In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RYAN JAMES HOYT, Defendant and Appellant.	CAPITAL CASE Case No. S113653

Santa Barbara County Superior Court Case No. 1014465
The Honorable William L. Gordon, Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

STATEMENT OF THE CASE

Appellant and codefendants Jesse James Hollywood, Jesse Rugge, Graham Pressley, and William Skidmore were charged by Santa Barbara Grand Jury Indictment with the kidnap for ransom or extortion and murder of Nicholas Markowitz in the course of kidnapping, in violation of California Penal Code sections 187, subdivision (a), 190.2, subdivision (a)(17)(B), and 209, subdivision (a), along with a personal firearm use enhancement. (1CT 19.)

The prosecution severed the cases and tried the defendants separately. Following a jury trial, appellant was convicted of one count of first degree murder (Pen. Code, § 187) and one count of kidnap (Pen. Code, § 207) committed with the personal use of a firearm (Pen. Code, § 12022.5). The jury found to be true the special circumstance that the murder was committed during a kidnap (Pen. Code, § 190.2, subd. (a)(17)(B)). (10RT 2225.)

Following a penalty phase, the jury returned a verdict of death. (11RT 2396.) This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution's Case-In-Chief

1. Appellant spends a Saturday at the home of his drug supplier, Jesse James Hollywood

On Saturday morning, August 5, 2000, Casey Sheehan delivered a van to Jesse James Hollywood's house. Hollywood had told Sheehan that he needed to move because too many people knew where he lived.[1] (6RT

[1] Sheehan was a childhood friend of both appellant and Hollywood. He sold marijuana for Hollywood. (6RT 1274, 1283.)

1324-1325, 1336-1337.) Sheehan was also aware that someone had broken out some windows at Hollywood's house. (6RT 1277.) The van belonged to a family friend, and Hollywood had used the van previously when he had moved from Reseda to West Hills. (5RT 1326.)

When Sheehan got to Hollywood's house with the van, appellant was already there, along with William Skidmore. Jake Builler showed up a little later. (6RT 1327-1328.)

For much of the day, appellant, Sheehan, and two others -- Skidmore and Builler -- "hung around" Hollywood's house, drinking beer and smoking marijuana. Eventually, Builler drove Sheehan home. (6RT 1327, 1328, 1330-1331.) Hollywood and Skidmore then went to Sheehan's apartment. Hollywood had been staying there while he prepared to move out of the West Hills house. (6RT 1332.) Hollywood and Skidmore stayed at Sheehan's apartment for about an hour. (6RT 1333.) They talked about going up to Santa Barbara for "Fiesta." (6RT 1335.)

That same night, at 11:30 p.m., Nicholas "Nick" Markowitz, who was 15 years old, returned home, just in time for his midnight curfew. Nicholas lived in West Hills with his parents, Jeffrey and Susan Markowitz. (4RT 791.)

As soon as Nicholas walked in the door, his father observed that Nicholas had "a glazed look" and his speech was slurred. Nicholas' parents confronted him about his demeanor. They also confronted him about what looked like a little pouch sticking out of his pocket. Nicholas ran out of the house. (4RT 791.)

Nicholas was gone from home for an hour. When he returned, his parents agreed that they would discuss the matter with him the following morning. Nicholas and his parents then sat and watched television for awhile, and Nicholas had a bowl of cereal. (4RT 792.)

2. Jeffrey and Susan Markowitz are unable to find their son, Nicholas

On Sunday morning, August 6, 2000, Jeffrey Markowitz played tennis. When he returned home, his wife Susan was in the kitchen, preparing breakfast. Jeffrey went to Nicholas' room, but Nicholas was not there. (4RT 792-793.)

Soon, Jeffrey telephoned Nicholas' friends. He also drove around the neighborhood looking for Nicholas, but to no avail. Susan "paged" Nicholas, but he did not respond. (4RT 794.) Nicholas did not return home that night. (4RT 795.)

On Monday, August 7, Susan began contacting a larger circle of Nicholas' friends and acquaintances. She made a spreadsheet listing 40 or 50 people and began calling them. (4RT 796.)

There had been one or two prior occasions when Nicholas had failed to come home. On those occasions, Nicholas had gone to the apartment of his half-brother, Ben Markowitz, and Ben had contacted Jeffrey (Ben's father) and Susan to let them know that Nicholas was all right. (4RT 788-789.) But this time was different. Ben did not call Jeffrey and Susan. (4RT 797.)

On Monday night, Jeffrey talked to Ben. The two went out looking for Nicholas but without success. (4RT 797.) On Tuesday morning, Jeffrey and Susan called the police. (4RT 797.)

About one week later, on August 14, at about 6:00 a.m., Santa Barbara Sheriff's detectives came to the Markowitz home. They told Jeffrey and Susan that their son Nicholas was dead. (4RT 797.)

3. Witnesses see Nicholas being beaten and thrown into a white van

On Sunday morning, August 6, Pauline Mahoney was driving on Platt Avenue in West Hills when she saw four boys beating up another boy.

The boy being beaten looked like a teenager with dark hair. (4RT 847-848.) The assailants appeared to be Caucasian, and all of them were approximately the same age. (4RT 849, 851.)

The assailants were kicking and hitting their teenaged victim, who was on the ground, against a wall. Then, about 20 seconds later, the assailants threw their teenaged victim into a white, windowless van, that was a few feet away. (4RT 850, 854.)

Mahoney observed the license plate number of the van as she drove by. (4RT 851.) She could not write it down, but she and her two young sons (who were with her in her car) memorized it and repeated it aloud to one another until they got home, where Mahoney immediately called 911. (4RT 852.)

Rosalia Gitau was stopped at a stop sign in West Hills in her car, when she saw four boys hitting another boy and then throwing him into a van. (6RT 1073-1074.) The victim had brown hair, and the four assailants were blonde. (6RT 1076.) Gitau did not want to stop. She kept driving, but, after she turned a corner, she called 911 from her cellular phone. (6RT 1080-1081.)

4. Hollywood and others make their trip to Santa Barbara in a white van

In the summer of 2000, Brian Affronti sold about a pound of marijuana a week. His source for the drug was Hollywood, whom he had known for about six months. Affronti and Hollywood had many mutual friends, including appellant, Rugge, and Skidmore. (5RT 861.)

Affronti had visited Hollywood at his home on Cohasset Street in West Hills. (5RT 864.) The two had gone together to Santa Barbara three or four times, often with Rugge and Skidmore. (5RT 864-865.) Rugge lived part-time in Santa Barbara. Appellant, Hollywood, and Affronti

sometimes met Rugge in Santa Barbara and spent the day with him. (5RT 865.)

Affronti planned to go to Santa Barbara with Hollywood in early August to attend the annual Fiesta there, an event that Affronti had never attended before but which he understood to be a city-wide party. (5RT 865-866.) The plan to attend Fiesta finally gelled on Sunday, August 6. Hollywood called Affronti that morning to make sure he was awake. By 1:00 or 2:00 p.m., Affronti was ready to go. Affronti assumed there would be other people driving up with him and Hollywood, because there were usually a lot of people around Hollywood. (5RT 867.)

Hollywood and Skidmore came to pick up Affronti but stayed at the bottom of the driveway. Affronti's stepfather did not like Skidmore, and, if he saw him at the house, there would have been a confrontation. Affronti hiked to the end of the driveway and got into the white van that was waiting there. (5RT 867-868.)

Affronti had seen the white van before at Hollywood's house, but it was not one of Hollywood's cars. Affronti believed that the van belonged to a friend of Hollywood's father and that Hollywood was using it to move his belongings out of the house on Cohasset. (5RT 868-869.) Hollywood had told Affronti that someone had "busted out" the windows in the Cohasset house, that he was getting threats, and that it was best for him to move. Hollywood either was unsure where he was moving to or he would not tell Affronti. In any case, Hollywood did not like to discuss the subject. (5RT 868-869.)

When Affronti got into the van, he saw that Rugge was in the driver's seat and Hollywood was in the passenger's seat. Skidmore was in the back with a boy who Affronti would later come to know was Nicholas Markowitz. (5RT 869-870.)

The group began the trip to Santa Barbara. Nothing was said to or about Nicholas until the group was passing Ventura County. At that time, Hollywood remarked that Nicholas' brother owed him money and that he was going to "pay up." Hollywood said that Nicholas' brother had been threatening his family. He mentioned the broken windows. He said that Nicholas better not try to run or do anything irrational. (5RT 872-873.)

The group exited the freeway at the Mission exit in Santa Barbara and drove to an apartment on Modoc Road. (5RT 877.)

5. Nicholas is held in a bedroom at the apartment on Modoc Road, his ankles and wrists bound with duct tape

The apartment on Modoc Road was the home of Richard Hoeflinger, who had known Rugge since junior high school, and Hoeflinger's roommate, Emilio Jerez. (5RT 943.) On the afternoon of August 6, Gabriel Ibarra, who was a friend of Hoeflinger's, stopped by to see Hoeflinger on his way to work at Kentucky Fried Chicken. (5RT 913.) When Ibarra arrived at the apartment, Hoeflinger was not there, but Jerez was. (5RT 917.)

Soon, Hoeflinger returned to the neighborhood and met Rugge in the street. Rugge asked if he could come inside, and Hoeflinger invited him into the apartment. Hoeflinger, however, was not expecting the four other people (Hollywood, Skidmore, Affronti, and Nicholas) who accompanied Rugge into the apartment.[2] (5RT 944.)

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[2] Ibarra recalled that Rugge had come to the door asking for Hoeflinger, had left when told he was not at home, but had returned a few minutes later, after Hoeflinger had come home. Rugge (who Ibarra had seen around the apartment on other occasions) came in, accompanied by several people who Ibarra had never seen before: Hollywood, Skidmore, Affronti, and Nicholas. (5RT 920-921, 924.)

Nicholas was taken to one of the back bedrooms. (5RT 880.) Rugge asked Hoeflinger if it was "okay" to use his bedroom. Hoeflinger gave Rugge permission to use his bedroom, and everyone except Hollywood went to the bedroom. (5RT 948.)

Hoeflinger asked Rugge what was going on. Rugge said, "We're just talking to the kid," or something to that effect. Hoeflinger was not satisfied with Rugge's answer and pressed Rugge: "What the hell is going on?" Rugge told Hoeflinger to calm down and that he would talk to him. (5RT 947.)

In the meantime, Jerez went and took a shower. When he returned to the living room, he asked Ibarra what was going on. Ibarra asked him what he meant, and Jerez told him to go have a look in the back bedroom. (5RT 925.) Ibarra followed Jerez down the hall and looked into the bedroom. He saw Nicholas sitting on the bed, his wrists and ankles bound. (5RT 926-927.)

When Ibarra saw Rugge, he asked him, "What's going on?" Rugge replied, "I don't know. He's tripping. Hollywood's tripping." It was the first time Ibarra heard the name "Hollywood." (5RT 928-929.) Hollywood went up to Rugge and told him to "keep his fucking mouth shut." (5RT 929.)

Ibarra became uneasy. (5RT 929.) He observed a bulge in the waistband of Hollywood's pants and thought it might be a weapon. (5RT 930.)

Ibarra left the apartment a few minutes before 4:00 p.m. to get to his job at Kentucky Fried Chicken. As Ibarra was leaving, Hollywood approached him. Hollywood put his hand at his waistband and told Ibarra that he had "better keep his fucking mouth shut." Ibarra took Hollywood's words as a threat. (5RT 932-933.)

When Affronti entered Hoeflinger's bedroom, he saw Nicholas with duct tape binding his wrists and ankles. Affronti told Hollywood that he had a date and needed to return home. (5RT 884.) But Hollywood told Affronti that he would give him the van when he returned from a trip to Rugge's house with Rugge and that Affronti could leave then with the van if he still wanted to do so.[3] (5RT 881.)

When Hollywood returned to the Modoc apartment from Rugge's house, Affronti and Skidmore left in the van. They had gotten about two exits south on the 101 Freeway when Affronti realized that he had left his cellular phone at the apartment. Affronti returned to the apartment to retrieve the phone. (5RT 882, 884.) When he entered the apartment, he saw Hollywood and Nicholas sitting on the sofa in the living room. Nicholas' restraints had been removed, and he and Hollywood were smoking marijuana. (5RT 882.) Affronti did not see Rugge or the others who had been in the apartment earlier. (5RT 885.) Affronti got his phone, and he and Skidmore drove back to Los Angeles. Skidmore dropped Affronti off at his house and left in the van. (5RT 886.)

At 4:06 p.m. and 4:24 p.m., telephone calls were made from Hoeflinger's apartment to appellant's home in the San Fernando Valley. (7RT 1537, 1538.) At 4:25 p.m., a telephone call was made to Hollywood's house in West Hills. (7RT 1538.)

When Hoeflinger returned to his apartment on Modoc Road, Rugge and Nicholas were still there. The others were gone. Rugge and Nicholas were sitting on the couch, watching television and drinking. Hoeflinger joined them. (5RT 953.) When Hoeflinger got a chance to talk to Rugge

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[3] Hoeflinger recalled that it was Skidmore who left with Hollywood for some time that afternoon and that Rugge was at the apartment the entire time. (5RT 949.) Hoeflinger left his apartment about a half hour after Rugge and the others arrived there; he had a barbecue to attend. (5RT 949.)

alone, Rugge told him that "this kid's brother owed Hollywood money, and they were just trying to get ahold of the brother," or something like that. Hoeflinger told Rugge he did not want to be involved. (5RT 954.)

Rugge and Nicholas stayed at Hoeflinger's apartment for a couple more hours. (5RT 954.) When they finally left, it was dark outside.[4] (5RT 955.)

6. Graham Pressley tells Natasha Adams that "they" had "kidnapped this kid (Nicholas) and brought him back up here to Rugge's house"

On Monday morning, August 7, Natasha Adams met Nicholas at Rugge's house. (5RT 1035.) Graham Pressley was there as well. Pressley told Adams that they had "kidnapped this kid and brought him back up here to Rugge's house." Adams was concerned enough to speak to Nicholas about it, either later that day or the next day. (5RT 1037.)

At about 1:00 or 2:00 p.m., Kelly Carpenter, who was friends with Adams, Pressley, and Rugge, went to Adams' house. Adams, Rugge, and Pressley were there. Nicholas, whom Carpenter had never met, was there as well. (5RT 961-965, 1037.)

At some point, Rugge left Adams' house. (5RT 1037.) The others stayed at Adams' house for an hour or two. (5RT 965.) Carpenter spoke to Nicholas. She thought he was "very sweet, pretty quiet, but a really nice guy." (5RT 966.) Adams, who by now was aware of the circumstances of Nicholas' presence, talked to Nicholas about going home. Nicholas told her that he was going to "stick around." He said he was going to "help out

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[4] There was a telephone call at 6:00 p.m. to Sheehan's home in Los Angeles. There were two more calls to Hollywood's house at 8:12 p.m. and 9:25 p.m. At 9:40 p.m., there was a telephone call from Hoeflinger's apartment to Hollywood's pager. (7RT 1539.) A three-minute call, using Hollywood's Sprint calling card, was placed from Canoga Park to Hoeflinger's apartment. (7RT 1540.)

his brother." Nicholas said he was "fine." (5RT 1038.) Adams gave Nicholas some rubbing alcohol to apply to a scrape on his elbow. (5RT 1038.)

Later that day, Carpenter, Adams, Pressley, and Nicholas left Adams' house and went to Rugge's house in the Hidden Valley area of Santa Barbara. (5RT 969.) When they arrived, Rugge, Hollywood, and Hollywood's girlfriend, Michele Lasher, were already there. (5RT 970, 1042.) Adams knew that Hollywood had something to do with Nicholas' presence in Santa Barbara, but she did not confront him about it. (5RT 1044.)

Carpenter knew who Hollywood was, because she had seen him about a week earlier. (5RT 971.) Carpenter knew that Rugge and Pressley both sold "a fair amount" of marijuana, and she believed that Hollywood was involved in the marijuana trade with Rugge. (5RT 971-972.)

Carpenter heard Hollywood talking about what he and Lasher were going to do that evening. Hollywood then spoke about Nicholas. Hollywood jokingly said that they might tie Nicholas up, throw him in the back seat of the car, and go to the Biltmore or Fess Parker's to get something to eat. (5RT 975-976.) Hollywood made Carpenter uncomfortable. (5RT 976.)

Hollywood was at Rugge's house for anywhere from 20 minutes to an hour and then left. (5RT 1044.) Carpenter and Adams left Rugge's house at about 5:00 or 6:00 p.m. and went home. Pressley and Nicholas were still there. (5RT 976, 1045.)

7. Hollywood tells Casey Sheehan that he and his friends had seen Nicholas walking down the street, had pulled over, and had grabbed him

That evening, Hollywood and Lasher went to Sheehan's apartment where they remained for a few hours, drinking beer and smoking

marijuana. Hollywood, Lasher, and Sheehan then went out. (6RT 1340-1341.) Sometime during the evening, Hollywood told Sheehan that they had taken Nicholas up to Santa Barbara. (6RT 1345.) He told Sheehan that Nicholas had just been walking down the street when he, Rugge, Affronti, and Skidmore had pulled over and grabbed him. (6RT 1346-1347.) Hollywood told Sheehan that Nicholas was still in Santa Barbara and that he was staying with Rugge. (6RT 1349.)

8. Pressley tells Adams that Hollywood offered Rugge money to kill Nicholas

On Tuesday morning, August 8, Adams returned to Rugge's house. Rugge, Pressley, Carpenter, and Nicholas were there. (5RT 986, 1047.)

Adams and Carpenter took a walk with Pressley at a nearby park. Adams told Pressley that she was concerned that Nicholas was still there. She asked Pressley what they were going to do about it. (5RT 1047.) Pressley responded that he had no idea. He said they were not going to hurt Nicholas in any way and they were just waiting for a call from Hollywood. (5RT 1047.) Pressley explained that "the guys had been down there looking for Nicholas' brother" but, when they were unable to find Ben, they found Nicholas. They beat him up, put him in the car, and brought him to Santa Barbara. (5RT 982.) Pressley claimed that Rugge, Hollywood, and Skidmore were involved, and maybe others. (5RT 983.)

Pressley told Adams and Carpenter that Hollywood had called Rugge and offered him money to kill Nicholas. Adams was appalled and asked Pressley what they were going to do. Pressley said, "Of course we're not going to do that. Now we don't know what to do, because we're in danger, like, all of us are." (5RT 1051.)

Adams wanted to tell somebody. She knew they were in "over their heads" and she did not know how much longer she could remember not to use Nicholas' name in front of people. Pressley told her not to say

anything. Pressley said something could happen to Rugge, to him, to Adams, or to Carpenter. Pressley told Adams to act like she did not know anything and was not involved and not to worry about it. (5RT 1051.)

After the conversation with Pressley, Adams returned to the Rugge house in tears, and she confronted Rugge. (5RT 1053.) Rugge told Adams that he did not know what to do but that he was going to get Nicholas home. Rugge said he was going to put Nicholas on a Greyhound bus that day. (5RT 1054.)

Rugge then began pacing. (5RT 986.) He asked Nicholas, "How do I know that I'm not going to have cops knocking on my door tomorrow?" (5RT 985.) Rugge sat down and told Nicholas, "I want to give you $50 to get on a train tonight and go home. I just -- I wash my hands of it. I just better not have police at my door tomorrow." (5RT 985, 986.) Nicholas said, "I'm not going to tell anybody. I'm cool." (5RT 1054.)

Later that day, Rugge told Nicholas that he was just "sick of it." (5RT 985.) Nicholas told Carpenter that the whole experience would make a good story to tell his (Nicholas') grandchildren one day. (5RT 1017.) Carpenter asked Nicholas why he did not just walk away. Nicholas replied that he did not want to "rock the boat." He believed he was going home and he did not want to "mess it up" and "have them angry" at him. (5RT 1018.)

9. The Lemon Tree Inn

Tuesday, August 8, was a hot day. Rugge suggested that they (Rugge, Pressley, Carpenter, and Nicholas) go to a motel and go swimming. (5RT 987.) Rugge took out the Yellow Pages and began looking for a motel. He decided on the Lemon Tree Inn on State Street.

(5RT 988.) At about 3:00 p.m., Pressley's mother drove Rugge, Pressley, Carpenter, and Nicholas to the motel.[5] (5RT 989.)

Rugge registered at the motel and paid for the room. Rugge, Carpenter, and Nicholas went up to the room. Pressley's friend, Nathan Appleton, joined them. Adams joined the group a couple of hours later. (5RT 990.)

10. Appellant does work for Hollywood to clear his drug debt

Appellant had been doing yard work, house work, and the like to pay down his drug debt to Hollywood. Sheehan and others in the group had observed appellant doing it on a regular basis, and had teased him about it. (6RT 1284-1285.)

11. Hollywood consults an attorney about the penalty for an aggravated kidnapping

Stephen Hogg, a criminal defense attorney who had a professional relationship with both Hollywood and Hollywood's father, Jack Hollywood, received a telephone call from Hollywood in the late afternoon or early evening on Tuesday. Shortly thereafter, Hollywood showed up at Hogg's home. (6RT 1187.)

The two had a conversation in Hogg's backyard. (6RT 1189.) Hollywood told Hogg that some acquaintances or friends of his had picked up the brother of the person who had destroyed his house. (6RT 1190.) Hogg counseled Hollywood to go to the police. Hollywood refused. He said, "I can't do that. They would come after my family." Toward the end of the conversation, Hollywood asked the attorney what kind of trouble his

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[5] Adams had left Rugge's house to pick up her father at work. At about 6:00 p.m., she paged Carpenter, who told her that they were all at the motel and that she should meet them there. (5RT 1055.) Adams arrived at the Lemon Tree Inn at 7:00 p.m. (5RT 1057.)

"friends" might be in. Hogg explained the difference between simple and aggravated kidnapping and said that the penalty for aggravated kidnapping was a potential life sentence. Hollywood did not react visibly to the information. (6RT 1193.)

Hollywood never said that he was not involved in the situation for which he had sought Hogg's counsel, but he did say that he had wanted to get away from it and that he had done so. (6RT 1192.) At that point in the conversation, Hollywood became visibly agitated. He started pacing and then announced, "I'm leaving," and did. (6RT 1193.) Hogg later paged Hollywood repeatedly but with no success. (6RT 1193.)

Shortly thereafter, Hollywood's father, Jack Hollywood, called Hogg.[6] (6RT 1994.) Jack Hollywood told Hogg to try to find Hollywood and to "sit on him until I get home." (6RT 1195.) Jack Hollywood indicated that he was on his way home and told Hogg, "I'll talk to you when I see you." (6RT 1195.) Jack Hollywood then instructed Hogg to call a family friend, John Roberts, and enlist his help in finding Hollywood. (6RT 1197.) Hogg agreed. Hogg did not call the police, because he did not think the police could do anything about the situation and he believed he had no information to give them. (6RT 1198.)

When Jack Hollywood spoke to Hogg, he was on vacation in Big Sur. (6RT 1209.) Jack Hollywood immediately cut his vacation short and started back to Los Angeles. (6RT 1213.) He tried calling his son's home telephone number as well as his pager, but to no avail. (6RT 1214-1219.)

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[6] Jack Hollywood remembered that he had called Hogg on an unrelated matter. (6RT 1211.) During the conversation, Hogg told Jack Hollywood that he thought Jack's son was in "some sort of trouble." (6RT 1212.)

12. Hollywood secures a car for appellant to drive to Santa Barbara

That same day (August 8), Hollywood asked to borrow Sheehan's car. Sheehan owned a 1985 Honda Accord. The paint on the car was a little weathered, but the car ran well. Hollywood did not tell Sheehan why he needed the car, and Sheehan did not ask. Sheehan agreed to lend Hollywood the car. (6RT 1280-1282, 1350.)

Hollywood came to Sheehan's apartment that evening and left with Sheehan's Honda. He returned about a half hour later, without the car. (6RT 1288.)

At about 9:00 p.m., Hollywood, his girlfriend Lasher, and Sheehan went out to a restaurant to celebrate Lasher's birthday.[7] (6RT 1289, 1353.)

13. The evening at the Lemon Tree Inn

On the evening of Tuesday, August 8, Rugge, Carpenter, Adams, Pressley, Pressley's friend Appleton, and Nicholas were in their room at the Lemon Tree Inn. The group was drinking and smoking marijuana. (5RT 991.) Rugge told the others in the room that if the telephone rang, they should answer it. (5RT 1060-1061.)

Nicholas told Carpenter that he sometimes took Valium to sleep and that he had had trouble sleeping the night before. (5RT 992.) Nicholas talked about what he would do once he got home. (5RT 993.) Nicholas said he could not wait to go to a hill near his house, that he would call a friend, watch the sunset, and just be happy that he was at home. (5RT 994.)

In the meantime, at about 11:00 p.m., Jack Hollywood telephoned his son once again from the road and finally got in touch with him. Jack

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[7] At 8:20 p.m., there was a two-minute call made to the Lemon Tree Inn. The call was made using Hollywood's Sprint calling card from a telephone in Canoga Park. (7RT 1544.)

Hollywood said, "I hear there's some kind of problem, and I want to talk to you." Hollywood replied that he was at his girlfriend's house. He gave his father directions to the house and told his father that he would talk to him there. (6RT 1221.) Jack Hollywood drove directly to Lasher's house in Calabasas. (6RT 1221.)

14. Rugge tells other to leave the Lemon Tree Inn

Adams testified that Rugge asked Adams, Carpenter, and Appleton to leave. She remembered his exact words as, "I'm sorry, but you ladies have to leave." (5RT 1059.) When Pressley tried to leave as well, Rugge asked him to remain. Pressley stayed in the room. (5RT 1060.)

15. Pressley digs a grave for Nicholas at Lizard's Mouth

In the early morning hours of Wednesday, August 9, Pressley went to the area known as Lizard's Mouth and dug a grave. (7RT 1472.)

In the meantime, Jack Hollywood and his wife arrived at Lasher's home. Jack Hollywood spoke to his son. Hollywood appeared nervous and rattled. (6RT 1222.) He was evasive and did not give his father much information. Hollywood asked his father how he had learned that there was something going on. Jack Hollywood responded that their attorney had told him that Hollywood was in "some kind of a jam." (6RT 1223.) Jack Hollywood asked his son if he was in danger. Hollywood said that he was involved in something that could mean that his life was in danger. (6RT 1223.)

Jack Hollywood assumed immediately that, whatever it was, it had something to do with Ben Markowitz. He knew that his son and Ben had been "in kind of a feud" for about six months. (6RT 1223.) By the end of the conversation, Jack Hollywood knew that there was a kidnapping and that the victim was Ben's younger brother, Nicholas. (6RT 1224.)

Jack Hollywood asked his son where Nicholas was being held, but Hollywood did not give him that information. Jack Hollywood thought about calling the police, but he did not do so. (6RT 1226.) Hollywood told his father that some friends of his were holding Nicholas somewhere. He said they were all there just drinking beer and eating ribs but that they were concerned because they had taken "the kid" against his will. (6RT 1231.)

At about 2:00 a.m., after he spoke to his son, Jack Hollywood went to the home of his friend John Roberts. Jack Hollywood told Roberts that his son had admitted that his friends "had the kid," that they were in a motel, that they were all right, but that they were not answering the telephone. (6RT 1257, 1267.)

16. Pressley tells Carpenter that appellant had arrived at the Lemon Tree Inn the night before with a Tec-9 gun

On Wednesday morning, Pressley told Carpenter that appellant had shown up at the Lemon Tree Inn the night before with a gun. He told Carpenter the gun was a Tec-9 (5RT 1014) which was a "really gnarly gun" that shot three bullets at a time. (5RT 1022.) Pressley said that they had driven Nicholas back to Los Angeles and dropped him off at the corner of his street. (5RT 1014-1015.) Pressley appeared tired and acted overwhelmed and flustered. (5RT 1021.)

17. Hollywood's father meets with appellant, who appears to know about the kidnapping

Jack Hollywood met again with his son at about 11:00 a.m. on Wednesday. (6RT 1237.) He wanted to find out where Nicholas was being held, to go get him, and to take him home to his family. But Hollywood did not tell his father where Nicholas was located. Instead, he gave his father the telephone number of a childhood friend (appellant) and told his father to call appellant and ask him. (6RT 1238.) Jack Hollywood called

appellant and asked to meet with him. Appellant agreed to the meeting. Appellant did not ask Jack Hollywood why he was calling. (6RT 1238-1239.)

Appellant and Jack Hollywood met at Serrania Park in Woodland Hills. (6RT 1239.) Appellant seemed a bit agitated and possibly a little scared. (6RT 1264.) Jack Hollywood began the conversation, "You know, what the hell -- you know, what's going on with this situation, and, you know, this kid? We have to go and -- let's, you know, find out where he is and let's go get him and take him home." (6RT 1240.)

Appellant said that he did not have control of the situation, that he was trying to find out, but that he was not having any luck. (6RT 1240-1241.) Jack Hollywood asked appellant who was in control. Appellant refused to give any names. (6RT 1243.) It was apparent to Jack Hollywood that appellant knew what was going on. (6RT 1242.)

Jack Hollywood told appellant that he had been questioning Hollywood the night before, as well as that morning, trying to find out where Nicholas was and how they could go get him. He told appellant, "Let's go get him. Let's get him and let's take him home." (6RT 1241.) Appellant said he could not do that because he did not know where Nicholas was and he did not know the people who had him. But appellant said he would see what he could do. Appellant said he did not know how to make it stop, that he was not involved from the start, and that he was irritated that he was being "dragged" into it. (6RT 1241.)

18. Appellant tells Casey Sheehan: "We killed [Nicholas]"

On Wednesday afternoon, Sheehan got home from work to find his Honda Accord had been returned. (6RT 1287.) There were several people at his apartment: appellant, Hollywood, Lasher, and Skidmore. Sheehan

asked appellant if there was a problem with Nicholas. Appellant replied, "Not anymore." (6RT 1295.)

Between 5:00 and 6:00 p.m., Sheehan accompanied appellant as he went shopping. Appellant bought some shirts, pants, and a pair of shoes, and he paid cash. Appellant spent a couple of hundred dollars. (6RT 1300-1301, 1367.)

Appellant told Sheehan that "a problem was taken care of. The problem in Santa Barbara." (6RT 1291, 1369.) Sheehan asked appellant what sort of a problem. Appellant responded that there were some things best left unsaid. (6RT 1292.) When Sheehan pressed appellant to be more specific, appellant told him that Nicholas had been killed. (6RT 1300.) He said, "We killed him." (6RT 1300.) Appellant told Sheehan that his outstanding debt to Hollywood "was taken care of." (6RT 1301.)

19. Appellant celebrates his birthday with a party

Appellant turned 21 years old on Thursday, August 10. Sheehan threw appellant a party at his apartment and invited 20 or 30 people to help celebrate the occasion. Hollywood and his girlfriend were among the guests. (6RT 1303.)

20. Hikers find Nicholas' gravesite

On Saturday, August 12, Lars Wikstrom was in the area just off West Camino Cielo -- known locally as Lizard's Mouth -- helping some friends make a music video. (5RT 1024.) Wikstrom was approached by a man who asked him to take a look at something he had come upon. Wikstrom and the man walked about 20 or 30 yards. As Wikstrom approached, he became aware of an odor that grew stronger and stronger. As Wikstrom continued along the trail, he could see and hear a great many flies. (5RT 1025.) The area was about 60 or 70 yards off the paved road up a winding trail. (5RT 1031.)

The men observed from a distance. Wikstrom could see on the ground what appeared to be Levi's (blue jeans) and a bit of what might be a shirt exposed through the dust and dirt. (5RT 1025-1026.) Wikstrom called the police and walked back down the trail to the street to wait for them.[8] (5RT 1026, 1027.)

Darla Gacek had never been to the area known as Lizard's Mouth before that Saturday when she went hiking with her neighbors. (7RT 1463.) The three hikers heard what they thought was a swarm of bees. They thought there must be a beehive nearby so they followed the sound to try to get a look at it. As they got closer to the source of the sound, they became aware of a smell and saw a pile of brush. They started moving the brush, because they thought there was a dead animal beneath it. They soon realized there was a human body beneath the brush. (7RT 1463-1464.)

Gacek and her neighbors encountered the group of filmmakers and borrowed one of their cellular phones to call 911. Members of the group hiked back down to the road to wait for police. Gacek and her neighbor waited next to the body so that no one would disturb it. (7RT 1464.)

The area where they came upon the body was not too far off the main trail. It was surrounded by large rocks. The body was covered by a bunch of dead branches that had been piled on top of it. When Gacek and her friends pulled the branches off, they could see clothing through the sand covering the body. (7RT 1464-1465.)

There were three or four very large branches covering the body. (7RT 1465.) The branches were about four or five feet long, about two and a half inches in diameter, and cleanly cut or sawed. (7RT 1466.) Gacek

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[8] The distance from the paved road on West Camino Cielo to the gravesite at Lizard's Mouth is about one-quarter to one-half mile. (6RT 1089-1090.)

remembered thinking at the time that whoever had tried to hide the body had done a poor job. (7RT 1468.)

When law enforcement officials responded to the gravesite, they observed duct tape across the mouth of the victim. (6RT 1094.) Detectives saw cuttings of brush along the entire trail from the trail head at West Camino Cielo all the way up to the site where the shallow grave was located. It looked as if someone had cleared the trail. (7RT 1532.)

Forensic technicians responded to the site. (6RT 1099.) There was significant decomposition of the body with accompanying insect activity. The investigating personnel discovered casings and projectiles. The body was buried only inches deep. In some places, it appeared to have been only covered lightly with dirt or not at all. (6RT 1100-1101.) This would have been a difficult area in which to dig a grave, because there were large rocks throughout the area and shallow topsoil. (6RT 1101.)

At the Santa Barbara County morgue, a ring was recovered from the victim. (6RT 1124-1125.) There was duct tape wrapped around the victim's wrists, which were entirely bound. More tape was around the victim's head. (6RT 1126.) The ring was discovered when the duct tape around the wrists was removed. (6RT 1126.)

That Saturday evening, Skidmore told appellant that Nicholas' body had been found. (8RT 1708.)

21. Appellant tells Sheehan that he shot and buried Nicholas

On Sunday, August 13, Sheehan and appellant went to visit Sheehan's father in Malibu. On the way, appellant confirmed that Nicholas was dead and asked Sheehan's advice. He wanted to know how to "get out of the situation." (6RT 1304, 1379.)

Sheehan told appellant that he would try to help him find a way to get out of the Valley, so that he could think about what he wanted to do.

(6RT 1381.) Appellant told Sheehan that "they" had shot Nicholas and put him in a ditch. He said that it had happened somewhere in Santa Barbara, that they had picked Nicholas up from a motel, and that they had taken him up to the site. He said he covered Nicholas' body with a bush. (6RT 1305.) He said it happened "somewhere in the middle of nowhere." (6RT 1381.)

22. The murder weapon

California Department of Justice technicians returned to the gravesite to continue their excavation and examination of the crime scene following the removal of Nicholas' body. (6RT 1101.) Beneath where Nicholas' body had been was a nine-millimeter weapon -- a Tec-9. (6RT 1101.) There was reddish discoloration at the gravesite where Nicholas' head had been. (6RT 1103.) Cartridge casings were removed from the dirt. (6RT 1103.) There were 14 nine-millimeter casings removed from the scene. (6RT 1112.)

Upon examination, it was discovered that there were two live rounds in the Tec-9. One round was in the chamber and another was jammed in the breach area. (6RT 1113.) The gun had been modified to fire as a fully automatic weapon. One pull of the trigger would give the shooter multiple shots of ammunition. (6RT 1131.)

The criminalist examining the weapon was able to put 37 cartridges into the magazine of the gun. (6RT 1135.) He did not do any specific rate of fire tests on the weapon but was of the opinion that an open bolt weapon similar to the Tec-9 was capable of firing 60-1000 rounds per minute. (6RT 1135-1136.) When the criminalist test-fired the weapon, it jammed. (6RT 1145.)

23. The autopsy

Dr. George Sterbenz performed an autopsy on Nicholas' body. (7RT 1443.) The body had a total of nine gunshot wounds. (7RT 1446.) Two involved the head and neck area and the remainder involved the torso. (7RT 1447.) There were multiple injuries, and some of them would have been independently, immediately, and rapidly fatal. (7RT 1447.) There was no way to determine in what order the shots were fired. (7RT 1448.)

One wound entered Nicholas' head at the chin. It passed through his head and ultimately exited the skull at the right rear surface of the head. It was a rapidly fatal injury. (7RT 1448-1449.)

A second wound came from a shot that entered on the left side of the neck, passed through the neck, and grazed the base of the skull, leaving a hole in the base of the skull. (7RT 1449.) This wound would not have killed as rapidly as the one to the chin, but was certainly potentially fatal. (7RT 1450.)

Another bullet entered Nicholas' chest on the left side, below the clavicle, and exited his body in the back, under his left shoulder. Post mortem insect activity on the body made it impossible to determine whether the round had pierced any of the sub-clavian vessels (the major artery and vein that pass to the arm), but the bullet's path traced through these vessels. The wound inflicted would have been potentially lethal if not treated. (7RT 1450.)

There were three more wounds on the left side of Nicholas' chest. They did not actually enter the chest cavity. The entry points were consistent with Nicholas' arms being down against the side of his body. (7RT 1451.)

Another round or bullet penetrated the left side of Nicholas' chest cavity and passed through his left lung. (7RT 1451.) As the round passed

through Nicholas' body, it injured his stomach and left lung. It would have been a potentially fatal injury. (7RT 1452.)

Another wound originated at the right upper abdominal surface. The bullet missed the rib cage, traveling upwards through the body and exiting out the back. As the bullet traveled through the body, it injured the liver and a large blood vessel known as the interior vena cava, the large vein that drains directly into the heart and the right lung. This was a fatal injury. (7RT 1452-1453.)

The internal bleeding associated with the sort of injuries sustained by Nicholas was not present in his body when autopsied. Due to decomposition, as well as the holes in Nicholas' back left by exit wounds, the fluids that would ordinarily have been found in the corpse had drained and soaked into the earth beneath his body. (7RT 1453.)

Without knowing in what order the fatal shots were fired, it was impossible to know how long it took Nicholas to die. (7RT 1453-1454.)

Adams learned that Nicholas' body had been found. She reported what she knew about the circumstances leading up to his death to the police. (6RT 1072.)

24. Appellant is arrested

On Wednesday, August 16, Sheehan got a call from appellant, who said, "They got Will [Skidmore]." (6RT 1389.) Appellant went on to say that his house was "hot," i.e., being watched, and asked if he could come and stay with Sheehan. (6RT 1389.)

