IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DOUGLAS OLIVER KELLY,** Defendant and Appellant.	**CAPITAL CASE** S049973

Los Angeles County Superior Court No. LA015339
The Honorable Michael Hoff, Judge

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DOUGLAS OLIVER KELLY,** Defendant and Appellant.	**CAPITAL CASE** S049973

STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, appellant was charged in count 1 with murder, a violation of Penal Code section 187, subdivision (a),[1/] and in count 2 with residential burglary, a violation of section 459. It was alleged that appellant committed the murder while he was engaged in the commission of robbery, rape, and burglary (§ 190.2, subd. (a)(17)), that he personally used a deadly and dangerous weapon during the commission of the murder (§ 12022, subd. (b)), and that he was armed with and used a deadly weapon during the commission of a sexual offense (§ 12022.3, subds. (a) & (b)). (CT 236-238.)

Appellant pleaded not guilty to both counts and denied the special allegations. (CT 275.)

Trial was by jury. (CT 404.) After the prosecution and the defense rested their guilt phase cases, the trial court granted a joint motion to dismiss the burglary charge (count 2) and the burglary special circumstance allegation. (CT 431; see RT 2039-2041.) The trial court also granted the defense's motion to

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1. All further statutory references will be to the Penal Code, unless otherwise indicated.

strike the section 12022.3 allegations. (RT 2046-2048, 2275.) The jury found appellant guilty of first degree murder, found true the rape-murder and robbery-murder special circumstance allegations (§ 190.2, subd. (a)(17)), and also found true the personal use of a deadly weapon allegation (§ 12022, subd. (b)). (CT 440, 519.)

At the penalty phase, the same jury returned a verdict of death. (CT 561-562.) After denying appellant's motion for a new trial and his motion to reduce the penalty to life imprisonment without the possibility of parole, the trial court sentenced appellant to death. (CT 589, 591-595.) The trial court imposed a $200 restitution fine. Appellant received a total of 1,057 days custody credit, consisting of 705 actual days and 352 days good time/work time. (CT 589, 591.)

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

STATEMENT OF FACTS

A. Guilt Phase – Prosecution Evidence

1. The Charged Offense: The 1993 Rape, Robbery And Murder Of Sara Weir

a. Appellant Works At A Gym Where He Meets Michelle Theard And Sara Weir

In early 1993, appellant met Michelle Theard at a gym in Burbank. (RT 892, 965-966.) Theard believed that appellant worked as a trainer at the gym, and that he also did some maintenance work there. (RT 898.) The pair began dating in March 1993. (RT 968.) About a month later, appellant moved in with Theard and her young son, Eric Alton,[2/] into Theard's apartment, located at 4950 Laurel Canyon, apartment 110, North Hollywood. (RT 890-891, 893,

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2. At the time of trial in 1995, Eric was 12 years old. (RT 890.)

968, 1003.)

Appellant seemed to be a "very friendly" and "very caring person." (RT 893.) Over the course of their relationship, appellant told Theard that he belonged to a "very wealthy" Chicago family, that he had a trust account, and that his mother sent him money whenever he needed it. (RT 894-895.) Although appellant did not have a car and Theard never saw evidence of his claimed familial wealth, appellant "always seemed to have money." (RT 895.) On several occasions, appellant told her he was selling jewelry for two women at the gym. Once, she accompanied him to the Jewelry Mart where appellant sold some jewelry for $800 or $900. (RT 896.) Appellant also told her that he was a partner in a restaurant located in Florida or Chicago, and that he owned or managed the Burbank gym. (RT 896, 898.) Theard believed appellant's representations. (RT 894.)

In April 1993, 18-year-old gym member Sara Weir[3/] hired appellant to train her and her friend, Dolores Whiteside. (RT 838, 858, 1041, 1044.) Weir described appellant to some of her friends as her personal trainer; she never expressed a romantic interest in appellant. (RT 860, 1028-1029, 1045-1046, 1049,1058, 1066, 1072, 1079, 1081.)[4/]

In the late spring of 1993, Weir asked her close friend Doreen Derderian to accompany her to appellant's apartment because he had a dog that needed a home. (RT 1079.) When they picked up appellant at the gym, appellant seemed "surprised" that Derderian had accompanied Weir. (RT 1080-1082, 1091.) During the drive to the apartment, appellant was "very distant" and

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3. Sara Weir was born on May 7, 1974. (RT 838.)

4. At the time, Sara was in a romantic relationship with a man named Hobart; their seven- to eight-month relationship ended in July or early August 1993. (RT 844, 870.) In August, 1993, Sara began dating a man named Paul. (RT 847, 875-876.) Sara expressed her romantic interest in Paul to her mother and to a number of her friends. (RT 847, 1029, 1054, 1065, 1072, 1081.)

seemed tense; his behavior made Derderian feel like "an intruder." (RT 1082-1083.) After looking at the dog, Weir and Derderian drove appellant back to the gym. (RT 1086.) Weir's interaction with appellant appeared "just like a trainer and a client." (RT 1084.) Nevertheless, Derderian asked Weir if she was "seeing [appellant] outside of the gym?" "No," replied Weir. (RT 1086.)

Then, in August or September 1993, appellant made "advances" toward Weir, prompting her to ask another friend, Jaci Coe, for advice. (RT 1056.) Weir told Coe that appellant had been "flirting with her" and that she had "tried to shrug it off" at first, but "it kept happening" and it "was getting a little creepy for [Weir] . . . ." (RT 1054, 1056.) Weir planned to end her trainer-trainee relationship with appellant. (RT 1062.)

b. Uncharged Act: The August 30, 1993, Rape Of Teri B.[5/]

In August 1993, around the time that appellant was making "advances" towards Weir, appellant met 28-year-old Teri B. at the gym and offered to train her. (RT 1760-1764.) Teri B., who was unemployed at the time, told appellant she could not pay him; however, appellant told her that she could start paying him once she had a job. (RT 1758-1760, 1768.) Teri B. trained with appellant

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5. Along with evidence of two other prior rapes committed by appellant in Florida (see *post*), testimony regarding appellant's rape of Teri B. was admitted pursuant to Evidence Code section 1101, subdivision (b). (RT 1455, 1460.) The three prior rape victims testified in succession toward the end of the prosecution's case-in-chief. Before these uncharged acts witnesses testified, the trial court admonished the jury that the testimony was being admitted for the limited purpose of showing a common scheme or plan, intent, identity, motive, or lack of appellant's reasonable and good faith belief in consent to sexual conduct. (RT 1461-1464, 1609; see CALJIC No. 2.50 (1994 rev.).) At the end of the guilt phase testimony, the jury again was instructed concerning the limited purpose of this testimony. (CT 453-457; RT 2120-2123; see CALJIC Nos. 2.09, 2.50 (1994 rev.), 2.50.1, 2.50.2.)

at the gym for about a week-and-a-half. (RT 1770.) During these workouts, Teri B. told appellant about her boyfriend, and appellant mentioned Theard. (RT 1771.) Appellant led Teri B. to believe that he and Theard were married, but separated. (RT 1820.) According to appellant, he shared a North Hollywood apartment with his "sister."[6/] (RT 1772, 1779, 1820, 1841.) At times, appellant expressed an interest in dating Teri B., but she declined. (RT 1807.)

Appellant told Teri B. about his business ventures. He said he had a financial interest in the gym (which he claimed to manage as well), and that he owned a frozen food company. (RT 1764-1766, 1781.) Appellant also told Teri B. that his family was wealthy, and that his mother (who lived in Chicago) planned to open some juice bars in Los Angeles. (RT 1765, 1774.) According to appellant, his mother wanted to invest in the juice bars because she did not trust him with money, due to his money and gambling problems, and thus she preferred to give him a managerial position in the juice bars instead. (RT 1777.) Appellant suggested that Teri B. work as his mother's assistant, and thereby act as her "go between" with appellant. (RT 1782.)

Teri B. believed appellant, and agreed to start working as an assistant. (RT 1774, 1781-1782, 1792.) As part of her "assistant" duties, Teri B. drove appellant to different locations appellant claimed were part of his mother's business ventures or other holdings, including a home construction site in Bel Air, an empty storefront in Beverly Hills, and an equestrian center in Burbank.[7/] (RT 1778, 1780, 1782, 1807.) Appellant also took Teri B. to a restaurant called USA Ribs, in which he also claimed to be a partner. (RT 1808-1809.)

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6. At the time, appellant was still living with Theard in her North Hollywood apartment. (RT 890-891, 895.)

7. Appellant did not have a car, but told Teri B. that he was waiting for a money transfer in order to buy one. (RT 1778.)

After two weeks, appellant had yet to pay Teri B. for her "assistant" work. (RT 1810-1811.) Teri B. asked appellant many times about the money she was owed and, after involving her father, appellant gave her a $1,000 check drawn on Theard's personal checking account; he still owed her an additional $1,500. (RT 1810-1813, 1819.) Appellant explained that the check had been drawn on Theard's account because Theard was "handling the real estate aspect of the business[.]" (RT 1813.) Teri B., having received the $1,000 check (which later bounced), used her personal account to cover costs she believed were related to the business, including: purchasing two cellular telephones (costing $400 apiece), repaying one of appellant's gym co-workers for money he had borrowed to rent a car, and writing a $48,000 check to a dealership to purchase a car.[8/] (RT 1813-1816, 1818-1819, 1822-1824.) Teri B. believed that she would be repaid for these costs. (RT 1818, 1822-1824.)

At about noon on August 30, 1993, Teri B. went to Theard's North Hollywood apartment, believing that appellant planned to introduce her to his mother. (RT 1820, 1839-1841.) After Teri B. arrived, appellant told her that his mother had not yet arrived. (RT 1841-1842.) He appeared agitated. (RT 1842.) After waiting in the living room for 15 minutes, Teri B. wanted to leave; she was feeling worried and "a little uncomfortable" because appellant appeared "really agitated." (RT 1843-1845.) Teri B. used the bathroom. But as she exited, the bathroom door burst in, hitting her and throwing her against the wall. (RT 1847.) Appellant entered the bathroom and grabbed her by the hair. (RT 1847.) He was holding a pair of blue-handled scissors in his right hand. (RT 1847, 1863; see Peo. Exh. 14 [scissors].) Teri B. began screaming and became hysterical. Appellant, holding the scissors to Teri B.'s throat,

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8. Teri B. wrote the check for the car because appellant assured her that he was expecting a $1 million wire transfer from Chicago. (RT 1823-1824.)

banged her head against the bathroom wall and repeatedly yelled at her, "Shut the fuck up, bitch, shut the fuck up or I'll kill you." (RT 1848.)

He dragged her out of the bathroom and into the master bedroom. (RT 1849, 1851-1852.) Teri B. struggled, but appellant was too strong. (RT 1849.) She begged appellant not to rape her, but instead "it escalated": he berated her and told her to "shut up"; then, he pushed Teri B. onto the bed and grabbed her by the throat. (RT 1849-1851.) She could not breathe. (RT 1851.) With Teri B.'s back on the bed, appellant kneeled over her and pressed the scissors into her throat, increasing the pressure until she felt blood running down her back. (RT 1852, 1864-1865.) Appellant appeared "incredibly angry" and "furious." (RT 1865.) He told Teri B. he would "slit [her] throat" if she opened her mouth, and he demanded that she undress. (RT 1865.)

Realizing that she could not escape, and fearing that he would kill her if she resisted, Teri B. changed her tactics: she told appellant that she loved him, and begged him not to hurt her or kill her.[9/] (RT 1852, 1865-1866, 1868.) Appellant continued insisting that he would kill her if she did not "shut up." (RT 1882.) He pulled off her clothing and tore off her underwear, leaving her naked. (RT 1867.) As penetrated her, appellant told Teri B.: "You better move like I like it. You better make noises like you like it or I'll kill you." (RT 1867-1868.) Afraid and scared, Teri B. tried to comply. (RT 1868.) Appellant held the scissors in his hand the entire time. (RT 1869-1870.) The sexual intercourse lasted for minutes. (RT 1868.) After raping her, appellant told Teri B., "You know you wanted this." (RT 1870.) Again, Teri B. asked appellant not to kill her and to let her go. (RT 1871.)

But after five to ten minutes, appellant became aroused again and raped

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9. At trial, Teri B. explained that she changed tactics because she "knew he was going to rape me and I just didn't want to die that way." (RT 1869.) Teri B. "thought [she'd] probably end up dying either way," but she "thought maybe [she'd] have a chance" if she became docile. (RT 1869.)

her again. (RT 1871-1872.) Teri B. cried. (RT 1872.) She told appellant that she "loved him" and asked him not to hurt her; appellant became less violent and put down the scissors. (RT 1869, 1872) Teri B. pushed the scissors off the bed to keep appellant from stabbing her again. (RT 1872-1873.)

After the second rape, appellant remained in the room. (RT 1873.) Appellant told Teri B. that if she reported the rapes to the police, he would come after her, kill her family as she watched, then kill her and dispose of her body in the ocean. (RT 1877.) He then put on a condom and sodomized her. (RT 1874.)

After sodomizing her, appellant had Teri B. wrap herself in a towel and sit on the living room sofa. (RT 1875, 1877.) Appellant poured a mixture of champagne and whisky into two glasses, gave one of the glasses to Teri B., and he drank the other. (RT 1875.) Appellant told Teri B. that he was part of the "Black mafia," and that he had wanted to spend his last days with her because he would be killed in a couple of days during a ritual. (RT 1875-1876.)[10/] Then, he gave Teri B. a watch, a ring, and a medallion, telling her that he would be dead in a couple of days. (RT 1876.)

Appellant took Teri B. back to the bedroom. Wanting Teri B. to orally copulate him, appellant poured champagne on himself and Teri B. (RT 1878.) However, the champagne burned appellant. (RT 1878.) He then orally copulated Teri B. and raped her a third time. (RT 1878.) Then, he sodomized her a second time, causing Teri B. defecate on herself. Appellant became "very angry" at Teri B., screaming that she was "a filthy fucking bitch" and telling her

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10. Appellant told Teri B. he wanted to spend his last days with her because he "cared so much about [her]." (RT 1876.) Additionally, when Teri B. had asked appellant why he was raping her, he pushed her towards a mirror and said, "Look at you. Who wouldn't want to be with you?" (RT 1879-1880.) He then told her: "I only have a couple of days to live and you are what I would want." (RT 1880.)

"to clean the shit off of [her]." (RT 1874.) Teri B. went into the master bathroom and used a towel to clean herself. (RT 1874-1875.) As she was cleaning herself, appellant entered the bathroom, hit Teri B. on the back of the head, and told her that she was "taking too fucking long and hurry up and get back to the bed." Teri B. feared she would die. (RT 1875.) She left the towel in the bathroom. (RT 1874.)

At about 4:00 p.m., Teri B. sensed that appellant felt it was important to leave the apartment. (RT 1878-1880.) Appellant told her that he wanted to take a walk on the beach with her one last time before he died. Appellant had Teri B. get dressed and had her drive them to the USA Ribs restaurant, where he needed to "firm some things up." (RT 1880-1881.) At the restaurant, appellant told her that he would hurt her if she tried anything. (RT 1881-1882.) Terrified that appellant would hurt her, Teri B. did not scream for help. While at the restaurant, and with appellant standing next to her, Teri B. telephoned her boyfriend and told him she would be late. (RT 1881-1882.) When she hung up the telephone, appellant asked her why she had not told her boyfriend she and appellant were "involved now." (RT 1881.) Inside the restaurant, Teri B. drank a soda as she tried to calm down while appellant talked to some African American men at another table. Teri B. did not try to get help from the other people at the restaurant because she believed they could be the people that appellant had told her would kill her and her family. (RT 1884-1885.) Appellant approached Teri B. and told her he would "make up for what he had done" and "make sure that [she] had money" for "any hurt he had inflicted." She told him that he could not "repay" her for he had done; however, appellant replied that they "want[ed] to be together" and asked her, "[a]ren't you glad that you were with me[?]" (RT 1884, 1887.) Appellant became "very apologetic." Teri B. began crying, at which point appellant became angry and stated: "Why are you crying about this? What about it was bad? Because it seemed pretty

good to me." Appellant became apologetic again and promised to compensate her financially. (RT 1887.) They were at the restaurant for about 15 minutes, and then left. (RT 1886-1887.)

Appellant told Teri B. to drive them to the ocean. (RT 1887.) Recognizing that the situation was "getting worse and worse" and fearing for her life, Teri B. began thinking of ways to escape. (RT 1888, 1893.) She drove toward Santa Monica, where a girlfriend of hers lived. (RT 1888.) During the drive, appellant received a call on the cellular telephone from Theard. (RT 1793-1794, 1893.) Teri B. overheard the half-hour conversation, during which appellant argued with Theard and pleaded with her to calm down. (RT 1793-1797.) Overhearing the conversation, Teri B. realized that what appellant had told her about his work, about his relationship with Theard and Theard's son Eric, and about his relationship with his mother were all untrue. (RT 1792-1793, 1797-1798, 1801-1802.) However, she still believed that appellant had "connections" who would kill her. (RT 1893.)

While appellant was stilling talking on the telephone to Theard, Teri B. drove to a liquor store and suggested that appellant buy them a six-pack of beer. (RT 1894-1895.) Appellant, who still talking to Theard on the telephone, got out of the car and walked toward the liquor store. Teri B. drove away as fast as she could. She drove to her friend's apartment located a few blocks away. (RT 1895.) Teri B. went upstairs to the apartment where she was met by her friend and told her that she was "in trouble" and need[ed] some help." (RT 1896.) But, appellant had run after Teri B., and he followed her into the apartment where a party was going on. (RT 1895-1896.) After asking for the apartment's address, appellant dialed a telephone number and gave the address as his location. (RT 1896-1897.) Teri B. told her friend that she needed help getting appellant out, and asked the friend to "bring some guys from the party." (RT 1897.)

Teri B., accompanied by some people from the party, drove appellant back to Theard's North Hollywood apartment. (RT 1897.) During the drive, appellant repeated that he was going to be killed in a couple of days, and asked Teri B. to take care of Theard's son, Eric, for him. (RT 1897-1899.) Appellant expressed animosity toward Theard, calling her "a vicious bitch," and saying that Theard was "trying to take him for a great deal of money in his divorce settlement" and that "she didn't deserve to have Eric." (RT 1898, 1900.) Appellant intimated that he intended to have Theard killed. (RT 1898.) When they arrived in front of the apartment building, appellant told Teri B. that he was sorry, he leaned over and gave her a kiss on the cheek, got his briefcase and got out of the car. (RT 1899-1900.) It was about 8:30 p.m. (RT 1900.) That was the last time Teri B. saw appellant. (RT 1793.) At the time, Teri B. did not report the August 30, 1993 rape. (RT 1855.)[11/]

c. The August 30-31, 1993, Assault Of Michelle Theard (Uncharged Acts Evidence), And The Events Leading Up To Labor Day (September 6, 1993)[12/]

Between 8:00 p.m. and 8:45 p.m. on August 30, 1993, Theard and her

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11. Teri B. did not report the rape until just before trial in the instant matter. At trial, Teri B. explained that she had told no one about the rape because she had been ashamed and terrified. Also, Teri B. believed appellant's statements that he would come after her family and "hunt [her] down and kill [her]," and that he "had people that could do it even if he was in jail." (RT 1855.) About a year-and-a-half after the rape, Teri B. confided in a friend, who persuaded her to enter counseling. (RT 1859.) As a result of the counseling, Teri B. decided to report the August 30, 1993 rape and testify. (RT 1860-1861.) At trial, Teri B. expressed her regret about not reporting the rape earlier. (RT 1859.)

12. Testimony regarding appellant's assault of Theard was admitted pursuant to Evidence Code section 1101, subdivision (b). (CT 355; RT 287-291, 886.)

son Eric returned to the apartment where earlier that day that appellant had repeatedly raped Teri B. (RT 900, 980.) Theard found the apartment's balcony doors open and the lights on. Inside the apartment, she found wine glasses and empty champagne bottles; in Eric's bathroom, she found women's undergarments and a pair women's glasses. (RT 900.) Within an hour of their arrival at the apartment, Theard received a telephone call from appellant. (RT 981.) She then received several additional telephone calls from appellant, who sounded intoxicated. (RT 901-902, 981.) During these telephone conversations, Theard told appellant she did not want him to come into the apartment because he was intoxicated and she was afraid. (RT 901-902.)

Appellant finally arrived back at the apartment shortly after midnight, fumbling with his keys as he tried to open the front door. (RT 901, 981.) Through the closed door, Theard again told appellant that she did not want him to come inside. (RT 901-902.) When Theard refused to open the door, appellant became angry. (RT 903.) Appellant tried to get through the door, and ultimately kicked it open. Appellant entered the apartment, grabbed Theard around the neck, and began strangling her. (RT 902.) Appellant, who had never been violent with Theard, did not appear incapacitated by alcohol. (RT 977, 995.) Appellant yelled at Theard for locking him out of the apartment. (RT 902.) He took Theard to the kitchen and held her over the stove as he strangled her with both hands. (RT 902-904.) Theard believed appellant "was trying to strangle [her] to death." (RT 905.) Then, still holding her by the neck, appellant picked up Theard, took her near the front door, and lifted her off her feet as he held her against the wall. (RT 904-905.) Appellant continued to strangle Theard. (RT 905.) His fingernails penetrated her neck. (RT 905-906.) Barely able to breathe and feeling that she was about to lose consciousness, Theard told appellant that he was going to kill her if he did not stop. But, appellant kept strangling her. (RT 906.)

When he finally let go, appellant fell to his knees and began crying. (RT 906.) Appellant began pacing around the apartment, rambling aloud that his "life was over," that "someone was looking to kill him," and Theard's and Eric's lives were in danger. (RT 906-907.) Theard telephoned one of appellant's friends, Ted Kelly (no relation), who arrived about 30 minutes later. (RT 983.) By the time Ted arrived, appellant had "stabilized." (RT 983-984.) Ted spent the night sleeping on the living room couch while Theard and appellant slept in the bed in master bedroom. (RT 907, 984.)

On August 31, 1993, appellant did not let Theard leave the apartment to go to work. (RT 906-907, 924.) He allowed Theard to telephone her work and her family, but otherwise he did not let her use the telephone. (RT 908.) Appellant and Theard stayed inside the apartment until about 4:00 p.m., when Eric returned from school. (RT 986.) Theard took Eric to football practice, leaving appellant alone in the apartment. (RT 986-987.) While away from appellant, Theard called a friend and then, at about 9:30 p.m., she filed a police report. (RT 987; see RT 909.) Appellant was arrested that night. (RT 981.)

Frightened by appellant's violence and convinced that he had tried to hurt or kill her, Theard did not feel comfortable living in the apartment. Later the same night, she returned to the apartment to pick up some clothes, and then she and Eric went to stay with her sister. (RT 909.) Theard never spent another night in the apartment. (RT 917.)

The next day, September 1, 1993, the apartment's front door was replaced with a temporary door and a new lock. (RT 938, 1925, 1927.) The apartment building manager gave Theard a key to the new front door lock; she did not give a key to appellant. (RT 1925-1926.) Theard had a restraining order issued to keep appellant away from the apartment. (RT 964.)

On the same day, appellant was released from jail. (RT 964.) Appellant placed a collect call to his 19-year-old co-worker, Karrie Marshall. (RT 1193-

1195.) He told Marshall that he was calling from jail and asked her to bail him out; however, Marshall replied that she could not help him that day because she had to "go to school." (RT 1195.) Later that day, appellant telephoned Marshall again, telling her that his attorney had bailed him out of jail and that he planned to bring by some money he owed her. (RT 1195-1196.) Appellant knew that Marshall lived alone in her apartment. (RT 1194-1195.) When appellant arrived at Marshall's apartment at about 3:00 or 4:00 p.m. that afternoon, he appeared surprised when he saw that a friend of Marshall's, a man, was also there. (RT 1196-1197.) Appellant used Marshall's telephone. (RT 1197.) When Marshall asked appellant about his arrest, appellant replied that he had been in a fight with his girlfriend, whom he denied beating. (RT 1197.) Marshall then asked appellant about the money he owed her, but appellant said he did not have it. (RT 1198.) Marshall asked appellant if he could bring the money later on, and appellant told her he would return in 20 minutes with the money. He then left. (RT 1199.)

At about 8:00 p.m. that evening, appellant telephoned Marshall once again. He told her he had the money and that he would come by in about an hour. (RT 1199.) Appellant, however, did not arrive until sometime between midnight and 12:30 a.m. (RT 1199-1200.) He knocked on Marshall's door and asked to come inside; Marshall said "no" and asked appellant what he needed. (RT 1200-1201.) Appellant asked Marshall if he could "crash" on her couch for a couple of hours because Theard had changed the locks to the apartment. Marshall, who was alone in the apartment, refused. She "was scared" and "had a bad feeling" about appellant. (RT 1201.) Appellant asked her again, but after she refused once more, he left. (RT 1202.)

A day or two later – Thursday, September 2 or Friday, September 3, 1993 – appellant telephoned Rosell "Tony" Momon, an acquaintance whom appellant had met at the gym. (RT 1128-1129.) Appellant told Momon that he

needed a ride because he was in jail following an argument with his girlfriend. (RT 1129.) Momon picked up appellant, who was walking down a street. (RT 1130.) Appellant told Momon that Theard had kicked him out of the apartment and that she might have obtained a restraining order against him. (RT 1130-1131.) Appellant asked to stay with Momon for a couple of days because he did not have any money. (RT 1131.) Appellant stayed at Momon's house for two days. During this time, appellant had Momon drive him to Theard's apartment to look for her, but they did not find her. (RT 1132-1133.) After appellant could not get inside Theard's apartment, they left. (RT 1141.)

Meanwhile, Theard returned to the apartment on Friday, September 3, 1993, or Saturday, September 4, 1993, for about 15 or 20 minutes to pick up some clothes. (RT 937-939, 990.) Nothing in the apartment was out of place. (RT 939.)

On Monday, September 6, 1993, which was Labor Day, Theard returned to "straighten up" the apartment because she had planned to start living there again. The apartment appeared undisturbed from her last visit. (RT 939-940, 991.) For her protection, Theard took a pair of scissors, which she normally kept in master bathroom's medicine cabinet, and put them on a nightstand located next to her bed. (RT 951-952, 997-998; see Peo. Exh. 14 [scissors].)[13/] Theard found appellant's briefcase and looked through it. (RT 913, 940.) Inside the briefcase, Theard found two blank checks bearing Teri B.'s forged signature. (RT 913, 915-916.)[14/] Based on appellant's representations to her,

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13. These scissors – People's Exhibit 14 – were the same scissors that appellant had used during his rape of Teri B. about a week earlier.

14. At trial, Teri B. identified the blank checks and noted that the signature was not hers. (RT 1837-1838, 1891.) Teri B. testified that she had not given appellant permission to possess or use her checks. (RT 1820-1822.) The briefcase also contained her driver's license, which she also identified at trial. (RT 1835-1837.)

Theard believed that Teri B. was appellant's accountant. He had once used one of Teri B.'s checks to pay for a $550 doctor's bill incurred by Theard. (RT 914-915.) Inside the briefcase, Theard also found some of her own blank checks bearing her forged signature. Theard had never authorized appellant to use her checks. (RT 916, 996-997.) These discoveries added to her concern about appellant. (RT 916.) Upon finding these items, Theard telephoned appellant's mother and learned that "[a]ll of the things" appellant had told her "were lies." (RT 913.) After learning this information, Theard decided that she and Eric needed to live elsewhere for their own safety. (RT 941.)

d. Sara Weir's Disappearance: The Events From September 6, 1993, To September 14, 1993

Sara Weir spent Labor Day weekend at her mother's house in Thousand Oaks. (RT 832, 847-857.) On Labor Day (September 6, 1993), she spent the day shopping at the local mall and returned to her mother's house around 4:00 p.m. or 4:30 p.m. (RT 853-854.) Weir told her mother, Martha Farwell, that she was driving back to Los Angeles – where she rented a room in a house owned by family friend, Elizabeth Mackiewicz – in order to do some laundry before returning to work the next morning. (RT 854-855.) Prior to leaving, Weir retrieved a voicemail message from her answering machine. (RT 854.) At about 5:30 p.m., Weir departed in her 1985 Ford Bronco II. (RT 855, 864.) Farwell never saw her daughter alive again. (RT 861.)

The same day, Momon and a friend once again drove appellant back to Theard's apartment. (RT 1133-1134, 1137.) At about 8:00 p.m. that evening, Momon received a telephone call from appellant, who told Momon that he was inside the apartment. (RT 1135-1136, 1139.) Momon believed that appellant had entered the apartment by climbing over the apartment's balcony and opening the sliding glass door. (RT 1134-1135, 1139, 1142.)

Meanwhile, on the same evening, Weir's friend Coe attempted unsuccessfully to contact Weir. (RT 1060.)

The next morning (September 7, 1993), Weir telephoned her work shortly after 9:00 a.m. (RT 1933-1934.) She sounded upset. (RT 1935.) Over the telephone, Weir told her co-worker, Heidi Kindberg, that she would not be coming to work that day because a friend had committed suicide. (RT 1934.) But, none of Weir's friends had committed suicide. (RT 1068.) Weir never called back, and Kindberg never saw her again. (RT 1935.)

That day, Coe again tried contacting Weir and again she was unsuccessful. Coe found this "very abnormal" for Weir. (RT 1061.)

On the same day, Weir's housemate, Mackiewicz, returned home after being out of town over Labor Day weekend. (RT 1066-1067.) Weir was not home, and Mackiewicz found no notes from Weir indicating her whereabouts. Mackiewicz never saw Weir again. (RT 1067.)

Meanwhile, at about 6:00 p.m. or 7:00 p.m on the same evening (September 7, 1993), appellant telephoned Momon. (RT 1136, 1140.) He told Momon that he "was hanging out with this other girl," someone other than Theard whom appellant did not identify. (RT 1136-1137.) Momon believed that the pair were hanging out in the apartment. After receiving this telephone call, Momon never heard from appellant again. (RT 1137.)

On the same day or the day following (September 7, 1993, or September 8, 1993), Robert Coty, who lived in an adjacent apartment building, noticed activity in a bedroom of Theard's apartment. (RT 1143-1149.)[15/] Coty, who

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15. Coty, who had never been inside the apartment (RT 1150), was not sure which bedroom – the master bedroom or Eric's room – he was looking into. (RT 1149 ["I would say it was that corner bedroom [Eric's room], the one that's marked bedroom. No. I'm sorry. It was the other one [master bedroom], the sliding glass door."]; see Supp. II CT 369 [Peo. Exh. 34 - diagram of Theard's apartment depicting one bedroom in the corner [Eric's room] and the master bedroom with a balcony].) The master bedroom in Theard's apartment

was standing about 150 to 175 feet away, saw a shirtless, muscular African American man whom Coty had previously observed in the apartment. (RT 1152-1154.) A naked "Caucasian" woman with dark hair was sitting or kneeling by the window sill. (RT 1153, 1157.) Sara Weir had brunette hair and she was of Canadian Blackfoot Indian descent. (RT 829, 835, 931.)[16/] The naked woman was in a "hunch[ed]" position as if she was "being dominated . . . or being scolded or something . . . ." (RT 1160.) The shirtless man walked around the woman once, and then disappeared from view for "a couple of seconds." The man walked around the woman a second time and then disappeared from view again. (RT 1154, 1157.) While the woman was still kneeling in the same position, the bedroom's drapes or blinds were closed. (RT 1157, 1159.)

On September 8, September 10, and September 11, 1993, Weir failed to appear for scheduled outings with her friends. Weir's friends tried contacting her, but they never heard back from her. (RT 856, 1025, 1035-1037, 1087-1088.)

On either September 8 or September 9, 1993, and again on September 11, 1993, Theard returned to her apartment. (RT 940, 943, 992.) There were no signs of forced entry to the front door. (RT 992.) However, during one of these post-Labor Day visits, Theard noticed signs that someone had been inside the apartment: a piece of wood normally kept in the sliding glass door track

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had a balcony and sliding glass door, which was located directly opposite from Coty's apartment building. (RT 891-892; Supp. II CT 369 [Peo. Exh. 34].) Given that Coty repeatedly stated that he had looked into the apartment through a sliding glass door by a balcony (RT 1149-1150, 1155), it appears that the activity Coty observed occurred in the master bedroom.

16. Weir's biological mother was Canadian Blackfoot Indian, and Sara had been born on the Blackfoot reservation in Canada. When she was a baby, Sara was adopted by Farwell and her then-husband, Roger Weir. (RT 829, 835, 1075.)

had been removed, and wine glasses and an empty champagne bottle were on the kitchen counter. (RT 953-955.) Theard also noticed an odor – as if something had spoiled – emanating from bathroom-hallway area. (RT 940, 943-944.) In the bathroom next to Eric's bedroom, Theard found some "moist, soiled" towels in the cabinet under the sink. (RT 929, 944-945.) Believing that the moist towels were the source of the odor, Theard hung the towels out to dry. (RT 945.) But when she and Eric returned to the apartment on a subsequent occasion, the odor was stronger. (RT 1010.)

On September 13, 1993, Farwell received a telephone call from Weir's employer inquiring about Weir's week-long absence from work. Farwell was shocked to hear of her daughter's absence. (RT 862.) Fearing that something was wrong, Farwell telephoned Weir's friends. (RT 862-863.) But, none of them had heard from Weir since before Labor Day. (RT 863, 1033, 1043.)

The next day, Farwell tried to locate her daughter by driving to the homes of Weir's friends whose telephone numbers Farwell did not have. She also looked around Weir's room in Mackiewicz's house. (RT 863.) It appeared that Weir had been to the room after leaving her mother's house on Labor Day because a dress that she had purchased that day was hanging in the closet, a packet of documents she had brought with her over the Labor Day weekend were laying on the desk, and some folded clothes were laying on the bed as if she had begun to do her laundry. (RT 863-865.) The same day, Farwell filed a missing person's report with the police. (RT 863.)

e. September 15, 1993: Weir's Body Is Discovered In Theard's Apartment

On September 15, 1993, Theard and Eric returned to the apartment once again. (RT 946, 993.) The odor was even stronger. (RT 946.) In Eric's bedroom, Theard opened the window to let out the odor and saw a "rug" stuffed

under Eric's bed. (RT 946, 1011.) Eric, who had not put the "rug" there, looked under his bed (RT 1011-1012.) He told his mother that it "looked like a bunch of chopped up body parts." (RT 1012.) When he saw it, Eric felt like "[t]hrowing up." (RT 1012.) Theard found a body, later identified as Weir's, wrapped in a blanket. (RT 946.)[17/] Theard and Eric immediately went to the building manager's apartment and telephoned the police. (RT 946, 1013.)

f. The Police Investigation And Autopsy

When the police arrived, they found Weir's naked body wrapped in the blanket and concealed under the bed. (RT 1291, 1294, 1415-1416, 1432-1433; see Supp. II CT 353, 370-373 [Peo. Exhs. 23, 35 & 36 - photographs of Weir's naked body as discovered].) There were several puncture wounds to her chest and a plastic bag covered her head, which was topped by a baseball helmet belonging to Eric. (RT 1002, 1417, 1426-1427, 1432-1433; see Supp. II CT 370-373 [Peo. Exhs. 35 & 36].) The plastic bag was secured by brown packaging tape, which had been wrapped around her neck. (RT 1278, 1427.) The tape on the plastic bag was consistent a roll of tape found in the kitchen. (RT 1282, 1425.) The ends of the roll of tape and the tape on the bag "clear[ly] and obvious[ly] match[ed]." (RT 1284-1285, 1295.) A latent partial print on the roll of tape matched appellant's right palm print. (RT 1385-1391; see RT 1282, 1284-1285.) Believing that the murderer had placed the helmet on Weir's head, the police had the helmet dusted for prints. (RT 1431-1432.) Appellant's latent finger and palm prints were found on the helmet. (RT 1286-1288, 1391-1394.) Appellant's latent finger and palm prints were also found on the bedpost and bedrail. (RT 1371-1372, 1375-1378, 1381-1383.)

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17. The body was initially identified as Weir's based on the missing persons report, and the identification was verified using her dental records. (RT 1243.)

The police sought to speak with appellant, but they could not find him. (RT 1241.) They also canvassed the apartment complex but, apart from Coty's visual observations, none of the other neighbors heard any screaming. (RT 1252, 1254.)

In the apartment, the police found appellant's briefcase, which contained various items including Teri B.'s sunglasses, her driver's license, and two of her blank checks bearing her forged signature. (RT 1828, 1832-1833, 1835-1838, 1936-1941; see Supp. II CT 331, 337-338 [Peo. Exhs. 13F & 13J].) Appellant's briefcase also contained a piece of paper with Michelle Theard's name signed three times, an "insufficient funds" bank document showing a $2,000 check drawn on Theard's account, two business cards from jewelry stores, a $350,000 checking deposit slip signed in appellant's name, and multi-page, handwritten documents listing jewelry and prices. (RT 1939-1941; Supp. II CT 325-326, 329-330, 332-336 [Peo. Exhs. 13C, 13E, 13G-13I, 13K & 13L].)

Los Angeles Police Detective John Coffey, the homicide coordinator for the North Hollywood Division, arrived at the crime scene to assist in the investigation. (RT 1408-1409.) Detective Coffey believed that Weir had been murdered in the apartment and, based on the state of her decomposed body, that she had been killed three to four days earlier. (RT 1410, 1424.) At trial, he opined that a man could have gained access to the apartment by climbing onto the balcony and entering through the sliding glass door. (RT 1412.) While there was a "very minimal" amount of blood at the crime scene given the "obvious violence involved and the degrees of injuries to the body" (RT 1418), Detective Coffey opined that the amount of blood at the crime scene was consistent with Weir being stabbed to death in a puncture-manner as she laid on her back (RT 1423-1424). Red stains were found in various locations: near a mirror in the master bedroom; by the front door; and by the door to a trash

chute located within eight to ten feet of the apartment's front door. (RT 1413-1414, 1434-1435, 1439.) When examining the crime scene, Detective Coffey believed that the red stains could be blood, and that the stains could have been caused by splatters from the murder weapon or by someone cleaning up after the murder, which he believed the murderer had done in order to "conceal what had gone on in that apartment." (RT 1420-1421, 1439-1440.)[18/] The nearby trash chute emptied into a dumpster located in the building's subterranean parking lot; on the day Weir's body was discovered, the dumpster was partially empty, leading Detective Coffey to believe that the trash had been picked up a couple of days before. (RT 1412-1414, 1436.) When the police opened the blanket, they found a blue washcloth under her foot; a later test revealed the presence of human blood on the washcloth. (RT 1288-1289, 1320-1322, 1326, 1420-1421.)

Los Angeles County Deputy Medical Examiner Eva Heuser, M.D., performed the autopsy on Weir's body, which was "very decomposed" and had "multiple stab wounds." (RT 1948, 1958, 1961.) An autopsy revealed a total of 29 stab wounds: two stab wounds to the neck; nine stab wounds to the mid-chest and left breast area; ten stab wounds to the epigastrium area; and eight stab wounds to the area between the epigastrium and the belly button. (RT 1981-1982, 1992, 1995-1996.) Three of the stab wounds were to Weir's heart. (RT 1998.) The medical examiner opined that two of these three heart wounds proved fatal: the stabs pierced the heart's sac and perforated the heart, causing the sac to slowly fill with blood; the accumulation of blood in the sac raised the

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18. Fibers from the stained carpet near Weir's head were analyzed for the presence of blood. (RT 1292, 1301, 1324.) Visually, the fibers appeared to contain a substance consistent with blood. (RT 1324.) But, the test results were "inconclusive" as to blood type: the presumptive test was consistent with presence of human blood; however, the additional species test could not provide a blood type (no "ABO result"). (RT 1325-1326.)

pressure in Weir's heart, preventing it from drawing in blood, which in turn dampened her body's blood circulation. (RT 1998, 2010-2011.) As a result of her lowering blood pressure, the medical examiner opined that Weir first lost consciousness. Then, about 10 to 15 minutes after the heart wounds had been inflicted, she died. (RT 2011.) The medical examiner explained that there would not have been much external bleeding with this type of injury to the heart because, if Weir had been lying on her back at the time of the stabbing, the blood would have leaked out of the heart slowly and accumulated inside her body. (RT 2012-2013.)

The medical examiner opined that the stabs wounds had been inflicted prior to death by a single weapon (RT 1966, 1978-1979, 1982), and most of the wounds revealed that the weapon had entered in a "fairly straight up and down" fashion (RT 2003). About two days after the discovery of Weir's body, a pair of scissors was recovered from the same kitchen cabinet shoebox where the roll of tape had been found. (RT 949, 959-960, 1303-1305, 1441.) On the inside of the scissors' blades, there was dried human blood indicative of Type A blood.[19/] (RT 949, 958-959, 1307, 1322-1323, 1326-1327.) These were the same scissors that appellant had used during his August 30, 1993 rape of Teri B. (RT 1847, 1863), and the same scissors that Theard had put on the nightstand on September 6, 1993 (RT 951-952). The dried blood found on the scissor blades was not Teri B.'s blood. (RT 2035.) Both the medical examiner and Detective Coffey opined that the scissors were consistent with the implement that caused the stab wounds inflicted on Weir. (RT 1430, 1988, 1999.)

The autopsy also revealed other antemortem injuries, including defensive

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19. The dried blood found on the scissors, as well as the blood found on the blue washcloth, could not compared to Weir's blood because, given the advanced decomposition of her body, there was no liquid blood remaining in her body. (RT 1328, 2018, 2021.)

wounds to Weir's hands, two bruises on her forehead, and two bruises to the back of her head. (RT 2004-2008.) The bruises were consistent with Weir's head being hit against a wall. (RT 2008-2009.) Given the "advanced" decomposed state of the body, the medical examiner could not determine whether the plastic bag that had been placed over Weir's head and wrapped with tape around her neck had contributed to her death. (RT 2015-2017.) The marks around Weir's neck, however, were consistent with antemortem abrasions. (RT 2016.)

A sexual assault kit – consisting of two swabs the vaginal area and two swabs of the rectal area – was performed on Weir's body. (RT 1317.) Although the criminalist who analyzed the sexual assault kit did not detect any spermatozoa or semen on the samples (RT 1318, 1326), he could not say with certainty that he did not observe any spermatozoa (RT 1319-1320). He explained that bacteria degrades evidence in cases involving bodily decomposition – "especially in the case of sexual assault evidence." (RT 1314.) He opined that, in a non-refrigerated environment, bodily fluids could decompose greatly over the course of a week (RT 1315), and that a one-week period was sufficient to degrade semen to unobservable levels (RT 1318).[20/] Thus, he could not determine whether or not spermatozoa or semen had existed in Weir's body, opining that either: there had been none present, or there had been spermatozoa or semen present but, by the time the sample was collected a week after Weir's death, it had degraded to the point that it could not be analyzed. (RT 1320, 1326.) The criminalist also stated that absence of spermatozoa or semen would not conclusively resolve whether there had been penile penetration, explaining that spermatozoa would not be found on sexual

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20. By way of comparison, the criminalist explained that detection of semen or spermatozoa is not expected in cases of a live rape victim when the examination is conducted 72 hours after the assault. (RT 1318-1319.)

assault kit swabs if: (1) there had been penile penetration without ejaculation; (2) the rapist had a low spermatozoa count; (3) the spermatozoa or semen had drained from the body; or (4) the spermatozoa or semen present in the body was not collected during the swabbing process. (RT 1330-1331.)

Similarly, the medical examiner opined that semen or spermatozoa would not have been detectable given the decomposed state of Weir's body. (RT 2025-2026.) She testified that a "combing" of Weir's pubic hair had been part of the sexual assault kit performed, but she did not know the results. (RT 2029.) An examination of vaginal and anal area of Weir's decomposed body revealed no signs of trauma. (RT 2028.) But, the medical examiner expressed "no opinion" regarding whether Weir had been raped because sexual intercourse, forced or consensual, could occur without producing trauma. (RT 2030-2031.) She also opined that vaginal injury would not be expected if Weir had been killed during the course of rape, but prior to penetration. (RT 2034-2035.)

g. November 24, 1993: Appellant's Arrest At The U.S.-Mexican Border

Over the course of the investigation, the police identified appellant as the suspect. (RT 1241.) The police attempted to locate appellant, but their attempts proved unsuccessful. (RT 1242, 1244.) But then, on November 24, 1993 – more than two months after Weir's murder – United States Customs agents detained appellant at the Mexican-American border as he attempted to re-enter the country at Laredo, Texas. (RT 1245-1246.) When detained, appellant possessed two of Weir's checks signed with her name. (RT 1212-1213, 1247-1249; see Supp. II. CT 344-345 [Peo. Exh.18 - photocopies of Weir's checks].) At trial, Weir's mother examined the checks and stated that the signatures were not Weir's. (RT 1213-1214.) There had been no activity

on Weir's checking account since September 1993. (RT 1214.) Weir's car was located in Mexico (RT 1244-1245),[21] but her purse and identification were never recovered (RT 864, 1068). Six days after appellant's capture, Los Angeles police detectives arrived in Laredo to transport appellant back to Los Angeles. (RT 1243, 1245, 1249.)

