third Party Contacts Did Not Taint the Jury

A defendant has a constitutional right to be tried by an impartial jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Nesler* (1997) 16 Cal.4th 561, 577.) An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence presented at trial. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) A sitting juror's involuntary exposure to out-of-court events, such as an outsider's attempt to tamper with the jurors by intimidation, may require examination for probable prejudice using the same standard which applies to situations involving where a juror directly commits misconduct by violating his or her oaths or duties as a juror. (*Id.* at pp. 294-295.)

Penal Code section 1089 provides in pertinent part:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

The conclusion of a trial judge on the question of individual juror bias and prejudice is entitled to great deference and requires reversal on appeal only upon a clear showing of abuse of discretion. (*People v. Boyette* (2002) 29

Cal.4th 381, 462.) A juror's inability to perform his/her duties must appear in the record as a "demonstrable reality." (*People v. Boyette, supra,* 29 Cal.4th at p. 462; *People v. Cleveland* (2001) 25 Cal.4th 466, 474.) When, as here, a juror affirms "a willingness and ability to act impartially in weighing the evidence and applying the law upon which he will be instructed, there must be facts which clearly show the juror's bias to warrant a reversal of the trial judge's decision not to excuse that juror . . . ." (*People v. Caldwell* (1980) 102 Cal.App.3d 461, 473.) Foster has made no such showing.

Here, the trial court called all three jurors into the courtroom outside the presence of the other jurors, asked them about the incidents, and allowed the prosecutor and the defense attorney to question the jurors about the incidents. (13 RT 3299-3303; 14 RT 3554-3556.) The inquiry disclosed the following.

At the beginning of the morning session of trial on April 1, 1996, outside the presence of the jury, the court informed the parties that Juror Number 9 had received several notes on the windshield of his car the previous week while parked at the courthouse. The court informed the parties that Juror Number 9 later discovered the notes had been from a friend and he thought it was "no big deal." The court asked the parties if they wanted to question Juror Number 9 about the incident. (13 RT 3297.) Both sides stated that they would like to question him. (13 RT 3298.)

During questioning, Juror Number 9 stated that he had received a note on his car on Wednesday and Thursday while parked at the courthouse. He later learned that his friend had left the notes. His friend worked nearby and had seen Juror Number 9's car in the courthouse parking lot. Juror Number 9's friend told him that he was just playing a little joke on him. When asked what the nature of the notes were, Juror Number 9 responded:

> It was just saying – the first one said something about knowing that I had two dogs; I like country music – which I do – and then the other one said something like – said I looked up; I looked down – I can't

remember exactly. It just didn't make any sense and – you know.

(13 RT 3299.)

Juror Number 9 said that the notes had caused him some concern. (13 RT 3299.) When asked if there was anything in the notes about the trial or being a juror, Juror Number 9 responded,

> No. No, because like I said I went to choir practice Thursday night and he says – he says to me: Did you see the notes on your car? And he explained it to me.

(13 RT 3299.)

Juror Number 9 informed the court and the parties that he did not believe getting the notes would affect his service as a juror or his decision in the case. (13 RT 3300.)

Juror Number 9 stated that he had told Juror Number 12 about the notes because Juror Number 12 had seen him take the notes off his windshield. (13 RT 3300.)

Privately, the court also asked Juror Number 12 about the incident. Juror Number 12 informed the court that he had seen Juror Number 9 take a note off his windshield but stated that it would not affect his decision in the case. (13 RT 3301-3302.)

The court instructed both jurors not to talk about the incident with any of the other jurors. (13 RT 3300, 3302.) The court then called together the entire jury and admonished them as follows:

> Ladies and gentlemen, this morning you may have heard Deputy Holt inquiring of one of your members if they had a note with them. [¶] Last week, one of the jurors received on his windshield two successive days a note having nothing to do with the trial and that juror find [sic] out on Thursday that it was a friend of his playing a joke and he was leaving a couple of notes. So it had nothing to do with the trial. [¶] Having heard about the note or notes under the circumstances, does that cause anybody concern?

(13 RT 3303.)

The jury responded in the negative. (13 RT 3303.) The court also asked the jury if there was anyone who would be affected in any way by the circumstance. Again the jury responded in the negative. (13 RT 3303-3304.)

The court then instructed the jury:

> Okay. And I just instruct you to disregard that occurrence. It was a joke arising out of a friendship and has nothing to do with the trial, all right. Okay. Thank you very much.

(13 RT 3304.)

Immediately after both sides rested on April 2, 1996, the court informed the parties he had received information Juror DeMaio[8/] had overheard two non-jurors in the parking lot point him out and say he was a juror in Foster's case and they would not want to be a juror in the case. (14 RT 3553-3554.) The parties decided to question him about the incident. (14 RT 3554.) The following exchange then occurred:

> THE COURT: I understand that the – you mentioned to Deputy Holt that you might have heard somebody in the parking lot discussing you or discussing something?
>
> JUROR DEMAIO: Yeah, discussing me as a juror. I pulled up –
>
> THE COURT: When was this?
>
> JUROR DEMAIO: After lunch today, okay. I came into – which would be the north side parking lot and I pulled up and there was a van in front of me and appeared to be a [C]hevrolet van, I believe it to be blue or white, and there was two people sitting in front. [¶] I pulled um in my – I have a Dodge Caravan and I got out of the van, came into the courtroom to come back here after lunch, and two people from that van were behind me. And one of the persons said there is one of the jurors on the trial and the other person said to that other person that said that, 'I wouldn't want to be a juror on this trial.' [¶] So I don't know if they were in here or part of what's happened, but that's all that was said.

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8. As appellant points out, Juror De Maio is identified by name in the record (14 RT 3553), and it is not possible to determine his juror number.

THE COURT: You didn't recognize the people?

JUROR DEMAIO: No, never seen them. You know, I don't scan out here. I mean, I could probably look out here if they are there, probably.

THE COURT: Go ahead and look now and see if any of those people are here. JUROR DEMAIO: No.

THE COURT: Okay. Well, what sort of impression did that make upon you?

JUROR DEMAIO: Didn't bother me in any way, shape, or form. It's just I was identified as one of the – of the jurors.

THE COURT: Okay. Do you think that that would bother you at all in terms of performing your functions as a juror?

JUROR DEMAIO: No, your Honor.

THE COURT: Would it affect the way you view this case in any way?

JUROR DEMAIO: No, your Honor.

(14 RT 3554-3556.)

The parties declined to question Juror DeMaio further, but the prosecutor requested that the court admonish him to disregard the comments. The court instructed Juror DeMaio not to mention the incident to anyone including the other jurors and to disregard what he had heard. (14 RT 3556.)

Neither incident had anything whatsoever to do with the facts or the law in this case. Nor was this a case where the jury received inadmissible evidence relating to guilt or innocence, or improper information from outside sources. The incidents did not favor either side and there was nothing prejudicial about them. The letter to Juror Number 9 was totally innocuous and he believed it was just a joke. The incidents were inadvertent and both jurors came forward as soon as they occurred. For these reasons, there was no abuse by the trial court in conducting the inquiry and in finding that the incidents did not cause

any of the jurors to be unable to carry out their duties.

Foster cites to *People v. McNeal* (1979) 90 Cal.App.3d 830, 838, to support his argument that the trial court did not make an adequate inquiry into the incidents. In *McNeal*, the appellate court determined that the trial court had insufficiently examined jurors for possible bias. In that case, the appellate court held that the trial court failed to determine the facts which might impair the juror's impartiality. The court stated,

> Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility.

Id.

Unlike *McNeal*, however, the trial court in the present case did make a inquiry into the facts surrounding the incidents. The court asked Juror Number 9 about the nature of the notes and Juror Number 9 told the court and the parties about the content of the notes. (14 RT 3299.) The court also asked whether there was anything in the notes which referred to the trial or Juror Number 9's duties as a juror. Juror Number 9 responded, "No." (13 RT 3299.) Similarly, the court inquired into the factual details of the incident involving Juror DeMaio. Juror DeMaio informed the court and the parties about what had happened and about the substance of the conversation he overheard. The court also asked Juror DeMaio about the people who he had overheard talking and whether Juror DeMaio recognized them or not. The court asked Juror DeMaio what type of impression the conversation had on him, whether it would affect his ability to perform his duties as a juror, and whether it would affect the way he viewed the case. (14 RT 3554-3556.)

In any event, even if the court's inquiry of consideration of the alleged misconduct was erroneous, the third party contacts were not prejudicial. The trial court admonished each of the jurors individually. (15 RT 3940.) The presumption of prejudice may be dispelled by an admonition to disregard the

improper information. (*People v.* Zapien (1993) 4 Cal.4th 929, 996; *People v. Pinholster* (1992) 1 Cal.4th 865, 925.) It is presumed the jurors follow such instructions. (*Id.*) Here, the trial court admonished the jurors to disregard the incidents and received assurances that they would. (13 RT 3300, 3302-3303; 14 RT 3556.) Here, any conceivable prejudice from the harmless notes and comments was dispelled by the court's prompt admonition and the jurors' assurances that they would disregard any extraneous information. Thus, Foster's claim fails.

V.

THE TRIAL COURT PROPERLY ORDERED THAT FOSTER BE RESTRAINED DURING TRIAL

Foster contends the trial court erroneously ordered that he be restrained during trial. He claims that restraints were used because of the nature of the charges. He argues that the imposition of the restraints, absent a showing of "manifest need," violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 160-177.) Foster's claim is not cognizable on appeal because defense counsel acquiesced to the use of electronic belt restraint. Further, because the federal constitutional contentions raised on appeal were not raised in the trial court, those claims are also waived. In any event, the use of restraints was appropriate, and any error in this regard was harmless because the record fails to demonstrate that the jury saw the shackles, or show that the restraints interfered with Foster's ability to participate in the proceedings or affected Foster's psychological well being. Moreover, the evidence of Foster's guilt was overwhelming.

A. Foster Has Waived His Argument Regarding Use of the Stun Belt and His Constitutional Claims by Failing to Raise Them Below

Foster has waived his claim regarding the use of the stun belt. It is well settled that Foster cannot challenge the use of physical restraints in the trial

court for the first time on appeal. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583, citing *People v. Stankewitz* (1990) 51 Cal.3d 72, 95; *People v. Walker* (1988) 47 Cal.3d 605, 629; *People v. Duran* (1976) 16 Cal.3d 282, 289.) As the record shows, Foster objected to only the leg restraints. He acquiesced to the use of the electronic stun belt. (2 RT 553.) Therefore, he cannot now complain about the use of this restraint. Additionally, Foster never raised the constitutional claims at trial that he now raises. Nor did he ever mention or argue that Foster would suffer adverse psychological consequences as a result of having to wear the electric stun belt, as he does on appeal. (2 RT 553, 555-558; 3 RT 600-601; 12 RT 2996; 14 RT 3559.) Therefore, those contentions are also waived. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.)

B. The Trial Court Properly Ordered Foster to Be Restrained During Trial

In any event, Foster's claims fail on their merits, as the trial court acted within its discretion and any error was harmless. The principles governing the use of restraints at trial are well settled:

> A criminal defendant cannot be physically restrained in the jury's presence unless there is a showing of manifest need for such restraints. Such a showing, which must appear as a matter of record, may be satisfied by evidence, for example, that the defendant plans to engage in violent or disruptive behavior in court, or that he plans to escape from the courtroom.

(*People v. Anderson* (2001) 25 Cal.4th 543, 595, citations omitted.)

"'The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.'" (*People v. Hawkins* (1995) 10 Cal.4th 920, 944, abrogated on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101, 110, quoting *People v. Duran, supra,* 16 Cal.3d at p. 291.) However, absent a clear abuse of discretion, a reviewing court will

uphold the decision of a trial court to shackle a defendant. (*People v. Hawkins*, *supra*, 10 Cal.4th at p. 944; *People v. Pride* (1992) 3 Cal.4th 195, 231.)

Also, as this Court has made clear, courtroom misconduct, or threats to disrupt courtroom proceedings, are not required in order to support a trial court's restraining of a criminal defendant. (*People v. Hawkins, supra*, 10 Cal.4th at p. 944; *People v. Livaditis* (1992) 2 Cal.4th 759, 774 ["It is not necessary that the restraint be based on the conduct of the defendant at the time of trial"].) This Court has held, however, that "in any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances." (*People v. Duran, supra*, 16 Cal.3d at p. 291.)

In the present case, the trial court properly ordered that Foster be restrained. Prior to trial, on January 26, 1996, the prosecutor filed a restraint motion. He requested that Foster wear leg restraints and an electronic security belt during trial. (2 RT 552; 1 Supp A CT 146-195.) Defense counsel informed the court that he did not oppose Foster wearing the electronic security belt, but did oppose the request for the leg restraints. Defense counsel stated that he was not aware of any recent escape attempts or any disciplinary problems by Foster and therefore the belt was sufficient without the need for the leg restraints. The prosecutor informed the court that he was leery of using the belt alone because it was a new device and had only been tested a few times. The prosecutor explained that shackles hidden from the jury's view should be used given the extreme nature of Foster's prior conduct and the circumstances of the current offense. The prosecutor informed the court that Foster had successfully escaped from prison on one prior occasion and, in the process of escaping, Foster had been shot. After Foster successfully escaped from prison, he went home. He was not apprehended for at least twenty-four hours. The prosecutor also informed the court that Foster had tried to resist apprehension

after his attack on Cindy Makris in 1982 when he fled from the scene of the crime in his truck resulting in a car collision. (2 RT 553, 555, 558; 1 Supp A CT 146-147, 154-195.)

Defense counsel responded that Foster had conducted himself as an absolute gentleman and had never been verbally obstreperous at any time during the current proceedings. Defense counsel also pointed out the prior escape attempt occurred almost twenty years earlier when Foster was in his twenties. (2 RT 555.) Defense counsel argued that because the courtroom was limited there were no guarantees that the jury would not see the leg restraints. (2 RT 556-557.)

Subsequently, the court granted the People's restraint motion, ordering that Foster be restrained with the security belt and the leg restraints. In so doing, the court stated that Foster had "over the years, exhibited violence and also a firm commitment to escape when he decided to do that." The court then stated that it would make every effort to ensure that the jury did not see the restraints. (2 RT 558-559; CT 299.)

After jury selection, but outside of the jury's presence, the trial court again brought up the issue of restraints. The court noted that the counsel's table, at which Foster was sitting, was built so that the jury, who was on the side of the table, would not be able to see Foster's legs if he kept them under the table. (3 RT 600.) Defense counsel responded that he did not have a problem with the court's observation, but did request that when the parties were introduced no one rise. (3 RT 600.) The court stated that all the parties could remain seated when they introduced themselves. The court then asked whether there was anything else regarding the leg restraints. Defense counsel responded in the negative. (3 RT 601.)

Subsequently, while discussing the proposed jury instructions, the court informed the parties that the chain restraint on Foster's ankle had been replaced

with a velcro one, which made no sound, and stated that "there's never been a time given when Mr. Foster is seated when any of the jurors could see that he was restrained." (12 RT 2996.) The court then asked the parties whether they thought the jury should be instructed with CALJIC No. 1.04, a cautionary instruction regarding restraints. Defense counsel responded that he did not want Foster's restraints brought to the jury's attention. (12 RT 2996.) Defense counsel then informed the court that he was concerned about the jury seeing the restraints when Foster took the witness stand. The court explained that it would be arranged so that Foster would already be seated in the witness stand, with the chair pushed in, when the jurors arrived in the courtroom so they would not see his legs. Defense counsel responded, "Okay." (12 RT 2996.) Subsequently, the court stated, "so it seems to me that since there's never been an occasion where the jurors could see the restraint, [CALJIC No. 1.04] need not be given." Defense counsel responded, "Unless something inadvertent happens, I don't want to draw the attention [sic]." The court replied that it would mark the instruction so they could come back to it later. (12 RT 2996.)

After the parties had rested and the court and the parties went back through the undecided upon instructions, the court, referencing CALJIC No. 1.04, stated, "There's never been a time, including when Mr. Foster testified, that any juror ever saw the restraint." (14 RT 3559.) Defense counsel informed the court again that he did not want the jury's attention directed to the restraints and therefore asked that the restraint instruction not be given and the court agreed not to give the instruction. (14 RT 3559.)

As noted by the trial court and pointed out by the prosecutor, Foster had successfully escaped from prison on a prior occasion. Moreover, Foster had attempted to flee after attacking Cindy Makris, which resulted in a car collision. (2 RT 553, 555, 558; 1 Supp A CT 146-147, 154-195.) Additionally, Foster's prior and current crimes were particularly violent. For all of these reasons, the

trial court properly ordered that Foster be restrained during trial. Foster attempts to downplay his prior escape and flight by pointing out that they occurred years ago and when Foster was very young. However, this Court has held that shackling on the basis of past violent and disruptive conduct together with the current charges did not constitute an abuse of discretion. (*See People v. Medina* (1995) 11 Cal.4th 694, 730-731 [shackling on basis of charges and past violent and disruptive conduct not an abuse of discretion].)

Moreover, the trial court took many precautions to ensure that the jury remained unaware of the restraints. (2 RT 558-559; 3 RT 601; 12 RT 2996.) By imposing "the least visible or obtrusive restraints available outside the presence of the jury" (*People v. Stankewitz, supra,* 51 Cal.3d at p. 96), the trial court pursued a less restrictive alternative. (See *Jones v. Meyers* (9th Cir. 1990) 899 F.2d 883, 885 [record showed court pursued less restrictive alternatives as only handcuffed one arm to chair and covered it up].) Therefore, the trial court acted within its discretion in ordering Foster restrained.

C. Any Error Was Harmless

Courtroom shackling, even if error, is harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense. (*People v. Anderson, supra*, 25 Cal.4th at p. 596; *People v. Tuilaepa, supra,* 4 Cal.4th at pp. 583-584; *People v. Cox* (1991) 53 Cal.3d 618, 652; *People v. Medina*, *supra*, 51 Cal.3d at pp. 897-898.) Here, there is absolutely no evidence at all that the jury saw the restraints. As the trial court stated, "There's never been a time, including when Mr. Foster testified, that any juror ever saw the restraint." (14 RT 3559.) Moreover, the restraints did not prevent or impair Foster's ability to testify. Nor is there any evidence that they prevented Foster from participating in his defense. Foster contends that Foster could have suffered potentially adverse psychological consequences from having to wear the electric stun belt. First,

as stated above, counsel not only waived this argument by failing to object to the belt but actually acquiesced to Foster wearing it. (2 RT 553.) Second, there was absolutely no evidence presented to support this claim. Foster now claims that based on his awareness that another defendant had been accidentally shocked by the belt and Foster's electric shock treatment as a child, the use of the belt might have prevented him from concentrating on the trial and therefore participating in his defense. (See AOB 171, 174-177.) However, there was no evidence that Foster was having trouble concentrating or participating in his defense. Moreover, there was no evidence presented to the trial court regarding Foster's prior experience with electric shock treatment. For all of these reasons, any error was harmless in this case.

VI.

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY SUA SPONTE ON TRESPASS AS A LESSER INCLUDED OFFENSE OF BURGLARY

Foster contends that the trial court erred in failing to sua sponte instruct the jury on the lesser included offense of trespass and the error violated Foster's rights to due process, fair trial and to a reliable determination of guilt and penalty as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 178- 193.) The trial court did not err. There was no duty to instruct sua sponte because trespass is not a lesser included offense of burglary.