Sheehan and appellant were on their way to make a telephone call at a neighborhood liquor store when they were arrested. Appellant was going to make a call from the store's pay phone because Sheehan believed the telephone in his home was tapped. (6RT 1306.) Appellant was carrying a pager which had gone off several times that day. The page was from an

800 number, and appellant was trying to get to a phone to return the call. (6RT 1307.)

25. Appellant tells police: "The only thing I did was kill him"

On August 17, while he was in custody at the Santa Barbara jail, appellant contacted Santa Barbara Sheriff's Detective William West. (7RT 1480-1481.) According to Detective West, appellant (after a telephone conversation with his mother) wanted to speak to a detective regarding the Nicholas Markowitz homicide. (7RT 1481.)

The interview, in which Sergeant Ken Reinstadler of the major crimes unit of the Santa Barbara Sheriff's Department also participated, took place in an interview room at the sheriff's headquarters in Santa Barbara County. It was both audio and videotaped. (7RT 1482-1483.)

Sergeant Reinstadler began the interview by asking appellant how he was doing. Appellant replied, "Shitty." (1CT 152.) Appellant was upset. During the telephone call with his mother, his mother had told him that the news was reporting that he had dug Nicholas' grave. (1CT 153.)

The detectives told appellant that they knew he owed Hollywood money and that he dealt marijuana for Hollywood. They asked appellant how much he owed Hollywood. Appellant said that it was "enough to do what I did." (1CT 165-166.)

According to appellant, he learned that Nicholas had been "taken" on Tuesday, sometime in the afternoon. He found out what had happened to Nicholas and, at the same time, found a way to erase his debt to Hollywood. (1CT 168.)

Appellant said that he was in a car with an "intermediary," driving down the road, when this person said, "Do you want to erase the debt?" Appellant said, "Of course, I said 'yeah'." (1CT 170.) Appellant took this to mean that he had to do something pretty serious -- that he had to kill

Ben's brother. (1CT 171-172.) The person said that there was a "mess" that needed to be "cleaned up." The person said that appellant needed to go "take care of" somebody. Appellant took that to mean that he would have to kill somebody. Appellant said that, at the time, he did not even know who the "somebody" was. (1CT 173.) The person did not give appellant any details but simply told appellant where to go -- Santa Barbara. (1CT 173.) Appellant said that the gun was already there when he got to the Lemon Tree Inn. (1CT 176-177.)

Appellant said that he was not the one who put the duct tape around Nicholas' mouth and he was not the one who dug Nicholas' grave. He insisted, "The only thing I did was kill him." (1CT 183.)

Appellant said he did not talk to Pressley on the way to Lizard's Mouth. Appellant said he had never previously been to Lizard's Mouth and that Pressley had picked the spot. He said Pressley had already dug the grave. Appellant said he did not know why and he did not ask. (1CT 186-187.) Appellant had never met Pressley before that night. He remembered only that Pressley had "poufy hair" and was no more than 18 years old. (1CT 188.) Appellant said they headed up the hill to Lizard's Mouth from the Lemon Tree Inn after midnight. (1CT 189.)

Then, at Lizard's Mouth, appellant said that there was a moment when he thought that what he was doing was wrong. It was right before he pulled the trigger. (1CT 195-196.)

B. The Defense Case

1. Appellant's testimony

In August 2000, appellant was working off the $200 balance of what had been, at the beginning of the year, a $1,200 drug debt to his supplier and childhood friend, Jesse James Hollywood. Appellant was repaying the debt by doing yard work and odd jobs at Hollywood's house in West Hills.

(8RT 1651.) Hollywood also had appellant getting money orders, running errands, and picking up after parties. (8RT 1649.)

On Saturday afternoon, Hollywood telephoned appellant. Hollywood told appellant to come to his house and "watch" the house. Appellant explained that someone had vandalized his house and broken the windows. (8RT 1658.)

Appellant walked from his grandmother's house to Hollywood's house. When appellant arrived at Hollywood's house, he saw Hollywood, who was angry. Hollywood told appellant that he had received a voice-mail message, informing him that Ben Markowitz had claimed responsibility for the vandalism. (8RT 1659.)

When appellant got to the house, Skidmore was there. Hollywood told appellant that they were going to Santa Barbara for Fiesta, where they would pick up Rugge. Hollywood did not invite appellant to accompany them. (8RT 1659.)

Appellant cleaned up the broken glass at Hollywood's house. (8RT 1660.) Hollywood and Skidmore left at some point. When they returned at about 10:00 p.m., Rugge was with them.[9] At that time, appellant left Hollywood's home and went to his grandmother's house. (8RT 1660.)

The next day, Sunday, August 6, appellant went to Hollywood's house when he woke up. He just assumed that Hollywood wanted him there. (8RT 1661.)

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[9] Rugge lived primarily at his father's house in Santa Barbara but occasionally visited his mother in West Hills. On August 5, Rugge was at his father's house with Adams. Adams had met Rugge through friends earlier that summer. (5RT 1034, 1036.) On the night of August 5, Adams met Hollywood. Hollywood was talking with others about celebrating "Fiesta." Adams did not care for Hollywood; he seemed "sleazy" to her. (5RT 1041-1042.) Adams overheard Rugge telling a couple of his friends that he was going to Los Angeles. (5RT 1035.)

Late that afternoon, appellant received a telephone call at Hollywood's house from Hollywood. Hollywood told appellant that he was in Santa Barbara with Skidmore and Rugge. Hollywood said that Skidmore would be returning the white van, and he asked appellant to return it to the owner, John Roberts.[10] (8RT 1662.)

Appellant spent Monday night, August 7, at Hollywood's house. The next day, Tuesday, Hollywood called him and said he wanted to meet. (8RT 1667.) When Hollywood pulled up to the house, appellant was outside having a cigarette. Hollywood beckoned him over to the car. Hollywood seemed excited and "cheery." He asked appellant if he would like to clear the final $200 from the long-lived debt. Appellant was delighted at the prospect. (8RT 1668.)

Hollywood told appellant that he needed appellant to "run" something up to Rugge in Santa Barbara; he did not tell appellant what the "something" was. (8RT 1668-1669.) Hollywood told appellant that Rugge was staying at a motel in Santa Barbara. Hollywood did not give appellant a contact number for Rugge until later. (8RT 1669.) Hollywood then dropped appellant off at Hollywood's house, telling appellant he would be back to pick him up later. (8RT 1670.)

Some hours afterward, Hollywood picked appellant up at the house, and the two went to Sheehan's apartment. (8RT 1671.) On the way, Hollywood gave appellant a telephone number where he could reach Rugge once he got to Santa Barbara. Appellant asked Hollywood for directions, because he had never been to Santa Barbara on his own. When they got to Sheehan's place, appellant got out of the car in which Hollywood had picked him up, Lasher's BMW. Appellant watched Hollywood open the

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[10] Two more telephone calls were made within the next hour from Hoeflinger's home to Hollywood's home. (7RT 1538.)

trunk, take out a bag, and hand it to him, along with the keys to Sheehan's car. (8RT 1672, 1675.)

Appellant made his way to Santa Barbara, stopped at an AM/PM Minimart, and called the Lemon Tree Inn. (8RT 1677.) Appellant spoke to Rugge, told him he had a bag for him, and told him he did not want anyone to be in the room when he got there. (8RT 1678.)

When appellant got to the Lemon Tree Inn, Rugge greeted him at the door. Appellant had the bag with him. (8RT 1678.) Pressley was in the room, which bothered appellant because he had expressly told Rugge to make sure he was alone. (8RT 1679.) Appellant set the bag on top of a dresser in the room. (8RT 1679.)

The room was a mess. There was a bunch of duct tape balled up on the bed. (9RT 1864.)

According to appellant, Rugge asked him if he could use the car to run some errands for an hour or so. (8RT 1680.) He said he needed to go drop a few things off. (8RT 1681.) Appellant was hungry and planned to hike back to the Jack in the Box. Rugge gave appellant the room key so that he could get back inside the room. (8RT 1681.) Before appellant left the room, Rugge asked if he could get a ride back to the San Fernando Valley later. He said he had a family wedding to attend. (8RT 1681-1682.)

Appellant walked to the Jack in the Box but then remembered that it was closed for the night. He went, instead, to the AM/PM Market, bought some candy and a pack of cigarettes, and walked back to the Lemon Tree Inn. (8RT 1683.)

At around 2:30 to 3:00 a.m., Rugge and Pressley returned to the room at the Lemon Tree Inn. According to appellant, Rugge looked serious and Pressley seemed "sheepish." Appellant and Rugge left the Lemon Tree Inn shortly thereafter. (8RT 1683.) Pressley remained at the motel. (8RT 1684.)

Rugge and appellant went back to Los Angeles; appellant was driving. He dropped Rugge off at the home of Rugge's mother and went home to his grandmother's house. (8RT 1684.)

At some point later that morning, appellant was "paged" by Hollywood's father, Jack Hollywood. He returned the call, and Jack Hollywood asked appellant if he could meet with him. (8RT 1698.)

The two met at a park in West Hills. (8RT 1699.) Jack Hollywood told appellant that Ben's brother had been taken. Appellant asked Jack Hollywood what he was talking about. Jack Hollywood asked about Ben's brother: "Where was he? Who did it?" (8RT 1700.)

Appellant was angry that Jack Hollywood brought up the whole thing. He was aggravated when the meeting ended. (8RT 1700-1701.)

A little later that day, appellant saw Hollywood at Sheehan's apartment. Appellant asked Hollywood why his father was paging him. Hollywood told appellant not to worry about it and gave him "three or four hundred bucks" for his birthday, which was the following day. (8RT 1702-1703.) Hollywood had never given appellant money as a birthday gift before this occasion. (8RT 1753.) Hollywood told appellant, "We're straight. No more debt." (8RT 1703.)

According to appellant's testimony, he heard on August 12 that Nicholas had been murdered. He learned about it from Skidmore. (8RT 1708.)

On Wednesday afternoon, August 16, appellant telephoned Skidmore's house. Skidmore's sister answered the telephone. She told appellant that her brother had been arrested and told appellant to be careful. (8RT 1714.)

Appellant was shaken up at this news, and started making telephone calls and "paging" people. He paged Sheehan, who told him that he did not want appellant at his house. Appellant went over anyway. (8RT 1715.)

The same telephone number kept showing up on appellant's pager. According to appellant, he assumed it was the police calling. He asked Sheehan if he could use Sheehan's telephone to return the page, but Sheehan said no -- he thought his telephone might be tapped. Sheehan agreed to take appellant to a pay phone. (8RT 1716-1717.)

When Sheehan pulled into the parking lot where a pay phone was located, the police arrested Sheehan and appellant. (8RT 1717.)

Appellant claimed he remembered nothing between the night of his arrest and waking up alone in a jail cell the following Saturday. (8RT 1777.)

2. Dr. Michael Kania's testimony

Dr. Michael Kania is a clinical psychologist who deals with forensic issues. (9RT 1804.)

According to Dr. Kania, he was surprised by the results of the MMPI (Minnesota Multiphasic Personality Inventory) test he administered to appellant. (9RT 1902.) According to Dr. Kania, the results were consistent with a profile of one suffering from paranoid schizophrenia. However, the results were consistent with other observations that Dr. Kania made of appellant -- that he was passive, dependent, the product of a chaotic home, and had problems with drugs and alcohol. (9RT 1903.)

Dr. Kania spent 11 to 13 hours with appellant. (9RT 1906.) Dr. Kania believed that appellant fell into a category of persons who falsely confess to things they did not do because, as a result of low IQ or psychological factors, they feel a need to protect other people. (9RT 1908.)

Dr. Kania believed that appellant was operating from a position of low self-esteem and high anxiety. Dr. Kania believed that appellant wanted to please people and was fearful of being rejected. (9RT 1910.)

Dr. Kania opined that appellant's failure to remember key events and incidents relative to the incident and his arrest and incarceration were the

result of a very traumatic emotional situation that disrupted his thinking. Dr. Kania believed it was possible that appellant's memory of those events might never be restored. (9RT 1914.)

C. Prosecution Rebuttal: Drs. David Glaser and Dana Chidekel

Dr. David Glaser, a clinical psychiatrist, examined appellant for three hours, reviewed the confession (audio, videotape and transcript), pleadings of the parties, Dr. Kania's interview notes and report. (9RT 1937.)

Dr. Glaser found appellant did not suffer from any current major mental illness. (9RT 1939.) Dr. Glaser also found no evidence a person like appellant would be more likely to falsely confess. (9RT 1942.)

Appellant's claim of amnesia was "simply malingering." (9RT 1948.) Specifically, appellant's memory was "crisp" except for his claimed inability to recall his confession. Appellant "definitely" understood where he was and what he was being asked by the police, and his answers were responsive. (9RT 1957.) It was Dr. Glaser's opinion that appellant was lying to the jury.

Dr. Dana Chidekel, a neuropsychologist, examined appellant with seven tests over two-and-a-half hours, and based on his responses, diagnosed a DSM-IV Axis 2 avoidance personality disorder, with self-defeating and dependent features. (9RT 1980.) Appellant had significant patterns of information processing and problems with visual spatial problem solving. Dr. Chidekel found no condition that interfered with appellant's inability to see, understand, or communicate. (9RT 1980, 1988.)

II. PENALTY PHASE

A. Aggravation

Susan Markowitz, Nicholas' mother, testified at length about the devastating impact of her 15-year-old son's murder on her, on many other relatives and hundreds of friends. Nicholas was a wonderful, talented and loving boy who loved life, was loved by many, and who looked forward to growing up. She was haunted by the murder of her only child, imagining him crying and begging for his life while bound, just before appellant killed him. She intended to attend the trials of all those responsible for his death, but felt that when those trials were completed, "I did not want to be here. I feel I have fallen into the depths of hell being on this Earth with the persons responsible for executing my son." (10RT 2240.) She attempted suicide twice following the murder of Nicholas. She concluded her testimony with a message to Nicholas: "I will be with you soon, son. Love, Mom." (10RT 2232-2241.)

B. Mitigation

Various witnesses, including relatives of appellant's, testified to the completely dysfunctional circumstances of his upbringing. His mother, Vicky Hoyt, was 19-years old when she married James Hoyt, and 21-years old when she gave birth to appellant. James Hoyt was "extremely abusive." And they had a volatile relationship. James Hoyt was physically abusive toward her and verbally abusive toward appellant, his son. Appellant was five-years old when the couple divorced and James Hoyt gained full custody of appellant. (10RT 2243, 2253.) Following the divorce, Vicky Hoyt became a heavy user of cocaine and alcohol. (10RT 2245, 2251.)

When Vicky Hoyt was pregnant with appellant, James Hoyt grabbed her by her hair and threw her against a car and onto the ground. (10RT 2246, 2250.) On another occasion, in appellant's presence, James Hoyt

threatened her with a pipe-wrench and would have "smashed" her in the head if her brother had not intervened. Appellant was four-years old at the time. (10RT 2247, 2250.)

Vicky Hoyt asked James Hoyt to get counseling so the family could remain together and the abuse could stop. He refused, and they divorced. (10RT 2248.) Appellant lived with his father until 1998, when his father abruptly left the state. (10RT 2250.)

Anne Stendel-Thomas is appellant's maternal aunt, and was very close to appellant when he was a child. She described the relationship of his parents as "somewhat volatile," and "dysfunctional" and described James Hoyt as physically abusive to Vicky Hoyt. At various times during appellant's childhood, Stendel-Thomas observed James Hoyt kick or knock Vicky Hoyt to the ground. He also did so when Vicky Hoyt was pregnant with appellant. When appellant was a child, appellant regularly witnessed family violence. Both of appellant's parents were physically abusive toward him, and were verbally abusive toward him "all the time." Vicky Hoyt's behavior was so unstable and the level of verbal and physical abuse in appellant's family was so significant that her sister, Stendel-Thomas, was eventually forced to seek therapy and stop being around appellant's family, because it was difficult to function in such an environment. (10RT 2252-2257.)

As a child, Vicky Hoyt was depressed and very emotional and distraught. She began abusing drugs at an early age and should have been, but was not, hospitalized for her condition. (10RT 2257.) When appellant was a small child, "there were always drugs around. . . ." (10RT 2258.) There were a number of occasions where Vicky Hoyt was too intoxicated to take care of appellant or her other children. (10RT 2258.)

In this dysfunctional environment, appellant acted as a mediator, trying to make his siblings and everyone get along. He was "a sweet, sweet kid." (10RT 2258.)

Carole Stendel, appellant's grandmother, provided additional context for her daughter Vicky Hoyt's erratic behavior, and the violence and dysfunction that permeated appellant's upbringing, as well as the trauma of his parents' divorce. Vicky Hoyt was the oldest daughter of six children, eight years older than Anne. As a child, Vicky Hoyt would stay in her room for days and not move or talk. She was emotionally unstable and beyond parental control. She got into drugs at an early age. She would stand up in class, walk around, and not know why. Her fourth-grade teacher recommended counseling, and Vicky Hoyt received group and family therapy. A psychiatrist diagnosed depression and recommended a hospital. She had trouble paying attention and sitting still, and dropped out of high school. She was volatile and would yell and scream if she did not "get her own way." (10RT 2266.)

The family had a history of depression and "chemical imbalance." Mark Stendel, appellant's grandfather, suffered depression, was in therapy for seven years, and was put on medication indefinitely. (10RT 2262-2265.)

After Vicky and James Hoyt married, they moved in with Vicky's parents. One day, Vicky Hoyt's mother returned home and learned that her husband had called the police, who were talking to James Hoyt outside the house. (10RT 2267.) When Vicky Hoyt told her mother that it was necessary to divorce James Hoyt because of the unhealthy atmosphere, she also said that James Hoyt "threatened her that if she attempted to take the children, he would do something to her. He would run her over with the van." (10RT 2269.) James Hoyt gained custody of the children; Vicky Hoyt was awarded visitation on weekends. (10RT 2269-2270.) The

children were "abandoned." (10RT 2271.) Now controlled by James Hoyt, they were verbally and physically abused by him. (10RT 2271.) Appellant remained a stoic mediator within the family, attempting to shield his brother Jonathan, "who usually got the brut of everything." (10RT 2271.)

In 1985, James Hoyt moved in with a woman, Robin, who had other children. They had a son in 1991 and eventually married. Appellant lived with James Hoyt and his wife until the couple moved to Nevada, when appellant was 20-years old. Robin was verbally abusive toward appellant. (10RT 2282, 2301.)

Nicholas Stendel, appellant's uncle, witnessed "violent, nasty" verbal abuse between appellant's parents in appellant's childhood home that was "hateful, desperate." (10RT 2279.) Stendel spoke of James Hoyt's "temper" and Vicky Hoyt's "psychological problems." (10RT 2283.) Appellant was present on these occasions of abuse. Vicky Hoyt deteriorated after the divorce, and her drug and alcohol abuse became more severe. She threatened people. Stendel also was aware of reports from appellant and others that appellant's stepmother was verbally abusive toward appellant and his siblings, telling them they were worthless. (10RT 2281-2285.)

Appellant's sister, Christina, eventually became a heroin addict and was facing prison at the time of appellant's trial. (10RT 2267.) Appellant worked for his father as a laborer or carpenter in Malibu for three to four months, and again at age 19, for another three months as a laborer. (10RT 2298.)

At the time Jonathan Hoyt testified at appellant's trial, he was serving a 12-year prison sentence for armed robbery and conspiracy to commit home invasion, crimes he committed at age 16, but for which he was tried as an adult. He described home life with James Hoyt and his stepmother Robin as involving physical violence. His father beat him on

many different occasions. His father would get frustrated over small things. Once Robin held him when he tried to run away, and brought him inside, where his father repeatedly hit him with a closed fist. Sometimes he feigned illness so he could go home from school, and be with his mother. His stepmother would say, "sometimes I feel like smacking you," to which he responded, "so you can treat me like Dad does?" When he was seven-years old, he told someone at school about the abuse, but because he was afraid, he said it was with an open hand. He saw his father hit appellant once when they were in the car, and his father kicked appellant in the stomach once when he had girls over. There was "a lot of abuse behind closed doors," which he and appellant never discussed. He feared his father. Robin treated them very badly, far worse than her own two children, berated them down and called them "pigs." Christina received the worst treatment and ran away when she turned 13-years old. (10RT 2311-2313.)

Jane Bright testified that her son and appellant were close friends between the ages of 4 and 15-years old. Appellant spent a lot of time at her house. He said his father beat him. She asked appellant to live with them but he said his mother would not allow it. He moved around a lot between his father, mother and grandmother. She cared deeply for appellant and considered him part of her family. (10RT 2321-2325.)

Several family members said they loved appellant, that he was not a violent person, and that they would be affected greatly if he were put to death, and felt nobody had helped him or his siblings to have safety and comfort. James Hoyt said he felt appellant's execution would be a "living nightmare you can't wake up from." (10RT 2296.)

The parties stipulated appellant had no discipline or custody problems since arrest, and no arrests or convictions for any other misdemeanor or felony. (11RT 2334.)

ARGUMENT

I. APPELLANT DID NOT PRESERVE HIS MERITLESS CLAIM THAT THE SUPERIOR COURT LACKED SUBJECT MATTER JURISDICTION

Appellant contends the trial court lacked subject matter jurisdiction to try his case because the murder of Nicholas Markowitz occurred in Los Padres National Forest, a geographic area over which the federal government purportedly has exclusive jurisdiction. Accordingly, appellant suggests that the matter be remanded to the trial court so that it may develop the factual record required to resolve the issue.[11] (AOB 50-60.) Appellant is incorrect.

"It has long been established that a state will entertain a criminal proceeding only to enforce its own criminal laws, and will not assume authority to enforce the penal laws of other states or the federal government through criminal prosecutions in its state courts." (*Betts, supra*, 34 Cal.4th at p. 1046.) It is presumed that a State has jurisdiction to try crimes committed within its borders. (*People v. Collins* (1895) 105 Cal. 504, 508-510; *People v. Crusilla* (1999) 77 Cal.App.4th 141, 147; *People v. Brown* (1945) 69 Cal.App.2d 602, 605-606.) This is true not only of state and privately-owned land, but also of land that is owned by the federal

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[11] As this Court held in *People v. Betts* (2005) 34 Cal.4th 1039, 1044, whether a trial court has jurisdiction to try a case is a question of law, not a factual question for the jury. Appellant acknowledges *Betts* but, relying on two federal court of appeals opinions, concludes that it "was wrongly decided[.]" (AOB 52.) Of course, this Court is not bound by decisions of the lower federal courts. (See, e.g., *People v. Avena* (1996) 13 Cal.4th 394, 431.) And other than his subjective opinion regarding the correctness of its decision, appellant gives no reason for this Court to revisit the point already decided in *Betts*, and none is readily apparent. (See, e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1294 [refusing to reconsider holdings on settled point].) Accordingly, this aspect of his argument should be rejected out of hand.

government. (*Collins, supra,* 105 Cal. at p. 509 [federal government's ownership of land "does not show any federal jurisdiction over crimes committed upon it, as that fact does not oust the jurisdiction of the state"].)

The well-settled counterpart of the presumption of jurisdiction is that a claim

> jurisdiction lies elsewhere (i.e., in the federal government) over an offense that is committed within the boundaries of the state, and that is defined by state law, is a defensive matter, and the defendant is required to allege and prove in the trial court "'any facts which he now claims might have had the effect of vesting exclusive jurisdiction in the federal courts.'"

(*Crusilla, supra,* 77 Cal.App.4th at pp. 146-147, quoting *People v. Allen* (1959) 172 Cal.App.2d 520, 522, and *In re Carmen* (1957) 48 Cal.2d 851, 855; see also *Collins, supra,* 105 Cal. at p. 509 [jurisdiction is a matter of defense].) Absent a showing of exclusive federal jurisdiction, the presumption of state jurisdiction will prevail. (See, e.g., *Carmen, supra,* 48 Cal.2d at pp. 853-855 [state jurisdiction upheld where defendant failed to present to the trial court facts establishing exclusive federal jurisdiction over murder committed in "Indian country"]; *Crusilla, supra,* 77 Cal.App.4th at pp. 146, 150 [where defendant failed to allege and prove "in the trial court" any facts that may have vested exclusive federal jurisdiction over crime committed at the San Ysidro Port of Entry, reviewing court found presumptive state jurisdiction based on appellate record, judicially noticeable material, and relevant legal authority]; *Brown, supra,* 69 Cal.App.2d at pp. 605-606 [presumption of state jurisdiction over crime committed at naval training station prevailed where defendant failed to produce any evidence to support his contention of exclusive federal jurisdiction].)

No showing of exclusive federal jurisdiction was made in this case. Appellant did not raise the issue at trial, much less present facts showing

that jurisdiction lay elsewhere, and he is not entitled to a remand for that purpose now.[12] Accordingly, on the record before this Court, the presumption that state jurisdiction existed (and continues to exist) in this case must prevail. (See, e.g., *Crusilla, supra,* 77 Cal.App.4th at p. 150; *Brown, supra,* 69 Cal.App.2d at pp. 605-606.)

Any residual uncertainty on this point can be dispelled by reviewing the history of California's statehood in light of the fact that the federal government can acquire exclusive jurisdiction over land in only three ways: by excepting the place from the jurisdiction of the State upon its admission to the Union, by accepting a cession of jurisdiction from the State after its admission to the Union, and by the purchase of land pursuant to the Property Clause. (*Ft. Leavenworth R. Co. v. Lowe* (1885) 114 U.S. 525, 526-527, 531-532, 538-539 [5 S.Ct. 995, 29 L.Ed.2d 264]; *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1520.) There is no contention that the federal government acquired exclusive criminal jurisdiction in this case via the purchase of Los Padres National Forest and,

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[12] Respondent recognizes that "fundamental jurisdiction cannot be conferred by waiver, estoppel, or consent" (*People v. Lara* (2010) 48 Cal.4th 216, 225, quoting *People v. Williams* (1999) 77 Cal.App.4th 436, 447), and does not contend that appellant's failure to challenge the trial court's jurisdiction below forfeited his right to present that *legal* issue to this Court. Rather, appellant's failure to present evidence to the trial court forfeited his right to develop a *factual* record to support his legal argument. (See, e.g., *Carmen, supra,* 48 Cal.2d at p. 855 ["To permit petitioner to . . . relitigate [the jurisdictional] issue [on habeas corpus] would encourage defendants charged with crimes, the jurisdiction over which might depend upon complex factual determinations, to withhold the raising of those issues until after they had attempted to obtain a favorable result at a trial on the merits. . . . The sanction of such procedure would permit piecemeal litigation of factual issues which should be finally determined upon a single trial . . . Petitioner therefore should have alleged and proved in the trial court any facts which he now claims might have had the effect of vesting exclusive jurisdiction in the federal courts"].)

as the ensuing discussion shows, the federal government neither reserved exclusive criminal jurisdiction when it granted California statehood, nor obtained exclusive criminal jurisdiction by the cession of jurisdiction from the State after its admission to the Union.

In 1848, the United States and Mexico entered the Treaty of Guadalupe Hidalgo. Article V of the Treaty delineated the land ceded to the United States by Mexico and included "Upper . . . California." (See Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic, art. V, ¶ 1 (1850 Stats. at p. 16).) In 1849, the People of California presented a Constitution to President Zachary Taylor outlining the boundaries of the State and asking for admission to the Union. (1849 Cal. Const., art. XII (1850 Stats. at p. 34); see also 1879 Cal. Const., art. III, § 2, codif. Gov. Code, §§ 160 & 170.) President Taylor submitted the request to Congress and, in 1850, Congress passed an Act for the Admission of California into the Union. (Vol. 9 Statues at Large, c. L, § 3, pp. 452-453.) Congress could have retained jurisdiction over land needed for the federal government. (*Ft. Leavenworth, supra,* 114 U.S. at pp. 526-527 [upon admitting Kansas to the Union, Congress could have, but did not, retain authority over certain lands ceded to the United States by France].) However, notwithstanding appellant's unsupported assertion to the contrary (AOB 54), the Act contained "no reservation of rights in the federal government." (*Martin v. Clinton Construction Co.* (1940) 41 Cal.App.2d 35, 46; *Coso Energy, supra,* 122 Cal.App.4th at p. 1523.) Thus, the new State had jurisdiction over all land within its borders from the time it entered the union.

In 1885, the United States Supreme Court held that jurisdiction over land ceded to the United States by a foreign country which the federal government did not use for military purposes and over which Congress had not reserved authority upon granting statehood to the State within whose

geographic boundaries said land was located remained with the State. (*Ft. Leavenworth, supra,* 114 U.S. at p. 539; see also *Wilson v. Cook* (1946) 327 U.S. 474, 487-488 [66 S.Ct. 663, 90 L.Ed. 793].) The Court further held that a State could properly cede non-exclusive jurisdiction to the federal government and reserve for itself specified rights. (*Ft. Leavenworth, supra,* 114 U.S. at p. 542; *Coso Energy, supra*, 122 Cal.App.4th at pp. 1521-1522.) Consistent with the holding of *Fort Leavenworth*, in 1891, the State of California ceded to the federal government "exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States . . . for all purposes *except* the administration of the criminal laws of this State and the service of civil process therein."[13] (Stats. 1891, ch. 181, § 1 at p. 262 [emphasis added].)[14] This non-exclusive cession of jurisdiction was presumptively accepted by the federal government.[15] (See, e.g., *S.R.A. Inc. v. State of Minn.* (1946) 327 U.S. 558,

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[13] In *Coso Energy*, *supra*, the court determined that the 1891 statute applies only to land ceded *by* California to the United States. (122 Cal.App.4th at pp. 1523-1535.) Appellant disagrees with this conclusion and asserts that the statute applies to all land ceded *to* the United States. (AOB 56.) The dispute need not be resolved here because the statute *excepted* the administration of criminal laws from the cession of jurisdiction. In other words, the State retained criminal jurisdiction over all land ceded *to* the United States whether or not it was ceded *by* California.

[14] The 1891 statute reserving criminal jurisdiction over national forests was re-enacted as Government Code section 113 in 1943. (Stats. 1943, ch. 134, p. 898, amended by Stats. 1947, ch. 1532, p. 3164, § 2.) In 1955, the State repealed Government Code section 113 (Stats. 1955, ch. 1447, p. 2636, § 1), and then re-enacted it in 1967. In its current form, Government Code section 113 provides for the State's acceptance of the retrocession of jurisdiction from the federal government over "land within this state" subject to certain conditions. (Added by Stats. 1967, ch. 1204, p. 2913, § 1, amended by Stats. 1998, ch. 829, § 23, p. 5221.)

[15] In 1940, Congress enacted 40 U.S.C. § 255 (now § 3112, subdivision (c)), which ended the presumption of exclusive federal jurisdiction over land that it had or would acquire. After that date, a State's

(continued...)

563 [66 S.Ct. 749, 90 L.Ed. 851]; *Brown, supra*, 69 Cal.App.2d at p. 604.) And in 1897, Congress expressly acquiesced to the State's reservation of criminal jurisdiction in the national forests by enacting section 480 of Title 16 of the United States Code. That section provides that a State's jurisdiction "over persons within national forests shall not be affected or changed by reason of their existence." (16 U.S.C. § 480.) In other words, "By this enactment Congress in effect . . . *declined* to accept exclusive legislative jurisdiction over forest reserve lands, and expressly provided that the state shall not lose its jurisdiction in this respect . . . ."[16] (*Wilson, supra,* 327 U.S. at p. 487, emphasis added; see also *United States v. Fresno County* (1977) 429 U.S. 452, 455 [97 S.Ct. 699, 50 L.Ed.2d 683] ["Pursuant to 16 U.S.C. § 480, the States retain civil and criminal

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(...continued)
cession of jurisdiction is operative only if the federal government formally accepts it.

[16] The case appellant contends "controls" the instant jurisdictional question, *Collins v. Yosemite Park & Curry Co.* (1938) 304 U.S. 518 [58 S.Ct. 1009, 82 L.Ed 1502], is, in fact, inapposite. (AOB 58.) The federal land at issue in *Collins* was a national park, not a national forest. Consequently, section 480, which recognized and preserved state jurisdiction over civil and criminal matters in national forests such as Los Padres, did not apply in that case. In addition, the State of California's cession of jurisdiction at issue in *Collins* was specific and limited to Yosemite National Park. And inasmuch as the terms of the cession informed the Court's decision in *Collins*, its holding is not relevant, much less controlling, here. Appellant's reliance on *Bowen v. Johnston* (1939) 306 U.S. 19, 29-30 [59 S.Ct. 442, 83 L.Ed. 455] [federal court had jurisdiction to try defendant for crime committed in national park where State of Georgia had ceded exclusive criminal jurisdiction], and *Underhill v. State* (Okla. 1925) 31 Okla. Crim. 149 [237 P. 628, 629] [state court did not have jurisdiction to try defendant for crime committed in national park because federal government reserved exclusive criminal jurisdiction over park (a former Indian reservation) upon admitting the State of Oklahoma into the Union and the State acknowledged sovereignty over places named in the Enabling Act] (AOB 55), is misplaced for the same reason.

jurisdiction over the national forests notwithstanding the fact that the national forests are owned by the Federal Government"].) Thus, it is clear that when the geographic area known as Los Padres National Forest was originally proclaimed a National Forest Reserve, the State of California had retained, and the federal government had acceded to, state jurisdiction over crimes committed therein.[17] (*Kleppe v. New Mexico* (1976) 426 U.S. 529, 543 [96 S.Ct. 2285, 49 L.Ed.2d 34] ["Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory . . . ."].) On the other hand, there is no indication that California ever ceded exclusive criminal jurisdiction over Los Padres National Forest to the federal government, much less that the federal government accepted any such cession as was required after 1940. (Cf. Gov. Code, § 126 [providing for cession of *concurrent* criminal jurisdiction over certain lands to federal government if federal government requests concurrent jurisdiction in writing and State Lands Commission determines that the cession is in State's interest].)

In sum, the federal government did not acquire exclusive criminal jurisdiction over Los Padres National Forest by any of the three means

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[17] Los Padres National Forest came into existence on December 3, 1936, when President Franklin Roosevelt issued an Executive Order renaming the Santa Barbara Forest Reserve as Los Padres National Forest. (Exec. Order 7501 1-FR 2141.) The Santa Barbara Forest Reserve had been established in 1903 when the Pine Mountain and Zaca Lake Forest Reserve (created by Proclamation 419 (June 29, 1898)), and the Santa Ynez Forest Reserve (created by Proclamation 438 (October 2, 1899)), were consolidated by President Theodore Roosevelt (Proclamation 33 (December 22, 1903)). All or parts of additional smaller forests were added to the Santa Barbara Forest Reserve thereafter. (See generally, Davis, Richard C. (September 29, 2005), National Forests of the United States, Appx. I, The Forest History Society (available at www.foresthistory.org/aspnet/places/national%20forests%20of%20the%20U.S.pdf).)

available. It necessarily follows that the State of California retained criminal jurisdiction over the murder of Nicholas Markowitz and that the Santa Barbara County Superior Court was the proper tribunal in which to try appellant for that crime.[18] Accordingly, appellant's contention must be rejected.

II. APPELLANT WAS PROVIDED WITH AN ADEQUATE OPPORTUNITY TO VOIR DIRE PROSPECTIVE JURORS

Appellant raises several challenges to the jury selection process at trial. Each of his contentions is meritless.

A. Appellant Was Not Entitled to Sequestered Voir Dire

Appellant first complains that the trial court violated his constitutional rights by refusing to conduct individual, sequestered voir dire. (AOB 62-84.) But there is no federal constitutional requirement that a trial court conduct individualized, sequestered voir dire in a capital case. Nor does this Court require it as a matter of state law. (*People v. Taylor* (2010) 48 Cal.4th 574, 607; *People v. Lewis* (2008) 43 Cal.4th 415, 494; *People v. Stitely* (2005) 35 Cal.4th 514, 536-537; *People v. Vieira* (2005)

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[18] This conclusion obtains even assuming that the State *did* lack criminal jurisdiction in Los Padres National Forest. Appellant's participation in the series of crimes that culminated in the murder began on state land over which the Santa Barbara County Superior Court undoubtedly had jurisdiction. (See, e.g., *People v. Mendoza* (1967) 251 Cal.App.2d 835 [State had jurisdiction to try defendant for weapons possession where evidence showed that he travelled on state highway between primary border station to secondary inspection station]; *People v. Baker* (1964) 231 Cal.App.2d 301, 306; [State had jurisdiction to try robbery/kidnapping case where much of continuing offense occurred wholly outside federal land] *People v. Allen, supra*, 172 Cal.App.2d at pp. 521-522 [State had jurisdiction to try defendant for possessing firearm where evidence showed he crossed state highway before being arrested at federal customs inspection station].)

35 Cal.4th 264, 287-288; *People v. Ramos* (2004) 34 Cal.4th 494, 511-513; *People v. Box* (2000) 23 Cal.4th 1153, 1180-1181.)

Denial of a motion for individual, sequestered voir dire does not implicate any state or federal constitutional rights and the denial of the motion is only reviewed for abuse of discretion. (*Taylor, supra*, 48 Cal.4th at p. 607; *People v. Navarette* (2003) 30 Cal.4th 458, 490; *People v. Waidla* (2000) 22 Cal.4th 690, 713-714.) A trial court abuses its discretion only when its ruling falls outside the bounds of reason. (*People v. Waidla, supra,* 22 Cal.4th at p. 714.)

Here, the trial court understood it had discretion to conduct individual voir dire but concluded that group voir dire was appropriate. The trial court here observed that sequestered voir dire is "not mandatory" absent a finding by the trial court that it would not be "not practicable to conduct the death qualification portion of the voir dire in the presence of the other prospective jurors." (1RT 223.) The trial court's approach to voir dire was reasonable on this record and the court's decision was not outside the bounds of reason. (See *People v. Jurado* (2006) 38 Cal.4th 72, 102; Cf. *People v. Ramos, supra,* 34 Cal.4th at p. 514 [group voir dire was practicable where the trial court used juror questionnaires and allowed counsel privately to question certain prospective jurors].) As a result, denying appellant's motion for individualized voir dire was not an abuse of discretion, nor did the denial violate appellant's constitutional rights.

Furthermore, nothing in the voir dire process here indicates that group voir dire resulted in actual bias. (Cf. *People v. Lewis, supra,* 43 Cal.4th at pp. 494-495 [evidence that 16 jurors changed their questionnaire answers after being "educated" during the voir dire process did not establish actual bias]; *People v. Vieira, supra,* 35 Cal.4th at p. 289 [the possibility that prospective jurors may have answered questions to please the trial court shows at most potential, not actual, bias].)