2. Uncharged Prior Crimes: The 1987 And 1991 Florida Crimes Committed By Appellant[22]

a. The 1987 Rape And Robbery Of Jodi D.

In December 1987, appellant was working as a cook at an Olive Garden restaurant in Florida where he met 21-year-old waitress Jodi D. (RT 1466-1469.) Jodi D. believed she had a good work relationship with appellant. (RT 1470.) Once, they had a "little argument" regarding a food order, but afterwards matters "seemed okay." (RT 1472.)

One night after work, Jodi D. and two co-workers were having drinks at another restaurant when appellant (accompanied by another co-worker) arrived and joined Jodi D.'s group. (RT 1475-1477, 1481.) Appellant drank a beer, but he did not appear intoxicated. Appellant and Jodi D. began talking about relationships. (RT 1482.) Appellant was "very friendly" while Jodi D. told him about her relationship with her boyfriend. (RT 1483.) She did not feel

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21. The police, however, were unable to persuade Mexican government officials to release Weir's car. (RT 1245.)

22. Along with appellant's sexual assault of Teri B., testimony regarding these uncharged prior crimes was admitted pursuant to Evidence Code section 1101, subdivision (b). (CT 355-356; RT 287-291, 306-307, 1460.) As noted in footnote 5, *ante*, the jury had been given a limiting instruction before hearing the testimony of the "uncharged acts" victim-witnesses (RT 1461-1464, 1609), and it was again instructed about the limited purpose of this testimony in the guilt-phase instructions (CT 453-457; RT 2120-2123; see CALJIC Nos. 2.09, 2.50 (1994 rev.), 2.50.1, 2.50.2).

that appellant was flirting with her; she trusted him and felt comfortable with him. (RT 1486.)

When the restaurant closed at 2:00 a.m., appellant suggested they continue their conversation somewhere else and Jodi D. agreed. (RT 1485, 1577.) Jodi D. drove because appellant did not have a car. (RT 1487.) After they dropped off Jodi D.'s two co-workers, appellant had Jodi D. drive to a location that he said was "not far at all." (RT 1488, 1490.) During the drive, appellant told her that he planned to leave his Olive Garden job in the next month because he was opening a new restaurant. (RT 1489.) Appellant told Jodi D. that he wanted to show her the new restaurant. He directed her to a closed restaurant and told her that he was going to change the restaurant's name to "Mr. Kelly's." (RT 1490.) Jodi D. believed everything he told her. (RT 1490-1492.) Appellant then directed Jodi D. to drive to a gas station, which he also claimed to own. (RT 1493.)

Next, appellant had Jodi D. drive to convenience store. (RT 1495-1496, 1584.) Upon leaving the convenience store, appellant told Jodi D. that he wanted to show her some rooms he rented for nights he worked late and did not want to drive home. Again, Jodi D. believed him. (RT 1496.) Leaving her car parked in front of the convenience store, the pair walked to a boarding house located around the corner. (RT 1497, 1586.) Jodi D. expressed concern about the predominately African American neighborhood, which was one of the worst in the area and considered "very unsafe"; however, appellant reassured her and she felt protected by him. (RT 1498-1499, 1587.) They returned to the convenience store, purchased two beers, and then went to appellant's second-floor room to talk. (RT 1500-1502, 1590.) It was about 3:00 a.m. (RT 1547-1548, 1585.)

Inside appellant's boarding house room, the television and the radio were both on. Appellant and Jodi D. sat on the bed as he showed her recipes

for his new restaurant. (RT 1504.) Appellant kissed her. (RT 1505.) Surprised, Jodi D. responded for a second or two; but then, she pushed appellant away, telling him that she was "not interested" and that she thought they were "going to talk." (RT 1505-1506, 1592.) Not yet fearing appellant, Jodi D. resumed talking with appellant, but he kissed her again. (RT 1506-1508.) She pushed him away again, and told him that she was leaving. (RT 1508.)

As Jodi D. headed for the door, appellant put his hand on the door's dead bolt and told her that she could not leave. (RT 1508, 1510.) Appellant said that their earlier argument regarding the food order had "really pissed [him] off," but he told her that he had "really screwed up" because he had not realized "how sweet" she was. (RT 1510-1511.) When Jodi D. repeated that she was leaving, appellant said she could not leave because the "Yeh Wehs" – a dangerous African American cult known for committing crimes – were "out there," that the Yeh Wehs had her car, and that they did not "like White people very much." (RT 1511-1513.) Jodi D. became frightened at the mention of the cult. (RT 1512.) Appellant told her not to worry because he would get her out of there, but first he "need[ed] one thing" from her. (RT 1513-1514.)

Appellant grabbed Jodi D.'s shirt and quickly took it off. (RT 1515, 1517.) Realizing that he intended to rape her, Jodi D. began crying. (RT 1515-1516.) Locked in room in a bad neighborhood without her car, Jodi D. felt that she could not overpower appellant, and she believed he would hurt her badly or kill her if she resisted. (RT 1517.) Appellant took off the rest of Jodi D.'s clothes within seconds, repeatedly telling her that he was "not going to hurt [her]" and "just want[ed] to love [her]" and "to be next to [her]." (RT 1518-1519.) Jodi D. continued to cry. (RT 1518.) Pushing Jodi D. onto the bed, appellant disrobed as she pleaded with him not to "do this to [her]." (RT 1518-1520.) Appellant got on top of Jodi D. and started forcing her legs apart. (RT

1520.) Jodi D. resisted and dug her fingernails into him, but appellant overcame her strength. (RT 1520-1521.) She told him she was a virgin,[23/] but this did not stop appellant. (RT 1522.) Appellant told her not to scream because no one would hear her and no one would care. (RT 1561.) He had started to penetrate her vagina with his penis. (RT 1523.) Jodi D., knowing that he was going to rape her, told appellant to "put on a condom." (RT 1523, 1527-1528.) Appellant got a condom as Jodi D. continued to cry. (RT 1524.) She did not try to escape because she was naked, the room was small, she believed her car was gone and she was in a bad neighborhood. (RT 1524-1525.) She also felt appellant might be dangerous if she tried to resist (RT 1525), and believed he might be armed with a knife (RT 1567-1568). After he put on the condom, appellant penetrated Jodi D., raping her for "[a] couple of minutes." (RT 1528.) Appellant did not ejaculate. (RT 1529.)

After the rape, appellant did not let Jodi D. get dressed or leave; rather, he began talking to her "like [they] were buddies or something." (RT 1529-1530.) Appellant repeated that he "would get [her] out of there," but that the Yeh Wehs were still around. (RT 1529-1530.) Jodi D. believed that the Yeh Wehs were outside. (RT 1530-1531.) Jodi D. tried to get appellant to let her go, telling him that her parents and boyfriend would be looking for her. But she feared angering appellant because she believed he would "beat [her] to a pulp or kill [her]." (RT 1531.)

After 20 or 30 minutes, appellant pushed Jodi D. back on the bed and raped her a second time as she cried. (RT 1534-1537.) Jodi D. believed that appellant would kill her because "everything was calculated" and "he was strong and . . . domineering." (RT 1538.) Jodi D. felt "dominated" because repeatedly during the night appellant stood over her and walked around her as

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23. Jodi D. had lost her virginity only about three months before. (RT 1522.)

she sat naked on the bed. (RT 1542.) The second rape lasted for five to ten minutes. (RT 1537.) Afterward, appellant got up and walked away. (RT 1538.)

Appellant did not let Jodi D. get dressed or use the bathroom, which was located outside the room. (RT 1538, 1541.) Instead, he had Jodi D. urinate in a paper cup. (RT 1539.) He told Jodi D. to look out the window for her car, telling her the Yeh Wehs still had her car. (RT 1539-1540.) He also looked through Jodi D.'s purse and opened her checkbook, which contained Jodi D.'s full name, her Social Security number, her parents' address (where she had lived until a few months before) and their telephone number. (RT 1566-1567.) Appellant wrote down this information, telling Jodi D., "There is always a way." (RT 1567.)

About 20 to 30 minutes after the second rape, appellant raped Jodi D. a third time. (RT 1541-1542.) Appellant turned her over. Realizing that appellant intended to sodomize her, Jodi D. turned herself back over. (RT 1549.) Trying to stay alive, Jodi D. decided to play along with appellant. She pretended to enjoy the vaginal intercourse, hoping that appellant would be satisfied and let her go. (RT 1549-1551.) Again, appellant did not ejaculate. (RT 1551.)

After the third rape, Jodi D. asked to leave. Again, appellant told her that the Yeh Wehs had not returned with her car. (RT 1551.) Then, he asked her if she was going to report him, and told her that he would accompany her to the police station. (RT 1544.) Jodi D. did not believe him. As a survival tactic, Jodi D. told him that she would not go to the police, that she planned to go home and "forget this ever happened." (RT 1545.)

Appellant told Jodi D. to give him her jewelry. (RT 1477-1478, 1543, 1545.) Jodi D. refused. (RT 1545.) Crying, she told appellant that he had "taken everything else from [her]." She offered to give him her wallet and her

money, but told him he could not have her jewelry. (RT 1546.) After Jodi D. refused to give him the jewelry at least twice, appellant told her to give it to him or he "would have to do something drastic." Hearing this, Jodi D. gave him all her jewelry. (RT 1547.) Jodi D. asked him not to rape her again. Appellant told her, "Don't worry, baby. After this[,] it will be over." When Jodi D. asked if he was going to kill her, appellant replied, "No, it's not worth it to me." Jodi D. did not believe him. (RT 1560.)

At about 6:00 or 7:00 a.m., appellant raped Jodi D. a fourth time. (RT 1548, 1553, 1560.) Afterward, appellant told her "they" – the Yeh Wehs – still had not returned with her car. But, Jodi D. began to believe there was no "they" and that her car had been outside the entire time. (RT 1533.)

At about 8:00 a.m., appellant told Jodi D. to take a shower. After Jodi D. initially refused, appellant gave Jodi D. her bra and underwear. Again, he told Jodi D. to take a shower; he was holding the rest of her clothes. The bathroom was outside the room and appellant opened the door. (RT 1557.) Believing he was going to let her go, Jodi D. tried to grab her keys, but appellant prevented her from reaching them. Still hoping to escape, Jodi D. went into the bathroom, but appellant followed her. (RT 1558.) While appellant guarded her, Jodi D. showered. (RT 1560.) When Jodi D. returned to the bedroom, appellant said they were going to leave. (RT 1558.) She got dressed, picked up her keys and her purse, and waited for appellant to get dressed. Finally, after keeping Jodi D. in the room for six hours and raping her four times, appellant opened the bedroom door and left with Jodi D. (RT 1559, 1593.) It was about 9:00 a.m. (RT 1540, 1594.)

Jodi D. asked for her jewelry, but appellant told her that he "needed it for something." (RT 1561.) Jodi D. convinced appellant that she would not report the incident to the police if he returned her jewelry. (RT 1562-1563.) Appellant told her to meet him in front of the restaurant the next day, at which

time he would return her jewelry. (RT 1561-1563.) Jodi D., however, had decided to report the incident. (RT 1564.) Jodi D., with appellant next to her, walked to her car. (RT 1564-1565.) The car did not appear as if it had been moved during the night. (RT 1564.) Jodi D. got in the car. Appellant leaned down, told her he would meet her at the restaurant the next day, and squeezed her arm. (RT 1565.) Jodi D. told him, "Get your fucking arm off of me," pushed him away, and slammed the door. Appellant walked away. When Jodi D. drove around the corner to note the location's address, she saw appellant re-enter the boarding house. (RT 1566.)

Later that day, Jodi D. reported the rapes to the police. (RT 1570.) The next day, appellant was arrested in his boarding house room. (RT 1602.) He ultimately accepted a plea bargain to lesser charges and time served. (RT 1570, 1599.)

b. The 1991 Rape And Robbery Of Kim V.

In 1991, 22-year-old Kim V. of South Africa traveled to Miami as part of a planned six-month visit to the United States. (RT 1610-1611, 1613.) Kim V. met appellant at a youth hostel where they were both staying. (RT 1613-1616, 1620.) Appellant, who seemed friendly, told Kim V. that he was chef and could get her a job. (RT 1614, 1616-1617.)[24/] The day following their initial meeting, appellant introduced Kim V. to two of his friends and, over the next five days, Kim V. socialized with the three of them on "numerous occasions." (RT 1620-1631.) During this time, appellant never made "passes" at Kim V. (RT 1631.) Appellant gave the impression that his family owned restaurants and that he was financially "well off," telling Kim V. that he did not need to work because he received an "allowance" from his mother. (RT 1635-

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24. In reality, appellant was unemployed after being fired from his job as a cook. (RT 1616.)

1636.)

One day, appellant and Kim V. spent the afternoon and evening in the Coconut Grove area of Miami, having lunch, doing some sightseeing and listening to jazz bands at a couple of bars. (RT 1633-1635, 1639-1642, 1744-1745.) At the bars, they drank beers, but the alcohol appeared to affect appellant only slightly. (RT 1649, 1745.) This was the first time Kim V. had spent any substantial time alone with appellant. (RT 1642.) Appellant seemed friendly and gave her a "friendship rose"; Kim V. trusted him. (RT 1643-1644, 1651.) The pair left the Coconut Grove area around 11:30 p.m. or 11:45 p.m. (RT 1642, 1645.) During the taxi ride to back to the hostel, appellant dozed off for a time. (RT 1746.) At the hostel, appellant purchased some beers and began drinking one of them as he and Kim V. walked to appellant's room. (RT 1746-1747.) Kim V., who was no longer staying at the hostel, went to appellant's room to retrieve some items she had left there earlier that day. (RT 1637-1639, 1645.)

When appellant entered the room, he drew the blinds and turned on the radio and television. (RT 1654, 1667-1668, 1747.) Appellant went into the bathroom. Kim V. waited for him because she wanted to say goodbye. (RT 1647.) When appellant exited the bathroom, his shirt was unbuttoned and his trousers were unzipped. (RT 1657.) Swaying his hips in a suggestive manner, appellant told Kim V. that she was "more than his home girl." (RT 1670-1671.) Kim V. became nervous, told appellant she was leaving, and began moving toward the door. (RT 1659.) But when Kim V. reached the door, appellant rushed toward her, bolted the door, and told her that she could not leave. (RT 1660-1661.) Kim V. began screaming, but appellant covered her mouth with his hand in a very forceful manner and said, "Shut up, bitch." (RT 1661-1662.) With his hand still covering her mouth, appellant dragged her to the room's kitchen area and told her he would kill her if she screamed. (RT 1662-1664.)

Kim V. feared for her life. (RT 1665-1666.) Appellant placed a knife to Kim V.'s throat and dragged her toward the bed. (RT 1667.)

Appellant pushed Kim V. down onto to the bed. Even though appellant's hand covered her mouth, Kim V. began screaming; however, the television was playing loudly. (RT 1673.) Appellant held Kim V. down as she screamed and struggled unsuccessfully. (RT 1675.) While she was pinned down, appellant forced Kim V.'s face into the pillows with one hand while he used his other hand to lift up her shirt and bra, exposing her breasts. (RT 1676.) Still covering her mouth, appellant rubbed his hand over her breasts and then lifted her skirt and pulled off her underwear. (RT 1677-1678.) Appellant shouted at Kim V. to spread her legs. (RT 1676, 1678.) Kim V. refused, tightly crossing her legs together. (RT 1678-1679.) Appellant screamed at her again, "Spread your legs." (RT 1679.) Kim V. shouted back, "No." (RT 1679.) Appellant had placed the knife on the bed next to the pillow. Appellant forced Kim V.'s legs apart with his hand, laid on top of her, and took off her clothes. (RT 1680-1681.)

Appellant penetrated Kim V.'s vagina with his penis. (RT 1681, 1685.) As he raped her, appellant continued to exert pressure on Kim V.'s face and neck. He also held her down by pulling her hair. (RT 1685.) The rape lasted for minutes. Afterward, appellant continued to lay atop Kim V., holding her down with his body weight. As he laid on her, appellant told Kim V. that she had "owed him." (RT 1686.) Crying and thinking that "it was all over," Kim V. tried to move; however, appellant commanded her to "stay on the bed[.]" (RT 1687-1689.) Each time she tried to move from the bed, appellant told her in a "harsh, aggressive" tone that he would "kill [her] if [she] moved." (RT 1687-1688.) She believed him. (RT 1688.)

At some point, appellant removed Kim V.'s clothes. (RT 1689.) As she sat naked on the bed, appellant stood above her and looked at her. (RT 1688-

1690.) He then looked through Kim V.'s money bag, which contained her money, passport, train ticket, and airline ticket. (RT 1671-1672, 1690, 1693.) While looking through Kim V.'s documents, appellant appeared to make a telephone call and speak with a person named "Kenny," instructing him to place a hold on Kim V.'s passport and to cancel her train and airline tickets. (RT 1693-1694, 1696-1697.) Kim V. feared that she would not able to get back home. (RT 1695.) Based on the telephone call, Kim V. believed that appellant was "linked to something" and that other people were involved, leading her to believe that these people would track her down if she escaped. After appellant looked through the documents, he put them out of Kim V.'s reach and told her not to touch them. (RT 1696.) Appellant told Kim V. that he was "in trouble with the Federal government" and that he wanted her to smuggle some money out of the country for him. (RT 1692.) Appellant told Kim V. he had "done this" – raping her and taking her documents – so that she would smuggle the money out of the country. (RT 1698-1699.) When Kim V. told him she would not do it, he threatened to "get" her boyfriend back in South Africa. Kim V. finally agreed in hope that he would leave her alone. (RT 1699.) But, appellant accused her of lying. (RT 1700.)

Appellant came toward Kim V., who was still naked on the bed, stood over her and then tried to rape her again. (RT 1700.) Kim V. resisted. Appellant pulled her hair back and covered her mouth with his hand as she screamed. When Kim V. forced her legs closed, appellant repeatedly told her he would kill her if she did not open them. (RT 1701.) His tone was aggressive and demanding, and Kim V. believed him. (RT 1701-1702.) Fearing for her life, Kim V. did not fight as long as she had during the first rape. During the second rape, Kim V. fought appellant by trying to push him off of her, but she was not strong enough. (RT 1702-1703.) Nothing she did -- her strength, her screams, her crying -- had any effect on appellant. (RT 1703-

1704.) The second rape lasted longer than the first. After he ejaculated, appellant continued to lay on top of her. (RT 1703.)

Appellant then began crying. In an apologetic tone of voice, appellant told Kim V. that he "didn't mean to do what he'd done" and repeatedly said he was "sorry." Appellant's statements did not make Kim V. feel better. (RT 1704.) But, hoping to convince him to let her go, Kim V. repeatedly told appellant that she forgave him. She still thought he would kill her. (RT 1705.) Appellant laid on the bed, crying; he told Kim V. to trust him and to lie on top of him. Kim V. thought that he would let her go. (RT 1706.) Appellant allowed Kim V. to smoke a cigarette, but he did not let her get dressed or get off the bed. (RT 1706-1707.) Realizing that appellant left her alone while she smoked, Kim V. smoked four cigarettes in a row. (RT 1707.) When appellant caught onto Kim V.'s cigarette-smoking strategy, he suddenly became aggressive and started shouting again. (RT 1707-1708.)

Appellant stood over the naked Kim V., pushed her onto the bed again, and raped her a third time. (RT 1709-1710, 1713.) Kim V. struggled for a bit, but gave up when she realized it was futile. (RT 1710-1711.) Appellant pushed on her face and neck; Kim V. believed he was trying to kill her. She held her breath and let her body "go limp" so that appellant would believe he had succeeded in suffocating her. But, appellant did not stop. (RT 1711.) Even though Kim V.'s body appeared lifeless, appellant pulled her hair and choked her "harder and harder" as he raped her. (RT 1712-1713.) Kim V., needing air, started breathing again. When appellant saw that she had been pretending, he became more angry and violent. (RT 1713.) Despite his increased aggression, Kim V. remained limp. Appellant ejaculated, and then told Kim V. to lie on top of him again. (RT 1714.)

Appellant then raped Kim V. a fourth time. Afterward, he repeatedly insisted that Kim V. lie on top of him, but she refused. Eventually, as a

compromise, she put her head on his chest. (RT 1714.) When appellant fell into a deep sleep, Kim V. got off the bed. (RT 1715-1717.) She put on her clothes, and collected her jewelry and documents that appellant had taken from her. (RT 1718.) The telephone rang, but it did not awaken appellant. (RT 1719-1720.) Kim V. picked up the receiver and laid it next to the telephone. (RT 1720.) She then unlocked the two door locks and left the room. (RT 1721.) She had been in the room for five hours. (RT 1689.)

That day, Kim V. reported the assault to the police. (RT 1723.) But, when the police arrived at the hostel, appellant was gone. (RT 1724.)

B. Guilt Phase – Defense Evidence

Appellant presented no evidence on his behalf. (RT 2037.)

C. Penalty Phase – Prosecution Evidence

1. The Rape Of Esther D.

In 1984, 24-year-old Esther D. was working as a hostess at restaurant in the small town of Morristown, New Jersey. (RT 2341-2343, 2347.) Appellant, who was new to town, worked as a cook in the restaurant. (RT 2345-2346.) At appellant's invitation, Esther D. joined appellant and a group of co-workers at a new discotheque that had opened next door to the restaurant. (RT 2348-2350, 2353-2354.) Once inside the disco, everyone ordered drinks. (RT 2355.) Appellant first ordered a mixed drink; later, he ordered a bottle of champagne because it was "the best and he only wanted the best." (RT 2357, 2407-2408.)[25/] He told Esther D. that the restaurant's owner, Tony, had taught him how to spend money and never run out. (RT 2361.) Appellant also told

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25. Prior to walking over to the disco, appellant had a beer at the restaurant. (RT 2407.)

her that he had known Tony for a long time, that they were "mafia related," that Tony "had done [appellant's] family wrong and that Tony owed them." (RT 2358.) Esther D. believed him. (RT 2359.) Appellant said that he always got what he wanted and that he wanted her. (RT 2364.) Esther D. replied that she was not interested, and instead wanted to be friends first. (RT 2363.) Appellant seemed receptive to friendship. (RT 2363-2364.)

It was late when the group decided to leave the disco. (RT 2362, 2365.) Appellant, Esther D., and Vic (the restaurant's head cook) returned to the restaurant where they talked together and appellant had a beer. (RT 2373, 2407-2410.) Appellant never appeared drunk. (RT 2416.) Esther D. began walking home, but appellant asked her to accompany him to his room so that they could continue their conversation. (RT 2363, 2365.) He assured her that they would "just sit and talk." (RT 2363.) Esther D., feeling reassured, went to appellant's hotel room with him. (RT 2366.) Vic had also planned to join them. (RT 2373.)

Once inside appellant's room, appellant and Esther D. talked more. (RT 2366.) Esther D. did not want to watch television, but appellant turned it on anyway. (RT 2366-2367.) When Vic did not arrive, Esther D. telephoned him and asked him to pick her up. (RT 2368, 2372-2373.) Vic said he would be there in 25 minutes, but Esther D. asked him to "make it sooner" because she wanted to leave. (RT 2373.)

Twice, appellant had tried to kiss Esther D., prompting her to tell him that she needed to leave. (RT 2370-2371.) After the second time, appellant bit Esther D.'s nose. (RT 2371-2372, 2374.) Again Esther D. told him she needed to leave. (RT 2372.) When Esther D. told him that she was going to walk home alone, appellant replied, "Oh, you think you are tough, huh?" (RT 2367-2371.) Esther D. stood up to leave, but appellant angrily told her to sit down. (RT 2369-2370.) Esther D. became nervous. Again she told appellant she had

to go, but again he yelled at her to sit down. (RT 2370.) Afraid, Esther D. began crying. (RT 2376-2377.) Again he tried to kiss her, and again Esther D. told him she wanted to leave. (RT 2370.) Appellant grabbed Esther D.'s arm and threw her onto the bed. (RT 2372.) Esther D. landed on her back, but got up. Appellant locked the room door. Esther D. was afraid. (RT 2375.)

Appellant walked toward Esther D.. He told her to take off her dress or else he would rip it off. He also said, "You are not going anywhere." (RT 2378.) Esther D. asked if he was joking and again said she needed to leave. (RT 2379.) Appellant told her to sit down because he was not playing with her. Esther D. sat down in a chair. (RT 2380.) He repeatedly told her to take off her dress or he would rip it off, ultimately saying that he was not going to tell her again. (RT 2381-2382.) Scared, Esther D. slowly began undressing. She knew appellant was going to rape her, but she hoped it would not happen. (RT 2382.)

While Esther D. undressed, appellant removed Esther D.'s driver's license from her purse and began dialing the telephone. (RT 2382-2383.) But the telephone call appeared not to go through, and appellant screamed that something was wrong with the telephone. When Esther D. had undressed completely, appellant angrily told her to get dressed. Quickly, Esther D. dressed. But when she had dressed, appellant yelled at her to take off her clothes again. (RT 2383.) Appellant placed another telephone call, saying into the telephone receiver: "Just listen. Take down this information. If anything happens to me, if anything happens to me, I want her killed." He then read off Esther D.'s name and address from her driver's license, and read off the name and address of her dentist from a card taken from her purse. Appellant said into the telephone receiver: "If anything happens to me, you get them both. You get her first." Again Esther D. asked to leave, but appellant told her he was going to teach her a lesson. Appellant told her that someone was outside and, if she tried to escape out the window, the person would shoot her, if the fall

from the window did not kill her first. (RT 2384.)

Appellant also stated that he had a gun underneath the mattress. (RT 2385.)[26/] Esther D. tried to get off the bed, but appellant tried to smother her with a pillow. She fought him, but appellant was much bigger and stronger. (RT 2385, 2387). When Esther D. began screaming, appellant turned up the volume on the radio. (RT 2385-2386.) Esther D. asked appellant if he was going to kill her. He answered that he had not decided yet. Esther D. replied, "If you are going to kill me, why don't you kill me first. That way I can die with my dignity." (RT 2386.) Appellant began attacking her. (RT 2387.) Esther D. scratched appellant's face and screamed "Fire," hoping someone would hear her. (RT 2387.) Appellant tried to rip out Esther D.'s tongue to stop her from screaming. (RT 2387-2388.) He grabbed Esther D.'s throat. (RT 2387.) Appellant bruised her mouth and throat, and scratched her with his fingernails. (RT 2388.)

He began raping her. (RT 2390.) During the rape, appellant choked her the entire time, causing Esther D. to "black[] out" a few times. (RT 2396-2397.) The rape lasted 15 to 20 minutes. (RT 2392.) Instead of ejaculating inside of Esther D., appellant ejaculated onto the bed, telling her, "I don't want to leave any evidence." (RT 2391.) When Esther D. regained consciousness after being choked again by appellant, he raped her a second time. (RT 2397.)

After the second rape, Esther D. got off the bed and walked to the corner of the room where she began acting like she "was crazy" or "had snapped" so that appellant would leave her alone. Appellant dozed off; however, he awoke each time Esther D. moved. (RT 2393.) When Esther D. approached the window, appellant awoke and told her that the person waiting outside would shoot her. (RT 2393-2394.) A couple of times, Esther D. asked appellant why he was raping her. (RT 2388-2389.) Appellant answered that he "had never

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26. Esther D. never saw the gun. (RT 2414.)

seen anyone as beautiful as [her]." (RT 2389.) When Esther D. told him he would "get in trouble" if he raped her, appellant replied he had "just gotten out of jail and[,] with his connections," law enforcement "couldn't touch him." (RT 2391.) He also told her that he was "in" with Tony, that Tony was "mafia related" and that "nobody" – meaning Esther D. – "leaves Tony." She assured him that she was "not leaving Tony." (RT 2394.)

Over the course of the night (from about midnight to dawn), appellant raped Esther D. six more times. (RT 2394-2395.) He attempted to sodomize her, but Esther D. prevented him from penetrating her by squeezing her body tightly. (RT 2395.) At some point during the night, appellant asked Esther D. if she was homosexual. She lied, and said yes. (RT 2397.)[27/] Appellant responded, "I can't belief [*sic*] I picked the wrong fuckin' girl." (RT 2397-2398.) Appellant told Esther D. that his mother was dead and that he had been on his own since his was 15 years old; in reality, however, his mother was alive and living in Chicago. (RT 2418.) He also expressed animosity toward women, telling Esther D. that women had caused the bite marks on his face and chest. (RT 2418-2419.)

When appellant fell asleep again, Esther D. made noises to test whether he was asleep. (RT 2398.) She picked up her clothes – including her bra and stockings, which she feared he could used to strangle her with if he awoke – but she left her purse behind. (RT 2398.) She also took the disposable razors from the bathroom so that appellant could not later claim that the scratches to his face (inflicted by Esther D.) had been shaving cuts. (RT 2399.) Esther D. eased the chain off the door, open it, and ran out of the room. She ran down the stairs as she put on her dress. (RT 2400.) As she ran out of the hotel, she yelled at a man to call the police. (RT 2400.) Running away from the hotel, Esther D. saw

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27. Due to her rapes by appellant, Esther D. explained at trial that "now I am. I don't take men now." (RT 2397.)

an acquaintance driving down the street, flagged him down, and had him take her to the police station. (RT 2401.) The police took her to the hospital where a rape kit was performed. (RT 2401-2402.)

Esther D. testified before a New Jersey grand jury, and appellant was indicted. (RT 2402-2403.) However, pursuant to a plea bargain, appellant served only 364 days in prison. (RT 2404.) When Esther D. learned of the plea bargain, she vomited. (RT 2405.) After his release, appellant returned to Morristown. (RT 2404.) Over a one-month period, Esther D. saw appellant in the town four times. On these occasions, he stared at her, came closer to her, and stared again. (RT 2404-2405.) On one occasion, appellant walked past her and said he was going to "get" her; on another occasion, he told her that he was "going to kill [her]." (RT 2405.)

2. The Impact Of Sara Weir's Murder On Her Family

Sara Weir's mother, Martha Farwell, testified about the impact of Weir's loss on the family. She recalled her shock and horror of learning that her daughter had been missing for week, and the family's search for Sara. (RT 2436-2443.) Farwell recounted the devastation of being contacted by homicide detectives on September 16, 1993, and then learning the next day that the body had been positively identified as Sara's. (RT 2443, 2452-2453.) When Farwell told her two young sons that their sister had been stabbed and killed, the family was crying and they "were all just a wreck." (RT 2453.)

Farwell was "overcome with grief." (RT 2453.) She went into shock and, for a six-month period, she lost her short-term memory. (RT 2444-2445.) Farwell also had difficulty talking with people, collapsing and crying whenever she tried talking about her daughter's murder. (RT 2446.) Farwell experienced physical manifestations of her grief, including pain caused by tension, and she had nightmares for two to three months following her daughter's death. (RT

2446, 2449.) Prior to trial, Farwell did not know all of the details surrounding the death. She explained that it had been difficult not knowing exactly what had happened during the last moments of her daughter's life. (RT 2450-2451.) She attended every day of the trial for two reasons: first, to represent Weir; and second, to learn what had happened to her daughter, "[n]o matter how horrible it was." (RT 2450.) For Farwell, sitting through the trial "answered many, many of the questions" and it helped to make it clear to her that her daughter "really [was] gone." (RT 2450, 2452.)

Farwell expressed that she and her family would never "be done" dealing with Weir's death. (RT 2461.) Weir's two younger brothers, Jeffrey and Christopher, experienced difficulty believing that she was dead. After his sister's death, Jeffrey took on more responsibility as the older of the two remaining siblings, and became more shy and isolated at school. (RT 2457.) The two boys became more dependent, and Farwell became "more cautious" and "more reluctant" to let them "go do things." For Farwell and her husband (Weir's stepfather), their daughter's loss was "the loss of that future" that they would have had with her and, now, "[a]ll of those things . . . that we would have participated in together . . . are totally gone." (RT 2459.)

The jury also viewed a videotape of Sara Weir's life – photographs accompanied by music – that Farwell prepared as part of her victim impact statement. (RT 2463-2464, 2468; see Peo. Exh. 47 [videotape].) As she explained to the jury prior to viewing the videotape, Farwell thought of her daughter at different ages when she thought of her loss. (RT 2461-2462.)

D. Penalty Phase - Defense Evidence

Appellant presented no evidence on his behalf. (RT 2471.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR JAMES T. FOR CAUSE BASED ON HIS VIEWS REGARDING CAPITAL PUNISHMENT

Appellant contends the trial court erroneously excluded prospective juror James T.[28] for cause based on his views regarding capital punishment, requiring automatic reversal of the death judgment. (AOB 20-33.) Respondent disagrees. First, to the extent appellant raises any state or federal constitutional or statutory issue not squarely grounded in *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], those issues have been waived and are subject to procedural default since appellant failed to raise them in the trial court. (See *People v. Hines* (1997) 15 Cal.4th 997, 1035, opn. mod. 16 Cal.4th 825; *People v. Holt* (1997) 15 Cal.4th 619, 666-667; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 (*Alvarez*).) In any event, appellant's contention is meritless because the record contains substantial evidence supporting the exclusion of prospective juror James T. for cause.

A. Relevant Proceedings

Prospective juror James T. completed a written juror questionnaire, which contained a series of questions asking prospective jurors about their views regarding the death penalty and the penalty of life in prison without the

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28. The trial in this matter, which took place in 1995, occurred before the changes in the law that now provide for the redaction of jurors' identification information. (Code Civ. Proc., § 237, subds. (a)(2)-(a)(4)). Thus, the record in this matter refers to the jurors by name. Appellant also refers to jurors by name in his Opening Brief. But, in the interest of protecting the jurors' identity from further dissemination, respondent will refer to the jurors by first name and last initial.

possibility of parole. (Supp. I CT 284-293.) In response to a question asking about his "opinion of the death penalty," prospective juror James T. wrote: "I dislike the way it seems to be applied. Basically I'm opposed until it comes to very heiness [*sic*] murders. I dislike the thought of having to decide someone's fate." (Supp. I CT 285.) Another question asked, "What are your general thoughts about the purpose of imposing a death sentence on a person convicted of murder under special circumstance(s)?" Prospective juror James T. wrote: "To get an incorrigable [*sic*] criminal that committed a series of very heinous crimes away from society permanently." (Supp. I CT 288.) In response to a question asking whether he had any "spiritual and/or religious beliefs" that he felt pertained to the issue of the death penalty as opposed to life in prison without the possibility of parole, prospective juror James T. answered: "Thou shalt not kill." (Supp. I CT 287.) When asked if "given the choice between two penalties, life without the possibility of parole, or death, for a person convicted of first degree murder with special circumstances, would you always vote for life without parole?," prospective juror James T. circled "Not Certain" as his answer. He gave the same "Not Certain" answer to a question that asked if he "would always vote for death" under the same circumstances. (Supp. I CT 289.) One of the last questions asked, "You will be given instructions by the Court of law that applies in this case. Will you be able to follow all these instructions, even if you do not agree with them?" Prospective juror James T. answered, "No." (Supp. I CT 290.)

During voir dire, the trial court asked prospective juror James T. about his questionnaire answers regarding his views on capital punishment:

> The Court: Then you indicated that you may have a problem if we get to the penalty phase?
>
> Prospective Juror [James] T[.]: Yes, I'm just -- I'm basically against the death penalty except -- and then I'll throw out Oklahoma and Oklahoma City and things like this. Then I waffle when it gets to that. When it

gets to the very heinous type of situations, then I'm waffling. I'm basically against the death penalty but –

The Court: Could you see a situation where you could impose it?

Prospective Juror [James] T[.]: Yes. Oh, yes.

The Court: And then on Question 96,[29/] if you could take a look at that.

Prospective Juror [James] T[.]: Yes.

The Court: And you remember how you answered it?

Prospective Juror [James] T[.]: I believe I answered it -- other than reading it again, I would answer it yes.

The Court: Okay. Thank you.

(RT 586-587.)

Appellant's trial counsel also conducted voir dire of prospective juror James T. (RT 605-606.) After a brief colloquy concerning the prospective juror's planned trip to Las Vegas, appellant's trial counsel, Mr. Cohen, asked prospective juror James T. regarding his views on capital punishment:

Mr. Cohen: . . . Where do you put yourself on the extremes of always imposing the death penalty or never imposing the death penalty regardless of the facts of the case? Do you find yourself in either extreme or in the middle?

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29. Question 96 concerned a juror's ability to set aside penalty issues during the *guilt* phase of the trial, asking:

> Having answered the above questions regarding your views on the sentence of death or life in prison without the possibility of parole, should you be selected to sit as a juror on this case, do you feel you are able and willing to comply put aside any thought of concern relating to penalty issues *while you deliberate guilt or innocence* on these charges?

(Supp. I CT 290, italics added.) In his response, prospective juror James T. wrote: "Penalty has nothing to do with guilt or innocence." (*Ibid*.)

Prospective Juror [James] T[.]: Probably a little bit toward the not but it depends on the case. Like I explained to the judge, in some cases, like Oklahoma or anything like that, I'd just as soon go out and do the job myself.

Mr. Cohen: The case determines your mind?

Prospective Juror [James] T[.]: Absolutely.

Mr. Cohen: Do you find yourself then a person who doesn't want to be put in a general category but wants to look at each individual case to make the decision?

Prospective Juror [James] T[.]: Absolutely.

Mr. Cohen: That's how you feel?

Prospective Juror [James] T[.]: That's the way I feel.

Mr. Cohen: That's the way you feel it should always be done?

Prospective Juror [James] T[.]: Absolutely.

Mr. Cohen: Thank you very much.

(RT 606.)

Then, the prosecutor, Mr. Ipsen, questioned prospective juror James T. further about his views regarding capital punishment:

Mr. Ipsen: Mr. T[.], if the law is as I've described it in California, that the death penalty is the law and the jury is supposed to weigh the two factors and make a decision based on aggravating and mitigating, does that law [*sic*] you support?

Prospective Juror [James] T[.]: Yes.

Mr. Ipsen: I got the impression you indicated that over all you are an opponent of the death penalty.

Prospective Juror [James] T[.]: Basically but with provisos.

Mr. Ipsen: You say provisos. You mentioned the Oklahoma situation?

Prospective Juror [James] T[.]: There is an awful lot of these serial cases and things like this that crimes are so heinous beyond description as far as I'm concerned.

Mr. Ipsen: In what sense are you an opponent because I think many people would say yes, I think Oklahoma and serial killers –

Prospective Juror [James] T[.]: I have struggled with this my entire life. I've never really -- *morally I'm opposed to it because I don't think anybody really has a right to take another person's life regardless, and it doesn't make it any more right for the government to do it than it is for an individual to do it.*

Mr. Ipsen: Morally that's how you feel?

Prospective Juror [James] T[.]: *That's morally the way I feel.*

Mr. Ipsen: Have you ever been in a position where you had to deal with that struggle between what you think is morally correct and what the law says the juror is supposed to do? Have you ever been in this position before?

Prospective Juror [James] T[.]: No.

Mr. Ipsen: Do you know how you are going to resolve the struggle of what you feel your morality is and what the state law is as the judge tells you?

Prospective Juror [James] T[.]: That's where -- sooner or later I feel that if you are going to do an effective job as a jury, *if at all possible* you have to set your own inconsistencies aside and go with what the law says.

Mr. Ipsen: You are saying that you don't think you would have a problem doing something that you think -- I just feel like *you may be in a position of having to decide whether to vote for something which is immoral under your morality* but you think technically is favored by the government. [¶] You may weigh them and say yeah, Mr. Ipsen is right, there are a lot of aggravating factors, there aren't mitigating factors, *but I morally just can't support the death penalty. I have trouble with the idea that you would abandon your own morality*.

Prospective Juror [James] T[.]: *I have the same trouble*.

Mr. Ipsen: Are you the best -- we talked about the idea of the doctor before. I think -- I'm sure you understand that. You are an intelligent man, I can tell.

Prospective Juror [James] T[.]: Yes.

Mr. Ipsen: My sense is you might not be the best juror for a death penalty case although excellent for any other murder case or any other –

> Prospective Juror [James] T[.]: I suspect you might be right. I suspect you might be right.
>
> Mr. Ipsen: Do you feel this might not be the best type of jury to sit on?
>
> Prospective Juror [James] T[.]: I suspect you are probably right.
>
> Mr. Ipsen: Are there other laws that you have a moral conflict with what the law of the state is, like it's illegal to commit robberies, illegal to commit burglaries, illegal to shoplift? Do you support those laws?
>
> Prospective Juror [James] T[.]: It comes down, as far as I'm concerned, to the death penalty. The death penalty murder basically is the only thing that I'm aware of at this point in time where death is an option.
>
> Mr. Ipsen: Thank you.

(RT 618-621, italics added.)

The prosecutor moved to excuse prospective juror James T. for cause. (RT 635.) When the trial court asked if there was any objection, appellant's trial counsel responded:

> I better state something for the record or some appellate lawyer is going to scream I'm incompetent and I will because, although he definitely is a strong leaner against the death penalty, I have to agree with that, you know, he didn't say he would in all circumstances not impose it. [¶] He, of course, mentioned Oklahoma and very heinous, what he felt was very heinous, that he could impose it. So I don't think he is a person that qualifies on the prosecution's end to go by cause.

(RT 636.) The trial court disagreed, explaining:

> At first I tended to agree with you but then because he indicated on serial cases and, let's face it, if we do get into a penalty phase, some people might think your client is a serial criminal; *but then the more Mr. Ipsen questioned, it's clear to me that [prospective juror James T.] would never vote for the death penalty.*

(RT 636, italics added.) At the point, the prosecutor added, "Is morally opposed." The trial court concurred, "Yes, absolutely opposed to it." Appellant's trial counsel said nothing in response. Thereafter, the trial court excused prospective juror James T. (RT 636.)

B. Applicable Law

In *Wainwright v. Witt, supra,* 469 U.S. 412, the United States Supreme Court held,

> the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

(*Id*. at p. 424; see *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Crittenden* (1994) 9 Cal.4th 83, 120-121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) This Court applies the *Witt* standard in determining whether a defendant's state constitutional right to an impartial jury was violated by an excusal of a prospective juror "for cause" based on the prospective juror's views of the capital punishment. (*People v. Ghent* (1987) 43 Cal.3d 739, 767; see *People v. Griffin* (2004) 33 Cal.4th 536, 558.) A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins* (2000) 22 Cal.4th 900, 986-987.) The critical question is "whether the juror's view about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*. [Citations.]" (*People v. Heard* (2003) 31 Cal.4th 946, 958-959, internal quotation marks omitted, italics in original; *People v. Hill* (1992) 3 Cal.4th 959, 1003.)

"Substantial evidence is the standard of review applicable to a finding on the potential effect of a prospective juror's views related to capital punishment. [Citations.]" (*People v. Griffin, supra*, 33 Cal.4th at p. 558.) The same standard applies to "the threshold finding regarding the nature of such views: Such a finding, [this Court] [has] stated, is generally binding if the prospective juror's responses are equivocal . . . or conflicting. [Citations.]" (*Id.* at pp. 558-559, ellipses in original, internal quotation marks omitted; see *People*

v. Cunningham (2001) 25 Cal.4th 926, 975; *People v. Bradford* (1997) 15 Cal.4th 1229, 1319; *People v. Mayfield* (1997) 14 Cal.4th 668, 727; *People v. Crittenden, supra*, 9 Cal.4th at p. 122; see also *Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426.) This Court recently reiterated that under this standard,

> "we pay due deference to the trial court, which was in a position to actually observe and listen to the prospective jurors. Voir dire sometimes fails to elicit an unmistakably clear answer from the juror, and there will be times when 'the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" [Citation.]