The amended information charged Foster with one count of burglary in violation of Penal Code section 459. The information also charged Foster with murder and alleged that the murder was committed during the commission of a burglary. (CT 294-296.)The amended information also alleged that the murder was committed while Foster was engaged in the commission of burglary in violation of sections 459 and 460.

The court instructed the jury on burglary. (14 RT 3607-3608.) While discussing whether to instruct on lesser included offenses, defense counsel stated, "I think for strategic reasons, we do not want lessers." (14 RT 3566.) The court then asked whether it was required to instruct on lesser included offenses if there was evidence to support them even over an objection from the defense. (14 RT 3566.) Defense counsel responded, "If the court decides it must give it sua sponte, we will submit the issue; we're not asking for it." (14 RT 3567.) The court then asked defense counsel whether he was objecting to it and defense counsel answered, "No, not objecting to it, if the court feels it should give it." (14 RT 3567.)

Foster claims that trespass is a lesser included offense of the burglary as charged in the information. As noted by Foster, the information alleged they committed burglary by "willfully and unlawfully" entering the structure. Foster contends this conjunctive allegation made the crime of criminal trespass a necessarily included offense to burglary. (AOB 183.)

In California, "a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.) This Supreme Court has stated unequivocally that "trespass is not a lesser necessarily included offense of burglary, because burglary, the entry of specified places with intent to steal or commit a felony . . ., can be perpetrated without committing any form of criminal trespass." (*People v. Birks, supra,* 19 Cal .4th at p. 118, fn. 8.) In other words, "[a] burglary may be committed by one who has permission to enter a dwelling." (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369.)

Foster does not explain how use of the phrase "willfully and unlawfully" supports an argument that trespass is a lesser included offense of burglary. If

he is claiming the use of the word "unlawfully" is synonymous with entering "without consent," respondent is unable to find any authority to support this proposition. Nor does Foster cite any. To the contrary, in the crime of burglary, it is the defendant's felonious intent, not the absence of consent or permission, that renders entry unlawful. (See *People v. Salemme* (1992) 2 Cal.App.4th 775, 778-779.) Use of the phrase "unlawfully entered an inhabited dwelling house" is synonymous with entering with the intent to commit a felony.

Citing *People v. Gauze* (1975) 15 Cal.3d 709, Foster maintains that a "trespass invariably will be subsumed in a burglary." (AOB 182.) The court observed that "[a] burglary remains an entry which invades a possessory right in a building. And it still must be committed by a person who has no right to be in the building." (*Id.* at p. 714.) In reliance on *Gauze,* Foster argues that lack of consent is an element of burglary.

Foster 's reliance on *Gauze* is misplaced. In *People v. Pendleton* (1979) 25 Cal.3d 371, this Court rejected Pendleton's assertion that the trial court erred in refusing his request for an instruction on unauthorized entry as a lesser-included offense of burglary, in that it was based on the faulty premise that entry without consent was an element of burglary (*Id.* at pp. 375, 382). This Court characterized the premise of Pendleton's argument as "false because 'it is settled that the entry need not constitute a trespass' to support a burglary conviction. [Citations.]" (*Id.* at p. 382.)

This Court in *Pendleton* also stated unequivocally that *People v. Gauze, supra,* 15 Cal.3d 709, "does not hold to the contrary. The defendant in *Gauze* was convicted of burglary predicated upon his entry into his own apartment with intent to assault his roommate. The question presented was whether the defendant could be guilty of burglarizing his own home. The Court answered this question in the negative because a person has an unconditional right to

enter his own home, even for a felonious purpose. This Court did not overrule existing authority upholding burglary convictions in which there was consensual entry. The law after *Gauze* is that one may be convicted of burglary even if he enters with consent, provided he does not have an unconditional possessory right to enter." (*People v. Pendleton, supra,* 25 Cal.3d at p. 382.) Inasmuch as unauthorized entry is not a lesser-included offense of burglary, the trial court did not have a sua sponte duty to give the instruction. Accordingly, there was no error.

VII.

THE JURY WAS ADEQUATELY INSTRUCTED AS TO THE PROSECUTION'S BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT FOSTER COMMITTED THE CRIMES

Foster contends that his convictions must be reversed because the jury was improperly instructed that the state did not have to prove his identity as the killer beyond a reasonable doubt which violated his rights to a fair trial and due process and rendered the guilt and penalty verdicts unreliable under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 194-202.) Foster's argument is without merit.

Over Foster's objection, though for different reasons than stated here (14 RT 3614-3616), the court instructed the jury with CALJIC No. 2.72, which provided:

> No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission made by him outside of this trial. [¶] The identity of the person who is alleged to have committed a crime is not an element of the crime, nor is the degree of the crime. Such identity or degree of the crime may be established by an admission.

(14 RT 3619; CT 462.)

CALJIC No. 2.72 must be given sua sponte. (*People v. Beagle, supra,*

(1972) 6 Cal.3d at p. 455.) However, Foster contends that because none of the instructions on the crimes committed (murder, burglary, robbery) or the special circumstance instructions specified identity as an element, identity was a contested issue in the case, CALJIC No. 2.72 eliminated the state' obligation to prove identity beyond a reasonable doubt. (AOB 198.)

In reviewing purportedly erroneous instructions, this Court inquires whether there is a reasonable likelihood that the jury has applied the challenged instruction in an unconstitutional manner. (*People v. Frye* (1998) 18 Cal.4th 894, 956, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385.) In conducting the inquiry, the Court must be mindful that individual instructions must be evaluated in the context of all instructions given. (*People v. Frye, supra*, 18 Cal.4th at p. 956, citing *Boyde v. California* (1990) 494 U.S. 370, 378, 110 S.Ct. 1190, 108 L.Ed.2d. 316; see also *People v. Burgener* (1986) 41 Cal.3d 505, 538 [correctness of jury instructions determined from entire charge of the court].) Here, Foster fails to suggest how the jury could have witnessed the whole trial, listened to all of the instructions, including those discussing the burden of proof, and somehow not realized that the prosecution had to prove beyond a reasonable doubt that Foster committed the crimes.

In any event, this Court addressed this identical claim in *People v. Frye, supra*, 18 Cal.4th at p. 960, and rejected it. In so doing, this Court stated:

> Under this instruction, the jury is informed that a defendant cannot be convicted of a crime unless there is proof as to each element of the offense independent of his extrajudicial confession or admission. Once the prosecution has proved the corpus delicti of murder, however, the prosecution may use evidence of a confession or admission to establish identity. Although the jury was not specifically instructed pursuant to CALJIC No. 2.91, that "[t]he burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged," nonetheless, the challenged instruction did not relieve the prosecution from proving that defendant committed the charged crimes. It provided only that the prosecution could rely on

> extrajudicial admissions to prove identity once the corpus delicti had been established. [Citation.] In light of the parties' steadfast focus on the issue of identity at trial, including the consistent position by the defense that defendant did not kill the [victims] and the extensive evidence presented by the People connecting him to the crimes, we conclude there is no reasonable likelihood the jury would have understood the prosecution had no obligation to prove defendant was the person who committed the offenses.

(*People v. Frye, supra*, 18 Cal.4th at p. 960.)

Nothing in Foster's argument should cause this Court to reach a different conclusion here.

VIII.

INSTRUCTING THE JURY WITH CALJIC NOS. 2.50, 2.50.1 AND 2.50.2 DID NOT VIOLATE FOSTER'S RIGHT TO DUE PROCESS AND A FAIR TRIAL AND A RELIABLE DETERMINATION OF GUILT AND PENALTY

Foster argues that by instructing the jury with CALJIC Nos. 2.50 (evidence of other crimes), 2.50.1 (evidence of other crimes by the defendant proved by a preponderance of the evidence), and 2.50.2 (definition of preponderance of the evidence), the prosecution's burden of proving two of the key elements of the crimes charged (identity and intent) was lowered to a preponderance of the evidence rather than proof beyond a reasonable doubt in violation of his rights to due process and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and to reliable determinations of guilt and penalty as guaranteed by the Eighth Amendment. (AOB 203-214.) Appellant waived his claim by failing to object. In any event, the claim is meritless.

During jury instruction discussions, defense counsel stated that he had no objections to the court giving CALJIC Nos. 2.50, 2.50.1, and 2.50.2 . (12 RT 2999-3000) After reviewing the jury instruction packet, which included

CALJIC Nos. 2.50, 2.50.1, and 2.50.2, and prior to instructing the jury, defense counsel reiterated that he did not have any objections to any of the instructions. (14 RT 3573.)

The trial court instructed the jury with CALJIC No. 2.50, which provided:

> Evidence has been introduced for the purpose of showing that the [d]efendant committed crimes other than that for which he is on trial, to wit, the crimes against Cindy Makris and Johnnie Clark. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that [the] [d]efendant is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show a characteristic method, plan, or scheme in the commission of criminal acts similar to the method[,] plan[,] or scheme used in the commission of the offense, in this case, which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the [d]efendant is accused. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.

(14 RT 3592-3593; CT 412.)

The trial court also instructed the jury with CALJIC Nos. 2.50.1 and 2.50.2. CALJIC No. 2.50.1 provided as follows:

> Within the meaning of the preceding instruction, such other crime or crimes purportedly committed by the [d]efendant Richard Don Foster against Cindy Makris and Johnnie Clark must be proved by a preponderance of the evidence. [¶] You must not consider such evidence for any purpose unless you are satisfied that the [d]efendant committed such other crime or crimes. The prosecution has the burden of proving these facts by a preponderance of the evidence.

(14 RT 3593; CT 413.)

And CALJIC No. 2.50.2 provided:

> Preponderance of the evidence means evidence that has more convincing force and the greater probability of truth than that opposed

> to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates[,] your finding on that issue must be against the party who had the burden of proving it. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it.

(14 RT 3593-3594; CT 414.)

Defense counsel did not object after the court instructed the jury with the preceding instructions or after the court finished instructing the jury with all of the instructions. (14 RT 3594, 3613, 3617.)

The jury was also instructed with CALJIC No. 2.01 (sufficiency of circumstantial evidence--generally), CALJIC No. 2.02 (sufficiency of circumstantial evidence to prove specific intent or mental state) and CALJIC No. 2.90 (presumption of innocence--reasonable doubt burden of proof). (14 RT 3587-3589; CT 400, 402-403.)

Additionally, during closing arguments both the prosecutor and defense counsel repeatedly reminded the jury, in clear and plain language, of the People's burden of proving Foster's guilt of the charged crimes beyond a reasonable doubt. (14 RT 3661-3662, 3734; 15 RT 3739-3740.)

A. The Issue Is Waived on Appeal

Without objection, the trial court gave the standard CALJIC instructions on 2.50, 2.50.1, and 2.50.2. Foster waived any federal constitutional claim because he failed to object on those grounds at trial. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3; *People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1.)]

B. The Instructions Did Not Reduce the Prosecution's Burden of Proof

The essence of Foster's contention was rejected by this Court in *People v. Medina*, *supra,* 11 Cal.4th at page 694, and *People v. Carpenter* (1997) 15 Cal.4th 312. The issue presented in *Medina* was whether CALJIC No. 2.50.1 was erroneous and conflicted with CALJIC No. 2.01. (*Medina, supra,* at p.

763.) This Court held that a preponderance of evidence standard has long been applied when determining the truth of evidence of other crimes as circumstantial evidence of intent or motive. Evidence of other crimes is a mere "'evidentiary facts'" that need not be proven beyond a reasonable doubt as long as the jury is convinced beyond a reasonable doubt of the truth of the "'ultimate fact'" of the defendant's knowledge or intent. (*Id.*, citing *People v.. Lisenba* (1939) 14 Cal.2d 403, 430-431.) This Court held that it saw no compelling reason to reconsider this rule. (*People v. Medina, supra,* at p. 764.)

The defendant in *Carpenter* contended it was error to have admitted evidence of three uncharged murders and one rape. (*People v. Carpenter, supra,* 15 Cal.4th at pp. 378, 380.) This evidence was found probative on the questions of intent, deliberation and premeditation. (*Id.* at p. 378.) The defendant asserted the same instructional error asserted here. The defendant argued that an instruction which advises the jury that uncharged crimes need only be proven by a preponderance of the evidence (CALJIC No. 2.50.1), together with an instruction that such evidence could be considered on the matter of defendant's state of mind (CALJIC No. 2.50), combined to reduce the prosecution's burden of proof as to the defendant's mental state below that of reasonable doubt. (*People v. Carpenter, supra,* at pp. 380-383.) This Court rejected the argument, finding the instruction on reasonable doubt (CALJIC No. 2.90) and on the sufficiency of circumstantial evidence to prove the necessary specific intent or mental state (CALJIC No. 2.01) made clear that the beyond a reasonable doubt standard applied to the finding of the intent element of the crime. (*People v. Carpenter, supra,* at p. 383.) Both CALJIC Nos. 2.90 and 2.01 were also given here.

Both *Medina* and *Carpenter* addressed Foster's concern that the combination of the CALJIC instructions given here unconstitutionally diluted the reasonable doubt standard. The discussion in each case starts with the

premise that a criminal defendant has a due process right to have each fact necessary to the conviction proven beyond a reasonable doubt. The cases recognized that: (1) this burden was not diminished by an instruction that other crime evidence need only be proven by a preponderance of the evidence, and (2) when CALJIC Nos. 2.50 and 2.50.1 are viewed in context with CALJIC Nos. 2.90 and 2.01, it is not reasonably likely that the jury found the necessary elements of the charged offense true on a standard less than beyond a reasonable doubt. (*People v. Medina, supra,* 11 Cal.4th at pp. 763-764; *People v. Carpenter, supra,* 15 Cal.4th at p. 383; *Estelle v. McGuire, supra,* 502 U.S. at pp. 72-73 [a jury instruction is reviewed under a standard that asks whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution].) Therefore, this Court should reject Foster's assertion that CALJIC Nos. 2.50, 2.50.1 and 2.50.2 combine to reduce the prosecutor's burden of proof.

C. Any Error Was Harmless

Foster contends any error amounted to a federal constitutional deprivation requiring reversal per se. (AOB 210-214.) Respondent disagrees. The challenged instructions do not reduce the prosecution's burden of proof. As acknowledged by Foster (AOB 214-216), this Court has repeatedly rejected constitutional challenges to many of the instructions discussed herein. (See *People v. Maury,* (2003) 30 Cal.4th 342, 396, 428-429 [CALJIC Nos. 2.21.2 and 2.22 and circumstantial evidence instructions]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.01, 2.02, 2.21, and 2.27]; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943 [circumstantial evidence instructions]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [same].) Because none of Foster's claims here implicate his constitutional rights, any error was harmless as there is no reasonable probability that Foster would have received

a different outcome had the instructions not been given. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

In any event, for the reasons stated above, any error was harmless under any standard. The jury was repeatedly and expressly instructed to find Foster guilty only if each element was proved beyond a reasonable doubt. Thus, any error regarding the challenged instructions was harmless.

IX.

SUBSTANTIAL EVIDENCE SUPPORTS FOSTER'S CONVICTION OF SECOND DEGREE ROBBERY AND FIRST DEGREE FELONY-MURDER PREDICATED ON THE COMMISSION OF A ROBBERY

Foster maintains that the evidence was insufficient under the due process clauses of the Fourteenth Amendment to the United States Constitution and the California Constitution to support his conviction of second degree robbery and first degree felony-murder conviction predicated on a robbery, rendering the determination of his guilt unreliable in violation of the Eighth Amendment to the United States Constitution. (AOB 215-225.) On the contrary, the evidence was sufficient to support the convictions.

> In deciding a sufficiency of the evidence claim, this Court review[s] the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.]

(*People v. Cole, supra,* 33 Cal.4th at p. 1212.)

> The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence . . . . An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence.

(*People v. Maury* (2003) 30 Cal.4th 342, 396.)

"The focus of the substantial evidence test is on the *whole* record of

evidence presented to the trier of fact, rather than on isolated bits of evidence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329, internal quotation marks omitted, emphasis in original.) "Reversal [on the ground of insufficiency of the evidence] is unwarranted unless it appears 'that upon *no hypothesis whatever* is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal. 4th 297, 331, emphasis added.)

In reviewing a sufficiency of the evidence claim, this Court has also stated:

> Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.

(*People v. Maury, supra*, 30 Cal.4th at p. 403.)

Federal due process likewise requires that a criminal conviction be supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) The relevant inquiry is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.* at p. 319.) This standard is "to the same effect" as the state standard. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Foster argues that the evidence adduced at trial was insufficient to establish he had the requisite mental state for robbery to sustain his convictions of second degree robbery and first degree felony murder. On the contrary, substantial evidence of Foster's intent to rob Johnson at the time he entered the church or during the fatal attack was adduced at trial.

Penal Code section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The

crime of robbery requires the defendant to have formed an intent to steal either before or during rather than after the application of force to the victim, and to have applied the force for the purpose of accomplishing the taking. (*People v. Bolden, supra,* 29 Cal.4th at p. 556.) "[T]he intent required for robbery . . . is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime." (*People v. Lewis, supra,* 25 Cal.4th at p. 643.)

> Liability for first degree murder based on a felony-murder theory is proper when the defendant kills in the commission of robbery, burglary, or any of the other felonies listed in [Penal Code] section 189.... Thus, to find a defendant guilty of first degree murder based on a killing perpetrated during a robbery, the evidence must show the defendant intended to steal the victim's property either before or during the fatal assault. (§ 211; citations.)

(*People v. Lewis*, *supra*, 25 Cal.4th at p. 642.)

Here, there was sufficient evidence Foster intended to rob Johnson of her car, wallet, check card, and change purse at the time he entered the church or while he was attacking her. First, Foster admitted that he needed money at the time of the murder. (13 RT 3401.) He was living in a small trailer on Jennings's property. His only real source of income came from collecting recyclables and turning them in to recycling centers for money. Foster and Jennings shared the earnings and were also sending money to Foster's mother in Washington. (12 RT 3177.) Prior to the murder, Foster's girlfriend asked him for $800 to pay for her rent and car payment. Foster admitted that he did not have enough money to give her. (13 RT 3402.) Thus, Foster had a motive to rob Johnson. He needed money.

Second, Foster went to the church on a Monday (8 RT 2002), a day not typically busy for a church. Johnson was working alone at the church on the day of her murder and only her car was in the parking lot. (8 RT 2007, 2009.) Foster therefore knew that either no one was at the church and he could take

church property or that only one person was there and that he could easily overcome one other person. Third, Foster had been to the church two days before under false pretenses and therefore was aware of the layout of the church. Consistent with an intent to commit robbery, Foster was casing the scene.

Additionally, before going to the church, Foster armed himself with a knife in preparation for the robbery. Also consistent with a robbery, Foster struggled with Johnson before killing her as shown by the numerous defensive wounds on her hands and arms, the knife wound to her neck, the blood smears, and the bracelet which was partially off her wrist. Foster also pulled the phone out of the wall. If Foster only wanted to kill Johnson, he would not have needed to keep her from calling for help. There were also wires on the floor by Johnson's chair. The jury could have reasonably believed that Foster was going to use them to tie her up in order to attack and rob her. He would not need to tie her up if his only motive was to kill her. And, finally, Foster also admitted robbing Clark on a previous occasion and was found guilty of robbing Makris on another. Those robberies occurred in a very similar fashion, as stated earlier. Taken together, all of these facts and circumstances are consistent with Foster's intent to rob Johnson and then later kill her to eliminate her as a witness and to affect his escape.