B. The Voir Dire Did Not Show Juror Bias

Appellant also complains that the voir dire of individual jurors demonstrates "particular concerns about impartiality" (AOB 68), but the voir dire at issue does not establish any such "concerns." For example, appellant alleges that Juror 9184, when responding to the juror questionnaire, demonstrated bias against appellant. Yet appellant is at a loss to explain how a claim of juror bias can be maintained in light of the juror's voir dire responses, as follows:

> THE COURT: Based on all of the questions that have been asked the last couple of days, the answers that you would give to those questions, based upon your answers in your questionnaire, based upon any views you might have of the criminal justice system, or any influences that you may have, you may have experienced as a result of the media coverage in this case, can you think of any reason as you sit there now that you could not give both sides a fair trial if you wound up on this jury?
>
> [JUROR 9184]: No.
>
> THE COURT: What?
>
> [JUROR 9184]: I have no reason to think that I could not.
>
> . . . .
>
> THE COURT: And I take it by the way you've answered the questions that you are prepared to follow the law?
>
> [JUROR 9184]: Yes, I am, sir.
>
> THE COURT: And to accord the Defendant the benefit of the presumption of innocence?
>
> [JUROR 9184]: Yes, I am.

(3RT 595-596.)

With respect to Juror 8919, appellant argues that the juror's questionnaire responses indicated a bias in favor of the death penalty, and complains that the bias was not addressed during voir dire. (AOB 69-70.) Appellant is wrong on both counts. First, the juror's voir dire responses did not suggest a bias. On the contrary, the juror's responses to questions regarding the juror's attitude toward capital punishment made clear the juror was neutral on the subject of capital punishment, and would not necessarily vote for death in a case of capital murder. (9CT 2589-2590.) Subsequently, during voir dire, Juror 8919 further demonstrated impartiality. (3RT 453-454.)

Second, and to the extent appellant is now claiming that two of the jurors' numerous responses on the questionnaires were ambiguous, appellant cannot complain on appeal, as he did not address those alleged ambiguities during voir dire. (See *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1311-1312 [finding claim of juror bias to have been defaulted, but address merits to foreclose later IAC claim].) In any event, Juror 8919's responses made clear that the juror would maintain an open mind during the trial and fairly evaluate the case and the question of punishment. (9CT 2589-2590.)

With respect to Juror 555, appellant contends that he was precluded from questioning Juror 555 about her willingness to consider a life sentence rather than a capital punishment. (AOB 70-71.) He overlooks her questionnaire responses, in which she specifically stated that she would consider both potential penalties in the event the case reached a penalty phase. (9CT 2660.) She further confirmed that she would reject the death penalty in favor of life imprisonment in an appropriate case. (9CT 2661.)

Appellant alleges that Juror 6619 exhibited "fixed views" in favor of capital punishment. (AOB 71-73.) Once again, however, the record of voir dire is to the contrary. In questionnaire responses, the juror expressed

amenability to either punishment, depending upon the evidence. (9CT 2690.) The juror also confirmed that, in an appropriate case, the death penalty should be rejected in favor of life imprisonment. (9CT 2691.) Appellant's opening brief includes only selective excerpts of the juror's voir dire responses when appellant argues that the juror was predispose toward the death penalty. But when the juror's responses are set forth in context, no bias appears:

> BY MR. CROUTER [DEFENSE COUNSEL]:
>
> Q In the questionnaire, you responded to the question -- well, number one, that -- not question number one -- that you are strongly in favor of capital punishment, the death penalty. Can you explain your feelings for us a little more?
>
> A [THE JUROR]: Did I write the word "strong"?
>
> Q That's a check box. You could have missed, made the wrong one.
>
> A Okay. Well, I believe that the death penalty is necessary in some cases. And granted, it's hard for a juror to vote that way. And many times it's through tears and anguish. But I think it must be done in some cases for society in general.
>
> Q Do you believe that you checked the proper box when you checked the one that says "strongly in favor of the death penalty"? Is that how you feel?
>
> A I'm not -- what was the other choice?
>
> Q The other choices were "moderately in favor," "strongly against," "moderately against," and "neutral."
>
> A I would just say I'm for it if it's deserved. I'm not a pro.
>
> Q You answered a question that asked, "Anyone who intentionally kills another person should always get the death penalty," and you indicated you agree somewhat. Is that how you feel?

A Well, I wouldn't know -- I need to know the facts. Is it in self-defense? I mean, I don't know.

Q All right. Can you think of any other situation, just using your imagination --

THE COURT: Well, I don't want them to imagine. That's -- I think you can ask -- she said that she -- she would think that the death penalty wasn't appropriate in self-defense. And is that the only circumstance that you feel the death penalty should not be imposed in the case of intentional killing is self-defense?

[THE JUROR]: No. There's automobile accidents.

THE COURT: This is an intentional killing. See, the -- the question is phrased in terms of an intentional killing. So we're not talking about automobile accidents.

When you said self-defense would be the exception, so I guess what I need to know is this. You're going to get -- you're going to get, if you get to that, we don't even know if the jury is going to reach the penalty issue, but if the jury reaches the penalty issue, then there's another phase of the trial. You're going to consider evidence that's presented in that phase. You'll be able to consider evidence you previously heard in the penalty phase. Then I'm going to give you some more instructions on the death penalty, and standards and things like that, and then you go in, and then you've got to weigh all the evidence, consider all the instructions, and then make a choice between the death penalty and life without possibility of parole. That's the job you have to do.

And so the question is, can you do that, or is it your, in your mind right now, that the only circumstance in which you think that the death penalty would not be appropriate would be in self-defense?

[THE JUROR]: No. Thank you for explaining further. I understand now. Yes, there's some instances I think that life in prison would be a better choice.

Q BY MR. CROUTER: You're not thinking about an accident where somebody is killed such as involuntary manslaughter, which would not be intentional?

A No.

Q Can you imagine a situation in which someone committed first-degree murder, and, of course, if the jury finds [appellant] guilty of first-degree murder, the jury would get to a penalty phase where you would find life imprisonment without parole to be the most appropriate sentence?

A Yes, it would be a situation like that.

MR. CROUTER: Thank you very much. Pass for cause.

(4RT 689-692.)

C. The Trial Court Did Not Improperly Restrict Voir Dire

Beyond his complaints about the individual jurors who are discussed above, appellant more generally alleges that the trial court impermissibly restricted voir dire on the facts of the case and the subject of penalty. (AOB 62, 73-84.)

A similar claim was recently considered and rejected in *People v. Fuiava* (2012) 53 Cal.4th 622. There, the defendant in a capital appeal claimed the trial court had conducted constitutionally inadequate questioning of the prospective jurors concerning possible biases arising from the circumstances of the crime. On appeal, the defendant contended the trial court's questioning had been insufficient to ascertain whether the jurors harbored any biases that might prevent them from impartially evaluating the defense. (*Id.* at p. 653.)

This Court found that the defendant's contention had been forfeited by his failure to raise it at trial. This Court recognized that the defendant had initially submitted proposed questions highlighting the circumstances of the case, and the trial court did not pose those questions during voir dire. The claim was defaulted on appeal because defense counsel at trial had not

objected that general questioning concerning the prospective jurors' ability to follow the court's instructions on self-defense would be -- or subsequently was -- insufficient to uncover any biases the prospective jurors might have held. Accordingly, the defendant's claim was not preserved for appeal. (*Fuiava, supra*, 53 Cal.4th at p. 653, citing *People v. Sanchez* (1995) 12 Cal.4th 1, 61-62.) Chief Justice Cantil-Sakauye, writing for the Court in *Fuiava*, observed that the

> controlling principle is that a defendant may not challenge on appeal alleged shortcomings in the trial court's voir dire of the prospective jurors when the defendant, having had the opportunity to alert the trial court to the supposed problem, failed to do so. It is not sufficient, as in the present case, for a defendant merely to suggest that particular questions be asked, and then silently stand by when the trial court suggests and subsequently takes a different course -- a trial court reasonably could view such silence as constituting assent to the court's approach.

(*Sanchez, supra*, at p. 62.)

The same is true in the present case. Although appellant proposed additional voir dire questions, he expressed no disagreement with the trial court's revisions. He thereby defaulted his present claim.

Appellant is also mistaken on the merits. As shown below, the trial court did not deny appellant's counsel the opportunity to conduct adequate voir dire on the circumstances of the case. And to the extent voir dire was restricted, the trial court's ruling was well within its discretion.

This Court reviews alleged limitations on voir dire, including death-qualification voir dire, only for abuse of discretion. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1120, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390; *People v. Burgener* (2003) 29 Cal.4th 833, 865.) A trial court has considerable discretion to contain voir dire within reasonable limits, and this discretion extends to death-qualification voir

dire. (*People v. Butler* (2009) 46 Cal.4th 847, 859; *People v. Zambrano, supra*, 41 Cal.4th at p. 1120.)

In *People v. Cash* (2002) 28 Cal.4th 703, 718, the defense anticipated that the prosecution would introduce as aggravating evidence the defendant's murder of his elderly grandparents at age 17 (i.e., evidence of prior murders) and attempted to ask a prospective juror during voir dire whether there were "any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty." (*People v. Cash, supra*, 28 Cal.4th at p. 719.) The trial court ruled that the question was improper and also denied a subsequent motion to ask prospective jurors whether there were any aggravating circumstances that would cause them to automatically vote for the death penalty. (*Ibid.*)

This Court held that the trial court in *Cash* had erred. This Court began its analysis with the basic principle that prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as a juror. (*People v. Cash, supra*, 28 Cal.4th at p. 719, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) The Court then explained:

> The real question is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror. [Citations.] Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty [citation], it is equally true that the real question is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.

(*People v. Cash, supra*, 28 Cal.4th at p. 720, internal quotation marks omitted.)

Applying these principles in *Cash*, this Court found error in the trial court's refusal of the defense's proposed voir dire. The Court explained

that the trial court's ruling prohibited defense counsel from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty if the defendant had previously committed another murder. (*People v. Cash, supra*, 28 Cal.4th at p. 721.) The Court reasoned that because the defendant's guilt of the prior murders of his grandparents was a general fact or circumstance that was present in the case and that could cause some jurors to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance. (*Ibid.*) Accordingly, the Court found that, in prohibiting voir dire on prior murder, a fact likely to be of great significance to prospective jurors, the trial court erred. (*Ibid.*; see *People v. Vieira, supra,* 35 Cal.4th at p. 286 [a trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for life without parole for a defendant convicted of multiple murder would be error, because multiple murder "falls into the category of aggravating or mitigating circumstances 'likely to be of great significance to prospective jurors'"].)

This Court went on to recognize that death-qualification voir dire must avoid two extremes. (*People v. Cash, supra*, 28 Cal.4th at p. 721.) The Court explained:

> On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective juror to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation.] In deciding where to strike the balance in a particular case, trial courts have considerable discretion. [Citations.]

(*Id.* at pp. 721-722.)

Here, appellant claims that the trial court "precluded" any voir dire questioning about the facts of this case and, more specifically, he alleges that the trial court's "ruling" prohibited the defense from gauging juror attitudes regarding the kidnap-murder of a 15-year-old victim, and the appropriate penalty in such a case. (AOB 62.) The claim ignores the trial court's explicit verbal advisement to all prospective jurors that the case involved "the alleged kidnapping of the 15-year-old Nicholas Markowitz . . . ." (3RT 314.) The trial court also explained to the assembled venire that the voir dire process would include asking prospective jurors "about your knowledge of the facts and the circumstances of the case . . . ." (3RT 316.) The facts and circumstances were, of course, the alleged kidnap and murder of a 15-year-old. The court repeatedly specified that the special circumstance of murder during the commission of a kidnapping was charged. (2RT 314, 318.)

The questionnaire utilized by the Superior Court further asked prospective jurors whether they would always vote guilty as to first degree murder and true as to the special circumstance of kidnap murder, in order to guarantee a penalty phase. (9CT 2560.) The questionnaire further specifically asked whether a juror would "always" vote for death, no matter what other evidence might be presented. (9CT 2560.) Appellant does not explain how these inquiries failed to elicit juror attitudes toward the death penalty in a special circumstance case involving the kidnap-murder of a minor. That was exactly the import of these questions.

Ignoring the explicit advisements of the trial court, appellant focuses exclusively on the court's decision to refrain from asking four questions proposed by the defense. Those questions were:

> 78. What was your first reaction when you heard this is a "kidnapping murder" case?

79. Would your feelings about the issue of kidnapping and murder be such that: You could not be fair and impartial in relation to the complaining witness. Neither statement applies.

98. During the course of the trial, the prosecution may present evidence that includes pictures of Mr. Markowitz after he died, and a gun that was used in the killing. The prosecution may even display the gun itself. How do you think this type of evidence would affect your judgment of the case as a whole?

120. During this trial you may hear detailed descriptions of kidnapping and murder. Would that effect [sic] your ability to be fair and impartial? If so, please explain.

(AOB 63-64.)

Appellant makes no showing here, and made no claim below, that his proffered additional questions were relevant, much less necessary. A question asking for a prospective juror's "first reaction" to learning this was a kidnap-murder case is neither a necessary nor a relevant inquiry. Similarly, a question asking a juror to predict a reaction to photographs of the victim or the murder weapon is irrelevant, having nothing to do with meaningfully gauging relevant juror attitudes. The same is true of appellant's proposed question asking a juror to speculate about whether "detailed" descriptions of the crime would "effect" [sic] the juror's ability to be impartial. Rather, such questions were vague, speculative and irrelevant. Typically, trial evidence is "detailed."

The instant case is readily distinguishable from *Cash*, as already explained, because there was no comparable restriction on voir dire in this case. The instant case is far more analogous to *People v. Burgener, supra*, 29 Cal.4th 833. There, the trial court sustained the People's objections when defense counsel asked prospective jurors whether they would impose the death penalty after considering a rather detailed account of some of the facts of the case and whether a prospective juror could continue to be impartial after hearing a list of the defendant's prior crimes. (*Id.* at p. 865.)

The trial court found that these questions invited the jurors to prejudge the case. (*Ibid.*) This Court found no error in the trial court's ruling, stating: "Defendant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating evidence. . . ." (*Ibid.*) Like in *Burgener*, appellant had no right to ask specific questions that invited prospective jurors to prejudge the case.

Finally, and as illustrated in the examples of individual jurors set forth above, the trial court here did not preclude defense counsel from asking appropriate questions of prospective jurors to ascertain whether the prospective jurors could maintain an open mind on penalty.

In sum, given the trial court's broad duty to restrict death-qualification voir dire, the trial court here did not abuse its discretion.

III. THE TRIAL COURT ACTED WELL WITHIN HIS DISCRETION WHEN REMOVING PROSPECTIVE JUROR GONZALEZ BASED ON THE JUROR'S INSISTENCE ON CONSIDERING PENALTY

Appellant claims the trial court violated his constitutional rights by excluding prospective Juror Gonzalez for cause, even after the juror maintained that he would consider (when deciding guilt) the potential penalty of death, and was burdened with the prospect of judging another person, and even despite the court's admonition that a juror was not to consider penalty. (AOB 84-101.) The claim is meritless, as the lower court acted well within its discretion.

This Court has repeatedly recognized that during voir dire, jurors may often offer conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve. When such conflicting or equivocal answers are given, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual

state of mind. (*People v. Hamilton* (2009) 45 Cal.4th 863, 890.) There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. It is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. (*People v. Abilez* (2007) 41 Cal.4th 472, 497-498.) The trial court's finding is entitled to deference even in the absence of clear statements from the juror that he or she is impaired, and the trial court's assessment of the prospective juror's demeanor is also entitled to deference. (*Uttecht v. Brown* (2007) 551 U.S. 1, 7 [127 S.Ct. 2218, 167 L.Ed.2d 1014].)

A trial court's determination concerning juror bias is therefore reviewed only for abuse of discretion. (*People v. Abilez, supra,* 41 Cal.4th at pp. 472, 497-498.) "[A]ppellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record." (*People v. Stewart* (2004) 33 Cal.4th 425, 451.) As such, "the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the 'definite impression' that he is biased, despite a failure to express clear views." (*People v. Lewis* (2006) 39 Cal.4th 970, 1007; see also *Uttecht, supra,* 551 U.S. at p. 9 ["Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."].) Even when

> "[t]he precise wording of the question asked of [the venireman], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty," the need to defer to the trial court remains because so much may turn on a potential juror's demeanor.

(*Uttecht, supra,* 551 U.S. at p. 8.)

Here, the trial court could easily have concluded Juror Gonzalez's views impaired his ability to serve as a juror. He strongly opposed capital punishment. (14CT 3923, question 31.) Further, during his in-court colloquy with the trial court, prospective Juror Gonzalez made clear that he was preoccupied with the issue of penalty, even at the stage when it was irrelevant:

> THE COURT: All right. Well, again, anything in those experiences that makes you think you couldn't be a fair juror in this case, knowing what the juror's job is?
>
> PROSPECTIVE JUROR GONZALEZ [100376586]: No, I don't think so. The only caveat I would put on that is that I have -- I have witnessed firsthand the results of the sentencing. And I have spoken with people who have been, for instance, sentenced for life, with no chance of parole and stuff like that. And that -- it's a very heavy burden to judge someone. So that's all I can say.
>
> THE COURT: Well, that brings us to an issue which we weren't going to get to yet, but we're there now, as far as -- and I'll come back to the others.
>
> But obviously as a juror in determining whether or not the Defendant committed any of the offenses with which he's charged in this case, the subject of punishment or penalty is not even to be considered or discussed. Do you understand that?
>
> PROSPECTIVE JUROR GONZALEZ [100376586]: (Nods head up and down.)
>
> THE COURT: You don't even get to that at that point. And so my question to you is, do you believe that because of your observations as to the circumstances of those who have been sentenced to prison for various things, do you believe that you would be inclined to consider the potential sentence in determining the issue of guilt or innocence? Do you think that would influence your view of the facts?

PROSPECTIVE JUROR GONZALEZ [100376586]: I would like to think it wouldn't, but it hangs on me very heavily, morally. I --

THE COURT: Mr. Gonzalez [100376586], the question is, if you wind up on this jury, are you going to deliberate with the other jurors, consider the facts, decide the facts based on the evidence, without consideration of any potential sentence that may be imposed, if you get to that phase of the case? That's the question.

PROSPECTIVE JUROR GONZALEZ [100376586]: I would have to say that no matter what I did, that would be a factor.

THE COURT: I'm going to excuse you.

(3RT 421-423.)

Juror Gonzalez did not equivocate on the point. (See *People v. Hamilton, supra,* 45 Cal.4th at p. 891 [trial court referred to the excused juror as "a man of pretty strong convictions" who did not wish to appear closed minded but who would, in actuality, always vote against the penalty of death]; *People v. Avila* (2006) 38 Cal.4th 491, 531 [referring to jurors having disclosed views against the death penalty "so strong as to disqualify them for duty on a death penalty case"]; see also *United States v. Fell* (2d Cir. 2008) 531 F.3d 197, 213.) When a prospective juror has made statements that support the trial court's conclusion that the juror is not qualified, "[t]he fact that [the juror] also gave statements that might have warranted keeping [her] as [a juror] does not change [the] conclusion" that substantial evidence supports the trial court's ruling." (*People v. Thornton* (2007) 41 Cal.4th 391, 414.) But in this case there were no such contrary statements.

The theoretical possibility that a prospective juror might be able to reach a verdict of death in some case does not necessarily render the dismissal of the juror an abuse of discretion. (*People v. Wharton* (1991) 53

Cal.3d 522, 588-589; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 80.) Excusal for cause is not limited to a juror who "'zealously opposes or supports the death penalty in every case.'" (*People v. Riggs* (2008) 44 Cal.4th 248, 282.)

In the circumstances of the present case, in which a juror unambiguously expressed hostility to the death penalty, as well as the firm intention to consider punishment in the guilt phase against the court's instructions, it is appropriate to defer to the trial court, which conducted the voir dire and, unlike this reviewing Court, was also able to observe the prospective juror's demeanor. Substantial evidence supports the trial court's conclusion that prospective Juror Gonzalez held views that rendered him unable "'realistically and honestly' to [follow the court's instructions and to] give the prosecution a fair hearing and a fair opportunity to at least persuade him to vote for the death penalty." (*People v. Hamilton, supra,* 45 Cal.4th at p. 891; see also *People v. DePriest* (2007) 42 Cal.4th 1, 21-23 [jurors properly excused who would experience extreme difficulty imposing capital punishment, even in an appropriate case, and whose responses and demeanor produced a definite impression that jurors' views on the death penalty would substantially impair the performance of their duties].)

Appellant also alleges that the trial court's dismissal of Juror Gonzalez was contrary to the United States Supreme Court's decision in *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 2526, 65 L.Ed.2d 581]. (AOB 90-92.) The claim should be rejected for the same reasons a very similar claim was unanimously rejected by this Court in *People v. Ashmus* (1991) 54 Cal.3d 932, 961-964.

In *Ashmus*, this Court found that prospective Juror Sullivan's views on capital punishment would "at the very least, have substantially impaired the performance of his duties as a juror." The Court acknowledged, as the

trial court had similarly recognized, that Juror Sullivan "apparently could consider the death penalty as a reasonable possibility." Yet on more than one occasion during voir dire, Sullivan "made plain" that his feelings about the death penalty would lead him to apply to the question of guilt or innocence a standard of proof higher than proof beyond a reasonable doubt. (*People v. Ashmus, supra*, 54 Cal.4th at p. 963.)

On appeal, Ashmus claimed that prospective Juror Sullivan could not be properly dismissed as he had confirmed that he would apply the relevant burden of proof in the guilt phase, regardless of his concession "that the prospects of the death penalty may affect . . . what [he] may deem to be a reasonable doubt." (*People v. Ashmus, supra*, 54 Cal.3d at p. 963, citing *Adams v. Texas, supra,* 448 U.S. at p. 50.) Under those circumstances, Ashmus claimed, Sullivan had established that he could adequately perform his duties as a juror, and therefore the trial court could not dismiss him for cause. (*Id.* at p. 563.) This Court rejected the contention. And the Court further found, as to other jurors whose removal was challenged, that a juror in these circumstances "must be able to do more, specifically, to consider imposing the death penalty *as a reasonable possibility.*" (*Id.* at p. 563, emphasis by the Court.) Juror Gonzales, like the jurors in *Ashmus*, revealed an inability to do so.

Appellant also misplaces reliance on *People v. Heard* (2003) 31 Cal.4th 946. In *Heard,* this Court reversed a defendant's death sentence because the trial court had erroneously excused a prospective juror whose statements indicated that he would not automatically vote for life without parole, regardless of the evidence. (*Id.* at pp. 963-966.) The prosecution had argued on appeal that the prospective juror's "long period of silence" before answering a question by the court supported excusal. (*Id.* at p. 967, fn. 10.) The reflection was appropriate, in this Court's view, in light of the trial court's imprecise questioning. Further, this Court found that the

prospective juror's answer that followed did not amount to grounds for excusing the prospective juror for cause. (*Ibid.*; see also *People v. Solomon* (2010) 49 Cal.4th 792, 834.) *Heard* has nothing to do with this case, as prospective Juror Gonzalez made clear that he disdained making a penalty determination and that he would consider the penalty in his guilt determination, even against the court's instructions.

In sum, the trial court acted within its discretion in dismissing prospective Juror Gonzalez for cause.

IV. APPELLANT DID NOT PRESERVE HIS CLAIM THAT THE INDICTMENT VARIED FROM THE PROOF AND THE PROSECUTOR'S THEORY, AND THE CLAIM LACKS MERIT IN ANY EVENT

Appellant contends that he was prejudiced by a "material variance" between the charging indictment and the proof and prosecutorial argument. More specifically, he claims that the indictment informed appellant that the prosecution was alleging that the murder occurred on August 8-9, 2000, and the kidnap for ransom or extortion took place on August 6-9, 2000, but that the prosecutor in rebuttal argument introduced an alternative theory, arguing that appellant was nevertheless, regardless of whether a participant in the initial kidnapping, guilty of a "second" kidnapping that commenced on August 8, 2009, the date appellant arrived at the Lemon Tree Inn and took the victim. (AOB 101-134.) The claim was not preserved for appellate review and is meritless in any event.

A. Appellant Has Forfeited His Claim

During the defense closing argument, defense counsel asserted that (1) the indictment alleges . . . appellant did not participate in the West Hills kidnapping and, alternatively (2) the West Hills kidnapping had ended at the point that Nicholas elected to remain with his captors in Santa Barbara, and (3) appellant did not shoot Nicholas. (10RT 2100.) In rebuttal, the

prosecutor countered the claim that the West Hills kidnapping had ended, and asserted that Nicholas remained a hostage from the time of his abduction in Los Angeles to his murder. Further, the prosecutor specifically noted that the indictment alleged a beginning and end for the kidnapping, i.e., a period of time in which appellant could either join the ongoing West Hills kidnapping or initiate a kidnapping that began at the Lemon Tree Inn. (10RT 2135-2136.)

As explained by the prosecutor below, without challenge by appellant at trial, there was no impermissible variance between pleading, proof or theory of liability here.

> [BY THE PROSECUTOR (MR. ZONEN):] Counsel spent approximately the first 45 minutes of her argument talking to you about when kidnapping ends. And she misstated the law as was given to you, effectively telling you that it ends as soon as a victim has the opportunity to leave and doesn't exercise that opportunity.
>
> That doesn't account for the possibility that there may be the opportunity and he chooses not to capitalize on it simply because of duress or coercion or threat. Threat to him, threat to any member of his family, specifically his brother.
>
> If Nicholas Markowitz had the opportunity to leave and chose not to leave simply because he felt it could place him in greater danger or jeopardy at a later time or place, his brother in greater danger or jeopardy, then he is still a kidnap victim. Never mind that he had the opportunity to walk away at some given point.
>
> Counsel didn't address that, but that is most assuredly part of the law of kidnapping as read to you, or will be read to you in the instructions, and something you should consider.
>
> Now, let's assume everything counsel said was correct. Let's assume that it is a correct statement of law that the moment a kidnap victim has the opportunity to flee, and chooses not to, that that person is no longer a kidnap victim, and the crime of kidnapping has ended. Let's assume that that were the case. Would he not be guilty of kidnapping? And the answer is,

of course not, because there is, independent of the kidnapping that took place on the 6th where he was brought from Los Angeles County to Santa Barbara, there is as well the kidnapping that took place in the late evening hours of the 8th, into the early morning hours of the 9th of August, where he's taken from the hotel, perhaps taken as well to Rugge's house at some point, we'll never know, and then taken up to the location on West Camino Cielo and there he was killed. That we know is an independent kidnapping. And certainly he would be guilty of that offense.

But uniquely, remarkably, in counsel's first 45 minutes of her closing argument addressing the question of kidnapping, never once addresses the issue of whether he would not, or would be guilty of a subsequent kidnapping that then took place from the hotel to the crime scene.

MR. CROUTER: Object, your Honor. There's one count only charged.

MR. ZONEN: I'm sorry?

THE COURT: That's right, isn't it?

MS. OWEN: Yeah.

MR. ZONEN: I didn't hear what he said.

THE COURT: He said the count, the kidnapping for -- count, relates only to the incident of the – I'll have to look. Isn't that your point?

MR. CROUTER: That there is only one count charged.

THE COURT: That's his argument.

MR. ZONEN: Well, you have to look at the date on the pleading on there, and the time, and whether or not it governs an entire period of time. And I believe in an Indictment you'll find that it covers the period of time from the 6th through the 9th.

THE COURT: Let's see. That's the way the count is drawn. August 6th through August 9th.

> MR. ZONEN: See, a kidnapping can go over a period of time, and in this case it did. That kidnapping took place from the 6th through the 9th. It is one count, but it's one count that covers the entirety of his movement from the time he left at the location near his residence in that area, I think near Ingomar and Platt in San Fernando Valley, to the point where he was killed up in Santa Barbara County. That's all covered in the pleading in that one count as a kidnapping.

(10RT 2134-2137.)

Although appellant lodged an unspecified objection during the prosecutor's argument in rebuttal, he did not allege in the trial court that there was any variance between pleading and proof, or that the prosecution was introducing a new theory that prejudiced appellant. Therefore, his current allegation that the defense was surprised and could not defend against the theory obviously was not shared by trial defense counsel. Appellant's failure to raise his present claim at trial precludes him from asserting the claim on appeal. (See generally, *People v. Burnett* (1999) 71 Cal.App.4th 151, 178; *People v. Gil* (1992) 3 Cal.App.4th 653, 659; *People v. Newlun* (1991) 227 Cal.App.3d 1590, 1604; *People v. Powell* (1974) 40 Cal.App.3d 107, 123-124; *People v. Rubin* (1963) 223 Cal.App.2d 825, 830-831, disapproved on other grounds in *People v. Poyet* (1972) 6 Cal.3d 530, 536.)

B. The Notice Claim Lacks Merit

Even if the claim has not been forfeited, it is meritless. The due process guarantees of the state and federal Constitutions require that a criminal defendant "receive notice of the charges adequate to give a meaningful opportunity to defend against them." (*People v. Seaton* (2001) 26 Cal.4th 598, 640.) The Fifth Amendment of the United States Constitution protects a defendant from being convicted of an offense different from that which was included in the indictment returned by a grand jury. (*Stirone v. United States* (1960) 361 U.S. 212, 217 [80 S.Ct.

270, 4 L.Ed.2d 252], citing *Ex parte Bain* (1887) 121 U.S. 1, 10 [7 S.Ct. 781, 30 L.Ed. 849].) "[A] variance occurs when the charging terms are unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." (*United States v. Helmsley* (2d Cir. 1991) 941 F.2d 71, 89.) Variances are not grounds for reversal absent a showing of prejudice. (*Ibid.*)

"No accusatory pleading is insufficient [. . .] nor can the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." (Pen. Code, § 960.) If the charging document charges the offense in such manner that the defendant is apprised of the act with which he or she is charged with sufficient certainty to enable the defendant to make a defense thereto, if the defendant is not misled by any statement contained in the information, or indictment, and the transaction is so identified that the defendant, by a proper plea, may protect himself or herself against another prosecution for the same offense, it must be held that the allegations are sufficient to sustain the conviction when an attack is made upon the ground of variance. (*People v. Silverman* (1939) 33 Cal.App.2d 1, 4-5.)

In order to obtain reversal of a conviction on the ground there was a variance between the allegations of a charging document and the proof at trial, the variance must be "material." (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 191, p. 398.)

> The test of the materiality of a variance [between the accusatory pleading and the proof] is whether the indictment or information so fully and correctly informs the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense.

(*People v. LaMarr* (1942) 20 Cal.2d 705, 711.)

Here, there was no variance between pleading and proof, much less a substantial variance. The prosecutor presented evidence that established the abduction of Nicholas by Hollywood and others on August 6, 2000, his detention in the days that followed, Hollywood's decision to engage appellant to murder the victim following Hollywood's realization that the kidnapping could result in a life sentence in prison if the victim survived and identified Hollywood as his abductor, and appellant's transportation of Nicholas to Lizard's Mouth where he shot and killed him. And, contrary to appellant's hyperbole, there was no intentional effort by the prosecutor to introduce a new theory into the case just before deliberations, and after the defense had completed its presentation. (AOB 117.) In opening statement, the prosecutor described the foregoing evidence; he did not discuss legal theories. (See 4RT 762.) Nor did he do so in opening argument. It was only after defense counsel misrepresented the law regarding kidnapping in her closing argument that the prosecutor discussed his theory of the kidnapping. But, again, the theory was consistent with the evidence which, in turn, was consistent with the indictment.

Appellant was alleged to have participated in a kidnapping "on or about August 6, 2000 through August 9, 2000." (1CT 22.) Obviously, the taking of Nicholas from the motel in Santa Barbara to his gravesite was an act of kidnapping. The jury found that to be so when it found Special Circumstance No. 1 in count one to be true. The inclusive dates alleged in count two allowed the jury to determine whether a kidnapping occurred between those dates in which appellant played a part. The instruction on simple kidnapping as a lesser offense included in the offense of kidnapping for ransom, as alleged in count two, allowed the jury to determine whether the kidnapping appellant participated in was an extension of the kidnapping-for-ransom which commenced in Los Angeles County or a

later-commenced, differently-motivated kidnapping which was undertaken in Santa Barbara County.

The fact that a kidnapping which commenced in Los Angeles on or about August 6, 2000 may have terminated before a discrete kidnapping commenced in Santa Barbara County on or about August 9 does not mean that the latter kidnapping was not adequately alleged in count two. It was, and appellant was well aware of the evidence which supported the prosecutor's characterization of Nicholas' last ride as a kidnapping.

As explained by the prosecutor, the indictment alleged a period of time in which kidnapping occurred, and did not differentiate between West Hills and the Lemon Tree Inn as the origin point of that kidnapping. And appellant does not identify any California law that remotely supports his assertion of lack of notice.

Instead, appellant relies on the dissimilar factual circumstances addressed by the Ninth Circuit in *United States v. Tsinhnahijinnie* (9th Cir. 1997) 112 F.3d 988, a case that illustrates the type of extreme facts required for fatal variance to be found under federal (not state) law. In *Tsinhnahijinnie*, the defendant was indicted for sexual abuse of a child occurring on an Indian reservation during the summer of 1992. (*Id.* at p. 989.) However, the child's testimony fluctuated between placing the abuse at the place and time in the indictment and placing it off the reservation in 1994. (*Id.* at p. 990.) Because the evidence adduced at trial differed significantly from the allegations in the indictment, the Ninth Circuit held that the indictment had not given the defendant adequate notice of the crime charged. (*Id.* at p. 992.) And the evidence that was produced as to the indicted crime was insufficient. (*Ibid.*)

Appellant also relies on *United States v. Adamson* (9th Cir. 2002) 291 F.3d 606, 610, 616, another Ninth Circuit case that is not comparable to appellant's case. There, the government alleged a single

misrepresentation but proved a different one, after affirmatively representing that the conduct alleged in the indictment was the sole basis for the prosecution.

Even under the law of the Ninth Circuit, which does not control here, a variance typically is immaterial if the government has proven that the criminal act occurred on a date "reasonably near" the date cited in the indictment. (See *United States v. Hinton* (9th Cir. 2000) 222 F.3d 664, 672-673 [18 days]; *United States v. Baker* (9th Cir. 1993) 10 F.3d 1374, 1419 [two months], *overruled on other grounds by United States v. Nordby* (9th Cir. 2000) 225 F.3d 1053; *Lelles v. United States* (9th Cir. 1957) 241 F.2d 21, 25 [19 days].)

In the first place, appellant never objected at trial to a lack of notice and did not move for a continuance. Accordingly, he has failed to preserve this issue for review. (*People v. Cole* (2004) 33 Cal.4th 1158, 1207; *People v. Gurule* (2002) 28 Cal.4th 557, 629; *People v. Seaton, supra,* 26 Cal.4th at p. 641.) In any event, the issue is without merit. Although appellant portrays the issue as involving notice of the prosecution's "theory," it is apparent that the prosecutor was simply responding to a defense claim in summation that the kidnapping had ended. The prosecutor's theory remained that only one kidnapping had occurred. It was only in response to the defense claim that the kidnapping had ended before appellant's arrival that the prosecutor countered that the inclusive dates of the kidnapping nevertheless allowed a conviction as long as the kidnapping in which appellant participated took place within the relevant time frame.

C. The Co-conspirators' Statements Were Properly Admitted

Appellant also now asserts the trial court erred in admitting statements of various witnesses because the statements were not admissible

as statements of co-conspirators, and therefore were inadmissible hearsay. (AOB 121-129.) The claim is meritless.

Hearsay statements by co-conspirators may be admitted against a party if the offering party presents "independent evidence to establish prima facie the existence of . . . [a] conspiracy." Once independent proof of a conspiracy has been shown, three preliminary facts must be established:

> (1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy.

(*In re Hardy* (2007) 41 Cal.4th 977, 995-996; Evid. Code, § 1223.)

Here, the conspiracy which appellant joined was ongoing when he took the victim to kill him at Lizard's Mouth. Moreover, it is for the trier of fact, considering the unique circumstances and the nature and purpose of the conspiracy of each case, "to determine precisely when the conspiracy has ended." (*Hardy, supra,* 2 Cal.4th at p. 143.) Thus, the object of the conspiracy here was neither attained nor defeated at the time of the statements contested by appellant. Appellant also argues that various statements did not further the conspiracy and thus failed to meet the requirement that the statement must be made in furtherance of the conspiracy. Rigid rules do not exist in this area and the question depends on an analysis of the totality of the facts and circumstances in the case. (*Ibid.*)

Here, the object of the conspiracy was the abduction of Nicholas Markowitz as extortion to enforce the debt Jesse Hollywood believed he was owed by Ben Markowitz. At the time appellant joined the conspiracy, its object remained the abduction of Nicholas, regardless of the fact that appellant's specific role in the conspiracy was to permanently silence

Nicholas by murdering him. All of the statements admitted by the conspiracy participants were relevant to the conspiracy and were made in furtherance of the conspiracy. When appellant claims otherwise , and alleges that "[n]one of the statements . . . related to a conspiracy "in which appellant participated (AOB 129), he makes a conclusory claim; he fails to identify any specific witness statement that was unrelated to the conspiracy, much less does he show that he objected to any statement at trial as inadmissible. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 300.) And, oddly, appellant cites no state law in support of this claim.

Appellant also claims, incorrectly, that Ninth Circuit precedent "controls" on this claim. (AOB 129.) He is wrong both as a matter of law, (*People v. Williams* (1997) 16 Cal.4th 153, 190 [decisions of lower federal courts interpreting federal law are not binding on state courts]; *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3 [decisions of lower federal courts are not binding, even on federal questions]), and on the facts. The case he cites, *United States v. Vowiell* (9th Cir. 1989) 869 F.2d 1264, held that statements made four days after a crime had ended were not made in furtherance of an earlier conspiracy. That case is irrelevant here.

D. The Trial Court Did Not Direct the Jury's Verdict

Appellant next claims, again relying on non-binding and distinguishable federal appellate cases, that the trial court here "directed the jury's verdict" on kidnapping and the special circumstance of kidnap-murder. He claims the lower court, when responding to a juror inquiry during guilt phase deliberations, "specially instructed the jury it could convict appellant on the basis of the prosecution's second-kidnap theory . . . [and] failed to clarify it could not convict appellant of kidnap if the movement of the victim during this 'second' kidnap was incidental to his pre-arranged murder, *and* that appellant could not be held strictly liable for an earlier kidnap by other participants based on his separate agreement to

kill its victim." (AOB 113; emphasis by appellant.) Appellant's claim was not preserved for appellate review, and is factually and legally meritless.