(*People v. Griffin, supra*, 33 Cal.4th at p. 559, brackets and ellipses in original, quoting *People v. Cain* (1995) 10 Cal.4th 1, 60, quoting in turn, *Wainwright v. Witt, supra*, 469 U.S. at p. 426.)

C. Substantial Evidence Supports Prospective Juror James T.'s Excusal For Cause

Applying theses principles to the instant matter, substantial evidence supports the trial court's findings that prospective juror James T. held views regarding capital punishment that would prevent or substantially impair his ability to perform his duties. (See *Wainwright v. Witt, supra,* 469 U.S. at p. 424.) The record supports the trial court's conclusion that prospective juror James T. "would never vote for the death penalty." (See RT 636.)

Prospective juror James T., in his questionnaire answers and responses to voir dire by the trial court and appellant's counsel, expressed reservations about the death penalty. For example, when asked in the juror questionnaire about his opinion concerning the death penalty, he wrote that he was "[b]asically opposed until it comes to very heiness [*sic*] murders" and that he "dislike[d] the thought of having to decide someone's fate." (Supp. I CT 285.) Similarly, during voir dire, he told the trial court that he was "basically against

the death penalty except" in situations like the Oklahoma City bombing case "and things like this." He explained that "[w]hen it gets to the very heinous type of situations, then I'm waffling." (RT 586.) Prospective juror James T. then stated that he could "see a situation" where he could impose the death penalty. (RT 586.) Later, when asked by appellant's trial counsel where he would put himself – "on the extremes of always imposing the death penalty or never imposing the death penalty regardless of the facts of the case" or "in the middle" – prospective juror James T. explained that he was "[p]robably a little bit toward the not" imposing the death penalty, but added that it depended on the case. He commented that "in some cases, like Oklahoma or anything like that, I'd just as soon go out and do the job myself." (RT 606.)

But, under questioning by the prosecutor, prospective juror James T.'s impairment crystallized. Initially, prospective juror James T. affirmed his support for the state law providing for the death penalty and the jury's duty to weigh aggravating and mitigating factors. (RT 618.) Then, however, he again reiterated that he was "[b]asically" opposed to the death penalty, "but with provisos." (RT 619.) When the prosecutor asked him about the parameters of these "provisos," noting that he had mentioned the Oklahoma City bombing case, prospective juror James T. answered, "There is an awful lot of these serial cases and things like this that crimes are so heinous beyond description as far as I'm concerned." (RT 619.) Upon further questioning, however, he acknowledged that he had "struggled" with the death penalty for his "entire life." He then made an even more forceful statement, admitting, "*morally I'm opposed to [the death penalty] because I don't think anybody has a right to taken another person's life regardless, and it doesn't make it any more right for the government to do it . . . .*" (RT 619, italics added.) When asked by the prosecutor how he would resolve a struggle between his moral opposition and state law, prospective juror replied that, "to do an effective job as a jury [*sic*],

if it is at all possible you have to set your own inconsistencies aside and go with what the law says." (RT 620, italics added.) This answer, however, conflicted with his answer to a juror questionnaire question that had asked if he could follow the legal instructions given, "even if you do not agree with them." Prospective juror James T. had answered, "No." (Supp. I CT 290.) Toward the end of voir dire, the prosecutor (Mr. Ipsen) posed this type of situation to him:

> You may weigh them and say yeah, Mr. Ipsen is right, there are a lot of aggravating factors, there aren't mitigating factors, but *I morally just can't support the death penalty*. I have trouble with the idea that you would abandon your own morality.

(RT 620, italics added.) Prospective juror James T. agreed, stating: "I have the same trouble." (RT 620.)

Thus, the record establishes that prospective juror James T. gave equivocal and conflicting answers on his ability to impose the death penalty and then, after further questioning, he made statements that led the trial judge, who was viewing his demeanor, to concluded that this prospective juror could not, in good conscience, vote for death. These views are sufficient and ample evidence to support his exclusion for cause because his views on the death penalty would have substantially impaired his ability to perform his duties. (See *People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [under *Wainwright v. Witt,* trial court properly excused a prospective juror who found it "very difficult" to vote for the death penalty]; *People v. Griffin, supra,* 33 Cal.4th at p.559 & fn. 9 [trial court reasonably found that the prospective juror's views on the death penalty would substantially impair her ability to perform her duties where the prospective juror stated that she "wouldn't want to take that responsibility" for voting for death and that could not "say a definite yes or no" when asked if she could "ever impose the death penalty"]; *id*. at pp. 559-560 & fn. 10 [trial court properly excused another prospective juror for cause where prospective juror stated that "she supported the death penalty, [but] also stated she *did not know* whether she actually could vote to impose the death penalty – even in a case in

which she had concluded that the defendant deserved the death penalty[]"; italics added]; *People v. Cunningham, supra*, 25 Cal.4th at p. 982 [trial court properly excused prospective juror who "was undecided as to his ability to" impose the death penalty]; *People v. Samayoa* (1997) 15 Cal.4th 795, 823 [prospective juror properly excused for cause when, upon reflection he stated he had become "really nervous about the death penalty" and could not put aside his personal views]; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 [while some answers showed a willingness to follow the law and the court's instructions, other answers furnished substantial evidence of prospective juror's inability to consider a death verdict].)

The trial court explained that, "[a]t first," prospective juror James T.'s responses regarding his ability to impose did not render him ineligible because he had stated he could impose the penalty in a serial case and "some people might think [appellant] is a serial criminal; *but then the more Mr. Ipsen questioned*, it's *clear* to me that [prospective juror James T.] would *never* vote for the death penalty." (RT 636, italics added.) Thus, "the trial judge [was] left with the definite impression that [the prospective juror] would be unable to faithfully and impartially apply the law." (*People v. Griffin, supra*, 33 Cal.4th at p. 559, internal quotation marks omitted.) Indeed, trial counsel's less than heartfelt objection – "I better state something for the record or some appellate lawyer is going to scream I'm incompetent" – suggests that he was simply making a pro forma objection, particularly where he never challenged the trial court's later conclusion that prospective juror James T. was "absolutely opposed" the death penalty. (RT 636.) Because the trial judge could see and hear prospective juror James T., this Court must pay deference to the trial judge's determination. (*People v. Griffin, supra*, 33 Cal.4th at p. 559.) The trial court's determination as to the prospective juror's true state of mind, which as here is supported by substantial evidence, is binding on the appellate court.

(See *People v. Harrison, supra,* 35 Cal.4th at pp. 227-228; *People v. Bradford, supra,* 15 Cal.4th at p. 1329; *People v. Carpenter* (1997) 15 Cal.4th 312, 357; *People v. Mayfield, supra,* 14 Cal.4th at p. 727; *People v. Crittenden, supra,* 9 Cal.4th at p. 122.) Accordingly, prospective juror James T. was properly excused for cause.

Nonetheless, appellant contends that prospective juror James T. was erroneously excluded because his "answers on voir dire did not demonstrate an impairment of his ability to consider death as a possible punishment in appellant's case." While appellant concedes that the record reveals that prospective juror James T. "generally opposed" the death penalty, he argues that the record showed that prospective juror James T. "was in favor of it in some cases and could conscientiously consider all the sentencing alternatives in this case." (AOB 21.) As discussed below, appellant's arguments fail.

Appellant claims that the trial court and prosecutor were incorrect in concluding that prospective juror James T. was "unalterably opposed to the death penalty." (AOB 27.) But, in making this argument, he points only to the early part of prospective juror James T.'s voir dire. (AOB 27, citing RT 585-586.) A consideration of the *entirety* of his voir dire shows that prospective juror James T. gave conflicting and equivocal responses and, ultimately, made statements that he could not, in good conscience, impose the death penalty. Specifically, prospective juror James T. repeatedly stated that he was "basically opposed" to the death penalty, noting only the following exceptions: "very heiness [*sic*] murders" (Supp. I CT 285); "Oklahoma and Oklahoma City and things like this" (RT 586); "Oklahoma or anything like that" (RT 606); and, in response to his previous answer of the Oklahoma City bombing case, "serial cases and things like this" (RT 619). But, even in "very heinous type of situations," he acknowledged that he was "waffling" with respect to the death penalty. (RT 586.) Upon further questioning, he stated unequivocally,

"morally I'm opposed to [the death penalty] because I don't think anybody has a right to take another person's life regardless, and *it doesn't make it any more right for the government to do it* than it is for an individual to do it." (RT 619, italics added.) He emphasized, "That's morally the way I feel." (RT 619.) Ultimately, when the prosecutor voiced that he was having "trouble with idea that you would abandon your own morality," and thus proposed that prospective juror James T. could not support the death penalty even when there were "a lot" of aggravating circumstances and no mitigating circumstances, prospective juror James T. agreed that he had "the same trouble." (RT 620.)

The trial court's determination of prospective juror James T.'s inability to perform the duties of a juror was shaped over the course of voir dire, explaining that while "at first" his responses did not merit disqualification for cause, "the more [the prosecutor] questioned," it became "clear" that prospective juror James T. "would never vote for the death penalty." (RT 636.) Notably, when the prosecutor opined that prospective juror James T. was "morally opposed" to the death penalty, and the trial court added that the prospective juror was "absolutely opposed to it," appellant's trial counsel never challenged this characterization. (RT 636.) The trial court's determination as to the prospective juror's true state of mind is supported by substantial evidence and, thus, is binding on this Court. (See *People v. Harrison, supra*, 35 Cal.4th at pp. 227-228; *People v. Bradford, supra*, 15 Cal.4th at p. 1329; *People v. Carpenter, supra*, 15 Cal.4th at p. 357; *People v. Mayfield, supra*, 14 Cal.4th at p. 727; *People v. Crittenden, supra*, 9 Cal.4th at p. 122.)

Additionally, while appellant concedes that prospective juror James T. "expressed discomfort with the thought of the imposing the death penalty," he asserts that this was not "a legitimate basis" for his exclusion. (AOB 27; AOB 27-30.) In support of his argument, appellant relies on *People v. Stewart* (2004) 33 Cal.4th 425, 446-447 (*Stewart*), in which this Court stated that "a

circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his or her duties as a juror' under *Witt* . . . ." (*Id.* at p. 447, internal brackets omitted.) Appellant quoted that statement in his brief. (AOB 29.) But, notably, he omits the immediately succeeding sentence in *Stewart*, in which this Court explained:

> 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 the appropriate penalty under the law.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 447, italics added.)

Here, the record evidences this unwillingness or inability on the part of prospective juror James T. While prospective juror James T. initially told the prosecutor during voir dire that he could follow the law and weigh aggravating and mitigating factors (RT 618), he later admitted that, even in a situation where there were "a lot of aggravating factors" and *no* mitigating factors, he could not support the death penalty because he would have trouble abandoning his moral opposition to it (RT 620). His acknowledgment is given further weight by the fact that, in response to the juror questionnaire asking if he would be able to follow all of the trial court's instructions on the applicable law, "even if you do not agree with them," prospective juror James T. had answered, "No." (Supp. I CT 290.) Thus, the further examination of prospective juror James T. revealed not simply his "nondisqualifying concept of a very difficult decision to impose a death sentence," but rather the "disqualifying concept of substantial impairment of [prospective juror James T.'s] performance of his . . . legal duty[.]" (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.)

Equally untenable is appellant's claim that "the trial court failed to asked

the necessary questions in order to determine [prospective juror James T.'s] qualifications to sit on appellant's jury." (See AOB 31-32, footnote omitted.) As set forth above, prospective juror James T. was extensively questioned during voir dire about his views on the death penalty. (RT 585-586, 606, 618-621.) As result of this questioning, it was "*clear*" to the trial court that prospective juror James T. "would *never* vote for the death penalty." (RT 636, italics added.) Accordingly, no additional questions were required or necessary since the trial court was entitled to conclude, based on the substantial evidence, that there was no uncertainty regarding his views under the *Witt* standard at the time the challenge for-cause was granted. (Cf. *People v. Heard*, *supra*, 31 Cal.4th at p. 965 ["*If* the trial court remained *uncertain* as to whether [the prospective juror's] views concerning the death penalty would impair his ability to follow the law or to otherwise perform his duties as a juror," the trial court and the prosecutor were "*free*, of course, to follow up with additional questions."; italics added.]

II.

THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR CHERYL M. FOR CAUSE BASED ON BIAS

Appellant contends the trial court violated state statutory provisions, as well as his federal constitutional rights to an impartial jury, due process, and reliable sentencing determination in a capital case, when it erroneously removed prospective juror Cheryl M. on the prosecutor's challenge for cause. (AOB 34-47.) Respondent submits that the trial court acted within its discretion when it excused prospective juror Cheryl M. for cause because the same prosecutor, Mr. Ipsen, had successfully prosecuted her son's uncle for rape. Moreover, any error in excusing this prospective juror was harmless.

A. Relevant Proceedings

During voir dire, the prosecutor asked prospective juror Cheryl M. if her son, a minor whose last name was "Pleasant" and who lived with her (Supp. I CT 2567, 2571), was related to Keith Pleasant. (RT 527.) Prospective juror Cheryl M. answered, "Yes." The prosecutor indicated that he "may know him also," but he was "not sure it would be the same person." (RT 527.) When the prosecutor asked if Keith Pleasant was "around right now," prospective juror Cheryl M. answered "[n]o" and stated that her son had not seen Keith Pleasant in "10 years or so, maybe, or more." Thereafter, the trial court permitted the prosecutor to inquire further about Keith Pleasant outside the presence of the other prospective jurors. When asked if Keith Pleasant had been prosecuted on rape charges and was in prison, prospective juror Cheryl M. answered that he was in prison, but she "didn't know what the charges were." She stated Keith Pleasant was her son's uncle on his father's side, but she had never married her

son's father. (RT 528.)[30/] Prospective juror Cheryl M. declared, "I do know Keith Pleasant," but noted that her son did "not really know his uncle because [she] was never married to his brother." The prosecutor, observing that she "seem[ed] familiar" to him, asked prospective juror Cheryl M. if she had ever been in the courtroom during Keith Pleasant's trial. She answered "no," adding that she did not know "where he was in court or anything about him" and that her "son doesn't even know where his uncle is." She proposed that the deputy district attorney "might know [her]" because she worked at a local post office. (RT 529.)

When prospective juror Cheryl M. left their presence, the deputy district attorney explained to the trial court and appellant's trial counsel that he had successfully prosecuted Keith Pleasant, who was serving prison sentence of over 30 years for rape. (RT 529.) He indicated that he planned to challenge prospective juror Cheryl M. based on bias, stating:

> I think I'm going to make a motion because I don't know what her views are, how biased [*sic*] she can be since I prosecuted her son's uncle for rape and he's in prison for a long time. But anyway I guess I'll make that at the appropriate time.

(RT 530.)

Later, when the deputy district attorney made his challenge, he explained:

> [Prospective juror Cheryl M.], *I prosecuted her son's uncle as [sic] he's currently in prison for multiple rape charges* and I feel that, I don't know, *I feel I recognize her*. I don't question her word but *she was not giving me eye contact the whole time* and my senses were so strong to ask her about her relationship with Keith Pleasant. I just think that that relationship may interfere with her sitting as a juror.

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30. Prospective juror Cheryl M. described Keith Pleasant alternately as her son's uncle or great-uncle. (Compare RT 528 ["The father of my child is the brother of his son."] with RT 529 ["I do know Keith Pleasant but my son does not really know his uncle because I was never married to his brother."].)

(RT 538, italics added.)[31/]

Appellant's trial counsel objected to the bias-based challenge, arguing that there was insufficient cause to excuse prospective juror Cheryl M. because she had represented that she had not been in the courtroom during Keith Pleasant's trial, that she may have been recognizable from her employment at a local post office, and that she did not know anything about Keith Pleasant's case. He added that the prospective juror was "the only Black juror so far that has made it to the box." (RT 538.) The trial court rejected counsel's attempt to interject race into the challenge and excused prospective juror Cheryl M. for cause, explaining: "[L]ike the gentleman that was excused yesterday, he said everybody is green, and that's how I look at people. But I do understand that she is the only Black. I do think it's cause, though." (RT 538-539.)

B. Substantial Evidence Supports Prospective Juror Cheryl M.'s Excusal For Cause

A challenge of a juror for cause may be based upon actual or implied bias. (Code Civ. Proc., § 225, subd. (b)(1)(B) & (C).) Actual bias is "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

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31. Later, at a hearing concerning the excusal of another juror, the prosecutor repeated his grounds for the for-cause challenge of Cheryl M., stating:

> The Court removed a juror for cause because she was the – by common law [she] would have been the sister-in-law of a defendant I prosecuted. [¶] . . . [¶] I was bringing it to the Court's attention and I did feel that she may be biased because of that and that at some point in the process of this trial, that could be a factor in her decision if she knew, found out or learned of the fact that I was the prosecutor, which was very likely. Just by talked to people at home about the trial she could have found out Ipsen is the same person.

(RT 736.)

impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).) Implied bias is "when the existence of the facts as ascertained, in judgment of law disqualifies the juror." (Code Civ. Proc., § 225, subd. (b)(1)(B).) Code of Civil Procedure section 229 limits the causes for which a challenge for implied bias may be made to those set forth in that section. (*People v. Holt, supra,* 15 Cal.4th at p. 655.) Those causes include, "[t]he existence of a state of mind in the juror evincing enmity against, or bias towards, either party." (Code Civ. Proc., § 229, subd. (f).)

"In general, the qualifications of jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal. [Citation]." (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1036, internal brackets and quotation marks omitted.) When conflicting inferences are raised by a juror's responses, the trial court is generally in a preferable position to evaluate the presence of bias or lack of impartiality (*People v. Williams* (1988) 199 Cal.App.3d 469, 477-478), and the court's evaluation of the prospective juror's integrity and sincerity is accorded great deference (see *People v. Crittenden, supra*, 9 Cal.4th at pp. 122-123).

Here, the trial court did not abuse its discretion when it excused prospective juror Cheryl M. for cause. The *same* deputy district attorney had successfully prosecuted her son's uncle for rape, resulting in a long prison sentence. (RT 538.) Prospective juror Cheryl M. admitted knowing the uncle (RT 529), and her son lived in the same residence with her (Supp. I. CT 2567). In light of these facts, the trial court could have reasonably inferred that prospective juror Cheryl M. might harbor ill feelings amounting to bias. (See *People v. Morris* (1991) 53 Cal.3d 152, 184 [same deputy district attorney had prosecuted juror], overruled on another point by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *People v. Williams*, *supra*, 199 Cal.App.3d at pp. 476-478 [juror facing prosecution in case possibly filed by same deputy district

attorney]; see also *People v. Holt, supra,* 15 Cal.4th at p. 656 [prospective juror who had a pending lawsuit against the prosecutor's office, but nevertheless claimed that it would not affect her ability to be impartial, was properly excused for cause].) The trial court, which "was present and could observe [the prospective juror], could judge [her] credentials far better than an appellate court reading a cold record." (*People v. Carpenter, supra,* 21 Cal.4th at p. 1037 [trial court did not abuse its discretion when it excused *for cause* two prospective jurors after they had expressed concerns about how they would react to evidence of drug usage and one of whom also described two negative experiences with police].) Accordingly, because this Court must afford great deference to the trial court's evaluation regarding the presence of bias or impartiality, the trial court did not abuse its discretion when it excused prospective juror Cheryl M. for cause. (See *People v. Crittenden, supra,* 9 Cal.4th at pp. 122-123; *People v. Williams, supra,* 199 Cal.App.3d at pp. 477-478.)

Nonetheless, appellant claims that "no evidence" supported the excusal for cause. (AOB 37, italics omitted; see AOB 37-40.) In support of this argument, he argues that the "there was simply no question" of prospective juror Cheryl M.'s credibility because her denials of "any relationship with the man who was prosecuted by Mr. Ipsen or any knowledge of his criminal case . . . were uncontradicted," and the prosecutor did not question her word. (AOB 39.) Respondent disagrees. While prospective juror Cheryl M. was not related to Keith Pleasant by blood, he was her son's uncle, her son lived with her, and she admitted knowing the uncle. (RT 527-529; Supp. I. CT 2567.) Furthermore, although prospective juror Cheryl M. denied knowledge of Keith Pleasant's case and prosecutor stated that he did not "question her word" that she had not been present during Keith Pleasant's trial, the prosecutor's remark does not mean that he did not believe she was biased. He felt he recognized her

and "she was not giving [him] eye contact the whole time," such that his "senses were so strong to ask her about her relationship with Keith Pleasant." (RT 538.) The prosecutor's remark could be understood that, notwithstanding prospective juror Cheryl M.'s denial that she had been present in courtroom, he believed that bias was likely. (See *People v. Holt*, *supra*, 15 Cal.4th at p. 655 [trial court's statement that it "did not question [a prospective juror's] integrity when she said she would be fair" could have been "understood as a conclusion that notwithstanding [the prospective juror's] belief that she could be fair, the court believed that actual bias existed[]"].) The trial judge, who had the opportunity to observe her and thus could judge her credibility "far better" than this Court on a cold record, could have reasonably inferred that prospective juror Cheryl M. might harbor ill feelings amounting to bias. (See *People v. Carpenter, supra*, 21 Cal.4th at p. 1037.) Thus, it cannot be said that the trial court, which was in a "far better" position to judge a prospective juror's credentials, abused its discretion when excused prospective juror Cheryl M. for cause.

C. Harmless Error

Regardless, any error in excluding prospective juror Cheryl M. was harmless. "'The general rule is that an erroneous exclusion of a juror for cause provides no basis for overturning a judgment.' [Citation.]" (*People v. Holt*, *supra*, 15 Cal.4th at p. 656, internal brackets omitted [for-cause excusal of a prospective juror based on bias was harmless]; accord, *People v. Carpenter*, *supra*, 21 Cal.4th at p. 1037 [error, if any, in excusing two prospective jurors for cause was harmless].) To the extent appellant asks this Court to reconsider its position and instead conclude that the erroneous exclusion for cause of a prospective juror on grounds unrelated to death qualification amounts to structural error (AOB 41- 47), the request should be rejected. As appellant

himself acknowledges (AOB 41), a "[d]efendant has a right to jurors who are qualified and competent, not to any particular juror." (*People v. Holt*, *supra*, 15 Cal.4th at p. 656.) Appellant does not claim that the juror seated instead of Cheryl M. did not meet this criteria. Indeed, appellant admits "there is no indication that her exclusion skewed the seated jury in favor of the prosecution." (AOB 44.) Here, "[t]he actual jurors of this case were qualified and competent." (*People v. Carpenter*, *supra*, 21 Cal.4th at p. 1037.)

Additionally, appellant recognizes that the prosecutor could have exercised a peremptory challenge to excuse prospective juror Cheryl M. for bias. (AOB 37 & fn. 17.) During the course of jury selection, the prosecutor used only 12 of his 20 peremptory challenges. (RT 452, 498, 537, 539, 540, 581, 636-637, 661-662, 793; see Code Civ. Proc., § 231 ["In criminal cases, if the offense charged is punishable with death . . . , the defendant is entitled to 20 and the people to 20 peremptory challenges].) Thus, any error in excusing prospective juror Cheryl M. for cause was harmless because, had the trial court not excused her for cause, the prosecutor would have been excused on a peremptory challenge. To the extent appellant asserts that an "unused peremptory challenge" argument should be rejected, his claim is unpersuasive because he relies on cases involving the materially different issue of *Witt* error, which is not subject to harmless error analysis. (See AOB 44-45, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 667-668, and *Moore v. Estelle* (5th Cir. 1982) 670 F.2d 56, 58-59.)

In sum, because appellant was tried before a fair and impartial jury, any error in excusing prospective juror Cheryl M. was harmless. (*People v. Holt*, *supra*, 15 Cal.4th at p. 656; accord, *People v. Carpenter*, *supra*, 21 Cal.4th at p. 1037.)

III.

APPELLANT'S *WHEELER* MOTION WAS PROPERLY DENIED; MOREOVER, ANY ERROR WAS HARMLESS

Appellant, who is African American, contends that the trial court prejudicially erred by denying his motion under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), which was made on the ground that the prosecution had exercised a peremptory challenge against prospective alternate juror Selina S., an African American woman. (AOB 48-76.) Specifically, appellant contends that he had made a prima facie showing of group bias. (AOB 52-59.) Moreover, although the trial court found that appellant had not made a prima facie case but allowed the prosecutor to provide a justification for the challenge, appellant contends the prosecutor's stated reasons for excusing prospective alternate juror Selina S. were pretextual. (AOB 59-68.) In making his pretext argument, appellant claims that this Court should engage in comparative analysis for the first time on appeal, notwithstanding this Court's holding to the contrary in *People v. Johnson* (2003) 30 Cal.4th 1302, 1325. (AODB 68-72.) All of appellant's contentions are meritless. The trial court properly denied appellant's *Wheeler* motion because appellant failed to establish a prima facie case of discrimination. Further, there were legitimate, race-neutral reasons for the challenge.

A. Relevant Proceedings

After initial "for cause" challenges of the prospective alternate jurors, and after the parties' stipulation to excuse an African American woman who had been the victim of rape,[32/] the prosecutor stated that he was prepared to

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32. The prosecutor and appellant's trial counsel had stipulated to the excusal for cause of an African American woman, Sara H., who had told the court and counsel that she did not know if she could be a fair and impartial

accept the alternates – which included two African American women, Sandra J. and Selina S. (RT 662, 706, 719, 736) – without having exercised any of his peremptory challenges during the selection of the alternates. (RT 734.) Appellant's trial counsel, however, exercised a peremptory challenge against a male prospective alternate. (RT 734.) The prosecutor then exercised a peremptory challenge against prospective alternate juror Selina S., at which point appellant's trial counsel asked to approach. (RT 735.)

In proceedings held in the hallway, appellant's trial counsel, Mr. Cohen, stated:

> I at this time make a *Wheeler* motion. There have been three[33/] Black jurors that I recall that have made it to the box either as the jury or as alternates, a lady from the other day [prospective juror Cheryl M.], and I can pull her thing if I could remember her. She was excused by the prosecutor. She was a Black woman. Then [prospective alternate juror Selina S.] who was a second Black woman.

(RT 735-736.) The prosecutor, Mr. Ipsen, countered that he had "not excused any Black jurors." The trial court agreed, stating: "I don't recall him doing that either, Mr. Cohen." Appellant's trial counsel stated that he "would have to look it up," and then added that prospective alternative juror Sandra J. was the only African American juror currently in the jury box. The prosecutor reminded appellant's trial counsel that prospective juror Cheryl M. had been excused for

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juror in this case involving a special circumstance rape allegation because she had been the victim of rape. (RT 704-707.)

33. Actually, *four* female African American prospective jurors had been called to the jury box, in the following order: (1) Cheryl M. (RT 503), who had been excused for cause because the same deputy district attorney had prosecuted her son's uncle (RT 538-539); (2) Sandra J. (RT 662), who was seated as an alternate, later impaneled as a juror, and then served as the jury foreperson during the trial's guilt phase (RT 788, 887-889; see CT 519); (3) Sara H. (RT 700), who had been excused by the parties' stipulation (RT 704-707); and (4) Selina S. (RT 700).

cause because under "common law [she] would have been the sister-in-law of a defendant I prosecuted." The trial court concurred. (RT 736.)

After further discussion concerning the prospective juror Cheryl M.'s excusal, the following colloquy took place between the court and counsel:

> Mr. Cohen: And then as to, again, [prospective juror Selina S.], she is then the first Black juror. We have only had two who have gotten – three have gotten to the box. One off for cause and now Mr. Ipsen challenged [prospective juror Selina S.] who specifically stated in answers to all questions she would be fair, independent, impartial juror and would judge the case on its merits and I'm making a *Wheeler* motion.
>
> The Court: All right. And I understand that there was one other Black female this morning that we stipulated, I believe.
>
> Mr. Cohen: That is correct.
>
> The Court: She did make it up here.
>
> Mr. Cohen: She went off because of her being a victim of a rape.
>
> The Court: Yes. And I think everybody agreed to that, but I was just wanting to make sure that the record was clear because it would seem contradictory at times.
>
> I am *not* going to ask Mr. Ipsen for an explanation. If he wants to put something on the record, he may; *but I do not think that you have laid out any legal grounds for me to grant a Wheeler motion*.
>
> Mr. Ipsen: I would like to just in case there is a later exclusion so I don't have to try to recall my reasons for this juror.
>
> The Court: You understand I'm not asking you for a reason.
>
> Mr. Ipsen: Yes, I do. I would like to point out that Sandra J[.] is an alternate, and I think she would be a good juror. I won't be using a peremptory as to her and she is also Afro-American.
>
> [Prospective alternate juror Selina S.], it's my recollection after speaking with [prospective alternate juror Carl C.] who indicated he

would have some difficulty implementing . . . the use of aggravating, mitigating factors, I asked her the same question and she said that she probably would have difficulty with that, implementing that standard also.[34/] That is one basis.

So I thought she was indicating she probably would have difficulty imposing the death penalty. That was not my initial or primary cause for concern as to her. And I had, just from reading her, the questionnaire, her being a social worker was one area I wanted to inquire into.[35/]

The defendant in this case had early childhood problems without his father being around. I don't know if that's going to come up, but I would suspect defense [*sic*] would bring that out, and that I think her empathy for that, she chose for a while a path of counseling children, helping them out, which I think is a wonderful thing, but I think it may show a bias or concern for children in those situations. I thought she would be biased.

It's also hard for me to express why, but the nature of her questionnaire is, she wrote probably five times as much as any other juror, which may have just been helpful. May have been she wanted to be helpful, but I just found it very disturbing.

It was just so odd that a person would be so expressive and redundant and repetitive and she'd write the same answer three or four or five times. I just felt very strange about her.

And I did note upon reading that she said she was Afro-American.

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34. During voir dire, prospective alternate juror Carl C. stated that the only special circumstance that justified the death penalty was a second murder conviction. (RT 713, 723-724, 728-729.) Later, over a defense objection, he was excused for cause. (RT 732-733.) Immediately prior to examining prospective alternate juror Selina S., the prosecutor asked another prospective female alternate juror if she could balance the factors and, if "the factors in aggravation substantially outweigh those in mitigation," whether she could vote for death. The other prospective alternate answered, "Yes." The prosecutor then asked her if she could "see [herself] voting that way," to which the prospective alternate again answered, "Yes." The prosecutor then turned to Selina S. and asked: "Could you, [Selina S.], same question." In contrast to the earlier prospective alternate's unreserved "yes," Selina S. answered, "Probably." (RT 730.)

35. In her questionnaire, prospective alternate juror Selina S. listed "residential counselor" and "behavioral therapist" as two prior occupations. (Supp. I CT 1607.) During voir dire, the prosecutor asked her about working as a behavioral therapist. (RT 731-732.)

> When I read this, I didn't realize that, but I put a negative on her, and just that she wrote too much, and I found her writing disturbing as far as psychological perspective.
>
> So that is a very ambiguous reason but that was one of my reasons when I first read her questionnaire. I think the primary reason for me making my decision was her indicating that she thought she would probably have a problem implementing the death penalty even if the Court instructs her and her background, her employment.

(RT 737-740, italics added.) Thereafter, the trial court and counsel resumed voir dire of the prospective alternate jurors.

B. Appellant Has Waived Any Challenge Under The Federal Constitution

At trial, appellant objected only on *Wheeler* grounds, and otherwise made no specific objections under the United States Constitution. (RT 735, 737.) *Wheeler*, as the California Supreme Court has made clear, is based on state law, not federal constitutional law. (*Wheeler*, *supra*, 22 Cal.3d at p. 287.) Because appellant has raised for the first time on appeal the contention that the prosecutor's use of peremptory challenges violated the federal Constitution, as enunciated in *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*), this contention has been waived. (Evid. Code, § 353; *People v. Ashmus* (1991) 54 Cal.3d 932, 987, fn. 16 [holding a criminal defendant waived his right to object to the trial court's discharge of a juror on federal constitutional grounds due to his failure to state his objection on those grounds at trial]; *People v. Bell* (1998) 61 Cal.App.4th 282, 289 [failure to challenge trial court's dismissal of a juror under either the federal or state Constitution waives such claims for appeal]; contra *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [declining to find defendant's federal *Batson* claim waived, although he had objected only on *Wheeler* grounds at trial].)

C. The Trial Court Properly Determined That Appellant Had Failed To Show A Prima Facie Case Of Group Bias In The Use Of Peremptory Challenges

In *People v. Box* (2000) 23 Cal.4th 1153, this Court reiterated the applicable principles regarding the discriminatory use of peremptory challenges as follows:

> "It is well settled that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both the state and federal Constitutions." (*People v. Turner* [(1994) 8 Cal.4th 137, 164, disapproved on another point by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5]; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky*[, *supra*,] 476 U.S. . . . [at p.] 89 [].) Under *Wheeler* and *Batson*, "[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association . . . ." (*People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154 []; italics omitted; *People v. Turner*, *supra*, 8 Cal.4th at p. 164; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.)

(*People v. Box*, *supra*, 23 Cal.4th at pp. 1187-1188.)

The phrases "strong likelihood" and "reasonable inference," as used in *Wheeler*, mean the same thing, and are consistent with, the term "inference of discriminatory purpose" that the United States Supreme Court applied in *Batson, supra,* 476 U.S. at p. 94. (*People v. Johnson*, *supra*, 30 Cal.4th at pp. 1306, 1313-1318; *People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7.)[36/] When

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36. Appellant claims that the *Wheeler* standard "places an unconstitutionally high burden on the moving party." (AOB 52, footnote omitted.) This Court has previously rejected identical arguments in other cases. (See, e.g., *People v. Johnson*, *supra*, 30 Cal.4th at p. 1314 [reiterating that the

a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling and will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question. (*People v. Farnam* (2002) 28 Cal.4th 107, 135.) If the reviewing court finds that the trial court properly determined that no prima facie case was made, it need not review the adequacy of the prosecution's justifications, if any, for the peremptory challenges. (*Id.* at p. 135, citing *People v. Turner*, *supra*, 8 Cal.4th at p. 167; accord, *People v. Davenport* (1995) 11 Cal.4th 1171, 1200-1201, disapproved on another point by *People v. Griffin, supra*, 33 Cal.4th at p. 555, fn. 5.) The reviewing court will view the trial court's ruling on *Wheeler* motions with "considerable deference." (*People v. Howard, supra,* 1 Cal.4th at p. 1155.)

The reviewing court also must consider whether the trial court considered all of the relevant circumstances. (See *People v. Howard*, *supra*, 1 Cal.4th at p. 1155.) There is no exhaustive list of circumstances which a trial court should consider to determine if the moving party has established a prima

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Wheeler "standard is not less generous than the test the *Batson* court itself applies to establish a prima facie case"]; *id*. at p. 1317 [explaining that, as used in *Wheeler*, "[t]he term 'strong likelihood' has never set a higher standard than *Batson* permits"].) With respect to this Court's 2003 decision in *Johnson*, the United States Supreme Court granted certiorari to review the this Court's decision interpreting *Batson*. (*Johnson v. California* (2003) 540 U.S. 1045 [124 S.Ct. 817, 157 L.Ed.2d 692].) But, the United States Supreme Court subsequently dismissed the case due lack of jurisdiction because there was no final judgment as to the remaining issues in the case. (*Johnson v. California* (2004) 541 U.S. 428 [124 S.Ct. 1833, 158 L.Ed.2d 696].) Following the resolution of the remaining issues by the California Court of Appeal (see *People v. Johnson* (Aug. 5, 2004, A085450) [nonpub. opn.]), the United States Supreme Court has again granted certiorari to review the *Batson* issue. (*Johnson v. California* (2005) __ U.S. __ [125 S.Ct. 824, 160 L.Ed.2d 610].) The matter is currently pending.

facie case. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 403-404.) Relevant circumstances include such factors as: (1) the challenger's act of striking most or all of the members of the identified group from the venire, or the challenger's use of a disproportionate number of peremptory challenges against members of the group; (2) the failure to engage the challenged jurors in anything more than desultory voir dire, or failure to ask them any questions whatsoever; (3) whether the defendant is a member of the excluded group, and if the victim is a member of the group to which the majority of the remaining jurors belong; (4) the similarity of the challenged jurors based on characteristics other than group membership; and (5) the extent to which the jury included members of the group allegedly discriminated against. (*People v. Turner*, *supra*, 8 Cal.4th at p. 168; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281; *People v. Trevino*, *supra*, 55 Cal.App.4th at pp. 403-404; see *Batson*, *supra*, 476 U.S. at p. 97.)

Appellant contends that his trial counsel "made a sufficient showing to constitute a prima facie case of discrimination" because "the first three" African American prospective jurors to make it into the jury box "had been stricken for one reason or another . . . " (AOB 52.) Respondent disagrees.

As a preliminary matter, respondent notes that appellant's assertion is factually incorrect. As noted previously (see footnote 33, *ante*), a total of *four* female African American prospective jurors had been called to the jury box when appellant's trial counsel made his *Wheeler* motion. Appellant also makes similarly inaccurate representations in his "Introduction and Factual Background" section, asserting that the prosecutor, "[h]aving successfully challenged for cause the first African American prospective juror to reach the box (RT 538), and *having* the second African American prospective juror excused by stipulation (RT 705-706), . . . *next* used a peremptory challenge against the *third* African American to reach the box, Selina S[.] . . . ." (AOB 48, italics added; see AOB 53.) This statement misrepresents the record in two

major respects. First, the prosecutor did not "have" prospective juror Sara H. excused by stipulation. Rather, the prosecutor stated that he "would like to keep her because she seems very intelligent, very nice and honest, but it does seem like she was tearing up just talking about the [rape] incident." The trial court thought that there was "good cause to let her go," at which point *appellant's trial counsel* suggested that the parties could stipulate to her excusal for cause. (RT 706.) Second, as noted above and in footnote 33, *ante*, Sara H. was the *third*, not second, African American woman called into the jury box, and Selina S. was the *fourth*, not third, African American woman called. The second African American woman called, Sandra J., was not challenged, either for cause or by peremptory, by the prosecutor.

Turning to the issue of whether appellant's trial counsel carried his burden of establishing a prima facie case of group bias, the record establishes that he did not. Under *Wheeler*, appellant's trial counsel was required to establish, aside from the existence of a cognizable group, that the prosecutor used a disproportionate number of peremptory challenges against African Americans, and that there was at least a reasonable inference that African American jurors had been challenged because of their group association rather than because of any specific bias. (*People v. Davenport*, *supra*, 11 Cal.4th at p. 1201; *Wheeler*, *supra*, 22 Cal.3d at p. 280.) To establish a "strong likelihood" or "reasonable inference" of group discrimination, appellant should have shown that the prosecution challenged all or most of the African American prospective jurors in the venire, used a disproportionate number of peremptory challenges against African Americans, or that the group members shared only the common characteristic of membership in the group. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 115.) But, he failed to do so.

Rather, appellant's trial counsel argued at trial that "three [*sic*] Black jurors . . . have made it to the box," and one had been excused for cause on the

prosecutor's motion, one had been excused by the parties' stipulation, and then the prosecutor exercised a peremptory challenge on Selina S. "who was a second [*sic*] Black woman." (RT 735-736.) But, a prima facie showing is not supported merely by arguing that a peremptory challenge was used against a member of a cognizable group or that the resulting jury contained only a small number of members of the cognizable group. (See *People v. Farnam, supra,* 28 Cal.4th at pp. 134-135 [assertion that use of peremptory challenges against four Black jurors did not demonstrate prima facie case, particularly where resulting jury had six Black members]; *People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 15 [assertion of group bias based solely on number and order of exclusion of protected group members and final jury composition not sufficient to establish prima facie case]; *People v. Turner, supra,* 8 Cal.4th at p. 167 [assertion of group bias based only on claim "that all of the challenged prospective jurors were Black and either had indicated that they could be fair and impartial or in fact favored the prosecution" was not sufficient to establish prima facie case].) Thus, the argument made by appellant's trial counsel was insufficient to establish a prima facie case of discrimination. (*People v. Turner, supra*, 8 Cal.4th at pp. 167-168, citing to *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536-537 "[defense counsel's statement that ' "there were only two [B]lacks on the whole panel, and they were both challenged by the district attorney' " fails to establish a prima facie case.]"; see *People v. Box, supra,* 23 Cal.4th at pp. 1188-1189 [insufficient showing of prima facie case where "the only basis . . . cited by defense counsel was that the prospective jurors - like defendant - were Black"].)

The trial judge, who had the opportunity to conduct the voir dire, was in a good position to determine under "all the relevant circumstances" of the case whether there was a "reasonable inference" these prospective jurors were being challenged because of their group association. (*People v. Turner*, *supra*, 8

Cal.4th at p. 168; *People v. Howard*, *supra*, 1 Cal.4th at p. 1156.) The trial court, by denying appellant's *Wheeler* motion, found that appellant had failed to establish a prima facie case of discrimination. (RT 738.) Substantial evidence supports the trial court's finding. (*People v. Griffin, supra*, 33 Cal.4th at p. 555 & fn. 5 [clarifying that trial court's denial of *Wheeler* motion is reviewed for substantial evidence].)

Here, the prosecutor did *not* challenge all or most of the African American prospective jurors in the venire or use a disproportionate number of peremptory challenges against African Americans. The record shows that he successfully challenged one African American juror for cause (RT 538), and exercised only *one* of his 14 peremptory challenges against an African American juror. (RT 452-453, 498, 536-537, 540, 581, 636-637, 661-662, 736, 771.)[37/] Significantly, the prosecutor had initially accepted Selina S. as an alternate; it was only *after* appellant's trial counsel had exercised a peremptory challenge against another prospective alternate that the prosecutor exercised his peremptory against her. (RT 734-735.) At the time of exercising the peremptory challenge, one African American woman – Sandra J. – was an alternate juror and she was never challenged by the prosecutor; she was eventually placed on the jury, and was the jury foreperson during the guilt phase. (RT 788, 887-889; CT 519.) "While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection. [Citations.]" (*People v. Turner, supra*, 8 Cal.4th at p. 168, citing *People v. Snow* (1987) 44 Cal.3d 216, 225, and *People v. Johnson* (1989) 47 Cal.3d 1194, 1221, fn. 7; see

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37. The prosecutor exercise 12 peremptory challenges when selecting jury members, and two peremptory challenges when selecting the alternate jurors.

People v. Davenport, supra, 11 Cal.4th at p. 1201 [no prima facie showing where defense counsel had argued that "three of the six challenged prospective jurors had Hispanic surnames," but other Hispanics remained in the venire].)

Even appellant acknowledges his trial counsel "was unable to establish a 'pattern' of strikes against black jurors." (AOB 57.) But, he claims that this was a function of "the extraordinarily small number of black jurors called to the box,"[38/] and thus argues that the combination of "other facts" – that appellant and prospective alternate juror Selina S. were "black" whereas "the victim, Ms. Weir, was white," and the prosecutor's questioning of [Selina S.] "did not seek to determine in any way [her] views on the issues about which she was questioned" – supports a prima facie case. (AOB 57.) He is incorrect on both counts.

First, while appellant and prospective alternate juror Selina S. were African American, the victim (Sara Weir) was Native American. (RT 835.)[39/] Thus, Weir was not "white, like the majority of the other jurors," as appellant mistakenly claims. (See AOB 57.) Nor does appellant provide any citation to the record in support of his claim that "the majority of the other jurors" were White. It appears that the jury was racially-diverse. The prosecutor observed, without objection: "We have Hispanics and all different races on our jury panel." (RT 719; see CT 404 [list of impaneled jurors].) Additionally, as noted

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38. As acknowledged at trial by appellant's trial counsel, the number of African Americans called was *not* unrepresentative of the judicial district and courthouse. (See RT 675, 792-793.)

39. Sara's biological mother was a Blackfoot Indian, and Sara was "from the Blackfoot Indian reservation" located outside of Calgary, Canada. (RT 835.) When Sara was six weeks old, she was adopted by Martha Farwell and her then-husband. (RT 829-830.) Even appellant acknowledges Sara was "part Canadian Indian." (AOB 5, fn. 5.) Nevertheless, he describes her as "white." (*Ibid*.)

above, the jury foreperson during the guilt phase was Sandra J., a African American woman. (See CT 519.) Second, the nature of the prosecutor's questioning of prospective alternate Selina S. was not desultory or non-existent. He asked her if she could "see" herself voting for death if the aggravating factors substantially outweighed those in mitigation. In contrast to the unreserved "yes" given by the immediately preceding prospective alternate, Selina S. had answered, "Probably." (RT 730.) Then, he asked her about her employment background. (RT 730-731.) The prosecutor asked questions about her previous employment as a behavioral therapist, including whether some of the juveniles she had worked with had "problems" with the criminal justice system. (RT 731-732.) She answered affirmatively. (RT 732.)