Foster however argues that the more reasonable interpretation of the evidence is the one the defense advanced at trial, i.e., that the blood and manner of killing suggested that Foster killed Johnson during a brief moment of rage and struggle, and then took her property as an afterthought. The evidence of robbery, however, is not rendered insufficient simply because an alternate interpretation of the evidence might exist. (See *People v. Bolden*, *supra,* 29 Cal.4th at p. 553 ["the failure of the evidence to conclusively rule out various scenarios under which defendant might not be guilty of robbery does not render

the evidence insufficient to support the robbery verdict"]; *People v. Webb* (1993) 6 Cal.4th 494, 530 ["The jury was aware of such competing inferences and presumably considered them in rendering its verdict"]; *People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054 ["If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment"].)

Foster's reliance on *People v. Green* (1980) 27 Cal.3d 1, 61- 62 (AOB 222), is also misplaced. There, the sole object of the robbery was to conceal the crime of murder. The defendant took the victim's property in order to conceal her identity. (*Ibid.*) In the instant case, there was nothing in the evidence demonstrating that Foster went to the church only intending to kill Johnson. To the contrary, the evidence shows that Foster needed money, and only after she put up a struggle, escalated his crime to murder. Moreover, in *Green*, the defendant and the victim were husband and wife. They had an unstable marriage and the defendant learned that his wife was cheating on him. The defendant also told his wife that he would kill her if she ever left him. (*People v. Green, supra*, 27 Cal.3d at p. 13.) In that case, it was reasonable to believe that the defendant had a motive to simply kill the victim and then use the robbery to cover up the killing. Such facts do not exist in the present case. There was no evidence that Foster and Johnson knew each other and no reason whatsoever for Foster to kill her, except to rid her as a possible witness and to get out of the church with her stolen property. For these reasons, *Green* is inapplicable.

Foster additionally claims the lack of sufficient evidence to support his conviction for first degree murder based on a theory of felony murder also violated his rights to due process and to a reliable penalty determination under the Eighth and Fourteenth Amendments to the United States Constitution.

(AOB 224-225.) The point is without merit, given there was substantial evidence to support his conviction on a felony-murder theory.

X.

SUBSTANTIAL EVIDENCE SUPPORTS THE SPECIAL CIRCUMSTANCE FINDING THAT THE MURDER OCCURRED IN THE COMMISSION OF A ROBBERY

Foster also contends that the robbery murder special circumstance under section 190.2, subdivision (a)(17)(i), was not supported by sufficient evidence. Specifically, Foster contends that the evidence shows that a robbery was committed in the course of a murder, rather than a murder taking place during the course of a robbery, such that the special circumstance cannot apply and violated his rights to due process under the Fourteenth Amendment to the United States Constitution and the California Constitution and rendered the special circumstance finding unreliable in violation of the Eighth Amendment to the United States Constitution. (AOB 226-229.) As with the previous argument, Foster's contention is meritless because the evidence shows that Foster killed Johnson while he was robbing her of her property.

As set forth in the prior argument, in determining whether the evidence is sufficient to support a criminal conviction, this Court, after viewing the evidence in the light most favorable to the prosecution, determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Cole*, *supra*, 33 Cal.4th 1158, 1212.) The same test is used to determine the sufficiency of the evidence for a special circumstance allegation. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790- 791.)

For purposes of a robbery-murder special circumstance allegation, the jury is required to find that the murder was committed while the defendant was engaged in the commission of, attempted commission of, or immediate flight after committing or attempting to commit a robbery. (Pen. Code, § 190.2, subd.

(a)(17).)

To prove a special circumstance, "the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder. (*People v. Mendoza* (2000) 24 Cal.4th 130, 182.) "Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*People v. Raley* (1992) 2 Cal.4th 870, 903.) It is only when the underlying felony is merely incidental to the murder that the felony-murder special circumstance does not apply. (*Ibid.*)

In the present case, there is no evidence to indicate that Foster took Johnson's property merely to remind him of the killing (see *People v. Marshall* (1997) 15 Cal.4th 1, 41), to conceal his actual motive for the killing, or to facilitate or conceal the killing (see *People v. Zapien, supra,* 4 Cal.4th at p. 984). Nor was there substantial evidence of any motive for the murder apart from accomplishing the robbery. As stated above, Foster and Johnson did not know each other and there was no reason for Foster to kill Johnson other than to obtain her money and her car. Rather, the jury reasonably inferred that Foster killed Johnson solely to facilitate the robbery. For these reasons, the evidence was sufficient to support the robbery-murder special circumstance.

XI.

SUBSTANTIAL EVIDENCE SUPPORTS FOSTER'S SECOND DEGREE BURGLARY CONVICTION AND FIRST DEGREE FELONY-MURDER CONVICTION PREDICATED ON THE COMMISSION OF A BURGLARY

Foster contends that insufficient evidence supports his conviction for burglary because the trial record fails to establish that he harbored a larcenous intent inside the church. Foster reasons that because the record fails to establish a free-standing burglary, his conviction for the Johnson's murder, premised on

the felony-murder rule, must fail as well. (AOB 230-236.) On the contrary, sufficient evidence supports Foster's conviction for burglary and the murder of Johnson. The circumstances of the crime leave no doubt of his intent to commit theft in the church. Accordingly, the evidence supports both the burglary conviction and the felony murder predicated on a burglary conviction.

As set forth in the two previous sufficiency of the evidence arguments, in determining whether the evidence is sufficient to support a criminal conviction, this Court, after viewing the evidence in the light most favorable to the prosecution, determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1158, 1212.)

Here, Foster complains that insufficient evidence supported his convictions for the second degree burglary of the church and the felony murder predicated on a burglary. Burglary is the entry of any statutorily enumerated premise, "with intent to commit grand or petit larceny or any felony." (Pen. Code, § 459; *People v. Birks, supra,* 19 Cal.4th at p. 113, fn.1.) While the intent to commit any felony will support a burglary conviction, the felony-murder rule and the burglary-murder special circumstance do not apply to a burglary committed for the sole purpose of assaulting or killing the homicide victim. (*People v. Seaton* (2001) 26 Cal.4th 598, 646, citing *People v. Garrison* (1989) 47 Cal.3d 746, 788-789; *People v. Wilson* (1969) 1 Cal.3d 431, 442.)

In this case, no question exists that the jury must have found a larcenous intent to convict Foster of each burglary charge. The jury instructions, after all, limited the intent requirement to "the specific intent to steal, take and carry away the personal property of another of any value and with the further specific intent to deprive the owner permanently of such property." (CT 444.) Accordingly, the prosecution bore a burden of proving that Foster entered the

church with the intent to steal.

Moreover, as set forth in the previous two sufficiency of the evidence arguments, the facts and circumstances adduced at trial unquestionably support the inference that Foster entered the church with the intent to steal from either the church or Johnson. Foster needed money. He armed himself with a knife and went to the church at a time when not many people would be there and had gone to the church two days before so he knew the layout of the building. On two previous occasions, Foster had entered other businesses with the intent to commit robberies inside and then did rob both Clark and Makris. Foster's unvarying dedication to thievery in every other commercial crime scene provided solid, credible evidence that he intended to take property in the church. Also, Foster had no reason to enter the church to kill Johnson, as stated previously. He did not know her and had no purpose to kill her other than to facilitate the stealing of her property. Thus, sufficient evidence clearly supports Foster's convictions for the burglary and the felony murder predicated on a burglary.

XII.

SUBSTANTIAL EVIDENCE SUPPORTS THE SPECIAL CIRCUMSTANCE FINDING THAT THE MURDER OCCURRED DURING THE COMMISSION OF A BURGLARY

Foster argues that the same deficiencies of proof in the previous argument require reversal of the burglary special circumstance. (AOB 237-239.) For the same reasons set forth above, the evidence was sufficient to support the burglary special circumstance finding.

XIII.

SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS OF PREMEDITATION AND DELIBERATION

Foster contends that the evidence is insufficient to prove that his murder of Johnson was willful, deliberate, and premeditated. (AOB 240-250.) Foster's argument is without merit.

Willful, deliberate, and premeditated murder requires that the defendant considered his decision beforehand, and formed, arrived at, or determined his course upon careful thought and weighing of considerations for and against the proposed course of action. (*People v. Mayfield, surpa,* 14 Cal.4th at p. 767.) The premeditation and deliberation process does not require any extended period of time. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) The true test is not the duration of time so much as it is the extent of reflection. (*Ibid.*) Thoughts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly. (*People v. Mayfield, supra*, 14 Cal.4th at p. 767.) A reviewing court "need not be convinced beyond a reasonable doubt that [Foster] premeditated the murders." The relevant inquiry on appeal is whether "any rational trier of fact" could have been so persuaded. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020.)

Categories of evidence establishing premeditation and deliberation include: (1) facts about a defendant's behavior before the incident that show planning; (2) facts about any prior relationship or conduct with the victim from which the jury could infer motive; and (3) factors about the manner of the killing from which the jury could infer the defendant intended to kill the victim according to a preconceived plan. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) However, the *Anderson* factors are merely descriptive, not normative or definitive, and unreflective reliance upon those factors is inappropriate. (*People v. Koontz, supra*, 27 Cal.4th at p. 1081.)

However, this Court has also held that the *Anderson* criteria are not rigid:

> Unreflective reliance on Anderson for a definition of premeditation is inappropriate. The Anderson analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. . . . Anderson identifies categories of evidence relevant to premeditation and deliberation that we 'typically' find sufficient to sustain convictions for first degree murder.

(*People v. Thomas* (1992) 2 Cal.4th 489, 517; see also *People v. Welch* (1999) 20 Cal.4th 701, 758, quoting *People v. Hawkins, surpa,* 10 Cal.4th at p. 957 [stating that the *Anderson* guidelines were "formulated as a synthesis of prior case law, and are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case."])

The guidance from the *Anderson* factors do not exclude other types of evidence and combinations of evidence that support a finding of premeditation and deliberation. It is also not necessary that these factors be accorded a particular weight. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32-33; *People v. Pride, supra,* 3 Cal.4th at p. 247.) Evidence of all three elements is not essential to sustain a conviction. (*People v. Edwards* (1991) 54 Cal.3d 787, 813-814.) It is not necessary to determine whether the evidence was sufficient to show Foster thought about the possibility of killing his victim from the outset. It is enough that the record shows sufficient premeditation and deliberation. (*People v. Kelly* (1990) 51 Cal.3d 931, 957.) Further, the method of killing alone can support a conclusion that the murder was premeditated and deliberate. (*People v. Memro* (1995) 11 Cal.4th 786, 863-864; *People v. Vorise* (1999) 72 Cal.App.4th 312, 318.)

In the present case, there was sufficient evidence to support a verdict of premeditated first degree murder. First, Foster had a knife with him. Second, although Foster relies on the testimony that the stab wounds to Johnson's torso

were applied in quick succession, those were not the only wounds. Foster and Johnson initially struggled. Foster then stabbed Johnson in the throat. It was not until after this struggle and Johnson was lying on the floor did Foster fatally stab her in her chest. During this time, Foster had sufficient time to decide that he was not going to leave another robbery victim alive. And finally and most importantly, the manner of Johnson's killing demonstrates premeditation. Foster punched Johnson in the face at least twice, stabbed her in the neck and then after she fell to the floor, defenseless and totally unarmed, stabbed her at least seven times directly into her chest without provocation. Thus, all the circumstances demonstrate that the trier of fact rationally found evidence of premeditation, and such finding was sufficient.

In any event, any error was harmless. The evidence supported the alternate theories of felony murder predicated on either robbery or burglary as set forth in detail above. The prosecutor argued all three theories to the jury.

> When a prosecutor argues two theories to the jury, one of which is factually sufficient and one of which is not, the conviction need not be reversed, because the reviewing court must assume that the jury based its conviction on the theory supported by the evidence. [Citations.]

(*People v. Seaton, supra,* 26 Cal.4th at p. 645.)

As set forth in detail above, the theories of felony murder predicated on either robbery or burglary were adequately supported by the evidence.

XIV.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Foster contends that the prosecutor committed misconduct by allegedly repeatedly seeking to elicit inadmissible testimony and evidence contrary to the trial court's ruling, inflaming the jury against Foster and violating Foster's rights to due process of law, assistance of counsel and to a reliable determination of guilt guaranteed by the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution. Specifically, he claims that the prosecutor 1) sought to elicit inadmissible testimony and evidence contrary to the trial court's rulings; 2) argued penalty during the guilt trial and insinuated during the guilt trial that Foster might be released from prison if convicted and sentenced to anything less than death; 3) argued that Foster was guilty of other, uncharged crimes that were irrelevant to the present case; 4) insinuated that Foster changed his appearance after his arrest and was thereby guilty because his appearance changed; and 5) insinuated that Foster was concealing evidence. (AOB 251-274.) By failing to raise objections to the conduct below and request an admonition, Foster has waived these claims. Even assuming the claims have been preserved, Foster has not established both misconduct and prejudice.

The applicable federal and state standards regarding prosecutorial misconduct are well established and are as follows:

> A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]

(*People v. Morales* (2001) 25 Cal.4th 34, 44; see *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

"To constitute a due process violation, the prosecutorial misconduct must be "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" (*Greer v. Miller* (1987) 483 U.S. 756, 764 [107 S.Ct. 3102, 97 L.Ed.2d 618], quoting *United States v. Bagley* (1985) 473 U.S. 667, 676 [105 S.Ct. 3375, 87 L.Ed.2d 481].) Bad faith is not a prerequisite to

finding prosecutorial misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822-823.)

In order to preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury. (*People v. Panah* (2005) 35 Cal.4th 395, 462, citing *People v. Brown* (2003) 31 Cal.4th 518, 553.) The requirement is waived only when the objection and/or the request for an admonition would have been futile or a prompt admonition would not have cured the harm caused by the misconduct. (*People v. Panah, supra,* 35 Cal.4th at p. 462; *People v. Bradford, supra,* 15 Cal.4th at p. 1333; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.)

At closing argument, a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. (*People v. Morales, supra,* 25 Cal.4th at p. 44.) "The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill, supra,* 17 Cal.4th at p. 819, internal quotation marks omitted; *People v. Hillhouse* (2000) 27 Cal.4th 469, 502 [prosecutor may "vigorously attack the defense case and argument if that attack is based on the evidence"].) During argument, a prosecutor may "state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history, or literature[,]" and he may vigorously argue his case. (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Wharton* (1991) 53 Cal.3d 522, 567.)

The prosecutor is given wide latitude to argue broadly the law and facts of a case. (*People v. Lucas* (1995) 12 Cal.4th 415, 473.) The prosecutor may comment on the actual state of the evidence (*People v. Medina, supra,* 11 Cal.4th at p. 755), and may "urge whatever conclusions he deems proper"

(*People v. Lewis* (1990) 50 Cal.3d 262, 283; *People v. Raley, supra,* 2 Cal.4th at p. 917). Prosecutors also have "'". . . broad discretion to state [their] views as to what the evidence shows . . . .'" (*People v. Welch, supra,* 20 Cal.4th at p. 752.)

"'A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" (*Boyde v. California, supra,* 494 U.S. at p. 378 [110 S.Ct. 1190, 108 L.Ed.2d 316]; see *People v. Gonzales* (1990) 51 Cal.3d 1179, 1224, fn. 21.)

When prosecutorial misconduct has occurred, the defendant must demonstrate that it was prejudicial. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1019.) The standard for reviewing prosecutorial remarks or comments to determine misconduct is whether there is a reasonable likelihood the jury misconstrued or misapplied the prosecutor's words in violation of the United States or California Constitutions. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663.) Even if genuine misconduct is established, the ultimate question in each case is whether it is reasonably probable that a result more favorable to the defendant would have occurred in the absence of such misconduct. Criminal trials are rarely perfect, and a judgment will not be reversed unless upon a consideration of the entire record, the misconduct resulted in prejudice amounting to a miscarriage of justice. (*People v. Hill, supra,* 17 Cal.4th at pp. 844-845.)

A. The Prosecutor Did Not Elicit Inadmissible Testimony

First, Foster claims that the prosecutor committed misconduct by attempting to elicit improper testimony from Foster on cross-examination. (AOB 252-256.) Specifically, Foster now complains about the following isolated questions asked of him by the prosecutor:

[Prosecutor]: Are you trying to leave the impression that if you commit a crime, you just admit it?

Defense counsel objected on grounds of relevance. The court sustained the objection. (13 RT 3251.)

[Prosecutor]: You don't like prison –

(13 RT 3252.)

The court sustained defense counsel's relevancy objection. (13 RT 3252.)

[Prosecutor]: After you were released from prison in 1982, did you – had you gotten any insight as to why you committed those crimes that landed you in prison back in 1972?

(13 RT 3258.)

Foster responded, "No, I did not." (13 RT 3258.) Defense counsel objected to the question and moved to strike the question and answer as improper cross-examination. The court sustained the objection and ordered that the answer by stricken. (13 RT 3259.)

[Prosecutor]: Did you do something at our 1982 trial to try to disguise your appearance?

(13 RT 3360.)

Foster replied, "I did not." (13 RT 3360.) Defense counsel objected to the question on foundational grounds. The court sustained the objection. (13 RT 3360.)

[Prosecutor]: So when you were released on December 12th, 1990, you had spent about 18 years in prison for the 1972 crime and 1982 crimes, is that correct, approximately?

(13 RT 3373.)

The court sustained defense counsel's relevancy objection. (13 RT 3373.)

[Prosecutor]: Well, during that period of time, isn't it true that you spent this time in prison all because victims had come into court and identified

you as their attacker.

(13 RT 3373.)

Foster answered, "With the exception of the escape." (13 RT 3373.) Defense counsel then objected on grounds that the question called for a conclusion. The court sustained the objection. (13 RT 3373.)

[Prosecutor]: You knew if you committed the crime of murder, you could get the death penalty?

(13 RT 3379.)

Foster objected on Evidence Code section 352 grounds and the court sustained the objection. (13 RT 3379.)

Foster now contends that these questions by the prosecutor were improper because they exceeded the scope of the court's admission of prior crimes evidence. Foster argues that the trial court ruled that Foster could be impeached with his prior crimes but that the prosecutor was prohibited from going into the details of the prior crimes. (AOB 255.) Foster maintains that the prosecutor ignored the court's ruling.

Foster has waived this prosecutorial misconduct claim by failing to raise it below and for failing to ask the court to admonish the jury. Although Foster objected to the allegedly improper questions, he did so on a different ground than he does now. A defendant may not raise the issue of prosecutorial misconduct on appeal unless on the same ground the defendant requested an assignment of misconduct and that the jury be admonished to disregard the impropriety. Because an admonition could have cured any of the alleged harm from the cross-examination, Foster's failure to do so precludes him from now challenging as misconduct the allegedly-improper cross-examination questions. (*People v. Panah, supra,* 35 Cal.4th at p. 462, *People v. Brown, supra,* 31 Cal.4th at p. 553.)