The jury asked the court a question, which prompted the following dialogue between the trial court and the foreperson:

> THE COURT: "Can appellant be involved on the basis of 207?"
>
> Now, I'm not quite sure about that. You do have in mind these instructions on lesser-included offenses, that if you don't find all the elements of a kidnap for ransom were met, then, but you still might find that the elements of a simple kidnapping are met. Now, what that -- what is it that you're asking me?
>
> JURY FOREPERSON [100321006]: Well, what our confusion is, is if the -- if the whole event from the 6th through the 9th meets the criteria of 209, but the defendant's participation would only -- could only be described as 207, we have a latitude to make that determination.
>
> THE COURT: You have to deal strictly with the defendant's participation. You have to think, now, while the -- you have to say, well now, what was this defendant's involvement? When did he become involved? What did he do? So you have to, obviously, limit it to him. And within the scope of the jury instructions, yes, you could -- *you could find him guilty of a lesser offense if you did not feel that as to him all of the elements of the greater offense were present.*
>
> JURY FOREPERSON [100321006]: So being a co-conspirator has nothing to do with it.
>
> THE COURT: It's not a conspiracy charge in that regard.
>
> MR. ZONEN: No.
>
> THE COURT: So, you're right. The co-conspirator instructions were given only for the purpose of allowing the jury to consider certain statements that were made by other conspirators.

(10RT 2219-2220, emphasis added.)

The trial court alluded to the "argument" the jury had heard as to whether the Los Angeles kidnapping was "ongoing" for purposes of evaluating appellant's liability, or whether, instead, "there was another kidnapping. Those were the issues that were presented to the jury. And I can only remind you of what those issues were. I can't answer that question for you." (10RT 2219.)

First, appellant never objected to the trial court's response to the jury question. He, therefore, failed to preserve the claim on appeal. (See *People v. Castaneda* (2011) 51 Cal.4th 1292, 1352 ["Defendant [waives claim that trial court erred in responding to a jury question] by agreeing with the trial court concerning the appropriate response to the jury's question"].)

Second, none of the alleged dangers claimed by appellant are present here. By its verdict, the jury obviously concluded -- unanimously -- that appellant was guilty of a murder committed during a kidnapping. At a minimum, that kidnapping occurred when appellant abducted Nicholas from The Lemon Tree Inn. When appellant now posits that the court's response to the jury precluded the jurors from acquitting appellant as an aider and abettor of the August 6 kidnap (AOB 130), he invents a scenario that has no relationship to the facts of this case. No one argued at trial that appellant was actively involved in the August 6 kidnapping. Nor was appellant convicted of kidnapping for ransom, a further indication that the jurors focused exclusively on *appellant's* role in the kidnapping. But in appellant's view, if a juror decided that the August 6 kidnapping had concluded, appellant would have been entitled to acquittal -- even though the evidence overwhelmingly established that appellant later abducted Nicholas from the Lemon Tree Inn and murdered him a short time later.

Appellant next claims, in an equally far-fetched assertion, that the trial court's response to the jury allowed a conviction even if appellant only asported the victim an insignificant distance. (AOB 130.) This claim, also

defaulted, is equally disconnected from the jury's inquiry and the court's response. And, in any event, there is no credible argument, supported by the record, that Nicholas was not transported a significant distance both on foot and by car. Appellant, while armed, took Nicholas from the Lemon Tree Inn to a car, and drove him to Lizard's Mouth -- in the Los Padres National Forest outside Santa Barbara. Appellant did not murder Nicholas either at the motel or anywhere near the motel. And he did not murder Nicholas at the entrance to Lizard's Mouth, but rather (under cover of darkness) took him a substantial distance into a secluded area of the forest -- 60 to 80 yards from the road, along a rock slope, a quarter-mile away from West Camino Cielo. (5RT 1024, 1031; 7RT 1533.) Appellant's claim that this movement "was not sufficiently substantial to constitute a kidnap" (AOB 130) is frivolous.

Additionally, appellant proposes that the trial court's response to the jury "precluded" appellant's acquittal of the special circumstance even if "the conduct which constituted the second-kidnap . . . was sufficiently independent of the murder. . . ." (AOB 130.) To the extent this claim can be understood, it is an oxymoron. Appellant's involvement in the kidnapping consisted of taking Nicholas a substantial distance and killing him. He was engaged for only that specific purpose. Of all the unsavory characters in this crime, he is the last person who could claim that his role was unrelated to the murder. The "danger" about which appellant warns -- that this Court "cannot be sure that the jury's verdict on kidnap and kidnap-murder charges was based on legally adequate evidence . . ." (AOB 131) is only appellant's invention. No rational juror would have harbored any doubt about the purpose of appellant's kidnapping. In any event, the court's response just told the jury to decide the case based on the jury's factual findings and did not tell the jury how to find those facts.

E. The Trial Court Had No Duty to Give a Unanimity Instructions

For the same reasons, appellant's arguments regarding the need for a unanimity instruction (AOB 132) are meritless. Citing no state law and no binding federal law and, instead, relying on distinguishable, non-binding, out-of-state cases, appellant theorizes that different jurors might have believed different scenarios relative to the facts underlying a kidnapping. But all of appellant's proposed scenarios share one element -- they ignore the facts of this case. Those facts establish that appellant arrived at the Lemon Tree Inn with the TEC-9 semi-automatic weapon for the sole purpose of taking Nicholas (AOB 133) from there and killing him in a remote forest. He promptly did so. Musings about whether some hypothetical juror hypothetically decided that appellant was somehow strictly liable for a kidnapping that had ended before appellant's arrival (AOB 133) at the Lemon Tree Inn to transport Nicholas is an exercise divorced from the reality of the facts established at trial. The court told the jury to decide whether appellant was guilty of kidnapping based on his own conduct. Thus, the strict liability scenario feared by appellant overlooks the court's specific response to the jury and the jury instructions.

V. APPELLANT'S STATEMENTS TO POLICE WERE PROPERLY ADMITTED

Appellant claims that audio and videotape evidence of his incriminating admissions to the police should have been excluded at trial. (AOB 134-183.) Despite appellant's arguments to the contrary, the evidence was properly admissible. Appellant on his own initiated the contact with the police; he was advised of, understood, and explicitly waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]); and he never unequivocally sought to cut off questioning. The trial court, who offered to hold an evidentiary hearing but

was rebuffed by appellant's own counsel, properly admitted evidence of the statements.

A. Appellant's Incriminating Admissions

According to the audio and videotapes, appellant started off by explicitly acknowledging to Detectives Reinstadler and West that, after previously asking to consult with a lawyer before questioning, he sought out a jail guard in order to arrange a new meeting where he could speak to a detective. (1CT 2A 153-154.) Detectives Reinstadler and West then re-advised appellant of his *Miranda* rights in a manner not challenged in this appeal and appellant explicitly acknowledged that he understood his rights but that he nonetheless wished to speak with the officers. (1CT 2A 155.)

Detective Reinstadler told appellant that, from many police interviews, he knew that appellant had killed the victim and that he now wanted to find out from appellant "how it went down." (1CT 2A 157-159.) Appellant asked, "Do you mind if I go back to my cell and think about it and talk to you guys tomorrow." (1CT 2A 161.) Detective Reinstadler responded that there was "no way I can talk to you tomorrow," explaining that, by then, "somebody's gonna get to you, telling you not to talk to us." (1CT 2A 161.) "And then," the detective continued, "the next thing you know, you're looking at being a triggerman" with "[n]o explanation." (1CT 2A 162.) Appellant asked whether it would be "said in court" that he had talked to the police and claimed that "it would be easier for me if I, if I knew I didn't have to say it in court." (1CT 2A 162, 164.) The detectives explained, "You may have to say in court yourself what you're going to tell us"; and appellant acknowledged that he understood "you can't promise me that." (1CT 2A 162, 164.) Appellant lamented that he was "going down for life." Detective Reinstadler said, "There's a difference between life and

the death penalty. And everything else in between. All we want is the truth." (1CT 2A 163.)

Then, under questioning, appellant admitted that he owed Hollywood "a lot of money"; that "an intermediary" had approached him and offered him a way to "erase" the debt; and that appellant understood that he was being asked to kill Nicholas. (1CT 2A 169-172.) Appellant said he arrived at the assigned spot, the Lemon Tree Inn, in "Casey's car" and found a gun there waiting for him. (1CT 2A 175-176.)

When the detectives followed up, appellant responded: "You guys know what happened. I think I am going to stop there for now. Can I get some more water, please?" (1CT 2A 177.) After giving him the water, Detective Reinstadler reminded appellant "that you can stop talking to us at any time" as a matter of right, and observed that it appeared to him that appellant was not going to "tell us something that may be different than what we do know." Detective West asked whether appellant desired merely to take a short break as opposed to "telling us you don't want to talk anymore, period." (1CT 2A 178-179.) Appellant said he was "talking about between now and tomorrow." (1CT 2A 179.) Again, Detective Reinstadler said that would be "too late," explaining again that, "once the lawyer contacts you, we are precluded from speaking with you anymore, period." (1CT 2A 179.) Detective Reinstadler reminded appellant that it was he who had arranged to speak with them. Detective West suggested that appellant ask himself "what can you say that would be able to help you out." (1CT 2A 180.) Detective Reinstadler noted, "If you were under the gun and someone's threatening you, these are things that all weigh on decisions as to why things happen." (1CT 2A 180.) When appellant mentioned a possible prison or death sentence, Detective Reinstadler said, "It could be life. There's all different degrees depending on what the district attorney feels was the motivation for this killing." (1CT 2A 181.)

Appellant opined, "There's no way he cuts this down to manslaughter." (1CT 2A 181.)

Detective Reinstadler asked, "[W]ho do you feel sorry for here?" Appellant replied, "The kid that I buried." (1CT 2A 181-182.) Under further questioning, appellant first denied putting duct tape on the victim's mouth. (1CT 2A 182.) "The only thing I did," appellant said at first, "was kill him." (1CT 2A 183.) But then he admitted that he also had put duct tape on the victim's mouth, temporarily, while at the hotel. (1CT 2A 183.) Appellant asserted that it had not been his idea to take the victim to the gravesite "above Santa Barbara," and said, "I didn't want that fucking guy there in the first place." (1CT 2A 184, 186.) Appellant indicated that Graham Pressley had picked the spot, that Pressley knew what was meant to happen there, and that Pressley had induced the victim by threats to dig his own grave. Appellant denied that he had made such threats himself. (1CT 2A 187.)

Following this, appellant said, "You guys, I think I want to stop there. I think you guys got a pretty good picture." (1CT 2A 189.) Detective West remarked that the picture was "pretty grim." (1CT 2A 189.) After discussions about his arraignment, appellant asked, "I didn't help myself at all tonight, did I?" (1CT 2A 190.) Detective Reinstadler said, "I think you could have maybe. But -- ." (1CT 2A 190.) Appellant responded, "All I did was tell you what you already knew." (1CT 2A 190.) The detective replied, "A lot of it." (1CT 2A 190.) Detective Reinstadler asked, "So you can't help us find Jesse, huh? Nobody knows where he's at? How about a clue? Steer us in the right direction." (1CT 2A 191.) Appellant inquired about the "odds" that giving a clue would "show up in court." Detective Reinstadler said, "I can't tell you. It couldn't hurt." (1CT 2A 191.) The conversation drifted for a few moments to other topics, such as what appellant would wear in court and whether he could make a

phone call to Sheehan from the jail. Appellant claimed that Hollywood had "nothing to do with this." (1CT 2A 195.) The detective retorted, "So the one guy that ordered this up that's taking your life away is going to get away. That's what you're telling me." Appellant did not answer. Detective Reinstadler then asked appellant whether, before pulling the trigger, he ever thought, "This is wrong." (1CT 2A 195.) Appellant said, "Hell, yes. Right before." (1CT 2A 196.)

Based on the tapes of the actual conversation between appellant and the detectives, the trial court properly ruled evidence of appellant's statements admissible at trial. The record supports those rulings.

B. Appellant's Waiver and Statements Were Knowing and Voluntary

The test for determining the voluntariness of a suspect's custodial statement is whether the statement is "the product of a rational intellect and a free will." (*Mincey v. Arizona* (1978) 437 U.S. 385, 398 [98 S.Ct. 2408, 2416, 57 L.Ed.2d 290, 304].)

That appellant understood his *Miranda* rights is evident by the following facts: the police properly read him his rights in the language contemplated by *Miranda*; he explicitly acknowledged that he understood them; and he actually had invoked them prior to his re-initiation of contact with the police. Indeed, appellant on appeal asserts that he actually invoked them again in his conversation with the detectives. As also evident from the tapes and the transcript, appellant understood that his statements to the police would be used in court. He repeatedly lamented the fact that he would be identified in court as the source of the information he was providing to the police, acknowledged his understanding that the detectives could not promise him otherwise, and throughout the questioning obviously sought to cut his story to avoid being the source of information identifying

Hollywood as an integral player in the sordid murder. His answers to the detectives' questions, further, were at all times logical and responsive.

Nor did the detectives coerce appellant. They re-read appellant his *Miranda* rights, designed to neutralize compulsion, and further reminded him of those rights at other points in the questioning. They paused in their questioning when appellant indicated he wanted a break. They gave him water when he asked for it. There is no indication that they ever touched him or displayed weapons in any way, intimidating or not. They never threatened him and they never promised him anything in return for his statements.

Appellant himself never testified afterward that he felt threatened by the police, induced to speak by any promises, or coerced in any way. Nor did he ever testify that he somehow had misunderstood his properly-framed *Miranda* rights.

C. Appellant's Challenges to the Admissibility of His Statements Are Meritless

Appellant raises numerous challenges to the receipt into evidence of his incriminating admissions. None has merit.

1. Claimed procedural violations and appellate review exception

Appellant argues that the trial court erred in ruling on the suppression-of-evidence motion without an evidentiary hearing. (AOB 157.) But he acknowledges that the judge offered to hold such a hearing and that the defense never took up the judge on the offer. (AOB 158.) In any event, the judge reviewed portions of the transcripts and tapes of the exchanges between appellant and the detectives. So there was an evidentiary hearing based on the only evidence the parties submitted to the court.

Somewhat similarly, appellant argues that evidence of his alleged mental impairments -- evidence produced only later at trial and well after the pre-trial suppression ruling -- somehow should have informed the judge's ruling on the suppression motion. (AOB 135-136.) But, although he mischaracterizes the rule as a mere "custom," he cites case law that makes it clear that the trial court's decision is to be reviewed on the basis of the evidence presented to that court at the time. Appellant suggests that this appellate rule of contextual review should be violated here just because he thinks evidence produced later in the trial has some bearing on the *Miranda*/voluntariness question. (AOB 137.) Thus, in truth, he seeks an exception that always would swallow the rule, i.e., he seeks to invalidate the rule itself. But the rule is a natural and universal one. (*People v. Price* (1991) 1 Cal.4th 328, 288; *People v. Balderas* (1985) 41 Cal.3d 144, 171; *People v. Tolliver* (2008) 160 Cal.App.4th 1231, 1237, fn. 9; *People v. Garry* (2007) 156 Cal.App.4th 1100, 1105, fn. 2; *People v. Gibbs* (1971) 16 Cal.App.3d 758, 761.) Appellant offers no justification for overruling the case law that recognizes the rule.

2. Claimed invalidity of *Miranda* waiver

Appellant argues that, by "facilitating" a phone call to appellant from his mother, the police improperly orchestrated pressure on him to make his request to re-initiate conversation with the detectives. (AOB 163.) But the record shows merely that the police were aware beforehand that appellant's mother wanted to call him and that they taped the call. (8RT 1619.) There is no indication that the police prompted the mother's call, instructed her about what to say, or knew what she was going to say. (Cf. *United States v. Henry* (1980) 447 U.S. 264, 273-275 [100 S.Ct. 2183, 65 L.Ed.2d 115] [mere "listening post"].) If the police had interfered with the mother's attempt to phone her son, appellant doubtlessly would now be claiming an impropriety warranting the invalidation of his *Miranda* waiver.

Moreover, any importuning by his mother would not have amounted to, and could not have been perceived by appellant as, coercion or compulsion by the police, which is all the United States Constitution is concerned with in this context. (See *Colorado v. Connelly* (1986) 479 U.S. 157, 165-167 [107 S.Ct. 515, 93 L.Ed.2d 473].) So, even if it played a role in appellant's thinking, it could not play a role in permitting suppression of his statements to the detectives. (See Cal. Const., art. I, § 28(d).) Nor, in any event, did appellant ever testify that his mother's statements prompted or even influenced his decision to re-initiate contact with the detectives and then to waive his *Miranda* rights and answer their questions. Without reason to believing that the alleged pressure actually influenced his decision, appellant's challenge must fail. (See *People v. Lucas* (1995) 12 Cal.4th 415, 442; *People v. Benson* (1990) 52 Cal.3d 754, 781.)

Appellant argues that his alleged mental deficits rendered him incapable of waiving his *Miranda* rights after he had re-initiated his conversation with the police. (AOB 130-136, 163-164.) Again, however, no evidence of this was presented to the court at the suppression hearing, so it may not be considered as grounds to upset the trial court's ruling. Even if the cited evidence were considered, it would not refute the clear evidence, manifest in the taped record of the questioning itself, that appellant understood his rights when he waived them. As noted above, he earlier had proved able to invoke his right to counsel to cut off questioning. He was manifestly well-oriented and responsive during the questioning and he clearly understood the connection between what he was saying to the police and the use of that information at his trial. In the event, he proved sophisticated and canny enough to shield Hollywood from any finger-pointing that could be traced directly to his statements to the police. Nothing in the subsequently adduced trial testimony by the psychological expert, in any event, directly addressed itself to the circumstances leading

up to appellant's waiver of his *Miranda* rights and his decision to speak with the detectives.

Appellant portrays himself as bewildered at the time by the consequences of his waiver. (AOB 164-167.) Of course, he never testified that he was bewildered. To the contrary, the tapes and transcript of the questioning show that appellant acknowledged that he understood the proper *Miranda* warnings he received. That he occasionally made equivocal statements about whether he wanted a break in the questioning shows, if anything, that he understood that the decision remained in his control. Indeed, the detectives reminded him of that right as the questioning progressed. (See, e.g., 1CT 2A 154, 155, 178, 179, 189, 190, 192.) Appellant in his brief seeks to school the police about precisely the words they should have used in the face of appellant's equivocation about continuing to answer questions at given points in the interrogation. But, following initial waiver of *Miranda* rights, the police may continue questioning a suspect unless and until he unequivocally re-asserts his rights. No further prohylactic is required. (*Berghuis v. Thompkins* (2010) __ U.S. __ [130 S.Ct. 2250, 2259-2260, 176 L.Ed.2d 1098]; *Davis v. United States* (1994) 512 U.S. 452, 461-462 [114 S.Ct. 2350, 129 L.Ed.2d 362].) Despite appellant's argument to the contrary, there was nothing wrong in the police refusing to agree to reschedule and resume questioning him the following day. *Miranda* allows the suspect to avoid police interrogation, but it does not give him a right to demand it on his terms.

Appellant complains that Detective Reinstadler misadvised him when he asked, "if I talk, does my name, do I, does it get said in court that I said it?" (AOB 141-142, 165.) Appellant apparently was reluctant to have others learn that he was the source of the information he was giving to the police. So, in context, the detective's answer, "it depends on what it is and the situation," was accurate and unobjectionable. Nor did the detective's

statement contradict the *Miranda* warning that the suspect's statements would be used in court, for he never assured appellant with respect to any particular statement that appellant somehow did not remain at risk of that.

Appellant also cites an exchange near the end of his conversation with the detectives, where he asked if he needed to "call" a lawyer or if the lawyer will come to him; the detective told him that he either could call one or wait for one to be appointed for him at the arraignment. He claims that this exchange shows that he misunderstood his *Miranda* rights and that the detective misrepresented those rights to him. (AOB 165.) But appellant wrenches the exchange out of context. At that point, the police were not interrogating him. The topic of discussion had switched to appellant's concerns about "warning" his lawyer about his statements prior to the future arraignment. (2CT 2A 336.) That is, it did not involve the *Miranda* concern of whether appellant wanted a lawyer prior to or during questioning. It therefore showed no misunderstanding by appellant of his *Miranda* rights. And, in the event, no further questioning ensued and no further statements were elicited from him.

3. Claimed police coercion

Appellant asserts that the detectives coerced him by telling him that they possessed damaging evidence against him, exaggerating in that regard, and by telling him that he therefore "needed" to tell them his side of the story. But suppression of a statement is not required just because the police tell a suspect that they possess incriminating evidence against him, or exaggerate, or even misrepresent what information they possess. (*People v. Jones* (1998) 17 Cal.4th 279, 299; *People v. Thompson* (1990) 50 Cal.3d 134, 167.) Such tactics are relevant only insofar as they might produce a false confession. (*Ibid.*) Nor, is it improper for the police to exhort the suspect to tell the truth or to tell him that it would be in his best interests to

tell the truth. (See *People v. Seaton* (1983) 146 Cal.App.3d 67, 74; *People v. Andersen* (1980) 101 Cal.App.3d 563, 578.)

Appellant retorts that the police parlayed this information into a "threat" when they told him that he "needed" to give them his side of the story. Thus, in his view, the police falsely implied that appellant would have no other opportunity and that the police would "comment" on his silence at his trial. (AOB 169.) Appellant's reading of these statements, however, is unrealistically tendentious. In any event, it is not improper for the police to speak of the interrogation as the suspect's "one opportunity" to tell the truth (see *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1279, 1282), or as his "last chance" to come forward (*United States v. Gamez* (9th Cir. 2002) 301 F.3d 1138, 1144).

Appellant says that the detectives made "promises and threats regarding the penalty consequences" of remaining silent. (AOB 172-174, 180.) He asserts that they improperly deceived him by telling him that duress was a defense to special-circumstance murder and that there are degrees of premeditated murder. (AOB 173.) It is true that Detective Reinstadler told appellant that "premeditated murder means different things . . . If you were under the gun and someone's threatening you, these are things that all weigh on decisions as to why things happen." (1CT 2A 180.) He also said, a few moments later, that "there are different degrees on what the district attorney feels was the motivation for this killing." (1CT 2A 181.) But these statements were not false; they did not promise appellant anything and they did not threaten him with anything for declining to speak.

Even where a killer premeditates, it would bear at least on the charging decision and on the penalty decision whether he had killed in response to duress. There is nothing wrong with pointing that out to a suspect. (*People v. Holloway* (2004) 33 Cal.4th 96, 115-116.) Nor, in any

event, did appellant ever claim that he felt threatened by such statements, or that he interpreted them as promises, so as to affect his decision to speak rather than to remain silent. In the absence of such evidence, the claim of threats and coercion fails. (*People v. Lucas, supra*, 12 Cal.4th at p. 442.)

4. Claimed "invocations" of rights

Appellant claims that the police improperly continued to question him after he had invoked his right to cut off questioning. He cites, first, his statement, "Do you mind if I go back to my cell and think about it tonight and talk to you guys tomorrow." (AOB 168.) But the police must stop questioning only when the suspect unequivocally invokes his right to silence or to counsel. (*Berghuis v. Thompkins, supra*, 130 S.Ct. at pp. 2259-2260; *Davis v. United States, supra*, 512 U.S. at pp. 459-461; *People v. Martinez* (2010) 47 Cal.4th 911, 947-949.) Appellant's "Do you mind?" statement here was hardly an unequivocal invocation. Moreover, in referring to his willingness to continue talking "tomorrow," appellant's statement did not reflect a clear intent to cut off questioning entirely. (See *People v. Castille* (2005) 129 Cal.App.4th 863, 885; *United States v. Al-Muqsit* (8th Cir. 1999) 191 F.3d 928, 936-937; see also *People v. Martinez, supra,* 47 Cal.4th at pp. 950-952; *People v. Rundle* (2008) 43 Cal.4th 76, 116.)

Appellant next cites his later statement -- "You guys know what happened. Think I'm going to stop there for now. Can I get a drink of water, please?" -- as a second unequivocal invocation of his *Miranda* rights. (AOB 169-170.) But this statement was not unequivocal either: appellant spoke only of stopping "for now" and further indicated that stopping was merely to get a drink of water. Moreover, instead of continuing with questions, Detective West sought to clarify whether appellant desired merely to take a short break as opposed to "telling us you don't want to talk anymore, period." (1CT 2A 178-179.) Appellant

confirmed that he was only "talking about between now and tomorrow." (1CT 2A 179.) With this statement, it remained at least ambiguous, rather than unequivocal, whether appellant meant to cut off questioning entirely. (See, e.g., *People v. Martinez, supra*, 47 Cal.4th at pp. 950-952.) Detective Reinstadler again informed appellant -- properly, -- that tomorrow would be too late.

Appellant says that his later statement, "All right. You guys, I think I want to stop there. I think you guys got a pretty good picture" (1CT 2A 189), amounted to an unequivocal invocation. (AOB 170.) Even if it did, however, there was no error in admitting evidence of appellant's subsequent statements at trial -- implying that he might help if he were not identified in court as the source of any "clue"; denying that Hollywood was involved; and acknowledging that, right before pulling the trigger, he realized it was wrong -- were not admitted against him as substantive evidence of guilt in the prosecution's case-in-chief. For they were admitted into evidence only after appellant, taking the stand in his defense case, contradicted his recorded statements. (8RT 1691-1695.) As appellant apparently acknowledges (AOB 176, 181), *Harris v. New York* (1971) 401 U.S. 222, [91 S.Ct. 643, 28 L.Ed.2d 1] permits the introduction of a suspect's un-coerced statements, even if obtained in violation of the prophylactic rule, to impeach the suspect's testimony after he takes the stand at trial. Here, as the trial court recognized, the latter statements -- that appellant thought about it being wrong before pulling the trigger -- were admissible to impeach appellant's testimony that he did not kill the victim and that he did not pull the trigger.

Appellant retorts that the evidence should have remained inadmissible, even if it would have impeached his trial testimony, because the police deliberately had questioned him "outside *Miranda*" in an effort to obtain impeachment evidence from him. (AOB 176.) He misplaces

reliance for this proposition on *Missouri v Siebert* (2004) 542 U.S. 600 [124 S.Ct. 2601, 159 L.Ed.2d 643]. (See also *People v. Peevy* (1998) 17 Cal.4th 1184.)

The holding in *Siebert* must be gleaned from the crucial fifth vote provided by Justice Kennedy's somewhat cryptic concurring opinion. (See *Marks v. United States* (1977) 430 U.S. 188, 193 [97 S.Ct. 990, 51 L.Ed.2d 260].) That holding may be stated as follows: where the police fail to abide by *Miranda* as part of a deliberate two-step plan to elicit an incriminating statement that later might be repeated by the suspect in an admissible form after proper *Miranda* warnings, then such subsequent statements related to "the substance of the pre-warning statement" will be deemed inadmissible, even if un-coerced and voluntary, in the absence of sufficient "specific, curative measures" to ensure that a reasonable suspect would appreciate that his *Miranda* rights were not diminished by his prior statement. In *Siebert*, the United States Supreme Court disallowed impeachment evidence of a suspect's statements because the police had engaged in such a two-step process. (*Siebert, supra,* 542 U.S. at pp. 608-610.)

Here, however, appellant never challenged the admissibility of his statements below on the ground that the police had engaged in any policy or practice of deliberately violating *Miranda*. At least two consequences follow from that failure. First, the failure to object on those grounds forfeits the claim on appeal. (Evid. Code, § 353, subd. (a); *People v. Jones, supra,* 17 Cal.4th at p. 299, fn. 1.) Second, the record contains no evidence of a *Siebert*-violative policy or practice on the part of the detectives. Instead, the record shows that, rather than obtaining from appellant an unwarned statement that arguably might have played a role in defeating any belief that a later or continued invocation of *Miranda* would be effective, the detectives repeatedly advised appellant of his *Miranda* rights and secured his express waiver of them before questioning him and obtaining

incriminating statements from him. In other words, there was no deliberate two-step plan as in *Siebert*, as proper *Miranda* warnings preceded the interview. Even if the detectives were now deemed to have failed to infer that appellant meant to invoke his rights, nothing indicates that such any failure was deliberate rather than in good faith. Even when broaching the subject of a possible break in the questioning, appellant employed indirect or ambiguous language short of explicitly refusing to answer further questions.

Appellant further retorts that there was no sufficient jury instruction limiting the use of his latter statements as impeachment of the credibility of his testimony rather than as substantive proof of guilt. (AOB 156.) But the trial judge indeed instructed the jury that out-of-court prior inconsistent statements should be considered only for the purpose of testing his credibility as a witness and not as proof of guilt. (10RT 2168.) Appellant complains that the instruction did not identify the precise statements subject to the limitation. But, to the extent it did not do so, the limiting instruction could only have inured to appellant's benefit by over-inclusiveness. In any event, the alleged post-invocation evidence became admissible under *Harris* as impeachment after appellant took the stand and offered a different version of events. It remained appellant's responsibility to seek a more specific limiting instruction later at the end of trial. (See *People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3; *People v. Freeman* (1994) 8 Cal.4th 450, 495.)

D. Harmless Error

In any event, admission into evidence of appellant's statements is subject to review for harmlessness. That is, such evidence received in violation of the federal Constitution will not affect the judgment if the error proves harmless beyond a reasonable doubt. (*Harrington v. California* (1969) 395 U.S. 250, 258 [89 S.Ct. 1726, 23 L.Ed.2d. 284]; *Arizona v.*

Fulminante (1991) 499 U.S. 279, 306-312 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

Although appellant asserts that his statements were crucial to his conviction, he offers no explanation for his assertion. (AOB 184.) And he ignores the testimony of Casey Sheehan. Sheehan testified that when he discovered that the Honda Accord he had loaned to Hollywood had been returned, he also found several people at his apartment: appellant, Hollywood, Lasher, and Skidmore. Sheehan asked appellant if there was a problem with Nicholas. Appellant replied, "Not anymore." (6RT 1287, 1295.) Between 5:00 and 6:00 p.m. that evening, Sheehan accompanied appellant as he went shopping for clothes. Appellant bought some shirts, pants, and a pair of shoes, and he paid cash. Appellant spent a couple of hundred dollars. (6RT 1300-1301, 1367.) Appellant told Sheehan that "a problem was taken care of. The problem in Santa Barbara." (6RT 1291, 1369.) Sheehan asked appellant what sort of a problem. Appellant responded that there were some things best left unsaid. (6RT 1292.) When Sheehan pressed appellant to be more specific, appellant told him that Nicholas had been killed. (6RT 1300.) He said, "We killed him." (6RT 1300.) Appellant told Sheehan that his outstanding debt to Hollywood "was taken care of." (6RT 1301.) This testimony of Sheehan -- ignored by appellant -- renders utterly harmless any alleged error in admitting appellant's custodial statements.

VI. THE TRIAL COURT DID NOT "COMPEL" APPELLANT TO TESTIFY

Appellant contends the trial court "compelled" him to testify in order to lay a foundation for his expert's claim regarding the theory of false confessions. He claims the trial court's ruling violated two United States Supreme Court decisions. (AOB 185-223.) The claim has not been preserved for appellate purposes and is meritless.

A. Factual Background

At trial, the court considered the proposed testimony of defense witness Dr. Kania, a psychologist called to testify that in his opinion, appellant had falsely confessed. The prosecution moved to limit the scope of Dr. Kania's testimony and the trial court held an Evidence Code section 402 hearing on the motion. Dr. Kania testified at the hearing and was cross-examined prior to the following colloquy regarding the permissible scope of Dr. Kania's trial testimony:

> THE COURT: It's not necessary for him [Dr. Kania] to testify as to the things that [appellant] told him during the interview about the circumstances of his interview about his reaction to the interview, he's going to testify to that I assume. I've been operating on that impression. So that, essentially, it's going to be, at most it will be some hypothetical questions assuming he had amnesia, what characteristic, what would be, how would that fit in with these characteristics that you've described? Well, anxiety will sometimes do that. That's what I'm talking about. He's already testified. I'm not going to let him testify as to circumstances, the things that he was told by [appellant]. [Appellant] can testify to those things and he can be asked questions about it. And I don't intend to allow him to give evidence -- an opinion as to the ultimate issue, which is whether or not [appellant] gave a false confession. That's a credibility call for the jury based upon all the circumstances. That's kind of the way I see it.
>
> MR. CROUTER [DEFENSE COUNSEL]: If I might. We believe that he should be able to testify regarding the ultimate issue, but, however, the Court's made your ruling, we submit to that.
>
> THE COURT: I haven't finally made it yet, but that's the way I'm leaning.
>
> MR. CROUTER: I see that.
>
> THE COURT: All right. Mr. Zonen, again, state specifically the limitations you would like to have me place on this witness.

MR. ZONEN [THE PROSECUTOR]: I'd like the Court to allow the witness to be able to testify in a generic fashion what one would expect to find under circumstances of persons who are interrogated in a criminal interrogation who give false confessions. I believe that he should be allowed to testify that based on his evaluation of [appellant], [appellant] has some or a number of characteristics that you would tend to commonly find among people who give false confession. I don't believe that this witness should be allowed to give any evidence as to the ultimate opinion as to whether or not this is a false confession or any part thereof. Or testify, effectively, on behalf of [appellant] as to his innocence in this case.

THE COURT: No, I agree with that.

MR. CROUTER: I do, too. He can't testify regarding innocence or guilt of [appellant]. And neither can, I think, he be cross-examined, certainly, in front of the jury about those kind of things. Such as, well, he didn't tell you certain things, or he told you certain things if they don't relate to this expert's area.

MR. ZONEN: Well, that I'm not certain about.

THE COURT: Well, that's -- you know, that's pretty tough to know in advance. If he relies upon statements made by [appellant] here in court, or if the statements given by [appellant] here in court are indicative of either the personality characteristics one might associate with a false confession, or are indicative of the kind of external pressures on someone that might give rise to a false confession, if he testifies to facts like that, then, obviously, and expresses his opinion that those are indicative, Mr. Zonen is entitled to cross-examine on it.

MR. CROUTER: Yes.

THE COURT: I don't know what else he's going to testify to. But anything that this witness is allowed to testify to as representing information upon which he relied that came from [appellant] then Mr. Zonen is entitled to cross-examine on it.

MR. CROUTER: I agree.

THE COURT: And if [appellant] gets up and says, "I didn't do this, I wasn't even there," and somehow this is

something that this witness relies on, then Mr. Zonen is entitled to cross-examine on it.

MR. CROUTER: That's correct.

THE COURT: So I don't see where we've got a problem.

MR. ZONEN: All right.

THE COURT: But as to the ultimate issue, that's going to be up to the jury based upon the – so he can testify that, you know, that there's a serious school in his field that acknowledges, or that deals with the subject of false confession, that he's familiar with it, that he's had experience with it, he's read the literature and so on, that he's conducted certain tests with this witness, he's interviewed [appellant], and that some of the personality characteristics that might give rise to a false confession are these, [appellant], based upon the studies, does or does not display some of these characteristics, certainly the circumstances of an interview, if there's evidence, you know, if the interview was of long duration, if [appellant] is subject to anxieties, or pressures and things, these can give rise to these kind of confessions, those are general things that he can testify to.

MR. CROUTER: Yes.

THE COURT: And then to the extent that [appellant] has testified and he can be asked about, you know, for example, this issue of if it turns out that there's a claim of amnesia about this. But as a general proposition -- but, ultimately, I'm not going to allow him to testify, give any opinion as to whether or not [appellant] under the circumstances of this case gave a false confession.

MR. CROUTER: Very well. We understand your ruling. We object to it on state and federal due process grounds, but we accept it.

THE COURT: Mr. Zonen, are you -- is that pretty much what you're talking about?

MR. ZONEN: Yeah. Actually, it's not too bad. I assume we've just ended cross-examination of the foundational hearing.

THE COURT: Well, I didn't see any purpose in cross-examining him.

MR. ZONEN: It's all right with me. It's okay. We've resolved that issue.

But before Dr. Kania goes can we bring up another matter, and that deals with discovery. I filed a motion sometime a ago dealing with discovery of materials. I received a copy of an MMPI test result that I couldn't read.

(7RT 1511-1515.)

B. Appellant's Contention Was Not Raised at Trial and Lacks Merit

This Court reviews a trial court's ruling on expert testimony for abuse of discretion. (*People v. Watson* (2008) 43 Cal.4th 652, 693; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1205; *People v. McAlpin* (2004) 121 Cal.App.4th 1194, 1205.)

The entire premise of appellant's argument on appeal is that he was not necessarily going to testify at trial and only did so because the trial court "coerced" (AOB 205) him to choose between waiving his right against self-incrimination by testifying or forgoing any evidence in support of his claim that his confession was false (AOB 204). The premise is not supported by the record. The record does not indicate that appellant's decision to testify was premised on any ruling that some foundation was required for expert testimony, much less a ruling "compelling" appellant to testify. On the contrary, the record indicates that when the trial court observed that the court anticipated that appellant would be testifying, defense counsel did not correct the court, and did not even suggest (much less allege) that the court was forcing appellant to do so. The trial court merely observed, correctly, that appellant could not present his hearsay version of events through his expert.

Contrary to appellant's numerous representations on appeal (see, e.g., AOB 185), the defense did not allege prior to appellant testifying at trial that appellant was somehow being compelled to repudiate his confession or forego the defense expert's testimony. The defense did not claim that appellant was forced to choose one constitutional right over another. In other words, appellant did not assert below that he would be required to sacrifice his Fifth Amendment right to pursue his Sixth Amendment right to present a defense. (See AOB 185.) Rather, the only objection asserted by appellant below prior to his testifying was his claim that Dr. Kania should have been allowed to testify to the ultimate issue of whether appellant's confession was false -- a claim appellant has abandoned all appeal. As a result, appellant's 37-page discourse (see AOB 185-222) is a make-weight, and is not based on the portions of transcript he cites since the multiple theories contained in his appellate arguments were never presented below. His hyperbolic claim that the trial court's requirement of a foundation was akin to "the process of the ecclesiastical courts and the Star Chamber" (see AOB 205-206) is not fairly based on this trial record, and the record does not support the overheated claims introduced in this appeal.

Similarly, appellant did not allege at trial that his Fifth Amendment waiver at trial was invalid. (See AOB 186.) And other aspects of appellant's appellate arguments are also not based on the trial record. For example, appellant indicates in his brief that the defense did not intend to call him as a witness, and only did so when allegedly placed in a "vise" by a trial judge who was requiring appellant to choose one constitutional right over another. (AOB 185, 187.) Appellant cites no portion of the trial record showing that he was put to such a choice, much less that he objected to it.

To the extent that appellant refers to the trial record at all (see AOB 188-190), the record only reveals an unremarkable dialogue, set forth above, between the trial court and counsel in which the court observes that proffered expert testimony requires an adequate foundation. (7RT 1510-1515.) And the same record further shows -- as previously noted -- that appellant only objected to the extent the court indicated that the expert would not be able to opine that appellant's confession was false. The record also shows that appellant did not claim below (as he claims on appeal) that he "was made to testify prior to his pivotal witness Dr. Kania, and without prosecution disclosure of its experts' reports. . . ." (AOB 192.)