Therefore, here, where one African American juror was excused for cause, a second African American juror was not challenged by the prosecutor and remained as an alternate, appellant's trial counsel agreed to the for-cause excusal of a third African American juror, the exclusion of one African American juror on the prosecutor's peremptory challenge, without more, is insufficient to show a prima facie case of group bias, and is not enough to overcome the presumption that the prosecutor exercised his peremptory challenge in a constitutional manner. (*People v. Farnam, supra,* 28 Cal.4th at pp. 134-135; *People v. Arias, supra,* 13 Cal.4th at p. 136, fn. 15; *People v. Turner, supra,* 8 Cal.4th at p. 167.) Accordingly, the trial court properly found that there was no prima facie case of racial discrimination in the prosecutor's use of the peremptory challenge. There is no good reason to second-guess the trial court's factual determination. (*People v. Johnson, supra,* 47 Cal.3d at p. 1221 & fn. 7.)

D. Even If The Trial Court Could Have Made A Finding Of A Prima Facie Showing, Appellant's Contention Fails Because Race-Neutral Reasons Supported The Exercise Of The Peremptory Challenge

Appellant's contention fails even if this Court finds that the trial court made a prima facie showing of group bias in the exercise of the prosecution's peremptory challenges. If the trial court has found a prima facie case of group bias, then the prosecutor must state adequate, race-neutral reasons for the peremptory challenges. (*Alvarez, supra,* 14 Cal.4th at p. 197.) These reasons must relate to the particular individual jurors and to the case at issue. (*Ibid.*) "'[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams, supra,* 16 Cal.4th at p. 664, quoting *Batson, supra,* 476 U.S. at p. 97.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation omitted], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*People v. Williams, supra,* 16 Cal.4th at p. 664.)

Here, although not required to do so, the prosecutor justified his peremptory challenge of prospective alternate juror Selina S. on three race-neutral grounds: (1) her voir dire response that she "probably would have difficulty" implementing "the use of aggravating, mitigating factors"; (2) her background as a "social worker"; and (3) the "nature of her questionnaire," which the prosecutor felt was "very disturbing" because her answers were "so expressive and redundant and repetitive and she'd write the same answer three or four or five times." (RT 738-740.) Appellant contends that these reasons for excusing prospective alternate juror Selina S. were "pretextual." (AOB 59-68.) Respondent disagrees. The record shows that the peremptory challenge was properly exercised for race-neutral reasons.

"A prospective juror's views about the death penalty are a permissible race- and group-neutral basis for exercising a peremptory challenge in a capital

case. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 970.) Here, there is substantial evidence that the prosecutor could reasonably believe that prospective alternate juror Selina S. would probably be unfavorable on the penalty issue. During voir dire, immediately prior to examining Selina S., the prosecutor asked another prospective female alternate juror if she could balance the factors and, if "the factors in aggravation substantially outweigh those in mitigation," whether she could vote for death. The other prospective alternate answered, "Yes." The prosecutor then asked her if she could "see [herself] voting that way," to which the prospective alternate juror again answered, "Yes." The prosecutor then turned to Selina S. and asked: "Could you, [Selina S.], same question." In contrast to the earlier prospective alternate's unreserved "yes," Selina S. answered, "Probably." (RT 730.)

The equivocal answer about voting for death is made more clear by her questionnaire answers. When asked in the questionnaire about her opinion of the death penalty, Selina S. seemed to indicate that it was the same as sentencing a defendant to life in prison without the possibility of parole, writing:

> In my opinion, any individual(s) who is [*sic*] guilty of a crime in which all the evidences [*sic*] undoubtly [*sic*] point to his guilty [*sic*], then the death penalty does not in my opinion mean a loss of his natural life. It also could mean his loss of his freedom from society forever.

(Supp. I CT 1627.) To this statement, she added, "Must have evidence before me." (Supp. I CT 1627.) Then, when asked in the questionnaire which punishment she thought would be worse for a defendant – death or life in prison without the possibility of parole – she made no selection. Instead, she wrote:

> I believe a person who commits and [*sic*] crime and is found guilty of that crime he or she must live for the rest of his [*sic*] her physical life with the fact that he or she is guilty as such. I believe both are bad for the defendant. He/she loses freedom either physically and/or bodily.

(Supp. I CT 1630.)

In light of her voir dire response and her questionnaire answers, substantial evidence supports the prosecutor's view that Selina S. was unfavorable on the penalty issue because she would probably have difficulty voting for death. (See *People v. McDermott, supra*, 28 Cal.4th at p. 977 [although prospective juror's "responses generally indicated neutrality on the death penalty, and although she eventually expressed the view that the death penalty was a harsher punishment than life in prison without possibility of parole," substantial evidence supports the trial court's finding that the prosecutor could reasonably view her as unfavorable on the penalty issue because "she nonetheless had expressed the view that there was really no difference between the two penalties in terms of severity"].)

Second, it is well-settled that excluding jurors on the basis of their employment is a permissible, non-discriminatory reason for exercising a peremptory challenge. (See *People v. Trevino*, *supra*, 55 Cal.App.4th at p. 411 ["it could be hypothesized the People were exercising their challenges based on a belief those members who had some connection with providing [health] care or social services would not be sympathetic to their case"]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791 [race-neutral factors included job in youth services agency and background in psychiatry or psychology]; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315 [no prima facie case where challenged members shared characteristic of being single and working in "social services or caregiving fields"].) Here, prospective alternate juror Selina S. wrote in her questionnaire that she had previously been employed as a "residential counselor" and "behavioral therapist." (Supp. I CT 1607.) Based on this employment background, Selina S. was properly the subject of a peremptory challenge because the prosecutor reasonably believed that she would be more sympathetic to the defense. (RT 739-740 [prosecutor explaining that the

defense may "bring out" evidence of appellant's "early childhood problems" and Selina S.'s employment background "may show a bias or a concern for children in those situations"]; see *People v. Young* (2005) 34 Cal.4th 1149, 1174 [prospective Black female juror properly excused by prosecutor who "may have reasonably believed that [the juror] would have difficulty setting aside her expertise as a therapist in evaluating the evidence"].)

Appellant counters that the "record does not support the prosecutor's characterization of [prospective alternate juror Selina S.'s] prior work as behavior therapist as 'counseling children, helping them out.' [Citation.]" (AOB 64-65, footnote omitted.) He is incorrect. There is substantial evidence that she counseled children and helped them while working as a behavioral therapist. When the prosecutor asked her about her previous occupation as a behavioral therapist, Selina S. explained that she had "worked with teenage kids who were wards of the court," and that these juveniles "had been taken from their homes because they were runaways or because they just didn't . . . get along with their parents . . . ." (RT 731.) When asked if she had dealt with "people that had problems within the criminal [justice] system," she answered, "Yeah." (RT 731-732.) She commented that some of the juveniles she had worked with were gang members, and then stated, "some of them, you know, had been in, you know, involved in various activities, I should say." (RT 732.) Thus, in light of her occupational background and responses concerning her work, prospective alternate juror Selina S. was properly the subject of the prosecution's peremptory challenge.

Third, prospective alternate juror Selina S. was properly the subject of a peremptory challenge based on the prosecutor's interpretation of her questionnaire responses, which he found to be "very disturbing" and "odd" because they were "so expressive and repetitive and redundant . . . ." (RT 739-340.) Appellant acknowledges that the answers were repetitive; however, he

counters that the questions were repetitive and redundant and, in his opinion, there was "nothing remotely unusual about her answers." (AOB 66-67.) Appellant, however, misses the point. Peremptory challenges "may be made on an 'apparently trivial' or 'highly speculative' basis. [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 294.) Here, the prosecutor's instinctive assessment that the questionnaire answers were "very disturbing," "odd," and "disturbing as far as a psychological perspective" was exactly the type of "hunch" that may appropriately serve as a basis for a peremptory challenge. (See *People v. Williams, supra,* 16 Cal.4th at p. 664; see *J.E.B. v. Alabama* (1994) 511 U.S. 127, 148 [114 S.Ct. 1419, 128 L.Ed.2d 89] (O'Connor, J., concurring) ["a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses . . . . That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous"].)

Appellant also argues that this Court should compare prospective alternate juror Selina S.'s questionnaire answers and voir dire responses with those of other jurors, i.e., engage in comparative juror analysis for the first time on appeal. (AOB 62-72.) However, the comparative analysis now argued by appellant was never made in the trial court. Indeed, when the trial court asked appellant's trial counsel if he wanted to "put anything else on the record" after hearing the prosecutor's reasons, appellant's trial counsel replied simply, "No, sir." (RT 740.) This Court has expressly rejected the use of comparative juror analysis for the first time on appeal when reviewing the trial court's decision that a prima facie case has not been shown and in reviewing the reason for a peremptory challenge after a prima facie case has been shown. (*People v. Johnson, supra,* 30 Cal.4th at pp. 1319-1325; *People v. Box, supra*, 23 Cal.4th

at p. 1190.)[40/] Accordingly, appellant's attempt to engage in a comparative analysis of the responses of other jurors to the jury questionnaire cannot be considered to demonstrate that a discriminatory peremptory challenge was used by the prosecution as to prospective juror Selina S.

In sum, the trial court properly determined that appellant had failed to demonstrate a prima facie case of group bias. Moreover, as to appellant's specific challenge to the prosecutor's reasons for his peremptory challenge against prospective alternate Selina S., the record shows that the peremptory challenge was properly exercised for a race-neutral reasons. Appellant is not entitled to reversal.

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40. Even in a comparative analysis, a violation is not necessarily shown "whenever prospective jurors of different races provide similar responses and one is excused and the other is not." (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1429.) The United States Supreme Court's case, *Miller-El v. Cockrell* (2003) 537 U.S. 322, 331-332 [123 S.Ct. 1029, 154 L.Ed.2d 931], does not change this rule. (See AOB 68-72.) In *Miller-El*, the record showed that an extensive record of comparative analysis had been made in the trial court. (*Ibid.*) United States Supreme Court quoted from this record (*Ibid.*) It was not doing comparative analysis for the first time on appeal. Additionally, the issue in *Miller-El* was not the substantive issue of discriminatory strikes, but rather a procedural issue of whether the appellant had made a record sufficient to entitle him to appeal. (*Id.* at p. 335.)

IV.

THE ADMISSION OF THE UNCHARGED CONDUCT EVIDENCE WAS PROPER

Appellant lists three categories of uncharged conduct evidence – (1) his fraudulent financial dealings with women he met at the gym; (2) his assault of Michelle Theard; and (3) his sexual assaults of Kim V., Jodi D., and Teri B. – which he claims were improperly admitted at trial. According to appellant, this evidence was inadmissible under Evidence Code sections 1101[41/] and 352, and its admission prejudiced him and violated his constitutional rights. (AOB 77-128.) Respondent submits that the evidence was properly admitted. Contrary to appellant's characterization, it was not introduced as "evidence of appellant's 'bad character' and criminal propensity." (See AOB 77.) Rather, the evidence was relevant to prove that appellant committed first degree murder (either premeditated or perpetrated during the commission, or attempted commission, of rape and/or robbery), and to prove the rape and robbery special circumstance allegations. Whether taken individually or collectively, none of the categories listed by appellant prejudiced the fairness of his trial. Therefore, they provide no grounds for reversal of his conviction.

A. Applicable Law

Evidence Code section 1101, subdivision (a), establishes a general rule that character evidence is inadmissible to prove conduct. (*People v. Ewoldt*

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41. Just a few months after the guilty verdict was rendered in appellant's trial, the Governor of California signed into law Evidence Code section 1108, which specifically permits, in sex crimes prosecutions, the admission of a defendant's other sexual conduct subject only to Evidence Code section 352 analysis. (See *People v. Yovanov* (1999) 69 Cal.App.4th 392, 405 [by enacting Evidence Code section 1108, "the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitation of Evidence Code section 1101"].)

(1994) 7 Cal.4th 380, 393.) However, subdivision (b) of section 1101 states:

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

(See *People v. Ewoldt, supra,* 7 Cal.4th at p. 393, fn. 1 [quoting Evidence Code section 1101, subdivision (b)].) The categories enumerated in Evidence Code section 1101 are a non-exclusive list. (*People v. Catlin* (2001) 26 Cal.4th 81, 146.)

The admissibility of uncharged conduct evidence depends on three principal factors: "the materiality of the fact sought to be proved or disproved, the tendency of the uncharged crime to prove or disprove the material fact, and the existence of any policy requiring exclusion of the evidence. [Citation.]" (*People v. Catlin, supra,* 26 Cal.4th at p. 146.) For materiality, "the fact in dispute may be either an ultimate fact in the proceeding or an intermediate fact from which such ultimate fact may be . . . inferred. [Citation.]" (*Ibid.*, ellipses in original, internal brackets and quotation marks omitted.) A defendant's "not guilty" plea puts in issue "all the elements of the charged offenses. [Citation.]" (*Ibid.*, citing *People v. Balcom* (1994) 7 Cal.4th 414, 422; *People v. Carpenter, supra,* 15 Cal.4th at pp. 378-379; *People v. Ewoldt, supra,* 7 Cal.4th at p. 400, fn. 4.) For the tendency of the uncharged conduct to prove the disputed facts, only the least degree of similarity is needed to prove intent. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) A greater degree of similarity is needed to prove common design or plan; it requires a "'concurrence of common features [such] that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.]" (*Ibid.*) The greatest degree similarity is required to prove identity. (*Id.* at p. 403.)

Uncharged conduct evidence is subject to admissibility under Evidence Code section 352. Under this section, a trial court has the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (1) necessitate under consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "Prejudice" under Evidence Code section 352 "is not synonymous with damaging." (*People v. Karis* (1988) 46 Cal.3d 612, 638, internal quotation marks omitted.) It is "not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*Ibid*.) Rather, evidence is unduly prejudicial only if it "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on issues. [Citations.]" (*People v. Barnett*, *supra*, 17 Cal.4th at pp. 1118-1119, internal quotation marks omitted.)

The admission of uncharged conduct evidence, and the Evidence Code section 352 analysis, is entrusted to the sound discretion of the trial court and trial court's decision will not be disturbed on appeal absent manifest abuse, i.e., the trial court's ruling fell "outside the bounds of reason. [Citation.]" (*People v. Catlin*, *supra*, 26 Cal.4th at pp. 120, 122, internal quotation marks omitted.)

B. The Evidence Of Appellant's Fraudulent Financial Dealings Was Admissible

1. The Proceedings Below

Prior to jury selection and over a defense objection, the prosecutor sought to admit evidence of appellant's financial dealings with people he met at the gym, including Michelle Theard and Teri B. (RT 263-274.) The prosecutor argued that appellant, through a "uniform pattern of lies and deceptions," had induced numerous women to loan him credit cards or give him money without repaying them, and, in the case of Theard and Teri B., he had

taken their checks without consent. Noting that appellant met Sara Weir at the gym and that appellant was in possession of two of checks bearing her forged signature when he was apprehended, the prosecutor argued that the uncharged conduct was relevant with respect to the robbery and burglary[42/] special circumstance allegations to prove: (1) the existence of appellant's intent to steal, and (2) the timing of the formation of this intent, i.e., that his intent to steal was not formed "incidental to" murdering Sara. (RT 265-270.)

Appellant's trial counsel countered that the uncharged conduct was not admissible as evidence of a common plan because there was insufficient evidence that appellant had taken Sara Weir's checks "by way of trick or device or theft," and unlike "an alleged crime of violence against Sara Weir," none of uncharged conduct incidents involved violence. (RT 270-272.)

The trial court disagreed with the defense, and ruled that all of uncharged conduct evidence was admissible, explaining:

> [I]t seems to that there is a very logical connection that exists among all of the, you know, in the borrowings or thefts, depending upon which they are, and that's not for me to determine whether they are thefts or borrowings at this time, that's going to be for the jury to determine, and the fact that there is no violence in any of the other ones, that to me is a collateral issue because the People are going to have to prove to the jury a number of things and that's what they are going to have to do and taking a fallacy 352 type of analysis, of course, all the evidence is

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42. Toward the end of the prosecution's case-in-chief, the prosecutor indicated that he did not intend to pursue to the burglary charge (count 2) or the burglary special circumstance allegation because he felt that the burglary statute "would be much more confusing for this jury, could delay them or interfere with their deliberations." (RT 1928-1929.) Then, after the defense rested without presenting evidence, appellant's trial counsel moved to dismiss the burglary charge and burglary special circumstance allegation. (RT 2039-2040.) The prosecutor did not oppose the motion because appellant's payment of rent to Theard and the restraining order obtained by Theard were "gray" areas in the law. (RT 2040-2041.) The trial court, however, treated the motion as a joint motion because it could "conceptualize where [the burglary count] would be viable[.]" (RT 2041.)

> prejudicial. [¶] The real issue is whether the probative value is outweighed by the prejudicial effect and I don't see how it can be.

(RT 273-274.)

At trial, Leticia Busby testified that she met appellant in 1993 at the gym, where she worked as an aerobics instructor. (RT 1258.) On August 26, 1993, appellant asked Busby if he could borrow her credit card because he wanted to take his girlfriend, Michelle Theard, to San Diego for the weekend. (RT 1260-1261.) Busby refused, telling him that he was "crazy" to think she would trust him with her credit card. (RT 1263.)

Similarly, Helen Walters met appellant at the gym in 1993, where they worked together in the gym's café. (RT 1175-1178.) During her three-month tenure at the café, Walters developed a platonic friendship with appellant; she "trusted him completely." (RT 1177-1178.) About four months after meeting him, appellant told Walters that he planned to open a food cart business at Disneyland with the money he had received as a large inheritance from a family member. Showing her a bank book that indicated he "had a lot of money," appellant asked to borrow her credit card to cover the cost renting a car and staying at Disneyland for the weekend. (RT 1179-1181.) In exchange for her help, appellant told her he would pay off the $300 balance she had on her credit card. (RT 1179.) Believing and trusting appellant, she agreed to let him borrow her credit card. (RT 1181.) Appellant charged $900 to her credit card, but never repaid her. (RT 1183-1184.) Once, when she attempted to get the money appellant owed her, Walters brought her boyfriend along, a fact which appellant did not like. (RT 1186.)

Karrie Marshall also met appellant at the gym café, where she worked with Walters. (RT 1192.) Even though they were mere work acquaintances, appellant telephoned Marshall to ask her to bail him out of jail following his assault of Michelle Theard. (RT 1193-1194.) Marshall had previously given appellant her telephone number because he had some money of hers that had

not been given to her from one of her paychecks. (RT 1194.) She told him she could not bail him out; nevertheless, later that afternoon, appellant telephoned her again and told her he would bring by the money he owed her. (RT 1195-1196.) Appellant knew she lived alone. (RT 1194-1195.) When appellant arrived that afternoon, he seemed surprised to see that a male friend of Marshall's was at the apartment with her. (RT 1196-1197.) When Marshall asked him for the money he owed her, he told her he did not have it but would return in 20 minutes with the money. (RT 1198-1199.) Appellant left, and hours later telephoned to say that he would return at about 9:00 p.m. (RT 1199.) However, he did not arrive at her apartment about midnight or 12:30 a.m. (RT 1199-1200.) Appellant asked to come inside, but Marshall refused. He asked to "crash on" her couch, but again Marshall refused because she was scared. She had a "bad feeling" about him because he had been arrested for assaulting Theard. (RT 1201.) Finally, after asking Marshall twice if he could stay with her, appellant left. (RT 1202.)

Teri B. also met appellant at the gym in 1993. (RT 1760-1763.) Appellant had convinced her to work for him as his mother's "assistant," telling her that his mother planned to open a string of juice bars. (RT 1760-1763, 1777, 1782.) Appellant never paid Teri B. for her work. (RT 1810.) Once, to cover part of the money he owed her, appellant gave her a $2,000 check drawn on Michelle Theard's personal checking account. (RT 1813, 1833-1834; Supp. II CT 334.) The check later bounced. (RT 1813-1814.) On September 6, 1993, Michelle Theard found forged checks drawn on her (Theard's) account in appellant's briefcase. (RT 940, 996-997.) In the briefcase, Michelle Theard also found forged checks drawn on Teri B.'s account. (RT 913, 915-916, 1838.) Teri B. had never given appellant blank checks from her checking account nor did he had permission to use or possess her checks. (RT 1821-1822, 1838.) Until the police returned the checks to her, Teri B. did not know

that they had been taken. (RT 1837-1838.) Appellant's briefcase also contained Teri B.'s driver's license, which she believed appellant had taken from her. (RT 1835-1837.)

In August 1993, Damon Stalworth, the owner of the USA Ribs Restaurant, cashed two personal checks for appellant at appellant's request; the checks were drawn on a woman's account, which Stalworth recalled was possibly Teri B.'s account. (RT 1163, 1166-1168, 1173-1174.) Stalworth recalled having seen appellant with Teri B. in the restaurant twice; the pair appeared to have a business relationship. (RT 1171-1172.) The checks bounced and appellant never repaid Stalworth. (RT 1167-1168.)

2. The Trial Court Acted Within Its Discretion When It Admitted This Evidence

The trial court acted within its discretion when admitted evidence of appellant's financial dealings with women he met at the gym because it was relevant to proving robbery. During closing argument appellant's trial counsel conceded that appellant had killed Sara Weir, but he challenged, among other things, the prosecution's theory that appellant had formed the intent to rob Sara Weir prior to, or in the course of, killing her. (RT 2228-2235.) The prosecution was required to prove the existence of such intent in order to establish robbery-murder (§ 189) and the robbery-murder special circumstance (§ 190.2, subd. (a)(17)), which in turn required the prosecution to show that appellant harbored the intent to permanently deprive Sara Weir of her property prior to killing her.

"Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2, italics in original.) In order to be admissible to prove intent, only "[t]he

least degree of similarity (between the uncharged act and the charge offense) is required . . . ." (*Id.* at p. 402.) "[T]he 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. [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 121-122, citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) "Robbery requires the specific intent to deprive the victim of his or her property permanently. [Citations.]" (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007; see *People v. Ortega* (1998) 19 Cal.4th 686, 693.)

Here, appellant's uncharged conduct involving his financial dealings with women he met at the gym – either defrauding them, or taking checks from them and forging their signatures – was sufficiently similar to support the inference that, prior to killing her, appellant harbored the same intent to deprive Sara Weir of her property. (See *People v. Yeoman, supra*, 31 Cal.4th at pp. 121-122; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) Appellant met Helen Waters, Karrie Marshall, Leticia Busby, Teri B., and Michelle Theard at the gym. He developed relationships with each of them and then, as the prosecutor explained, he used a "uniform pattern of lies and deceptions" to defraud them or, in the case of Theard and Teri B., to take their checks without their consent. (RT 267.) In the same manner, appellant met Sara Weir at the gym, and cultivated a friendship with her. When appellant was apprehended crossing the border from Mexico into the United States, he had in his possession two of Sara Weir's checks bearing her forged signature. (RT 1212-1213, 1247-1249.) Sara Weir's purse and identification card was never recovered. (RT 864.) However, Sara Weir's missing car was located in Mexico. (RT 1244-1245.) At trial, the prosecutor argued that appellant's taking of Sara Weir's property was not "afterthought" as the defense argued, but rather his decision to take her property was part of his premeditated plan. (RT 2183, 2190-2191, 2254-2259.) The inference that appellant's intent to permanently deprive Sara Weir of her

property was not "incidental to" her murder was enough to support the trial court's discretionary decision to permit the jury to consider appellant's uncharged conduct. (See *People v. Yeoman*, *supra*, 31 Cal.4th at p. 122.)

Notwithstanding the plain relevancy of this evidence to prove intent, appellant contends that the evidence of appellant's uncharged "fraudulent behavior" was not relevant to proving the robbery-murder special circumstance because the uncharged conduct did not involve "violence, force or fear – the very elements necessary to prove the robbery special circumstance." (AOB 99-100.) But, as explained above, the uncharged conduct demonstrated appellant's pre-existing intent to permanently deprive, thus proving the theft element of robbery. Because only the "least degree of similarity (between the uncharged act and the charged offense) is required to prove intent," appellant's fraudulent dealings or covert theft of financial instruments was sufficiently similar to the charged conduct to support the inference that he "'"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402, brackets in original.)

Appellant also claims that there was "no discernible, legitimate reason" for admitting the testimony of Karrie Marshall and Leticia Busby. Specifically, he asserts that Marshall's testimony showed only that appellant "was a dishonest and frightening individual who preyed upon young white women" and that the significance of Busby's testimony was "incomprehensible" because she had refused to lend appellant her credit card. (AOB 101, footnote omitted.) Appellant's argument fails. Appellant never gave Marshall the money missing from her paycheck, he unsuccessfully tried to borrow a credit card from Busby, but then he was successful in so doing with another female co-worker, Walters. Appellant's conduct with both Marshall and Busby was relevant to showing that appellant harbored an intent to deprive his female victims of their property, and thus the trial court acted within its discretion when it admitted the evidence

under Evidence Code section 1101, subdivision (b).

Alternatively, appellant asserts that the uncharged conduct should have been excluded on Evidence Code section 352 grounds because its prejudicial effect "outweighed its minimal probative value." (AOB 101-102, 117-118.) Respondent disagrees. Appellant's financial dealings with women he met at the gym were highly probative of his intent to permanently deprive Sara Weir of her property and the existence of that intent prior to, or at the time, he killed her. Also, one of the factors to considered in evaluating the admissibility of the evidence of appellant's uncharged conduct is whether the evidence is stronger or more inflammatory than the evidence of the charged offenses. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211.) Balanced against the charged crimes, appellant's uncharged fraud and theft conduct would not have prejudiced the jury against him. As such, the trial court acted within its discretion when it conducted its Evidence Code section 352 analysis and found that the probative value of this evidence was not outweighed by its prejudicial effect.

C. The Evidence Of Appellant's Assault Of Michelle Theard Was Admissible

1. The Proceedings Below

Prior to jury selection, the trial court held a hearing regarding the admissibility of appellant's August 30-31, 1993, assault of his former girlfriend, Michelle Theard, with whom he had been living just prior to the crimes committed against Sara Weir and in whose apartment Weir's body was found. (RT 274-289.) At the time of the hearing, appellant was charged with burglary of Theard's apartment (count 2), and there was a burglary-murder special circumstance allegation. (CT 236-238.)

The prosecutor argued that evidence of appellant's assault of Michelle

Theard was relevant to show appellant's "motivation" for burglarizing Theard's apartment and committing the crimes against Sara Weir in that apartment, explaining:

> "[T]he relationship between a victim and a defendant is always critical in this case not only [*sic*] burglary of her apartment but in that apartment another individual is found murdered. [¶] I think that the motivation for some of the activity and his going back and breaking in and doing everything he did cannot be divorced from the events that happened only a very, very short period of time prior to that where his girlfriend had him arrested for attacking her. [¶] I just don't think that one can understand anything about the case without that, *the motivation or the intent to steal* from her, I think it's right out of their relationship.

(RT 274-275, italics added; RT 287.)

Appellant's trial counsel objected to the introduction of this evidence, arguing that the assault against Michelle Theard was not sufficiently similar to the charged offenses to show "common plan, motive or scheme" because appellant had choked, but not stabbed, Michelle Theard. (RT 278-279, 287.) He also argued against admitting the evidence for the purpose of showing intent and identity. (RT 287.)

The prosecutor reiterated that the appellant's relationship with Theard – particularly his anger toward her – and his recent connection with the apartment were relevant to explaining appellant's "motivation" for choosing the apartment as the crime location and for hiding Sara Weir's body under Theard's son's bed. (RT 281-282.) The prosecutor also argued that the evidence was admissible to show intent. (RT 287.)

The trial court concluded that the evidence of appellant's assault of Michelle Theard was admissible. (RT 289, 291.) The trial court explained that the incident was not remote, and it shared many similarities with the incident involving Sara Weir, namely "a physical emotional domination and control exercised by [appellant] . . . ." (RT 288.) The trial court found conducted an Evidence Code section 352 analysis and found "significant probative value to

these events," which "far, far outweighs prejudicial effect." (RT 288-289.)

2. The Trial Court Acted Within Its Discretion When It Admitted The Evidence Of Appellant's Assault Of Michelle Theard

Here, appellant's assault of Michelle Theard was admissible under Evidence Code section 1101, subdivision (b), for the purpose of showing appellant's motive and intent for burglarizing Theard's apartment and, later, for committing the crimes against Sara Weir in the apartment. (See *People v. Memro* (1995) 11 Cal.4th 786, 864, [under subdivision (b) of Evidence Code section 1101, "evidence of conduct may be admitted to prove motive or intent, although it may not be admitted to show a disposition to do the type of conduct shown by the evidence"], opn. mod. 12 Cal.4th 783.) "'[M]otive is an intermediate fact which may be probative of such ultimate issues as intent [citation], identity [citation], or commission of the criminal act itself [citation].' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 370, original brackets omitted.) "[T]he intermediate fact of motive" may be established by evidence of "prior dissimilar crimes." (*People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23.)

> "Similarity of offenses [is] *not* necessary to establish this theory of relevance" for the evident reason that the motive for the charged crime arises simply from the commission of the prior offense. [Citation.] The existence of a motive requires a nexus between the prior crime and the current one, but such linkage is not dependent on comparison and weighing of the similar and dissimilar characteristics of the past and present crimes. [Citation.]

(*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018, italics added.)

Here, appellant's assault of Michelle Theard was relevant to establishing

motive. First, as the prosecutor had argued, the assault was relevant to show that appellant's motive for breaking into Theard's apartment – which in turn was relevant to proving the burglary charge and burglary-murder special circumstance allegation pending at the time of the pretrial hearing on the admissibility of this evidence – was appellant's anger at Theard. Second, even after the burglary charge and burglary-murder special circumstance were dismissed after the defense rested (RT 2040-2041), appellant's assault of Michelle Theard remained highly relevant and admissible with respect to his motive for raping, robbing, and murdering Sara Weir in Theard's apartment. A nexus – both as to time and place – existed between his assault of Michelle Theard and the crimes he committed against Sara Weir: the two incidents occurred only about a week apart, they took place in the same apartment, and appellant hid Sara Weir's naked body (topped by Theard's son's baseball helmet) under her son's bed. Thus, appellant's assault of Michelle Theard precipitated the breakdown of their relationship, which supported the prosecution's theory that appellant's rape, robbery and murder of Sara Weir were motivated by his anger at Michelle Theard. (*People v. Barnett, supra*, 17 Cal.4th at p. 1118 [evidence of defendant's assault on another person was probative as to motive because the assault precipitated the breakdown of the defendant's relationship with the victim, and thereby supported the prosecution's theory that the defendant tortured and killed the victim for revenge]; see *People v. Anderson* (1968) 70 Cal.2d 15, 26- 27, 73 [motive is relevant to finding premeditation and deliberation].) Additionally, the assault of Michelle Theard served to explain her absence from the apartment during the time that appellant committed the crimes against Sara Weir, and explained the presence of the convenient stabbing weapon – the scissors – which Michelle Theard had placed on the nightstand next to her bed on the same day that Sara Weir was last seen by her mother.

Nor does Evidence Code section 352 require the exclusion of this relevant evidence. Here, the trial court expressly found that appellant's assault of Michelle Theard had "significant probative value," which "far, far outweighs prejudicial effect." (RT 288-289.) The trial court acted within its discretion when making this ruling. The evidence was highly probative of appellant's motive to rape, rob and murder Sara Weir – namely, his anger at the breakdown of his relationship with Michelle Theard. Even his placement of Sara Weir's body under Theard's son's bed evidenced this motive because, as the prosecutor argued during closing, he left Weir's naked body "wrapped up and packaged, gift wrapped for Michelle." (RT 2185.) Given the highly probative nature of this evidence to show motive, evidence that appellant assaulted (but did not kill) his live-in girlfriend was not likely to have prejudiced the jury against him compared to the charges that he raped, robbed and murdered Sara Weir. (*People v. Zepeda*, *supra*, 87 Cal.App.4th at p. 1211.) Indeed, his trial counsel used appellant's assault of Theard to help the defense: he challenged the prosecution's rape-murder theory by arguing to the jury that it showed that appellant could "commit violence, terrible violence without a sexual assault." (RT 2215.) Accordingly, the trial court did not abuse its discretion.

D. The Evidence of Appellant's Sexual Assaults of Kim V., Jodi D. and Teri B. Was Admissible

1. The Proceedings Below

The prosecutor also sought to introduce evidence of appellant's prior sexual assaults of Kim V., Jodi D., and Teri B., all of which the defense opposed. Each were the subject of separate Evidence Code section 402 hearings. (RT 274-291 [Kim V. and Michelle Theard hearing], RT 296-307 [Jodi D. hearing], RT 1447-1448, 1452-1456 [Teri B. hearing].)

With regard to the admissibility of appellant's 1991 sexual assault of

Kim V., the prosecutor argued that it was relevant to show (1) intent to rape and steal, and (2) common plan or design. (RT 281-285.) The prosecutor summarized the similarity of both circumstances: appellant had developed a platonic relationship with the victims; the crime scenes were connected to appellant; he utilized stabbing instruments in both cases; and, appellant raped Kim V. and took her property, which was relevant to showing that appellant harbored a similar intent with respect to Sara Weir. (RT 284-285.) Appellant's trial counsel countered that intent was not an issue for purposes of felony-murder and rape, that the appellant's sexual assault of Kim V. was not sufficiently similar to the charged offense to constitute a common plan or design, and that its prejudicial effect "far outweigh[ed] its probative value" because it took place two years before the charged offense. (RT 276-280, 287.) The trial court concluded that appellant's 1991 sexual assault of Kim V. was not remote, that appellant's crimes against Sara Weir shared "many, many similarities" with his sexual assault of Kim V., and that the 1991 sexual assault had "significant probative value," which "far, far outweighs the prejudicial effect." (RT 288-289.) Thus, the trial court ruled that appellant's 1991 sexual assault of Kim V. was admissible under Evidence Code section 1101, subdivision (b). (RT 289, 290-291.)

At the hearing regarding appellant's sexual assault of Jodi D., appellant's trial counsel objected to the admissibility on the ground that the uncharged act and the charged offense were not part of "a single continuing conception or plan" because appellant assaulted Jodi D. in 1987 whereas the crimes against Sara Weir took place in 1993. (RT 300-303.) He also pointed to the passage of time between the two incidents as a reason for excluding the 1987 sexual assault on Evidence Code section 352 grounds. (RT 302.) The prosecutor countered that relevancy of appellant's sexual assault of Jodi D. was not limited to common plan or design, but rather it was also relevant to showing motive

and modus operandi for purposes of intent. (RT 304.) The prosecutor explained that appellant engaged in a similar modus operandi, which evidenced his intent to rape: appellant befriended both women through his work, he concocted a fabricated story about the nature of his employment, and then, "due to his hatred or animosity towards women[,] these initial friendship situations turn into violent acts on these women, violent power domination over women." (RT 304-305.) The trial court found that appellant's 1987 sexual assault of Jodi D. was "not at all remote," and that it was "clearly, clearly relevant." (RT 306-307.) Finding the sexual assault of Jodi D. to be "strikingly similar" to the other uncharged acts evidence, the trial court observed:

> It looks to me that it's back to the analysis of the other day. It's a severe power domination play. We have the jewelry that was taken. And the evidence that was given by [Jodi D.] regarding [appellant's] physical description is eerie in its accuracy. As I sit here and look at him right now it's absolutely eerie.

(RT 306-307.) The trial court rejected the defense argument that the evidence was not admissible as common plan or design, explaining that "everything" it had "heard so far" was analogous to "a series of bank robberies that are carried out in [*sic*] very similar fashion." (RT 307.) In conducting its Evidence Code section 352 analysis, the trial court found that the prior sexual assault was "extremely probative" and that "the prejudicial effect pales when compared to the probative value of this." Thus, like appellant's sexual assault of Kim V., the trial court ruled appellant's sexual assault of Jodi D. was admissible under Evidence Code section 1101, subdivision (b). (RT 307.)

At the hearing regarding the admissibility of appellant's August 30, 1993 sexual assault of Teri B.,[43/] appellant's trial counsel once again characterized all

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43. Prior to trial, appellant's sexual assault of Teri B. was not known to the prosecution, which had considered her only as one of appellant's financial victims. (RT 1021.) Around May 25, 1995, the prosecutor told appellant's trial counsel that he suspected that appellant had raped Teri B., but

of appellant's prior sexual assaults as a series of spontaneous acts, arguing that they were not part of a common plan or design given the lapse of time between them. (RT 1452-1453.) The prosecutor countered that the appellant's sexual assaults of Jodi D., Kim V., and Teri B. were relevant to "show [appellant's] intent and modus operandi." (RT 1453.) In addition to his prior arguments, the prosecutor argued that appellant committed "almost identical acts," which showed "a very strong inference that [appellant] is a serial rapist type individual who commits crimes with similar intent, with very similar modus operandi, very similar situations." (RT 1454.) The trial court determined that the evidence was "clearly relevant." (RT 1454.) In its Evidence Code section 352 analysis, the trial court found that the evidence was "extremely probative," and not more prejudicial than probative. (RT 1454-1455.) Noting the similarity of appellant's actions, the trial court explained:

> When I started listening to the tape [of Teri B.'s interview], I thought

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he did not know any details. (RT 1021-1022.) The prosecution began its case-in-chief on May 30, 1995. (RT 828.) On the evening of May 31, 1995, a police detective was able to make contact with Teri B., who told him that appellant had raped her and, during the course of the rape, that he had used blue-handled scissors. (RT 1021.) On June 1, 1995, the prosecutor informed the court and appellant's trial counsel about Teri B.'s disclosure the night before. (RT 1020-1021.) The prosecutor stated that he could "put off" Teri B.'s testimony until appellant's trial counsel had time to read a police-generated report of Teri B.'s account, and that he would make Teri B. available for an interview by appellant's trial counsel. (RT 1022-1023.) Teri B. was formally interviewed by the police on June 1, 1995. (RT 1113.) On the following court day, appellant's trial counsel received a recording of the interview. (RT 1111.) He objected to the introduction of evidence concerning appellant's sexual assault of Teri B. "due to the lateness of it," but opined that neither the prosecutor nor the police had been derelict in their duties. (RT 1112-1113.) The trial court found that there had been *no* "sandbagging" by the prosecution, and stated that it would interrupt the trial if appellant's trial counsel needed time to conduct an investigation regarding the "newly discovered evidence." (RT 1116-1117.) The hearing on the admissibility of appellant's assault of Teri B. was held on June 8, 1995. (RT 1447-1448, 1452-1456.)

> for a minute I was having memory problems because I started hearing very similar things and I realized I was not having memory problems, it was just the same story being told by [Teri B.] that some of the other individuals had discussed.

(RT 1455.) The trial court concluded that the evidence was "strikingly similar," and that it was "all the things that 1101.B was about so it's going to come in." (RT 1455.)

Later, appellant's trial counsel again unsuccessfully objected to the admissibility of appellant's sexual assaults of Jodi D., Kim V., and Teri B. (RT 1457.) The prosecutor clarified that, in addition to showing modus operandi, intent, and common plan or design, he believed the three prior sexual assaults were also admissible for purposes of identity . (RT 1459-1460.) The trial court agreed that the evidence was also admissible for identity. (RT 1460.)

Before any of these three witnesses testified, the jury was preinstructed that the evidence was being admitted for the limited purpose of showing: "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," identity, "the existence of intent," motive, and that "the defendant did not reasonably and in good faith believe that the person with whom he engaged or attempted to engage in . . . a sexual act consented to such conduct[.]" (RT 1461-1464.) The jury was reminded of these instructions prior to Kim V.'s testimony. (RT 1609.) Then, prior to closing arguments, the jury was instructed once again concerning the limited purpose of the uncharged acts testimony. (RT 2120-2123; CT 453-457; see CALJIC Nos. 2.09, 2.50 (1994 rev.), 2.50.1, 2.50.2].)[44/]

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44. The jury was instructed with CALJIC No. 2.09 ["Evidence Limited as to Purpose"] as follows:

> Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the

limited purpose for which it was admitted. [¶] Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

(CT 453; RT 2120.)

The jury was instructed with CALJIC No. 2.50 (1994 rev.) ["Evidence of Other Crimes"] as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed a crime or crimes other than that for which he is on trial. [¶] 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 used 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 intent which is a necessary element of the crime charged, the identity of the person who committed the crime, if any, of which the defendant is accused, a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if defendant committed the other offenses the defendant also committed the crimes charged in this case; [¶] The existence of the intent which is a necessary element of the crime charged; [¶] The identity of the person who committed the crime, if any, of which the defendant is accused; [¶] A motive for the commission of the crime charged; [¶] The defendant did not and in good faith believe that the person with whom he engaged or attempted to engage in a sexual act consented to such conduct; [¶] 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 this case. [¶] You are not permitted to consider such evidence for any other purpose.

(CT 454-455; RT 2120-2122.)

The jury was instructed with CALJIC No. 2.50.1 ["Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence"] as follows:

> Within the meaning of the preceding instruction [CALJIC No. 2.50], such other crime or crimes purportedly committed by

2. The Trial Court Acted Within Its Discretion When It Admitted The Evidence Of Appellant's Sexual Assaults Of Jodi D., Kim V., And Teri B.

The prosecutor argued that appellant committed first degree murder under two theories – (1) premeditated and deliberate murder, and (2) felony-murder (i.e., that appellant killed Sara Weir during the commission or attempted commission of rape and/or robbery) – and, for purposes of the special circumstances, that he committed the murder during the commission or attempted commission of rape and robbery. (RT 2170-2182, 2247-2260.) While appellant's trial counsel conceded during closing argument that the prosecution had proved that appellant killed Sara Weir (RT 2235-2236), the defense theory was that appellant killed her during a "mood swing," that he did not rape her, and that he took property only "incidental to" the murder, and therefore he was guilty only of second degree murder and neither of the special circumstances applied. (RT 2203–2215, 2226-2236.) In light of the defense

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> a defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that the defendant committed such other crime or crimes. [¶] The prosecution has the burden of proving these facts by a preponderance of the evidence.

(CT 456; RT 2122-2123.)

The jury was instructed with CALJIC No. 2.50.2 ["Definition of Preponderance of the Evidence"] as follows:

> "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.

(CT 457; RT 2123.)

theory, appellant's prior rapes of Kim V., Jodi D., and Teri B. were relevant and admissible to prove first degree murder – that appellant intentionally killed with premeditation and deliberation, or that the murder was committed in the perpetration or attempted perpetration of rape and/or robbery – and to prove the rape and robbery special circumstance allegations.

a. Corpus Delicti Of Rape

As a preliminary matter, appellant argues that the evidence of appellant's prior acquaintance-rapes of Kim V., Jodi D., and Teri B. was inadmissible to prove the rape special circumstance allegation because there was insufficient other evidence to establish the corpus delicti of Sara Weir's rape. (AOB 103-110.) Appellant's argument is flawed for two reasons.

First, the admission of the uncharged offenses committed against Kim V., Jodi D., and Teri B. was not limited to proving the corpus delicti of rape. Rather, the jury was repeatedly instructed that the uncharged acts evidence could also be considered for intent, identity, and that "the defendant did not reasonably and in good faith believe that the person with whom he engaged or attempted to engage in . . . a sexual act consented to such conduct[.]" (RT 1461-1464, 1609, 2120-2123; CT 453-457.) Nor was the uncharged conduct evidence limited to proving the rape felony murder charge or the rape-murder special circumstance; rather, this evidence was also relevant and admissible to prove robbery felony murder and the robbery-murder special circumstance. For example, the prosecutor had specifically argued that the circumstances surrounding appellant's sexual assault of Kim V. were admissible to show intent to steal. (RT 281-285.) Additionally, in finding appellant's sexual assault of Jodi D. admissible, the trial court had pointed to appellant's taking of her jewelry. (RT 306.)