In any event, no misconduct occurred. "A prosecutor is permitted wide

scope in the cross-examination of a criminal defendant who elects to take the stand." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1147.) When a defendant takes the stand and denies the crime, the scope of cross-examination is wide. The prosecutor may introduce evidence, including unrelated offenses, which explain or refute the defendant's version. (*People v. Harris* (1981) 28 Cal.3d 935, 953.)

With respect to the prosecutor's first allegedly improper question to Foster about Foster trying to leave the impression that "if you commit a crime, you just admit it," the prosecutor did not commit misconduct in asking it. First, the question was asked only after Foster stressed to the jury that he had not been convicted of raping Clark, but rather had pled guilty. (13 RT 3250-3251.) The prosecutor could reasonably have believed Foster was attempting to discredit his role in the prior crime and was therefore just questioning him about it. Moreover, the question was innocuous and as Foster's reference to it without any argument (see AOB 255-256), clearly shows that he has no reason to fault the prosecutor's question. Same goes for the prosecutor's second question about Foster not liking prison. Foster does not state any reason for the misconduct (AOB 255-256). Moreover, it is not likely that either question was construed by the jury in an objectionable fashion or affected the jury's verdict.

With respect to the rest of the above questions, Foster maintains that they were improper because the court limited the scope of cross examination to not include details of Foster's prior crimes. (AOB 255-256.) However, no such limitation is clear from the record. The record shows that defense counsel informed the court that Foster would be taking the stand (12 RT 3151) and asked the court to have the prosecutor give an offer of proof as to the prior crimes he would be impeaching Foster with. (12 RT 3152.) A discussion about which crimes the court would allow the defendant to be impeached with ensued. (12 RT 3152-3170.) Toward the end of the discussion, defense

counsel stated, "Well, at this point in the proceedings a person who testifies, whether he's a defendant or not, can ask if he's convicted of a felony and what that felony was, and that's it. There's no details, no relitigation [sic] or anything like that."

The prosecutor replied, "Well, I guess we could get into it. Basically if you look at the rules of this section under People versus Harris --"

The court then stated, "What are you going to offer that will be relevant to any of these issues?" The prosecutor then stated that he did not know and guessed that he was being premature. (12 RT 3170.) Also, the prosecutor specifically asked the court if he could go into the details of Foster's prior crimes since Foster had only mentioned them on direct examination. (13 RT 3220.) After some discussion and the court doing its own research, the court stated that the law seemed clear and it would allow it. (13 RT 3233-3234.) Therefore, the record shows that the court did not limit the scope of the prior crimes impeachment evidence. Moreover, even assuming the court did make such a ruling, there is not a reasonable likelihood that the jurors construed any of the questions or answers in an objectionable fashion. The jury had already heard extensive testimony from the victims and Foster's parole officer about the prior crimes evidence. Therefore, any error was harmless. The jury had received this information regardless of whether the prosecutor asked Foster about it or not. Additionally, in view of the strong evidence of Foster's guilt as set forth in detail above (see harmless error section of Argument II), and Foster's lack of credibility as a witness, Foster suffered no prejudice.

B. The Prosecutor Did Not Discuss Penalty During the Guilt Phase of Trial

Second, Foster argues that the prosecutor committed misconduct by discussing penalty during his opening statements in the guilt phase of trial when he referred to Foster's attacks on Clark and Makris. (AOB 256-258.) Foster

also argues that the prosecutor improperly interjected penalty into the guilt trial by questioning Foster's parole officer about Foster's prior sentences. (AOB 258-260.)

The part of the prosecutor's opening statements to which Foster now objects is as follows:

> [Foster] had a trial and was convicted of robbing Cindy Makris, assaulting her with intent to rape and with intentionally inflicting great bodily injury upon her and he was sentenced to prison. He was sentenced to the maximum the law allows at the time which was 13 years. [¶] Now, in California at that time 13 years didn't mean 13 years. A person would serve a portion of that time and then they had to be released on parole if they behaved themselves in prison.

(7 RT 1755.)

Foster also now objects to the prosecutor's questioning of Foster's parole officer Steven Slaten. The prosecutor asked Slaten if Foster had been sentenced to life in prison after his rape conviction in 1973. Defense counsel objected on foundational grounds and the court sustained the objection. The prosecutor then asked Slaten whether Foster had pled guilty to rape and sentenced to life imprisonment in Idaho. The court sustained an objection by defense counsel. The prosecutor asked Slaten whether Foster had been paroled. (8 RT 1969-1970.) Foster now claims that the prosecutor's reasons for this line of questioning was to show that a sentence of life imprisonment did not mean life imprisonment thereby improperly interjecting penalty into Foster's guilt trial. (AOB 260.)

Foster has waived this prosecutorial misconduct claim by failing to raise it below and for failing to ask the court to admonish the jury. Foster did not object at all to the portion of the prosecutor's opening statements to which he now claims were misconduct. And, although Foster objected to the allegedly improper questions to Slaten, he did so on a different ground than he does now. A defendant may not raise the issue of prosecutorial misconduct on appeal

unless on the same ground the defendant requested an assignment of misconduct and that the jury be admonished to disregard the impropriety. Because an admonition could have cured any of the alleged harm from the cross-examination, Foster's failure to do so precludes him from now challenging as misconduct the allegedly-improper cross-examination questions. (*People v. Panah, supra,* 35 Cal.4th at p. 462, *People v. Brown, supra,* 31 Cal.4th at p. 553.)

While acknowledging that he failed to object to this conduct and to request an admonition, he asserts that an admonition would not have cured the harm. (AOB 258.) However, Foster fails to explain why this is so. Rather, he simply proffers a blanket statement that admonitions simply would not have cured the harm. This is entirely insufficient to show the claimed misconduct falls under the exception which permits Foster to preserve the issue for appeal notwithstanding the failure to timely object and request an appropriate admonition.

In any event, there was no misconduct. The prosecutor's statements in his opening argument were correct statements of fact and a fair inference to draw from the evidence. Although Foster had received a life sentence for raping Clark, he was clearly released on parole because he was later convicted of attacking and robbing Makris. Thus, the statements in opening arguments and questions to Slaten were not misconduct. Moreover the jury would eventually have learned that Foster was released from prison even though he was serving a life sentence when they heard Makris' testimony, as that incident was committed in 1982, after Foster was sentenced to life for the Clark crimes. Also, the jury received the court documents which recounted this information.

Moreover, any error could not have been prejudicial. Not only would the jury eventually learn that Foster did not serve a life sentence even though he had been sentenced to one when they heard that Foster had been released on

parole after being sentenced to life, but the trial court instructed the jury with CALJIC Nos. 17.42 and 8.83.2 that they were not to consider penalty in determining guilt and it must not affect their verdict. (CT 437, 456.) The trial court also instructed the jury that the statements made by the attorneys in argument were not evidence (CT 386). (*People v. Cash* (2002) 28 Cal.4th 703, 734 [no prejudice since jury was instructed that argument was not evidence].) Therefore, there has been no prejudice occurred.

C. The Prosecutor Did Not Argue That Foster Was Guilty of Uncharged Crimes

Third, Foster now objects to the following portion of the prosecutor's opening statement:

> At around noon on August 26th, that Monday, 1991 while [Johnson] was alone there in the church [Foster] walked in. Just like in 1982 when he walked into Cindy Makris' office, [Foster] had a knife. Just like he had done before, [Foster] confronted [Johnson], made her get her purse and brought her back there into the minister's office in another room of the church. Just like he had before with Cindy Makris, the contents of [Johnson]'s purse were dumped on the floor at her feet and her purse was put on the floor, and he robbed []Johnson.
>
> Now, I mentioned that [Johnson] was a strong-willed woman, a strong-willed woman, and at some point when [Foster] had plans for her, at some point she said no. At some point she, too, resisted just like Johnnie Clark resisted, just like Cindy Makris resisted. At some point [Johnson] resisted but, unfortunately, there was no Dick Nestor there to walk right in the middle of it an save her . . . .
>
> . . . . . .
>
> She struggled with [Foster] . . . . Only she didn't stop resisting like Johnnie Clark stopped and was okay. Cindy Makris didn't quite stop but she was saved . . . .

(7 RT 1759-1760.)

Foster argues that the prosecutor's statements were used to appeal to the jurors emotions by suggesting that Foster was also guilty in the present case of attempted sex crimes as he was in the Makris and Clark incidents. Foster

claims that because there was no evidence in the present case that Foster intended or attempted to commit any sexual crimes upon Johnson the prosecutor's comments were inaccurate, lacked support and foreshadowed evidence that would not be forthcoming. (AOB 262-263.)

As Foster acknowledges (AOB 261-262), he has waived this prosecutorial misconduct claim by failing to raise it below and for failing to ask the court to admonish the jury. Foster did not object at all to the portion of the prosecutor's opening statements to which he now claims were misconduct. Nor did he request that the jury be admonished to disregard the impropriety. Because an admonition could have cured any of the alleged harm from the cross-examination, Foster's failure to do so precludes him from now challenging as misconduct the allegedly-improper cross-examination questions. (*People v. Panah, supra,* 35 Cal.4th at p. 462, *People v. Brown, supra,* 31 Cal.4th at p. 553.)

While acknowledging that he failed to object to this conduct and to request an admonition, he asserts that an admonition would not have cured the harm. (AOB 261.) However, Foster fails to explain why this is so. Rather, he simply proffers a blanket statement that admonitions simply would not have cured the harm. This is entirely insufficient to show the claimed misconduct falls under the exception which permits Foster to preserve the issue for appeal notwithstanding the failure to timely object and request an appropriate admonition.

Even if the claim has not been waived, no misconduct occurred here. None of the prosecutorial comments challenged as misconduct mention any such sexual conduct by Foster and though Foster may attribute this to the subtlety of the prosecutor, it is not reasonable the jury construed any of the comments in the objectionable way Foster believes they would. Moreover, the prosecutor was simply pointing out the accurate factual similarities between the

three crimes as the trial court had previously ruled he was allowed to do.

In any event, no prejudice occurred. The trial court instructed the jury that the statements made by the attorneys in argument were not evidence (CT 386). (*People v. Cash, surpa,* 28 Cal.4th at p. 734 [no prejudice since jury was instructed that argument was not evidence].) Also, in light of the brief nature of the prosecutor's comments and the strong evidence of Foster 's guilt, Foster was not prejudiced by the comments.

D. The Prosecutor Did Not Insinuate That Foster Was Guilty Because He Changed His Appearance

Fourth, Foster claims that the prosecutor committed misconduct by insinuating that Foster was guilty because he changed his appearance. (AOB 263-267.)

During his examination of Nestor, the prosecutor asked him about his preliminary hearing testimony in Foster's 1982 attack on Makris. The prosecutor asked Nestor if he remembered testifying at that preliminary hearing and whether Foster's appearance had changed between the time of the attack on Makris and the preliminary hearing in that case. (7 RT 1875.) Nestor testified that Foster had grown a beard and a mustache since the attack on Makris and Foster's hair appeared fluffy or dirty on the day of the attack, but was slicked back at the preliminary hearing. (7 RT 1875-1876.) The prosecutor then asked Nestor:

> And at the [1982] trial when – and when you first saw him at the preliminary hearing, did that kind of throw you off, here is a person with a beard that didn't exist at the time you had him arrested that you approached him, did that throw you off a little bit?

(7 RT 1876.)

Nestor responded, "Made him look different, yes." The prosecutor then asked Nestor, "Did that kind of throw you off, you thought, how could this kind of thing be allowed to happen, a person can try to disguise their appearance and

be allowed to do that?" (7 RT 1876.) Nestor replied, "Yes, it did." (7 RT 1876.) Defense counsel objected to the question on the grounds that it was leading and suggestive. The trial court sustained the objection. (7 RT 1876.) The prosecutor then asked Nestor if Foster had shaved off the beard before the trial in the Makris case. (7 RT 1876.)

Foster claims that the questions were harmful to Foster and put before the jury information that fell outside the evidence. (AOB 265.) Foster also claims the questions were designed to encourage the jury to infer that Foster was guilty in this case because he had in the past changed his appearance in other cases to prevent identification. (AOB 265-266.)

Foster has waived this issue by failing to object and seek an admonition to disregard allegedly improper conduct by the prosecutor. (*People v. Panah, supra,* 35 Cal.4th at p. 462, *People v. Brown, supra,* 31 Cal.4th at p. 553; see also *People v. Cunningham, supra,* 25 Cal.4th at p. 1000 [same claim of prosecutorial misconduct could have been cured by an admonition] .)

Even if this claim was preserved, it fails on the merits because it is not reasonable the jury construed any of the comments in an objectionable way. (*People v. Morales*, *supra,* 25 Cal.4th at p. 44; see *People v. Samayoa*, *supra,* 15 Cal.4th at p. 841.) Based on the questions, it appears the prosecutor wanted to show Foster's appearance had changed between the time of his prior attack on Makris and the time of the preliminary hearing and trial, and therefore witnesses would describe him differently from his appearance at trial. As Foster was not tried for the Makris crimes because he pled guilty, the prosecutor's questions were not improper. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1000; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 974 [defendant's alteration of appearance between the time of incident and the time of trial is relevant to the issue of identity].)

Additionally, after asking Nestor about Foster's appearance, the

prosecutor asked him if could identify Foster presently. Nestor responded that he could only identify him because he was sitting at the defense table. Nestor replied that a lot of time had passed between 1982 and now. (7 RT 1877.) In order to establish that Nestor actually did know Foster, the prosecutor needed to ask relevant questions about how Foster's appearance had changed from when he last saw him. Moreover, one of the theories advanced by the prosecutor in proving his case was that Foster robbed Johnson because he needed money. Foster's appearance was also relevant to proving that back in 1982, appellant had a motive for the robbery, based on the reasonable inference that he lacked money as indicated by his unkempt appearance. was poor and had a motive for the robbery. Thus, the prosecutor did not commit misconduct by this line of questioning.

Also, it is reasonably likely that Foster was deliberately trying to change his appearance to refute the prosecutor's theory that Foster needed money and therefore robbed Johnson. As such, the prosecutor's questions were not improper because they related to the issues of identity and consciousness of guilt and therefore the prosecutor did not use a "deceptive" or "reprehensible" method to persuade the jury.

In any event, no prejudice has been shown. Foster maintains, "Surely, the prosecutor was aware that jail grooming requirements alone could have accounted for Foster's change in appearance." (AOB 266.) So too could the jury. Additionally, the jury was instructed with CALJIC No. 1.02 that statements by counsel were not evidence (CT 386). (*People v. Cash, supra,* 28 Cal.4th at p. 734 [no prejudice since jury was instructed that argument was not evidence].) Moreover, the prosecutor's questions and Nestor's answers related to the issue of identity and there was overwhelming independent evidence of Foster's identity as the killer. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 185 [any misconduct in the prosecutor's argument that the defendant's changed

appearance was a "ploy" was harmless in light of the overwhelming evidence of guilt].)

E. The Prosecutor Did Not Insinuate That Foster Was Concealing Evidence

Lastly, Foster argues that the prosecutor committed misconduct by impermissibly insinuating that Foster was concealing evidence. (AOB 267-269.)

During redirect examination of David Stockwell, the prosecutor's criminalist, the prosecutor asked him which blood stains he had released to the defense criminalist. (9 RT 2437.) Defense counsel objected, arguing the evidence was irrelevant, more prejudicial than probative under Evidence Code section 352, and the prosecutor was violating the confidentiality of defense trial preparation. (9 RT 2437-2438.) In support of his question, the prosecutor stated that defense counsel had questioned Stockwell about the blood stains and called in to question what Stockwell did in analyzing them, namely that he did not test all of the stains. The prosecutor informed the court that he wanted to show that the prosecution was not hiding anything. (9 RT 2438.) After hearing arguments from the parties outside the presence of the jury (9 RT 2440-2447), the court overruled the objection.

Also, during cross examination of the defense DNA expert Dr. Mueller, the following questioning was conducted by the prosecutor to which Foster now objects:

> [Prosecutor]: You're familiar with a lot of DNA labs, aren't you?
>
> [Mueller]: Yes.
>
> [Prosecutor]: And if I had a blood sample and I thought somebody screwed up and didn't do it right, I could call anyone of those DNA labs and say, would you reanalyze [sic] this, couldn't I?
>
> [Mueller]: Not necessarily, no.

[Prosecutor]: How many DNA labs do you know of that somebody could pick up the phone, any attorney, and say, hey, I think they screwed up, I want this reanalyzed [sic] right now? How many do you know of?

[Mueller]: Those would have to be private labs and there are probably, the ones that I'm familiar with, six, seven different private labs that would do some type of DNA test.

[Prosecutor]: Now, did you – you were hired by the defense in this case to give them some advice on DNA analysis, is that correct?

[Mueller]: On the population genetic issues, that's correct.

[Prosecutor]: Did you tell them here's a lab, sent that blood over there and reanalyze [sic] it?

(12 RT 3090-3091.)

Defense counsel objected without stating a ground for the objection and the court sustained it. (12 RT 3091.)

Foster argues that the prosecution's questioning in the these two instances was misconduct because the questioning insinuated that Foster was intentionally hiding from the jury the results of blood analysis consistent with guilt and that Foster had the duty to offer evidence of his innocence in order to be acquitted. (AOB 268.) Foster also argues that the prosecutor committed misconduct by asking argumentative questions which are improper. (AOB 269.) Additionally, Foster maintains that the prosecutor committed misconduct because his questions were irrelevant to the issues in the case. Foster asserts that his expert's request for blood analysis was irrelevant because Mueller's testimony concerned statistical analysis and probabilities rather than the propriety of blood analysis. (AOB 269.)

Foster has again waived this claim by failing to object on grounds of misconduct and failing to ask that the court admonish the jury. Such an admonition would have cured any harm, therefore Foster was not excused from requesting it. (*People v. Panah, supra,* 35 Cal.4th at p. 462, *People v. Brown,*

supra, 31 Cal.4th at p. 553.)

In any event, no misconduct occurred here. It is not improper for a prosecutor to argue that the jury should believe the prosecution evidence and reject defense theories, without casting personal aspersions on defense counsel or Foster and suggesting defense counsel believes his client is guilty. (See *People v. Thompson* (1988) 45 Cal.3d 86, 112; see also *People v. Melton* (1988) 44 Cal.3d 713, 743-744.) The prosecutor may generally suggest that the failure of the defense to pursue a possible defense, or challenge the prosecution evidence, shows the defense case is weak. (See *People v. Frye, supra,* 18 Cal.4th 894, 973; *U.S. v. Mares* (9th Cir.1991) 940 F.2d 455, 461.) The prosecution may also note the failure of the defense to produce evidence which the jury might logically expect to be produced, if favorable evidence existed. (See *People v. Ratliff* (1986) 41 Cal.3d 675, 690-691.)

Since the defense made an issue of the manner in which the blood was tested, the prosecution was entitled to question Mueller about all the circumstances surrounding the testing, including the involvement of the defense expert. Since the defense chose to have an expert testify about the analysis of the blood stain evidence, it is not improper for the prosecutor to question him about it. The jury was entitled to learn of all the circumstances involved in the testing, not just to portions of it that the defense wants the jury to hear. (See *People v. Cooper* (1991) 53 Cal.3d 771, 896.)