Similarly, appellant cites no part of the record supporting his allegation that "he was blindsided" by the prosecution's cross-examination of him (see AOB 195) and his allegation that he had "no notice" that the prosecution was countering his expert's opinion (see AOB 204). These claims, and the lengthy associated arguments appellant has developed on appeal, were not asserted to the trial court at the time any of the relevant rulings or testimony occurred. Appellant's speculative claim that when "he left the stand, his theory of the defense [was] in tatters" is, if true, attributed more properly to the strength of the prosecution's case and the unconvincing defense that appellant offered at trial, and not because appellant was unfairly made to choose between unconstitutional alternatives.

Within the appellate arguments that were not presented below, appellant now also claims that by compelling him to testify, the trial court effectively forced him to testify that his confession was untrue. According to appellant, this aspect of his trial testimony "did nothing to further his defense." (See AOB 193.) He is wrong, for several reasons. First, expert testimony regarding the possibility of a false confession was irrelevant absent a foundation for such a theory. Beyond appellant's self-serving

claim that the circumstances of his interview with police indicated his confession was false, nothing about that encounter objectively suggested it would have produced a false confession to murder. Therefore, some foundation was required. (See *People v. Ramos, supra*, 121 Cal.App.4th at p. 1201; *People v. Son* (2000) 79 Cal.App.4th 224, 240.) Otherwise, and if appellant were correct, a defendant could always present testimony regarding false confessions, even in those cases in which no evidentiary basis for such a claim remotely existed.

Appellant could have, but did not, argue to the trial court that a foundation for Dr. Kania's testimony could have been established by relying on the confession transcript and testimony related to that subject, or some other evidence, and that doing so would not require appellant to testify. Appellant failed to do so at trial. Moreover, as previously stated, the record does not support appellant's claim that a "ruling" of the trial court prompted appellant to testify. At most, the court assumed in its discussion as to the scope of Dr. Kania's testimony that appellant would be testifying. But the court never stated appellant's testimony was a prerequisite for the experts' opinions.

Appellant also claims the trial court's "ruling" violated *Crane v. Kentucky* (1986) 476 U.S. 683, 684, 690-691 [106 S.Ct. 2142, 90 L.Ed.2d. 636], in which the United States Supreme Court held that the manner in which a criminal defendant's voluntary confession is obtained is admissible to show that the confession is unreliable. (AOB 204.) According to *Crane*, "where the prosecutor's case is based on the defendant's confession, the defense must be permitted to delve into the circumstances under which the confession was secured." (*Crane, supra,* 476 U.S. at p. 689; *Ramos, supra,* 121 Cal.App.4th at p. 1205; *People v. Page* (1991) 2 Cal.App.4th 161, 185.) *Crane* does not, however, compel admission of all expert testimony relating to a false confession; it only precludes "blanket exclusion" of all

evidence relating to the circumstances of a confession. (*Ramos, supra*, at p. 1206; *Page, supra,* at p. 185.) And *Crane* does not apply in this case, as the court did not rule the false confession evidence was inadmissible unless appellant testified at trial.

In *People v. Page, supra*, 2 Cal.App.4th 161, the defendant confessed to a murder and recanted his confession shortly thereafter. The defense offered a psychologist to testify about the reliability of defendant's confession. In an evidentiary ruling challenged on appeal, the expert was allowed to testify regarding general principles of social psychology and the factors that might lead a person to give a false confession, but he could not relate those principles to the defendant's statement or render an opinion concerning the reliability of the defendant's statements. Specifically, the expert was not permitted to testify that certain psychological factors and characteristics of interrogation existed in the defendant's taped statements showing the confession to be unreliable. (*Id.* at pp. 180-183.)

The Court of Appeal in *Page* found that the testimony of defendant's expert had been properly restricted. The court emphasized that the determination of whether to exclude or permit expert testimony was within the discretion of the trial judge and nothing in the authoritative case law required the trial court to permit the expert to discuss the particular evidence in the case or give his opinion on the reliability of the confession. (*Page, supra,* 2 Cal.App.4th at p. 188.) Furthermore, the court reasoned such testimony may very well have been unnecessary as the connection between the expert's general testimony and the particulars of the case was for the jury to make. The court observed that the expert "outlined the factors which might influence a person to give a false statement or confession during an interrogation. Having been educated concerning those factors, the jurors were as qualified as the professor to determine if those

factors played a role in [defendant's] confession, and whether, given those factors, his confession was false." (*Id.* at p. 189.)

Page also pointed out that although the expert did not explicitly link these factors to the confession, the link was obvious and was specifically made by defense counsel in closing argument. (*Id.* at p. 186.) Unlike the defendant in *Crane,* the defendant in *Page* was not denied the opportunity to present a false confession defense. He was allowed to explore the physical and psychological environment in which the confession was made and the psychologist was allowed to testify as to the psychological factors that can lead to a false confession. (*People v. Page, supra*, 2 Cal.App.4th at pp. 185-186.) The same is true here.

In *People v. Ramos, supra,* the defendant was convicted of four counts of attempted murder based in part on his statement to police that, after an altercation with rival gang members, he aimed a handgun at the rival gang members' fleeing car and pulled the trigger but the gun did not fire. At trial, the defendant sought to introduce the testimony of an expert on police interrogation techniques and false confessions. The trial court excluded the expert testimony, finding no evidentiary basis for an opinion that the confession was false, notwithstanding evidence that the defendant made the confession based on promises of leniency. (*Ramos, supra,* 121 Cal.App.4th at pp. 1204-1205.)

The appellate court affirmed, reasoning that, unlike in *Crane,* the trial court did not make a blanket exclusion of all evidence related to the circumstances of the defendant's confession; on the contrary, the defendant introduced evidence of the interrogation techniques used on him and other witnesses. (*People v. Ramos, supra,* 121 Cal.App.4th at p. 1201; see also *People v. Son, supra,* 79 Cal.App.4th at pp. 240-241 [no abuse of discretion to preclude sociologist from testifying about police tactics used to wear

down suspects into making false confessions where there was no evidence that the police had engaged in any tactics to wear down the defendant].)

Plainly, *Crane* does not stand for the proposition that a defendant has the blanket right to call an expert to allege that the defendant's confession was false. The rule remains that expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) A trial court may exclude the testimony of a false confessions expert where the defendant's testimony about why he falsely confessed is easily understood by jurors. (*People v. Son, supra,* 79 Cal.App.4th at p. 241.) Here, there was no exclusion of the expert witness. Nor was there a "ruling" requiring appellant to testify in order to establish a foundation.

And the trial court's "ruling" in this case did not implicate *Brooks v. Tennessee* (1972) 406 U.S. 605 [92 S.Ct. 1891, 32 L.Ed.2d 358], the other Supreme Court case that appellant claims is relevant. (AOB 203.) In *Brooks,* the United States Supreme Court declared unconstitutional a Tennessee statute that required that a criminal defendant "'desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case.'" (*Brooks, supra,* 406 U.S. at p. 606.) The court found that this statute impermissibly restricted a defendant's right against self-incrimination by casting too heavy a "burden on a defendant's otherwise unconditional right not to take the stand." (*Id.* at pp. 610-611.)

The Supreme Court in *Brooks* reasoned that the decision whether to testify is important and difficult and poses serious dangers to the success of an accused's defense. At the close of the state's case a defendant may have some notion of the strength of his case but cannot be certain that his witnesses will testify as expected and he may, in some cases, be forced to call hostile witnesses whose testimony is even more difficult to predict.

Under such circumstances, the defendant might choose to "remain silent at that point, putting off his testimony until its value can be realistically assessed." (*Brooks, supra,* 406 U.S. at p. 611.) However, the Tennessee rule exacted too high a price for that silence by keeping the defendant off the stand entirely unless he testified first. The state's legitimate interest in preventing testimonial influence was not "sufficient to override the defendant's right to remain silent at trial." (*Ibid.*)

For similar reasons, the *Brooks* Court also found that the Tennessee statute infringed on a defendant's due process right. (*Brooks, supra,* 406 U.S. at p. 613.) Requiring the defense to make the important tactical decision as to whether the defendant will exercise his constitutional right before it could evaluate the actual worth of its own evidence restricted the defendant and his counsel in the planning of the defense case. Further, by requiring the defendant to testify first or not at all, the rule deprived the defendant of the assistance of counsel with respect to the "timing of this critical element of his defense." (*Ibid.*)

The trial court here did not violate *Brooks*. Appellant was not excluded from the stand. Nor was he forced to be the first witness in his defense case, or a witness at all. The *Brooks* court found that "the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand." (*Brooks, supra,* 406 U.S. at p. 613.) Here, no such restriction was imposed. The record simply does not establish that appellant was "forced" to do anything, much less make a decision that would violate *Brooks.*

Appellant also relies on *People v. Lawson* (2005) 131 Cal.App.4th 1242, which he describes as supporting his claim of compelled testimony. (See AOB 208.) In *Lawson*, the Court of Appeal reversed the defendant's conviction for possession of cocaine base because the trial court not only erroneously instructed the jury pursuant to the 1996 version of CALJIC No.

2.28 that the defense failed to provide discovery, but also excluded the defendant's sole witness from testifying, thereby forcing the defendant to testify and allowing the prosecutor to impeach the defendant with his prior convictions. (See *People v. Thomas* (2011) 51 Cal.4th 449, 482.) Those circumstances have no relevance here.

Appellant's reliance on *People v. Cuccia* (2002) 97 Cal.App.4th 785, is also misplaced. In *Cuccia,* the Court of Appeal held the trial court violated the defendant's constitutional rights by requiring him to testify out of order or rest his case when a scheduled defense witness could not be located. (*Id.* at p. 790.) That did not happen here.[19]

C. The Trial Court Did Not Unfairly Limit Appellant's Testimony

Appellant also claims that the trial court "unfairly limited" appellant's testimony regarding the circumstances of his confession, while granting the prosecutor latitude in cross-examination. (AOB 216.) But at no time did defense counsel timely object to either the trial court's rulings regarding the scope of cross-examination or the alleged inconsistency between rulings governing direct examination and cross-examination. As a result, this claim was not preserved for appellate review. (See, generally, *People v. Halvorsen* (2007) 42 Cal.4th 379, 413-414.)

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[19] Appellant does no better when he reaches to compare this case to out-of-state authorities. (See AOB 210-211.) In *State v. Kido* (App. 2003) 102 Hawai'i 369 [76 P.3d 612], a Hawaii state trial court was found to have violated the defendant's constitutional rights by requiring him to testify, if at all, prior to other defense witnesses. That did not happen here. And in *Childress v. State* (1996) 266 Ga. 425, 434-438 [467 S.E.2d 865], the Georgia Supreme Court ruled that the trial court had impermissibly forced a defendant to choose between foregoing relevant evidence and testifying. As the record here makes clear, appellant was not forced to make any such choice.

Citing *People v. Webb* (1993) 6 Cal.4th 493, 534, appellant claims that his right to testify was impermissibly "foreclosed or censored based on content." (AOB 216.) Appellant takes the Court's observation in *Webb* entirely out of context. The issue there was whether a defendant testifying in the capital phase of a penalty trial may testify in favor of a death sentence. The answer to that question is yes, for reasons that have absolutely nothing to do with the issue appellant raises in this case.

This Court in *Webb* invoked *People v. Guzman* (1988) 45 Cal.3d 915, in which a capital defendant described his life of tragedy and violent crime in great detail, and urged the jury to impose death to spare him from what he believed was an intolerable sentence of life imprisonment. This testimony was given over defense counsel's objection and in the absence of any other evidence in mitigation. In rejecting the claim that the penalty verdict was "unreliable," this Court in *Guzman* recognized that a competent defendant has a fundamental right to testify in his own behalf, even if contrary to the advice of counsel. (*Id.* at p. 962; accord *People v. Lancaster, supra,* 41 Cal.4th at p. 101.)

For obvious reasons, *Webb* is irrelevant here. Here, during appellant's testimony at trial, defense counsel attempted to elicit appellant's claimed recollection and interpretation of statements appellant had made during his recorded interview with investigators. *But this was the same interview about which appellant claimed he had no memory.* Therefore, in light of appellant's claimed memory loss, his attempt at trial to interpret those statements was -- as noted by the prosecutor and the trial court -- speculative and was irrelevant. Nonetheless, the court allowed defense counsel the extended opportunity to refresh appellant's recollection as to individual statements. And if refreshed, defense counsel was allowed to question appellant at length about appellant's interpretation of various statements he had made to investigators; and appellant testified at great

length regarding those statements. (See, e.g., 8RT 1729-1734.) Contrary to appellant's representation, there was no inconsistency in the manner in which the trial court allowed cross-examination on these subjects. And on cross-examination, appellant merely reiterated his claim of amnesia. (See, e.g., 8RT 1741.) In any event, the trial court acted well within its discretion in evaluating the permissible scope of examination. (See *People v. Farnam* (1993) 6 Cal.4th 494, 535.)

D. The Trial Court Did Not Curtail Dr. Kania's Testimony

Without including record citations to document his claim, appellant also complains that the trial court erred by "curtailing" the testimony of Dr. Kania. Appellant's Opening Brief does not identify any specific "rulings" in the record in this regard, either in appellant's rendition of the "facts" (AOB 199) or in appellant's "argument" on the point (AOB 217). Each point in an appellate brief must be supported by citation to the record. (Cal. Rules of Court, rules 14(a)(1)(B) and (C).) Failure to do so waives the claim of error on appeal. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Respondent should not be required to comb through appellant's 380-page opening brief in search of record references that are not included in the relevant portion of the brief, much less should a party be required to scour a record of thousands of pages in support of portions that might be relevant to an opponent's undocumented claims of error. Dr. Kania testified at length and provided a more than adequate context in which a jury could evaluate the reliability of his opinions. He read police reports, watched the videotaped confession and listened to appellant's phone call with his mother. Before testifying, he spoke with appellant for approximately 13 hours, and during that meeting he administered psychological tests to appellant. Dr. Kania's lengthy trial testimony did not indicate that his

evaluation of appellant, or his extensive testimony about that evaluation, had been curtailed in any meaningful way. (See 9RT 1883 1926.)

Next, appellant claims that Dr. Glaser was allowed to testify for the prosecution that appellant lacked credibility, while appellant was precluded from eliciting defense expert Dr. Kania's opinion that appellant's confession was false. (AOB 218-220.) This, according to appellant, created an unfair "asymmetry" between the parties in regard to the latitude given to testifying experts. (AOB 218.) Not so.

Appellant did not allege any such "asymmetry" at trial and therefore should not be allowed to do so on appeal. On the contrary, defense counsel *agreed* with the trial court that Dr. Kania had been allowed to testify that appellant had amnesia and that Dr. Kania thought appellant's claim of amnesia was credible. (9RT 1936.) And, in fact, Dr. Kania had so testified when in direct examination, he stated in no uncertain terms that appellant's claim of amnesia was "credible . . . ." (9RT 1914.) He also testified that he had been retained for the specific purpose of evaluating whether appellant's confession "was a true confession or a false confession . . ." (9RT 1892) and that appellant's "characteristics" were supportive of a false confession claim. (9RT 1911.) No rational juror would have doubted that Dr. Kania was testifying, in effect, that he endorsed the claims of false confession and amnesia. Moreover, there was no "asymmetry." Appellant is claiming that his expert should have been allowed to vouch for appellant's credibility, while the prosecution's expert should have been precluded from giving a contrary opinion. That sort of "asymmetry" is apparently not objectionable to appellant.

Finally, appellant claims the trial court erred in excluding Dr. Kania's proposed surrebuttal testimony. (AOB 220-221.)

The trial court is granted broad discretion to admit or reject surrebuttal evidence. (*People v. Marshall* (1996) 13 Cal.4th 799, 836.) In

exercising that discretion, a trial court may evaluate several factors including whether the evidence "should have been covered in the original case" (*People v. Lamb* (2006) 136 Cal.App.4th 575, 582), and the significance of the proposed evidence. (*People v. Marshall, supra,* 13 Cal.4th at p. 836.) On appeal, the trial court's ruling is only reviewed for abuse of its discretion. (*Ibid.*)

Appellant neglects to mention, when mischaracterizing the lower court's ruling (and omitting a record reference in support of his claim), that the trial court specifically and repeatedly found that (1) the proposed testimony was not proper surrebuttal and (2) the proposed testimony was in fact merely an attempt to anticipate the prosecutor's argument to the jury. Nor does appellant acknowledge that defense counsel *agreed with the trial court* that the proposed testimony was offered to counter an anticipated argument of opposing counsel. And appellant also neglects to point out that in response to defense counsel's request, the prosecutor volunteered to structure his argument to "avoid the controversy." (9RT 1999-2006.)

There was no abuse here.

E. Harmless Error

Assuming error only for argument's sake, it would be harmless. The Sixth and Fourteenth Amendments guarantee a state criminal defendant a meaningful opportunity to present a complete defense. (*Crane, supra,* 476 U.S. 683, 690-691.) However, the right to present relevant testimony is not without limitation. (*Michigan v. Lucas* (1991) 500 U.S. 145, 149 [111 S.Ct. 1743, 114 L.Ed.2d 205].) A defendant is not denied his right to present a defense "whenever 'critical evidence' favorable to him is excluded. . . ." (*Ibid.*) Although the "complete exclusion" of evidence establishing a defense may be a constitutional violation, the exclusion of defense evidence on a minor point is not. (*People v. Cunningham* (2001)

25 Cal.4th 926, 999; accord, *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

In this case, there is no possibility the trial court's alleged evidentiary rulings prejudiced appellant, whether tested under the state standard for evidentiary rulings (*People v. Cunningham, supra,* 25 Cal.4th at pp. 998-999; *People v. Watson* (1956) 46 Cal.2d 818) or the standard applicable had the rulings completely prevented appellant from establishing a defense. (*Crane, supra,* 476 U.S. at p. 691; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Here, there was no exclusion of defense evidence generally and no exclusion of expert testimony specifically. Appellant had the opportunity to dispute his admissions based on both his own trial testimony and the supporting testimony of Dr. Kania. And, since appellant's admissions were recorded, the jury had the opportunity to evaluate the false confession claim in light of the jurors' own evaluation of the recorded statements appellant made to investigators. It is important to remember what appellant would prefer to forget -- that appellant presented *his version* of events to the jury, as was his right. When he testified he told the jury, in no uncertain terms, that he did not remember either his post-arrest phone calls to his mother or the police interview. (8RT 1721.) Further, he conveniently claimed a blank memory starting with his arrest and continuing for the four days thereafter. (8RT 1749, 1758.) Appellant's insistence on that scenario was not predicated on any ruling of the trial court. If, as appellant now asserts, his claimed memory loss at trial "torpedoed" the defense (AOB 222), he has only himself to blame.

VII. ANY ERROR IN COMPELLING APPELLANT TO UNDERGO PSYCHIATRIC EXAMINATION WAS HARMLESS AS IT IS NOT REASONABLY PROBABLE THAT THE JURY WOULD HAVE OTHERWISE CREDITED APPELLANT'S INCREDIBLE CLAIM OF AMNESIA

Appellant contends that the trial court's order requiring appellant to submit to psychiatric examinations by experts retained by the prosecution violated his federal and state constitutional right to due process and his privilege against self-incrimination. (AOB 223-242.) Respondent submits there was no federal constitutional violation and any state law error was harmless.

Prior to trial, the prosecutor asked the trial court for an order compelling appellant to undergo a psychiatric examination conducted by a psychiatrist retained by the prosecution. The prosecutor contended the examination was warranted because appellant had placed his mental state in issue by alleging that his confession was false. As such, the prosecutor maintained, the People were entitled to have appellant independently examined. (6CT 1225.) Defense counsel objected to the People's request. (6CT 1593-1596.) The trial court granted the People's request to conduct a mental examination allowing the prosecution to rebut evidence of appellant's state of mind "by access to defendant's mind." (2RT 306; 5CT 1306.) Dr. Glaser and Dr. Chidekel conducted the ordered evaluation. Dr. Glaser, a psychologist, interviewed appellant and Dr. Chidekel, a neuro-psychologist, administered psychological tests to appellant and both testified in rebuttal, contrary to the opinion of appellant's expert, Dr. Kania. Dr. Kania had claimed that factors such as low self-esteem, sleep deprivation, and the stress of his distraught mother could have induced appellant into a false confession. (7RT 1502, 1515.)

A. *Verdin v. Superior Court*

Seven years after appellant's trial, this Court decided *Verdin v. Superior Court* (2008) 43 Cal.4th 1096. Verdin, who was charged with attempted premeditated murder and other crimes, announced his intention to assert a diminished actuality defense at trial. He intended to argue that his voluntary intoxication prevented him from forming the mental state required to establish the charged offenses. To establish this defense, Verdin intended to rely upon the report and testimony of Dr. Francisco Gomez, a psychiatrist who examined him and rendered opinions regarding his mental state at the time of the crimes. (*Id.* at pp. 1100, 1101.) The People, in turn, asked the trial court for Dr. Gomez's written materials (a request Verdin did not oppose) and for an order directing defendant Verdin to submit to a mental examination by an expert retained by the prosecution. (*Verdin, supra,* 43 Cal.4th at pp. 1100, 1101.) The trial court so ordered the mental examination, after which the defendant sought writ relief. Following the appellate court's denial of the writ, this Court granted review. (*Id.* at pp. 1101-1102.)

On appeal, Verdin contended that the trial court's order that he submit to a mental examination performed by an expert retained by the People was not authorized by state law. He also contended that if state law did authorize such an examination, it violated his state and federal constitutional rights. (*Verdin, supra,* 43 Cal.4th at p. 1102.) This Court held that a mandatory psychiatric examination constituted discovery within the meaning of the criminal discovery statutes (§ 1054 et seq.) and that those statutes did not authorize the trial court to order a defendant to submit to a psychiatric examination by an expert retained by the People. (*Verdin, supra,* 43 Cal.4th at pp. 1103-1109.) This Court concluded that cases such as *People v. Carpenter* (1997) 15 Cal.4th 312, *People v. McPeters* (1992) 2 Cal.4th 1148, and *People v. Danis* (1973) 31 Cal.App.3d 782, which the

People had relied upon to support their argument that the trial court was authorized to order the prosecution to be granted access to the defendant for a mental examination by a prosecution-retained expert because the defendant placed his mental state in issue, did not survive the passage of Proposition 115.[20] (*Verdin, supra,* at pp. 1106-1107.)

> Proposition 115
>
> also added chapter 10 to part 2, title 6 of the Penal Code, commencing with section 1054[, the criminal discovery statutes], establishing the procedures for, and limitations on, discovery in criminal cases. Section 1054 sets forth the purposes of this new chapter, including that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." [Citation.]

(*Verdin, supra,* 43 Cal.4th at pp. 1102-1103.)

Relying on the preamble to Proposition 115,[21] the People in *Verdin* argued that the express purpose of Proposition 115 would be thwarted by abrogation of the rule that a defendant who places his or her mental state in issue must submit to a mental examination by a prosecution expert.

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[20] On June 5, 1990, the electorate of this State approved Proposition 115, the Crime Victims Justice Reform Act. "'Proposition 115 added both constitutional and statutory language authorizing reciprocal discovery in criminal cases.' The new constitutional provision, article I, section 30, subdivision (c) of the California Constitution, declares that '[i]n order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the People through the initiative process.'" (*Verdin, supra,* 43 Cal.4th at p. 1102.)

[21] The preamble to Proposition 115 provides in part: "'[W]e the people further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a *quest for truth.*' [Citations.]" (*Verdin, supra,* 43 Cal.4th at p. 1107.)

(*Verdin, supra,* 43 Cal.4th at p. 1107.) The *Verdin* court rejected the People's argument, explaining:

> In order to effectuate the goals set forth in the preamble to Proposition 115, . . . the framers of that initiative did not authorize the judiciary generally to create appropriate rules governing discovery in criminal cases. Although we must interpret the statutes governing discovery in criminal cases, we are not at liberty to create new rules, undeterred to any statute or constitutional mandate. Instead, the framers of Proposition 115, by including the exclusivity provision of section 1054, subdivision (e), authorized *the Legislature* to create the applicable rules in the first instance. Only when interpreting a statute or where a rule of discovery is "mandated by the Constitution of the United States" (§ 1054, subd. (e)) does this court have a role. . . . We thus conclude that nothing in the preamble to Proposition 115 authorizes or justifies the judicial creation of a rule that a criminal defendant who places his mental state in issue may be ordered by the court to grant the prosecution access for purposes of a mental examination by a prosecution expert.

(*Verdin, supra,* at pp. 1107-1108.)

The *Verdin* court then summarized "that (1) any rule that existed before 1990 suggesting or holding a criminal defendant who places his or her mental state in issue may thereby be required to grant the prosecution access for purposes of a mental examination by a prosecution expert was superseded by the enactment of the criminal discovery statutes in 1990, and (2) nothing in the criminal discovery statutes (§ 1054 et seq.) authorizes a trial court to issue an order granting such access." (*Verdin, supra,* 43 Cal.4th at p. 1109.)

This Court in *Verdin* further concluded that no other express statutory provision authorized a mental examination by a prosecution expert (*Verdin, supra,* 43 Cal.4th at pp. 1109-1114) and that "nothing in the United States Constitution mandates the trial court's order that the People be granted access to [defendant] for purposes of a mental examination by a

prosecution expert on the ground that he intends to raise a mental defense." (*Id.* at p. 1115.) The court observed that

> [w]hile it is probable the People could more effectively challenge [defendant's] anticipated mental defense if a prosecution expert were granted access to him for purposes of a mental examination, that probability does not establish that denial of such access violates article I, section 29 of the California Constitution. Should [defendant] present a mental defense at trial, the People's strong interest in prosecuting criminals can often be vindicated by challenging that defense in other ways.

(*Verdin, supra,* at pp. 1115-1116.) In light of its conclusion, it was unnecessary for the *Verdin* court to determine whether the trial court's order violated defendant Verdin's constitutional rights. (*Id.* at p. 1116.) Although *Verdin* raised the possibility of constitutional infirmaries from compelled examinations, more recently, in *People v. Clark*, the Court decided that any error from improperly ordering the defendant to submit to a compelled mental health examination was an error of state law only and thus subject to the *Watson* standard of prejudice. (*People v. Clark* (2011) 52 Cal.4th 856, 940-941.)

Verdin compels the conclusion that it was error under state law to require appellant to submit to mental examinations by prosecution experts. This violation of the discovery statute is subject to the harmless error standard elucidated in *People v. Watson, supra,* 46 Cal.2d at page 836 (*People v. Zambrano, supra,* 41 Cal.4th at p. 1135, fn. 13, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22), and here the error indeed was harmless.[22]

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[22] In 2009, the Legislature amended section 1054.3 in response to *Verdin*. (Stats. 2009, ch. 297, § 1.) The amendment which took effect on January 1, 2010, provides as follows:

(continued...)

(...continued)

(b)(1) Unless otherwise specifically addressed by an existing provision of law, whenever a defendant in a criminal action or a minor in a juvenile proceeding brought pursuant to a petition alleging the juvenile to be within Section 602 of the Welfare and Institutions Code places in issue his or her mental state at any phase of the criminal action or juvenile proceeding through the proposed testimony of any mental health expert, upon timely request by the prosecution, the court may order that the defendant or juvenile submit to examination by a prosecution-retained mental health expert.

(A) The prosecution shall bear the cost of any such mental health expert's fees for examination and testimony at a criminal trial or juvenile court proceeding.

(B) The prosecuting attorney shall submit a list of tests proposed to be administered by the prosecution expert to the defendant in a criminal action or a minor in a juvenile proceeding. At the request of the defendant in a criminal action or a minor in a juvenile proceeding, a hearing shall be held to consider any objections raised to the proposed tests before any test is administered. Before ordering that the defendant submit to the examination, the trial court must make a threshold determination that the proposed tests bear some reasonable relation to the mental state placed in issue by the defendant in a criminal action or a minor in a juvenile proceeding. For the purposes of this subdivision, the term 'tests' shall include any and all assessment techniques such as a clinical interview or a mental status examination.

(2) The purpose of this subdivision is to respond to *Verdin v. Superior Court,* 43 Cal.4th 1096, which held that only the Legislature may authorize a court to order the appointment of a prosecution mental health expert when a defendant has placed his or her mental state at issue in a criminal case or juvenile proceeding pursuant to Section 602 of the Welfare and Institutions Code. Other than authorizing the court to order testing by prosecution-retained mental health experts in response to *Verdin v. Superior Court, supra,* it is not the intent of the Legislature to disturb, in any way, the remaining body of case law governing the procedural or substantive law that controls the administration of these tests or the admission of the results of these tests into evidence.

B. Any Error Was Harmless

Appellant faced a huge challenge at trial: he had to account for his unambiguous confession to detectives that he had killed Nicholas. (9CT 2534.) At trial, in an effort to distance himself from his unequivocal admission of guilt, appellant offered a different version of events. He claimed that he was only the unwitting dupe of Jesse Hollywood, and that he had innocently driven Hollywood's car to Santa Barbara as directed by Hollywood, unaware that the car contained Hollywood's TEC-9 handgun. Appellant asserted that Rugge, Pressley, and Hollywood used the gun to kill the victim. These two alternative scenarios -- one admitting guilt prior to trial and the other denying any knowing involvement in the murder when testifying in his own defense -- could not be easily reconciled. In an effort to bridge the impossible gap between these alternatives, appellant asserted in his trial testimony and in the opinion of defense expert Dr. Kania that his memory of the events of this case was intact, save for his convenient claimed inability to recall any of his damaging admissions to investigators.[23]

Appellant's claim of amnesia was reasonably viewed by the jury as evidence of malingering, unsupported by any objective proof. His allegation of blackout was further undermined by the fact that he was able to lucidly converse with his mother during the same time period that he later alleged was within the period of amnesia, much less his confession to Casey Sheehan and his later confession to investigators.

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[23] In his brief, appellant describes the trial defense of third-party culpability and false confession as inferior to a defense of brain damage. (AOB 332, 336.) But as the trial court observed, when denying appellant's new trial motion, the defense asserted at trial was superior to an unconvincing claim of brain damage. (11RT 2553; Arg. IV, *post.*)

Significantly, when the prosecutor in closing argument challenged appellant's claim of amnesia, he did so without reference to the compelled examinations:

> [BY THE PROSECUTOR:] The Defendant testified in this case as to two things with regards to his confession to law enforcement and his confession to his friend Casey Sheehan. His testimony was, one, "I remember none of it." And two, "I must have been protecting him."
>
> "I remember none of it" we've already talked a little bit about. But now let me tell you, now that we've had a chance to look through all of the statements, somebody tell me, and maybe they will do so on closing argument, but somebody tell me, what was it exactly that caused this amnesia, other than, of course, the desire not to answer any questions about his confession, which of course is called malingering, faking it. But what otherwise did it?
>
> We know amnesia exists in our society. All of the experts who testified, testified that there is such a thing as people forgetting certain things. It happens with, in some cases, head trauma. People who are in accidents, okay, in which case they remember not necessarily what happened immediately prior to the accident, and all of a sudden they'll tell you, "I remember something up to a certain point, and I remember waking up in the hospital."
>
> It happens in instances of people who go through a terrible trauma, people who were in war and bombs going off around them. Children who have been subject to long-term sexual abuse, things like that, who because of a need to disassociate from what happened, go into, they go into what they call dissociative behavior where they literally move away from what happened, block it out of their lives. These types of horrible long-term abuses that take place.
>
> What happened here? What exactly is it that caused this horrible psychological abuse where for 48 hours, conveniently the same 48 hours where he goes in and gives a confession. What exactly was it? The police telling him, "You're under arrest. It's murder." Proning him out on the ground.

> There wasn't a mark on him. They treated him like a perfect gentleman. They never raised their voice, they never used obscenities, they never yelled at him. They didn't accuse him of being a cold-blooded murderer.
>
> At one point Sergeant Reinstadler said, "The press will make you out to be a cold-blooded murderer." There's a difference between the two. Are we supposed to believe that it was that ridiculous telephone call from his mother that all of a sudden activated a period of 48 hours of amnesia where he remembers nothing?
>
> Sorry, folks, that phone call is unfortunate. And it's sad that anybody has to deal with a parent who's at that level of instability, okay. That's not perhaps bad character, but nothing about him at all that makes him more or less prone to one of two things, giving a false confession or suffering amnesia, than anybody else in this room. Nothing.
>
> And what you saw on the witness stand was an example of a man who was engaging in acts of protection. In other words, trying to protect himself, minimize his responsibility, and weave his story into the facts as he knew it going into this trial.
>
> That's a man who does not suffer from mental illness. He certainly is not a man who suffers from such a disturbance that he has a thought disturbance problem. What he has is poor character. He's a man who's simply not prepared to live the kind of honest and law abiding lifestyle that the rest of us do. It is exactly the man who, given the opportunity to improve his situation by doing a hit, by taking the life of a completely innocent person for no more than profit and status, would jump at exactly what he did.

(9RT 2075-2078.)

In a different but analogous context, it is worth noting that inconsistencies are deemed implied where the court finds a witness to be falsely claiming not to presently recall material facts in order to deliberately avoid testifying as to material matters. For instance, in *People v. Green* (1971) 3 Cal.3d 981, a witness' selective amnesia resulted in his clearly remembering every event occurring concurrently with those material

matters as to which he claimed not to remember. The trial court there found these evasions to be inherently incredible and an implied denial of the facts contained in his earlier statements. It found his earlier statement properly admissible pursuant to Evidence Code section 1235. This Court agreed. (*Id.* at pp. 986-989.) Although, as noted, *Green* arose in a different context, the case recognizes the inherent incredibility of a claim akin to appellant's trial version of events.

Given appellant's mutually exclusive and antagonistic explanations, it is not reasonably probable that a result more favorable to appellant would have occurred if the trial court had not required appellant to submit to mental examinations. Stated otherwise, it is not reasonably probable that the jury would have concluded appellant falsely confessed, regardless of whether the jury had heard the testimony of prosecution mental health experts. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1135, fn. 13.)

In light of *Clark*, appellant cannot maintain in this Court that an order for a compelled mental health examination by a prosecution expert is violative of federal constitutional rights. As explained in *Clark*, no case holds that the federal constitution prohibits a court from ordering a defendant who has placed his or her mental state in issue to submit to a mental examination by a prosecution expert, and *McPeters, supra,* 2 Cal.4th at page 1190, holds the contrary.

The United States Supreme Court has never held that a defendant who proffers a mental defense in a criminal case, and is subject to a compelled mental examination by a retained prosecution expert, has been denied due process. (See *Estelle v. Smith* (1981) 451 U.S. 454, 471-472 [101 S.Ct. 1866, 68 L.Ed.2d 359]; *Buchanan v. Kentucky* (1987) 483 U.S. 402, 421-424 [107 S.Ct. 2906, 97 L.Ed.2d 336].)

Two earlier cases from this Court, predating *Verdin*, countenanced examination by experts on motion of the prosecution.[24] In *People v. McPeters, supra,* 2 Cal.4th 1148, during penalty phase, the defendant presented testimony by two mental health experts as to his mental condition. Both experts relied on extensive interviews and testing of the defendant. The Supreme Court found no constitutional error from the trial court's order that the defendant submit to an examination by a prosecution mental health expert, and the subsequent testimony by the expert that the defendant had refused to participate in the examination. (*Id.* at p. 1190.)

In *People v. Carpenter, supra,* 15 Cal.4th 312, after the defense had presented its own expert testimony about the defendant's mental condition at the penalty phase of the trial, the trial court granted the prosecution's request to compel defendant to submit to a psychiatric examination. Part of the court's order was that the examiner ask the defendant no questions about another, pending case. This Court found no error from the court's instruction to the jury concerning the defendant's refusal to submit to the examination. (*Id.* at pp. 412-413.) There was, in summary, no constitutional violation.[25]

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[24] Both cases were disapproved of in *Verdin* on the grounds that they were made without statutory authority. (*Verdin, supra*, 43 Cal.4th at p. 1106.)

[25] Respondent notes that a reversal of appellant's conviction on the basis that a compelled examination requires a new trial would only result in a retrial in which ironically, a compelled examination would be *admissible* in light of the change in the law described above. As a result, reversal on this basis would accomplish nothing.

VIII. APPELLANT DID NOT PRESERVE A CLAIM OF PROSECUTORIAL MISCONDUCT IN GUILT PHASE CLOSING ARGUMENT, AND THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Appellant contends various comments made by the prosecutor during guilt phase closing argument constituted prejudicial misconduct. (AOB 242-257.) The claim should be rejected, as appellant failed to object at trial and, in any event, there was no misconduct. Moreover, any alleged misconduct was harmless.

A prosecutor engages in misconduct by misstating facts but enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom. (See *People v. Hamilton, supra,* 45 Cal.4th at p. 928; *People v. Coffman* (2004) 34 Cal.4th 1, 95.) A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution only when it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108 [96 S.Ct. 2392, 49 L.Ed.2d 342].) A prosecutor's conduct that does not render a criminal trial fundamentally unfair violates California law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.)

As a general rule, to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm. The rule applies to capital cases. (*People v. Wilson* (2008) 44 Cal.4th 758, 800; *People v. Carter* (2005) 36 Cal.4th 1114, 1203; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Here, the record fails to disclose a

basis for applying any exception to the general rule requiring both an objection and a request for a curative instruction. (See *People v. Frye* (1998) 18 Cal.4th 894, 970.) Accordingly, insofar as appellant's claim of prosecutorial misconduct relates to comments that were not objected to, the claim is barred. (*Ibid.*)

A. The Prosecution did Not Argue "Facts Outside the Record"

In his first allegation of misconduct, appellant alleges that the prosecutor violated a court order by improperly asserting in summation that appellant "did considerably more than shoot the victim" and "was probably involved in the taping and the burial process, if not digging the grave. . . ." (AOB 243.) There was no objection. The misconduct claim, therefore, was not preserved for appeal. (*People v. Price, supra,* 1 Cal.4th at p. 447; see also *People v. Brown* (2003) 31 Cal.4th 518, 553.)

Assuming the claim is considered on the merits, it is meritless. According to appellant, no evidence supported the claim because Graham Pressley's statement to investigators had been sanitized to omit any reference to appellant digging the grave. (7RT 1433, 1471-1472, 1478-1479.) Pressley did not testify at trial and his statement about the crime had been relayed to the jury at trial by Detective Cornell. Pressley had originally made the statement to Detective Cornell. The prosecutor admonished Detective Cornell prior to testifying that Detective Cornell was to refrain from including Pressley's statements about appellant's role in the grave-digging and burial. When Detective Cornell testified, however, he indicated that Pressley had said that he (Pressley) had dug the grave, and "they" -- i.e., Pressley and appellant -- had buried the victim. The jury was promptly admonished to consider only the portion of the statement in which Pressley admitted digging the grave and disregard the burial statement. (7RT 1478-1479.)