Second, contrary to appellant's assertion (AOB 108-109), the uncharged

conduct was *not* the only evidence that a sexual assault occurred as to Sara Weir. At the outset, respondent notes that the prosecution was not required to show a completed sexual assault in order to prove felony-murder and the rape-murder special circumstance; rather, both could be proved by showing that the murder was committed while appellant was engaged in the attempted commission of rape. (§§ 189 [felony murder], 190.2, subd. (a)(17)(C) [rape special circumstance]; *People v. Hart* (1999) 20 Cal.4th 546, 610 [rape special circumstance may be supported by evidence of attempted rape]; *People v. Marshall* (1997) 15 Cal.4th 1, 37 [first degree murder conviction can be sustained on the theory that the killing occurred in the course of an attempted rape].)

Here, there was more than enough other evidence to establish the corpus delicti of rape. Sara Weir's decomposed body was found, naked, underneath a bed in the apartment appellant had previously shared with his ex-girlfriend. (RT 946, 1415-1416, 1432-1433.) While no evidence of semen or spermatozoa was detected, Sara Weir's body was not discovered until days after her murder; given its advanced state of decomposition, the criminalist and medical examiner had opined that any such evidence would have decayed beyond the point of detection. (RT 1318, 1320, 1326, 2025-2026.) And, while there was no evidence of bruising to her vaginal or rectal region (RT 2028), the medical examiner explained that sexual intercourse could occur without producing such trauma (RT 2030-2031). Weir's body evidenced other numerous injuries, including antemortem bruises to her head (RT 2007-2008), and two stab wounds and antemortem abrasions on her neck (RT 1981-1982, 1996, 2016). Additionally, the minimal amount of blood at the scene suggested that Sara Weir had been killed while she lying on her back. (RT 1423-1424, 2012-2013.) Moreover, during time-frame during which the crimes against Sara Weir occurred, Robert Coty observed a shirtless man matching appellant's general

description walking around a living, *naked* woman in Theard's apartment where Sara Weir's body was later found. (RT 1143-1149, 1152-1154, 1157.) The naked woman, who had dark hair like Sara Weir, appeared as if she were being dominated by the man. (RT 931, 1153, 1160.) On September 7, 1993 – the day after she was last seen by her mother and the same day or day before Coty's observation – Sara Weir telephoned her co-worker and told her that she would not be at work that day a friend had committed suicide, which was untrue. (RT 1068, 1933-1935.) As the prosecutor later argued, Sara Weir "made up the story" of the suicide in an attempt to "cry[] out for help" because she "had gone through a lot already." (RT 2189.)

This evidence – Sara Weir's naked body, Weir's September 7, 1993 telephone call, the injuries to her head and neck, the murder occurring while she laid on her back, and Coty's observations of a living, naked woman matching Weir's general description being dominated by a man matching appellant's description – was more than sufficient to establish the corpus delicti of rape. (See *People v. Robbins* (1988) 45 Cal.3d 867, 886 [where the child-victim's body was so decomposed that a physical examination could not establish the commission of a sexual assault, the absence of clothing where the body was discovered was one factor in proving the corpus delicti of lewd conduct with a child]; see also *People v. Jennings* (1991) 53 Cal.3d 334, 366-368 [corpus delicti rule satisfied for prima facie showing of rape where the naked, badly-decomposed body of a woman, whose jaw had been broken, was found in an irrigation canal].) In a case like this – where the victim's body was decomposed such that it was "impossible to verify the sexual conduct by scientific evidence, and there were apparently no eyewitnesses to the crime" – the corpus delicti rule cannot "be interpreted to call for more . . . ." (*People v. Robbins, supra*, 45 Cal.3d at p. 886.)

Having established that there was sufficient evidence to satisfy the

corpus delicti rule, respondent submits that the trial court acted within its discretion when it admitted evidence of appellant's sexual assaults of Jodi D., Kim V., and Teri B. under Evidence Code section 1101, subdivision (b), to show intent, common plan or design, and identity.

b. Intent

The uncharged conduct was properly admitted to show the existence of intent. With respect to materiality, the defense ultimately conceded that appellant killed Sara Weir, but challenged the prosecution's first degree murder and special circumstance theories, arguing instead that appellant had killed Sara Weir during a "mood swing" and thus he was guilty only of second degree murder. (RT 2202-2215, 2226-2235.) In light of the defense theory, the following were disputed issues: intent to kill, premeditation and deliberation, intent to commit rape, and intent to commit robbery, which in turn implicated an intent to permanently deprive Sara Weir of her property. (See *People v. Carpenter, supra*, 15 Cal.4th at p. 379 [where defendant was charged with first degree murder, attempted murder, attempted rape and rape, the "facts of intent to kill, premeditation and deliberation, and intent to rape" were material issues].)

Only the "least degree of similarity" between the uncharged and charged conduct is required for uncharged conduct to be admissible to prove intent. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) Here, the uncharged conduct and charged offense were strikingly similar. In all four cases, appellant cultivated friendships with his victims, all of whom were young women. Appellant met Jodi D., Teri B. and Sara Weir through his work; with Kim V., appellant told her he could get her a job. In all four cases, he lied to the women regarding his true profession. Additionally, in all four cases, he lured the young women to his residence (or in the case of Sara Weir, his recently-former

residence), and there disrobed the women and attacked them.

Here, the uncharged offenses were properly introduced to show that appellant's murder of Sara Weir was intentional, premeditated and deliberate. In each of the three prior sexual assaults, appellant lured his victims to his residence. Appellant successfully prevented Jodi D. from escaping by threatening her that a dangerous cult was located outside (RT 1511-1513, 1529-1530); during the sexual assault, Jodi D. feared angering appellant because she believed he would beat her "to a pulp" or kill her (RT 1531). With Kim V., appellant repeatedly threatened to kill her, he placed a knife to her throat before raping her, and during one of the rapes he choked her to the point where she believed he was trying to kill her. (RT 1662-1664, 1667, 1687-1688, 1701, 1710-1711.) With Teri B., appellant stabbed her in the neck with the same blue-handled scissors he later used to kill Sara Weir, he repeatedly told her he would kill her, and then told her that, if she reported the rapes to the police, he would kill her and her family. (RT 1847-1848, 1852, 1863-1865, 1877.) Although appellant ultimately did not kill Jodi D., Kim V., and Teri B., by his threats and conduct he expressly indicated he was entertaining a deliberate *intent* to kill, and thus this evidence was relevant to showing the requisite intent for premeditated, deliberate murder of Sara Weir. (*People v. Robbins, supra,* 45 Cal.3d at pp. 878-879 [defendant's prior sexual offense involving a child was admitted to prove his intent to engage in lewd and lascivious conduct and to prove that the homicide was not the product of an accident but rather intentional, premeditated, and deliberate].)

The uncharged conduct was also admissible to support the inference that prior to, or at the time of killing her, appellant harbored the intent to rob Sara Weir, or to permanently deprive her of her property, which was required for felony-murder and the robbery-murder special circumstance allegation. Appellant took property from Jodi D. and Kim V. during the course of forcibly

raping them numerous times: after raping Jodi D. twice, appellant looked through her purse and opened her checkbook (RT 1566-1567), and then, between the third and fourth rapes, appellant took her jewelry (RT 1547); during the course of forcibly raping Kim V., appellant took jewelry and documents from her (RT 1671-1672, 1690, 1693). Furthermore, as discussed in Argument IV(B), *ante*, Teri B.'s driver's license and two of her forged checks were found in appellant's briefcase following her rape. In the instant charged case, two of Sara Weir's checks (bearing her forged signature) were found in appellant's possession when he was apprehended crossing the border into Texas from Mexico. (RT 1212-1214, 1247-1249.) Her missing car was located in Mexico. (RT 1244-1245.) Her purse and identification, however, were never recovered. (RT 864.) Given the similarity between the uncharged and charged conduct, the inference that appellant's intent to rob Sara Weir, or to permanently deprive her of her property, was not "incidental to" her murder was enough to support the trial court's discretionary decision to permit the jury to consider appellant's uncharged conduct involving Jodi D., Kim V., and Teri B. (See *People v. Yeoman, supra*, 31 Cal.4th at p. 122.)

Likewise, appellant's sexual assaults of Jodi D., Kim V. and Teri B. were admissible to demonstrate that appellant harbored an intent to rape Sara Weir prior to, or when, he killed her, which was relevant to proving rape-based felony murder and the rape-murder special circumstance allegation. Appellant's conduct during the three uncharged sexual assaults was remarkably similar to the instant case. In the instant case, there was evidence that appellant had Sara Weir in Theard's apartment for a long period of time: Sara Weir was last seen by her mother on September 6, 1993 (RT 861); the same day, Russell "Tony" Momon dropped off appellant at Theard's apartment (RT 1133-1134, 1137); that night, appellant telephoned Momon and told him he was inside the apartment (RT 1135-1136, 1139); the following morning, Sara Weir telephoned

her work with the false story about a friend's suicide (RT 1068, 1933-1935); that evening, appellant telephoned Momon again and told him hanging out with a woman other than Theard (RT 1136-1137, 1140), presumably Sara Weir; on the same day, or the following day, eyewitness Robert Coty observed a man matching appellant's description walk around a seated or kneeling naked woman, who matched Sara Weir's general description (RT 1147-1154); and, according to Coty, the woman looked as if she was being dominated by the man (RT 1160). Similarly, in the three uncharged acts, appellant lured Jodi D., Kim V., and Teri B. to his residence where, over the course of many hours, he proceeded to forcibly rape them. Additionally, appellant acted in a similar "dominating" fashion after raping Jodi D. and Kim V.: after raping Jodi D., he "dominated" her by walking around her as she sat naked on the bed. (RT 1542); likewise, after raping Kim V., appellant stood above her (RT 1688-1690, 1700, 1709-1710). Thus, given the similarity of the conduct to the instant case, the uncharged conduct was admissible to show that appellant probably harbored the same intent to rape Sara Weir prior to, or at the time of, killing her. (*People v. Carpenter, supra*, 15 Cal.4th at p. 379 [holding that "a jury could reasonably infer from the evidence" of prior rape that defendant intended to rape victim in charged offense].)

c. Common Design Or Plan

Appellant's sexual assaults of Jodi D., Kim V., and Teri B., were also admissible to show common design or plan, which is used "to prove that the defendant *engaged in the conduct* alleged to constitute the charged offense." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, footnote omitted, italics added; *id*. at p. 394, fn. 2 ["Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged"; italics in original].) "Unlike evidence used to prove intent, where the act is conceded or assumed,

'in proving design, the act is still undetermined . . . .' [Citation.]" (*Id*. at p. 394, fn. 2, ellipses in original, internal brackets omitted; accord, *People v. Balcom, supra,* 7 Cal.4th at p. 423.) To prove common plan or design, the degree of similarity between the uncharged act and the charged offense needs to be greater than that needed to prove intent, but less than that needed to prove identity. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403.)

> [T]he common features must indicate the existence of a plan rather a series of spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts.

(*Id*. at p. 403.)

Here, the common features between the charged and uncharged offenses demonstrate that, when appellant committed the offenses against Sara Weir, he was acting pursuant to a common plan or design to rob, forcibly rape, and then intentionally kill her with premeditation and deliberation. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403 [evidence that defendant committed prior, uncharged lewd acts on victim's older sister "share[d] sufficient common features to support the inference that both the uncharged misconduct and the charged offenses [were] manifestations of a common design or plan," and thus "relevant to establish that defendant committed the charged offenses in accordance with that plan"].) As previously discussed, the charged and uncharged conduct was practically identical: in all four cases, appellant cultivated friendships with his victims, all of whom were young women; he lied to the women regarding his true profession; and he lured them to his residence where he committed the crimes against them.

The three uncharged incidents involved the taking of property during the course of raping the women repeatedly: appellant forcibly raped Jodi D. and

Kim V., took property from them, and then forcibly raped them again; he forcibly and repeated raped Teri B., and she later discovered that her driver's license and checks had been taken from her. (See Arg. IV(D)(2)(b), *ante*.) Similarly, Sara Weir's checks were found in appellant's possession when he crossed the border from Mexico, and her missing car was located in Mexico; her identification was never recovered. (See *ibid*.) As such, the uncharged conduct was admissible to show that appellant was acting pursuant to a common design or plan of robbing Sara Weir before he killed her. (*People v. Balcom, supra*, 7 Cal.4th at pp. 424-426 [prior robbery-rape shared sufficient common features with the charged robbery-rape to support the inference that the uncharged and charged acts were manifestations of a common plan or design, which was relevant to show that the defendant either employed or developed the plan in committing the charged robbery-rape].)

The prior sexual assaults also shared sufficient common features with appellant's crimes against Sara Weir to show that appellant raped Sara Weir before killing her. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) The three uncharged sexual assaults involved threats and/or violence followed by rape. For example, when appellant initially attacked Teri B., he burst into the bathroom, causing the door to hit her and throw her against the wall. (RT 1848.) With Kim V. and Teri B., appellant held a stabbing instrument – a knife with Kim V., and the blue-handled scissors with Teri B. – to his victims' necks and then he raped them. (RT 1667, 1847-1848, 1852, 1863-1865.) Before raping Teri B., he pushed her onto the bed and grabbed her by the throat. (RT 1849-1851.) After raping Kim V. twice, appellant choked her as he raped her a third time. (RT 1712-1713.) Additionally, as discussed previously (see Arg. IV(D)(2)(b)), appellant repeatedly threatened to kill Kim V. and Teri B. during the course of raping them, and Jodi D. feared that he would kill her. Similarly, Sara Weir's body evidenced antemortem violence. She had antemortem bruises

on her head: two bruises on forehead and two bruises on the back of her head. (RT 2007-2008.) The bruises were consistent with her head hitting a wall. (RT 2008.) She had two stab wounds on her neck that were consistent with the blue-handled scissors; the neck wounds were not immediately fatal. (RT 1962-1966, 1968, 1981-1982, 1999, 2002.) She also had antemortem abrasions on her neck. (RT 2016.)

Furthermore, while no bodily fluids were detectable due to the decomposition of Sara Weir's body, appellant did not ejaculate when he raped Jodi D. (RT 1529, 1551); thus, his completed rape of Jodi D. was circumstantial evidence to prove that appellant could have penetrated Sara Weir -- thus, committing a completed rape -- without leaving any bodily fluids. (See § 263 [only slightest penetration required for rape]; *People v. Wright* (1990) 52 Cal.3d 367, 405.)

Also, appellant engaged in similar post-rape conduct with Jodi D., Kim V., and Teri B., which was relevant to proving that appellant had raped Sara Weir before killing her. As discussed above, his post-rape domination conduct with Jodi D. and Kim V. was similar to that witnessed by Robert Coty with respect to Sara Weir. Additionally, after raping Teri B. twice, appellant poured a mixture of champagne and whisky into two glasses, gave one of the glasses to Teri B., and drank the other. (RT 1875.) Likewise, Theard found wine glasses and an empty champagne bottle in the apartment when she returned during one of her post-Labor Day visits. (RT 954.)

Appellant, however, argues that appellant's sexual assaults of Kim V., Jodi D., and Teri B., were not admissible as evidence of common plan or design for two reasons. (AOB 112-114.) First, he claims that his rapes of Kim V. and Jodi D. could not be "considered part of a plan or design" because they occurred six years and two years, respectively, before his crimes against Sara Weir. (AOB 112.) But, this restricted view of the admissibility was rejected

by this Court in *Ewoldt*. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 401 [overruling cases formerly holding that uncharged acts were "admissible to establish a common design or plan only where the charged and uncharged acts [were] part of a single, continuing conception or plot"]; see 1 Witkin, Cal. Evidence (4th ed. 2000), Circumstantial Evidence, § 97.) In *Ewoldt*, this Court explained that the proper inquiry is whether "evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offenses are sufficiently similar to support the inference that they are manifestation of a common design or plan." (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 401-402.) Accordingly, appellant's "single, continuing conception or plot" argument must be rejected.

As his second ground for arguing against the existence of common plan or design, appellant claims that the rapes of Kim V., Jodi D. and Teri B. were "spontaneous acts." He focuses on his "bizarre" and "psycho" behavior during the assaults, which he claims is "utterly inconsistent with the notion of a plan or design." (AOB 112-114.) But, appellant's focus is too narrow. Rather, the incidents show that "appellant had a *plan* to cultivate friendships with young women, lure them to his room and sexually assault them," and that is *exactly* "what happened during each of the incidents." (See AOB 112-113, italics in original.)

In sum, due to the remarkable similarity to the charged offense, the uncharged conduct evidence was relevant to showing that appellant raped Sara Weir and then killed her. (*People v. Kipp* (1998) 18 Cal.4th 349, 370-371 [similarities between prior uncharged rape-murder and charged rape-murder admissible to show that when the defendant committed the charged and uncharged offenses "he was acting pursuant to a common plan or design to forcibly rape and to kill the young women he had chosen as his victims"].)

d. Identity

Appellant admits that the other evidence – including his fingerprints on the packaging tape roll used to secure the plastic bag over Weir's head, appellant's September 7, 1993, telephone conversation with Momon that he was with a woman other than Theard, and appellant's possession of Sara Weir's property – "all pointed to the fact that appellant was with Weir at or near the time she died." (AOB 111.) In light of this other evidence, he contends that the evidence of appellant's prior sexual assaults was cumulative as to identity and, thus, it should not have been admitted for that purpose. (AOB 110-111.) Respondent disagrees.

First, while the prosecutor did not initially seek to introduce appellant's sexual assaults of Kim V. and Teri B. to prove identity (RT 281, 1453-1454), he later expressly argued that the three prior sexual assaults were admissible to prove identity. (RT 1459-1460.) The trial court agreed. (RT 1460.) Second, even though the defense ultimately conceded during closing argument the appellant killed Sara Weir (RT 2235-2236), appellant had placed identity at issue by entering a "not guilty" plea to murder charge and special circumstance allegations. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 146; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 378-379; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 400, fn. 4.) Thus, the prosecutor was required to prove identity. (Cf. *People v. Steele* (2002) 27 Cal.4th 1230, 1243 [even if the defense concedes intent at trial, "the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent"].) Indeed, he argued the issue of identity during closing argument with respect to appellant's motivation for hiding Sara Weir's body under his ex-girlfriend's son's bed, i.e., that it was a deliberate choice motivated by revenge. (RT 2165, 2176-2177.) As such, the uncharged conduct evidence was not cumulative.

Nevertheless, even assuming that the evidence of appellant's prior sexual

assaults was cumulative with respect to the issue of identity, he was not prejudiced by its admission. The same evidence was properly admitted to prove intent and to common design or plan. (*People v. Yeoman, supra*, 31 Cal.4th at p. 122 [no prejudice resulting from admission of uncharged conduct to prove identity because same evidence was properly admitted to prove intent and defendant conceded that identity "'was never seriously questioned'"].)

e. The Probative Value Of This Evidence Was Not Substantially Outweighed By Its Prejudicial Effect

"Evidence of uncharged crimes is inherently prejudicial but may still be admitted if it has substantial probative effect. [Citation.]" (*People v. Carpenter, supra*, 15 Cal.4th at p. 380.) Here, when evaluating the admissibility of appellant's sexual assaults of Jodi D., Kim V., and Teri B., the trial court conducted an Evidence Code section 352 analysis. In each instance, the trial court found that the "significant" or "extremely" probative value of the uncharged conduct far outweighed its prejudicial effect. (RT 288-289 [Kim V. evidence]; RT 307 [Jodi D. evidence]; RT 1454-1455 [Teri B. evidence].) The trial court's ruling was well within its discretion.

As discussed above, the evidence of appellant's prior sexual assaults was highly probative on the issues of intent, common plan or design, and identity. The charged and uncharged conduct was committed in a nearly identical manner, which evidenced appellant's planned course of action, i.e., to develop friendships with young women, lure them to his residence, and then sexually assault and rob them. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) The probative value of the sexual assaults of Jodi D. and Kim V. was further enhanced by the fact that they "provided a detailed report of [the] incident[s] without being aware of the circumstances of the charged offense . . . ." (*Ibid.*)

Contrary to appellant's assertion (AOB 120), testimony by all three

victims did not increase the prejudicial effect of this evidence. Rather, as this Court explained in *Ewoldt*, "[t]he probative value of such evidence is increase[d] further if instances of similar misconduct, committed pursuant to the same design or plan, were produced." (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 404-405.) Additionally, the fact that appellant was convicted of the sexual assault of Jodi D. "reduces any prejudicial effect. [Citation.]" (*People v. Steele, supra*, 27 Cal.4th at p. 1245.) Moreover, while appellant left before the police arrived after Kim V. reported her sexual assault (RT 1723-1724), the jury was not told about any subsequent legal action which may have resulted, thereby decreasing the likelihood it would convict to punish appellant for this crime. (See *People v. Callahan* (1999) 74 Cal.App.4th 356, 371 [no undue prejudice for Evidence Code section 352 purposes where "the jury was not told one way or the other about any legal action which may have resulted" from the prior uncharged act].) Similarly, while the jury learned that Teri B. had not reported the sexual assault prior to instant trial, appellant was not prejudiced because the jury was not informed of any ongoing or subsequent legal action. (*Ibid*.)

Quite simply, any prejudice to appellant from this evidence did not merit exclusion under Evidence Code section 352 because it was the type of prejudice that naturally flowed from this relevant, highly probative evidence. (*People v. Karis, supra,* 46 Cal.3d at p. 638.) In light of the highly probative nature of appellant's three prior sexual assaults, it cannot be said that the trial court's ruling fell "outside the bounds of reason. [Citation.]" (*People v. Catlin, supra,* 26 Cal.4th at pp. 120, 122, internal quotation marks omitted.)

Finally, to the extent appellant argues that the admission of the uncharged conduct evidence violated his federal due process rights and his right to a reliable adjudication of a death verdict (AOB 122), he has waived this argument because he did not object on such grounds at trial. (*People v. Catlin,*

supra, 26 Cal.4th at pp. 122-123 ["Defendant's contention that the admission of the other-crimes evidence violated his state and federal constitutional right to a fair trial is waived because it was not raised below."].) Notwithstanding waiver, this Court should reject the argument because "the trial court's decision to admit the evidence was correct under state law [citations], was neither arbitrary nor fundamentally unfair, and did not render the death verdict unreliable." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 123.)

E. Harmless Error

Even assuming that the admission of the uncharged conduct evidence was error, it was harmless because it is not reasonably probable that appellant would have received a better result in the absence of the error. (*People v. Malone* (1988) 47 Cal.3d 1, 22 [harmless error standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836, applies to erroneous admission of character evidence].)

First, excluding all of the uncharged conduct testimony, there was ample evidence of first degree premeditated murder. Weir's body revealed 29 stab wounds. (RT 1996.) There were antemortem defensive wounds to her hands (RT 2004-2005), but most of the stab wounds revealed that the weapon had entered in a "fairly straight up and down" manner (RT 2003), and there was evidence that she had been stabbed while laying on her back (RT 1423-1424, 2012-2013). This indicated that Weir did not struggle long. The medical examiner opined that Sara Weir was unconscious for several minutes before dying. (RT 2011.) She was found with a plastic bag over her head, and the bag had been secured with tape wrapped around her neck. (RT 1278, 1426-1427, 1432-1433.) Appellant's latent prints were found on the matching roll of tape and on the baseball helmet found on her head. (RT 1282, 1284-1288, 1295, 1385-1394.) As the prosecutor articulated during closing argument (RT 2166-

2167, 2169, 2171), the plastic bag appellant placed over Weir's head, and his act of taping it securely around her neck, evidenced his premeditated and deliberate intent to kill.

Second, there was also ample other evidence that appellant murdered Sara Weir during the course of rape and robbery, thereby supporting first degree felony murder and the special circumstance findings. Weir was last seen by her mother on September 6, 1993. (RT 861.) That evening, appellant told Momon that he was in Theard's apartment (RT 1133-1137, 1139.) The next morning, Sara Weir was still alive because she telephoned her work and, in a cry for help, concocted a story about a friend's suicide. (RT 1068, 1933-1934.) That evening, appellant telephoned Momon again and told him that he was "hanging out" with a woman other than Theard. (RT 1136-11367, 1140.) That day, or the day after, Robert Coty saw in Theard's apartment a man matching appellant's description walking around a woman matching Weir's description; the woman was naked and appeared to be dominated by the man. (RT 1147-1154, 1157, 1159-1160.) Weir's naked and decomposed body was finally discovered in Theard's apartment days later. (RT 946, 1415-1416, 1432-1433.) The naked state of her body was probative of rape because, as the prosecutor had argued, Weir had been seen alive and naked, and then found dead and naked. (RT 2185.) She had 29 stab wounds. (RT 1996.) The nature of the wounds and the minimal amount of blood indicated that she had been stabbed while lying on her back. (RT 1422-1424, 2012-2013.) There was evidence of antemortem violence: in addition to the defensive wounds on her hands, there were several antemortem bruises on her head (RT 2015-2016), antemortem abrasions on her neck (RT 2007-2009), and two not-immediately fatal stab wounds on her neck (RT 1981, 2002). Her antemortem injuries supported the prosecution's theory that she had been forcibly raped and robbed. While no spermatozoa or semen was detected (RT 1318, 1325-1326), its presence would

have been undetectable given the badly decomposed state of her body (RT 1320, 1326). Moreover, the absence of bodily fluids or bruising to the vaginal or rectal area did not undermine the prosecution's case because only the slightest penetration was required for rape (see § 263), and attempted rape was sufficient to prove rape-murder and the rape special circumstance (see §§ 189, 190.2, subd. (a)(17(C)). There was also other evidence of robbery. When appellant was apprehended crossing the border from Mexico, he had two of Sara Weir's forged checks in his possession. (RT 1212-1213, 1247-1249.) Also, Weir's missing car was located in Mexico. (RT 1244-1245.) Respondent submits that this non-uncharged conduct evidence is sufficient to support appellant's first degree murder conviction based on felony murder as well as the true findings on the rape and robbery special circumstance allegations.

In arguing prejudice, appellant focuses primarily on the impact of the evidence of appellant's sexual assaults of Jodi D., Kim V., and Teri B, which showed appellant to be a serial acquaintance rapist. (AOB 123-126.) But, prior to hearing any of this evidence, the jury was admonished that the evidence was admitted for the limited purpose of showing intent, identity, motive, "a characteristic method, plan or scheme," and the absence of appellant's reasonable and good faith belief in Sara Weir's consent to engage in sexual, or attempted sexual, conduct. (RT 1461-1464, 1609.) The jury was similarly instructed at the end of the guilt phase. (RT 2120-2123; CT 453-457; see CALJIC Nos. 2.09, 2.50 (1994 rev.), 2.50.1, 2.50.2].) The jury is presumed to have followed these instructions (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73), which reduced the danger of any prejudice to appellant. (*People v. Catlin, supra*, 26 Cal.4th at p. 147.) Moreover, because there was ample other evidence of first-degree murder and a true finding on at least one special circumstance allegation, the trial would have proceeded to the penalty phase, at which point appellant's sexual assaults would have been admitted. (§ 190.3,

factor (b).)

Nevertheless, appellant argues that the admission of the uncharged conduct evidence merits reversal because "the case was a close one." (AOB 127-128.) He is incorrect.

In support of his "close case" argument, appellant points to the jury's request for readback of eyewitness Robert Coty's testimony. (AOB 127.) Coty had testified that, during the relevant time-frame of Sara Weir's disappearance and murder, he saw a man walking around a naked woman in an adjacent apartment, and that the man appeared to be dominating the woman. (RT 1147-1154, 1157, 1159-1160.) The man matched appellant's general description, and the woman matched Weir's general description. The jury's request of this testimony, as opposed to any of the uncharged conduct testimony, indicates that the jury did *not* decide the case based solely the prior sexual assaults. As such, the readback request undercuts appellant's prejudice argument.

Additionally, contrary to appellant's assertion (AOB 128), the jury deliberations in this capital murder case were not long: after 10 days of trial testimony from 27 witnesses (CT 404, 409, 411, 415, 423-424, 426, 429-431), it took the jury less than 14 hours of deliberation to find appellant guilty of first-degree murder and to find true both of the special circumstance allegations (CT 434, 436-438, 440).

In sum, the trial court acted within its discretion when it admitted the uncharged acts evidence. Regardless, in light of the other evidence supporting first degree murder (both felony murder and premeditated, deliberate murder) as well as the rape- and robbery-based special circumstance findings, any error in admitting the uncharged acts evidence was harmless. Likewise, any error in admitting the uncharged acts evidence with respect to any one prior victim, or any one theory of admissibility, was harmless in light of the other admissible uncharged acts.

Accordingly, appellant's argument challenging the admissibility of the uncharged acts evidence must be rejected.

V.

APPELLANT WAS NOT DEPRIVED OF HIS RIGHT TO PERSONAL PRESENCE

Appellant contends that his right to be present at trial, which is protected by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and article I, section 15 of the California Constitution, was violated when he was not present during in camera hearings or sidebars held by the trial court in the presence of the prosecutor and his trial counsel. (AOB 129-141.)[45/] Appellant cites five instances where he was not present: (1) during voir dire, the legal argument by his trial counsel and the prosecutor during the hearing on the defense's *Wheeler* motion concerning prospective alternate juror Selina S. (AOB 130-135); (2) during voir dire, the questioning of prospective juror Cheryl M., conducted by the prosecutor in the presence of the trial court and appellant's trial counsel, where the prospective juror revealed that her son's uncle had been successfully prosecuted by the same prosecutor (AOB 135-136); (3) during voir dire, the legal argument by his trial counsel and the prosecutor concerning prospective juror James T.'s views regarding the death penalty (AOB 135-136); (4) during trial, a sidebar between the court and counsel regarding the defense's proposed cross-examination of Sara Weir's mother regarding evidence that Sara Weir had consumed alcohol during her life (AOB 137-140); and (5) during trial, the prosecutor's initial disclosure that Teri B. had, the night before, reported for first time that appellant had raped her (AOB 138-140). Respondent submits that appellant did not have a right to be personally present during these discussions between the court and counsel.

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45. Appellant also claims that his absence violated his statutory rights (AOB 129-130), but he fails to identify a single statute. Accordingly, respondent limits its discussion to the alleged constitutional violation.

A. Applicable Law

> A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution . . . . (*People v. Jones* ([1991] 53 Cal.3d [1115], 1141; *People v. Douglas* (1990) 50 Cal.3d 468, 517.) A defendant, however, 'does not have a right to be present at every hearing held in the course of a trial.' (*People v. Price* (1991) 1 Cal.4th 324, 407.) A defendant's presence is required if it 'bears a reasonable and substantial relation to his full opportunity to defend against the charges.' (*People v. Freeman* (1994) 8 Cal.4th 450, 511.) The defendant must show that any violation of his right resulted in prejudice or violated the defendant's right to a fair and impartial trial. (*People v. Jackson* (1980) 28 Cal.3d 264, 310.)

(*People v. Hines*, *supra*, 15 Cal.4th at pp. 1038-1039; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 433; *People v. Waidla* (2000) 22 Cal.4th 690, 741-742.)

A defendant is "not entitled to be personally present either in chambers or at bench discussions which occur outside of the jury's presence on questions of law or other matters . . . ." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1080, citing, inter alia, *People v. Jackson*, *supra*, 28 Cal.3d at pp. 309-310.) Furthermore, there must be a "reasonably substantial relation" to a defendant's ability to defend himself, not a mere "shadow" benefit. (*People v. Ochoa, supra*, 26 Cal.4th at p. 433.)

A reviewing court applies an independent, or de novo, standard of review to a trial court's exclusion of a criminal defendant from trial, either in whole or in part, to the extent the trial court's decision entails a measurement of the facts against the law. (See *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1355-1358.)

B. Appellant Was Not Deprive Of His Right To Personal Presence

Here, appellant had no right to be personally present at the enumerated proceedings because they involved the discussion of legal issues between the court, the prosecutor and appellant's trial counsel. (*People v. Cole* (2004) 33

Cal.4th 1158, 1230-1232 [defendant had no right to be personally present at various proceedings, including pretrial hearings on motions, and bench conferences during voir dire related to confidential interviews of various prospective jurors and alternate jurors and to challenges for cause, and in-court conferences regarding jury instructions].) There is no indication that appellant's presence at these routine proceedings might have had any impact. (*People v. Holt, supra,* 15 Cal.4th at p. 707.) Appellant's "arguments to the contrary are unduly speculative." (*People v. Cole, supra*, 33 Cal.4th at p. 1232.) Thus, there is "no arguable basis for claiming that [appellant's] absence 'prejudiced his case or denied him a fair and impartial trial.' [Citation.]" (*People v. Bittaker, supra*, 48 Cal.3d at pp. 1080-1081 [absence from various hearings and conferences nonprejudicial]; see *People v. Hardy* (1992) 2 Cal.4th 86, 178 [defendant had not right to be present during conference involving legal issues].)

The cases relied upon by appellant are distinguishable, and thus do not merit a contrary result. (See AOB 131-141.) Appellant relies heavily on this Court's decision in *People v. Ayala* (2000) 24 Cal.4th 243, 262, and, to a lesser extent, on the Ninth Circuit's decision in *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1257. (AOB 131-134, 136-137.) But as appellant himself points out, both *Ayala* and *Thompson* involved the exclusion of both "the defendant *and his attorney*." (AOB 131, fn. 50, italics in original.) Such was not the case here. During all of the reported proceedings held in the hallway outside the presence of the jury, appellant's trial counsel was present. (Supp. III CT 4-5.) As such, appellant fails to carry *his* burden of demonstrating that his absence prejudice his case or denied him a fair trial. (*People v. Bradford, supra*, 15 Cal.4th at p. 1357.)[46/]

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46. Appellant incorrectly, and without citation, claims that respondent bears the burden of disproving prejudice. (AOB 135.)

VI.

SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S MURDER CONVICTION AND SPECIAL CIRCUMSTANCE FINDINGS (RESPONSE TO AOB ARGS. VI-VIII)

Appellant challenges the sufficiency of the evidence supporting his murder conviction (prosecuted under the alternative theories of premeditated murder and felony murder) and the special circumstance findings. First, he contends that the evidence of robbery was insufficient to support a robbery-murder conviction and the special circumstance finding based on robbery, arguing that the evidence showed only theft. (AOB 142-151.) He also contends that the evidence of rape was insufficient to support a rape-murder conviction and the special circumstance based on rape because there was no physical evidence of a sexual assault. (AOB 152-166.)[47/] Finally, he contends there is insufficient evidence to support his murder conviction based on intentional, premeditated, and deliberate murder. (AOB 167-177.) But, having failed to convince 12 jurors at his trial, appellant merely reargues the evidence presented and asks this Court to reach a different conclusion. Respondent submits that the evidence was more than sufficient to support appellant's murder conviction and the special circumstance findings.

A. Standard Of Review

Where a defendant challenges the sufficiency of the evidence upon which a judgment is based, the proper test is whether substantial evidence supported the conclusion of the trier of fact, not whether the evidence proved guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d

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47. After the defense rested, the trial court denied appellant's motion for acquittal on the rape- and robbery-based special circumstance allegations. (RT 2039-2046.)

557, 578.) A reviewing court must view the evidence in the light most favorable to the People and presume every fact which the trier of fact could reasonably have deduced from the evidence in favor of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The role of a reviewing court is a limited one:

> A reviewing court may not substitute its judgment for that of the jury. It must view the record favorably to the judgment below to determine whether there is evidence to *support* the instruction, not scour the record in search of evidence suggesting a contrary view. [Citation.]

(*People v. Ceja* (1993) 4 Cal.4th 1134, 1143, italics in original.)

The same standard applies to the review of circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Circumstantial evidence "is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) While a jury must acquit a defendant if it finds that the circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, "it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Indeed, if the circumstances reasonably justify the jury's findings, the reviewing court's opinion that the circumstances might also be reasonably reconciled with a contrary finding does *not* warrant a reversal of the judgment. (*Id.* at p. 933.)

The test used to determine the sufficiency of the evidence for a special circumstance allegation is the same as that for the substantive crime. (*People v. Mayfield, supra,* 14 Cal.4th at pp. 790-791.)

B. Substantial Evidence Supports Robbery-Murder And The Robbery-Murder Special Circumstance Finding

In Argument VI of his Opening Brief, appellant challenges the sufficiency of the evidence supporting his first degree murder conviction and

the robbery special circumstance finding. (AOB 144-151.) Specifically, he argues that his first degree murder conviction cannot be sustained under a robbery-murder theory because there was insufficient evidence that (1) he took Sara Weir's property, i.e., her checks and car keys, from her possession, (2) that the property was taken by the use of force or fear, and (3) that he harbored the intent to steal either prior to, or at the time, of killing her. (AOB 144-150.) Essentially, appellant argues that it was "more likely" that he obtained Weir's checks prior to killing her or that he took her property as "an afterthought." (AOB 146.) As for the robbery-murder special circumstance finding, he argues that there was insufficient evidence that he harbored "an independent felonious purpose to rob" or that "a connection between the killing and the intent to further such a plan" existed. (AOB 150-151.) In other words, he argues that the robbery was merely "incidental to" the murder. Respondent disagrees.

First degree murder may be accomplished by "murder . . . committed in the perpetration of, or attempt to perpetrate" certain enumerated felonies, including robbery. (§ 189.) A homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1016.)

Robbery is "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." (§ 211; *People v. Hill* (1998) 17 Cal.4th 800, 849.) The victim's possession of the property may be either actual or constructive, and it need not be exclusive. (*People v. Miller* (1977) 18 Cal.3d 873, 880-881.) Constructive possession does not require direct physical control over the item, but it does require that a person knowingly exercise control or the right to control a thing, either directly or through another person or persons. (*People v. Nguyen* (2000) 24 Cal.4th 756, 759-762; *People v. Austin* (1994) 23 Cal.App.4th 1596, 1609.) "Immediate presence" means that

property must be within the victim's reach or control, so that she could, if not overcome by violence or prevented by fear, retain her possession of it. (*People v. Harris* (1994) 9 Cal.4th 407, 415.)

This Court repeatedly has observed that "when one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery." (*People v. Turner* (1990) 50 Cal.3d 668, 688; accord, *People v. Bolden* (2002) 29 Cal.4th 515, 553; *People v. Hughes* (2002) 27 Cal.4th 287, 357 (*Hughes*); *People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) "If a person commits a murder, and after doing so takes the victim's wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money." (*People v. Marshall*, *supra*, 15 Cal.4th at p. 35.)

Here, contrary to appellant's assertion (AOB 144-145), there was substantial evidence from which a rational trier of fact could have found that Weir's checks and car keys were taken from her "immediate presence" and that the taking was accomplished by the use of force or fear. To begin with, appellant concedes that his possession of the "uncashed checks 'supports an inference that he took them from Weir or her immediate presence . . . .' [Citation.]" (AOB 147.) That she would have retained possession and control over her items if appellant had not overcome her by killing her is practically self-evident. Here, as discussed above (Arg. IV(D)(2)(b)), there was circumstantial evidence that appellant held Sara Weir captive for many hours, if not days, before killing her: she was last seen by her mother on September 6; the following morning, she telephoned into work with a false story -- a cry for help; that evening, appellant telephoned Momon and told him that he was with a woman other than Theard; on the same day (or the day after), Robert Coty observed a woman matching Sara Weir's general description being dominated by a man matching appellant's general description. Additionally,

Sara Weir's body exhibited several antemortem injuries – bruises to her head and abrasions on her neck – as well as defensive wounds to her hands. (See Arg. IV(D)(2)(c), *ante*.) Furthermore, as discussed in Argument IV, appellant's sexual assaults of Jodi D., Kim V., and Teri B. were admitted to show that, when appellant committed the offenses against Sara Weir, he was acting pursuant to a pre-existing common plan or design to rob her while he forcibly raped her. Based on all of this evidence, the jury reasonably could have found that appellant took the checks and car keys from Weir, by the use of force or fear, prior to killing her.

There is also substantial evidence that appellant harbored the intent to steal Weir's property either prior to, or at the time of, using force or fear to accomplish the taking. (See *People v. Kipp, supra*, 26 Cal.4th at p. 1128 [robbery conviction requires showing "'that the requisite intent to steal arose either before or during the commission of the act of force[]'"]; cf. *People v. Morris* (1988) 46 Cal.3d at p. 23, fn. 9 [an intent to rob will not support a conviction of felony murder if it arose after the infliction of the fatal wound], citing *People v. Green* (1980) 27 Cal.3d 1, 54, fn. 44.) Here, as discussed in Argument IV, the evidence of appellant's fraudulent financial dealings with the women he met at the gym, along with his taking of Michelle Theard's and Teri B.'s checks, was admissible to support the inference that prior to, or at the time of killing her, appellant harbored the intent to rob Weir. Likewise, appellant's sexual assaults of Jodi D. and Kim V., during which he robbed them while raping them numerous times, were admissible for the same purpose. (Arg. IV (D)(2)(b), *ante*.) Moreover, the prior sexual assaults were admissible to show that appellant was acting pursuant to a common design or plan of robbing Weir before he killed her. (Arg. IV(D)(2)(c), *ante*; see also *People v. Seaton* (2001) 26 Cal.4th 598, 644 [a perpetrator who wounds the victim, then decides to steal and thereafter finishes off the victim, has committed robbery and robbery-

murder].) Accordingly, it was reasonable to infer that appellant had the intent to steal Weir's property when he attacked her.[48/]

Appellant's reliance on *People v. Morris, supra,* 46 Cal.3d 1, and *People v. Marshall, supra,* 15 Cal.4th 1, is misplaced. (See AOB 147-150.) In *Morris*, this Court reversed a robbery conviction and robbery-murder special circumstance where the victim was found naked, shot to death, in a bathhouse, and there was no evidence that the victim had any personal property in his possession at the time of the murder. The *Morris* Court found that evidence the defendant used a credit card previously in the victim's possession was consistent with the defendant having surreptitiously stolen the card from the victim's clothing, or the victim having offered the card to the defendant in exchange for sexual services. (*People v. Morris*, 46 Cal.3d at pp. 20-22.) In *Marshall*, the Court found insufficient evidence of robbery where the only property taken from the victim was a letter of no clear value to the defendant. (*People v. Marshall*, 15 Cal.4th at pp. 34-35.)

By contrast, here, there was ample evidence that appellant robbed Weir before murdering her. As discussed above, the uncharged conduct evidence was admitted to show *both* appellant's intent to rob and the act of robbery itself. Second, unlike the valueless letter taken in *Marshall*, here appellant took checks from Sara Weir that bore her forged signature. Had he chosen to, appellant could have used the checks and his past conduct showed that he was fully-capable of doing so. Additionally, he took Sara Weir's car. This evidence amply supports the jury's finding that appellant robbed Sara Weir prior to the murder.

Likewise, appellant's sufficiency challenge to the robbery-murder special

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48. The fact that appellant might have entertained multiple motives for killing the victim does not invalidate appellant's conviction. (See *People v. Bolden, supra*, 29 Cal.4th at p. 558.)

circumstance finding fails. This special circumstance applies when the murder was committed while the defendant was engaged in the commission of, attempted commission of, robbery. (§ 190.2, subd. (a)(17)(A).) To prove a felony-murder special circumstance, the defendant must have "intended to commit the felony at the time he killed the victim and . . . the killing and the felony were part of one continuous transaction. [Citations.]" (*People v. Coffman* (2004) 34 Cal.4th 1, 88.) In other words, the underlying felony may not be "merely incidental to murder[.]" (*People v. Green*, *supra,* 27 Cal.3d at p. 61; see *People v. Turner*, *supra*, 50 Cal.3d at p. 688 ["the elements of a robbery-murder special circumstance are not present if theft of the victim's property was merely 'incidental' to a murder"].) But, under California law, concurrent intents to kill and to commit an independent felony will support a felony-murder special circumstance. (*People v. Clark* (1990) 50 Cal.3d 583, 608-609; see *People v. Zapien* (1993) 4 Cal.4th 929, 984-985 [where the evidence suggested a pre-existing intent to kill and then rob the victim, the robbery-murder special circumstance finding was proper because the robbery was not merely incidental to the murder].)

Here, there was substantial evidence showing that appellant had an independent felonious purpose to rob Weir, and that her murder and the robbery were part of one continuous transaction. As discussed in detail above with regard to felony murder, ample evidence demonstrated that appellant harbored the intent to steal property before, or during the course of, using force against her, and that the robbery and the murder were part of one continuous transaction. The prosecutor made this point during closing argument, reasoning: "In all of [appellant's] past instances he had a joint desire to take from his victims, both money and the joy of inflicting fear and pain in them, which is what it was." (RT 2183.) Thus, he urged the jury to "[c]onvict [appellant] of either no crime because he committed none or of both special

circumstances because both were part of his plan and reason for what he did to Sara." (RT 2184; see RT 2258-2259 [prosecutor arguing that appellant taking from each of his victims showed that his robbery of Sara Weir was not an "afterthought"].) The evidence was plainly sufficient to show that appellant had an independent felonious purpose in committing robbery, which was not merely incidental to his murder of Weir.[49/] Accordingly, the robbery-murder special circumstance is supported by substantial evidence.