Moreover, it is proper for counsel to cross-examine an expert witness more extensively than a lay witness and is "entitled to attempt to discredit the expert's opinion." (*People v. Dennis* (1998) 17 Cal.4th 468, 519.) Also, the prosecutor is entitled to comment on the credibility of a witness based on evidence that has been presented at trial. (*People v. Thomas, supra,* 2 Cal.4th at p. 529.) Since, it had already been adduced at trial that Mueller had received a portion of the blood stains for analysis (9 RT 2437), it was proper for the

prosecutor to ask him about it. For all of these reasons, the prosecutor's conduct did not amount to misconduct.

Even assuming misconduct, it was harmless. Not only had the jury already learned, without an objection by the defense, that the blood stains had been released to the defense for analysis (9 RT 2437), but the independent evidence of Foster's guilt was overwhelming.

XV.

THE TRIAL COURT'S PRE-INSTRUCTION TO THE JURY WAS PROPER

Foster contends that the trial court's pre-instruction to the jury failed to define "life without the possibility of parole" thereby violating Foster's right to a fair trial, due process and a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 275-292.) The trial court's pre-instruction was proper, and even assuming error it was harmless.

Foster argues that the court's statements to the jury misled them into speculating that life without parole did not mean life without parole, created doubt that life without the possibility of parole really meant life without the possibility of parole, and did not clearly instruct the jury that life without the possibility of parole means that Foster would never be released. He claims that these errors violated his constitutional rights to a fair trial, due process, equal protection and rendered the penalty unreliable. (AOB 280-287.)

Defense counsel did not object to the court's statements to the jury. (3 RT 645, 649.) By failing to assert his constitutional grounds in the trial court, he waived his claims on appeal. (See *People v. Earp, supra,* (1999) 20 Cal.4th at pp. 826, 893; *People v. Carpenter, supra,* 15 Cal.4th at p. 385.)

In any event, Foster's claim fails on the merits. The court clearly informed the jury that if it convicted Foster of life without the possibility of

parole it meant that Foster would "never be released from prison." (3 RT 644.) The court told the jury that both punishments, life without the possibility of parole and execution, "mean exactly what they say." (3 RT 644-645.) The court also stated that if the jury imposed a life sentence without the possibility of parole on Foster he would "never be released on parole" and would "never be considered for release." (3 RT 645.) The court informed the jury that circumstances where men like Charles Manson and Sirhan Sirhan kept coming up for parole review were "unique" and that the law has changed since then. (3 RT 643.) Thus, the court's statements to the jury clearly explained that life without the possibility of parole meant just that. The court specifically admonished the jury.

At the beginning of trial, after all the jurors with hardships had been excused for cause, the trial court spoke to the prospective jurors and informed them that Foster had been charged with murder and that the case was different in that if the jury found Foster guilty of murder they would be presented with two sentencing choices: life without the possibility of parole or death. (3 RT 641-642.) The court then told the jurors:

> In this situation, then, we are concerned with the choices of a sentence of life without parole or death and you would be obliged to make a choice should you reach that point in the case.
> Now, because of that possibility, I'm going to give you some information now that normally would not be given to jurors. It deals with somewhat of a history of the death penalty in California.
> It's been many of our experiences that many of our citizens have some real confusion and misinformation about our system of capital punishment. So I'm going to take a few minutes to talk to you about the state of the law today which may, hopefully, eliminate any conceptions you might have about the death penalty in California.
>
> . . . . . .
>
> In 1970, the death penalty law in California and in many other states was found to be unconstitutional by the United States Supreme Court. The [C]ourt concluded that the law was too arbitrary and that there was no way to determine in advance which people convicted of murder should

face the death penalty and which should not.
At that time, there were many people on death row in California, and because the law under which they had been sentenced was invalidated, their sentences were commuted to life in prison.

At that time there was no punishment in California known as life imprisonment without parole so all those people received a sentence of life with parole possibility. And it's because of those circumstances that men like Charles Manson and Sirhan Sirhan keep coming up for parole review.

I know that it makes many of our citizens very nervous to think that these men might be paroled, but what you need to know is that their cases are unique and they are considered for parole only because of that change in the law that occurred.

In 1978, California passed a new death penalty law and it was an initiative on the ballot passed by the voters. This law contained two major components:

First, it listed certain special circumstances which could result in the death penalty and require a special finding by the jury as to the truth of the [sic] those special circumstances.

Second, it added a new punishment to California law known as life in prison without the possibility of parole. Under that punishment, a Defendant would **never be released from prison**.

Now, this new law was tested, which took some years, and was found by both the California Supreme Court and the United States Supreme Court to be constitutional. Many people have now been convicted under this new law, and as you may be aware, many years passed before anyone was actually executed in California. Much of that time was consumed in testing the new law and the appellate review of those Defendants' cases. However, there have been two executions in California in the recent past and I anticipate that there will be many more executions in the near future. What you need to know is the following:

In 1996, in California, the law means exactly what it says. If the Defendant in this case is found guilty of first degree murder and if either of the special circumstances alleged are found to be true, then the jury will have the obligation of determining which punishment to choose.

> There will, under those circumstances, be a second phase of the trial, which I'll explain to you in a few minutes.
>
> At the conclusion of that phase, the jury will have only two options: Death or life imprisonment without parole, and again, you are instructed that **both those punishments mean exactly what they say. If you vote for life without parole, the Defendant will never be released on parole and will never be considered for release.** If you vote for death, the Defendant will be executed.

(3 RT 642-645; emphasis added.)

The trial court also instructed the jury with CALJIC No. 8.84, which stated in pertinent part that the jury was responsible for fixing the penalty to be death or prison confinement for life without the possibility of parole. (CT 649.) Since the record fails to demonstrate that any of the jurors misunderstood the plain meaning of life without the possibility of parole, there was no error. (*People v. Kipp, supra,* 18 Cal.4th at p. 379 [no sua sponte duty to give instruction on actual consequences of penalty verdict since the record did not show the jury had misunderstandings regarding the consequences]; *People v. Padilla* (1995) 11 Cal.4th 891, 971.)

As to Foster's argument that the trial court failed to define in its pre-instructions the meaning of life without the possibility of parole, this Court has consistently rejected the argument. (*People v. Prieto* (2003) 30 Cal.4th 226, 270; *People v. Maury, supra,* 30 Cal.4th at p. 440; *People v. Smithey* (1999) 20 Cal.4th 936, 1009; *People v. Earp, supra,* 20 Cal.4th at p. 903; *People v. Arias* (1996) 13 Cal.4th at p. 172.) Foster acknowledges this Court's rejection of his argument, yet requests that this Court re-examine it's holding in light of *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133], *Shafer v. South Carolina* (2001) 532 U.S. 36 [121 S.Ct. 1263, 149 L.Ed.2d 178], and *Kelly v. South Carolina* (2002) 534 U.S. 246 [122 S.Ct. 726, 151 L.Ed.2d 670]. (AOB 281.) The point made by the High Court in these three South Carolina cases is that those juries were never properly advised

about the relationship between life imprisonment and parole eligibility. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271; *People v. Arias*, *supra*, 13 Cal.4th at pp. 172-173; *People v. Padilla*, *supra,* 11 Cal.4th at p. 971.) In this case, the jury received adequate and correct instruction on this point. The court sufficiently instructed the jury regarding their sentencing alternatives and the instruction did not violate Foster's constitutional rights.

Even assuming some error by the trial court in its initial admonishment to the jury, any error was harmless because uncontradicted evidence adduced during the penalty phase and defense counsel's closing argument informed the jury of Foster's parole ineligibility under a sentence of life without the possibility of parole. During the testimony of defense witness James Park, a former warden in the Department of Corrections, Park specifically explained to the jury that if Foster got a sentence of life without the possibility of parole he would never get out no matter how well he performed in prison. (21 RT 5343.) During closing arguments, the defense informed the jury that Foster would be incarcerated "for the rest of his natural life." (22 RT 5717.) Defense counsel also informed the jury during his closing argument that Foster would "die in prison" whether they sentenced him to death or life in prison without the possibility of parole. Accordingly, even if a misunderstanding by the jury about the meaning of a life sentence without the possibility of parole could have existed from the initial admonishment, it was clearly harmless given subsequent instructions and argument.

XVI.

THE TRIAL COURT HAD SUFFICIENT INFORMATION UPON WHICH TO DETERMINE WHETHER JURORS WERE DEATH QUALIFIED BASED ON THEIR QUESTIONNAIRES AND FOSTER'S JURY WAS NOT COMPRISED OF JURORS WHO HAD A PENALTY BIAS IN FAVOR OF DEATH

Foster contends the trial court erred by not questioning the jurors about their penalty bias and his jury was comprised of jurors who were biased in favor of the death penalty. (AOB 293-328.) There was no error. The questionnaire was legally proper and sufficient to provide the court with the information it needed to determine whether the jurors were death qualified and the juror's responses unambiguously demonstrated that they would not be prevented or substantially impaired from performing their duties as a juror.

A prospective juror may be excused for cause if that juror's views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) The issue is "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror." (*People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

This Court recently reversed the penalty phase of a death penalty conviction on the grounds that the trial court excused five prospective jurors for cause over the defense's objection based solely on written answers to a legally flawed jury questionnaire and refused to let defense counsel follow-up during voir dire. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 425.) As will be demonstrated below, the differences between this case and *Stewart* are numerous and significant, and reversal of the penalty phase is not required in this case.

The 13 page questionnaire at issue in *Stewart* was comprised of only 1

multi-part section concerning the juror's views on the death penalty. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 442-443.) That question was phrased as follows:

> "(1) Do you have a conscientious opinion or belief about the death penalty which would prevent or make it very difficult for you:
>
> "(a) To find the defendant guilty of first degree murder regardless of what the evidence might prove? ( ) Yes ( ) No
>
> "(b) To find a special circumstance to be true, regardless of what the evidence might prove? ( ) Yes ( ) No
>
> "(c) To ever vote to impose the death penalty? ( ) Yes ( ) No
>
> "If you answer to (a), (b) or (c) is 'Yes' please explain.
>
> "(2) Are your opinions or beliefs about the death penalty of such a nature that you would:
>
> "(a) Vote for first degree murder regardless of what the evidence proved so that the death penalty could be imposed ( ) Yes ( ) No
>
> "(b) In all cases vote for the death penalty if there is a verdict finding the defendant guilty of first degree murder and a special circumstance to be true regardless of what mitigating evidence might be presented? ( ) Yes ( ) No
>
> "If your answer to (a) or (b) is 'Yes,' please explain."

(*People v. Stewart* (2004) 33 Cal.4th 425, 442-443, fn. 8.)

The trial court in *Stewart* then met with counsel to rule on stipulated challenges for cause. The court assured counsel that it would make rulings on "unambiguous" answers, but ambiguous answers would be "cleared up." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 443.) The court ultimately granted 17 stipulated challenges for cause and deferred rulings on three prospective jurors, (*People v. Stewart*, *supra*, 33 Cal.4th at p. 444.)

There were five jurors the prosecutor challenged for cause based upon

the questionnaire. All five indicated that they did not have a conscientious opinion about the death penalty which would prevent or make it very difficult to find the defendant guilty of first degree murder or to find a special circumstance true regardless of what the evidence might prove. However, each juror also answered "yes" to the question which asked whether they had a conscientious opinion or belief about the death penalty which would prevent or make it difficult to ever impose the death penalty. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 444.)

The first juror explained, "I do not believe a person should take a person's life. I do believe in life without parole." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 444.) The second juror wrote, "I am opposed to the death penalty." The third juror responded, "I do not believe in capit[a]l punishment." The fourth juror wrote, "[i]n the past, I supported legislation banning the death penalty." Finally, the fifth juror wrote, "I don't believe in irrever[i]ble penalties. A prisoner can be released if new information is found." The court granted the prosecution's motion on all five prospective jurors. (*Id.* at p. 445.)

This Court held in *Stewart* that the trial court erred in ruling on the questionnaires alone under the circumstances of that particular case. It is well established that the trial court must have sufficient information regarding a prospective juror's state of mind to permit a reliable determination as to whether the juror's views would prevent or substantially impair the performance of his or her duties. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 445-446.)

In finding the trial court committed error, this Court was careful to note the absence of authority forbidding the practice of granting a motion for excusal for cause based on juror questionnaires alone. "We need not and do not hold that a trial court never may properly grant a motion for excusal for cause over defense objection based solely upon a prospective juror's checked answers and

written responses contained in a juror questionnaire." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 449.) Rather, this Court based its decision on the poor phrasing of the juror questionnaire and the need for further oral voir dire in order to clarify the jurors' positions. (*Id.* at p. 451.)

The jury questionnaire in *Stewart* asked whether each prospective juror's beliefs or opinions would either "prevent or make it difficult" for the prospective jurors "to ever vote for the death penalty." (*Stewart, supra*, 33 Cal.4th at pp. 442-443, fn. 8.) This Court reasoned that many members of society had personal views concerning the death penalty that would make it "difficult" to ever vote to impose the death penalty. Prospective jurors who would find it very difficult are entitled and duty-bound to sit on a capital jury, unless those views would prevent or substantially impair the performance of his or her duties. Along those same lines, this Court noted that a prospective jurors' beliefs about the death penalty is not a sufficient basis for exclusion. Those who firmly believe that the death penalty is unjust may serve so long as they clearly state that they are willing to set aside their beliefs in deference to the law. Ultimately, this Court found that the question posed to the prospective jurors did not directly address the pertinent constitutional issue. A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is appropriate under the law. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 446-447.)

This Court also focused on the written answers provided by the prospective jurors. This Court found that those answers only stated generalized opposition to the death penalty and the approval of a life sentence. The answers might have provided a "preliminary indication" that the prospective juror might

prove to be subject to a challenge for cause upon further examination. However, absent clarifying follow-up and an examination of the prospective juror's demeanor the "bare written response" was not sufficient to establish a basis for exclusion for cause. (*People v. Stewart, supra*, 33 Cal.4th at p. 448.) This Court found that nothing in the written comments was disqualifying by itself or when considered in conjunction with the checked answers. (*Id.* at p. 449.)

The 10th Circuit for the United States Court of Appeals also dealt with a similar, but distinguishable situation. The federal court declined to decide whether it was improper for a trial court to excuse jurors for cause based on questionnaires alone in a capital case. (*United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1269.) However, the court nevertheless reversed because one prospective juror's questionnaire did not support dismissal for cause. (*Id.* at pp. 1270-1272.) Specifically, this juror merely indicated that she believed the death penalty was proper in some cases, but did not think she would be able to vote for the death penalty in a case because she did not feel that she would ever be "100% sure" that death was the proper verdict. She echoed that sentiment one other time in the questionnaire. She declined to answer a question giving her options about whether she would automatically vote one way or another and indicated that her feelings regarding the death penalty would not prevent her from making a determination during the guilt phase. (*Id.* at p. 1271.)

The court in *Chanthadara* found that the prospective juror's responses did not sufficiently demonstrate that her views on the death penalty would substantially impair the performance of her duties. To the contrary, the court concluded that her statements were ambiguous, especially in light of the fact she failed to answer the question giving her options which sought to mirror the *Witt* standard. (*United States v. Chanthadara, supra,* 230 F.3d at p. 1271.) None of the questions the prospective juror answered articulated the proper legal

standard under *Witt* and she was never asked whether she would consider imposing the death penalty if the facts of the case and evidence warranted it in light of her personal beliefs. (*United States v. Chanthadara, supra,* 230 F.3d at p. 1272.) Based on the ambiguity in the prospective juror's answers, the guilt phase was reversed. (*Id.* at p.1273.)

Both *Stewart* and *Chanthadara* are distinguishable from this case. The jurors here did not require excusal because their questionnaires unambiguously demonstrated that their views on capital punishment, and other aspects of jury service, were not biased in favor of death and did not substantially impair them from performing their duties as jurors. Thus, no error occurred in the trial court's treatment of the jurors.

Foster complains on appeal that the trial court should have asked follow up questions to the juror's answers on the questionnaire and during voir dire and his jury consisted of jurors with biases in favor of death. By failing to object to the trial court's failure to ask questions during voir dire, he has waived this issue on appeal. (*People v. Stitely* (2005) 35 Cal.4th 514, 538 [defendant's claim about the manner in which voir dire was conducted waived on appeal by failing to object below]; see also *People v. Ochoa, supra*, 26 Cal.4th at p. 431.)

In any event, the questionnaire in this case was sufficient to provide the court with information to determine whether the jurors were biased in favor of death and the answers provided show that none of the jurors were so biased. The two pillars upon which the reversal on *Stewart* rested are simply not present in this case. First, a fair comparison of the questionnaire used in this case and the questionnaire in *Stewart* reveals that the questionnaire here alleviated the concerns present in *Stewart.* Furthermore, the additional answers provided by the jurors in question did not present the ambiguities seen in *Stewart*, which would have required additional follow-up to clarify their position. Moreover, the defense attorney and the prosecutor were permitted and

did ask additional follow-up questions during voir dire. As such, the trial court had sufficient information upon which to excuse the prospective jurors for cause.

Here, the court included questions regarding the attitudes of jurors towards the death penalty. (CT 535-538.) However, unlike the court in *Stewart*, the trial court also tracked the language of *Witt* in order to weed out those jurors who would be prevented or substantially impaired from performing the duties of a juror. Question 122 clearly accomplished that end by allowing jurors to chose whether they would automatically vote for life in prison, automatically vote for the death penalty, or listen to the evidence and the instructions and decide accordingly. (CT 538.) A juror who would automatically vote for life in prison or the death penalty without regard to the evidence would be prevented or substantially impaired from performing his duties.

The questionnaire given here provided the court sufficient evidence upon which to base a *Witt* determination. Jurors were able to express their beliefs, but also were placed in the shoes of potentially having to make a decision and upon reflection could find that no matter what the evidence they would be compelled to vote in a certain direction. Question 122 in combination with the multiple questions on the prospective jurors' attitudes on the death penalty (see CT 535-538) supplied the court with more than sufficient information to base its rulings on *Witt*. This is in stark contrast from the questionnaire in *Stewart*, which focused only on the juror's general beliefs about the death penalty and whether those beliefs would make a decision "difficult." As such, the questionnaire used here was substantially more informative than the questionnaire in *Stewart*, tracked the proper standard, and contained sufficient information upon which the court and counsel could ascertain whether prospective jurors were excusable for cause.

In the present case, after consulting with the prosecutor about the questions to be included in the jury questionnaire, defense counsel stated that he had reviewed the final copy and it complied with the court's orders. (3 RT 591.) The final questionnaire was a comprehensive 32 page questionnaire. (2 CT 512-540.) The questionnaire with respect to a prospective juror's opinions about the death penalty and a summary of the jurors' answers to those questions is provided below.

106. Are you willing to weigh and consider all the aggravating and mitigating factors that will be presented to you before deciding the penalty in this case? Yes __ No __

107. What are your general feelings about the death penalty?

108. What are you general feelings about the sentence of life without the possibility of parole?

109. Which sentence is the most severe? Death ___; or life without possibility of parole ___
Why?

110. What do you believe is the purpose of the death penalty?

111. Do you have any moral, philosophical, or religious objection to the death penalty? Yes__ No__
Please explain:

112. Do you belong to any group that advocates the increased use or abolition of the death penalty? Yes__ No__
If yes, what groups?