Insofar as appellant argues that the prosecutor capitalized on the detective's statement when he argued in summation that appellant was "probably" involved in the burial (AOB 243), appellant ignores other portions of the record that clearly supported such an argument. Specifically, appellant ignores his own admission to Sergeant Reinstadler that appellant buried the victim. (9CT 2533.) Appellant also ignores the trial testimony of Sheehan. Sheehan testified that following the murder, appellant told Sheehan that Nicholas was dead and that appellant had killed him in Santa Barbara. Appellant explained that "they" had picked Nicholas up from a hotel and had taken him up to the site. Appellant told Sheehan that "we took him to a ditch, shot him and put a bush over him." Appellant said he had covered Nicholas' body with the bush. He said it happened "somewhere in the middle of nowhere." Appellant wanted to know how to "get out of the situation." (6RT 1304-1305, 1379, 1381.)

Sheehan's testimony alone renders appellant's present contention moot. In addition, although appellant denied placing duct-tape over the victim's mouth at the scene of the murder, he admitted duct-taping the victim's mouth earlier, when appellant removed the victim from the motel. (9CT 2534.) His admission also renders his present claim trivial.

As for the "burial" of the victim, other evidence independently established that the victim's body had merely been placed under a pile of brush rather than buried. (7RT 1463-1464.) The hikers who discovered the body near a hiking trail so testified. (5RT 1025-1026; 7RT 463-1464.) In other words, the "burial" was exactly consistent with appellant's description to Sheehan and, later, to investigators. The evidence, consisting of Sheehan's statement and also the observation of the hikers, independently supported the conclusion that appellant disposed of the body. This Court has instructed that a prosecutor "enjoys wide latitude in commenting on the evidence, including the reasonable inferences and

deductions that can be drawn therefrom. [Citation.]" (*People v. Hamilton, supra,* 45 Cal.4th at p. 928.) There was no misconduct.

B. The Prosecution Did Not "Manipulat[e] Inferences from Excluded Defense Evidence"

As already stated above (Arg. VI, *ante*), Dr. Kania, the defense expert, was allowed to testify fully as to the general factors relating to the reliability of a confession in an interrogative setting. The prosecutor correctly pointed out, however, that Dr. Kania was not authorized to claim that appellant had testified falsely. Because the jury was "thoroughly educated" regarding the general principles used to evaluate the reliability of in-custody statements, it was equipped to apply Dr. Kania's theories to the circumstances of appellant's confession in making the ultimate factual determination of whether his confession was reliable or accurate. (*People v. Page, supra,* 2 Cal.App.4th at pp. 188-189.)

Following Dr. Kania's trial testimony, defense counsel argued at length in summation that appellant had falsely confessed, and further argued to the jury that Dr. Kania's testimony unambiguously supported the defense claim of a false confession. (10RT 2111-2120.) In rebuttal, the prosecutor argued as follows:

> [BY THE PROSECUTOR: MR. ZONEN:] Counsel talks about Dr. Kania. Understand what Dr. Kania did do and what he didn't do. What all these experts did and didn't do. Nobody, nobody testified, nobody testified that the Defendant either did or did not make a false confession. Nobody testified to that.
>
> The extent of what any of the experts talked about, to some extent is whether or not there were certain personality conditions that he may or may not have had, that may or may not have been consistent with the people who give false confessions. There's a difference between that.
>
> It's for you to decide whether there was or was not a false confession. I can challenge all of you right now, look in your notes as to the conversation or the testimony of Dr. Kania, and

none of you will find anywhere in your notes quoted Dr. Kania saying he gave a false confession.

MR. CROUTER [Defense counsel]: I'm going to object. Counsel's arguing the Court's restriction on the evidence.

MR. ZONEN: I'm arguing the extent of the evidence given --

THE COURT: He's arguing the extent of the testimony, the extent to which they -- the scope of their opinion was, did not encompass whether or not in this particular case there was a false confession.

MR. ZONEN: That's right.

THE COURT: I think defense counsel said the same thing in your argument. So to the extent that -- and that's it, ladies and gentlemen, the expert testimony on the subject of false confessions, by Court order, did not allow either expert to give an opinion as to whether or not a false confession was given in this case. It simply authorized the experts to testify as to the character traits of a person as to other factors which might result in false confession, then that leaves it up to the jury to decide whether there's one in this case.

I think that's -- I think that ought to be sufficient.

MR. ZONEN: Thank you, your Honor.

MR. CROUTER: Thank you.

(10RT 2148-2149.)

Appellant now contends the prosecutor improperly "whipsawed" the defense by first excluding testimony that the confession was false yet later arguing that there was no testimony that the confession was false. (AOB 244.) But it is also clear that, when read in context, the record shows that the prosecutor accurately asserted that Dr. Kania had not testified that there was a false confession. That, in fact, is accurate. It is not misconduct to argue what is, and what is not, contained in the record. Moreover, the trial court promptly cautioned the jury regarding interpretation of expert

testimony and made clear to the jurors that the trial court "did not allow either expert to give an opinion as to whether or not a false confession was given in this case." (10RT 2149.) "In the absence of evidence to the contrary, we presume the jury heeded the admonition." (*People v. Burgener, supra,* 29 Cal.4th at p. 874; accord *People v. Williams* (2010) 49 Cal.4th 405, 469.) And in light of the admonition, there was nothing improper or misleading about the challenged comments.

C. The Prosecutor Did Not Impermissibly Reference Immunity

Appellant contends the prosecutor engaged in misconduct by improperly vouching for Casey Sheehan, an immunized witness. (AOB 247-250, 252-253.) This contention lacks merit. The prosecutor's argument was based on the facts in the record and reasonable inferences therefrom. He did not refer to evidence outside the record, state a personal belief in the witness's testimony, or place the prestige of his office behind the witness. Appellant claims, however, that the prosecutor engaged in impermissible vouching when he observed to the jury that Sheehan "would not have needed immunity if appellant were innocent." (AOB 253; 9RT 2067.)

Here, defense counsel objected to the prosecutor's statement and the trial court sustained the objection and admonished the jury to disregard the prosecutor's statement. (9RT 2067.) As a matter of law, misconduct is defined as an egregious *pattern* of behavior. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Hence, an isolated remark does not constitute misconduct. Further, the jury is presumed to have followed the trial court's admonition. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

In *People v. Ward* (2005) 36 Cal.4th 186, this Court held,

> "[A] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his] office behind a witness by offering the impression that [he] has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' [his] comments cannot be characterized as improper vouching. [Citations.]"

The prosecutor here had an obligation to disclose to the jury any inducements made to a prosecution witness to testify. (*People v. Frye, supra,* 18 Cal.4th at p. 971; *People v. Morris* (1988) 46 Cal.3d 1, 24-34; *People v. Fauber* (1992) 2 Cal.4th 792, 823). "Prosecutorial assurances, based on the record, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper 'vouching,' which usually involves an attempt to bolster a witness by reference to facts outside the record." (*People v. Medina* (1995) 11 Cal.4th 694, 757.) To the extent a trial is a credibility contest among witnesses, the prosecutor and defense are permitted to question witnesses about their motives and inducements to tell the truth so that the jury can make a fair determination of credibility. The closing argument is the attorney's opportunity to persuade the jury, based on the evidence at trial and the logical inferences drawn therefrom, to believe the witnesses and theory put forth by the attorney.

It is not, however, misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence. Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events

that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument. (*People v. Huggins* (2006) 38 Cal.4th 175, 207.)

Claims of improperly bolstering witnesses' credibility by reference to their immunity agreements have been rejected in *People v. Kennedy* (2005) 36 Cal.4th 595, 622, *People v. Frye, supra*, 18 Cal.4th at pages 971-972, and *People v. Freeman, supra,* 8 Cal.4th at page 489. (See also *People v. Williams* (1997) 16 Cal.4th 153, 257 [prosecutor informed jury that witness "cut a deal" to testify truthfully in return for pleading to reduced charges].)

In *People v. Kennedy, supra*, 36 Cal.4th at page 622, and in *People v. Freeman, supra*, 8 Cal.4th at page 489, this Court rejected arguments that the prosecutor unfairly bolstered a witness's credibility by suggesting that the court sanctioned the immunity agreement, finding in both cases that no reasonable juror would interpret the comments or questions as implying that the judge, or anyone else, had vouched for the witness's honesty. Here, similarly, the prosecutor's observation was a reasonable inference.

Assuming arguendo error is found, it was harmless. The fact that Hollywood obtained Sheehan's car and provided the car to appellant was not in dispute. Appellant's opening brief is silent as to how the prosecutor's reference to Sheehan's immunity would have made any difference on a material issue in the trial. Under either the state *Watson* or the federal *Chapman* standard of harm, any possible error was harmless. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

IX. THE JURY WAS ADEQUATELY INSTRUCTED ON ACCOMPLICES AND IMMUNITY

Appellant contends that the trial court failed to identify Hollywood and William Skidmore as accomplices when instructing the jury per

CALJIC No. 3.16 that accomplice testimony should be viewed with caution and required collaboration. He also complains about the trial court's failure to give CALJIC No. 3.19 and to modify CALJIC No. 2.20. (AOB 257-273.) The contention lacks merit.

A. Out-of-Court Statements

An accomplice is a person who is liable to prosecution for the identical offense charged against the defendant. (Pen. Code, § 1111.) If the prosecution presents the testimony of an accomplice, the trial court must instruct the jury that the witness's testimony should be viewed with distrust and that testimony cannot support a conviction absent corroboration. (*People v. Hernandez* (2003) 30 Cal.4th 835, 874; *People v. Tobias* (2001) 25 Cal.4th 327, 331; see CALCRIM No. 334.) As our Supreme Court stated in *People v. Williams* (1997) 16 Cal.4th 635,

> "[a] court must instruct on the need for corroboration only for accomplice *testimony* (§ 1111); '"'testimony' within the meaning of . . . section 1111 includes all oral statements made by an accomplice or co-conspirator under oath in a court proceeding *and* all out-of-court statements of accomplices and co-conspirators used as substantive evidence of guilt which are made under suspect circumstances.'" [Citations.] As we explained in *People v. Sully, supra,* 53 Cal.3d 1195, 1230: 'The usual problem with accomplice testimony -- that it is consciously self-interested and calculated -- is not present in an out-of-court statement that is *itself sufficiently reliable* to be allowed into evidence.'"

(*Williams, supra,* 16 Cal.4th at p. 682; original italics.)

Here, neither Hollywood nor Skidmore testified. For that reason, cases cited by appellant involving the trial testimony of an accomplice and the need to give a cautionary instruction are irrelevant. (See, e.g., *People v. Frye, supra,* 18 Cal.4th at pp. 965-966.) Appellant does not identify any statement by either Hollywood or Skidmore that was allegedly made under circumstances indicating the statement was either self-interested,

calculated, or otherwise suspect. Neither Hollywood nor Skidmore was incarcerated or even detained at the time they made statements later admitted at appellant's trial. As such, their statements did not implicate the concerns of trustworthiness that usually attend accomplice testimony, and thus did not qualify as "testimony" that needed to be corroborated under section 1111, thereby triggering the need for accomplice witness instructions. (See *People v. Williams, supra,* 16 Cal.4th at pp. 245-246; *People v. Sully* (1991) 53 Cal.3d 1195, 1230; *People v. Jeffery* (1995) 37 Cal.App.4th 209, 217-218.) Appellant does not contend otherwise.

Even assuming, purely for argument's sake, that the trial court erred in giving a cautionary accomplice instruction, any hypothetical error was harmless. Appellant's guilt was overwhelmingly established by the cumulative weight of the evidence. Appellant's brief does not attempt to allege that any statement by Hollywood or Sheehan was particularly significant.

In addition, even though the court did not specifically instruct the jury it needed to view Hollywood's and Skidmore's out-of-court statements with caution, the overall accomplice witness instructions that were given amply conveyed the definition of an accomplice and the requirements of accomplice corroboration. Even if not identified by name, Hollywood and Skidmore obviously were accomplices to appellant's crimes and subject to the accomplice instructions. (CALJIC No. 3.10; 5CT 1452, CALJIC No. 3.11; 5CT 1453; CALJIC No. 3.12; 5CT 1454; CALJIC No. 3.13; 5CT 1455; CALJIC No. 3.14; 5CT 1456; CALJIC No. 3.18; 5CT 1458; see *People v. Andrews* (1989) 49 Cal.3d 200, 214-215.)

Even the outright failure to instruct the jury regarding accomplice testimony is subject to harmless error analysis under *People v. Watson, supra,* 46 Cal.2d at page 837. (*People v. Lewis* (2001) 26 Cal.4th 334, 371; *People v. Hinton* (2006) 37 Cal.4th 839, 881; *People v. Avila, supra,* 38

Cal.4th at p. 562.) Any error in failing to provide such instructions does not warrant reversal unless there is a reasonable probability that the error influenced the jury's verdict. (*Lewis, supra,* 26 Cal.4th at p. 371.)

B. CALJIC No. 3.19

Here, as already noted, the jury was completely instructed on the definition of an accomplice and the limitations of accomplice testimony. Consequently, there is no reasonable probability that appellant would have obtained a more favorable result had the court instructed the jury in the manner appellant proposes. (*Watson, supra,* 46 Cal.2d at p. 837.)

C. Immunized Witnesses

Appellant also alleges that the trial court erred by failing to instruct the jury "to view the testimony of immunized witnesses with care and caution, and examine motives." (AOB 268.) Respondent disagrees. The jury was advised that Casey Sheehan had been granted immunity for his testimony. (6RT 1205.) Sheehan testified that he was aware that the grant of immunity was only valid if he testified truthfully. (6RT 1308, 1387.) The grant of immunity to him was addressed in summation by both parties (9RT 2065-2067, 2101, 2108-2109, 2155) and the grant of immunity was identified in instructions as a factor potentially affecting his credibility (10RT 2168). This instruction was sufficient to cover the immunity case.

This Court has declined to impose any sua sponte duty to give a special instruction regarding the credibility of a witness granted immunity. (*People v. Freeman, supra,* 8 Cal.4th at p. 508; *People v. Daniels* (1991) 52 Cal.3d 815, 867, fn. 20; *People v. Hunter* (1989) 49 Cal.3d 957, 977-978.) Therefore, appellant has forfeited any claim that the instructions were inadequate because he did not request a clarifying or special instruction in the trial court. When the trial court proposes an otherwise correct instruction that the defendant believes is insufficient or incomplete, failure

to request clarifying or amplifying language forfeits any claim of instructional error in that regard. (*People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023; *People. v. Horning* (2004) 34 Cal.4th 871, 909.) Insofar as appellant might alternatively attempt to argue that trial counsel's failure to object constituted ineffective assistance, that claim would fare no better. Failure to make a meritless request cannot constitute ineffective assistance of counsel. (*People v. Frye, supra,* 18 Cal.4th at p. 985, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421.)

Nor does appellant explain how any of the witnesses he identifies (Natasha Adams-Young, Brian Affronti, Kelly Carpenter, Steven Hogg, John Hollywood, Michele Lasher and Sheehan) could fairly be described as someone with a significant incentive to shift blame or otherwise testify unreliably. None of those seven participated in the abduction of the victim. None played a significant role in the crimes.

X. THE JURY WAS ADEQUATELY INSTRUCTED ON THE KIDNAP-MURDER SPECIAL CIRCUMSTANCE, AND THE PROSECUTION WAS NOT REQUIRED TO ESTABLISH AN INDEPENDENT PURPOSE OF THE KIDNAPPING

Appellant contends the felony-murder special circumstance must be reversed because the evidence does not establish an independent purpose for the kidnapping. (AOB 273-280.) The claim lacks merit as a matter of law.

Penal Code section 190.2, subdivision (a)(17)(M), specifically states that even if the felony of kidnapping is committed "primarily or solely for the purpose of facilitating the murder," the special circumstance is proven. This language became effective on March 8, 2000. (Stats. 1998, ch. 629, § 2; Prop. 18, approved by voters, Primary Elec. (Mar. 7, 2000).) Nicholas Markowitz was murdered in August of 2000, after this version of section 190.2, subdivision (a)(17)(M) became effective. For crimes committed on or after March 8, 2000, no independent purpose for the kidnapping need be

established in order for the kidnap-murder special circumstance to apply. Appellant's contention that the true finding on this special circumstance must be reversed because there was no evidence of an independent purpose therefore fails. At the time of appellant's crimes and trial, there was no requirement that the prosecution establish an independent purpose for the kidnapping, regardless of the instructions given at trial.

XI. APPELLANT DID NOT PRESERVE MOST OF HIS CLAIMS OF PROSECUTORIAL MISCONDUCT IN PENALTY PHASE ARGUMENT AND THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT IN HIS PENALTY PHASE ARGUMENT

Appellant contends the prosecutor committed misconduct in his penalty phase closing argument. (AOB 281-294.) The contention was not preserved for appellate review and, in any event, is meritless.

A. Arguing Factor (k) Evidence

Appellant contends that the prosecutor impermissibly argued that evidence proffered by the defense as mitigating was in reality aggravating evidence. (AOB 286-290.) He refers to the following portions of the prosecutor's argument, in which he recited the "catch-all" factor of Penal Code section 190.3(k) before offering his interpretation of how the jurors should consider its operation in appellant's case:

> [BY THE PROSECUTOR:] "Any other circumstances which extenuates the gravity of the crime."
>
> This is the part where you can really consider just about anything you want. And this is the part where the defense will ask you to consider the fact that he had a childhood that was less than stellar, that that would be considered a matter in mitigation for your consideration.
>
> Let me talk to you a little bit about that issue, the question of his childhood and what is the relevance of that information here today.

First of all, did he have a dysfunctional childhood and did he come from a dysfunctional family?

Folks, you don't need witnesses to answer that question. I mean, you don't need to have his uncle come up, or his aunt take the witness stand, or neighbors take the witness stand to answer that question.

Look at the results of the childhood. There's three siblings there. The oldest child, Christina, is, I'm not sure at this point, 23, 24 years old and a life-long heroin addict; and the second child in this family is the Defendant, and he manages to commit a horrific murder before the age of 21; the third child from that family who I guess is now 18 years of age is Jonathan, and at age 16 he commits a crime so scary and so horrible that he's not only tried as an adult in this home invasion armed robbery at age 16, but he is given a sentence of twelve years in state prison. I mean, that is a remarkable sentence for a teenager to receive. That is to believe that there's nothing redeemable about this person at all.

Now, when you look at that and you look at that alone that is irrefutable evidence that this was a dysfunctional home. That they batted zero with the accomplishments of all three of the children in this family.

There's no question that their mother is neurotic. There is no question that the father is probably heavy-handed. I don't feel a big need to get into the debate of how heavy-handed is he or was he. I mean, you know, was he slapping them, was he hitting them, was he punching them? Who knows. We are never going to know the answer to that. Whether the abuse was in the form of discipline gone wild, or whether it was gratuitous brutality, we're never going to know the answer to that.

No one ever reported it to the police at the time. So, either that means that nobody cared or it means that they didn't view it as serious enough at the time that that happened.

That's really quite irrelevant at this point. The question is, what does that have to do with you today?

As we look back upon his childhood, whether it was an abusive family or whether it was a dysfunctional family, what does that tell us today? How does that bode for his future?

Are they telling us, effectively, that this was the family so dysfunctional and a family environment so violent that, frankly, he at this time lacks the ability to make the kinds of decisions that the rest of us make? That he lacks the ability at this point to be compassionate toward another person? That he lacks the ability at this point to be able to appreciate the pain that other people might feel as a result of his violent conduct? Is that what they're saying, that all of this is the cause of what happened, his childhood, beatings by his father, indifference by his stepmother, a neurotic and mentally ill mother? Is that what they're effectively saying, that the consequence of this childhood has created somebody who really lacks any notion of empathy at all for other people?

And aren't they really saying that that is in effect a violent person?

Aren't they really saying that what has been created out of this is somebody who is quite willing to accept an assignment for a few hundred dollars and the promise that he would look more favorable among his peers?

And if that is so, why does that count as a matter in mitigation? Why should that not be considered by you as a factor in aggravation? That the end product, or end result of this childhood would be two brothers who simply don't function among healthy normal people. That they pose a serious danger to others because of the fact that they think only for themselves and only for the personal benefit of themselves, and monetary benefits of themselves.

And isn't that consistent with his behavior after this happened? Within what, eighteen hours after this happened he's buying himself new clothing and spending money with his ill-gotten gains. That he's getting stoned and partying every night thereafter. That there's not a moment of consideration of the horror that he has just perpetrated.

Wouldn't that be consistent with exactly the portrait that's been painted of him for us? Of a person whose childhood

was so completely lacking in morality that he's missed that part of his education and his development.

And doesn't, really, that speak to his dangerousness? And if so, how is that a matter in mitigation as against any matter in aggravation? Something for you to consider during your deliberation.

Folks, the very first one of the factors in consideration are the circumstances of this crime. Let me suggest to you that that is so compelling that it outweighs anything that might be a matter in mitigation. . . .

(11RT 2344-2348.)

Appellant failed to object to the foregoing statements, and his current claim was thus not preserved for appellate review. (*People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Coddington* (2000) 23 Cal.4th 529, 595; *People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

Where the prosecutor's argument that the absence of a particular mitigating factor should be considered as aggravating was brief and unobjected to, it can be found to be neither misconduct nor prejudicial. (*People v. Lucas, supra,* 12 Cal.4th at pp. 491-493; *People v. Champion* (1995) 9 Cal.4th 879, 939-940; *People v. Kelly* (1992) 1 Cal.4th 495, 549.) Such is the case here. Even assuming for the sake of argument appellant's misconduct claim was preserved, it is meritless.

In *People v. Hamilton, supra,* 45 Cal.4th at pages 952-953, the defendant argued that the prosecutor's questions improperly suggested to the jury that evidence of defendant's artistic talents he had offered in mitigation actually revealed an underlying morbid fascination with women's heads. He claimed the prosecutor thereby improperly turned evidence in mitigation into evidence in aggravation.

This Court rejected the contention for procedural and substantive reasons that also apply in this case. This Court determined that the

defendant had forfeited this claim on appeal when he failed to object at the time the prosecutor asked the complained-of questions. (*People v. Lewis, supra,* 43 Cal.4th at p. 503.) The Court also rejected the claim on the merits, noting the well-established rule that prosecutors "have wide latitude to discuss and draw inferences from the evidence at trial," and whether "the inferences the prosecutor draws are reasonable is for the jury to decide." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

Here, as in *Hamilton*, the prosecutor was not obliged to stipulate to the effect of appellant's proffered evidence. On the contrary, the prosecutor could maintain that an alternative inference was possible. (See also *People v. Schmeck* (2005) 37 Cal.4th 240, 300 ["Nor did the prosecutor commit misconduct by stating that "sympathy is a factor both for aggravation and for mitigation if any."]; *People v. Padilla* (1995) 11 Cal.4th 891, 959 [prosecutor's reference to defendant's family's history of drug use and alcohol did not constitute misconduct.].) When considered in context, it is evident that the prosecutor was asserting that insofar as one might view the information about appellant's childhood was necessarily extenuating his crime, in fact his background did not necessarily constitute mitigating evidence.

It is true that a prosecutor may not argue that the lack of mitigating evidence pertaining to the factors listed in Penal Code section 190.3 renders them aggravating in a given case. (*People v. Lucas, supra,* 12 Cal.4th at p. 491; *People v. Champion, supra*, 9 Cal.4th at p. 939; *People v. Turner* (1990) 50 Cal.3d 668, 714; *People v. Davenport* (1985) 41 Cal.3d 247, 289-290, superseded by statute on other grounds as stated in *People v. Crittenden, supra,* 9 Cal.4th at p. 140; see also *People v. Panah* (2005) 35 Cal.4th 395, 496.) But it is also true that where a prosecutor argues that certain mitigating factors are not present in the case and that the circumstances of the crime serve as aggravation (as well as disproving

mitigation), there is no error. (*People v. Panah, supra*, 35 Cal.4th at pp. 496-497; *People v. Clark* (1993) 5 Cal.4th 950, 1030-1031, overruled on other grounds, *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 144, vacated on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802 [113 S.Ct. 32, 121 L.Ed.2d 5].)

Similarly, it is proper prosecutorial argument to note the absence of certain mitigating factors. This Court has declined to overrule the "distinction between statements that focus upon the absence of mitigating evidence and statements urging the absence of mitigating evidence constitutes an aggravating circumstance" drawn in *People v. Clark, supra,* 5 Cal.4th at page 1030. (*People v. Castaneda, supra,* 51 Cal.4th at pp. 1348-1349.) While a prosecutor cannot argue that the jury is not permitted to consider mitigating evidence, the prosecutor "may argue that certain evidence does not in fact mitigate or at least attempt to minimize the mitigating effect of the evidence." (*People v. Valencia* (2008) 43 Cal.4th 268, 305, accord *People v. Rundle, supra,* 43 Cal.4th at p. 196 [proper to argue mitigation not present], overruled on other grounds, *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

In *People v. Sims*, this Court held that the prosecutor had fairly argued that the defendant's background of having been abused as a child had no mitigating effect in relation to the crimes committed. The Court in *Sims* cautioned that it would not be proper to suggest that the jury could not consider such evidence in mitigation. (*People v. Sims* (1993) 5 Cal.4th 405, 464.) As a practical matter, the prosecutor's argument in the present case was the equivalent of the argument approved in *Sims*. Assuming error only for the sake of argument, such error is evaluated under the "reasonably possible" test of harmless error. (*People v. Daniels, supra,* 52 Cal.3d at p. 889, reversed on other grounds, *Daniels v. Woodford* (9th Cir. 2005) 428

F.3d 1181.) More specifically, the error is harmless if, as here, the jury was aware of the underlying facts and was properly instructed on the weighing process. (*People v. Clark* (1992) 3 Cal.4th 41, 169.)

Appellant also defaulted his complaint that the prosecutor committed misconduct when he argued that appellant's age was not a mitigating factor. (AOB 282, 290.)[26] The claim was not preserved for appellate review, and lacks merit. An indication of the lack of merit is appellant's failure (within his conclusory two-paragraph argument) to cite even one case indicating that the prosecutor's observation was improper, much less prejudicial.

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[26] [BY THE PROSECUTOR:] "The age of the defendant at the time of the crime."

The defense will urge you to accept that as a very significant matter in mitigation, but not much.

This crime occurred two days before his 21st birthday. Do you realize that that would make him among the older ones among our fighting force currently in Afghanistan. If he had gone to college it would put him in his senior year in college at that point. It would have him older than most of the population that go to the universities in this state, and, for that matter, in this country.

Let me suggest that if he had been 17 at the time of this offense, as was one of the co-defendants, Mr. Pressley, then maybe that would be a factor to give a lot of consideration to. But he had already been three years out of high school, or what passed for high school while he was there. And during that time he made very conscious decisions as to how he was going to live his life. He was doing that as, effectively, a dope dealer, an alcoholic, and a drug addict, and a slacker. He wasn't doing anything. But he had plenty of years to think about it during that period of time.

Let me suggest to you that his level of maturity would not have changed very much between 21 and 31, or 41. Certainly probably did between 17 and 21. So to the extent that he gets any consideration for his age, that he was twenty at the time, let me suggest that it would be minimal.

(11RT 2342-2343.)

Also defaulted, and meritless, is appellant's allegation that the prosecutor argued facts not in evidence when he stated that appellant had obtained shovels and dug the victim's grave. (AOB 284, 291-292, citing 11RT 2349.)

As explained in Argument VIII, the prosecutor's argument was based on evidence that appellant participated in all aspects of the murder. And, as also previously noted, on Sunday, August 13, 2000, (following the murder) Casey Sheehan and appellant went to visit Sheehan's father in Malibu. On the way, appellant confirmed that Nicholas was dead and asked Sheehan's advice. He wanted to know how to "get out of the situation." (6RT 1304, 1379.) Sheehan told appellant that he would try to help him find a way to get out of the San Fernando Valley, so that appellant could think about what he wanted to do. (6RT 1381.) Appellant told Sheehan that they had shot Nicholas and put him in a ditch. He said that it had happened somewhere in Santa Barbara, that they had picked up Nicholas from a motel, and that they had taken him up to the site. He said he covered Nicholas' body with a bush. (6RT 1305.) He said it happened "somewhere in the middle of nowhere." (6RT 1381.) In light of appellant's explicit admissions, his misconduct claim is trivial.

In addition, appellant claims the prosecutor improperly referred to the conditions of confinement that appellant would enjoy if sentenced to life in prison. (AOB 290-291.) This Court has held that "evidence of the conditions of confinement that a defendant will experience if sentenced to life imprisonment without parole is irrelevant to the jury's penalty determination because it does not relate to the defendant's character, culpability, or the circumstances of the offense." (*People v. Quartermain* (1997) 16 Cal.4th 600, 632, citing *People v. Daniels, supra*, 52 Cal.3d at pp. 876-878; *People v. Thompson* (1988) 45 Cal.3d 86, 138-139.) Here, however, no objection was offered and thus any error was waived. (*People*

v. Cole, supra, 33 Cal.4th at pp. 1201-1202; *People v. Brown, supra,* 31 Cal.4th at p. 553.) Moreover, even presuming arguendo the prosecutor's comments were erroneous, and that the error was preserved despite appellant's failure to object, it was clearly harmless, as a rational juror would have based the penalty decision on the enormity of appellant's crime of murdering a defenseless child, and made the penalty decision only after weighing all of the evidence and arguments, and did not base a decision on a brief reference to life in prison. Appellant also ignores defense counsel's effective counter to the prosecutor's reference to life in prison, as follows:

> [BY DEFENSE COUNSEL:] Now, Mr. Zonen has painted for you a picture of a country club. Prison bars, concrete walls, guards armed with guns and maze and teargas, hardly a country club.
>
> Yes, in our present prison system people sentenced to life without parole are not thrown into a dark dungeon, chained to the wall and allowed to rot away such as on Devil's island. But [appellant]'s life will be totally and completely in and under the control of others. And maybe for him, maybe for him that is a good thing.
>
> In my more than 25 years experience in the practice of law I have run across many who became institutionalized and became valuable in their institutions. I mean, we've all heard of the Birdman of Alcatraz, we've all heard of people sentenced to prison for life who do become productive and give back in some measure to society, become authors, become philosophers, become counselors to others.
>
> No, it's not a country club in prison. In no way can that suggestion be made to you that it is. If [appellant] is able to play basketball it's because someone else will tell him when he can do that. If he gets three squares a day, yeah, that will be an improvement on that dysfunctional life and the context of his life before that one terrible moment.
>
> I stand before you now not to ask you to forgive [appellant] for what he did, it's an unforgivable crime, I stand before you today to beg you for mercy, to show the mercy that is

in all of our hearts, that [appellant] was unable to show to Nicholas Markowitz at that terrible moment. I beg you for his life. It's not an easy thing for a lawyer to beg anybody for anything, but I do that to you now.

Let him spend the rest of his days in contemplation and in prison of the evil that he did. Let him spend the rest of his days telling other prison inmates and other people, young people who may visit him, other people in our society of the terrible consequences of drugs and of murder.

There really can be no doubt based on [appellant]'s history before that terrible moment, his history afterwards while in confinement, that abhorrent behavior by him that the terrible moment of the killing will not repeat. Life in prison is a hard, nasty, brutal, but effective teacher of morality and the difference between right and wrong.

Now, [appellant] in prison for the rest of his life he will never able to go to the refrigerator to get a snack. He will never have the control over his life that you and I have. His every moment will be controlled by others. And never again to see the sun, the rain, the night, the day at the time and manner in which he chooses, but at the direction of others. This is a far greater punishment than the quick release of lethal chemicals into his body.

I beg you to show him the mercy that for whatever reason he did not show to Nicholas Markowitz. Let the killing stop here and now while you have the power to do so. Send not to know for whom the bell tolls, do not let it toll for [appellant], do not let it toll for you.

(11RT 2372-2374.)

As shown by the foregoing, the jury was presented with ample context in which to evaluate confinement as a sentencing option.

In a related contention, appellant also claims that the prosecutor improperly argued for retribution on behalf of the Markowitz family when he posed a question to the jury in penalty argument. According the appellant, the prosecutor's statement was: "should the Markowitz family

have to wonder if appellant is playing basketball or whether justice was done." (AOB 292, citing 11RT 2354.) According to the record, however, the prosecutor said, "Should the Markowitzs have to spend the balance of their days wondering if he's enjoying his basketball game at that moment and wondering whether justice was done in this particular case?"

The differences are significant. Obviously, the prosecutor would not have referred to an "appellant" at that point. More importantly, the literal quote was focused on the perception of the victim's family, and was not a statement regarding an objectively correct penalty decision. In any event, as there was no objection at trial to the statement, there is no cognizable claim on appeal. (*People v. Cole, supra,* 33 Cal.4th at pp. 1201-1202; *People v. Brown, supra,* 31 Cal.4th at p. 553.)

And appellant's point is meritless. The prosecution had presented -- as the only testimony offered in the penalty phase in aggravation -- testimony from the victim's mother. Her testimony was that the murder of her only child had devastated her, and she made clear to the jury her view of the irony that her child was now dead while those responsible for callously killing him walked the Earth. As she put it, "I feel I have fallen into the depths of hell being on this earth with the persons responsible for executing my son." (10RT 2240.) She told the jury that appellant had robbed Nicholas -- and her -- of a future. (10RT 2235, 2236, 2237, 2238, 2239.) In her words, ignored by appellant, "[o]ur world as we knew is destroyed." (10RT 2238.) The prosecutor merely noted the contrast between the opportunities available in a prison environment, as compared with the unrelenting agony faced by the survivors of a murdered child.

In the penalty phase of a capital case, the prosecution is not agnostic. Rather, it is asserting -- necessarily -- that aggravation outweighs mitigation and therefore capital punishment is warranted. The aggravating evidence here was to the same effect as the belatedly-challenged statement of the

prosecutor -- the apparent inequity of a sentence other than death based on the circumstances of the case. The remark of the prosecutor was little more than a reminder of the evidence. And the jury was, unquestionably, correctly instructed as to the duty to base its decision on the evidence rather than statements of counsel. (11RT 2377.) There is no plausible risk the jurors misunderstood their duty or were swayed by a one-sentence reference to prison basketball games.

Also insignificant is appellant's claim that the prosecutor improperly argued that appellant should be punished for the kidnapping in Los Angeles even though appellant was "unaware, and played no part . . ." in the kidnapping in Los Angeles. (AOB 293.) Appellant fails to cite any portion of the record in support of his claim, and the record does not indicate that appellant lodged any objection at trial on the basis he now asserts. Appellant implies, without citation to the record, that the prosecutor argued to the jury in the penalty phase that appellant was somehow responsible for the events in Los Angeles. (AOB 293.) But the prosecutor made no such argument. And, to the extent that appellant claims on appeal that he was "unaware" of the Los Angeles kidnapping (AOB 293), he merely views the evidence in the light most favorable to him. That is not the relevant standard. Viewed in the light most favorable to the judgment, as is required, the evidence overwhelmingly showed that appellant knew that he was collecting a kidnapped child in order to murder him. That is what he did, and that is what the prosecutor fairly argued that appellant did.

XII. CALIFORNIA'S DEATH PENALTY IS CONSTITUTIONAL

A. Introduction

With this argument, appellant presents the standard challenges to California's death penalty scheme. (AOB 294-308.) As he acknowledges, this Court has "consistently . . . rejected" such challenges but he asserts

them here to preserve the right to future federal review. (AOB 294.) Given appellant's concession, and absent any apparent reason for the Court to revisit its prior decisions, appellant's challenges to the death penalty scheme must be rejected.[27] (See, e.g., *People v. Harris* (2005) 37 Cal.4th 310, 365 [refusing to reexamine holdings regarding constitutional challenges to death penalty statute absent persuasive reason to do so]; *People v. Holt* (1997) 15 Cal.4th 619, 700-703 [same].)

B. Appellant's Contentions Are Contrary to This Court's Well-Settled Death Penalty Jurisprudence

1. Section 190.2 narrows the class of death-eligible murderers

Appellant contends that section 190.2 fails to meaningfully narrow the pool of murderers eligible for the death penalty. He asks the Court to revisit its decision in *People v. Stanley, supra,* 10 Cal.4th at pages 842-843 and find section 190.2 unconstitutional. (AOB 294-295.)

Time and again this Court has held that "[t]he set of special circumstances qualifying a first degree murder for capital sentencing (§ 190.2) is not impermissibly broad." (*People v. Ronald Moore* (2011) 51 Cal.4th 386, 415; see also *People v. Dykes* (2009) 46 Cal.4th 731, 813; *Harris, supra,* 37 Cal.4th at p. 365.) Appellant's request that the Court reconsider this well-settled point is not compelling and principles of *stare decisis* require that it be rejected.

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[27] For ease of reference, respondent's argument follows the structure of appellant's, e.g., section B(1) of the Respondent's Brief corresponds to section B(1) of the Opening Brief, etc.

2. Section 190.3, subdivision (a) properly allows the jury to consider the circumstances of the crime in deciding penalty

Appellant contends that subdivision (a) of section 190.3 is unconstitutional because it allows the jury to impose the death penalty based solely on the circumstances of crime. (AOB 295-296.) As appellant concedes, the Court has consistently rejected this challenge. (AOB 296, referring to *People v. Kennedy, supra,* 36 Cal.4th at p. 641, and *People v. Brown* (2004) 33 Cal.4th 382, 401; see also *Dykes, supra*, 46 Cal.4th at pp. 812-813; *People v. Harris, supra,* 37 Cal.4th at p. 365; *People v. Prieto* (2003) 30 Cal.4th 226, 276; and see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750] ["our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty"].) And because appellant gives no reason for the Court to reconsider the issue (other than his subjective conclusion that subdivision (a) was put to "expanded use" in his case), the contention should, once again, be rejected.

3. Burden of proof

a. The Constitution does not entitle appellant to a beyond a reasonable doubt determination regarding the truth of the aggravating factors or the appropriateness of the death sentence

Appellant contends the trial court's failure to instruct the jury it had to conclude beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors before it could impose the death penalty violated his right to a jury determination based on proof beyond a reasonable doubt for the reasons discussed in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584, 604 [122 S.Ct. 2428, 15 L.Ed.2d 556],

Blakely v. Washington (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2431, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 297-298.) Appellant acknowledges that this Court has held that the foregoing authority does not invalidate California's death penalty sentencing scheme. He asks for reconsideration of the point because "[n]o rational jury would have voted to impose the death sentence" on him if it had been instructed pursuant to the principles of the foregoing Supreme Court authority. (AOB 298, referring to *Prieto, supra,* 30 Cal.4th at p. 263.) Appellant further contends that, the Sixth Amendment aside, due process and equal protection required that the jury be convinced beyond a reasonable doubt not only regarding the factual basis for its decision, but also that death was the appropriate sentence. He again asks the Court to reconsider a prior contrary holding. (AOB 298, referring to *People v. Blair* (2005) 36 Cal.4th 686, 753.)