C. Substantial Evidence Supports Rape-Murder And The Rape-Murder Special Circumstance Finding

In Argument VII of his Opening Brief, appellant claims that his first degree murder conviction and the rape-murder special circumstance should be reversed due to insufficient evidence of a completed or attempted sexual assault. (AOB 152-166.) Viewing the evidence in the light most favorable to the prosecution, respondent submits that a rational trier of fact could have determined with the requisite degree of certainty that appellant murdered Sara Weir while he was engaged in raping her or attempting to rape her.

First, the evidence of appellant's sexual assaults of Jodi D., Kim V., and Teri B. was relevant and admissible to prove that appellant raped Sara Weir. As discussed fully in Argument IV(D), *ante*, the similarity between the charged conduct and uncharged conduct was striking: in all four cases, appellant cultivated friendships with his victims (all of whom were young women), lied to them about his profession, and then lured them to his residence where he assaulted them. The three uncharged sexual assaults involved violence,

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49. Assuming any one special circumstance is found invalid, the death judgment need not be set aside where there is another valid special circumstance remaining. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 512; see also *Zant v. Stephens* (1983) 462 U.S. 862, 890-891 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

followed immediately by forcible rape, from which the jury could infer that appellant immediately raped Sara Weir after the initial use of violence.

Indeed, the type of violence appellant used was frightening similar to the instant case: appellant used stabbing instruments with Kim V., Teri B., and Sara Weir; in fact, the same scissors appellant had used to stab Teri B. before raping her, he again used a week later to inflict non-fatal wounds to Sara's neck and to kill her by stabbing her numerous times. (RT 1667 [Kim V.]; RT 1847-1848, 1852, 1863-1865 [Teri B.]; RT 1962-1966, 1968, 1981-1982, 1999, 2002 [Sara].) As the prosecutor explained during closing argument, appellant's common plan or design of committing rape indicated a completed rape of Weir:

> In every instance the defendant's first thing after attacking, after brutalizing with the weapon was a rape. During that point, the weapon was used. The knife [*sic*] was held to the throat of Teri or the scissor[s]. The knife was held with Kim. The choking and hair pulling with Jodi during the first rape.

(RT 2188.)

Additionally, Weir's antemortem injuries fit appellant's method of accomplishing a completed rape. For example, when appellant initially attacked Teri B., he burst through the bathroom door which hit her and threw her against the bathroom wall, he pushed her onto the bed in the master bedroom and grabbed her by the throat, and then he proceeded to rape her. (RT 1848-1851.) Likewise, after raping Kim V. twice, appellant choked Kim V. as he raped her a third time. (RT 1712-1713.) Here, Weir had antemortem bruises on her head that were consistent with her head hitting a wall (RT 2007-2008), and she had antemortem abrasions on her neck (RT 2016). Moreover, the empty champagne bottle found after Labor Day matched his act of drinking a champagne-based beverage after raping Teri B. (See Arg. IV(D)(2)(c).) As such, appellant's prior sexual assaults had been admitted to prove, in part, that appellant had been acting pursuant to a common plan or design such that he forcibly raped Sara

Weir before killing her.

Second, Robert Coty's testimony regarding his observations of September 7 or September 8, 1993, buttressed the prosecution's theory of completed rape. Coty testified that he looked through the sliding glass door into the bedroom (i.e., master bedroom) of Theard's apartment and saw "somebody sitting or kneeling a bit below the window sill like and they [*sic*] were Caucasian and [had] dark hair, but I couldn't make out if it was, you know, nose features or something like that." (RT 1149-1150, 1153, 1155; see Supp. II CT 369 [Peo. Exh. 34 - diagram of apartment depicting master bedroom with sliding door and balcony].)[50/] Contrary to appellant's characterization on appeal (AOB 158-159), Coty testified that the person he observed being dominated was a naked *woman*, stating: "It appeared to me at that time to be all natural color, you know, a light complexion like *she* didn't have no clothes, the person didn't have no clothes on." (RT 1153, italics added.)[51/] Coty saw a shirtless African American man walk around the naked woman twice. (RT 1154; see RT 1157 [reiterating that he thought the woman "was disrobed"].) Coty had previously seen the man in the apartment. (RT

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50. Coty's reference to "window sill" is probably the top of the master bedroom balcony because he repeatedly stated that he had looked through a sliding glass door into the apartment (RT 1149-1150, 1155), there was a balcony off the master bedroom with a sliding glass door located opposite of Coty's apartment building (RT 891-892; Supp. II CT 369 [Peo. Exh. 34]), and the balcony had "a solid wall railing" (RT 1150).

51. Citing the same testimony, appellant inexplicably claims that "Coty was unable to say whether the dark-haired Caucasian person he saw through the window was male or female. (RT 1153.)" (AOB 158, footnote omitted.) The record belies such an assertion. Coty expressly referred to the person he observed as "she." (RT 1153.) Indeed, the disingenuousness of appellant's claim is evidenced by the fact that, when quoting Coty's testimony, appellant *omits* the word "she" and in its place inserts ellipses. (AOB 159, quoting RT 1153.)

1151-1154.) Then, before he lost sight of the activity in the room when the curtains were closed, Coty saw that the woman "who was kind of sitting or kneeling was like, I don't know how to say it, like a hunch, like they [*sic*] was being dominated or something, I don't know."[52/] He repeated that, when the curtains were being closed, the woman "who was sitting or kneeling, they [*sic*] were kind of crunched up like they were being dominated, like they [*sic*] were being scolded or something." (RT 1160.) While appellant claims that Coty did not see the woman "sitting on the bed" (AOB 158-159), the bed in Theard's master bedroom was located next to the sliding glass door, which was curtained. (Supp. II CT 346 [Peo. Exh. 19 - photograph of master bedroom with bed next to sliding glass door with curtains drawn].) About a week earlier, appellant had raped Teri B. on the same bed. (RT 1849-1851, 1867-1870.)

Coty's observation of this domination behavior matched appellant's *post-rape* domination behavior with Jodi D. and Kim V., and thus it was circumstantial evidence that appellant had already raped Sara Weir. (See Arg. IV(D)(2)(c).) The prosecutor argued this point during his closing remarks, explaining that "the evidence best suggests that he was at a phase beyond [attempted rape], that there was already domination, there had already been at least one rape [before she was killed], that there was this ongoing nightmare." (RT 2189; see RT 2256.) Additionally, Weir's September 7, 1993 telephone call to her co-worker – "crying out for help" by fabricating a story about a friend's suicide – supported the prosecution's theory of a completed rape. (RT 2189 [prosecutor arguing that, when Weir made the telephone call, she "already knew that she was in trouble and she was crying out for help," and that she "had gone through a lot already" because appellant "didn't give you a chance to do

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52. Although he did not see the man closed the curtains, Coty believed that he had because the woman remained kneeling as the curtains closed whereas the man was not in sight. (RT 1154, 1157, 1159-1160.)

that before the first time he raped you."].)

Third, Sara Weir's body supported a finding of rape. She was found naked, with defensive injuries to her hands. (RT 1432-1433, 2004-2007; see Supp. II CT 370-373 [Peo. Exhs. 35 & 36 - photographs of naked body as discovered].) Given nature of her wounds and the minimal blood at the scene, the investigating detective opined that Weir had been killed while she was lying on her back. (RT 1422-1424.) Likewise, the medical examiner agreed that there would have been minimal external bleeding had Weir been stabbed while lying on her back. (RT 2012-2013.)

Thus, the prosecutor argued to the jury that, even without the evidence of appellant's prior sexual assaults, Coty's observations and Sara Weir's naked dead body were ample evidence of rape or attempted rape, stating:

> Even if you didn't know about [appellant's] past, you have a young girl found completely naked seen by Mr. Coty, kneeling sitting, in . . . his own words, she seemed to be subdued or dominated by this person standing over her, and the evidence seems compelling, this is during the course of some domination involving nudity. [¶] A lot of people get killed. They are not all naked. We know [Sara] was naked and alive and she is found dead naked and wrapped up and packaged, gift wrapped for Michelle. Not all murder victims end up naked. And that can tell you about intent.

(RT 2185.)

Appellant counters that the nakedness of Sara Weir's body is insufficient, "[a]s a matter of law," to "constitute evidence of sexual assault." (AOB 163.) In support of this argument, appellant relies on four cases – *People v. Granados* (1957) 49 Cal.2d 490, *People v. Craig* (1957) 49 Cal.2d 313, *People v. Anderson, supra,* 70 Cal.2d 15, and *People v. Johnson* (1993) 6 Cal.4th 1 – where this Court had found evidence concerning the condition of the female victims' bodies insufficient to support murder convictions based on rape and child molestation. (AOB 160-162.) But, this Court recently observed that *Granados, Craig* and *Anderson* (all of which *Johnson* relies upon) "are, by

their nature, dependent on the particular facts of the case, and none speaks precisely to the facts here." (*People v. Holloway* (2004) 33 Cal.4th 96, 138.)

> The cited decisions, as a group, may be read to establish "that the victim's lack of clothing . . . is insufficient to establish specific sexual intent." (*People v. Johnson* (1993) 6 Cal.4th 1, 41 . . . .) But the finding in the present case rests on substantially more than the victims' nudity.

(*People v. Holloway, supra*, 33 Cal.4th at p. 138.)

Such was the case here. Appellant's nearly-identical prior sexual assaults and Robert Coty's observations of a woman matching Sara Weir's description, who was alive, naked and being dominated by a man matching appellant's description, "distinguish the cited cases and support the rational inference" that appellant raped Weir before murdering her. (*See People v. Holloway, supra*, 33 Cal.4th at p. 138.)

Nor does the absence of other physical evidence of sexual assault warrant a different result. While there was no evidence of trauma to Weir's vaginal or rectal region (RT 2028), the medical examiner explained that sexual intercourse could occur without producing trauma (RT 2030-2031). Similarly, this Court has explained that "the 'absence of genital trauma is not inconsistent with nonconsensual sexual intercourse.' [Citation.]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1084, overruled on another point by *People v. Hill, supra*, 17 Cal.4th at p. 823, fn.1.)

Likewise, the absence of detectable semen or spermatozoa is not compelling for two reasons. First, a completed rape requires only the slightest penetration. (§ 263.) At trial, the police criminalist who analyzed the sexual assault kit performed on Sara Weir's body opined that the absence of semen or spermatozoa was not conclusive of penile penetration. (RT 1317, 1331.) He explained that various reasons could account for the absence of such evidence, including a failure to collect the semen or spermatozoa onto the swabs while performing the sexual assault kit, drainage of this evidence from the body, or

failure to ejaculate. (RT 1330-1331.) Indeed, the failure to ejaculate during the course of rape was not uncommon for appellant: he did not ejaculate during his first and third rapes of Jodi D. (RT 1529, 1551.) Additionally, appellant had used a condom during his first rape of Jodi D. and during his first sodomy of Teri B. (RT 1528, 1874), which also could have explained the absence of semen or spermatozoa in Weir's body had such evidence been detectable.

Second, Weir's body was "very decomposed" by the time it was discovered about a week after her murder. (RT 1961.) Given passage of time and the "very hot and dry" time of year, Weir's body was in such an "advanced" state of decomposition that it had begun to "mummify," i.e., the bodily tissues had started "drying out." (RT 2017-2018.) At trial, the criminalist explained that bodily fluids such as blood and semen decompose when a body decomposes. (RT 1313-1314.) Thus, while no semen or spermatozoa was detected on the sexual assault kit performed on Weir's body, the criminalist opined that it was "certainly possible" that any semen present had degraded beyond observable levels where the body had been in a non-refrigerated condition for a week. (RT 1318.) As point of comparison, he explained: "In living rape victims we do not expect to see any sperm or semen present if the rape examination is conduct after 72 hours from the assault." (RT 1318-1319.) Therefore, due to the decomposition of the body, the criminalist could not tell whether there had been no spermatozoa present or whether spermatozoa had been present but, due to the passage of time, the evidence had decomposed by the time the sample was collected. (RT 1320.) Likewise, the medical examiner who performed the autopsy opined that, due to the decomposed state of Weir's body, any semen or spermatozoa that may have been present would not have been detectable. (RT 2025-2026; see RT 2026 ["Certainly the enzymatic activity which is the basis for detection of semen would be long gone."].) Thus, the absence of *undetectable* evidence, resulting from appellant's successful

hiding of Weir's body, does not warrant overturning the jury's finding of rape. A contrary result would offend justice. (See *People v. Jennings, supra*, 53 Cal.3d at pp. 368-369 [a defendant's "successful disposal of the victim's body 'is one form of success for which society has no reward"].)

Moreover, attempted rape may support a felony murder conviction and rape special circumstance finding. (§§ 189, 190.2, subd. (a)(17)(C).) An attempt occurs when there is specific intent to commit a crime and a direct but ineffectual act done towards its commission. (§ 21a.) Attempted rape does *not* require physical touching, let alone "some physical conduct of a distinctly and unambiguously sexual nature." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 387.) For example, in *People v. Marshall, supra*, 15 Cal.4th 1, this Court found sufficient evidence of attempted rape to support a felony-murder conviction where the victim was killed in an abandoned apartment building where, a month earlier, the defendant had assaulted and dragged another woman towards the same building and told that woman that "he was going to rape and kill her before she managed to escape; the victim's body "was found with her underwear and pants pulled down, and she had abrasions on her neck, face and arms"; and the "[d]efendant was detained at the building shortly after the murder," a letter belonging to the victim "was found in his possession, and the stains of blood consistent with [the victim's] blood type were on his sweatshirt." (*Id.* at p. 36.) Here, the evidence of appellant's prior sexual assaults, Coty's observations, and the condition of Weir's body is sufficient evidence that appellant had not only the intent to rape Weir, but also committed numerous acts towards commission of the crime. (*Ibid*.)

The rape-murder special circumstance is also supported by substantial evidence. The evidence of appellant's prior sexual assaults, and Coty's observation of a naked woman being dominated by a man matching appellant's description, "strongly suggests that [appellant's] primary motivation was rape,

not murder, or at least that the rape was an 'independent purpose.' [Citation.]" (*People v. Carpenter, supra*, 15 Cal.4th at p. 387.)

In sum, there was sufficient evidence to support a verdict of felony rape-murder as well as the rape-murder special circumstance.

D. Substantial Evidence Supports Premeditated, Deliberate Murder

In Argument VIII of his Opening Brief, appellant contends that his first degree murder conviction should be reversed because there is insufficient evidence to support a finding of premeditated, deliberate murder. (AOB 167-177.) Specifically, he asserts that there was no evidence that appellant planned to kill Weir, there was no evidence that his motive for killing her was to silence her, and his manner of killing Weir did not evidence premeditation and deliberation. (AOB 168-177.) Appellant is mistaken.

Murder which is willful, premeditated, and deliberate is defined as murder in the first degree. (§ 189.) Reviewing courts have determined that the term "premeditated" means "considered beforehand." "Deliberate" has been defined as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. [Citations.]" (*People v. Mayfield, supra,* 14 Cal.4th at p. 767, internal quotation marks omitted; accord, *People v. Vorise* (1999) 72 Cal.App.4th 312, 318.) A defendant need not plan an action for any great period of time in advance, and premeditation may be arrived at quickly. (*People v. Vorise, supra,* 72 Cal.App.4th at p. 318, quoting *People v. Rand* (1995) 37 Cal.App.4th 999, 1001.) A reviewing court "need not be convinced beyond a reasonable doubt that [appellant] premeditated the murder[]." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020.) The relevant inquiry on appeal is whether "any rational trier of fact" could have been so persuaded. (*Ibid*., internal quotation marks omitted.)

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, supra*, 70 Cal.2d at pp. 26-27; accord, *People v. Thomas* (1992) 2 Cal.4th 489, 516-517.) 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. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way. [Citation.] *Anderson* identifies categories of evidence relevant to premeditation and deliberation that we 'typically' find sufficient to sustain convictions for first degree murder. [Citation.]

(*People v. Thomas*, *supra*, 2 Cal.4th at p. 517; see *People v. Steele, supra*, 27 Cal.4th at p. 1249 [" ' "*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]"' [Citation.]"].) 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, 33, citing *People v. Pride* (1992) 3 Cal.4th 195, 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 appellant 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.)

In the present case, there was sufficient evidence to support a verdict of premeditated first degree murder. To begin with, there was sufficient evidence appellant planned to murder Weir. Prior to Labor Day, appellant visited the apartment complex, but never saw Theard, who was living with her sister following his August 30, 1993 assault. (RT 909, 941, 1132-1133.) Appellant returned to the apartment on Labor Day. (RT 1133-1137, 1139.) Weir was last seen by her mother the same evening. (RT 854-855, 861.) Given appellant's past conduct of luring his victims to his residence, a rational trier of fact could have found that appellant lured Sara Weir to the apartment on Labor Day evening. As discussed above in Argument IV, there was circumstantial evidence that he held her captive in the apartment for hours, if not days: Sara failed to appear for work the following morning (September 7, 1993), at which point she telephoned her co-worker about a fabricated suicide; on the same day or day after, Coty observed a naked woman matching Weir's general description in the adjacent apartment; he saw the woman being dominated by a man matching appellant's general description. Based on this evidence, a rational trier of fact could have found that appellant premeditated the murder either before luring Sara to the apartment or during the course of holding her captive there. (See *People v. Rich* (1988) 45 Cal.3d 1036, 1082 [evidence of premeditation and deliberation where the defendant lured the victim out of a bar and drove her to a dump, where he stripped, raped, and then shot her at close range].)

Appellant also had motive to kill Weir. As discussed in Argument IV, *ante*, the prosecution's theory was that appellant raped, robbed and then killed Weir to revenge himself upon Michelle Theard, his former live-in girlfriend who had obtained a restraining order against him after he had assaulted her a week earlier. The placement of Sara's body under Theard's son's bed, and capped with Theard's son's baseball helmet, evidenced this revenge motive.

As the prosecutor argued during his closing, "that tells us something about the killer, all the circumstances, because all these things were done by choice." (RT 2176-2177.) Additionally, appellant's prior sexual assaults of Kim V. and Teri B. – during which he had expressly threatened to kill them and had used stabbing instruments while committing his crimes against them – evidenced appellant's hatred of women, and thus supplied a motive to kill Weir. (See *People v. Steele, supra*, 27 Cal.4th at p. 1250 [motive to kill where the defendant told police that he "hated women"].) Furthermore, in keeping with the prosecution's theory that appellant had already raped Weir prior to killing her, the prosecutor had argued that appellant's motive for killing Weir was to prevent her from "be[ing] a witness against [him]." (RT 2171; see *People v. Pride, supra*, 3 Cal.4th at p. 247 [a rational trier of fact could have concluded that the defendant killed the victim "to silence her as a possible witness to her own sexual assault"].)

But, perhaps the most telling evidence of premeditation and deliberation is the method that appellant killed Weir. "[T]he method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder. [Citation.]" (*People v. Memro, supra*, 11 Cal.4th at pp. 863-864.) Weir's body had 29 stub wounds, with the stab wounds concentrated on the front of her torso. (RT 1981-1982, 1992, 1995-1996.) Appellant stabbed her in the heart three times, and two of the wounds proved fatal. (RT 1998, 2010.) While Weir had some defensive wounds to her hands (RT 2004-2007), the stab wounds to her torso were "fairly straight up and down (RT 2003), suggesting that Weir did not resist for long as appellant continued to stab her. Indeed, the medical examiner opined that the stabs to the heart rendered Weir unconscious, and that she was unconscious for 10 to 15 minutes before she died. (RT 2010-2011.) The three stab wounds to Weir's heart, and the other numerous stab wounds to her body (possibly inflicted as she

lay unconscious), evidence a "brutal method of killing [that] supports the inference of a calculated design to ensure death, rather than an unconsidered 'explosion' of violence. [Citation.]" (*People v. Alcala* (1984) 36 Cal.3d 604, 626, footnote omitted [premeditation and deliberation where victim had multiple stab wounds and damage to her "teeth and jaw also indicated a blow to the head with a blunt object"], disapproved on other grounds by *People v. Falsetta* (1999) 21 Cal.3d 903, 911; see *People v. Hovey* (1988) 44 Cal.3d 543, 556, [stabbing and beating victim repeatedly in the head "'supports the inference of a calculated design to ensure death, rather than an unconsidered "explosion" of violence'"].)

Furthermore, appellant's actions of wrapping a plastic bag around Weir's head and securing the bag in place with packaging tape supported premeditation and deliberation. The medical examiner opined that a plastic bag, wrapped tightly around the neck – as was the case with Weir – would cause asphyxiation. (RT 2014.) Given the decomposed state of her body, the medical examiner could not determine if the bag over Weir's head contributed to her death; however, the marks around her neck were consistent with antemortem abrasions. (RT 2015-2016.) Thus, a rational trier of fact could have determined that appellant acted with premeditation and deliberation because, by taking the extra steps of placing the bag over Weir's head and securing it with packaging tape, he sought to ensure her death. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1128 [defendant's search of drawers and jewelry boxes -- rather than immediate flight from scene -- supported premeditation and deliberation].)

Thus, despite appellant's attempts to argue to the contrary, there is ample evidence supporting an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. (See *People v. Robertson* (1982) 33 Cal.3d 21, 49-50 [finding sufficient evidence of premeditated murder because, unlike in *Anderson*, "there is . . . overwhelming

evidence of felonious, sexually motivated violent conduct planned and executed by the defendant prior to the killings"].)

In sum, there was sufficient evidence to support a verdict of robbery-murder as well as the robbery special circumstance, there was sufficient evidence to support a verdict of rape-murder as the rape special circumstance, and there was sufficient evidence to support a first degree murder verdict based on premeditated, deliberate murder.

VII.

THE JURY WAS FULLY INSTRUCTED ON FELONY MURDER BECAUSE THE TRIAL COURT INSTRUCTED ON THE ELEMENTS OF RAPE AND ROBBERY (RESPONSE TO AOB ARG. IX)

In Argument IX of his Opening Brief, appellant claims that his first degree murder conviction and the death judgment should be reversed because the trial court failed to fully instruct the jury on felony murder. (AOB 178-187.) Specifically, he claims that the trial court "did not instruct the jury on the elements of either rape or robbery in connection with the felony murder instruction." (AOB 179.) But, in the immediately following sentence, he concedes that "[t]he jury was instructed on the elements of the underlying felonies as part of the special circumstance instructions. [Citation.]" (AOB 179, citing RT 2144-2148; see CT 490 [CALJIC No. 9.40 – Robbery], CT 493-494 [CALJIC No. 10.00 (1994 rev.) – Rape - Spouse and Non-Spouse - Force or Threats].) Respondent submits that appellant's claim fails for several reasons. First, appellant has waived it because he failure to request a clarification at trial. Second, there was no error because the instructions, when properly viewed as a whole, set forth the elements of rape and robbery. Finally, any alleged error was harmless because the jury found the rape and robbery special circumstance allegations to be true.

A. Waiver

First, "a defendant's failure to request a clarification instruction forfeits that claim on appeal. [Citation.]" (*People v. Young, supra,* 34 Cal.4th at pp. 1202-1203.) Here, during the discussions between the court and counsel regarding jury instructions, appellant's trial counsel never requested a clarification regarding the sequence of the instructions defining rape and robbery after the general instructions, i.e., counsel did not request that the trial

court read these definitions directly after the general instructions regarding murder as opposed to reading them after the general instructions concerning special circumstances. (RT 2051-2065, 2073-2091, 2105-2109, 2279-2297.) Accordingly, appellant has forfeited this claim on appeal.

B. The Trial Court Instructed The Jury On The Elements Of The Underlying Rape And Robbery Felonies

"Whether the jury was properly instructed on the elements of the charged offense is a mixed question of law and fact that [this Court] believe[s] is predominantly legal." (*People v. Cole, supra,* 33 Cal.4th at p. 1208.)

> It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] "The fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial." [Citation.] "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." [Citation.]

(*People v. Burgener* (1986) 41 Cal.3d 505, 538-539, original internal brackets omitted, overruled on another point by *People v. Reyes* (1998) 19 Cal.4th 743, 745.)

Here, notwithstanding appellant's waiver, there was no error because the instructions, taken as a whole, set forth the relevant legal principles regarding felony murder based on rape and/or robbery. At the outset, the trial court instructed the jurors with CALJIC No. 1.01, which informed them to "[c]onsider the instructions as a whole and each in light of all the others." (RT 2115; CT 447.) After further general instructions, the trial court read the instructions regarding homicide, murder, malice, deliberate and premeditated murder, and first degree felony murder. (RT 2132-2136; CT 474-479.) In the felony murder instruction – CALJIC No. 8.21 – the trial court informed the

jurors that first degree murder included "[t]he unlawful killing of a human being . . . which occurs during the commission or attempted commission of crime or as a direct causal result of robbery and/or rape . . . ." Additionally, the instruction informed the jurors that "[t]he specific intent to commit rape and/or robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." (RT 2136; CT 479.) The trial court next instructed on the degrees of murder and the jury's duty regarding the assignment of degree, the jury's ability to return a partial verdict on homicide, and the general instructions on special circumstances and attempt. (RT 2136-2145; CT 480-488.) Then, it instructed the jurors with the definitions of rape and robbery as well as other attendant instructions. (RT 2145-2148; CT 490-494.) Specifically, the trial court instructed the jurors with CALJIC No. 9.40, which set forth the elements of robbery (RT 2145; CT 490), and with CALJIC No. 10.00, which set for the elements of rape (RT 2147-2148; CT 493-494). These standard instructions did not state that they were limited to the special circumstance allegations.

Thus, the elements for felony murder were provided in three instructions – the standard felony murder instruction (CALJIC No. 8.21), the standard robbery instruction (CALJIC No. 9.40), and the standard rape instruction (CALJIC No. 10.00) – which, taken as a whole, fully and completely instructed the jurors. (See *People v. Burgener, supra,* 41 Cal.3d at pp. 538-539.) This Court "must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citations.]" (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.) Given the entirety of the charge, there is no reasonable likelihood that the jury could have found appellant guilty of felony murder without finding all of the elements of the underlying felonies. (See *People v. Kelly* (1992) 1 Cal.4th 495, 525-526 [there was no reasonable likelihood that the jury understood the charge as

asserted by the defendant]; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385] [applying "reasonable likelihood" test to claim of erroneous instruction].)

C. Harmless Error

"[A] trial court's failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury's verdict. [Citations.]" (*People v. Cole, supra*, 33 Cal.4th at pp. 1208-1209.) "However, if no rational jury could have found the missing element unproven, the error is harmless beyond a reasonable doubt. [Citation.]" (*People v. Nicholson* (2004) 123 Cal.App.4th 823, 833.)

Here, even assuming that the trial court erred in the sequence it gave the instructions defining rape and robbery, the error was harmless beyond a reasonable doubt because the jury found true the rape and robbery special circumstance allegations. (CT 519.) Faced with similar situations, this Court has explained:

> "Because a jury must unanimously agree that a special circumstance finding is true (§ 190.4), and the jury in this case was so instructed, the jury's finding that defendant killed [the victim] in the course of committing [a robbery] indicates that the jury unanimously found defendant guilty of first degree murder on the valid theory that the killing occurred during the . . . commission of a [robbery]." [Citations.]

(*Hughes, supra*, 27 Cal.4th at p.368, quoting *People v. Marshall, supra*, 15 Cal.4th at p. 38, ellipses and internal brackets in original; accord, *People v. Haley* (2004) 34 Cal.4th 283, 315.) Here, because the jury unanimously found true the rape and robbery special circumstance allegations, they necessarily found appellant guilty of first degree murder under valid felony murder theories. (See *ibid.*) As such, appellant is not entitled to reversal.

(*People v. Flood* (1998) 18 Cal.4th 470, 502-504 [an omitted finding necessarily made under other instructions renders error harmless].)

VIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FELONY MURDER (RESPONSE TO AOB ARG. X)

In Argument X of his Opening Brief, appellant contends that the felony murder instruction (CALJIC No. 8.21)[53] given by the trial court was impermissibly ambiguous, and thereby violated his federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 188-195.) Specifically, appellant contends that the instruction, as given, was erroneous because the trial court should have removed the phrase, "or as a direct causal result." (AOB 188-190.) He asserts that the failure to remove the phrase "fatally eliminat[ed] a necessary element" of felony murder of the offense – namely, the specific intent to commit one of the underlying felonies, rape or robbery – because the phrase, "'during the commission or attempted commission of the crime,' was not juxtaposed with the words 'of robbery and rape' . . . ." (AOB 189-191.) His argument fails. The claim is waived because appellant failed to request clarification below. Notwithstanding appellant's waiver, his claim fails because the instruction, as given, was not ambiguous and, given the true finding on the rape and robbery special circumstances, any alleged error was harmless.

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53. As given by the trial court, CALJIC No. 8.21 (First Degree Felony-Murder) provided:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime or as a direct causal result of robbery and or rape is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit robbery and or rape and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(CT 479; RT 2136.)

A. Waiver

"A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial. [Citation.]" (*People v. Hillhouse, supra*, 27 Cal.4th at p. 503.) This Court, in *Alvarez, supra*, 14 Cal.4th at pp. 222-223 (*Alvarez*), found waiver involving CALJIC No. 8.21. There, the defendant complained on appeal that the trial court "should have referred not to an unlawful killing occurring 'during the commission or attempted commission of . . . a robbery,' but rather to one occurring 'as a direct causal result' thereof." (*Id*. at p. 222, brackets omitted.) But, as this Court observed, "[h]ad [the defendant] desired such a clarification, he should have requested it of the superior court. He made no request of this sort." (*Ibid*.) Thus, this Court held: "Because defendant did not request clarification of the otherwise adequate instructions below, he may not complain here. [Citation.]" (*Id*. at p. 223, footnote omitted.)[54/]

Here, as in *Alvarez*, appellant did not request a clarification of CALJIC No. 8.21. Indeed, when the trial court asked about CALJIC No. 8.21, appellant's trial counsel expressly stated: "I think that is the correct preamble. I think it has to be given, deleting, of course [the reference to the dismissed burglary count.]" (RT 2062.) Thus, having failed to request a clarification, appellant is prohibited from complaining on appeal. (*Alvarez, supra*, 14 Cal.4th at p. 255.)

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54. Appellant claims that this Court, in *Alvarez*, explained that "[t]he language, 'as a direct causal result' should be reserved for situations other than those when the fatal blow is struck in the course of an enumerated felony, even if death does not result until later[.]" (AOB 189, citing *People v. Alvarez, supra*, 14 Cal.4th at p. 255.) Appellant's interpretation is not exactly correct. In *Alvarez*, this Court observed that the instruction's Use Notes gave this advice, but then noted that Use Notes do *not* "have the force of law." (*Id*. at p. 255, fn. 28.)

B. CALJIC No. 8.21, As Given, Was Not Ambiguous

Notwithstanding appellant's waiver, CALJIC No. 8.21, as given, was not ambiguous because it is not reasonably likely that the jurors would have interpreted the instruction as not requiring them to find that appellant harbored the specific intent to commit the underlying felonies, as appellant claims. (*People v. Frye* (1998) 18 Cal.4th 894, 957 (*Frye*) [an instruction is ambiguous or misleading only if, in the context of the entire charge, there is a reasonable likelihood that the jury applied the instruction in way that violates the Constitution]; see *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) The second paragraph of CALJIC No. 8.21 made clear to the jurors that they needed to find that appellant harbored the specific intent to commit rape and/or robbery, stating: "The *specific intent to commit rape and or robbery* and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." (CT 479, italics added; RT 2136.)

Appellant, however, asserts that it was "reasonably likely" that the jurors interpreted CALJIC No. 8.21 as allowing them to "convict appellant of first degree murder if they found the killing was unintentional or accidental, as long as it occurred during the commission of 'the crime[,]'" which in turn they could have interpreted "to mean the circumstances surrounding the killing rather than the enumerated felonies of robbery and rape . . . ." (AOB 190-191, footnote and italics omitted.) But, such an interpretation is unreasonable. The second paragraph also used the word "crime," which in the context of the sentence could only be read as referring to rape and/or robbery. (CT 479; RT 2136.) Additionally, the closing arguments by the prosecutor and appellant's trial counsel made clear that the underlying "crime" was rape and/or robbery. (See *People v. Young*, *supra*, 34 Cal.4th at p. 1202 [in addition to considering the entirety of the charge, "[t]he reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury"].)

Here, the prosecutor and appellant's trial counsel discussed the underlying felonies of rape and robbery when discussing felony murder. (RT 2172-2182, 2247-2248 [prosecutor]; RT 2207-2215, 2231-2234 [appellant's trial counsel].) As such, it is *not* reasonably likely that the jurors interpreted the word "crime" as referring to the killing, as opposed to the underlying felonies of rape and robbery.

Accordingly, CALJIC No. 8.21 instructed the jurors that, in order to find appellant guilty of felony murder, they needed to find that he had harbored the specific intent to commit rape and/or robbery. In fact, appellant acknowledges as much in another section of his Opening Brief. Citing the record where the trial court read CALJIC No. 8.21 to the jury, appellant states that "[t]he jury was instructed that an unlawful killing during the commission of a rape or robbery is first degree murder when the perpetrator has the *specific intent to commit robbery*. (RT 2136.)" (AOB 213, italics added.) Thus, given the instruction's wording ("specific intent to commit rape and or robbery"), the closing arguments by appellant's counsel and the prosecutor, and appellant's acknowledgment that instruction informed the jurors of the specific intent requirement, CALJIC No. 8.21 was not ambiguous.

C. Harmless Error

Regardless, any ambiguity was harmless beyond a reasonable doubt because the jury's true findings on the special circumstances of rape and robbery means it found the homicide was intentional. (See *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35] ["the omission of an element [of a substantive offense] is an error that is subject to harmless-error analysis" under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]].) To find the rape and robbery special

circumstance allegations true, the jury needed to find that appellant had an independent purpose for the commission of the rape and the robbery, that is, that the commission of the rape and robbery was not merely incidental to the murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1260, citing *People v. Mendoza* (2000) 24 Cal.4th 130, 182.) As discussed in Argument VI, *ante*, there was substantial evidence that appellant entertained an independent purpose to rape and rob Sara Weir. The jury's special circumstances findings demonstrate the jury necessarily found every element of first degree murder under a rape-murder and a robbery-murder theory proven beyond a reasonable doubt. (*Hughes*, *supra*, 27 Cal.4th at p. 368; see *People v. Seaton*, *supra*, 26 Cal.4th at p. 669 ["By finding the burglary-murder and robbery-murder special-circumstance allegations true, the jury necessarily rejected the defense's argument that he was guilty only of voluntary manslaughter, a claim based on the defense's theory that the killing did not occur in the course of a burglary or robbery."].) Accordingly, appellant is not entitled to reversal. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [a legally erroneous jury instruction does not require reversal where it can be determined from the record that the jury relied upon a correct theory of guilt].)

IX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE MURDER (RESPONSE TO AOB ARG. XI)

In Argument XI of his Opening Brief, appellant contends that the trial court erred by instructing the jury on first degree murder because the information – the prosecution's charging document – alleged murder in violation of section 187, rather than specifying first degree murder in violation of section 189. (AOB 198-205.) He asserts that he was "charged exclusively with second degree malice murder," and thus the trial court lacked jurisdiction to try him for first degree murder. (AOB 197-198.) As such, he claims that the failure to specifically allege first degree murder in the charging document violated his federal constitutional rights because he was convicted of "an uncharged crime." (AOB 204-205.)

Appellant's argument fails because this Court has repeatedly rejected the argument that malice murder and first degree felony murder are separate offenses, and this Court has reaffirmed that an accusatory pleading charging murder need not specify the theory of murder upon which the prosecution intends to rely. (See, e.g., *Hughes, supra*, 27 Cal.4th at pp. 368-370 and cases cited therein.) As Court explained in *Hughes*:

> [W]e reject, as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses. Accordingly, we also reject defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed.

(*Id.* at p. 370.) In light of *Hughes*, appellant's claims that the trial court lacked jurisdiction to try him for first degree murder (AOB 198) and that he was convicted of an "uncharged crime" in violation of his constitutional rights

(AOB 204-205), must be rejected.

While appellant acknowledges this Court has held that a defendant may be convicted of first degree murder where the charging document alleges murder in violation of section 187, he argues that the cases so holding – including this Court's *Hughes* decision – rest on faulty reasoning. (AOB 198-202.) Specifically, he claims that these cases are premised on *People v. Witt* (1915) 170 Cal. 104, in which this Court held that a defendant may be convicted of felony murder even though the information charged only murder with malice, but that *Witt* was "undermined" by *People v. Dillon* (1983) 34 Cal.3d 441, 472, which construed "'*section 189* as a statutory enactment of the first degree felony-murder rule in California.'" (AOB 199-200, italics added in AOB.) But, the defendant in *Hughes* made an identical argument, which this Court rejected. (*Hughes, supra*, 27 Cal.4th at p. 369.) In *Hughes*, this Court explained that, "subsequent to *Dillon, supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt, supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely." (*Hughes, supra*, 27 Cal.4th at p. 369.) Accordingly, appellant's reassertion of this previously-rejected argument lacks merit.

Moreover, as in *Hughes, supra*, 27 Cal.4th at 369-370, and *People v. Diaz* (1992) 3 Cal.4th 495, 557, appellant received adequate notice that the prosecution was attempting to prove first degree murder. Appellant was aware of the prosecution's first degree murder theory as of the filing of the felony complaint for the arrest warrant. The felony complaint alleged as death penalty special circumstances pursuant to section 190.2 that appellant murdered Sara Weir while engaged in the commission of rape and robbery. (CT 239-243.) The section 190.2 special circumstance allegations gave appellant notice that the prosecution was seeking to prove felony murder in the first degree.

Likewise, the amended felony complaint alleged the same rape- and robbery-based special circumstances and added a burglary-murder special circumstance allegation. (CT 244-248.) At the arraignment hearing, where appellant was represented by the same counsel who defended him at trial, appellant denied all the special allegations. (CT 4-8.) At the preliminary hearing, appellant unsuccessfully moved to dismiss the special circumstance allegations. (CT 219-226.) His trial counsel even argued that "there [was] insufficient evidence to support any type of a rape allegation or a [*sic*] section of murder during the commission of a rape" (CT 222), and that there was insufficient evidence of robbery for "felony murder" (CT 226). The information contained the same three special circumstance allegations, which appellant denied. (CT 236-238, 275; RT 1-2.) Then, almost a year prior to trial, appellant unsuccessfully moved to dismiss the special circumstance allegations contained in the information. (CT 276-289; RT 4-14.) Appellant challenged the denial of the motion by filing a petition for writ of prohibition in the California Court of Appeal. (CT 297-336.) In his petition, appellant asserted that the special circumstance allegations made him "eligible for the death penalty . . . ." (CT 303.) In addition, well before the trial, the prosecution announced its intention to seek the death penalty – something that was legally predicated on a first degree murder conviction. (RT 55-56.) Obviously, appellant was well aware of the capital nature of his trial at the time of jury voir dire. As such, appellant received adequate notice of the prosecution's first degree murder theory. (See *Hughes, supra*, 27 Cal.4th at p. 370.)

Nor does appellant's invocation of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), add anything of substance to his claim. (See AOB 202-204.) In *Apprendi*, the court held that the Fourteenth Amendment's due process clause requires "any fact [other than the fact of a prior conviction] that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) There can be no serious question as to whether that occurred in this case:

> Under the law of this state, all of the facts that increase the punishment for murder of the first degree -- beyond the otherwise prescribed maximum of life imprisonment with possibility of parole to either life imprisonment without possibility of parole or death -- already have been submitted to a jury (and proved beyond a reasonable doubt to the jury's unanimous satisfaction) in connection with at least one special circumstance, prior to the commencement of the penalty phase.

(*People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) Further, as shown above, appellant had adequate notice (not to mention actual and timely knowledge) of the specific facts upon which he was subject to conviction for first degree murder, based on both a felony murder theory and on a premeditation and deliberation theory.

Accordingly, appellant's claim must fail.

X.

THE TRIAL COURT HAD NO DUTY TO INSTRUCT ON THEFT AS A LESSER INCLUDED OFFENSE OF ROBBERY (RESPONSE TO AOB ARG. XII)

Even though appellant was not charged with robbery, he contends in Argument XII of his Opening Brief that the trial court should have instructed, sua sponte, on theft as a lesser included offense of robbery because the jury was instructed on robbery-murder as a felony-murder theory. (AOB 206-210.) His claim is meritless. As appellant himself acknowledges, this Court has repeatedly rejected identical arguments. (AOB 208, citing *People v. Cash* (2002) 28 Cal.4th 703, 737 (*Cash*) ["Defendant . . . was not charged with robbery, and the court therefore had no duty to instruct on theft as a lesser included offense of robbery[]"], and *People v. Silva* (2001) 25 Cal.4th 345, 371 (*Silva*) ["Although a trial court on its own initiative must instruct the jury on lesser included offenses of charged offenses, this duty does not extend to uncharged offenses relevant only as predicate offenses under the felony-murder doctrine"].) Recently, in *People v. Valdez* (2004) 32 Cal.4th 73, this Court relied upon its earlier decisions in *Cash* and *Silva* to once again reject the claim, explaining:

> [W]hen robbery is not a charged offense but merely forms the basis for a felony-murder charge and a special circumstance allegation, a trial court does not have a sua sponte duty to instruct the jury on theft. [Citations.] As in *Silva* and *Cash*, defendant was not charged with robbery; rather, robbery was the underlying predicate felony in the felony-murder charge and the special circumstance allegation. [¶] . . . The issue presented here is whether the trial court had a sua sponte duty to instruct the jury on a lesser included offense of an uncharged crime. That issue was resolved in *Silva* contrary to defendant's position.

(*People v. Valdez, supra*, 34 Cal.4th at pp. 110-111, citing *Cash, supra*, 28 Cal.4th at p. 737, and *Silva, supra*, 25 Cal.4th at p. 371.) Accordingly, this Court should decline appellant's invitation to reconsider this settled issue.

XI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.51 (RESPONSE TO AOB ARG. XIII)

The trial court gave the standard instruction on motive – CALJIC No. 2.51.[55/] (CT 465; RT 2127-2128.) In Argument XIII of his Opening Brief, appellant claims that this instruction was improper because: (1) it "allowed the jury to determine guilt based upon the presence of an alleged motive"; and (2) it "shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof." (AOB 211-217.) Appellant's arguments fail because this Court has previously rejected similar contentions.

A. The Instruction Did Not Allow The Jury To Determine Guilty Based On Motive Alone

Appellant claims CALJIC No. 2.51 was erroneous, in part, because it "improperly allowed the jury to determine guilt based upon the presence of an alleged motive . . . ." (AOB 211.) His claim fails for two reasons.

First, it is not cognizable on appeal. This Court found a similar claim waived in *People v. Cleveland* (2004) 32 Cal.4th 704, 750. There, the defendants requested CALJIC No. 2.51 at trial, but on appeal claimed that the instruction implied that evidence of motive alone was sufficient to prove guilt.

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55. CALJIC No. 2.51 ("Motive"), as given, provided:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(CT 465; RT 2127-2128.)

(*Ibid*.) This Court concluded that the claim was waived because such an "argument merely goes to the clarity of the instruction." (*Ibid*.; see *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."].) This Court explained that, "[i]f defendants had thought the instruction should be clarified to avoid any implication that motive alone could establish guilt, they should have so requested. They did not. [Citation.]" (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 750, citing *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 504.) Here, appellant did not object to CALJIC No. 2.51 at trial. (RT 2055-2057.) As such, he has failed to preserve this claim on appeal. (*People v. Cleveland*, *supra*, 27 Cal.4th at p. 750.)