113. Do you feel the death penalty is used:
Too often? ____ Too seldom? ___
Please explain:

114. If we had a vote tomorrow in the State of California to decide whether or not to have a death penalty in the State of California, how would you vote? Keep the death penalty ___

Abolish the death penalty ___
Would not vote ___
Please explain:

115. Have your feelings about the death penalty changed in the last 10 years? Yes___ No___
Please explain:

116. (a) Do you have any religious preferences or affiliations?
Yes ___ No ___
If yes, what?

(b) Do you attend religious services regularly?
Yes ___ No ___

(c) Does your religion have a view on the death penalty?
Yes ___ No ___

(d) What is your religion's view of the death penalty?

(e) Do you agree or disagree with it?
Agree ___ Disagree ____
Please explain:

117. Have you ever discussed the death penalty with your spouse or friends? Yes ___ No ___
Do they share your feelings about it? Yes ___ No ___
Please explain:

118. Do you feel the death penalty law in the State of California is fair? ____ Unfair? ___ Please explain:

119. Are your feelings about the death penalty such that you would <u>never</u> be able to <u>personally vote for the death</u> of the defendant under any circumstances, but would always vote for a sentence of life without the possibility of parole?
Yes ___ No ___
Please explain:

120. If you conclude that the defendant is guilty of first degree murder and that a special circumstance is true, and that a sentence of death is legally warranted in this case, would you:

(a) Be reluctant to personally vote for a sentence of death? Yes ___ No ___

(b) Be reluctant to personally sign the verdict form for the sentence of death? Yes ___ No ___

(c) Be reluctant to stand up in court, facing the defendant, and state that your verdict is death? Yes ___ No ___
Please explain:

121. Are your feelings about the death penalty such that you would refuse to find the defendant guilty of first degree murder and/or would refuse to find the special circumstances true, solely to avoid having to make a decision on the death penalty? Yes ___ No ___
Please explain:

122. Please **read all** of the group descriptions below (1-5) thoroughly. After reading them all, check the one that best describes you.

GROUP 1 (____)
I will always vote for death in every case of murder with special circumstances. I cannot and will not weigh and consider the aggravating and mitigating factors.

GROUP 2 (____)
I favor the death penalty but will not always vote for death in every case of murder with special circumstances. I can and will weigh and consider the aggravating and mitigating factors.

GROUP 3 (____)
I neither favor nor oppose the death penalty.

GROUP 4 (____)
I have doubts about the death penalty, but I would not vote against it in every case.

GROUP 5 (____)

I oppose the death penalty. I will never vote for the death of another person.

Stewart and *Chanthadara* are both distinguishable from this case because the jurors' answers in this case did not contain the ambiguities of the jurors in *Stewart*. The questions contained no ambiguity about whether a juror would be willing to listen to the evidence and the instructions and base his decision on that, or if his beliefs would compel an automatic decision. Any juror that would vote automatically without regard to the evidence satisfies the *Witt* standard. Furthermore, Question 122 had the advantage of placing the prospective juror in the shoes of a juror who was faced with that decision. In doing so, the prospective juror is able to give a realistic answer about how they would act in a given situation and not merely a theoretical answer on their beliefs in the death penalty.

The relevant answers to the preceding questions by the jurors during death qualification in the present case are set forth below.

Juror No. 1

In her questionnaire, Juror No. 1 stated that she would not be willing to weigh and consider the aggravating and mitigating factors. (CT 1054.) Yet, she also stated that she neither favored nor opposed the death penalty. (CT 1057.) When asked at voir dire her views on the death penalty, she stated that she was not all for it and not against it. (6 RT 1550-1551.) She responded that she could still have an open mind going into the penalty phase even if Foster was found guilty at the trial. (6 RT 1552.) Juror No. 1 also stated that she would be willing to weigh and consider both aggravating and mitigating evidence in making her decision. (6 RT 1553.)

Juror No. 2

In her questionnaire, Juror No. 2 stated that she favored the death penalty but would not always vote for death in every case of murder with special

circumstances. She could and would weigh and consider the aggravating and mitigating factors. (CT 1087, 1090.) She stated that her own personal views of the death penalty were that she was in agreement with it, but would have to be "really positive" a person was guilty to give them a death sentence. (CT 1089.)

During voir dire, Juror No. 2 was asked if she could be swayed toward imposing a life sentence and she responded affirmatively. (4 RT 959.) When asked if she would consider all the factors, she stated "I would consider them." (4 RT 960.)

Juror No. 3

Juror No. 3, in his questionnaire, indicated that he favored the death penalty but would not always vote for death in every case of murder with special circumstances. He stated that he could and would be wiling to weigh and consider the aggravating and mitigating factors. (CT 1120, 1123.)

During voir dire, Juror No. 3 stated that he favored the death penalty but again indicated that he would place himself in the group that favored the death penalty but would not always vote for death in every case of murder with special circumstances and could and would be wiling to weigh and consider the aggravating and mitigating factors. (5 RT 1386.) When asked by defense counsel if Juror No. 3 would consider psychiatric testimony when determining penalty, Juror No. 3, who was dubious of such testimony, stated that he did not think he would. (5 RT 1388.) Defense counsel then asked him if he really thought he could be fair in this type of case. Juror No. 3 responded, "I would try to be." (5 RT 1388.)

Juror No. 4

Juror No. 4 stated that his brother-in-law and father-in-law were district attorneys, but "never" discussed cases with them. (6 RT 1530.) He did not believe that his relationship to them would influence him at all. (6 RT 1531.)

Juror No. 4 stated that he would consider the factors in mitigation and aggravation. (6 RT 1533, 1535.) Juror No. 4 placed himself in group 3 on the questionnaire, neither favored nor opposed the death penalty. (6 RT 1534.)

Juror No. 5

Juror No. 5 indicated that she believed the death penalty was not used enough and that her and her husband favored the death penalty. (5 RT 1187-1188.) However, when asked which group she included herself in she indicated group 2, which favored the death penalty but would not always vote for death in every case of murder with special circumstances and could and would be wiling to weigh and consider the aggravating and mitigating factors. (CT 1189; 5 RT 1398.) She also stated that "life without the possibility of parole should also be considered depending on mitigating factors presented." (CT 1186.) During voir dire, she stated that she would consider mitigating factors. (5 RT 1399.) She also stated that after weighing the aggravating and mitigating factors, she could vote for death if the aggravating factors outweighed the mitigating factors. (5 RT 1399.)

Juror No. 6

During voir dire, Juror No. 6 stated that he had served on two non-death penalty murder cases previously, saw it as his duty to serve and could have an open mind about sitting on another. (6 RT 1660-1661.) When asked which group he included himself in, he stated group 4 which states that he had doubts about the death penalty but would not vote against it in every case. (6 RT 1662.) He stated that he would consider mitigating factors in determining the penalty to be imposed. (6 RT 1662-1663.) When questioned about the discrepancy between choosing group 4 on her jury questionnaire and placing herself in group 2 during voir dire, he said he did not remember checking box 2 on the questionnaire. (6 RT 1663-1664.) He did assure the prosecutor that if the aggravating factors were overwhelming he could vote for death. (6 RT

1664-1665.)

Juror No. 7

Juror No. 7 stated that he somewhat favored life without the possibility of parole but would not necessarily vote for it in every circumstance. (6 RT 1517.) He assured defense counsel that he would consider the aggravating and mitigating factors in making his decision. (6 RT 1517-1518.) Juror No. 7 also stated that the death penalty was not against his beliefs though and could vote for death under the appropriate circumstances. (6 RT 1519.)

Juror No. 8

Juror No. 8 stated that he neither favored nor opposed the death penalty. (CT 1321.) He stated that he could and would consider mitigating and aggravating factors. He further stated that he believed death was the most severe punishment. (CT 1318.)

During voir dire, he again stated that he would be willing to consider both mitigating and aggravating factors. (6 RT 1623-1626.) He also stated that he would have an open mind. (6 RT 1625.) He assured the prosecutor that under the appropriate circumstances he could impose a sentence of death. (6 RT 1626.)

Juror No. 9

Juror No. 9 stated that he favored the death penalty but would not impose it in every case. (6 RT 1489.) He also stated that he would consider aggravating and mitigating factors in making his penalty determination. (6 RT 1487-1489.) He also assured the prosecutor that under the appropriate circumstances he could vote for death. (6 RT 1493-1494.)

Juror No. 10

Juror No. 10 stated that she favored the death penalty but would not always vote for death in every case of murder with special circumstances. She could and would weigh and consider the aggravating and mitigating factors.

(CT 1384, 1387; 4 RT 877.) Although she indicated that she favored the death penalty (CT 1384-1386), she stated that she would never vote for death unless she was sure it was warranted (CT 1387.)

During voir dire, she stated that although she was very pro-death penalty and would lean towards death, she would be willing to consider a life sentence under appropriate circumstances. (4 RT 877.) She also assured the defense attorney that she would not always vote for death. (4 RT 879.) And she stated that she would weigh and consider the aggravating and mitigating factors. (4 RT 880.) She told the prosecutor that she thought she could listen to both sides, be fair and make a proper decision. (4 RT 880.)

Juror No. 11

Juror No. 11 stated in her jury questionnaire that she would be willing to consider aggravating and mitigating evidence. (CT 1417.) She placed herself in the group that neither favored nor opposed the death penalty. (CT 1420.)

During voir dire, she stated that she believed there were cases where the death penalty was appropriate. (6 RT 1565.) She stated that she would be willing to listen to the mitigating evidence and would be willing to weigh and consider it. (6 RT 1566-1567.) She assured the prosecutor that she could vote for death under appropriate circumstances. (6 RT 1568.)

Juror No. 12

In his questionnaire, Juror No. 12 stated that he neither favored nor opposed the death penalty and would be willing to weigh and consider the aggravating and mitigating factors. (CT 1450, 1451; 5 RT 1263.) He stated that senseless killing warranted the death penalty but also stated that it should not be imposed lightly. (CT 1452.)

During voir dire, she stated that she would consider mitigating factors in making her penalty determination. (5 RT 1262-1263.) She also assured the

prosecutor that under the appropriate circumstances she could vote for death. (5 RT 1264.)

Thus, none of the jurors eventually seated answered that they would always vote for death no matter what the evidence. In spite of this clarity, Foster nevertheless complains that the jurors were worthy of follow-up because of other answers given in the questionnaires. However, given their response to question 122, no other response presented the type of ambiguity that was present in *Stewart*.

Nothing in any of the jurors questionnaires or responses during voir dire indicated that they would be prevented or substantially impaired from performing their duties as a juror. They all assured the court and the parties that they would be willing to consider both the aggravating and the mitigating factors in making their penalty determination, including those that favored the death penalty. Those jurors who favored the death penalty assured the court and the parties that they would not always vote for death in every case.

The trial court's reliance upon the questioning by the parties and the juror's questionnaires did not present the error found in *Stewart* or *Chanthadara*. To the contrary, the questionnaire here provided the court sufficient information upon which the trial court and counsel could determine whether a prospective juror would be prevented or substantially impaired from performing their duties as a juror. Specifically, question 122 followed the *Witt* standard and sought to identify those jurors who would make an automatic decision based on their beliefs, rather than on the court's instructions and the evidence. Furthermore, none of the jurors indicated they would automatically vote for death without regard to the evidence and nothing contained in their questionnaire created any ambiguity as to that position. The other answers reinforced the conclusion that they were not prevented or substantially impaired from performing the duties of a juror on a death penalty case.

Moreover,

> in order to demonstrate that his or her right to a fair and impartial trial was affected by any error in the trial court's refusal to sustain the defendant's challenges for cause, a defendant must have employed a peremptory challenge to excuse the juror or jurors in question, exhausted the defendant's peremptory challenges or justified the failure to do so, and communicated to the trial court the defendant's dissatisfaction with the jury ultimately selected.

(*People v. Cunningham, supra,* 25 Cal.4th at p. 976, citing *People v. Ochoa, supra*, 19 Cal.4th at p. 444; see also *People v. Williams* (1997) 16 Cal.4th 635, 667.)

Here, Foster did not use any of his peremptory challenges to excuse the jurors in question, did not exhaust his peremptory challenges, justify his failure to do so, and stated that he was satisfied with the jury ultimately chosen. Thus, Foster has failed to show how he was prejudiced by the trial court's failure to further question the jurors. Consequently, Foster's claim should be denied.

XVII.

FOSTER'S JURY DID NOT INCLUDE JURORS WHO WERE BIASED

Foster contends that the penalty must be reversed because several of the jurors who served on his case were actually biased, specifically Juror Nos. 1, 3, 7, 10, 11, and 12. (AOB 329-343.) As shown in the previous argument and in Argument I, infra, none of the jurors, including the five Foster specifically refers to in this argument, were actually biased.

Actual bias "is defined as 'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' [Citations.]" (*People v. Nesler, supra,*16 Cal.4th at p. 581.) Such bias may be found where a juror admittedly cannot be objective in considering the death penalty or weighing the aggravating

circumstances against the mitigating ones. (*People v. Boyette* (2002) 29 Cal.4th 381, 461-463; see *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [juror may be removed if predisposition to give greater weight to mitigating factors precludes juror from engaging in weighing process and returning death verdict].)

As set forth in both Arguments I and XVI, above, none of the jurors including those specifically pointed out in this argument could not objectively consider the death penalty or weigh the aggravating and the mitigating factors.

As he did before, Foster maintains that based on her jury questionnaire answers Juror No. 1 was strongly in favor of the death penalty. Foster points out that she stated in her questionnaire that she would be unwilling to consider mitigating and aggravating factors in making her penalty determination. (AOB 331-332.) However, during jury voir dire, she assured the parties and the court that she would be so willing to consider both aggravating and mitigating factors. (6 RT 1553.) Foster also refers to her statement in her questionnaire that "we need severe punishment for severe crimes" as support for his claim that was actually biased in favor of death. (AOB 332.) However, in both her questionnaire and at voir dire, she stated that she was neither in favor of nor opposed to the death penalty. (CT 1057; 6 RT 1550-1551.) She also stated that she could still have an open mind going into the penalty phase even if Foster was found guilty at the trial. (6 RT 1552.) Thus, there was nothing from Juror No. 1's statements during voir dire or in her questionnaire that show she was actually biased in favor of the death penalty.

Foster also refers to Juror No. 3's law enforcement background and distaste for psychiatrists to show that Juror No. 3 was actually biased in favor of death. (AOB 323-324.) Juror No. 3 did state that his police training may make it more difficult to follow the court's instruction that a defendant is innocent until proven guilty, but he also stated that he could be a fair and impartial juror. (CT 1125.) Therefore, although he stated it would be "more

difficult" he did not say it would be impossible. Additionally, Juror No. 3 later assured the court and the parties during voir dire that he had an open mind, agreed to listen to the entire case and to consider what all sides had to say. (7 RT 1717-1718.)

Additionally, although Juror No. 3 indicated that he had a low opinion of psychiatrists and stated that he did not think he would be able to consider such testimony (5 RT 1388), he assured the defense counsel when defense counsel asked him if he really thought he could be fair in this type of case, that he would try to be. Defense counsel then passed for cause. (5 RT 1388.) Moreover, both in his questionnaire and at voir dire, Juror No. 3 agreed to consider the aggravating as well as the mitigating factors in the case to determine penalty. (CT 1120; 5 RT 1386.) Also, Juror No. 3 stated that although he favored the death penalty he would not always vote for death in every case of murder with special circumstances. (CT 1123; 5 RT 1386.) Thus, Foster has not shown that Juror No. 3 was actually biased in favor of death.

Foster next asserts that Juror No. 7 was actually biased because in response to questioning from the prosecutor about his thoughts on the death penalty, Juror No. 7 replied, "if it's proven without a shadow of a doubt and voted you [sic] on it – and I agree with it because we're in a democratic society and I would have to go with the law of the land." (6 RT 1519.) Foster also refers to Juror No. 7's statements that voting for the death penalty "wouldn't go against any beliefs" and that he would vote for the death penalty if Foster "did the crime." (AOB 334.) However, Juror No. 7 also stated that he somewhat favored life without the possibility of parole even though he would not necessarily vote for it in every circumstance and agreed to consider the aggravating and mitigating factors in making his decision. (6 RT 1517-1518.) Thus, Juror No. 7 was not actually biased in favor of the death penalty. On the contrary, it appears that any bias would be to favor life without the possibility

of parole.

Foster also maintains that Juror No. 10 was also actually biased. (AOB 334.) He based his claim on her statements that she "would lean towards the death penalty" and was "very pro-death as far as the death penalty." (AOB 334; RT 875, 877; CT 1384-1386.) However, she also stated that although she favored the death penalty she would not always vote for death in every case of murder with special circumstances and could and would weigh and consider the aggravating and mitigating factors. (CT 1384, 1387; 4 RT 877, 880.) She also stated that she would never vote for death unless she was sure it was warranted (CT 1387.) She also stated that she would be willing to consider a life sentence under appropriate circumstances. (4 RT 877.)

Foster also relies on her statement to the prosecutor that she was not sure and it would be very difficult to listen to both sides and make a proper decision. (AOB 334; 4 RT 880.) However, although she initially did say that she was not sure and it would be very difficult, but she thought she could listen to both sides, be fair and make a proper decision. (4 RT 880.)

Foster next argues that Juror No. 11 was actually biased because she stated that she did not think she would be able to weigh and consider the evidence and circumstances that cause sympathy or extenuates the gravity of the crime including a person's history, abuse as a child, and abandonment or whether she could consider psychological testimony. (AOB 334; 6 RT 1565, 1567.) Although Juror No. 11 initially stated that she did not think she could consider such mitigating evidence, when further questioned by the defense attorney, she stated that she would "listen" to it and when asked weather she would weigh and consider the evidence, she replied, "Oh, yeah, that's exactly what I would do." (6 RT 1567.)

Foster also refers to Juror No. 11's assurances to the prosecutor that she could consider death, had no qualms about voting for death and that the death

penalty was not against her beliefs as supposedly showing actual bias in favor of the death penalty. (AOB 334-335; 6 RT 1568.) However, Juror No. 11 stated in her jury questionnaire that she would be willing to consider aggravating and mitigating evidence. (CT 1417.) She also placed herself in the group that neither favored nor opposed the death penalty. (CT 1420.) Thus, there is no evidence that Juror No. 11 was actually biased in favor of death.

Finally, Foster contends that Juror No. 12 was also actually biased in favor of death. For this, he refers to his statements that "to kill another person should warrant the death penalty" and a person serving a life without the possibility of parole "sounds" like "being catered to for a crime committed." (AOB 335; CT 1450.) He also refers to his statement that the death penalty was too seldom imposed and although many people have been sent to death row "only a few have been executed" and senseless killings warranted the death penalty. (AOB 335; CT 1451-1452.) Juror No. 12, however, stated that he neither favored nor opposed the death penalty and would be willing to weigh and consider the aggravating and mitigating factors. (CT 1450, 1451; 5 RT 1262-1263.) And although he did state that senseless killing warranted the death penalty, he also stated that it should not be imposed lightly. (CT 1452.)