Appellant gives no compelling reason for the Court to reconsider its oft-repeated conclusion (see, e.g., *People v. Vines* (2011) 51 Cal.4th 830, 891; *People v. Lee* (2011) 51 Cal.4th 620, 651-652; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 227; *People v. Ward, supra,* 36 Cal.4th at p. 221; *Prieto, supra,* 30 Cal.4th at pp. 262-263) that the high court's decisions regarding the jury trial guarantee do not apply to the determination of penalty in a capital case under California law. The same is true of the Court's determination that the "Fourteenth Amendment[] do[es] not require that the prosecution prove beyond a reasonable doubt the existence of aggravating circumstances, or that the aggravating circumstances outweigh the mitigating circumstances, or that death is the appropriate punishment." (*Lee, supra,* 51 Cal.4th at p. 651; see also *People v. Griffin* (2004) 33 Cal.4th 536, 597; *Holt, supra,* 15 Cal.4th at pp. 701-702.) Accordingly, appellant's arguments must be rejected.

b. Evidence Code section 520 does not apply to the penalty determination in capital cases and the trial court did not err by failing to instruct the jury as to any burden of proof vis-à-vis penalty

Citing Evidence Code section 520,[28] appellant contends that the prosecution always bears the burden of proof in criminal cases, that there is a legitimate and settled expectation that the burden of proof rests with the prosecution, and that parties to a criminal action are entitled to have decisions reached according to this burden. Therefore, he continues, his jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any aggravating factor, that the aggravating factors outweighed the mitigating factors, that death was the appropriate sentence, and that, all things being equal, the presumptively appropriate sentence was life without parole. Or, appellant argues, the court should have instructed the jury that there was no burden of proof because absent such instruction it is likely the jury would have mistakenly believed appellant had the burden, or it would have failed to presume that life was the appropriate sentence if the evidence was in equipoise. (AOB 298-299.) Appellant again asks the Court to reconsider its contrary decisions. (AOB 299, referring to *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137, and *People v. Arias* (1996) 13 Cal.4th 92, 190.)

It is well-settled that there is no presumption that life is the appropriate sentence. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Sapp* (2003) 31 Cal.4th 240, 317; *Arias, supra,* 13 Cal.4th at p. 190.) Further, with the exception of evidence regarding prior violent crimes and felony convictions:

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[28] Evidence Code section 520 states, "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."

> the court need not instruct regarding a burden of proof. Because unlike the guilt determination, the sentencing function is inherently moral and normative, not factual and, hence, not susceptible to a burden-of-proof quantification, it is sufficient that the jury was instructed 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 possibility of parole." . . . Under the principles recited above and contrary to defendant's claim, Evidence Code section 520, establishing that a party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue, does not apply to the normative decision on penalty that is performed by the trier of fact at the penalty phase of a capital trial.

(*Dykes, supra,* 46 Cal.4th at p. 814 [citations, quotations and editing marks omitted]; see also *People v. Cowan* (2010) 50 Cal.4th 401, 509; *People v. Leonard* (2007) 40 Cal.4th 1370, 1429.) As there is no compelling reason for the Court to reconsider its holdings on these points, appellant's arguments must fail.

c. The jury's findings

(1) The Constitution does not require a unanimous jury finding on the aggravating factors

Appellant argues that California's failure to require a unanimous jury on aggravating factors that warrant the death penalty violates his right to a jury trial, equal protection, due process, and the proscription against cruel or unusual punishment. Appellant asks that the Court's contrary holdings be reconsidered. (AOB 300-301, referring to *Prieto, supra,* 30 Cal.4th at p. 275, and *People v. Taylor* (1990) 52 Cal.3d 719, 749.) However, he gives no persuasive reason for this Court do so and none is apparent. "*Nothing* in the federal Constitution requires the penalty phase jury to . . . agree unanimously that a particular aggravating circumstance exists." (*People v. Williams* (2008) 43 Cal.4th 584, 648, emphasis added;

see also *People v. Tafoya* (2007) 42 Cal.4th 147, 197; *People v. Jenkins* (2000) 22 Cal.4th 900, 1053.)

(2) The Constitution does not require a unanimous jury finding regarding unadjudicated criminal activity

Appellant contends that his rights to due process, a jury trial, and a reliable sentence were violated because the jury was not instructed it had to unanimously find that he engaged in prior unadjudicated criminal activity before it could consider such evidence in aggravation. Appellant recognizes that the Court has rejected this argument in the past (AOB 301-302, referring to *Ward, supra,* 36 Cal.4th at pp. 221-222, and *People v. Anderson* (2001) 25 Cal.4th 543, 584-585), but asserts it should reconsider the point because the prosecutor presented evidence that appellant engaged in the sale of marijuana and verbally threatened to extract a drug debt from a third party by force or fear, then the prosecutor relied on that evidence in closing argument. Appellant is mistaken. The evidence of unadjudicated criminal activity presented by the prosecution in this case was much milder than that which was introduced, and upheld, in *Ward.* (*Ward, supra,* 36 Cal.4th at p. 197 ["[T]the prosecution presented additional evidence of the Stumpf killing as one of the factors in aggravation. . . . There was also evidence defendant possessed sharpened toothbrushes in jail, had a physical altercation with police during a traffic stop in October 1987, and participated in a melee involving gang members at Lynwood Park in May 1987"].) Consequently, there is no reason for the Court to reconsider its "consistently applied" rule that "while an individual juror may consider violent 'other crimes' in aggravation only if he or she deems them established beyond a reasonable doubt, the jury need not unanimously find other crimes true beyond a reasonable doubt before individual jurors may consider them." (*Anderson, supra,* 25 Cal.4th at p. 590.) This is true

notwithstanding *Apprendi v. New Jersey, supra,* 542 U.S. 296, and related cases. The high court's decisions regarding the jury trial guarantee do not apply to the determination of penalty in a capital case under California law. (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.)

(3) The phrase "so substantial" in CALJIC No. 8.88 is not vague or ambiguous

Pursuant to CALJIC No. 8.88 (Penalty Trial – Concluding Instruction), the trial court instructed the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are *so substantial* in comparison with the mitigating circumstances that it warrants death instead of life without parole." (6CT 1551, emphasis added.) Appellant asks the Court to reconsider *People v. Breaux* (1991) 1 Cal.4th 281, insofar as it upheld the instruction's use of the phrase "so substantial" against a challenge that it is vague or ambiguous. (AOB 302, citing *id.* at p. 316, fn. 14.) However, he provides no persuasive reason for the Court to do so and none is apparent. Indeed, the Court has consistently rebuffed such invitations. (See, e.g., *People v. Geier* (2007) 41 Cal.4th 555, 618-619; *People v. Moon* (2005) 37 Cal.4th 1, 43; *People v. Carter* (2003) 30 Cal.4th 1166, 1226.) Accordingly, the contention should be rejected again.

(4) The word "warrants" in CALJIC No. 8.88 properly guides the jury

As noted above, the trial court instructed the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it *warrants* death instead of life without parole." (6CT 1551, emphasis added.) Appellant contends the word "warrants" does not clearly inform the jury that the ultimate question in the penalty phase of a capital case is whether death is an appropriate sentence. He asks the Court

to reconsider contrary authority. (AOB 303, referring to *Arias, supra,* 13 Cal.4th at p. 171.) This contention is "spurious." (*Breaux, supra,* 1 Cal.4th at p. 316.) It not only insults the jury's intelligence -- why else would the jury hear penalty phase evidence and make a penalty recommendation if not to decide the "ultimate question" of the appropriate penalty? -- it has also been rejected in numerous prior cases (see, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1274; *People v. Taylor* (2009) 47 Cal.4th 850, 899-900; *People v. Friend* (2009) 47 Cal.4th 1, 90; *Moon, supra,* 37 Cal.4th at p. 43), and should be rejected again in this case.

(5) The jury was properly instructed as to its weighing of aggravating and mitigating factors

Section 190.3 identifies the factors the jury may consider in deciding sentence and then states:

> After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term if life without the possibility of parole.

The trial court instructed the jury pursuant to CALJIC No. 8.88, a portion of which provided:

> 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 without parole.*

(6CT 1551, emphasis added.)

Appellant contends CALJIC No. 8.88 violated his right to due process because the emphasized language "inform[ed] the jury of the circumstances that permit the imposition of a death verdict" but did not inform it of the "converse principle" of section 190.3, i.e., that the jury must "impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances." (AOB 303-304.) Appellant acknowledges that his argument is counter to this Court's decision in *People v. Duncan* (1991) 53 Cal.3d 955 (upholding the predecessor of CALJIC No. 8.88), but asserts *Duncan* conflicts with cases that have disapproved instructions that emphasize the prosecution's theory of the case while minimizing the defense theory. (AOB 304, referring to, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529.) He also argues that the instruction's "non-reciprocity . . . tilts the balance of forces in favor of the accuser and against the accused." (AOB 304.)

Appellant's contention lacks merit. First, the three cases that purportedly conflict with *Duncan* are not pertinent to the issue he has raised because two were decided by the Court of Appeal and do not bind this Court on any point. Although the third case was a prior decision of this Court, it was decided 24 years before the 1978 death penalty law was enacted and, in any event, did not involve the death penalty nor addressed the manner in which a jury is to weigh aggravating and mitigating factors in reaching a sentence recommendation. Second, the Court has repeatedly rejected this argument in the 20 years since *Duncan* was decided. In its

most recent discussion of *Duncan*, the Court explained, "CALJIC 8.88 highlights the significant burden that must be satisfied before a verdict of death may be returned, and thereby conveys that life in prison without the possibility of parole is the appropriate punishment if this burden is not met." (*People v. Page* (2008) 44 Cal.4th 1, 57; see also *People v. Ray* (1996) 13 Cal.4th 313, 355-356; *People v. Wader* (1993) 5 Cal.4th 610, 662.) As appellant has failed to identify a persuasive reason for the Court to reconsider this conclusion, his argument must be rejected.

(6) The Constitution does not require that the jury be instructed regarding a standard of proof at the penalty phase or that unanimity is not required for mitigating factors to be considered

In an argument closely related to one already addressed, § XII(B)(3)(b), appellant contends that the trial court's failure to instruct the jury regarding a standard of proof at the penalty phase violated his Eighth Amendment right to full consideration of the mitigating evidence. (AOB 304.) It is well-settled, however, that "the trial court [is not] required to instruct as to standard of proof." (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; see also *Vines, supra,* 51 Cal.4th at p. 891 [California's death penalty scheme is not unconstitutional "In failing to impose a burden of proof on either party, even if only proof by a preponderance of the evidence, or, alternatively, in failing to instruct the jury on the absence of a burden of proof"]; *Whisenhunt, supra,* 44 Cal.4th at p. 227.) Instead, it is sufficient to instruct the jury that "'[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole.'" (*Manriquez, supra,* 37 Cal.4th at p. 589.) Appellant's jury was so instructed. (6CT 1551.) Accordingly, this aspect of his contention must fail.

Appellant also contends that, absent a penalty phase instruction to the contrary, the jury likely believed it had to reach a unanimous decision regarding the truth of mitigating factors before it could consider such factors in deciding penalty. (AOB 305.) The Court has held that an explanatory instruction is not required. (*People v. Lomax* (2010) 49 Cal.4th 530, 594; *People v. Ervine* (2009) 47 Cal.4th 745, 810; *People v. Rogers* (2006) 39 Cal.4th 826, 897; *Moon, supra,* 37 Cal.4th at p. 43.) Because appellant identifies no reason for the Court to reconsider its holdings, this aspect of his contention also must fail.

d. The Constitution does not require that the jury be instructed regarding presumption of life

Appellant asserts the "presumption of life is the correlate of the presumption of innocence" and that California's failure to require his sentencing jury to be instructed that the law favors life and presumes it to be the appropriate sentence absent persuasive evidence to the contrary violated his rights to due process, equal protection, to be free from the infliction of cruel and unusual punishment, and to have his sentence determined in a reliable manner. (AOB 305-306.) As previously discussed, there is no such presumption. (See § XII(B)(3)(b), *supra*.) Consequently, there was no correlate instructional error. (See, e.g., *People v. Moore* (2011) 51 Cal.4th 1104; *Lee, supra,* 51 Cal.4th at p. 652; *Ronald Moore, supra*, 51 Cal.4th at p. 416.)

e. The Constitution does not require the jury to make written findings at the penalty phase

According to appellant, California's death penalty scheme violated his Sixth, Eighth, and Fourteenth Amendment rights, as well as his right to meaningful appellate review to ensure that the death penalty was not imposed in an arbitrary or capricious manner, because it does not require

the jury to make written findings at the penalty phase. Appellant asks the Court to revisit its prior holdings rejecting similar contentions. (AOB 306, referring to *People v. Cook* (2006) 39 Cal.4th 566, 619, and *People v. Fauber, supra,* 2 Cal.4th at p. 859.)

"'[N]othing in the federal Constitution requires the penalty phase jury to . . . make written findings of the factors it finds in aggravation and mitigation.'" (*Dykes, supra*, 46 Cal.4th at p. 813, quoting *Williams, supra*, 43 Cal.4th at p. 648; see also, e.g., *People v. Thomas* (2011) 51 Cal.4th 449, 507; *Manriquez, supra,* 37 Cal.4th at p. 590; *Moon, supra,* 37 Cal.4th at p. 43.) Accordingly, the Court should reject appellant's contention without reconsidering this well-settled point.

f. CALJIC No. 8.85 need not be modified to eliminate inapplicable factors

Appellant asserts that the trial court's failure to delete inapplicable factors from CALJIC No. 8.85 (Penalty Trial – Factors for Consideration) probably confused the jury and prevented it from making a reliable penalty determination. He asks the Court to reconsider the differing opinion it expressed in *People v. Cook, supra,* 39 Cal.4th at page 618, and to hold that all inapplicable factors *must* be deleted from the instruction. (AOB 307.) Appellant provides no compelling reason for the Court to reconsider *Cook* or any of the other numerous cases in which it has held upheld CALJIC No. 8.85. (See, e.g., *People v. Russell, supra,* 50 Cal.4th at p. 1274; *People v. Burney* (2009) 47 Cal.4th 203, 261; *People v. Moon, supra,* 37 Cal.4th at p. 42; *People v. Farnam, supra,* 28 Cal.4th at pp. 191-192.) Accordingly, appellant's argument must fail.

g. The Constitution does not require inter-case proportionality review and intra-case proportionality review has not been requested

Appellant asserts that the failure of California's death penalty scheme to require the trial court or this Court to engage in inter- and intra-case proportionality review violates due process, equal protection, and the prohibition against an arbitrary and capricious sentencing decision. (AOB 307.) Appellant asks the Court to take judicial notice of the non-capital sentences that his codefendants received for their roles in the murder of Nicholas Markowitz and to review its prior decisions regarding proportionality review. (AOB 307, referring to *People v. Fierro* (1991) 1 Cal.4th 173, 253.)

Appellant is correct that the State's death penalty scheme does not require inter-case proportionality review. (See, e.g., *Dykes, supra*, 46 Cal.4th at p. 813; *People v. Crittenden, supra,* 9 Cal.4th at pp. 156-157; *People v. Mincey* (1992) 2 Cal.4th 408, 476.) However, inter-case proportionality review is not mandated by the Constitution (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]) and appellant provides no compelling reason for the Court to revisit its decision that such review need not be undertaken.

On the other hand, California law does provide for intra-case proportionality review. (*People v. Riel* (2000) 22 Cal.4th 1153, 1223-1224, citing *People v. Dillon* (1983) 34 Cal.3d 441.) However, appellant appears to misunderstand what it entails.

"'"Intracase" review [is undertaken] to determine whether the penalty is disproportionate to a defendant's personal culpability.'" (*Riel, supra,* 22 Cal.4th at p. 1223, quoting *People v. Mincey, supra,* 2 Cal.4th at p. 476.) "[T]he disposition accomplices received is not part of that review." (*Ibid.*; see also *Arias, supra,* 13 Cal.4th at p. 193.) Rather, "[t]o

determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts" as well as "the personal characteristics of the defendant, including age, prior criminality, and mental capabilities." (*Riel, supra,* 22 Cal.4th. at pp. 1223-1224.) The sentence is only unconstitutional if it is "grossly disproportionate to the defendant's individual culpability" or "shocks the conscience and offends fundamental notions of human dignity." (*Id.* at p. 1224.)

Thus, the sentences that appellant's codefendants received are not relevant to any intra-case proportionality review undertaken with regard to his death sentence. That said, such review need not be undertaken here because appellant does not request it. (*Arias, supra,* 13 Cal.4th at p. 193 [intra-case proportionality review is undertaken "on request"].) Given appellant's role as the trigger man, intra-case proportionality review would not aid him. (See, e.g., *Mincey, supra,* 2 Cal.4th at pp. 476-477; *People v. Wright* (1990) 52 Cal.3d 367, 449, disapproved on another ground by *People v. Williams, supra,* 49 Cal.4th at p. 459.) Accordingly, appellant's arguments must be rejected.

h. California's death penalty scheme does not violate equal protection

Appellant argues that California's death penalty scheme violates equal protection because it provides fewer protections to capital defendants than to non-capital defendants. He contends that his case provides a suitable vehicle for the Court to reconsider its prior holdings on this issue. (AOB 308, referring to *People v. Manriquez, supra,* 37 Cal.4th at p. 590.) However, appellant provides no basis for reconsideration and, inasmuch as capital and noncapital defendants are not similarly situated (see, e.g.,

Moore, supra, 51 Cal.4th 1104; *People v. Watson, supra,* 43 Cal.4th at p. 701; *People v. Coffman, supra,* 34 Cal.4th at p. 123), no reason for reconsideration is readily apparent. Consequently, appellant's argument must be rejected.

i. California's death penalty scheme does not violate international law

In his final challenge, appellant asserts that California's death penalty scheme violates international law and again asks the Court to re-evaluate its prior decisions that conflict with his assertion. (AOB 308, referring to *People v. Cook, supra,* 39 Cal.4th at pp. 618-619, *People v. Snow, supra,* 30 Cal.4th at p. 127, and *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In support of his request, appellant invokes the international community's "overwhelming rejection" of the death penalty and the United States Supreme Court's reliance on international law in *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1], a case in which the Court held the death penalty constitutional as applied to the juvenile defendant. (AOB 308-309.)

Appellant's request must fail. Whatever the international community's stance on capital punishment may be, this Court has consistently and repeatedly "rejected the contention that California's death penalty statutes violate international law." (*Dykes, supra,* 46 Cal.4th at p. 820; *Geier, supra,* 41 Cal.4th at p. 620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) As the Court has explained, "the death penalty statutes adequately narrow the class of persons subject to the penalty of death under state and federal law" and "[i]mposition of that penalty in a manner consistent with state and federal law does not constitute a violation of international law." (*Dykes, supra,* 46 Cal.4th at p. 820.) Further, *Roper* provides no reason for the Court to revisit its prior holdings inasmuch as that case concerned the constitutionality of sentencing a juvenile offender

to death which is an issue that is not before this Court. Moreover, *Roper*'s discussion of international law was necessarily dicta given the high court's acknowledgement that the opinion of the world community was "not controlling." (*Roper, supra,* 543 U.S. at pp. 575, 578; see also *id.* at p. 627 (dis. opn. of Scalia, J. [criticizing majority's reliance on international opinion]).) Accordingly, appellant's final challenge to California's death penalty scheme, like each of his preceding ones, must be rejected.

XIII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO REVIEW OWEN'S STATE BAR RECORDS

Appellant contends the trial court erred by denying his request to review Owen's State Bar records. Appellant contests not only the trial judge's (Judge William Gordon) rulings on the matter, but also alleges that the judge who presided over record correction proceedings (Judge Brian Hill) erred in rejecting his attempt during record correction to re-litigate Judge Gordon's denial and order production of the requested records, even after Judge Hill afforded appellate counsel an extensive opportunity to litigate the issue and after the court ordered the State Bar to retain its records relating to Owen. (AOB 309-321.) In general, but particularly insofar as appellant's appellate argument is aimed at Judge Hill's rulings, appellant is seeking to convert the instant appeal into a habeas corpus proceeding, including appellant's explicit request that this Court (1) authorize appellant to once again re-issue subpoenas, (2) require even further augmentation of the appellate record in this case, and (3) allow appellant to supplement his present claims with evidence he may develop in the future. (AOB 310.)

"An appeal reviews the correctness of a judgment as of the time of its rendition, based on the record that was before the trial court for its consideration." (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, quoting *In re James V.* (1979) 90 Cal.App.3d 300, 304; *In re Brittany H.* (1988) 198

Cal.App.3d 533, 554.) A party "cannot challenge a lower court's ruling and then augment the record with information not presented to the lower court." (*People v. Brown* (1993) 6 Cal.4th 322, 332.) "Augmentation does not function to supplement the record with materials not before the trial court. [Citations.]" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) On appeal, an appellate court is to disregard statements of matters in the briefs that are not properly in the record. (*Weller v. Chavarria* (1965) 233 Cal.App.2d 234, 246.)

These well-settled rules are ignored by appellant, who seeks to convert this appeal into a habeas proceeding, or a hybrid appeal/writ proceeding, in which appellant would be allowed to continue to litigate extra-record claims in the context of an appeal. Appellant had an opportunity, within his motion for new trial, to litigate his entitlement to Owen's Bar records. He further had an opportunity to pursue relief, through a writ of mandate, to contest the Superior Court's 2002 denial of that request. What he cannot do, but is attempting to do, is to treat this appeal as a habeas proceeding.[29]

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[29] Appellant's attempt to convert this appeal into a habeas-style inquiry is evidenced by his reliance on habeas corpus cases such as *In re Vargas* (2000) 83 Cal.App.4th 1125, 1134-1136.

In *Vargas*, the habeas petitioner was alleging chronic malfeasance by his trial counsel and, since the case was not an appeal, the petitioner was not confined to the appellate record. The Court of Appeal in *Vargas* took judicial notice of four prior cases identified by the petitioner in which various courts had determined the same defense counsel had rendered ineffective assistance. Counsel had a record of "repeated and severe accusations of misfeasance" that had been "recognized by many courts as having substance worthy of investigation. This is not the usual case." (*Ibid.*)

The instant case, unlike *Vargas*, is not a habeas proceeding, and appellant did not offer the trial court any evidence of malfeasance in other cases. Instead, he asked the trial court to authorize a fishing expedition into

(continued...)

The only issue that is appropriately reviewed in this appellate proceeding is whether Judge Gordon properly denied appellant's motion to quash the subpoena directed at the State Bar. He clearly did. The State Bar submitted extensive objections to appellant's subpoena. (6CT 1720-1726.) As noted in those objections, appellant's subpoena was overly broad, and failed to identify with reasonable particularity which documents were sought. (See Code Civ. Proc. § 2020, subd. (d); *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 222.) Instead, the subpoena requested any and all documents pertaining to Owen. Appellant's request was over-broad and burdensome to the State Bar, a non-party. And, since the subpoena failed to define with any degree of specificity the documents that were claimed as necessary, the State Bar could not determine who, on behalf of the State Bar, would be the appropriate custodian of records. (6CT 1720.)

(...continued)
State Bar records. The request was appropriately denied, since the relevant inquiry at the new trial motion and on this appeal) is whether appellant has demonstrated ineffective representation *in appellant's case*, based on the *trial* record.

To the extent that appellant claims that "the law" is that evidence of attorney malfeasance in unrelated cases is a relevant inquiry of an ineffective counsel claim, he is flatly wrong as a matter of law. Federal courts have concluded "[p]rior acts of misconduct on the part of defense counsel are inadmissible to support a claim that counsel must have acted similarly in a particular case." (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 829; see also *Maciel v. Carter* (N.D.Ill.1998) 22 F.Supp.2d 843, 858.) California courts have relied on these federal cases to apply the same rule in all but the unusual cases. (*In re Vargas*, *supra*, 83 Cal.App.4th at p. 1134.) The Court in *Vargas* expressly noted that *Vargas* was such an unusual case. And the cases cited above arose in the habeas context, and were not appeals. In other words, there is no such "law" allowing consideration of unrelated cases during appellate review of an ineffective counsel claim.

Second, the requested information was privileged and confidential and therefore not subject to disclosure. In support of its assertion of privilege, the State Bar relied on article I, section I of the Constitution, California Business and Professions Code sections 6086.1 and 6094, California Evidence Code section 1040, rules 2301 and 2302(a) of the Rules of Procedure of the State Bar, and this Court's decision in *Chronicle Publishing Company v. Superior Court* (1960) 54 Cal.2d 548. (6CT 1721.)

Finally, the State Bar asserted that the type of documents sought would violate a member's state constitutional right to privacy. (6CT 1724.) Article I, section 1 of the California Constitution creates a constitutional right of privacy. (See *White v. Davis* (1975) 13 Cal.3d 757, 765.)

When denying appellant's motion, after reviewing various submissions that included the State Bar's opposition and the arguments raised by appellant, the trial court stated as follows:

> THE COURT: All right.
>
> Well, as far as I'm concerned the issue of whether or not Miss Owen competently performed her duties in relating to [appellant] is not going to be -- issue is best framed by looking at what Miss Owen did or did not do in connection with this case. Is she didn't make the proper investigation, if she didn't talk to the witnesses she should have talked to, if she didn't properly prepare her briefs, or the legal issues in the case, if she didn't properly present the case in trial, that's what you look at. And that's the proof of the pudding.
>
> And what someone else not connected with this case may have thought of Miss Owen's performance in another case has no relevance whatsoever to that. And the fact she didn't do a proper job in another case doesn't establish anything about what she did in this case.
>
> And it seems to me to be looking through complaints, to be looking at them from other people, trying to determine whether or not there are claims which would reflect on Miss

Owen's competence in those cases doesn't further the investigation regarding her performance in this case.

Now, counsel has talked about the fact that, and I think there's no question that this information is privileged. I mean, that's clear. Counsel has talked about the fact, well, but even under -- even if it's privileged due process requires that the privilege be disregarded so the information can be made available. Then that's what we have to do. But due process, a due process violation has to be based upon some relevance, some finding that the materials sought to be disclosed has some relevance to any issue as to which the due process violation is being claimed.

For example, that case, that Ansbro case that was cited in the Defendant's Points and Authorities, that was a slam dunk in that case. There was a due process issue was clear cut. This guy was charged with manslaughter, drunk driving manslaughter, and he said, look, we want to show that it wasn't my driving that caused this accident, it was the configuration of the roadway, the design of the roadway, and we need to have information about other similar accidents that may have happened there in order to develop that. But that was a direct connection between the circumstances that existed on that roadway and the conduct of the driver who was charged with this felony. We don't have that here. We're speculating that there might be some stuff in those complaints that would reflect badly on Miss Owen's ability to do the job she was supposed to do in those cases.

As far as I'm concerned, the question is what did she do in this case. I don't see anything that compels me to go behind the privilege, or even to take the time to review all of these things in camera, because it just doesn't have any relevance to whether or not she performed properly in this case.

So, the objections are well taken, and I'm going to sustain the State Bar's objection. They need not produce the documents. And I'll sustain the motion to quash on behalf of Miss Owen.

(11CT 2506-2509.)

As already explained in footnote 29, *ante,* appellant's attempt to impugn Owen with his speculation as to her alleged misconduct in other

cases was correctly rebuffed by the trial court. As shown there, neither the California case cited by appellant (*In re Vargas*, *supra*, 83 Cal.App. at pp. 1134-1136), nor the federal decision he invokes (*Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1460), applies in this context. The standard here, as previously explained is whether counsel provided deficient performance in a specific aspect of the representation that resulted in prejudice to appellant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674].) And as appellant effectively admits, he has no idea as to what -- if anything -- is contained in Owen's Bar records.[30]

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[30] It is puzzling that appellant would attempt to rely on the Ninth Circuit's decision in *Sanders*, given that years ago, the Ninth Circuit specifically explained the narrow context of *Sanders*:

> Admittedly, we held in *Sanders* that an attorney's subsequent disbarment for a course of conduct with other clients in which he exhibited "general incompetence and indifference to the interests of his clients," was probative of whether his failure to investigate the case stemmed from a strategic decision or mere incompetence and indifference. *See Sanders,* 21 F.3d at 1460. However, *Sanders* involved the "rare case" in which counsel's objective incompetence was so severe that the petitioner might have been convicted of murder despite his actual innocence, *id.* at 1455, and in which the attorney only briefly explained his actions to one other person, *id.* at 1452, and could not be located to testify at the evidentiary hearing conducted by the district court. *Id.* at 1451.
>
> In any case, *Sanders* does not hold that prior instances of misconduct or unrelated complaints to state bar associations should ordinarily be admitted as evidence that an attorney acted incompetently or that otherwise presumptively reasonable decisions were actually made due to general disinterest or other impermissible reasons. Indeed, *Sanders* did not concern the admissibility of such evidence at all. Although we held such evidence relevant in *Sanders,* we did not address the standards to be employed by the district court in deciding whether to admit such evidence and the state apparently offered no objection to its admission or use.

(continued...)

There was no error.

XIV. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR NEW TRIAL

Appellant contends the trial court erred in denying his motion for new trial alleging numerous instances of ineffective assistance of counsel. (AOB 321-378.) Respondent submits the lower court acted well within its discretion.

(...continued)

> Notwithstanding our use of such evidence in the extraordinary situation presented in *Sanders,* it is clear that a habeas petitioner should not be allowed to transform what should be an inquiry into the reasonableness of counsel's performance at his trial into an general inquisition of defense counsel's record and reputation. Because the essential inquiry is whether the petitioner received objectively reasonable and conflict-free representation, evidence that the attorney may have erred or acted inappropriately in unrelated cases will normally have little, if any, probative value, and may therefore be properly excluded by the district court pursuant to Federal Rule of Evidence 403. Moreover, because Federal Rule of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," prior acts of misconduct on the part of defense counsel are inadmissible to support a claim that counsel must have acted similarly in a particular case.

(*Bonin v. Calderon, supra,* 59 Cal.3d at p. 828.)

As the Ninth Circuit explained in *Bonin*, S*anders* does not stand for the proposition that a challenged attorney's State Bar records are generally admissible. The opposite is true; such records are generally inadmissible. And the rationale for that rule of inadmissibility applies with far greater force in the appellate context when review is confined to the four corners of the trial record, than in the habeas corpus environment that was involved in both *Sanders* and *Bonin*. Yet, as *Bonin* makes clear, appellant relies on a non-existent rule of law. It is ironic, to say the least, that appellant would chide two judges of the Superior Court for failing to follow "the law" (AOB 315) in this case, when that "law" was directly contrary to appellant's representation.

A. Background

The jury returned its penalty verdict on November 29, 2001, and sentencing -- originally set for January 14, 2002 -- was continued until February 25, 2002. (11RT 2396, 2398; 2400; 6CT 1574.) Cheri Owen resigned from the Bar on February 13, 2002, with charges pending. (7CT 2069.) Attorney Crouter continued to represent appellant, and sentencing was continued several times. (11RT 2406, 2413.) The continuances in part were granted to allow the prosecution additional time to respond to the section 190.4, subdivision (e) motions filed by attorney Crouter. (11RT 2411.) Crouter would later advise the trial court that, following Owen's resignation from the Bar, Owen continued working on appellant's case, did a "substantial" amount of research on appellant's post-trial motions and prepared the draft motion for a new guilt phase trial. (11RT 2423.) The trial court would eventually describe the motion as "competently done, well presented." (11RT 2423.)

On May 15, 2002, the trial court heard appellant's pro per request to have attorney Crouter relieved. The court declined to relieve attorney Crouter at that time, subject to appellant retaining new counsel. (11RT 2424-2426.) The matter was continued until June 6, 2002. (11RT 2429.) On June 6, 2002, attorney Robert Sanger appeared and advised the court he was representing appellant as privately-retained counsel. (11RT 2430.) Attorney Sanger sought and was granted a two-month continuance, until August 13, 2002. (11RT 2431-2435.)

Thereafter, attorney Sanger submitted supplemental arguments in support of the motion for new trial, and a motion to modify the sentence. The new trial motion including numerous claims aimed at Owen's representation, and Sanger also sought disclosure of Owen's State Bar records. (11RT 2472; see Arg. XIII, *ante*.) Following several continuances, and the denial of the defense request to subpoena State Bar

records relating to Owen, a hearing on appellant's motion was eventually held on February 7, 2003. By that time, the court had considered numerous submissions by attorney Sanger as well as an opposition from the prosecution. (11RT 2527.) Following lengthy arguments by counsel, the trial court denied the motion, and articulated its reasons at length for the denial. (11RT 2570-2578.) The court also denied the motion to modify the penalty, and stated its reason for doing so. (11RT 2585.) The individual claims raised in the new trial motion are discussed below.

In his argument on appeal, appellant constructs a 58-page treatment of the new trial hearing, and does so in a manner which makes it difficult to differentiate between claims raised during trial court proceedings on the motion and arguments regarding the motion that are advanced for the first time by appellant on appeal; arguments that were never presented to the trial court are not properly raised in this appeal. In this response, respondent confines its analysis to those claims that were presented to the trial court during the motion, and thereby preserved for appellate review. Respondent does not, therefore, respond to the numerous defaulted claims and theories that are contained within appellant's 58-page submission to this Court.

B. Legal Standards

Section 1181 specifies the statutory grounds on which a defendant may seek a new trial following a conviction. Although ineffective assistance of counsel is not one of the statutory grounds for seeking a new trial, the issue may nonetheless serve as the basis for a nonstatutory motion for a new trial. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583; *People v. Reed* (2010) 183 Cal.App.4th 1137, 1143; *People v. Andrade* (2000) 79 Cal.App.4th 651, 659.) A trial court order denying a statutory new trial motion is generally reviewed for manifest abuse of discretion. (See *People v. Delgado* (1993) 5 Cal.4th 312, 328.)

In order to prevail on a claim of ineffective assistance, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." (*Strickland v. Washington, supra,* 466 U.S. 688.) A defendant must also demonstrate there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*) "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." (*Id.* at. p. 700; see also *People v. Hester* (2000) 22 Cal.4th 290, 296; *In re Ross* (1995) 10 Cal.4th 184, 201.) When reviewing a claim of ineffective counsel, a reviewing court begins with the presumption that the lawyer was competent. (*United States v. Cronic* (1984) 466 U.S. 648, 658, 666 [104 S.Ct. 2039, 80 L.Ed.2d 657].)

C. Analysis

Before addressing appellant's individual claims, respondent replies to appellant's allegation that the trial court generally violated legal requirements governing new trial motions. One of appellant's many newfound claims is that, as a matter of law, "in the context of a § 1181 *Fosselman* motion which makes a *prima facie case* of ineffective assistance of counsel, the Superior Court must hold an adversary hearing, at which the defense is entitled to question former counsel under oath . . ." (AOB 322.) Appellant does not indicate he raised such a claim below, and cites no legal authority remotely requiring a hearing in such a case. (See *People v. Duran* (1996) 50 Cal.App.4th 103, 113 [trial court may decline to conduct an evidentiary hearing; defendant not entitled to a hearing as matter of right].)

Appellant also claims the trial court in this case, when considering the motion for new trial, generally misunderstood the relevant legal standards governing a motion for new trial and that, as a result, this case is

similar to *People v. Knoller* (2007) 41 Cal.4th 139. But the two cases have nothing in common, except that both involved new trial motions.

In *Knoller,* a husband and wife were found guilty of a variety crimes after their dogs attacked and killed their neighbor. (*Id.* at p. 142.) The trial court denied the husband's motion for a new trial, but granted the wife's motion in regard to her conviction for second degree murder -- the murder conviction was based upon a theory of implied malice. (*Ibid.*) The trial court reasoned that the motion for a new trial should be granted in regard to the murder conviction because the evidence reflected that the wife lacked awareness that there was a high probability her conduct would cause the death of another person. (*Ibid.*) The trial court also commented, "[A] great troubling feature of th[e] case" was that the husband had never been charged with murder, but the wife was convicted of murder. (*Id.* at pp. 150-151.) Before granting the motion, the trial court remarked, "'[T]he equal administration of justice is an important feature in any criminal court. That played a role as well.'" (*Id.* at p. 151.)

The Court of Appeal reversed the trial court's order granting a new trial. (*Knoller, supra,* 41 Cal.4th at p. 142.) The appellate court directed the trial court to reconsider the motion "in light of the Court of Appeal's holding that implied malice can be based simply on a defendant's conscious disregard of the risk of serious bodily injury to another." (*Ibid.,* italics omitted.)

This Court granted the wife's petition for review. One of the issues considered by this Court in *Knoller* was whether the trial court abused its discretion in granting the motion for a new trial due to the evidence being contrary to the verdict (§ 1181, subd. (6)). (*Knoller, supra,* 41 Cal.4th at p. 142.) The Court concluded that "the trial court applied an erroneous definition of implied malice in granting [the wife] a new trial on the second degree murder charge." (*Id.* at p. 157.) Further, this Court held that

charging the wife with murder, but not the husband, was "a permissible exercise of prosecutorial discretion, not grounds for a new trial." (*Id.* at p. 158.)

Knoller has no relevance to this case, as here the trial court made no such errors. The trial court in the instant case explained its reasons at length for denying appellant's motion for new trial. The court's reasons were based upon the evidence presented and relevant legal authority, and the decision to deny was within the court's discretion.

Appellant also relies on *People v. Martinez* (1984) 36 Cal.3d 816. (AOB 358.) *Martinez*, like *Knoller*, has nothing to do with this case other than the generic fact that it involved a new trial motion. In *Martinez*, the trial court denied the defendant's motion for new trial, which was based on newly discovered evidence, in part due to lack of reasonable diligence. (*Id.* at p. 822.) This Court reversed, stating, "We do not believe . . . that this lack of diligence is a sufficient basis for denial of defendant's motion." (*Id.* at p. 825.) It added:

> [S]ome California cases suggest that the standard of diligence may be relaxed when the newly discovered evidence would probably lead to a different result on retrial. [Citations.] On the other hand, we have found none which declare that although newly discovered evidence shows the defendant was probably innocent, he must remain convicted because counsel failed to use diligence to discover the evidence.

(*Ibid.*, fn. omitted.)

This Court explained:

> "Once a trial court determines that a 'defendant did not have a "fair trial on the merits, and that by reason of the newly discovered evidence the result could reasonably and probably be different on a retrial,"' [citation], it should not seek to sustain an erroneous judgment imposing criminal penalties on the defendant as a way of punishing defense counsel's lack of diligence. In many cases, . . . proof of counsel's lack of diligence to discover evidence will demonstrate that counsel was

> constitutionally inadequate. . . . In such cases a new trial would be required. . . . The focus of the trial court, however, should be on the significance and impact of the newly discovered evidence, not upon the failings of counsel or whether counsel's lack of diligence was so unjustifiable that it fell below constitutional standards. Counsel who believes in good faith that he used due diligence cannot reasonably be expected to argue his own ineffectiveness; his client should not pay a penalty because of the attorney's unwillingness to assert his own incompetence. If consideration of the newly discovered evidence is essential to a fair trial and a just verdict, the court should be able to grant a new trial without condemning trial counsel as constitutionally ineffective."