Notwithstanding appellant's waiver, his claim that the instruction allowed the jury to determine guilt based on motive alone is meritless. In *People v. Snow* (2003) 30 Cal.4th 43, 97-98, this Court rejected an identical argument, explaining:

> If the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of murder. When CALJIC No. 2.51 is taken together with the instruction on the concurrence of act and specific intent (CALJIC No. 3.31) and the instruction outlining the elements of murder and requiring each of them to be proved in order to prove the crime (CALJIC No. 8.10), there is no reasonable likelihood (*People v. Frye*, *supra*, 18 Cal.4th at p. 958) it would be read as suggesting that proof of motive alone may establish guilt of murder.

(Italics in original; see *People v. Cleveland*, *supra*, 32 Cal.4th at p. 750 [CALJIC No. 2.51 was not erroneous because it was not reasonably likely that the jury would infer CALJIC No. 2.51 implied that motive alone was sufficient to prove guilt in light of the reasonable doubt instruction, and it was not

prejudicial "given the strong evidence of guilt aside from motive"].)

Here, the trial court instructed the jury on the concurrence of act and specific intent with CALJIC No. 3.31 (CT 473; RT 2132), on the elements of murder with CALJIC No. 8.10 (CT 475; RT 2132-2133), and on reasonable doubt with CALJIC No. 2.90 (1994 rev.). (CT 471; RT 2130-2131). Given the entire charge, CALJIC No. 2.51 was not erroneous or ambiguous. (*People v. Snow*, *supra*, 30 Cal.4th at pp. 97-98; see *People v. Cleveland*, *supra*, 32 Cal.4th at p. 750.) Also, the instruction was not prejudicial because there was substantial evidence of appellant's guilt (see Arg. VI, *ante*) such that "the jury certainly did not base its verdict[] solely on motive." (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 750.) Thus, just as in *Snow* and *Cleveland*, this Court should reject appellant's challenge to CALJIC No. 2.51.

B. The Instruction Did Not Shift The Burden Of Proof

Appellant also claims that CALJIC No. 2.51 violated his rights because it impermissibly shifted the burden of proof. (AOB 211, 213-216.) In this regard, he makes two arguments: (1) by stating that "motive was not an element of the crime," the instruction lessened the prosecution's burden of proving beyond a reasonable doubt that he harbored the intent to rape and/or rob because "[t]here is no logical way to distinguish motive from intent in this case" (AOB 213-216); and (2) by "inform[ing] the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence," the instruction shifted the burden to appellant "to show an alternative motive," i.e., that the instruction implied that he had to prove his innocence (AOB 216-217). Both contentions fail.

First, CALJIC No. 2.51's statement that "motive is not an element of the crime charged" did not serve to lessen the prosecution's burden of proving beyond a reasonable doubt that appellant harbored the intent to rape and/or rob.

This Court rejected a similar argument in *Cash, supra,* 28 Cal.4th at pp. 738-739. Contrary to appellant's present contention that "[t]he distinction between 'motive' and 'intent' is difficult" (AOB 214-216), in *Cash*, this Court reiterated that "motive" and "intent" are *not* synonymous because "motive is the 'reason a person chooses to commit a crime,' but it is not equivalent to the 'mental state such as intent' required to commit the crime. [Citation.]" (*Cash, supra,* 28 Cal.4th at p. 738; see *People v. Hillhouse, supra,* 27 Cal.4th at pp. 503-504 [reiterating that the terms "intent," "motive," and "malice" are not synonymous].) Thus, because "motive" and "intent" are not interchangeable, CALJIC No. 2.51 could not have confused the jury regarding the prosecution's burden of proving intent.

Notwithstanding the distinction between "motive" and "intent," appellant claims that there existed a "potential for conflict and confusion in this case." (AOB 216.) In making his argument, he relies on *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127 (*Maurer*), a child molest case where giving CALJIC No. 2.51 was prejudicial error under the facts of that case. (AOB 216.) But, this Court has repeatedly rejected the application of *Maurer* beyond child molest cases, where motive (unlike other crimes) is an element of the case. (See, e.g., *Cash, supra,* 28 Cal.4th at pp. 738-739; *People v. Hillhouse, supra,* 27 Cal.4th at p. 504.) This Court has explained:

> [In *Maurer*,] the defendant had been convicted of misdemeanor child annoyance under section 647.6. The court found that, although motive is not generally an element of a criminal offense, "the offense of section 647.6 is a strange beast," and it did have a motive as an element -- an unnatural or abnormal sexual interest. [Citation.] Thus the court found the instructions contradictory, and thereby erroneous. [Citation.] This case is distinguishable. Here, although malice and intent or purpose to steal were elements of the offenses, motive was not.

(*People v. Hillhouse, supra,* 27 Cal.4th at p. 504; see *Cash, supra,* 28 Cal.4th at p. 738-739 [*Maurer* distinguishable because, in the case at bar, "the instructions as a whole did not use the terms 'motive' and 'intent'

interchangeably, and therefore there is no reasonable likelihood the jury understood those terms to be synonymous"].) Thus, here, appellant's reliance on *Maurer* is misplaced because appellant was convicted of murder, not child molest or annoyance. Because motive is not an element of murder (*People v. Hillhouse, supra*, 27 Cal.4th at pp. 503-504), there was no conflict between CALJIC No. 2.51 and the elements of the crime.

As for appellant's contention that the instruction implied he had to prove his innocence, this Court rejected as similar argument in *People v. Prieto* (2003) 30 Cal.4th 226. There, the defendant argued that the phrase "tend to establish innocence" in CALJIC No. 2.51 implied that he had to establish his innocence. (*Id*. at p. 254.) This Court disagreed, explaining:

> "CALJIC No. 2.51 [does] not concern the standard of proof . . . but merely one circumstance in the proof puzzle-motive." (*People v. Estep* (1996) 42 Cal.App.4th 733, 738 . . . .) "[T]he instruction merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence, nor does it lighten the prosecution's burden of proof, upon which the jury received full and complete instructions." (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1497 . . . .) Thus, no reasonable juror would misconstrue CALJIC No. 2.51 as "a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90." (*Estep*, at p. 739.) Accordingly, the instruction did not violate defendant's right to due process.

(*Ibid*., brackets and first ellipses in original.)

Appellant fails to acknowledge this Court's decisions upholding the propriety of CALJIC No. 2.51. In light of this Court's repeated rejection of claims identical to appellant's, his challenge to this instruction should be summarily rejected.

XII.

THE REASONABLE DOUBT INSTRUCTION AND OTHER RELATED INSTRUCTIONS PROVIDED TO THE JURY DID NOT DILUTE THE PROSECUTION'S BURDEN OF PROOF (RESPONSE TO AOB ARG. XIV)

In Argument XIV of his Opening Brief, appellant contends that the trial court's instruction on reasonable doubt (CALJIC No. 2.90 (1994 rev.)), when combined with the circumstantial evidence instructions (CALJIC Nos. 2.01, 8.83, 8.83.1), diluted the prosecution's burden of proof, and that other standard instructions (CALJIC Nos. 1.00, 2.21.2, 2.22, 2.27, 2.51, and 8.20) also "vitiated" the reasonable doubt standard. (AOB 218-235.) This Court has rejected identical contentions in a number of other cases. Appellant provides no reason for this Court to overrule these other cases.

A. Waiver

At trial, appellant's trial counsel requested the old version of CALJIC No. 2.90 containing language of "abiding conviction to a moral certainty" (RT 2057), rather than the 1994 Revision omitting this language, which was given by the court (CT 471; RT 2130-2131). He also objected to CALJIC 8.20 ("Deliberate and Premediated Murder"), arguing that the prosecution's evidence sought "to prove a felony murder; i.e., in this case, robbery murder or a rape murder," and he did not believe there was "any evidence presented in this case to show premeditation or deliberation . . . ." (RT 2060.) The trial court disagreed (RT 2062), and gave the premeditated murder instruction (CT 477-478; 2134-2136). But, appellant's trial counsel did not object to the other instructions that appellant now challenges on appeal. Specifically, his trial counsel affirmatively stated on the record that he had no objections to CALJIC Nos. 1.00 through 2.27. (RT 2055.) Additionally, the record reveals that appellant's trial counsel did not object to CALJIC Nos. 2.51, 8.83 and 8.83.1.

(See RT 2055-2056, 2079-2081.) Because these instructions are correct in law, appellant has forfeited any claim that CALJIC Nos. 1.00, 2.01, 2.21.2, 2.22, 2.27, 2.51, 8.83, and 8.83.1, either standing alone or in combination, were erroneous. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."].)

B. CALJIC No. 2.90, When Combined With CALJIC Nos. 2.01, 8.83, And 8.83.1, Did Not Dilute The Prosecution's Burden Of Proof

Appellant claims that CALJIC No. 2.90 (1994 rev.)[56/] – which uses the phrase "abiding conviction" in defining the reasonable doubt standard[57/] – when

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56. As given by the trial court, CALJIC No. 2.90 (1994 rev.), provided:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(CT 471; RT 2130-2131.)

57. Appellant claims that the reasonable doubt definition given in CALJIC No. 2.90 included the words "moral certainty" and "moral certainty." (RT 219-220.) He is mistaken. While appellant's trial counsel had requested the old version of this instruction, which included those terms (RT 2057), the trial court gave the revised instruction, which makes no such reference (see CT 471; RT 2130-2131). (See *Victor v. Nebraska* (1994) 511 U.S. 1, 10-17 [114 S.Ct. 1239, 127 L.Ed.2d 583] [observing that the terms "moral evidence" and

combined with the circumstantial evidence instructions (CALJIC Nos. 2.01 [sufficiency of circumstantial evidence generally],[58/] 8.83 [sufficiency of circumstantial evidence to prove the special circumstance],[59/] 8.83.1 [sufficiency

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"moral certainty" in the former version of CALJIC No. 2.90 were antiquated, but did not suggest a standard of proof lower than due process requires].) Thus, to the extent appellant complains about the instruction due to these terms (AOB 219-220, 233-234, fn. 76), his argument is baseless.

58. CALJIC No. 2.01, as given by the trial court, provided:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to guilt and the other to a finding of not guilty you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to a finding of guilt. [¶] If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(CT 451; RT 2118-2119.)

59. CALJIC No. 8.83, as given by the trial court provided:

> You are not permitted to find a special circumstance alleged in this case to be true based on circumstantial evidence unless the proved circumstances is not only (1) consistent with the theory that a special circumstance is true, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be

of circumstantial evidence to prove mental state][60/]), diluted the prosecution's burden of proof. (AOB 219-220.) His argument fails.

"The 1994 revision of CALJIC No. 2.90 conforms precisely to the instruction suggested in *People v. Freeman* (1994) 8 Cal.4th 450, 504, fn. 9 . . . , and correctly defines reasonable doubt. [Citations.]" (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1091.) The argument that the revised version of

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> proved beyond a reasonable doubt. [¶] In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth. [¶] If, on the other hand, one interpretation of such evidence appears to you to be reasonable and other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(CT 487; RT 2141-2143.)

> 60. CALJIC No. 8.83.1, as given by the trial court provided:
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> The specific intent with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only [¶] (1) consistent with the theory that the defendant had the required specific intent but [¶] (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to any such specific intent is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent and the other to the absence of the specific intent, you must adopt that interpretation which points to the absence of the specific intent. [¶] If, on the other hand, one interpretation of the evidence as to such specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(CT 488; RT 2143-2144.)

CALJIC No. 2.90 is defective "has been rejected by every appellate district." (*People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286.)

With respect to the circumstantial evidence instructions – CALJIC Nos. 2.01, 8.83, and 8.83.1 – this Court has "repeatedly rejected defendant's argument" that they dilute the reasonable doubt standard, explaining:

> Those instructions, which refer to an interpretation of the evidence that "appears to you to be reasonable" and are read in conjunction with other instructions, do not dilute the prosecution's burden of proof beyond a reasonable doubt. [Citations.]

(*People v. Maury* (2003) 30 Cal.4th 342, 428 (*Maury*) [former version of CALJIC No. 2.90 with "moral evidence" and "moral certainty" terms], citing *Hughes, supra*, 27 Cal.4th at pp. 346-347, *People v. Osband* (1996) 13 Cal.4th 622, 678-679, and *People v. Ray* (1996) 13 Cal.4th 313, 347.) Thus, because CALJIC No. 2.90 correctly defined reasonable doubt and the circumstantial evidence instructions did not dilute the prosecution's burden, the instructions, in combination, were proper. (See *Maury, supra*, 30 Cal.4th at p. 429 ["Because the [standard reasonable doubt] instruction, individually, correctly defines reasonable doubt, we reject defendant's claim that this instruction, when considered together with the other complained-of instructions [CALJIC Nos. 2.01, 8.83, and 8.83.1, plus, CALJIC Nos. 2.21.2 (witness willfully false), 2.22 (weighing conflicting testimony)], was improper. [Citation.]"].)

Appellant has presented no compelling reason for this Court to overrule the long line of cases upholding the propriety of these instructions. (See AOB 231-234.) Accordingly, his claim must be rejected.

C. Other Standard Instructions – CALJIC Nos. 1.00, 2.01, 2.21.2, 2.22, 2.27, 2.51 and 8.20 – Did Not "Vitiate" The Reasonable Doubt Standard

Equally unavailing is appellant's argument that other standard instructions – CALJIC Nos. 1.00, 2.01, 2.21.2, 2.22, 2.27, 2.51, and 8.20 –

"vitiated" the reasonable doubt standard. (AOB 224-230.)[61]

1. CALJIC Nos. 1.00, 2.01, And 2.51 Did Not Misinform The Jury

Appellant contends that CALJIC Nos. 1.00 [duties of judge and jury],[62] 2.01 [sufficiency of circumstantial evidence generally],[63] and 2.51 [motive],[64] "misinform[ed] the jury that their duty was to decide whether appellant was guilty or innocent, rather than guilty or not guilty." (AOB 225-226.) Similar arguments have been rejected this Court. (*Frye, supra*, 18 Cal.4th at p. 958 [involving CALJIC Nos. 1.00, 2.51, and 2.52]; accord, *People v. Crew* (2003) 31 Cal.4th 822, 847-848 (*Crew*) [rejecting defendant's argument that CALJIC Nos. 1.00, 2.01, 2.51, and 2.52, which referred to "guilt or innocence," relieved the prosecution of its burden of proof]; *People v. Nakahara* (2003) 30 Cal.4th 705, 714 (*Nakahara*) [following *Frye* in rejecting defendant's claim that

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61. In his subdivision heading, appellant also refers to CALJIC Nos. 2.21.1 [discrepanicies in testimony], and 2.52 [flight after crime]. (AOB 224.) However, these references appear to be mistakes: appellant's reference to CALJIC No. 2.21.1 appears to be a typographical error because appellant actually discusses CALJIC No. 2.21.2 when referring to the former instruction (see AOB 226-228); and, the jury was never instructed with CALJIC No. 2.52.

62. The part of CALJIC No. 1.00, to which appellant now objects on appeal, reads:

> You must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because [he] has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent.

(CT 445; RT 2114.)

63. For text of instruction, see footnote 58, *ante*.

64. For text of instruction, see footnote 55, *ante*.

CALJIC Nos. 1.00 and 2.51 misled the jury].)

For example, in *Frye*, the defendant implicitly referenced CALJIC No. 1.00 and other jury instructions (CALJIC Nos. 2.51 [motive] and 2.52 [flight after crime]) when arguing that such instructions improperly shifted the burden of proof because they referred to "innocence" and thus improperly "placed on him the burden of establishing his innocence of the charged crimes" rather than have the prosecution proof his guilt beyond a reasonable doubt. (*Frye, supra,* 18 Cal.4th at p. 958.) This Court rejected the defendant's argument for the following reasons: (1) the jury had been instructed with "CALJIC No. 2.90 on the presumption of innocence and its corresponding burden on the prosecution to prove defendant guilty beyond a reasonable doubt"; (2) the trial court emphasized the prosecution's burden of proof through other jury instructions; and (3) the prosecutor emphasized the People's burden of proof during closing arguments. (*Ibid*.) Thus, this Court concluded:

> Viewing the instructions as a whole, an in light of the record at trial, we conclude it is not reasonably likely the jury understood the challenged instructions to mean defendant had the burden of establishing his innocence. [Citation.]

(*Ibid*.)

In light of this Court's decision in *Frye,* and as this Court recently reaffirmed in *Nakahara* and *Crew*, appellant's contention is unavailing. Here, as in *Frye*, the trial court gave CALJIC No. 2.90 (CT 471; RT 2131-2132), which instructed the jury on the "presumption of innocence and its corresponding burden on the prosecution to prove defendant guilty beyond a reasonable doubt." (*Frye*, *supra*, 18 Cal.4th at p. 958.) Also, like in *Frye*, the prosecution's burden of proof was emphasized in a number of different instructions, including CALJIC Nos. 8.71 [doubt whether first or second degree murder], 8.75 (1989 rev.) [partial verdict homicide], 8.80.1 (1993 rev.) [special circumstances introductory], and 17.16 [personal use of deadly/dangerous

weapon]. (CT 482-485, 495; RT 2137-2141, 2148-2149.) Finally, during closing argument, appellant's trial counsel reminded the jury that the prosecution bore the burden of proving appellant guilty beyond a reasonable doubt. (RT 2200.) Thus, just as in *Frye*, viewing the instructions as a whole, and in light of the record at trial, it is not reasonably likely the jury understood the challenged instructions to mean defendant had the burden of proving his innocence. (*Frye, supra*, 18 Cal.4th at p. 958; see *Nakahara, supra*, 30 Cal.4th at p. 714.)

2. CALJIC No. 2.21.2 Did Not Impermissibly Lessen The Prosecution's Burden Of Proof

The trial court provided the jury with CALJIC No. 2.21.2 (Witness Willfully False), as follows:

> A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of the truth favors his or her testimony in other particulars.

(CT 462; RT 2126.) Appellant contends this instruction "lightened the prosecution's burden of proof" because it allowed the jury "to credit prosecution witesses by finding only a 'mere possibility of truth' in their testimony. [Citation.]" (AOB 226-227, citing *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046, footnote omitted.) This Court has repeatedly rejected this contention. (See, e.g., *Maury, supra*, 30 Cal.4th at p. 428; *Nakahara, supra*, 30 Cal.4th at p. 714; *People v. Hillhouse, supra*, 27 Cal.4th at p. 493; *People v. Riel* (2000) 22 Cal.4th 1153, 1200.)

CALJIC No. 2.21.2 "does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute." (*Maury, supra*, 30 Cal.4th at p. 429, internal quotation marks omitted, quoting *People v. Beardslee* (1991)

53 Cal.3d 68, 95.) This Court stated in *Maury*:

> "When CALJIC No. 2.21.2 is considered in context with CALJIC Nos. 1.01 (consider instructions as a whole) and 2.90 (burden of proof), "the jury was adequately told to apply CALJIC No. 2.21.2 'only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt.' [Citation.]" [Citation.]

(*Maury, supra*, 30 Cal.4th at p. 429, bracket in original, quoting *People v. Foster* (1995) 34 Cal.App.4th 766, 775.)

Here, as in *Maury*, the jurors were instructed with CALJIC Nos. 1.01 and 2.90. (CT 447, 441; RT 2115, 2131-2132.) In the context of these instructions, no reasonable jury would interpret CAJLIC No. 2.21.2 as permitting a criminal conviction on less proof than "beyond a reasonable doubt." (*Maury, supra*, 30 Cal.4th at p. 429.) In light of this Court's repeated rejection of claims identical to appellant's, his claim should be summarily rejected.

3. CALJIC No. 2.22 Did Not Lessen The Prosecution's Burden Of Proof

The trial court instructed the jury on weighing conflicting testimony with CALJIC No. 2.22 as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number of other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side as against the other. You must not decide an issue by the simple process of counting the number of witnesses. The final test is not in the number of witnesses, but in the convincing force of the evidence.

(CT 463; RT 2126-2127.) Appellant contends this instruction "replaced the constitutionally-mandated standard of 'proof beyond a reasonable doubt' with

something that is indistinguishable from the lesser 'preponderance of the evidence standard'. . . ." (AOB 227-228.) He asserts that CALJIC No. 2.22 lessened the reasonable doubt standard because it "instruct[ed] that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater 'convincing force.' [Citation.]" (AOB 228.) This Court has recently rejected these very contentions and should do so again. (*Maury, supra*, 30 Cal.4th at p. 429; *Nakahara, supra*, 30 Cal.4th at p. 714.)

In *Nakahara*, the defendant argued that CALJIC No. 2.22 "improperly 'replaced' the beyond reasonable doubt standard with a standard akin to a preponderance of evidence standard." (*Nakahara, supra*, 30 Cal.4th at p. 714.) This Court rejected the argument, explaining: "CALJIC No. 2.22 is appropriate and unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof (see CALJIC No. 2.90). [Citations.]" (*Ibid*.) Similarly, in *Maury*, this Court rejected the "convincing force" argument appellant asserts on appeal, explaining:

> [W]hen this instruction is considered with CALJIC Nos. 1.01 and 2.90, " '[i]t is apparent that the jury was instructed to weigh the relative convincing force of the evidence (CALJIC No. 2.22) only as part of the process of determining whether the prosecution had met its fundamental burden of proving defendant's guilt beyond a reasonable doubt . . . .' " [Citations.]

(*Maury, supra*, 30 Cal.4th at p. 429, original internal brackets omitted, ellipses in original.) In light of this Court's holdings in *Nakahara* and *Maury*, appellant's claim must be rejected.

4. CALJIC No. 2.27 Did Not Lessen The Prosecution's Burden Of Proof

The trial court instructed the jury with the 1991 Revision of CALJIC No.

2.27, as follows:

> You should give the testimony of a single witness whatever weight you think it deserves. However, testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of such fact depends.

(CT 464; RT 2127.) Appellant claims this instruction was "flawed" because it suggested "that the defense, as well as the prosecution, had the burden of proving facts." (AOB 228-229.) This Court has previously rejected such challenges to CALJIC No. 2.27. (See, e.g., *People v. Turner*, *supra*, 50 Cal.3d at p. 697; accord, *People v. Montiel* (1993) 5 Cal.4th 877, 941.)

CALJIC No. 2.27 simply advises the jury on how to evaluate a fact proved solely by one witness's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700.) Although the instruction does not refer to the prosecution's burden of proving each element beyond a reasonable doubt, the instruction, when read in context with the other instructions, in no way lessens the prosecution's burden of proof. (*People v. Montiel*, *supra*, 5 Cal.4th at p. 941.) Because this Court has previously rejected arguments identical to the one advanced by appellant, who provides no compelling reasoning for revisiting this settled issue, this Court should summarily deny appellant's claim.

5. CALJIC No. 8.20 Did Not Lessen The Prosecution's Burden Of Proof

The trial court instructed the jury on premeditated, deliberate murder with CALJIC No. 8.20, which provided, in pertinent part:

> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

(CT 477; RT 2135.) Appellant claims that this instruction "misled the jury regarding the prosecution's burden of proof" because the instruction used the word "precluding," which appellant asserts "could be interpreted to required the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. [Citation.]" (AOB 229-230, citing *People v. Williams* (1969) 71 Cal.2d 614, 631-632.) This Court recently rejected a similar challenge. (*Crew, supra*, 31 Cal.4th at p. 848.)

In *Crew*, the defendant claimed that CALJIC No. 8.20, among other instructions, lessened the prosecution's burden of proof. (*Crew, supra*, 31 Cal.4th at p. 848.) This Court rejected the argument, explaining:

> [CALJIC No. 8.20] requires the jury to find the killing was preceded by a clear and deliberate intent to kill that must have been formed upon preexisting reflection and not precluded by conditions that negate deliberation. There is no reasonable likelihood that any jury would misconstrue this instruction as lessening the prosecution's burden of proof in any respect.

(*Ibid*.) In light of this Court's holding in *Crew*, appellant's claim must be rejected.

XIII.

THE VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED DURING THE PENALTY PHASE (RESPONSE TO AOB ARG. XV)

In Argument XV of his Opening Brief, appellant contends that the admission of the victim impact evidence – the testimony of Sara Weir's mother, Martha Farwell, and an accompanying 22-minute videotape depicting images of Sara – was erroneous and prejudicial for a variety of reasons. (ABO 236-259.) As set forth below, respondent submits that this evidence was proper.

A. Relevant Facts

Following the guilty verdict, appellant's trial counsel objected to the prosecution presenting "anything to the jury regarding penalty other than what was presented during the guilt phase" because he "did not receive a copy" of the prosecution's written notice of its planned penalty phase evidence (§ 190.3), although he admitted knowing that the prosecutor had filed the notice and the prosecutor had previously verbally informed him of out-of-state convictions he planned to introduce. (RT 2315-2316.) The prosecutor clarified that he had informed appellant's trial counsel that the section 190.3 notice was available in the court's file and, given their working relationship, he had told counsel to "come by [his office] and pick it up," but counsel "never did." (RT 2317.) When the trial court asked appellant's trial counsel how he had been "prejudiced by this," appellant's trial counsel conceded: "Your Honor, I'm *not*, because I received the information but I didn't receive the formal written notice served personally on me is the only comment I was making, Your Honor." (RT 2318-2319, italics added.) The trial court inquired if appellant's trial counsel desired "some time to do anything," to which counsel replied, "I'll just have an opportunity to look it over." The trial court denied appellant's motion to limit

the penalty phase evidence. (RT 2319.) Then, the prosecutor stated on the record that he planned to call another of appellant's prior rape victims, Esther D., as a penalty phase witness, and to call Sara Weir's mother, Martha Farwell, as a victim impact witness. (RT 2320.) Appellant's trial counsel indicated that he planned to present either one witness (appellant) or no witnesses during the penalty phase. (RT 2320.)

Two days later, prior to beginning the trial's penalty phase, the prosecutor stated on the record that he had informed appellant's trial counsel that Farwell had "prepared a 20-minute" videotape, which included "photographs of Sara at different ages," and that he would make the videotape available so that appellant's trial counsel could view its contents prior to Farwell's testimony. (RT 2332.) Then, after a lunch recess, the penalty phase began with the prosecutor's brief opening statement (RT 2338-2339), followed by Esther D.'s testimony about her 1984 rape by appellant (RT 2340-2419). After the trial recessed for the day, the court, the prosecutor and appellant's trial counsel viewed the videotape prepared by Farwell. (RT 2420, 2426.)

The next day, appellant's trial counsel stated that Farwell's proposed testimony regarding the "impact of Sara's life and her passing on her and the family . . . seem[ed] permissible by law." However, he objected to the introduction of the videotape, arguing that it was "a beautiful tribute to Sara" but it did not "qualif[y] . . . as victim impact." He argued the videotape was improper because it was "going to have a tremendous emotional effect on the jury." (RT 2427.) He felt the probative value of Farwell's victim impact testimony "would be so overshadowed by the emotional effect on the jury" of the videotape (RT 2427-2428), which he argued was not victim impact evidence but rather:

> It is a chronology of the life of a young lady. It doesn't say in itself how it impacted, her loss impacted the Farwell family. It isn't testimony of how [*sic*] this tape as to the impact. This tape is a chronology of her life.

(RT 2428.)

The prosecutor disagreed. (RT 2428-2431.) He argued that videotape prepared by Farwell was part of her victim impact testimony and thus proper, explaining:

> Mrs. Farwell will be testifying, and this was her preparation, of what the impact was on her. When she mentioned it to me, I indicated it would be all right for her to prepare it and it would be presented to the Court. Speaking for her, her belief is that this is necessary for her to express what the loss was and this is her best way of expressing what Sara meant to her and to the family. [¶] Through the photographs, her testimony, I think would relate to that. What this video, accompanied with her expression of the loss and the nightmares, this video I think would allow the jury to see who the person lost was. My view is that that's what victim impact is all about.

(RT 2430-2431.) The prosecutor also argued that the videotape would not have an "overshadowing or disproportionate impact" in light of the "tremendous, tremendous amount" of other aggravating factors, including the evidence of the crime itself and appellant's crimes against the other women. (RT 2430.)

The trial court conducted an Evidence Code section 352 analysis and concluded that the videotape was admissible. The trial court explained:

> Okay. In looking at the [video]tape yesterday, I believe that Mrs. Farwell could testify to everything that's contained in that tape. It's a very compelling tape. I will grant you that. This is a very compelling case. [¶] I think if the People wish to present it, I see no objection to it. In doing a 352 analysis, I think that it has more probative value than any prejudicial effect. I think what [the prosecutor] said, what this jury has heard from many other people makes this [video]tape pale. [¶] So if the People want to introduce it, they can over the defense objection.

(RT 2431.)

When the trial resumed, the prosecutor told the jury that Martha Farwell would be called as the prosecution's final witness, and that the prosecution's penalty phase evidence consisted of the two penalty phase witnesses and "all of the evidence presented at the guilt phase . . . ." (RT 2434.)

Thereafter, Farwell testified about the impact of Weir's death on the family. (RT 2434-2453, 2457-2466.) She recounted her shock and horror upon learning that her daughter was missing and the family's search for Weir (RT 2436-2443), the devastation of learning that Weir had been killed (RT 2443, 2452-2453), and the immediate and ongoing effect of Weir's murder on Farwell and rest of the family (RT 2444-2446, 2449, 2453, 2457, 2459, 2461-2466). When thinking of the loss, Farwell thought of Weir over the totality of her daughter's 19 years of life, explaining: "[W]hen I think of her, I see her sometimes as a 10-year-old, sometimes as a 12[-] or 13-year-old. I see her in different perspectives depending on which memories are coming up." (RT 2461-2462.) Farwell told the jury that she had prepared a videotape, consisting of images of her daughter at different ages and accompanied by some of her daughter's favorite music selections, because she "felt that it was important to see her as a person . . . instead of being just a victim . . . ." (RT 2463.) Then, the 22-minute videotape was played for the jury. (RT 2468; see Peo. Exh. 47.)

Following playing of the videotape, and outside the jury's presence, the prosecution indicated to the court that it planned to rest. (RT 2469.) Thereafter, appellant and his counsel conferred privately. Back on the record, and still outside the jury's presence, appellant's trial counsel announced to the court and the prosecutor that appellant had decided not to testify. (RT 2469-2470.) When the jury returned, both the prosecution and defense rested. (RT 2470-2471.)

B. Victim Impact Evidence Was Admissible As A Circumstance Of The Offense

While appellant acknowledges that victim impact evidence is generally admissible, he contends that no victim impact evidence of any kind should have been admitted in his case because it violated due process. (AOB 237-243.)

Specifically, he argues that allowing any victim impact evidence was error, because it "impermissibly skewed the balance" at the penalty phase because "humanizing information about the victim" had been presented during the guilt phase, the uncharged acts evidence was admitted in both phases, and the defense chose not to present evidence in either phase. (AOB 237-238, 243.) His argument is meritless.

First, to the extent appellant is now arguing that no victim impact evidence should have been admitted at trial – i.e., that, separate from the videotape, Martha Farwell should not have been permitted to testify about the impact of her daughter's loss on the family – his claim is forfeited because, at trial, he had objected only to the videotape. (RT 2427-2428.) He did not interject a timely and specific objection to Farwell's testimony independent of the videotape. Indeed, his trial counsel expressly affirmed that Farwell's testimony regarding "impact of Sara's life and her passing on [Farwell] and the family . . . seems permissible by law." (RT 2427.) Accordingly, he cannot argue on appeal that no victim impact evidence whatsoever should have been allowed because he failed to preserve the issue for review. (See Evid. Code, § 353; *People v. Hines, supra*, 15 Cal.4th at p. 1047 [defendant's failure to object to victim impact evidence and argument waived issue on appeal]; *People v. Sanders* (1995) 11 Cal.4th 475, 549 [nonspecific objections to prosecutor's argument regarding victim impact evidence failed to preserve claim for review]; *People v. Montiel, supra*, 5 Cal.4th at p. 934 ["Counsel's failure to object and/or request an admonition waives any direct appellate challenge to [victim impact] evidence and argument."]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245 [failure to make a timely and specific objection to prosecutor's argument regarding victim impact waived the issue on appeal].)

But, even if appellant had made appropriate objections at trial, his claims here would fail.

> In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825-827, 111 S.Ct. 2597, 115 L.Ed.2d 720 [(*Payne*)].) Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case. (*People v. Boyette* [(2002) 29 Cal.4th 381, 444] . . . ; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836 [(*Edwards*)] . . .)

(*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

Victim impact evidence is designed to show the victim's uniqueness as an individual human being. (*Payne, supra*, 501 U.S. at p. 823.) It is admissible to show the specific harm caused:

> [A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." [Citation.]

(*Id.* at p. 825.) Thus, if a state chooses to permit the admission of victim impact evidence, the Eighth Amendment erects no *per se* bar:

> A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

(*Id.* at p. 827.) The *Payne* court acknowledged that if the victim impact evidence was "so unduly prejudicial that it renders the trial fundamentally unfair," the defendant would be entitled to relief for a due process violation. (*Id*. at p. 825.) But nothing in *Payne* suggested victim impact evidence creates

a particular problem in this regard.

Rather, so long as the evidence is not "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response," the evidence is properly admitted. (*Edwards*, *supra*, 54 Cal.3d at p. 836; see *Payne*, *supra*, 501 U.S. at p. 825.) This Court recently reiterated that "evidence showing the direct impact of the defendant's acts on the victim's family and friends is not barred by state or federal law [citation]." (*People v. Benevides* (2005) 35 Cal.4th 69, 107, citing *People v. Pollock*, *supra*, 32 Cal.4th at p. 1180.)

The specific harm caused by appellant when he murdered Sara Weir – the impact on her family – was relevant to the jury's meaningful assessment of appellant's "moral culpability and blameworthiness." (See *Payne*, *supra*, 501 U.S. at p. 825.) Likewise, the defense was entitled to present mitigating evidence. Prior to the commencement of the penalty phase, appellant's trial counsel announced that it might present a defense witness, namely, appellant. (RT 2320.) Then, after the prosecution presented its penalty phase evidence, the defense announced appellant had decided not to testify. (RT 2469-2470.) That the defense *chose* not to present penalty phase evidence – a decision made known to the court and the prosecution only *after* the presentation of the prosecution's evidence – does not change the fact that the prosecution had been entitled to show how and why Sara's family were affected by appellant's crime, which would have advanced the State's interest in "counteracting" any mitigating evidence appellant might have presented. (See *Payne*, *supra*, 501 U.S. at p. 825.)

Neither did any of the "humanizing information" presented about Sara Weir during the guilt phase preclude the prosecution from presenting victim impact evidence during the guilt phase. As the United States Supreme Court acknowledged in *Payne*, "[i]n many cases the evidence relating to the victim is

already before the jury at least in part because of its relevance at the guilt phase of the trial." (*Payne, supra*, 501 U.S. at p. 823.) But, the *Payne* court explained that this did not make victim impact evidence inadmissible:

> But even as to additional evidence admitted at the sentencing phase, the mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of a dilemma. . . . "[T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence *should be admitted* and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party."

(*Ibid.*, italics added.)

Appellant cannot complain that the evidence of harm was too great – he created the evidence by murdering Sara Weir and by raping four other women. Appellant is essentially suggesting the jury should have been given a more limited, *false* picture of the harm he caused. Under appellant's argument, rather than allow the jury to know the evidence of the harm caused, it should be totally excluded where the harm caused is devastating. His argument that the prosecution should have been prevented from presenting any victim impact evidence must be rejected.

C. The Victim Impact Evidence Regarding Weir's Life Was Properly Admitted

Alternatively, appellant argues that even if victim impact evidence was admissible, the evidence presented in his case "exceeded any parameters envisioned by the United States Supreme Court in *Payne*, or this Court in *Edwards*." (AOB 244-247.) Appellant focuses primarily on Farwell's testimony – learning of Sara's disappearance and the devastation of being told that Sara had been murdered, and the effect that Sara's murder had on her and her family. (AOB 244-245.) He also claims that the videotape prepared by

Farwell as part of her testimony exceeded these parameters because her testimony, if admissible "under some interpretation of *Payne*," was "the absolute limit" on victim impact evidence. (AOB 247.) Once again, he is incorrect.

In *Payne*, the United States Supreme Court addressed the admissibility of "'victim impact' evidence relating to the personal characteristics of the victim and emotional impact of the crimes on victim's family," and found such evidence admissible. (*Payne, supra,* 501 U.S. at pp. 817, 827.) Prior law had prevented even a "quick glimpse" of the victim's life. (See *Payne, supra,* 501 U.S. at p. 822.) "But to suggest," as appellant does (AOB 246), "that *Payne* stands for the proposition that only a brief glimpse of the victim's life is constitutionally permissible is to misread that case" (*State v. Knese* (Mo. 1999) 985 S.W.2d 759, 771). Nothing in *Payne* limits the history of the victim to a brief glimpse. As one state's high court has explained, the rationale of the majority opinion in *Payne* itself supports a conclusion that evidence of the victim's personal characteristics is *not* limited to a "quick glimpse":

> The fundamental rationale announced by the Court in *Payne* looks to the fairness of the sentencing phase proceedings. The majority opinion [in *Payne*] notes that, just as the defendant is entitled to present evidence in mitigation designed to show that the defendant is a "uniquely individual human being," the State should also be allowed to present evidence showing each victim's "uniqueness as an individual human being." Specifically, "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." This evidence is necessary to allow the State to show the "full moral force" of its evidence and to prevent the victim from becoming "a faceless stranger at the penalty phase of a capital trial." Thus, in the majority's view, there is "no reason to treat such evidence differently than other relevant evidence is treated."

(*State v. Knese*, *supra*, 985 S.W.2d at p. 771, fns. omitted, quoting *Payne*,

supra, 501 U.S. at pp. 822-823, 825, 827.)

In *Edwards*, this Court held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (*Edwards, supra*, 54 Cal.3d. at p. 835.) While the holding in *Edwards* "only encompasses evidence that logically shows the harm caused by the defendant," this Court expressly refused to explore the "outer reaches" of this evidence. (*Id*. at p. 836.) It did, however, hold that "emotional" evidence is admissible. (*Ibid*.) While "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed," this Court in *Edwards* explained that, in "strik[ing] a careful balance between the probative and prejudicial," a trial court "*should allow* evidence and argument on *emotional* though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*Ibid*., italics added.) Thus, in *Edwards*, this Court found that photographs of the victims (taken while alive), which would have been irrelevant and prejudicial during the guilt phase, were properly admitted during the penalty phase, explaining:

> Although we have cautioned against admitting irrelevant photographs of the victims while alive at a guilt phase [citation], the same considerations do not apply at a penalty phase. *Evidence irrelevant and prejudicial to determining guilt may be relevant to judging the appropriate punishment once guilt is established.* [Citation.] Defendant assaulted both girls depicted in the photographs. Whatever the photographs suggested of the preciousness of their lives was relevant to determining the proper punishment for taking one of those lives, and attempting to take the other. [Citation.]

(*Ibid*., italics added.)

"The jury, in making a normative decision whether the defendant should live or die, is entitled to hear how the defendant's crime has harmed the survivors. [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 573.) Testimony by family members about the various ways their lives were affected

by the victim's death is proper. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172 [no error to allow family members to explain various ways their lives were adversely affected by victim's death]; see *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017 [prosecution argument on family's likely suffering from victim's death was proper]; *United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1219 [proper to admit evidence of last contacts with victim], disapproved on other grounds by *Hooks v. Ward* (10th Cir. 1999) 153 F.3d 1206, 1227; *United States v. McVeigh*, *supra*, 153 F.3d at p. 1220 [proper to admit evidence that child victims manifested innocence and unconditional love].) While such testimony is obviously emotional, it is not surprising or shocking. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 550 [that families were aggrieved was an "obvious truism" and an "obvious and predictable consequence[]"].) Moreover, in the penalty phase of a capital trial, a trial court's discretion to exclude evidence as unduly prejudicial is *narrower* than in the guilt phase because (1) the prosecution is entitled to show the circumstance of the defendant's crime "in a bad moral light" and (2) the potential for prejudice on the issue of guilt is no longer a concern. (*People v. Anderson* (2001) 25 Cal.4th 543, 591-592.)

The victim impact evidence in this case was proper because it consisted of the immediate temporal and spatial circumstances of the crime as well as that "which surrounds materially, morally, or logically" the crime. (*Edwards*, *supra*, 54 Cal.3d at p. 833.) Farwell's testimony recounting the devastation of a daughter's murder upon a family, which appellant's trial counsel had conceded was permissible (RT 2427), consisted of a reasonable 30 pages. (RT 2434-2453, 2457-2466.) As this Court has explained, "[i]t is common sense that surviving families would suffer repercussions from a young woman's senseless and seemingly random murder long after the crime is over." (*People v. Brown*, *supra*, 31 Cal.4th at p. 573.) Thus, Farwell's testimony regarding the

immediate effects of Sara's murder as well as the residual effects of her murder on Farwell and the rest of her family was proper. (See, e.g. *People v. Brown* (2004) 33 Cal.4th 382, 397-398 [proper victim impact evidence from multiple family members who testified about "either the immediate effects of the murder . . . or the residual and lasting impact they continued to experience – such as [one family member's] feelings when passing his brother's grave"].)

Moreover, evidence of a victim's life history provides the jury with a picture of the unique life extinguished by the defendant. (*Payne, supra*, 501 U.S. at p. 823.) Here, the videotape encapsulating the 19 years of Weir's life was a mere 22 minutes. (Peo. Exh. 47.) In keeping with *Payne*, the accompanying videotape "'remind[ed] the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to [her] family.' [Citation.]" (*Payne, supra*, 501 U.S. at p. 825.) While undoubtedly powerful, the evidence was not so inflammatory that it diverted the jury from its proper role. (*Payne, supra*, 501 U.S. at p. 809; see *Edwards, supra*, 54 Cal.3d at p. 836.) Here, the victim impact evidence related to Weir's personal characteristics and emotional impact of her murder on her family. (*Payne, supra,* 501 U.S. at p. 817.) Thus, the jury was properly allowed to hear evidence concerning the full impact of appellant's actions.

D. The Videotape Accompanying Farwell's Testimony Was Properly Admitted

Appellant also specifically contends that the videotape that Farwell had prepared as part of her victim impact testimony should have been excluded. (AOB 248-252.) He claims that the videotape, consisting of images of Weir set to music and narrated by Farwell, "went far beyond the standards set by this Court and by the United States Supreme Court," and that it was "so highly

inflammatory and emotional" that it violated his constitutional rights. (AOB 251, 252.) He also points specifically to the videotape's "last images" – of Weir's grave and video footage of Canada – which he claims were "particularly prejudicial and should have been excluded. [Citation.]" (AOB 248, citing *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373.) Respondent submits that the trial court acted within its discretion when, after expressly weighing the probative value against its prejudicial effect, it permitted the introduction of the videotape.

Generally, a great variety of victim impact evidence is admissible. In addition to evidence of the victim's good character, other courts have approved victim impact evidence on the "victim's talents, intelligence, spirituality, work ethic and educational background, standing in the community, and numerous other traits." (Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L.Rev. 257, 269-270, fns. omitted [collecting cases] (hereinafter, "Blume").) Moreover, family members' testimony "recollect[ing] past incidents or activities" that they shared with the victim may be properly admitted because,

> their testimony simply serve[s] to explain why they continued to be affected by his loss and to show the "victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." [Citation.]

(*People v. Brown, supra*, 33 Cal.4th at p. 398, quoting *Payne, supra*, 501 U.S. at p. 823.)

Here, the videotape helped Farwell express the loss of her daughter to the jurors. As the prosecutor explained to the trial court and appellant's trial counsel, Farwell had prepared the videotape as part of her victim impact testimony because she believed it was "her best way of expressing what Sara meant to her and to the family." (RT 2430-2431.) Later, during her victim impact testimony, Farwell told the jurors that when she thought of the loss of

her daughter, she recalled Weir at different ages: "I see her sometimes as a 10-year old, sometimes as a 12 or 13-year-old. I see her in different perspectives depending on which memories are coming up." (RT 2461-2462.) Here, the images of Weir's life history contained in the videotape properly provided the jury with a picture of the unique life that appellant chose to extinguish. (See *Payne, supra*, 501 U.S. at p. 823.)

Neither were the "last images" on the videotape, showing Weir's grave and the Canadian landscape of her birthplace, improperly inflammatory or prejudicial. Recently, in *People v. Brown, supra*, 33 Cal.4th at p. 398, this Court examined an analogous situation. There, the defendant challenged as inadmissible a victim's brother's testimony about "his custom of saluting his brother's grave every time he [drove] past the cemetery" and a father's testimony that had "not gone fishing since his son's death." (*Ibid*.) This Court considered the testimony as "simply manifestations of the psychological impact experienced by the victims, in no way inconsistent with our prior decisions nor 'fundamentally unfair' within the meaning" of *Payne*. (*Ibid*.) Likewise, here, the inclusion of an image of Weir's grave and footage of the Canadian landscape (her birthplace) were manifestations of the psychological impact of Weir's death on her mother.