Foster has therefore failed to show that any of the jurors, including the ones he singles out in this argument, had an actual bias in favor of the death Foster contends that the penalty must be reversed because several of the jurors who served on his case were actually biased, specifically Juror Nos. 1, 3, 7, 10, 11, and 12. (AOB 329-343.) As shown in the previous argument and in Argument I, infra, none of the jurors, including the five Foster specifically refers to in this argument, were actually biased.

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substantial rights of any party.' [Citations.]" (*People v. Nesler, supra,* 16 Cal.4th at p. 581.) Such bias may be found where a juror admittedly cannot be objective in considering the death penalty or weighing the aggravating circumstances against the mitigating ones. (*People v. Boyette, supra,* 29 Cal.4th at pp. 461-463; see *People v. Kaurish, supra,* 52 Cal.3d at p. 699 [juror may be removed if predisposition to give greater weight to mitigating factors precludes juror from engaging in weighing process and returning death verdict].)

As set forth in both Arguments I and XVI, above, none of the jurors including those specifically pointed out in this argument could not objectively consider the death penalty or weigh the aggravating and the mitigating factors.

As he did before, Foster maintains that based on her jury questionnaire answers Juror No. 1 was strongly in favor of the death penalty. Foster points out that she stated in her questionnaire that she would be unwilling to consider mitigating and aggravating factors in making her penalty determination. (AOB 331-332.) However, during jury voir dire, she assured the parties and the court that she would be so willing to consider both aggravating and mitigating factors. (6 RT 1553.) Foster also refers to her statement in her questionnaire that "we need severe punishment for severe crimes" as support for his claim that was actually biased in favor of death. (AOB 332.) However, in both her questionnaire and at voir dire, she stated that she was neither in favor of nor opposed to the death penalty. (CT 1057; 6 RT 1550-1551.) She also stated that she could still have an open mind going into the penalty phase even if Foster was found guilty at the trial. (6 RT 1552.) Thus, there was nothing from Juror No. 1's statements during voir dire or in her questionnaire that show she was actually biased in favor of the death penalty.

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of death. (AOB 323-324.) Juror No. 3 did state that his police training may make it more difficult to follow the court's instruction that a defendant is innocent until proven guilty, but he also stated that he could be a fair and impartial juror. (CT 1125.) Therefore, although he stated it would be "more difficult" he did not say it would be impossible. Additionally, Juror No. 3 later assured the court and the parties during voir dire that he had an open mind, agreed to listen to the entire case and to consider what all sides had to say. (7 RT 1717-1718.)

Additionally, although Juror No. 3 indicated that he had a low opinion of psychiatrists and stated that he did not think he would be able to consider such testimony (5 RT 1388), he assured the defense counsel when defense counsel asked him if he really thought he could be fair in this type of case, that he would try to be. Defense counsel then passed for cause. (5 RT 1388.) Moreover, both in his questionnaire and at voir dire, Juror No. 3 agreed to consider the aggravating as well as the mitigating factors in the case to determine penalty. (CT 1120; 5 RT 1386.) Also, Juror No. 3 stated that although he favored the death penalty he would not always vote for death in every case of murder with special circumstances. (CT 1123; 5 RT 1386.) Thus, Foster has not shown that Juror No. 3 was actually biased in favor of death.

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necessarily vote for it in every circumstance and agreed to consider the aggravating and mitigating factors in making his decision. (6 RT 1517-1518.) Thus, Juror No. 7 was not actually biased in favor of the death penalty. On the contrary, it appears that any bias would be to favor life without the possibility of parole.

Foster also maintains that Juror No. 10 was also actually biased. (AOB 334.) He based his claim on her statements that she "would lean towards the death penalty" and was "very pro-death as far as the death penalty." (AOB 334; RT 875, 877; CT 1384-1386.) However, she also stated that although she favored the death penalty she would not always vote for death in every case of murder with special circumstances and could and would weigh and consider the aggravating and mitigating factors. (CT 1384, 1387; 4 RT 877, 880.) She also stated that she would never vote for death unless she was sure it was warranted (CT 1387.) She also stated that she would be willing to consider a life sentence under appropriate circumstances. (4 RT 877.)

Foster also relies on her statement to the prosecutor that she was not sure and it would be very difficult to listen to both sides and make a proper decision. (AOB 334; 4 RT 880.) However, although she initially did say that she was not sure and it would be very difficult, but she thought she could listen to both sides, be fair and make a proper decision. (4 RT 880.)

Foster next argues that Juror No. 11 was actually biased because she stated that she did not think she would be able to weigh and consider the evidence and circumstances that cause sympathy or extenuates the gravity of the crime including a person's history, abuse as a child, and abandonment or whether she could consider psychological testimony. (AOB 334; 6 RT 1565, 1567.) Although Juror No. 11 initially stated that she did not think she could consider such mitigating evidence, when further questioned by the defense attorney, she stated that she would "listen" to it and when asked weather she

would weigh and consider the evidence, she replied, "Oh, yeah, that's exactly what I would do." (6 RT 1567.)

Foster also refers to Juror No. 11's assurances to the prosecutor that she could consider death, had no qualms about voting for death and that the death penalty was not against her beliefs as supposedly showing actual bias in favor of the death penalty. (AOB 334-335; 6 RT 1568.) However, Juror No. 11 stated in her jury questionnaire that she would be willing to consider aggravating and mitigating evidence. (CT 1417.) She also placed herself in the group that neither favored nor opposed the death penalty. (CT 1420.) Thus, there is no evidence that Juror No. 11 was actually biased in favor of death.

Finally, Foster contends that Juror No. 12 was also actually biased in favor of death. For this, he refers to his statements that "to kill another person should warrant the death penalty" and a person serving a life without the possibility of parole "sounds" like "being catered to for a crime committed." (AOB 335; CT 1450.) He also refers to his statement that the death penalty was too seldom imposed and although many people have been sent to death row "only a few have been executed" and senseless killings warranted the death penalty. (AOB 335; CT 1451-1452.) Juror No. 12, however, stated that he neither favored nor opposed the death penalty and would be willing to weigh and consider the aggravating and mitigating factors. (CT 1450, 1451; 5 RT 1262-1263.) And although he did state that senseless killing warranted the death penalty, he also stated that it should not be imposed lightly. (CT 1452.)

Foster has therefore failed to show that any of the jurors, including the ones he singles out in this argument, had an actual bias in favor of the death penalty. Consequently, his claim should fail.

XVIII.

PROPORTIONALITY REVIEW IS NOT REQUIRED

Foster argues the failure to conduct inter-case proportionality review violates the Fifth, Eighth and Fourteenth Amendments of the federal constitution. (AOB 344-355.) This Court has already determined "intercase proportionality review is not constitutionally required." (*People v. Morrison* (2004) 34 Cal.4th 698, 730; accord *People v. Box* (2000) 23 Cal.4th 1153, 1217.) There is no need for this Court to revisit this issue, as the contention has long been settled to the contrary: "Neither the federal nor the state Constitution requires intercase proportionality review." (*People v. Cunningham, supra,* 25 Cal.4th at p. 1042.)

As this Court summarized in *People v. Lewis* (2001) 26 Cal.4th 334:

> We also reject defendant's claim that because it does not require intercase proportional review, the California death penalty statute ensures arbitrary, discriminatory, or disproportionate impositions of death sentences. "[U]nless a defendant demonstrates that the state's capital punishment law operates in an arbitrary and capricious manner, the circumstances that he or she has been sentenced to death, while others who may be similarly situated have received a lesser sentence, does not establish disproportionality violative of the Eighth Amendment." [Citation.] Moreover, we disagree that defendant is denied equal protection and substantive due process because noncapital defendants receive some comparative review under the determinate sentencing law. [Citation.]

(*People v. Lewis, supra*, 26 Cal.4th at pp. 394-395; see also *People v. Kipp, supra,* 26 Cal.4th at p. 1139; *People v. Hillhouse, supra,* 27 Cal.4th at pp. 510, 511.)

This Court's conclusion is totally consistent with United States Supreme Court precedent. The high court, after noting that the Eighth Amendment does not require comparative proportionality review by an appellate court in every case in which the death penalty is imposed and the defendant requests it, held

that California's 1977 death penalty statute was not rendered unconstitutional by the absence of a provision for comparative proportionality review.[9] (*Pulley v. Harris, supra*, 465 U.S. at pp. 50-54 .) Therefore, as this Court concluded in *People v. Farnam* (2002) 28 Cal.4th 107, 193, there is "no reason to rule differently here."

XIX.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE FOSTER'S REQUESTED INSTRUCTION REGARDING VICTIM IMPACT EVIDENCE

Foster contends the trial court erred in denying his request for a special instruction that advised the jury that it was not to allow victim impact evidence to "divert your attention from your proper role in deciding the appropriate punishment in this case" and "not impose the penalty of death as a result of an irrational, purely emotional response to this evidence." Foster claims the court's denial was a violation of his constitutional rights, including his state and federal rights to a fair trial, due process, and a reliable penalty determination. (AOB 356-361.) Foster's contention fails. The instructions given adequately guided the jury in its sentencing discretion.

During the penalty phase, Johnson's daughter, Monica DiVencenzo, identified pictures of her own two children and her brother and sister. DiVencenzo testified that she and her mother were close and before the murder they saw each other on a daily basis. They used to talk, shop or go places together. DiVencenzo's daughter stayed with Johnson almost every Saturday night and then went to church with her on Sunday. (15 RT 4001-4003.)

Foster submitted a proposed jury instruction in the penalty phase about

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9. The high court noted that the 1977 and 1978 statutes are substantially similar and that, for the most part, "what is said applies equally to the current California statute." (*Pulley v. Harris* (1984) 465 U.S. 37, 39, fn. 1, [104 S.Ct. 871, 79 L.Ed.2d 29].)

the use and consideration of victim impact evidence. The instruction entitled Special Instruction No. A2 instructed the jury:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family. [¶] You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case. [¶] You must not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(CT 589.)

The prosecutor opposed the instruction because the law allows the jury to consider victim impact evidence. (22 RT 5640-5641.) The court stated that it had read *Payne v. Tennessee* (1991) 501 U.S. 808, 826-827, [111 S.Ct. 2597, 2608, 115 L.Ed.2d, 720] and *People v. Edwards*, *supra,* 54 Cal.3d at p. 836, the cases cited by the defense in support of the instruction. The court determined that neither *Payne* nor *Edwards* supporting giving the instruction and refused to give the instruction. The court did inform defense counsel however that he could object during argument if he felt that the prosecutor's argument went beyond relevant, material evidence. (22 RT 5640-5641.)

During closing arguments, the prosecutor stated:

> Let's think about Gayle for a minute. You didn't hear her entire life story, but you heard a little about her. You heard that she was a wife; she was a mother; she was a grandmother. She was close with her grandchildren, with her children, with her husband . . . .

(22 RT 5674.)

The prosecutor later stated:

> Mr. Foster wants all the things that he took from Gayle. He wants to be able to turn on the TV set at night, watch his favorite show. He wants to be able to visit with the people that he makes friends with, with his family. Gayle will never be able to do that.

(22 RT 5693.)

The trial court instructed the jury with CALJIC No. 8.84.1, which

provided as follows:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are interested otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial. [¶] **You must neither be influenced by bias nor prejudice against the defendant**, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(CT 650; 22 RT 5747; emphasis added.)

Both the United States Supreme Court, as well as this Court, have upheld victim impact evidence and arguments against constitutional and statutory challenge. In *Payne v. Tennessee, supra,* 501 U.S. at pp. 826- 827, the High Court held that the Eighth Amendment erects no bar to the admission of evidence about the impact of a murder on the victim's family. In *People v. Edwards, supra,* 54 Cal.3d at pp. 832-836, this Court concluded that victim impact evidence and argument are admissible as bearing on section 190.3, factor (a), circumstances of the crime. More recently, in *People v. Taylor* (2001) 26 Cal.4th 1155, 1170, this Court ruled that evidence from the victim's wife and son about the "various ways they were adversely affected by their loss of [the victim's] care and companionship" was properly admitted. The testimony in the instant case was of this same proper nature. The victim impact testimony included only the victim's daughter.

Indeed, Foster does not take issue with the admission of the victim impact evidence, but merely suggests the court should have given his proposed instruction instructing the jury not to allow emotion to overcome reason and preventing them from making a rational penalty decision. However, a similar request by a defendant was rejected by this Court in *People v. Ochoa, supra,* 26 Cal.4th at p. 455. In *Ochoa*, a special instruction was requested by the

defense.[10/] This Court found that the instruction was properly refused, as the information was covered in CALJIC No. 8.84.1. (*Ibid.*) The same reasoning applies here. CALJIC No. 8.84.1 instructed the jury that it "must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings." (CT 650.) This language countered any notion that the jurors would make an irrational decision for the death based on being overcome by emotion.

Foster's claim that the terms "bias" and "prejudice" were inadequate because they connote racial or religious discrimination (AOB 362-363) is fallacious. There was no reference to race or religion in the instruction, nor were those even issues in this trial for that matter. Similarly unsound is Foster's contention that the jury would not understand that the admonition against being "swayed by public opinion or public feelings" would apply to being influenced by the "private" opinions of Johnson's daughter. (AOB 363.) Any "opinions" of Johnson's daughter (who was part of the "public") would have been those testified to at trial, hence public. Any "private" opinions would, obviously, be private and unknown to the jury. The instruction further told the jury that it

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10. The special instruction requested in *Ochoa* read as follows:

> Evidence has been introduced for the purpose of showing the specific harm caused by the Defendant's crimes. Such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether the Defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons for the Jury to show mercy to the Defendant.

(*Ochoa, supra*, 26 Cal.4th at p. 455.)

must determine the facts "from the evidence," "follow the law" as instructed by the judge, "exercise your discretion conscientiously, and reach a just verdict." (CT 650.) It is to be presumed that the jury followed the instructions. (See *People v. Turner* (1994) 8 Cal.4th 137, 190; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) The instruction given was adequate. The trial court did not violate Foster's constitutional rights by refusing to give the special instruction because the jury was adequately instructed with CALJIC No. 8.84.1.

XX.

PENAL CODE SECTION 190.3, FACTOR (A), AS APPLIED, DOES NOT PERMIT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH

Foster argues that the instructions about mitigating and aggravating factors, CALJIC Nos. 8.85, 8.87, and 8.88, render Foster's death sentence unconstitutional because (1) the application of section 190.3, subdivision (a) resulted in arbitrary and capricious imposition of the death penalty on Foster; (2) the use of his unadjudicated criminal activity and lack of jury unanimity unconstitutionally violated his rights to due process, an impartial jury, a reliable penalty determination and equal protection; (3) the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence; (4) the failure of the instruction to require specific, written findings by the jury with regard to the factors in aggravation violates Foster's constitutional rights to meaningful appellate review and equal protection of law; and (5) even if the procedural safeguards previously addressed do not render California's death penalty scheme constitutionally inadequate to ensure reliable capital sentencing, denying them to capital defendants violates equal protection. (AOB 365-391.) This Court has repeatedly rejected these claims. Likewise, Foster's present claims should be rejected. Foster's death sentence does not violate the United States

Constitution.

The trial court instructed the jury on the sentencing factors in Penal Code section 190.3, as set forth in CALJIC No. 8.85[11], the standard jury instruction on the statutory factors to be considered by the jury in determining whether to impose a death sentence or life without the possibility of parole. (CT 655-656.) The trial court also instructed the jury with CALJIC No. 8.87[12] regarding other

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11. The court instructed the jury with CALJIC No. 8.85 as follows:

12. The court instructed the jury with CALJIC No. 8.87, which provided:

> Evidence has been introduced under CALJIC No. 8.85, factor (b) for the purpose of showing that the defendant Richard Don Foster has committed the following acts which involved the express or implied use of force or violence or the threat of force or violence:
>
> 1. The robbery and forcible rape of Johnnie Clark on May 23, 1972, in violation of Penal Code section 211 and 261.
>
> 2. The kidnapping, robbery, forcible rape and forcible oral copulation of Dinah Jackson on June 13, 1972, in violation of Penal Code sections 207, 211, 261 and 288(a).
>
> 3. The robbery and assault with intent to commit rape of Cindy Makris on March 29, 1982, in violation of Penal Code sections 211 and 220.
>
> 4. The express or implied threats to use force or violence on 10 year old Megan Miles during the phone calls to Lynn Miles on October 25, 1989 and December 3, 1989, in violation of Penal Code section 653(m)a.
>
> Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant Richard Don Foster did in fact commit such criminal acts. The definition of each such alleged criminal act and the elements required for

criminal acts that it could consider as aggravating circumstances. Additionally, the court instructed the jury as follows:

> Potential aggravating factors are limited to those listed in CALJIC No. 8.85 (a), (b) and (c) only. You may not consider any other evidence as an aggravating factor. You may not consider the absence of a mitigating factor as an aggravating factor. [¶] You may not consider the same facts more than once in determining the presence of aggravating factors.

(CT 657.)

The court also instructed the jury with CALJIC No. 8.88[13], the standard jury instruction on aggravating and mitigating factors, generally. (CT 651-652.)

A. Foster Has Waived His Claim Regarding CALJIC Nos. 8.85 And 8.88

Initially, Foster neither challenged CALJIC Nos. 8.85 and 8.88 nor sought clarifying instructions in the trial court, and has thus waived any claims of error with respect to these instructions. (3 RT 601-602; *People v. Arias, supra*, 13 Cal.4th at p. 171; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) This Court, however, has consistently considered the merits of challenges to California's death penalty based on an "as applied" theory without discussing whether these challenges were raised at trial. (*People v. Hernandez* (2003) 30

> its proof are included elsewhere in these instructions. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> I[t] is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(CT 653-654.)

13. This instruction is set forth in Argument XXII, below.

Cal.4th 835, 863.) Even if this Court declines to address the question of whether an objection below to preserve a challenge to the death penalty statute as applied was necessary, Foster's claim fails because it lacks merit.

B. Penal Code Section 190.3, Factor (a), As Applied, Does Not Permit The Arbitrary and Capricious Imposition of Death

Foster contends his death sentence must be set aside because Penal Code section 190.3, factor (a)[14], as applied, allows arbitrary and capricious imposition of death in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Specifically, Foster contends factor (a) has been applied in a manner such that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (AOB 366-375.) This argument, as this Court has held, is without merit.

As Foster acknowledges, the United States Supreme Court rejected an Eighth Amendment facial challenge to factor (a) more than a decade ago. (AOB 367, citing *Tuilaepa v. California* (1994) 512 U.S. 967, 975-976 [114 S.Ct. 2630, 129 L.Ed.2d 750].) In so doing, the Supreme Court wrote:

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

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14. Section 190.3, factor (a), states:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [ ] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Similarly, this Court has repeatedly rejected the claim that factor (a), as applied, allows for the arbitrary and capricious imposition of the death penalty. (See e.g., *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Turner* (2004) 34 Cal.4th 406, 438; *People v. Brown* (2004) 33 Cal.4th 382; *People v. Pollock* (2004) 32 Cal.4th 1153, 1196; *People v. Lewis, supra,* 26 Cal.4th at p. 394; *People v. Wader* (1993) 5 Cal. 4th 610, 663.) This Court's comments in *Brown* apply with equal force to Foster's argument here:

> Defendant's argument that a seemingly inconsistent range of circumstances can be culled from death penalty decisions proves too much. What this reflects is that each case is judged on its facts, each defendant on the particulars of his offense. Contrary to defendant's position, a statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances. (See generally *Lockett v. Ohio* (1978) 438 U.S. 586, 602-606, 98 S.Ct. 2954, 57 L.Ed.2d 973.)