(*People v. Martinez, supra,* 36 Cal.3d at pp. 825-826, fn. omitted, quoting *People v. Williams* (1962) 57 Cal.2d 263, 275.) In a footnote, the Court stated: "We distinguish those cases in which the lack of diligence is that of the defendant himself, as where the defendant knows of a witness but does not inform his counsel. [Citation.]" (*People v. Martinez, supra,* at p. 825, fn. 8.)

Martinez has no application here. There is no issue of diligence in the present case.

In this case, appellant contends that privately-retained trial defense counsel Cheri Owen was generally unprepared to represent appellant in a guilt or penalty trial. (AOB 328-329.)[31]

On direct appeal, this Court exercises deferential scrutiny of counsel's performance: "'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless

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[31] Appellant cites no authority for the proposition that trial counsel's level of experience is relevant to a claim of ineffective assistance of counsel. Rather, the standard is whether counsel provided deficient performance in a specific aspect of the representation that resulted in prejudice to the defendant. (*Strickland v. Washington, supra,* 466 U.S. at p. 687.) Counsel's experience has no bearing on this determination.

counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.]" (*People v. Mendoza-Tello* (1997) 15 Cal.4th 264, 266.) Appellant's various complaints about Owen are only relevant insofar as they demonstrate that she demonstratively erred in the defense of appellant's case, and that appellant was prejudiced thereby. As respondent will show, however, appellant's complaints about Owen's alleged errors are not meritorious, nor can he show that but for her alleged failures he would not have been convicted and sentenced to death.

Ultimately, this Court need not resolve the issue of whether retained counsel's performance at trial was deficient because appellant fails to establish he suffered prejudice as a result of his attorney's alleged deficient performance. (See *Strickland v. Washington, supra,* 466 U.S. at p. 697 [if it is easier to dispose of ineffectiveness claim on ground of lack of prejudice, court need not address performance prong of analysis].) As respondent will demonstrate, appellant has not demonstrated a reasonable probability that the result of the trial would have been different but for his retained counsel's purportedly unprofessional conduct.

1. Grant of "Literary and Media" rights

Appellant submitted to the trial court a four-sentence "Unconditional Grant of Rights," dated February 12, 2002, and purportedly signed by appellant and Owen, which stated that appellant was granting Owen ownership of "any and all of my rights regarding any or all literary and media individuals or entity's." [Sic.] (6CT 1685.) Appellant also filed a three-sentence "Waiver of Attorney-Client Privilege," also dated February 12, 2002, waiving "my privilege" so that Owen "may write and speak about my entire personal background and my criminal case in Santa Barbara." (6CT 1386.)

As this Court has reiterated, an attorney has a conflict of interest with a client when "an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or his own interests." (*People v. Doolin, supra,* 45 Cal.4th at p. 417, citations omitted.) The United States Supreme Court has held that conflict of interest claims "are a category of ineffective assistance of counsel claims." (*Ibid.*, citing *Mickens v. Taylor* (2002) 535 U.S. 162, 166 [122 S.Ct. 1237, 152 L.Ed.2d 291].) "'[U]ntil' . . . 'a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.'" (*Mickens, supra*, 535 U.S. at p. 175 [emphasis in original], quoting *Cuyler v. Sullivan* (1980) 446 U.S. 335, 350 [100 S.Ct. 1708, 64 L.Ed.2d 333]; see also *People v. Doolin, supra,* 45 Cal.4th at p. 414 [flat fee agreement including investigation costs did not create conflict of interest].)

The trial court reviewed appellant's claim when it was raised by attorney Sanger in appellant's new trial motion, and ruled in pertinent part as follows:

> [BY THE COURT:] And that brings us, then, to the literary contract, which is the first evidence of incompetence that's been raised in the moving papers, and, apparently, based upon what I read, Miss Owens did obtain defendant's signature on documents purporting to waive attorney/client privilege and granted to her exclusive rights to exploit her client's story for her benefit.
>
> Now, by definition, the potential for a conflict of interest between attorney and client is obvious, agreements such as this are violative of the canons of the American Bar Association and the California State rules of professional conduct and could subject a lawyer to discipline.
>
> The question, though, is such an agreement by itself, does that alone create some sort of an inference or presumption that therefore the defendant was not properly or competently represented, and I think there -- as I understand it, there has to be

some showing of cause and effect, in other words, that the act or omission of the lawyer in seeking the benefits of the agreement has placed her client's defense in jeopardy.

Of course, the major case in that regard is that Corona case, in which counsel's conduct in furtherance of his economic interest under the contract was fairly blatant in the way it impacted on the defense.

I can't find that kind of cause and effect in this case and none has been shown to me.

(11RT 2547-2548.)

The trial court did not abuse its discretion. The agreement was, undoubtedly, improper. Yet, as the trial court recognized, appellant did not present any evidence that the post-trial agreement had any impact on the outcome of the trial. Appellant did not present or offer any evidence indicating that any of Owen's decisions or strategies were affected by the post-trial agreement. Appellant presented no evidence that any of Owen's conduct prior to or during the trial were affected by the agreement. Appellant did not illustrate that any evidence was offered, or withheld, based on the February 2002 agreement, nor did he show that reasonably competent counsel would have proceeded in any manner differently in the absence of the agreement.

Despite appellant's appellate speculation (AOB 324), there was no evidence that the one-paragraph "Grant of Rights" dated February 12, 2002, memorialized a prior agreement between Owen and appellant. Rather, the agreement was executed only after Owen had completed her representation of appellant. (11RT 2396.) As respondent will show, authority relied upon by appellant involves a case in which defense counsel was actively representing competing interests, and had entered into a rights agreement while actively defending his client. That did occur here. Owen exited the

case and appellant was replaced by other counsel at all times following the agreement regarding "media rights."

In *People v. Corona* (1978) 80 Cal.App.3d 684, the Court of Appeal ordered a retrial of Juan Corona after his convictions for murdering 25 migrant workers. The court found that Corona's counsel had been ineffective in failing to investigate the case adequately and in failing to raise the defenses of mental incompetence, legal insanity, or diminished capacity. The court held that the "literary rights contract resulted in trial counsel who was devoted to two masters with conflicting interests -- the attorney was forced to choose between his own pocketbook and the best interests of his client, the accused." (*People v. Corona, supra*, 80 Cal.App.3d at p. 720.)

Relief was granted in *Corona* based on the unique circumstances and facts established by the defendant in that case, regarding the conduct of his attorney. Those facts included the following, as recounted by the Court of Appeal there:

> Since Corona was not able to pay the substantial amount of attorney's fees chargeable in a case of such magnitude, a fee agreement was entered into between the parties. Pursuant to the agreement, [defense counsel] Hawk was granted exclusive literary and dramatic property rights to Corona's life story, including the proceedings against him, in return for legal services. Under the agreement, Corona expressly waived the attorney-client privilege, thereby removing any impediment to the publication of the most intimate and confidential details of his life and his trial. The surrender of all-inclusive publication rights and the attorney-client privilege was irrevocable and in perpetuity binding not only on Corona, but also his heirs, executors, legal representatives and assigns. The income derived from the publications was to inure solely and exclusively to Hawk. In the wake of the agreement, Hawk hired Ed Cray, a professional writer who participated in the proceedings as Hawk's investigator and sat at the counsel table during the trial. Well before the commencement of the trial, Cray and Hawk entered into a contract with the MacMillan

> Publishing Company to publish the book to be written about Corona and his trial. The book, entitled *Burden of Proof, The Case of Juan Corona*, authored by Cray and supplemented by Hawk's afterword, was published just a few months after the completion of the trial.

(*People v. Corona, supra*, 80 Cal.App.3d at p. 704.)

Clearly, relief was warranted in *Corona* because of the specific circumstances there, in which the defendant established as demonstrable fact that counsel's inadequate representation was related to and affected by his conflict. *Corona* does not stand for the proposition that the discovery of a "literary and media agreement" is *per se* grounds for relief. Instead, prejudice must be shown. And, as already shown in *Corona*, the conflict existed during the defendant's trial. Here, it did not.

In *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 616-617, this Court upheld a waiver of a conflict of interest created by an alleged literary-rights fee agreement. In *Maxwell*, the defendant, charged with ten murders and four robberies, sought representation by private counsel with whom he had negotiated a literary-rights fee agreement. Counsel and Maxwell entered into a waiver and fee contract. The trial court recused Maxwell's private counsel and appointed substitute counsel. Maxwell then obtained review of the recusal decision by seeking a writ of mandate. (*Id.* at p. 612.)

This Court overturned the trial court's order recusing the chosen counsel, holding that the trial court had erred in finding Maxwell's initial waiver invalid. The Court weighed the defendant's right to be represented by counsel of his choice against the probable conflict of entering into a literary-rights fee agreement with his chosen private attorney. The court held that given Maxwell's insistence on being represented by his chosen counsel, any possible conflict arising from the fact that counsel and Maxwell had entered into a literary-rights fee agreement was outweighed by the defendant's right to counsel of his choice. In so holding, the court

noted that the literary-rights fee agreement may have improved representation of the client. The court also surmised that private defense counsel might conduct a "careful, diligent defense that avoids conviction" because a "quiet strategy that succeeds may well make a better story than a flamboyant failure." (*Id.* at p. 618.)

In light of *Corona* and *Maxwell*, there is no rule of automatic reversal. On the contrary, the cases establish that reversal is only appropriate where the defendant shows he was prejudiced by a demonstrated conflict. And, as already noted, the agreement here was a post-trial agreement. *Corona* and *Maxwell* are pre-trial agreements, not post-trial. Appellant established none of the requisite factors here in his submissions to the trial court. Owen's one-paragraph argument, while undoubtedly unprofessional, had no demonstrated impact on appellant's representation. The trial court therefore did no abuse its discretion when it denied relief on this ground of the new trial motion.

2. Owen's role as an "informant"

Appellant contends, without citation to the trial record, that as part of his new trial motion, he alleged that he was entitled to a new trial because Owen was "an informant to the Office of the Los Angeles District Attorney . . . ." (AOB 326.) Although the record indicates that appellant did seek Owen's State Bar file, and also shows that Owen (represented by counsel) advised the trial court that she had been "assisting" the State Bar and the District Attorney of Los Angeles County in investigations unrelated to appellant's case (8CT 2172), appellant fails to identify where in this voluminous record he established that Owen was "an informant," much less that her assistance to those agencies affected appellant's defense. Instead, appellant implies that he made such a showing, and claims the trial court erred in rejecting his claim. (AOB 338.) The task of identifying and addressing appellant's contention is complicated by his failure to cite the

record, and his failure to demonstrate where in the lengthy new trial proceedings he raised his present contention. The district attorney's response to appellant's new trial motion does not discuss any "informant" claim (8CT 2342-2361), nor does appellant in his opening brief identify any ruling by the trial court on an "informant" claim. On the contrary, appellant faults the trial court for failing to address the claim (AOB 374) -- even though appellant in his brief does not identify specifically where he raised the claim.

Insofar as appellant alleges, and Owen acknowledged, that she provided assistance to the State Bar and/or the Los Angeles District Attorney regarding investigations unrelated to this case, appellant fails to identify any plausible grounds for relief from his unrelated murder conviction. Neither the State Bar nor the Los Angeles District Attorney's Office played any role in this case, as this case was prosecuted by the District Attorney of Santa Barbara. There is no basis to conclude on this record that Owen's unrelated assistance to those agencies has any relevance here, nor is there any basis to conclude that a more elaborate record would alter this conclusion.[32]

Appellant relies on *United States v. Marshank* (N.D. Cal. 1991) 777 F.Supp. 1507. (AOB 374.) In *Marshank*, a federal district court ordered an indictment be dismissed because of pervasive and prejudicial pre-indictment intrusion into the attorney-client relationship. (See *Marshank, supra*, 777 F.Supp. at p. 1530.) There, Minkin, the attorney for two defendants cooperating with the government, provided information to the government that led to the arrest and indictment of another one of his

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[32] The case in which Owen cooperated with the Los Angeles County District Attorney's Office appears to be *People v. Milstein* (2d No. B233589). This information, while not in the record, is supplied for the Court's information.

clients. (See *id.* at pp. 1512-1515.) Minkin then encouraged that client to cooperate with the government to secure an indictment against Marshank, with whom Minkin had an ongoing attorney-client relationship. (See *id.* at pp. 1514-1518.) Minkin also had a financial interest in Marshank's indictment. The government had agreed to give a share of the proceeds from property seized from Marshank to Minkin's other client in exchange for providing information for Marshank's indictment. (*Ibid.*) Minkin, in turn, had negotiated a fee arrangement with that client whereby he would be paid a percentage of the sum the government provided from Marshank's seized property. (*Ibid.*) After Marshank's arrest, Minkin told police that they would have to be rougher with his client, Marshank, to get him to cooperate. (*Ibid.*) Minkin also contacted Marshank's ex-wife in an effort to get her to pressure Marshank to cooperate with the government. (*Ibid.*)

In dismissing the indictment, the *Marshank* court held:

> [T]he government actively collaborated with Ron Minkin to build a case against the defendant, showing a complete lack of respect for the constitutional rights of the defendant and Minkin's other clients and an utter disregard for the government's ethical obligations . . . [T]he government colluded with Minkin to obtain an indictment against the defendant, to arrest the defendant, to ensure the Minkin would represent the defendant despite his obvious conflict of interest. . . .

(*United States v. Marshank, supra,* 777 F.Supp. at p. 1524.)

In this case, unlike in *United States v. Marshank,* there is no evidence that Owen was an "informant." Nor is there any evidence she was colluding with the government to investigate and prosecute appellant or any other client, and there is no indication in the record that Owen offered any information damaging to appellant to any agency. Further, and also contrary to the situation that existed in *United States v. Marshank,* there is no indication that Owen had a financial interest in cooperating with the

state in its investigation of a client. Additionally, the record here, unlike in *United States v. Marshank,* does not demonstrate that the Santa Barbara District Attorney's Office or any other governmental agency was playing any role -- much less an active role -- in supporting defense counsel's active representation of conflicting interests. For all these obvious reasons, *Marshank* is irrelevant.

D. Alleged Misappropriation of Penal Code Section 987.9 Funds

Appellant contends Owen misappropriated thousands of dollars of Penal Code section 987.9 funds, obtaining the county funds with the representation that they were necessary for the defense but diverting them for her personal use. (AOB 327-328.) Appellant did not show below a reasonable probability that but for any fiscal malfeasance Owens may have committed against Santa Barbara County, the result of appellant's trial would have been different.

When denying the motion for a new trial, the court addressed the alleged misappropriation of funds, as follows:

> [BY THE COURT:] In a similar vein, we have assertions of overreaching or downright fraud by counsel in her retainer arrangements and the use of funds.
>
> Now, again, counsel --·in other words, we're being asked to assume that these allegations are true. Counsel Miss Owen didn't come in and hasn't filed any declarations, we have nothing from her by way of defending herself of these charges. But assuming that -- I guess I have to assume for the sake of the argument that she may have overreached in her retainer arrangements, there's the allegation that she told her investigator to use certain funds to satisfy other obligations, it's not clear to me that these were funds that were necessarily obtained from defendant or from the county, they were funds in which she paid to him, or that, but, begin, I think that, you know, it might be grounds to discipline Miss Owen, but I don't -- I can't see anything in that that tells me that that translates into incompetent representation. Unless we're going to try to establish some

> presumption, and I don't think the cases say there's a presumption of incompetence flowing simply because of allegations of misconduct of that kind.

(11RT 2548-2549.)

The court did not abuse its discretion. The alleged misappropriation of funds from Santa Barbara County is not independently relevant, and is only relevant insofar as it could reflect a failure to devote available resources to significant avenues for a defense. But appellant never made that showing. And the question of whether the defense representation was adequate is evaluated by objectively assessing that representation, regardless of this allegation. As the trial court recognized, appellant never established that the alleged diversion of funds resulted in any prejudice to appellant. (11RT 2549.)

E. Alleged Lack of Preparation

In a one-page discussion, appellant argues his trial counsel were ineffective as a result of their general failure to better prepare for trial. (AOB 328-329.) Defense counsel is inadequate if he or she fails to discover a viable defense as a result of failing to investigate adequately. (*People v. Williams* (1988) 44 Cal.3d 883, 936.) Here, appellant fails to identify how the alleged failure of trial counsel to better prepare resulted in the withdrawal of a potentially meritorious defense at either the guilt phase or the penalty phase. Moreover, given the extensive new trial proceedings that were conducted in this case, at which appellant was represented by different counsel, this appellate record contains both the allegedly inadequate trial defense that was offered along with the proposed superior defense asserted by attorney Sanger during the new trial proceedings. But the trial court's rejection of the alternative defenses suggested by attorney Sanger demonstrates that Sanger could not identify any shortcomings on

the part of trial counsel that rendered trial counsel's representation inadequate.

F. "Newly Discovered Brain Damage"

Appellant contends on appeal he presented a prima facie case to the trial court that defense counsel Owen and Crouter failed to reasonably investigate a claim that appellant is brain-damaged. Alternatively, he alleges that the trial court should have granted a new trial by determining there was newly-discovered evidence of brain damage as claimed by Dr. Globus, a psychiatrist whose opinions were introduced in appellant's new trial motion.[33] (AOB 329-334.) The claims are meritless.

Appellant contends trial defense counsel failed to present a defense of "brain damage" and only consulted with a mental health professional (Dr. Kania) belatedly, and only to answer a "narrow referral question" regarding appellant's false confession claim. Appellant assumes that a "brain damage" defense was "*the* best defense to premeditation and deliberation, and *the* most compelling showing of mitigation . . . ." (AOB 332-333.)

But a far-fetched claim of brain damage was *not* appellant's best defense. On the contrary, the trial court, when denying the motion for a new trial and after hearing all of appellant's submissions in support of the new trial motion -- including the testimony of Dr. Globus and the post-trial

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[33] Appellant makes much of the testimony of Dr. Globus, a psychiatrist, whose opinion was offered on behalf of appellant at the motion for a new trial. (AOB 331-332.) Juries in capital cases have regularly found Dr. Globus' defense-friendly opinions unpersuasive in cases later affirmed by this Court. (See *People v. Parson* (2008) 44 Cal.4th 332, 342; *People v. Cox* (2003) 30 Cal.4th 916, 946; *People v. Arias, supra*, 13 Cal.4th at p. 125; *People v. Pride* (1992) 3 Cal.4th 195, 254; *People v. Webster* (1991) 54 Cal.3d 411, 427; *People v. Babbitt* (1988) 45 Cal.3d 660, 697.)

evaluation by Dr. Chidekel -- specifically observed that competent counsel would *not* have presented a brain damage defense on behalf of appellant, and that the defense presented by Owen and co-counsel Crouter at trial was a superior defense to a post-trial claim of brain damage, in light of the trial evidence. (11RT 2553.)[34] As noted by the trial court when evaluating appellant's motion to modify the penalty, appellant murdered Nicholas only

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[34] Appellant's trial defense failed not because a better defense was not offered, but because the evidence of his guilt was overwhelming. The defense offered by trial defense counsel, while unsuccessful, was not unreasonable. Trial defense counsel asserted a multi-component defense on behalf of appellant at trial. First, defense counsel urged that appellant was not involved in the original kidnapping of Nicholas. And there was no evidence to the contrary. Second, the defense argued that the kidnapping of Nicholas terminated at various times over the 72 hours, and that once it terminated, he was free to return home, and that it terminated before appellant arrived in Santa Barbara. That was also a reasonable claim, and the same claim was subsequently advanced by Hollywood in his own defense and appeal. (*Attorney Appeals Conviction in "Alpha Dog" Case, Ventura County Star, February 9, 2012.*) Third, the defense argued at trial that the jury should find that the prosecution had not met its burden of proof, given that no fingerprints were left on the victim, the car or the duct tape linking appellant to the murder. This was also a reasonable defense strategy, relying on the lack of physical evidence. In addition, trial defense counsel urged the jury to disregard appellant's apparent confession as unreliable, claiming it was prompted by appellant's traumatic arrest and his vulnerability to his imploring mother, and that the confession was only made to shield the more likely killer -- Hollywood. And the false confession claim was not merely based on appellant's self-serving account, but was bolstered by expert witness Kania. Collectively, the trial defense was a reasonable defense, and a far more plausible defense than appellate counsel's preferred defense of 'brain damage" -- a defense that disregards all potential shortcomings in the prosecution's case, embraces appellant's confession and admits appellant was a paid killer, but claims that negligible evidence of appellant's "cognitive deficits" rendered him not guilty of the murder he admitted committing. Fourth, and after the prosecution rested its case-in-chief (7RT 1551), the defense called five witnesses: Stephen Blackmer, Ramon Arias, Ernest Seymour, and Detectives Williams and Cornell, to further support an alibi and third party culpability defense.

after much deliberation, and the trip from the Lemon Tree Inn to the murder scene (much less the longer journey from Los Angeles to Santa Barbara) afforded appellant with time to reflect on the "enormity and futility" of murdering a "defenseless teenage boy who had done neither defendant nor his confederates any harm." (11RT 2585.) The trial court accurately termed the murder "a hired killing for the forgiveness by Jesse Hollywood of an unliquidated debt and a few dollars" in exchange for which appellant was "more than willing" to abduct Nicholas and kill him. (11RT 2585.)

The trial court also considered, and credited, the defense evidence of appellant's excessive use of intoxicants and his "dependent personality and almost slavish obedience to the directions of Jesse Hollywood, [and] his need for peer acceptance." (11RT 2586.) The court likewise considered appellant's relative youth and "tumultuous childhood and adolescence . . . ." (11RT 2586.)

However, in the trial court's view, none of those admittedly mitigating circumstances significantly extenuated the crime. As noted by the court, appellant was not under the influence of alcohol or drugs at the time of the murder. On the contrary, his ability to plan an execution and drive a long distance to accomplish the murder showed his lack of impairment. Nor was there "any evidence" that appellant was impaired by any emotional disturbance, nor was there any evidence appellant was unable to make rational decisions, including the decision to kill. "At most" the trial court observed, "the evidence establishes that he felt beholden to Jesse Hollywood, he felt a sense of security in being included in Hollywood's coterie of friends and was anxious to please Mr. Hollywood so things could stay that way." (11RT 2587.)

Appellant ignores the trial court's assessment; a thoughtful evaluation that included consideration of all of the allegedly game-changing mitigating information submitted by attorney Sanger in support of the

motion for new trial. Appellant also ignores significant barriers facing trial defense counsel in this case.

The evidence established that appellant, doing business with his employer, Hollywood, accepted an assignment to murder the teenage victim. Appellant travelled from Los Angeles to Santa Barbara for that purpose, and arrived at the Lemon Tree Inn carrying a nine-millimeter pistol owned by Hollywood. He collected the victim, Nicholas, and drove Nicholas to the remote camping area of Lizard's Mouth. There, appellant shot Nicholas several times, killing him. Subsequently, appellant confessed killing and burying the victim to an intimate friend. When questioned by police, appellant eventually admitted his guilt. The circumstances of the crime indicated a calculated execution, not the result of a brain-damaged personality. And appellant's confession made clear his awareness and appreciation for the criminality of his conduct. An MRI scan was performed on appellant showing "no evidence of abnormality of the brain." (8CT 2384.) A neuropsychological assessment of appellant was also conducted. While the evaluator, Dr. Chidekel, recognized and described appellant's cognitive deficits, she concluded that those deficits did not preclude him from being aware of the implications or ramifications of his actions. (8CT 2395.) In fact, she described him as having "intact cognitive function." (8CT 2396.) Appellant's trial testimony reveals a clarity of thought, as does his extended exchange with the trial court regarding his post-trial critique of his trial attorneys and his request for new counsel for post-trial proceedings. (11RT 2417-2427.)

Dr. Chidekel performed a neuropsychological examination on appellant on November 6, 2001. Dr. Glaser performed a psychiatric interview on the same date. (8CT 2390.) Dr. Chidekel's findings and her extensive evaluation are contained in the record and were considered by the trial court in connection with appellant's new trial motion. (8CT 2390-

2391.) Her findings did not support a claim of brain damage, nor did the findings of Dr. Glaser, whose entire evaluation is not included in the record an appeal. (8CT 2399-2400.)[35]

In relevant part, Dr. Chidekel concluded as follows:

> While right hemisphere dysfunction can preclude individuals understanding all the ramifications of some of their actions, [appellant] would not have been precluded from understanding that shooting Nicholas Markowitz would have resulted in Nicolas Markowitz's death. An individual with right hemisphere dysfunction who was approached and paid $1,200 to kill someone would not be precluded from the awareness that in so doing, he would bear the responsibility for the death of another person. Frontal dysfunction can impair judgment, but the ramifications of [appellant]'s actions would not be lost on him according to this deficit either.
>
> Would a right hemisphere problem or a frontal deficit make [appellant] more or less inclined to kill another individual? If, in fact, [appellant] had a dependency relationship on Mr. Hollywood, and if he had a vested interest in maintaining Mr. Hollywood's favor, it is entirely possible that [appellant], given his neuropsychological profile and its bearing upon his cognitive and personality function, would be more likely to accept such an assignment, but it would not mean that he would do so without the awareness of the implications of his actions.
>
> It has been alleged by Dr. Globus that [appellant] had a predisposition to dissociate as a means of defending himself in the presence of overwhelming feeling. A propensity to dissociate would be one factor to be examined to evaluate the credibility of [appellant]'s contention that he had no memory for having made his (false) confession. Neither right hemisphere nor frontal deficits predispose individuals to use dissociation as

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[35] In a related claim, appellant complains that medical records, EKG-test results, and neuropsychological testing results were not presented to the jury, and alleges that they would have bolstered a brain damage defense. (AOB 330-331.) But, Dr. Chidekel and Dr. Glaser's evaluations make clear that none of those instruments were supportive of a brain damage defense.

a defense to contend with strong feelings. Further, I do not find evidence in the test battery to support a predisposition for dissociation. The Repression subscale of the MMPI-II is low, which is incompatible with a predisposition to dissociate. Scale 3 on the MMPI-II is within normal limits while Scale 4 is elevated. The combination is found in individuals who are more impulsive and not in those who tend to repress or hold things in. The Histrionic scale on MCMI-III is also within normal limits, which is incompatible with a tendency to repress and thereby to dissociate.

[Appellant] is making an allegation of a situational amnesia. Right hemisphere and frontal lobe dysfunction do not predispose individuals to amnesia. Amnesia can be the product of a head injury. It can be caused by a seizure. It can be caused by the acute or persisting effects of a substance, by dementia or delirium, or by posttraumatic stress. It can also be alleged by a person who is not being truthful. [Appellant] did not sustain a head injury or a seizure on the day he made his confession. [Appellant]'s system had been clear of drugs and alcohol for 48 hours by the time he made his confession. Dementia is not supported by the findings of neuropsychological assessment. Delirium is a much more extensive disturbance that would have been readily apparent in his mental status at the time of the confession and would have required immediate medical attention. While being interviewed was certainly stressful, a variety of factors suggest that [appellant] was not traumatized by it at the level that would produce amnesia for the event. First, he provides detail during the confession that suggests that at the time, cognitively, he is functioning very well. While the PK scale on his MMPI-II is elevated, this scale has a strong relationship to other anxiety scales and tends to be elevated for individuals who feel generally overwhelmed. The PTSD scale of the MCMI-III is within normal limits. Also the situational stress index on Rorschach Inkblot Technique is within normal limits suggesting a good balance between [appellant]'s capacity to cope and the magnitude of his situational stressors. A fabrication of amnesia for the event is more likely. [Appellant] has responded to objective personality measures in a manner compatible with a predisposition to exaggerate. In the DSM-IV, one is directed to look for florid symptoms in situations where there is secondary gain such as in legal matters, when considering a possibility of malingering. Certainly this applies

in the current situation. Also, [appellant] lies. Initially he says he was at his grandmother's house. He then changes his story. Certainly his having done so demonstrates a propensity for dishonesty. When he's told he has been identified in the area by witnesses, he states he has just realized that he is "going down." This represents a shift in response to salient information in the environment. His neuropsychological test performance demonstrates that he is able to respond to changes in the environment and to shift accordingly. The fact that he conducts himself in this manner during the course of his confession suggests intact cognitive function at the time. Overall, the pattern portrayed is incompatible with a bona fide amnesic problem.

I am aware that [appellant] gave testimony to the same sequence of events, independently, that was testified to by two of the other participants in this action. I find this to be noteworthy. Neuropsychological testing has demonstrated that [appellant]'s memory is poor. Presumably if three defendants independently give the same testimony about a sequence of events, this means that the events either took place or conversely, they fabricated a story together and determined this to be the version of events that they would portray. Neuropsychological results for [appellant] however suggest that he would encounter difficulty remembering all the details of any such fabricated story. It is not surprising that [appellant] presents as anxious and depressed at the time of Dr. Globus' interview. In light of his long period of incarceration and the sentence that could be delivered for his crime, one would be hard-pressed to imagine that [appellant] would not be depressed and anxious. If anything, these emotional findings argue for the intactness of his awareness of the ramifications of his situation. Certainly the portrait painted of [appellant]'s life by Dr. Globus' report is a pitiable one. Assuming all the historical facts alleged in Dr. Globus report are true, it could certainly be said that [appellant]'s life is not an enviable one. By the same token, the combination of genetic and environmental factors in his history has not produced deficits that preclude him being aware of his actions and their implications. There is no compelling evidence to support that a tendency to compliance and submissiveness would manifest in the production of a false confession of murder to individuals who would condemn an individual who had

engaged thus. Personality factors would be more likely to render him more submissive to established dependency figures.

(8CT 2395-2397.)

The trial court considered these findings and conclusions of Dr. Chidekel, along with the evaluation of Dr. Glaser, and, of course, the court had presided over appellant's trial. As the court pointed out when evaluating appellant's new trial motion, the new trial claim of brain damage was different from, and inconsistent with, appellant's defense at trial. Further, the court observed that the defense asserted at trial represented a more credible defense than the eleventh hour claim of brain damage:

> [BY THE COURT:] Then we come to the question of the failure to develop and produce evidence of brain damage. There are two problems to this argument in terms of the guilt phase. The first relates to minimizing the impact of the testimony given in rebuttal of plaintiff's expert Dr. Kania, and then the second prong relates to the possibility of raising a defense based on defendant's lack of the requisite intent or mental state for first-degree murder.
>
> Now, as to the second prong, I'm a little bit at a loss to understand that argument, because it doesn't appear that that kind of a defense would have been asserted by competent counsel since it's inconsistent with the defense actually presented, which seems to me, under the circumstances, was a better shot. That defense was that this was a false confession and somebody else was the killer.
>
> There's been no argument made by the defense that the selection of the false confession defense was itself incompetent, or that the presentation of that defense was contrary to the wishes of the defendant or that the defense was bogus. Therefore, it's hard for me to see how the second prong of the defense would have come up in the first place, even if some evidence of brain damage had been perfected.
>
> Now, as to the first prong of the argument that the rebuttal witness, Dr. Glaser, testified, essentially, that persons making false confessions and suffering from amnesia concerning the process must suffer from serious mental illness or brain

disorder. Now, the argument by the defense that the impact of this testimony would have been neutralized had the evidence of the defendant's brain damage been diagnosed as Dr. Globus -- if the evidence as diagnosed by Dr. Globus had been available at the time of trial.

Now, Dr. Kania, of course, didn't agree that brain damage was an essential precondition to the person's predilection to give a false confession under certain circumstances; furthermore, there's no evidence from Dr. Kania, who was the Defendant's expert, and I assume has been available to the defense, that he had requested or required this kind of information, or that he requested any information from the defense that was not provided to him.

In other words, there was a choice made to present a certain defense, an expert that was apparently qualified to give testimony on the defense was called, testified as to what felt were characteristics of a person who might give a false confession, he testified as to what characteristics, personal characteristics [appellant] had and Dr. Glaser disagreed with him.

There's nothing that says that Dr. Kania, nothing from Dr. Kania says, I asked for this, I asked for that in order to present this evidence, in order to form an opinion and I didn't get it. So, I don't know how that jeopardizes the defense.

As it happened, the rebuttal witness didn't agree with Dr. Kania, which is typical of these kinds of cases.

Then we get the argument that Miss Owen compounded the error by arguing to the jury as a fact that the Defendant did not suffer -- had not suffered and did not have any brain damage.

Now, I read that transcript and that's not what I read. In fact, her argument to the jury was a paraphrase of Dr. Glaser's opinion that only persons with brain disorders or retardation make false confessions, and she argued, her argument was that that was a ridiculous argument. She was criticizing Dr. Glaser's position, she was not conceding the point. And I think that particular ground is a result of a misreading of the transcript.

> And I heard that testimony. She was simply saying here's what Dr. Glaser told you, that's ridiculous, it's not necessary to have these kinds of things in order to make a false confession. That's the thrust of that argument. It was not a concession that he did or did not have any brain damage.

(11RT 2553-2556.)

There was, and is, no evidence of brain damage as a viable defense in this case. Thus, appellant's claim fails under both *Strickland* prongs.

Appellant also claims, without citation to the record, that Owen retained Dr. Kania "on the eve of trial" and only to address the reliability of appellant's confession, and not to render an opinion about appellant's "mental state or mental health." (AOB 329.)

Appellant further alleges, citing only intermediate federal appellate courts, that the trial court's rejection of appellant's claim was "contrary to governing laws." (AOB 352.) Of course, opinions of intermediate federal appellate courts are not "governing law" here. (*People v. Crittenden, supra,* 9 Cal.4th at p. 120, fn. 3; *Rohr Aircraft Corp. v. San Diego County* (1959) 51 Cal.2d 759, 764-765; *People v. Crawford* (1990) 224 Cal.App.3d 1, 7.) And appellant is wrong about the requirements of federal law.

With respect to presenting a mental defense at trial, "an attorney is entitled to rely on the opinions of mental health experts in deciding whether to pursue" such a defense. (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1038.) "[C]ounsel does not have a duty 'to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert. . . .'" (*Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267, 1277, quoting *Hendricks, supra*, 70 F.3d at p. 1038.) "To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnoses demands that an attorney already be possessed of the skill and knowledge of the expert."

(*Hendricks, supra*, 70 F.3d at p. 1039.) Unless the expert that counsel has retained advised counsel that services of additional experts are needed, there is "no need for counsel to seek them out independently." (*Babbitt v. Calderon* (9th Cir. 1998) 151 F.3d 1170, 1174 [holding that there was no duty for counsel to seek out PTSD experts in absence of a request to do so].) Counsel also has "no duty to ensure the trustworthiness of the expert's conclusions." (*Ibid.*) "If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous . . . . To hold otherwise would raise the Sixth Amendment hurdle well above the floor of minimal competence requiring attorneys to have a specialized knowledge to evaluate an expert's conclusions before relying upon them in making strategic choices." (*Hendricks, supra*, 70 F.3d at p. 1039; see also *LaGrande v. Stewart* (9th Cir. 1998) 133 F.3d 1253, 1272; *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 851.)

In this case, there is no showing that Dr. Kania alerted trial counsel to a necessary mental defense that counsel failed to pursue.

As the trial court correctly noted:

> [BY THE COURT:] There's nothing that says that Dr. Kania, nothing from Dr. Kania says, I asked for this, I asked for that in order to present this evidence, in order to form an opinion and I didn't get it. So, I don't know how that jeopardizes the defense.
>
> As it happened, the rebuttal witness [at trial] didn't agree with Dr. Kania, which is typical of these kinds of cases.

(11RT 2355.)

Nor is appellant correct when he argues that his trial lawyers inadequately investigated and presented evidence of appellant's "impairments" sufficient to impress a jury when making the penalty

decision. (See, e.g., AOB 353, 356, 359-361, 364.) As set forth in the Statement of Facts, above, the penalty phase in this case painted a horrific picture of a grotesquely dysfunctional home environment that appellant was forced to endure as a child, at the hands of a violent if not sadistic father and a drug and alcohol-addled abusive mother, one in which appellant regularly witnessed physical and more often verbal violence. The defense -- in the form of the assailed attorneys Owen and Crouter -- presented as mitigating evidence a number of witnesses who testified about appellant's brutal family background of physical and emotional despair. This evidence went unchallenged. No juror needed an additional hired defense expert witness to put this uncontradicted portrait of abuse into context.

G. Alleged Failure to Challenge Voluntariness of Appellant's Confession

Appellant contends that trial counsel failed to challenge the voluntariness of appellant's confession, and alleges the confession resulted from appellant's cognitive deficits. (AOB 334-335.) But as already noted, in the portion of Dr. Chidekel's report that is set forth *ante*, there is "no nexus between right hemisphere or frontal dysfunction and a propensity to give a false confession." (8CT 2394.) In claiming otherwise on appeal, and alleging that Dr. Chidekel's testimony and conclusions support appellant's brain damage claims (see, e.g., AOB 331), appellant ignores the record and misstates the testimony of Dr. Chidekel.

H. Legal Standards Employed by the Trial Court

As noted previously, appellant also argues that the trial court abused its discretion by applying improper legal standards in denying appellant's new trial motion. (AOB 345-378.) In reality, appellant's complaints regarding "legal standards" is little more than a reformulation of appellant's preceding argument; that the court erred in denying the motion. In any

event, and even if treated as a separate claim regarding the appropriate legal standards, appellant's argument is unavailing. The applicable legal standard was originally described by this Court as follows:

> While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. [Citations.] It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. [Citations.] This does not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict. [Citations.]

(*People v. Robarge* (1953) 41 Cal.2d 628, 633.)

> The statement by the trial judge that "the Court sits as a thirteenth juror" has an unfortunate connotation; the phrase is misleading, and it does not properly describe the function of the trial judge in passing upon a motion for a new trial. As we have seen, it is the province of the trial judge to see that the jury intelligently and justly performs its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict.

(*People v. Robarge, supra*, 41 Cal.2d at p. 634.)

Section 1181, subdivision 7, allows for the granting of a motion for new trial "[w]hen the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed."

Section 1181, subdivision 6, allows for the granting of a motion for a new trial "[w]hen the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

At the hearing on the motion for new trial, and when the court announced its ruling on the motion, defense counsel Sanger did not suggest -- much less allege -- that the court had applied an incorrect standard. In making its ruling on the various claims raised in the motion, the trial court complied with the standard set out by this Court in *Robarge*, which was to "consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict." (*People v. Robarge, supra*, 41 Cal.2d at p. 633.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: July 13, 2012

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 61,800 words.

Dated: July 13, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Ryan James Hoyt**
No.: **S113653**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 13, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 13, 2012, at Los Angeles, California.

M.I. Rangel
Declarant

Signature

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