As the trial court correctly determined when it conducted its Evidence Code section 352 analysis, the videotape had "more probative value than any prejudicial effect." The trial court explained that the effect of the videotape "pale[d]" in comparison to the other evidence presented to the jury, i.e., the circumstances of Weir's murder and other rapes appellant had committed. (RT 2431.) Indeed, the majority of the penalty phase testimony consisted of Esther D.'s recounting her 1984 rape by appellant. (RT 2340-2419.) Additionally, the jury had before it appellant's prior rapes of Jodi D., Kim V. and Teri B. (See RT 2434.) Moreover, in his closing argument, the prosecutor did not focus the

jury's attention on the videotape itself; rather, he emphasized how appellant had killed Weir (RT 2564, 2567-2569), the impact of her death on her family (RT 2564-2565, 2586), and appellant's prior crimes (RT 2572-2573, 2575-2583). Thus, when viewed in the context of the other evidence before the jury, and the prosecutor's closing argument, the admission of the videotape "did not surpass constitutional limits." (*People v. Boyette, supra*, 29 Cal.4th at p. 444 [no constitutional violation where prosecution's victim impact evidence – including photographs of the victims while alive and family members' testimony regarding how they loved and missed the victims – was "relevant," and prosecutor's argument – emphasizing the victim impact evidence but also speaking "of the relevance of the facts of the crime itself, as well as other aspects about defendant that (she argued) demonstrated why the death penalty was appropriate for him and a life sentence was not" – was "appropriate"].)

Appellant's citation to a Texas state case, *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, does not compel a different result. (See AOB 250-251.) In *Salazar*, the prosecution introduced a 17-minute videotape that was a montage of 140 photographs of the victim, nearly half of which depicted the adult victim as he was as an infant, toddler, or small child, set to music from the film *Titanic*. (*Salazar v. State*, *supra*, 90 S.W.2d at pp. 332-333, 337.) The reviewing court found the probative value of the evidence was minimal and the risk of unfair prejudice high. (*Id.* at pp. 337-339.) But, *Salazar*, an out-of-state case, is not controlling. Indeed, other courts have found the introduction of videotapes permissible. (See Blume, *supra*, 88 Cornell L.Rev. at p. 271 & fn 128 [collecting cases].) For example, in *Hicks v. State* (1997) 327 Ark. 727, 728-731 [940 S.W.2d 855], a state court upheld the admission of a 14-minute videotape, which included approximately 160 photographs of the victim at various stages of his life, his family and friends, where the videotape was narrated by the victim's weeping brother.

Where a defendant causes a great harm or loss, there is no rational reason for limiting evidence that demonstrates that harm. In criminal law, the appropriate penalty is often based on the degree of harm caused by the defendant. (*Payne*, *supra*, 501 U.S. at p. 819 ["the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment"].) The videotape that Farwell had prepared as part of her victim impact testimony properly demonstrated the harm caused by appellant. Accordingly, the trial court acted within its discretion when it permitted the prosecution to play the videotape for the jury.

E. Evidence Of Weir's Personal Characteristics Did Not Invite Improper Comparisons

Contrary to appellant's assertion (AOB 252-257), the evidence of Weir's life history did not improperly invite comparisons between her and other victims and between her and appellant.

In *Payne*, the Supreme Court specifically rejected the notion that victim impact evidence invited comparisons with other victims. (*Payne, supra*, 501 U.S. at p. 823.) Rather, victim impact evidence is admitted to show each individual victim's uniqueness. (*Ibid.*) Such was the case here where the evidence demonstrated Weir's unique characteristics.

Nor did the prosecution argue that the death penalty was more deserving in this case because of Weir's characteristics. The prosecutor did argue in closing that the jurors could consider Weir's loss to her family, stating:

> And reflect upon those you love and what that loss would mean to you. And that's something you can do. And any person that's killed during a rape, this could be – this law protects anybody, a street person, not to devalue that, but when you look at aggravation and mitigation, there may be less pain caused to loved ones of the person who has been so

> unfortunate as to choose a life of drinking and being on the street. [¶] And you can consider that in this case Sara was something else. Sara was brought back to life in this Court for you through her friends, through her family, through her image, through her loss. . . . [¶] And the reason we got to know her was so that we could decide, Sara, is your loss aggravated, is that a factor that would tend to be something we can consider when deciding what the just verdict is.

(RT 2565.) Such an argument was proper because the prosecutor was merely reminding the jurors that they could consider the family's loss when weighing aggravating and mitigating circumstances. (See *Payne*, *supra*, 501 U.S. at p. 825 [victim impact evidence may be used to remind the jury that "'the victim is an individual whose death represents a unique loss to society and in particular to [her] family'"].) Appellant claims that this statement by the prosecutor "invited an improper comparison between appellant and Ms. Weir[.]" (AOB 253, citing RT 2565.) But, the prosecutor made no reference to appellant in this statement; instead, he focused on the impact of Weir's loss to her family.

Moreover, there is nothing in *Payne* that prohibits comparing the defendant and the victim. (See, e.g., *Humphries v. State* (S.C. 2002) 351 S.C. 362, 376-377 [570 S.E.2d 160] ["*Payne* does not prohibit character comparisons between defendants and victims; it prohibits comparisons that suggest that there are worthy and unworthy victims."]; *Jackson v. State* (Tex. 2000) 33 S.W.3d 828, 834 ["*Payne* discourages 'measuring the worth of the victim compared to other members of society.'"].) In fact, other courts have allowed comparisons. (*State v. Ringo* (Mo. 2000) 30 S.W.3d 811, 821 [prosecutor properly contrasted the hardships suffered by defendant with hardships suffered by victim's family; such an argument "did not . . . attempt to weigh the relative values of defendant's life compared to others"]; *State v. Haselden* (N.C. 2003) 357 N.C. 1, 20-21 [577 S.E.2d 594] [proper to contrast defendant's age with victim's and victim's daughter's ages, and proper to reference victim's mother in mentioning defendant's love for mother]; see also

State v. Prevatte (N.C. 2002) 356 N.C. 178, 246 [570 S.E.2d 440] [proper to ask jury to contrast court's fairness with defendant and defendant's fairness with victim].)

Here, the victim impact evidence did nothing to suggest a comparison between Weir and appellant. The prosecutor did not make any comparisons, either. The most he said was that appellant "didn't value his own life," he did not "value others," and thus the jury could "value [appellant's life] equally." (RT 2584.) But there was nothing improper about such an argument. It was appropriate for the prosecutor to argue the relative weight the jury should give to two relevant sentencing factors: the circumstances of the crime, which included information about the victim, and the circumstances related to appellant's life, such as his prior history of violent crimes. The prosecutor argued that the death penalty was appropriate based on appellant's actions. He did not argue, or even suggest, that the death penalty was appropriate because appellant's life was not as important as Weir's. Rather, the argument was essentially that Sara Weir's life was worth something to her family while appellant's life should be given the same value as he placed on his victim's life. Thus, the prosecutor's argument – which emphasized the viciousness of appellant's killing of Weir, appellant's other violent crimes, and effects of appellant's actions on the survivors (including Weir's family) – was proper. Such an argument was not likely to divert the jury from their proper role in sentencing.

Appellant also contends that the victim impact evidence "creates the danger that racial discrimination will affect the jury decision," and that the "danger [was] particularly acute in cross-racial crimes like this one . . . ." (AOB 255; AOB 255-257.) Certainly, the prosecution would err if it were to urge that a death sentence should be imposed on the basis of the victim's or defendant's race. (*Booth v. Maryland* (1987) 482 U.S. 496, 517 [107 S.Ct. 2529, 96

L.Ed.2d 440] (dis. opn. of White, J.) [pre-*Payne* case; victim impact evidence should be held constitutionally permissible, but "the State may not encourage the sentencer to rely on a factor such as the victim's race in determining whether the death penalty is appropriate"], overruled by *Payne, supra*, 501 U.S. 808; *South Carolina v. Gathers* (1989) 490 U.S. 805, 821 [109 S.Ct. 2207, 104 L.Ed.2d 876] (dis. opn. of O'Connor, J.) [pre-*Payne* case; "It would indeed be improper for a prosecutor to urge that the death penalty be imposed *because* of the race, religion, or political affiliation of the victim"], overruled by *Payne, supra*, 501 U.S. 808; *Furman v. Georgia* (1972) 408 U.S. 238, 242 [92 S.Ct. 2726, 33 L.Ed.2d 346] (conc. opn. of Douglas, J.) [death penalty is unconstitutionally "unusual" if imposed on the basis of defendant's "race, religion, wealth, social position, or class"].) But such was not the case here. The prosecutor did *not* urge a death sentence on any such unconstitutional bases, and so the jury was not diverted from its proper role. Quite simply, the victim impact evidence did not invite the improper comparisons appellant suggests. His claim should be rejected.

F. Appellant Was Not Prejudiced By The Admission Of The Evidence

Appellant claims the alleged errors in admitting victim impact evidence were prejudicial. (AOB 243, 249, 251-252, 257-259.) Any erroneous admission of victim impact evidence is subject to harmless error analysis. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1246 [any error in admitting victim's family member's opinion was not likely to have affected verdict in light of callousness of crime].) Here, there is no reasonable possibility that the jury would have returned a different sentence but for the erroneous admission of any victim impact evidence. (*People v. Jones*, *supra*, 29 Cal.4th at p. 1264, fn. 11.) For the same reasons, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

The victim impact evidence was limited to the testimony of Weir's mother, Martha Farwell, and the accompanying videotape. Farwell testified about the family's relationship with Weir, learning about her daughter's disappearance and murder, and the impact Weir's murder had on the family. (RT 2434-2453, 2457-2466.) The testimony gave context to the stark facts of the senseless murder of a 19-year-old woman. The evidence in this case properly showed "victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." (*Payne*, *supra*, 501 U.S. at p. 823.) "Courts have always taken into consideration the harm done by the defendant in imposing sentence," and "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." (*Id.* at p. 825.) The evidence adduced in this case was representative of the harm caused by appellant's crime.

The testimony was not inflammatory. That Sara Weir's family was aggrieved was an "obvious truism." (*People v. Sanders*, *supra*, 11 Cal.4th at p. 550.) Even if the testimony aroused emotions and evoked sympathy, "it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.) Also, the trial court's instructions told the jury not to be swayed by bias or prejudice against appellant (CT 533; RT 2546; see CALJIC No. 8.84.1 (1989 new)), and that they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider" (CT 553; RT 2558; see CALJIC No. 8.88 (1989 rev.)). The jury is presumed to have followed these instructions. (*People v. Rich*, *supra*, 45 Cal.3d at p. 1102.)

Additionally, appellant's trial counsel urged the jury not to vote for death, reminding them that they could not restore Weir's life by doing so:

> The law, ladies and gentlemen, gives you a tremendous, tremendous amount of power in this case. It gives you the power to give and the power to take life, but it does not give you the power to restore life. By [*sic*] your verdict you could bring Sara back, I know your job would be much easier. That is a power, ladies and gentlemen, that none of us have.

(RT 2591.)

Moreover, the jury had already heard evidence of the callousness and brutality of the murder: Sara Weir had antemortem injuries (RT 2004-2008), and 29 stab wounds inflicted by a pair of scissors (RT 1996, 1999); the medical examiner opined that Weir lost consciousness after being stabbed in the heart, and died about 10 or 15 minutes later (RT 2010-2011); her body was found stuffed under a child's bed (RT 1294, 1415-1416); her head was covered by a plastic bag, which was secured tightly around her neck with packaging tape, and a Dodgers baseball helmet had been placed atop her head (RT 1426-1427, 1431-1432). As this Court has observed, "among the most significant considerations [in the jury's assessment of punishment] are the circumstances of the underlying crime. [Citations.]" (*People v. Mitcham, supra*, 1 Cal.4th at p. 1062.) The jury had also heard of appellant's long history of violent, criminal acts: the assault of his girlfriend, and the rapes of Esther D., Jodi D., Kim V., and Teri B. The aggravating evidence of the murder and appellant's criminal history was devastating, which, as the trial court had observed (RT 2431), made the videotape "pale" by comparison. The admission of the challenged victim impact evidence "did not undermine the fundamental fairness of the penalty-determination process." (*People v. Mitcham, supra*, 1 Cal.4th at p. 1063.) Thus, even if it evidence had been excluded, there is no reasonable possibility that the jury would have returned a different sentence. Therefore, any alleged error was harmless.

XIV.

THE PENALTY-PHASE SPECIAL INSTRUCTIONS WERE PROPERLY REJECTED (RESPONSE TO AOB ARG. XVI)

In Argument XVI of his Opening Brief, appellant contends that the trial court erred by refusing to instruct with three defense-requested special instructions. (AOB 260-269.) Respondent submits that the trial court properly refused the instructions as they were argumentative or duplicative of other properly given instructions.

A. Waiver

To the extent appellant claims that the trial court's failure to instruct the jury with his proposed defense instructions violated his federal constitutional rights (AOB 261, 263-265, 267, 269), such claims are waived because appellant failed to object on these grounds in the trial court. (See *People v. Sanders, supra*, 11 Cal.4th at p. 510, fn. 3.) However, even if the claim is not waived, it lacks merit.

B. The Trial Court Properly Rejected The Defense-Requested Special Instructions Because They Were Argumentative Or Duplicative

Appellant claims the trial court erred when it refused to instruct the jury with defense-prepared special instructions that would have told the jury that: (1) it need not unanimously agree on any matter offered in mitigation; (2) "it could reject the death penalty based on evidence that gives rise to sympathy or compassion" for appellant; and (3) "'one mitigating factor can sometimes outweigh a number of aggravating factors.'" (AOB 260-269.) The trial court, which gave a modified version of a defense-prepared special instruction on lingering doubt (CT 547; RT 2554), refused to give other defense-prepared

special instructions because "they [were] all contained in other instructions, namely, [CALJIC No.] 8.88." (RT 2533; see RT 2539 ["And the other [defense-prepared special instructions] we already discussed and they are said in different ways in [CALJIC No.] 8.88"].)

This Court has explained:

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.] Moreover, the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]

(*People v. Gurule* (2002) 28 Cal.4th 557, 659.) "Although instructions pinpointing the theory of the defense might be appropriate, a defendant is not entitled to instructions that simply recite facts favorable to him. [Citation.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159, original italics omitted.)

First, appellant's claim that the trial court erred when it refused to give a defense-prepared special instruction informing the jury that it need not be unanimous in considering mitigating evidence fails.[65/] This Court rejected similar challenge in *People v. Breaux* (1991) 1 Cal.4th 281, 314-315 (*Breaux*), in which it distinguished the same cases that appellant relies upon. (See AOB 261-263, discussing *McKoy v. North Carolina* (1990) 494 U.S. 433 [108 L.Ed.2d 369, 110 S.Ct. 1227], and *Mills v. Maryland* (1988) 486 U.S. 367 [100

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65. The full text of the proposed special instruction read:

> There is no requirement that all jurors unanimously agree on any matter offered in mitigation or aggravation. Each juror must make an individual evaluation of each fact or circumstance offered in mitigation or aggravation. Each juror must make his or her own individual assessment of the weight to be given such evidence. Each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

(CT 558.)

L.Ed.2d 384, 108 S.Ct. 1860].) In *Breaux,* the defendant claimed that the trial court improperly rejected his proposed jury instruction that unanimity was not required for consideration of mitigating evidence. (*Breaux, supra*, 1 Cal.4th at p. 314.) This Court disagreed, explaining:

> There was nothing in the instructions to limit the consideration of mitigating evidence and nothing to suggest that any particular number of jurors was required to find a mitigating circumstance. The only requirement of unanimity was for the verdict itself. [Citation.] [¶] The instructions that were given in this case unmistakably told the jury that each member must *individually* decide each question involved in the penalty decision. They were told to consider all the evidence, specifically including any circumstance in mitigation offered by defendant. We find no error in the court's refusal to give defendant's proposed instruction.

(*Id*. at p. 315, italics in original.)

Such was the case here. As in *Breaux*, there was nothing in the given instructions that limited the jurors' consideration of mitigating evidence or that suggested that "any particular number of jurors was required to find a mitigating circumstance." (See *Breaux, supra*, 1 Cal.4th at p. 315.) Also, similar to the instructions in *Breaux*, the jurors were instructed with CALJIC No. 8.88 (1989 rev.), which told them that "[i]n order to make a determination as to the penalty, all twelve jurors must agree," but in order "[t]o return a judgment of death, *each* of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 554, italics added; RT 2558-2559.) Thus, just as in *Breaux*, the trial court did not err when it refused the defense-prepared special instruction because it was duplicative of CALJIC No. 8.88.

As his second claim, appellant contends that the trial court erred in refusing the defense-prepared special instruction on mercy "that would have informed the jury that it could reject the death penalty based on evidence that

gives rise to sympathy or compassion" for appellant. (AOB 264; AOB 264-267.)[66/] But, this Court has rejected similar challenges in other cases. (See, e.g., *People v. Monterroso* (2004) 34 Cal.4th 743, 791-792; *People v. Smith* (2003) 30 Cal.4th 581, 638; *People v. Prieto, supra,* 30 Cal.4th at p. 271, citing *People v. Lewis, supra,* 26 Cal.4th at p. 393; *Hughes, supra*, 27 Cal.4th at p. 403.)

Here, the jury was instructed with a modified version of CALJIC No. 8.85 (CT 543-544; RT 2550-2553),[67/] which this Court has held adequately covers the mercy instruction. (*People v. Prieto, supra,* 30 Cal.4th at p. 271, citing *People v. Lewis*, *supra*, 26 Cal.4th at p. 393.) Additionally, the jury was also instructed with CALJIC No. 8.88, which instructed that a mitigating circumstance was "any fact, condition or event, which as such, 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," and told the jury that "[y]ou are free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." (CT 553; RT 2557-2558.) As such, the jury was adequately informed that the jury could take into account any sympathy it had for appellant as a mitigating factor. (*Hughes, supra*, 27 Cal.4th at p. 403 ["a trial court need not give a specific 'mercy instruction,' even if

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66. The full text of the proposed special instruction read:

> In determining which penalty is to be imposed on the defendant, you have absolute power to select the sentence of life without parole based solely upon your desire to show mercy, no matter how egregious the crime or how unsympathetic the defendant. The law permits you to choose life over death simply because you believe life itself is more desirable than death.

(CT 557.)

67. Pursuant to the parties' agreement, and for a defense tactical reason, the standard instruction was modified to omit reference to factor (c) of section 190.3 ("[t]he presence or absence of any prior felony conviction"). (RT 2526-2527.)

requested," when the jury is instructed with CALJIC No. 8.85 and instructed that it is "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors your are permitted to consider"].) Thus, in light of the other instructions given, "the rejected instruction was cumulative." (*People v. Prieto, supra*, 30 Cal.4th at p. 271, footnote omitted.)

Equally unpersuasive is appellant's third claim that the trial court erred when it refused the defense-prepared instruction stating that "'one mitigating factor can sometimes outweigh a number of aggravating factors.'" (AOB 267; AOB 267-269.)[68/] The proffered instruction was argumentative and duplicative. (See, e.g., *People v. Smith, supra*, 30 Cal.4th at p. 638; *People v. Anderson, supra*, 25 Cal.4th at pp. 598-600; *People v. Hines, supra*, 15 Cal.4th at pp. 1068-1069.)

In *Hines*, the defendant claimed that the trial court erred in refusing to give a special instruction stating that "a single mitigating circumstance may outweigh all the aggravating factors." (*People v. Hines, supra*, 15 Cal.4th at p. 1068.) This Court concluded that the proffered instruction was "argumentative, because it states that a single mitigating circumstance may be dispositive without saying the same about a single aggravating circumstance. [Citation.]" (*Id*. at p. 1069; accord, *People v. Smith, supra*, 30 Cal.4th at p. 638.) Likewise, appellant's proffered instruction was argumentative because it stated only that "one mitigating factor" could outweigh a number of aggravating factors without stating the opposite. As such, it was properly rejected.

Appellant's proffered instruction was also duplicative. In *Anderson*, the

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68. The full text of the proposed special instruction read:

> The weight to be given to the factors in aggravation and mitigation is a matter for each juror to determine. Each juror must assign the factor present in this case whatever weight the juror finds to be appropriate. [¶] For this reason, one mitigating factor can sometimes outweigh a number of aggravating factors.

(CT 559.)

jury had been instructed with a modified version of CALJIC No. 8.85 and with CALJIC No. 8.88 (1989 rev.), but the defendant claimed that the trial court erred in refusing to give additional instructions regarding aggravating and mitigating circumstances. (*People v. Anderson, supra*, 25 Cal.4th at pp. 598-599.) This Court concluded that the trial court properly rejected the additional instructions "as duplicative, redundant, and argumentative" because CALJIC Nos. 8.85 and 8.88, which were given, "covered all the points emphasized by defendant, and did so in more neutral fashion." (*Id*. at p. 599.) Here, as in *Anderson*, the jury was instructed with CALJIC Nos. 8.85 and 8.88. (CT 543-544, 555-554; RT 2550-2553, 2557-2559.) "No reasonable juror, so instructed, could infer the law . . . made sentencing a mechanical or mathematical process," or that it "authorized a judgment of death simply because the aggravating circumstances were marginally greater in number or weight than those in mitigation." (*People v. Anderson, supra,* 25 Cal.4th at pp. 559-600.)

Contrary to appellant's assertion (AOB 269), there was no "need to specially instruct the jury on the appropriate process of weighing mitigating factors." (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1161.) As this Court explained in *Gutierrez*, "CALJIC No. 8.88 properly advised the jury that '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.'" (*Ibid*.) That standard instruction "properly describes the weighing process as '"merely a metaphor for the juror's personal determination that death is the appropriate penalty under all of the circumstances'." [Citations.]" (*Ibid*.) As such, the jury was adequately informed on the weighing process of aggravating and mitigating factors.

Regardless, even if the trial court erred by failing to give any of the defense-prepared instructions, there is no reasonable possibility that appellant

suffered prejudice from the lack of instruction. (See *People v. Jones*, *supra*, 29 Cal.4th at p. 1264; *People v. Brown* (1988) 46 Cal.3d 432, 448-449.)[69/] During closing argument, appellant's trial counsel told the jury that they were "here, ladies and gentlemen, as 12 separate individuals to vote your own conscience." (RT 2590-2591.) Later, he reminded them of their duty to act as individuals making a penalty decision, telling them: "You know, [in] these proceedings you act as individual jurors." (RT 2595.) Appellant's trial counsel reiterated the warning in CALJIC No. 8.88 that weighing the evidence was "not a mathematical formula" (RT 2596), that "[y]ou just don't add up numbers" (RT 2596, 2597), and that "[e]ach of you are to give whatever weight you feel each applicable factor deserves" (RT 2597). Additionally, he expressly argued that "[o]ne factor in mitigation can outweigh more factors in aggravation if you feel that it deserves more weight than the others." (RT 2597.) He also stated that "the law is neutral in this area . . . [i]t does not prefer a death sentence." (RT 2597.) Moreover, as noted above, the standard instructions given informed the jury of the proper circumstances to take into account in deciding whether to impose death or life without the possibility of parole. In sum, there is no reasonable possibility that appellant was prejudiced. Thus, his instructional error claims should be rejected.

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69. The reasonable possibility standard for assessing prejudice in the penalty phase is the same in substance and effect as the beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. at p. 24. (*People v. Jones, supra*, 29 Cal.4th at p. 1264, fn. 11.)

XV.

INTERCASE PROPORTIONALITY REVIEW OF DEATH SENTENCES IS NOT REQUIRED BY THE FEDERAL CONSTITUTION (RESPONSE TO AOB ARG. XVII)

In Argument XVII of his Opening Brief, appellant contends that California death penalty statute violates the Eighth and Fourteenth Amendments of the United States Constitution because the state statute does not provide for intercase proportionality review of sentences. (AOB 270-274.) This Court has repeatedly rejected the claim that the United States Constitution requires intercase proportionality review of death sentences. (See *People v. Prieto, supra,* 30 Cal.4th at p. 276; *People v. Snow, supra,* 30 Cal.4th at pp. 126-127; *People v. Box, supra,* 23 Cal.4th at p. 1217.) Having offered no compelling reason for reconsideration, appellant's contention fails.

XVI.

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE NOT UNCONSTITUTIONAL (RESPONSE TO AOB ARG. XVIII)

In Argument XVIII of his Opening Brief, appellant "raises a number of . . . constitutional objections to the death penalty statute identical to those [the Court has] previously rejected." (*People v. Welch* (1999) 20 Cal.4th 701, 771; AOB 275-316.) To the extent appellant alleges statutory errors not objected to at trial, the issue is waived on appeal. (See *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Similarly, any complaints relating to instructions that were not erroneous but only incomplete are waived unless appellant requested clarifying or amplifying language. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 503.) Respondent will not "rehearse or revisit" the numerous claims previously and regularly rejected by this Court. (*People v. Ayala* (2003) 24 Cal.4th 243, 290 [internal quotation marks excluded].) Respondent simply identifies appellant's complaint and notes the Court's applicable opinions.

A. Absence Of Reasonable Doubt Standard Is Not Unconstitutional

Appellant claims that California's death penalty statute and instructions are unconstitutional because "neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof." (AOB 276, footnote omitted; AOB 276-299.) Appellant's claim is meritless.

As appellant recognizes (AOB 277, 281-282), this Court has repeatedly held that California law does not require a jury to find, beyond a reasonable doubt, (1) the existence of aggravating factors (except for other crimes under

section 190.3, subdivision (b)),[70] (2) that aggravating factors outweigh mitigating factors, or (3) that death is an appropriate penalty. (*People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Cox* (2003) 30 Cal.4th 916, 971; *People v. Box, supra*, 23 Cal.4th at p. 1217.) The United States Supreme Court decisions in *Apprendi*, *supra*, 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] (*Ring*), do not alter this conclusion. (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32 [finding *Apprendi* and *Ring* inapplicable]; accord, *People v. Martinez, supra*, 31 Cal.4th at pp. 700-701; *People v. Cox, supra*, 30 Cal.4th at pp. 971-972; *Nakahara, supra*, 30 Cal.4th at pp. 721-722; *People v. Smith*, *supra*, 30 Cal.4th at p. 642; *People v. Prieto, supra*, 30 Cal.4th at p. 272 ["*Ring* does not apply to California's penalty phase proceedings"].) And, contrary to appellant's assertion (AOB 277, 279-280, 284-292), the United States Supreme Court decision in *Blakely v. Washington* (2004) 524 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) "does not undermine [this Court's] analysis on point[]" because *Blakely* "simply relied on *Apprendi* and *Ring* . . . ." (*People v. Morrison* (2004) 34 Cal.4th 698, 731.)

B. No Burden Of Persuasion In The Penalty Phase

Appellant also claims that California's death penalty statute is unconstitutional because "the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determination the jury had to make." (AOB 299; AOB 299-305.) Appellant acknowledges that

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70. In CALJIC No. 8.87, the jury was instructed that it must find that appellant committed the other crimes evidence – his assault of Michelle Theard, and rapes of Esther D., Jodi D., Kim V., and Teri B. – beyond a reasonable doubt. (CT 545; RT 2553-2554.) The jury was also reminded of the reasonable doubt definition when given a modified version of CALJIC No. 2.90 as part of the guilt phase instructions. (CT 546; RT 2554.)

this Court has held otherwise, but asks this Court to reconsider its prior holdings. (AOB 299-300, citing *People v. Hayes* (1990) 52 Cal.3d 557, 643.) Appellant provides no compelling reason for doing so. This Court recently reaffirmed the holding of *People v. Hayes, supra,* 52 Cal.3d at 643, and reiterated that there was no burden of proof and no burden of persuasion in the penalty phase. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1135-1136.)

C. Absence Of Unanimity Requirement Regarding Aggravating Factors Is Not Unconstitutional

Appellant contends that the jury must unanimously agree on which aggravating factors warrant death. (AOB 305-312.) This Court has held otherwise. (*People v. Prieto, supra,* 30 Cal.4th at p. 275; *People v. Kipp, supra,* 18 Cal.4th at p. 381.) Nor do *Ring, supra,* 536 U.S. 584, *Apprendi, supra,* 530 U.S. 466, or *Blakely, supra,* 124 S.Ct. 2531, alter this conclusion. (*People v. Morrison, supra,* 34 Cal.4th at p. 731; *People v. Prieto, supra,* 30 Cal.4th at p. 275.)

D. No Relief Based On Properly-Rejected Special Instructions

Appellant complains that the absence of a burden of proof instruction was "compound[ed]" by "the trial court rejection of the defense requested instructions" concerning unanimity and mitigating circumstances. (AOB 312-315.) But, as discussed in Argument XIV, *ante,* the trial court properly rejected the defense-requested special instructions, which were argumentative and duplicative. As such, appellant is not entitled to relief.

E. Absence of Presumption-Of-Life Instruction Is Not Unconstitutional

Appellant contends that his constitutional due process rights were violated because the trial court failed "to instruct the jury that the law favors life

and presumes life imprisonment without parole to be the appropriate sentence . . . ." (AOB 315; AOB 315-316.) Appellant recognizes that this Court rejected such an argument in *People v. Arias, supra,* 13 Cal.4th at p. 190. (AOB 316.) This Court has repeatedly reaffirmed *Arias*. (*People v. Prieto, supra*, 30 Cal.4th at p. 271, and cases cited therein.) Appellant "offers no compelling reason for [this Court] to reconsider," and thus his claim should be rejected. (*Ibid*.)

XVII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88 (RESPONSE TO AOB ARG. XIX)

In Argument XIX of his Opening Brief, appellant contends that CALJIC No. 8.88 (1989 rev.), the standard penalty phase concluding instruction given in this case, was "constitutionally flawed." (AOB 317-331.)[71/] Appellant raises

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71. The trial court instructed the jury with CALJIC No. 8.88 (1989 rev.), as follows:

> 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 as such, 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 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

several complaints about this instruction, each of which have been presented to and rejected by this Court in previous cases. Among his complaints are that the instruction failed: (1) to quantify the words "so substantial" so as to provide guidance to the jurors, resulting in a standard that was unconstitutionally vague (AOB 318-322); (2) "to inform the jurors that the central inquiry" was the appropriateness of the death penalty because it used the phrase "warrants death instead of life without parole" (AOB 322-325); (3) to instruct the jurors that they were required to return a sentence of life without the possibility of parole if the mitigating factors outweighed the aggravating factors, and thereby improperly reduced the prosecutor's burden of proof; (AOB 325-330); and (4) to instruct the jury that the neither party "bears the burden to persuade" the jury regarding the appropriateness of the death penalty (AOB 330-331).

These challenges to CALJIC 8.88 have been rejected by this Court:

(1) The term "so substantial" is not unconstitutionally vague. (*People v. Boyette, supra*, 29 Cal.4th at p. 465; *People v. Jackson* (1996) 13 Cal.4th 1164, 1243; *Breaux, supra*, 1 Cal.4th at pp. 315-316; see *People v. Millwee* (1998) 18 Cal.4th 96, 162-163 ["We have repeatedly rejected claims that [CALJIC No. 8.88] is inadequate or misleading in describing when the balance of factors warrants the more serious penalty."].)

(2) The use of the term "warrants" in CALJIC No. 8.88 is not "too broad" or "permissive," and it does not mislead a "jury into believing that it

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without parole.

You shall now retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provide and then you shall return with it to this courtroom.

(CT 553-554; RT 2557-2559.)

may impose death even when not the 'appropriate' penalty." (*People v. Jackson, supra,* 13 Cal.4th at p. 1243; see *People v. Boyette, supra,* 29 Cal.4th at p. 465; *Breaux, supra,* 1 Cal.4th at p. 316.) Contrary to appellant's suggestion,

> [CALJIC No. 8.88] as a whole conveyed that the weighing process is "merely a metaphor for the juror's personal determination that death is the appropriate penalty under all of the circumstances." [Citation.] "There is no reasonable likelihood that the jury would have thought it could return a verdict of death if it did not believe that penalty was appropriate." [Citation.]

(*People v. Jackson, supra,* 13 Cal.4th at pp. 1243-1244, quoting *People v. Johnson, supra,* 3 Cal.4th at p. 1250.)

(3) CALJIC No. 8.88 is *not* flawed because it "does not inform the jury that it is required to return a verdict of life imprisonment without possibility of parole if it finds the aggravating factors do not outweigh the mitigating factors." (*People v. Jackson, supra,* 13 Cal.4th at p. 1243; accord, *People v. Taylor, supra,* 26 Cal.4th at p. 1181.) This Court has repeatedly explained that "'[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating,'" and that it is unnecessary to state the converse. (*People v. Jackson, supra,* 13 Cal.4th at p. 1243, quoting *People v. Duncan* (1991) 53 Cal.3d 955, 978.)

(4) As previously discussed in Argument XVI B., *ante,* penalty phase instructions that the prosecution has the burden of persuasion are not required.

Appellant can do no more than request that this Court reconsider its prior holdings. It need not do so. As such, appellant's challenges fail.

XVIII.

THE INSTRUCTIONS REGARDING MITIGATING AND AGGRAVATING FACTORS IN SECTION 190.3 AND THE APPLICATION OF THESE FACTORS DID NOT RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL (RESPONSE TO AOB ARG. XX)

In Argument XX of his Opening Brief, appellant mounts a series of separate attacks on the mitigating and aggravating factors in section 190.3, and on the death sentencing process. (AOB 332-362.) Preliminarily, appellant failed to raise these claims in the trial court; therefore, they have been waived. (See *People v. Williams* (1997) 16 Cal.4th 153, 270.) In any event, this Court has repeatedly rejected each of these claims. Appellant provides no new reason why this Court should reconsider its previous decisions. Thus, all of the claims should be rejected.

A. Section 190.3, Factor (a), Does Not Allow The Arbitrary And Capricious Imposition Of The Death Penalty

Appellant contends the death penalty is invalid because section 190.3, factor (a), as applied, allows arbitrary and capricious imposition of death in violation of the Eighth Amendment to the United States Constitution.[72/] (AOB 334-341.) This argument has been previously rejected and should be rejected here. (See, e.g., *Maury, supra,* 30 Cal.4th at p. 439; *People v. Jenkins, supra,* 22 Cal.4th at pp. 1050-1051; see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750] [explaining that 190.3, factor (a), was

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72. 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.

"neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]. There is no need for this Court to revisit the issue.

B. Unadjudicated Criminal Activity Is A Proper Aggravating Factor

Appellant contends that any use of unadjudicated crimes was improper, and even if proper, the jury was required to unanimously find any such crime had been proven beyond a reasonable doubt. (AOB 342-352.) These claims have previously been rejected by this Court: "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. [Citations.]" (*People v. Brown, supra*, 33 Cal.4th at p. 402, citing *People v. Anderson, supra,* 25 Cal.4th at p. 584, and *People v. Prieto, supra*, 30 Cal.4th at p. 263.) Appellant's reliance on *Ring, supra*, 536 U.S. 584, is misplaced (see AOB 347), as this case does not affect California's death penalty law. (*People v. Prieto, supra*, 30 Cal.4th at p. 272 ["*Ring* does not apply to California's penalty phase proceedings"].)

C. Trial Court Did Not Need To Delete Sentencing Factors From CALJIC No. 8.85

Appellant contends that the failure to delete "inapplicable" factors from CALJIC No. 8.85 violated his federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 352-354.) As appellant recognizes (AOB 353), this Court has repeatedly rejected identical arguments. (See, e.g., *People v. Cunningham, supra*, 25 Cal.4th at p. 1041; accord, *People v. Stanley, supra*, 10 Cal.4th at. p. 842.) As this Court reiterated in *People v. Yeoman, supra*, 31 Cal.4th at pp. 164-165:

> Trial courts need not delete from the list of sentencing factors set out in CALJIC No. 8.85 those that may not apply. [Citation.] The failure to do so does not deprive defendant of his rights to an individualized

sentencing determination [citation] or to a reliable judgment [citation].

Because appellant provides no basis for rejecting these cases, his claim fails.

D. The Trial Court Did Not Err By Not Delineating Which Penalty Factors Could Only Be Mitigating

Appellant contends that the trial court's failure to instruct the jury which factors "were aggravating, which were mitigating, or which could be either aggravating or mitigating" deprived him of his Eighth and Fourteenth Amendment rights to a fair and reliable penalty determination. (AOB 354-355.) He contends that the use of the phrase "whether or not" – in this case, in factors designated as (c), (d), (e), (f), (g), and (i)[73/] – could have led the jury to believe that the absence of any of these mitigating factors could constitute an aggravating factor. (AOB 355.) Respondent disagrees.

Appellant is not arguing that the trial court's penalty instructions were inaccurate, but rather that the court should have given a further clarifying instruction stating that certain of the factors listed in CALJIC No. 8.85 could only be treated as mitigating. Appellant, however, made no request for such an instruction in the trial court. As such, he has failed to preserve this claim for appeal. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 503.)

Notwithstanding waiver, the claim is meritless because this Court has repeatedly rejected it. (See, e.g., *Maury, supra*, 30 Cal.4th at pp. 443-444; *People v. Catlin, supra*, 26 Cal.4th at p. 178; *People v. Cunningham, supra*, 25 Cal.4th at p. 1041; *People v. Ochoa* (1998) 19 Cal.4th 353, 458; *People v. Williams, supra*, 16 Cal.4th at pp. 271-272.) As appellant offers no persuasive

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73. As previously noted in footnote 67, *ante*, the reference to factor (c) of the 190.3 in the standard CALJIC No. 8.85 was omitted pursuant to the parties agreement and for a defense tactical reason. (RT 2526-2527.) Due to this omission, the subsections of the remaining factors were "renumbered" accordingly.

reason for this Court to revisit its longstanding rejection of such claims, the instant claim should similarly be rejected.

E. Adjectives Used In Conjunction With Mitigating Facts Do Not Act As Unconstitutional Barriers To Consideration Of Mitigation

Appellant asserts that the use of "restrictive" adjectives in the list of potential mitigating factors – i.e., the words "extreme" in renumbered factors (c) and (f), and "substantial" in renumbered factor (f) – impermissibly acted as unconstitutional barriers to consideration of mitigation by his jury in violation of the Sixth, Eighth and Fourteenth Amendments. (AOB 355-356.) This contention is without merit. This Court previously has held that the words "extreme" and "substantial," as set forth in the death penalty statute, do "not impermissibly limit consideration of mitigating factors in violation of the federal Constitution. [Citations.]" (*Maury, supra*, 30 Cal.4th at p. 439, citing *People v. Barnett, supra*, 17 Cal.4th at pp. 1178-1179, *People v. Williams, supra*, 16 Cal.4th at p. 276, and *People v. Scott* (1997) 15 Cal.4th 1188, 1227-1228; see also *People v. Arias, supra*, 13 Cal.4th at pp. 188-189 [words "extreme" and "substantial" are not impermissibly vague]; *People v. Stanley, supra*, 10 Cal.4th at p. 842 [same].) Appellant's contention should be rejected.

F. Written Findings On Aggravating Factors Are Not Required

Appellant argues the jury should have been required to return written findings identifying the aggravating factors supporting the death verdict. (AOB 356-359.) This Court has previously rejected identical arguments. (*People v. Yeoman, supra*, 31 Cal.4th at pp. 164-165; *People v. Martinez, supra*, 31 Cal.4th at p. 701; *People v. Smith, supra*, 30 Cal.4th at pp. 641-642; *People v. Lucero* (2000) 23 Cal.4th 692, 741.) Appellant provides no basis for rejecting those cases.

G. Appellant's Equal Protections Rights Were Not Implicated By Absence Of The "Previously Addressed Procedural Safeguards"

Appellant contends the absence of the "previously addressed procedural safeguards" resulted in a denial of his equal protection rights, because, according to him, those safeguards are provided to non-capital defendants. (AOB 359-362.) Insofar as these unspecified "procedural safeguards" relate to penalty phase procedures, capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (See *People v. Johnson, supra,* 3 Cal.4th at pp. 1242-1243.) Insofar as appellant argues the lack of intercase proportionality review in capital cases amounts to a violation of equal protection, this Court has previously rejected this claim and should do so here. (See *People v. Cox, supra*, 30 Cal.4th at p. 970.)

For the foregoing reasons, appellant's challenge to California's death penalty procedures should be rejected.

XIX.

CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL NORMS OR THE EIGHTH AMENDMENT (RESPONSE TO AOB ARG. XXI)

In Argument XXI of his Opening Brief, appellant contends California's use of the death penalty violates international norms and, thereby, also violates the federal constitutional ban on cruel and unusual punishment under the Eighth Amendment. (AOB 363-369.) This claim was specifically rejected in *People v. Ghent*, *supra*, 43 Cal.3d 739, 778-779 (discussing the 1977 death penalty statute), and has thereafter been repeatedly rejected by this Court. (*People v. Brown, supra*, 33 Cal.4th at p. 404; *People v. Snow, supra*, 30 Cal.4th at p. 127 [international law does not compel the elimination of capital punishment in California]; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511 ["International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements."] This Court also has rejected the contention that California's use of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the federal Constitution. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Samayoa*, *supra*, 15 Cal.4th at pp. 864-865.) Appellant does not provide sufficient reasoning to revisit the issue here, and thus, it should be rejected.

XX.

DEATH JUDGMENT SHOULD BE UPHELD BECAUSE THE TRUE FINDINGS ON THE SPECIAL CIRCUMSTANCE ALLEGATIONS SHOULD BE AFFIRMED (RESPONSE TO AOB ARG. XXII)

In Argument XXII of his Opening Brief, appellant contends that the death judgment must be reversed if this Court reverses either of the two special circumstance allegations (rape-murder and robbery-murder) found true by the jury. (AOB 370-373.) However, as discussed in Argument VI, *ante*, substantial evidence supports the true findings on the rape- and robbery-based special circumstance allegations. Moreover, contrary to appellant's assertion (AOB 370), a death judgment need not be set aside if one special circumstance finding is reversed. Rather, the death judgment may be upheld if *either* of the two special circumstance allegations are valid. (See, e.g., *People v. Silva* (1988) 45 Cal.3d 604, 632 [rejecting defendant's argument that death judgment must be reversed where some special circumstance findings were set aside because "one valid felony-murder (kidnapping for robbery) special-circumstance finding" remained]; see also *Zant v. Stephens, supra*, 462 U.S. at pp. 890-891 [death judgment upheld where one of several aggravating circumstances, previously found true by the jury, was held invalid].)[74/] Additionally, because one valid special circumstance finding makes a defendant "properly death-eligible" (see *People v. Hamilton* (1988) 45 Cal.3d 351, 364, fn.7), neither *Ring, supra*, 536 U.S. 584, nor *Apprendi, supra*, 530 U.S. 466,

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74. Whether the California death penalty statute is a "weighing statute" for which the state court is required to determine that the presence of an invalid special circumstance was harmless beyond a reasonable doubt is an issue currently pending before the United States Supreme Court. (*Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054, 1058-1068, cert. granted in part Mar. 28, 2005, sub nom. *Brown v. Sanders* (2005) __ U.S. __ [125 S.Ct. 1700, _ L.Ed.2d __.)

alters that conclusion. (See *Nakahara, supra*, 30 Cal.4th at pp. 721-722 [stating that *Ring* and *Apprendi* "have no application to the penalty phase procedures of this state"].)

XXI.

CUMULATIVE ERROR DOES NOT WARRANT REVERSAL (RESPONSE TO AOB ARG. XXIII)

In Argument XXIII of his Opening Brief, appellant contends the cumulative effect of the alleged errors occurring during both the guilt and penalty phases require reversal of the death judgment. (AOB 374-376.) Respondent disagrees as no error occurred during either the guilt or penalty phase, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton*, *supra*, 26 Cal.4th at pp. 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180.) A defendant is entitled to a fair trial, not a perfect one. (*People v. Box*, *supra*, 23 Cal.4th at p. 1214; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009.) Appellant received a fair trial.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: May 5, 2005

Respectfully submitted,

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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 69,820 words.

Dated: May 5, 2005

Respectfully submitted,

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