(*People v. Brown, supra*, 33 Cal.4th at p. 401.)

For these reasons, Foster's argument should be rejected.

C. The Use of Foster's Unadjudicated Criminal Activity Did Not Violate His Constitutional Rights

Foster also claims that instructing the jury that it could consider unadjudicated criminal activity as an aggravating factor violated his rights to due process, trial by an impartial jury, a reliable determination of guilt, and equal protection. He also argues that the failure to require a unanimous jury finding on the unadjudicated acts of violence violated his right to a jury trial and absent a requirement of jury unanimity on the unadjudicated acts of violence, the instructions allowed jurors to impose the death penalty on unreliable factual findings that were never deliberated, debated or discussed. (AOB 375-385.)

This claim, too, is one this Court has rejected many times.

"The jury may properly consider evidence of unadjudicated criminal activity

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

D. The Use of Restrictive Adjectives in The List of Potential Mitigating Factors Did Not Act As a Barrier to The Jury's Consideration of Circumstances in Mitigation

Foster additionally argues that the use of the adjectives in the mitigating factors, e.g. "extreme" and "substantial," acted as barriers to the consideration of the factors of mitigation under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 385, citing CALJIC No. 8.85, factors (d) and (g); CT 655-656.) This Court has rejected this argument on numerous occasions based on the rationale that the jury is permitted to consider "any other circumstances which extenuates the gravity of the crime." (*People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Morrison, supra*, 34 Cal.4th at pp. 729-730; *People v. Lewis, supra*, 26 Cal.4th at p. 395; *People v. Anderson, supra*, 25 Cal.4th at p. 601.) That being the case, the Court should reject this claim.

E. California Law Does Not Violate the Eighth, And Fourteenth Amendments by Failing to Require the Jury to Provide Written Findings Regarding Aggravating Factors

Foster claims that his constitutional rights were violated because the instructions given in this case did not require the jury to make written findings about the aggravating factors they found and considered in imposing a death sentence. (AOB 385-388.) This Court has repeatedly rejected the claim that

unanimous written findings regarding aggravating factors are constitutionally required. (See *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Maury, supra*, 30 Cal.4th at p. 440; *People v. Fauber, supra*, 2 Cal.4th at p. 859.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725] citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].) Foster has provided no new reason for this Court to reconsider its prior decisions rejecting this very claim. Therefore, this claim should be denied.

F. The California Sentencing Scheme Does Not Violate Equal Protection

Foster also contends that California's death penalty scheme violates equal protection because it provides significantly fewer procedural protections to those facing a death sentence than those charged with non-capital crimes. (AOB 388-391.) Foster claims that capital defendants receive disparate treatment. Foster's arguments should be rejected. This Court recently rejected this argument and noted in *People v. Brown, supra*, 33 Cal.4th at p. 382, "Death penalty defendants are not denied equal protection because the statutory scheme does not contain disparate sentence review." (*People v. Brown, supra,* 33 Cal.4th at p. 402, citing *People v. Jenkins* (2000) 22 Cal.4th 900, 1053, and *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288). Because this Court has repeatedly foreclosed Foster's argument, the claim should be summarily rejected.

Foster's death sentence is constitutional.

XXI.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS PROPERLY SET FORTH THE APPROPRIATE BURDEN OF PROOF

Foster contends that the California death penalty statute and instructions run afoul of the Sixth, Eighth, and Fourteenth Amendments because they (1) did not instruct the jury on the burden of proof regarding the applicable aggravating factors; (2) did not require the jury to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that a death sentence was appropriate; (3) did not require the state to bear the burden of persuasion at the penalty phase; (4) did not require jury unanimity as to the existence of aggravating factors; (5) did not instruct the jury that Foster had no burden of proving the existence of a mitigating factor; and (6) failed to instruct the jury on the presumption of life. (AOB 392-430.) The California death penalty statute and instructions properly set forth the appropriate burden of proof.

A. The Trial Court Was Not Required to Instruct the Jury on The Burden of Proof

Unlike the determination of guilt, the sentencing function is inherently moral and normative, not functional, and thus not susceptible to any burden-of-proof qualification. (*People v. Burgener* (2003) 29 Cal.4th 833, 884-885; *People v. Anderson, supra,* 25 Cal.4th at p. 601; *People v. Welch, supra,* 20 Cal.4th at p. 767; see *People v. Daniels* (1991) 52 Cal.3d 815, 890; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.) This Court has repeatedly rejected claims identical to Foster's regarding a burden of proof at the penalty phase. (*People v. Welch, supra,* 20 Cal.4th at pp. 767-768; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Snow, supra,* 30 Cal.4th at p. 126; *People v. Box, supra,* 23 Cal.4th at p. 1216; *People v. Carpenter, supra,*

15 Cal.4th at pp. 417-418; *People v. Dennis, supra,* 17 Cal.4th at p. 552; *People v. Holt, supra,* 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Foster does not offer any valid reason for this Court to vary from its past decisions.

Insofar as Foster contends that *Ring v. Arizona* (2002) 536 U. S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], compel a different conclusion (see AOB 394-409), he is mistaken. These cases have been found to have no application to the penalty phase procedures of this state. (*People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morrison, supra,* 34 Cal.4th at p. 730; *People v. Brown* (2004) 33 Cal.4th 382, 402; *People v. Smith, supra,* 30 Cal.4th at pp.641, 642; *People v. Prieto, supra,* 30 Cal.4th at pp. 262-264, 271-272, 275.)

B. The Court Was Not Required To Instruct the Jury That It Could Only Impose a Death Sentence If It Found Beyond a Reasonable Doubt That the Aggravating Factors Outweighed the Mitigating Factors and That Death Was the Appropriate Penalty

Foster contends that the jury should have been instructed that they could only impose a death sentence only if they were persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty. (AOB 409-415.)

This Court has previously held that there is no constitutional requirement that the jury, in order to return a verdict of death, must unanimously find that aggravating factors outweigh the mitigating factors beyond a reasonable doubt or that death is the appropriate remedy beyond a reasonable doubt. (*People v. Mendoza, supra,* 24 Cal.4th at p. 191; *People v. Barnett* (1998) 17 Cal.4th 1044,1178; *People v. Bradford* (1997) 14 Cal.4th 1005, 1059.) Having offered no valid reasons why this Court should not follow those cases, Foster's claim necessarily fails.

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

This Court has specifically rejected Foster's claim (AOB 415-420) that the constitutional guarantees of equal protection and due process and Evidence Code section 520, which imposes the burden of proof on the prosecution, require the prosecution to bear the burden of persuasion in the penalty phase of a capital trial. (See *People v. Lenart, supra,* 32 Cal.4th at pp. 1135-1136.) Because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of penalty. (*People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Kipp, supra,* 26 Cal.4th at p. 1137.) Because Foster offers no valid reason to overturn these past decisions, his claim should be rejected.

D. The United States Constitution Does Not Require Unanimous Agreement on Aggravating Factors

Foster contends that the instructions violated the Sixth, Eighth and Fourteenth Amendments to the federal constitution by failing to require juror unanimity on aggravating factors. (AOB 421-427.) This Court has consistently and repeatedly held that "neither federal nor state Constitution requires the jury to unanimously agree as to aggravating factors." (*People v. Panah, supra,* 35 Cal.4th at p. 499; *People v. Combs, supra*, 34 Cal.4th at p. 868; accord *People v. Monterroso, supra*, 34 Cal.4th at p. 795; *People v. Morrison, supra*, 34 Cal.4th at p. 730; *People v. Pollock, supra,* 32 Cal.4th at p. 1196; *People, v. Yeoman, supra,* 31 Cal.4th at p. 157; *People v. Jenkins, supra,* 22 Cal.4th at p. 1053; *People v. Howard* (1992) 1 Cal.4th 1132, 1196.) Because Foster provides no persuasive reason for departing from this precedent, his claim should be rejected.

E. There Is No Requirement That the Jury Be Instructed Regarding the Standard of Proof and Lack of Need for Unanimity As to Mitigating Instructions

Foster maintains that the court's refusal to instruct the jury with his proposed instruction that Foster did not bear the burden of proving the existence of a mitigating factor (see 22 RT 5650) impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment and therefore the instructions violated the Sixth, Eighth, and Fourteenth Amendments to the federal constitution. (AOB 427-428.) This Court, however, has repeatedly held the California death penalty statute is not unconstitutional because it does not contain a requirement that the jury be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination. (*People v. Stitely, supra,* 35 Cal.4th at p. 574; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Vieira* (2005) 35 Cal.4th 264, 300; *People v. Morrison*, *supra,* 34 Cal.4th at pp. 730-731; *People v. Welch, supra*, 20 Cal.4th at pp. 767-768) Because Foster offers no meritorious reason for this Court to reconsider this rule, his claim should be rejected.

F. The Trial Court Properly Did Not Instruct the Jury on the Presumption of Life

Foster contends that the trial court erred by failing to instruct the jury on the presumption of life, thereby violating his Eighth and Fourteenth Amendment rights. (AOB 429-430.) This Court has previously rejected this argument. (*People v. Arias*, *supra,* 13 Cal.4th at p. 190.) In *Arias*, this Court found that so long as a

> death penalty law properly limits death eligibility by requiring the finding of at least one aggravating circumstance beyond murder itself, the state may otherwise structure the penalty determination as it sees fit, so long as it satisfies the requirement of individualized sentencing by allowing the jury to consider all relevant mitigating evidence.

(*Ibid.*, citing *Tuilaepa v. California, supra,* 512 U.S. at p. 973; *Boyde v. California, supra,* 494 U.S. at p. 377[upholding 1978 law's provision that sentencer "shall" impose death if aggravation outweighs mitigation]; *Zant v. Stephens* (1983) 462 U. S. 862, 875 [103 S.Ct. 2733, 77 L.Ed.2d 235] [once defendant is death eligible, statute may give jury "unbridled" discretion to apply aggravating and mitigating sentencing factors].)

Thus, as Foster has given no persuasive reason for departing from this precedent, an instruction on the presumption of life was neither required nor proper.

XXII.

THE TRIAL COURT'S INSTRUCTION WITH CALJIC NO. 8.88 – THE STANDARD INSTRUCTION ON THE DETERMINATION OF PENALTY - WAS PROPER

Foster contends that CALJIC No. 8.88[15/], the standard instruction on the

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15. In pertinent part, CALJIC No. 8.88, as given in this case, stated:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [the] defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not

determination of penalty which was given by the trial court in the instant case, is defective in several respects. He contends that the flaws in the instruction violated his rights to a fair trial, due process, equal protection, and a reliable penalty determination. (AOB 431-443.) Foster waived these claims by failing to object at the trial court below. Additionally, each of Foster's challenges to CALJIC No. 8.88 has been rejected by this Court, and Foster provides no basis for this Court to reconsider its prior rulings.

Initially, Foster has waived his claims of error. "'A party may not complain on appeal that an instruction correct in the law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarification or amplifying language.'" (*People v. Lewis* (2002) 25 Cal.4th 610, 665, quoting *People v. Andrews* (1989) 49 Cal. 3d 200, 218.) Thus, any error was waived. Foster had the opportunity to request changes or modifications in CALJIC No. 8.88 and failed to do so. (2 RT 602.) He cannot sit back at trial without objection and then raise those claims on appeal as a basis for reversal. His contentions have been waived. (*People v. Lewis, supra*, 25 Cal. 4th at p. 665; *People v. Saunders, supra,* 5 Cal.4th at pp. 589-590.)

In any event, no error occurred. Foster first contends that the "so substantial" language of CALJIC No. 8.88 -- i.e., that the jurors "must be persuaded that the aggravating circumstances are *so substantial* in comparison

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mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
(CT 651-652.)

with the mitigating circumstances that it warrants death instead of life without parole" (emphasis added) -- is impermissibly vague and ambiguous. (AOB 431-434.) This Court has repeatedly rejected the claim that the "so substantial" language of CALJIC No. 8.88 is unconstitutionally vague. (See *People v. Coffman* (2004) 34 Cal.4th 1, 124; *People v. Griffin* (2004) 33 Cal.4th 536, 593; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316.)

Foster next contends that the term "warrants" in CALJIC No. 8.88 -- i.e., that the jurors "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" (emphasis added) -- is overbroad. Foster contends that instead of determining whether death was warranted, the jury should have been instructed to determine whether death was appropriate. (AOB 435-438.) This Court has repeatedly rejected this claim. (See *People v. Griffin, supra*, 33 Cal.4th at p. 593; *People v. Medina, supra,* 11 Cal.4th at p. 781; *People v. Breaux, supra*, 1 Cal.4th at pp. 315-316.)

Foster next claims that the instruction was inadequate because it failed to expressly inform the jurors that they were required to return a verdict of life imprisonment if they found that the aggravating factors did not outweigh the mitigating factors. (AOB 438-442.) Again, this Court has repeatedly rejected this claim. (See *People v. Coffman, supra*, 34 Cal.4th at p. 124; *People v. Kipp, supra,* 18 Cal.4th at pp. 349, 381; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) Having offered no persuasive reason why this Court should not follow it's prior decisions, Foster's claim should fail.

XXIII.

FOSTER'S SENTENCE DID NOT VIOLATE INTERNATIONAL LAW OR THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Foster contends California's death penalty scheme and his death sentence violates Articles VI and VII of the International Covenant of Civil and Political Rights (ICCPR), international norms of humanity and decency, and the Eighth and Fourteenth Amendments of the United States Constitution. (AOB 444-450.) Foster does not have standing to allege a violation of the ICCPR. Even if he did, no international law violation occurred because neither California's capital sentencing scheme nor Foster's death sentence violate the state or federal constitution. Foster's Eighth and Fourteenth Amendment claims should also be rejected because Foster has failed to establish the existence of a national consensus against executing those who commit crimes like the ones Foster has.

The United States is a signatory to the ICCPR. (*People v. Brown, supra,* 33 Cal.4th at pp. 402- 403.) But because treaties generally apply only to disputes between sovereign governments, Foster lacks standing to challenge the death penalty under the ICCPR. (*Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547 []; but see *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1286 ["The clear language of the ICCPR manifests that its provisions are to govern the relationship between an individual and his state"].) Even assuming Foster does have standing, his claim fails on the merits.

"International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hillhouse, supra,* 27 Cal.4th at p. 511.) With respect to the ICCPR, as this Court recently observed:

> [The United States] signed the [ICCPR] on the express condition "[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." (138 Cong. Rec. S4781-01 (Apr. 2, 1992); see Comment, *The Abolition of the Death Penalty: Does "Abolition" Really Mean What You Think it Means?* (1999) 6 Ind. J. Global Legal Studies 721, 726 & fn. 33.)

(*People v. Brown, supra*, 33 Cal.4th at pp. 403-404.)

As discussed *infra*, there were no state or federal constitutional law violations in this case. Consequently, this Court need not consider whether such violations "would also violate international law [.]" (*People v. Hillhouse, supra*, 27 Cal.4th at p. 511; accord *People v. Brown, supra*, 33 Cal.4th at p. 404 [declining to find law defective based on international law where no other defect in imposing the death penalty against defendant was found]; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055 (same).) Foster's related Eighth and Fourteenth Amendments claim also do not provide a basis for relief.

Foster asserts that imposing the death penalty in his case violates international norms of humanity and decency. In this regard, he notes all Western European countries, Canada, Australia, and New Zealand have abolished the death penalty. (AOB 447.) He argues that because nations in the Western world no longer accept the death penalty, the Eighth Amendment to the United States Constitution does not permit this nation to "lag so far behind." (AOB 450.)

While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," (*Thompson v. Oklahoma* (1988) 487

U.S. 815, 868-869, fn. 4 [108 S.Ct. 2687, 2716-2717, fn. 4, 101 L.Ed.2d 702] (Scalia, J., dissenting), quoting *Palko v. Connecticut* (1937) 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed. 288] (Cardozo, J.), overruled by *Benton v. Maryland* (1969) 395 U.S. 784 [89 S.Ct. 2056, 23 L.Ed.2d 707]), they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

Because Foster has failed to show there is a national consensus against imposing a sentence of death in cases like his, his Eighth and Fourteenth Amendment claim fails. (Compare *Atkins v. Virginia* (2002) 536 U.S. 304, 314-316, 321 [122 S.Ct. 2242, 153 L.Ed.2d 335] [holding the execution of a mentally retarded prisoner violates the Eighth Amendment's ban on cruel and unusual punishment after noting a national consensus against this practice had emerged].)

XXIV.

THERE WAS NO CUMULATIVE ERROR

Foster rehashes his previous claims and contends that the cumulative errors require reversal of both the guilt and penalty phase verdicts. (AOB 451-455.) All of Foster's assignments of error are either meritless or harmless individually, and in combination.

When a criminal defendant claims the denial of the right to due process and a fair trial based upon cumulative error, a reviewing court weighs the cumulative effect of any errors below and determines whether it is reasonably probable that the jury would have reached a more favorable result absent the errors. (*People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Watson, supra,* 46 Cal.2d at p. 436.) Even assuming error below, the overwhelming evidence of Foster's guilt and appropriateness of a death sentence belie any suggestion of prejudice, cumulative or otherwise. Moreover, Foster's constitutional rights entitle him to a fair trial, not a perfect one. (*People v. Stewart, supra,* 33

Cal.4th at p. 521.) Foster clearly received a fair trial notwithstanding any errors below, as any errors below clearly do not rise to the level of the denial of a fair trial. The judgment of conviction and sentence should be affirmed without modification.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: February 8, 2006

Respectfully submitted,

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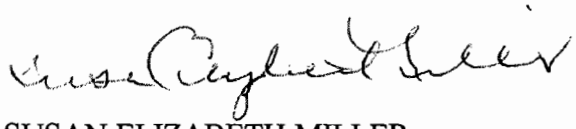

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 56,247 words.

Dated: February 8, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

SUSAN ELIZABETH MILLER
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DECLARATION OF SERVICE BY MAIL

Case Name: **PEOPLE v. RICHARD DON FOSTER** Case No: **S058025**

I declare:

I am employed in the County of San Diego, California. I am 18 years of age or over and not a party to the within entitled cause; my business address is 110 West A Street, Suite 1100, San Diego, California 92101.

On **February 8, 2006**, I served the attached
(Date)

RESPONDENT'S BRIEF

I also served a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California, addressed as follows:

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For delivery to: **Honorable Stanley W. Hodge, Judge**

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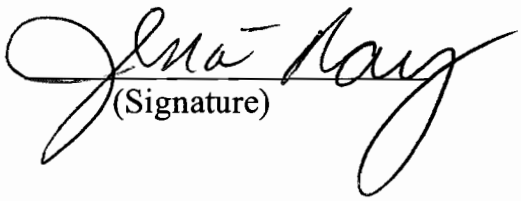
I declare under penalty of perjury the foregoing is true and correct, and this declaration was executed at San Diego, California, on **February 8, 2006**.
(Date)

JENA RAY
(Typed Name)


(Signature)