that these objections are preserved for our review but conclude that any error was harmless beyond a reasonable doubt.

1. The DNA Evidence

The evidence at issue concerns analysis performed in two Cellmark labs: one lab in Dallas, Texas, the other in Germantown, Maryland. The most notable evidence produced by the Dallas laboratory concerned Palmer's underwear. A profile of defendant, believed to be unique to him and to a subset of his male blood relatives, matched a sperm fraction extracted from cuttings of Palmer's underwear.

The most notable evidence produced by the Germantown laboratory concerned the vibrator found in Palmer's apartment. DNA on a swab of the vibrator matched defendant's DNA (in a sperm fraction) and Palmer's DNA (in a nonsperm fraction). The Germantown evidence also indicated that blood stains found in Palmer's apartment matched her DNA profile and that sperm on the rug matched defendant's.

During deliberations, the jury asked for a readback of Dr. Staub's testimony, specifically " 'the parts about the underwear and the [vibrator], especially the conclusions.' " During closing argument, the prosecution described evidence of "defendant's semen . . . in the seat of [Palmer's] panties" as "a bit of a problem for the defendant."

2. Harmlessness

The evidence that defendant killed Palmer was overwhelming. A criminalist testified that the DNA analysis she performed linked defendant to sperm fractions extracted from an aqua-colored blanket and towel cutting found near Palmer's body, as well as a nonsperm fraction from a nearby cigarette butt. Defendant's relationship with Palmer had failed

and he was frantic to reconnect with her. The night she disappeared, he was seen with a Ford Ranger that she drove home that evening. Soon after she disappeared, he expressed consciousness of guilt, conveying to others that he was going to be on the news, was going to hell, or wanted to kill himself. He also told Mengoni not to worry about anyone showing up to testify regarding Palmer's missing Ford Escort, evincing special knowledge that Palmer, then missing, was already dead. That he had purchased rope of the kind found around Palmer's body further pointed toward his involvement in her killing.

To say that defendant killed Palmer, however, is not to say that he committed first degree murder, let alone special circumstance murder. The more significant question is whether the DNA evidence may have prejudiced the jury's assessment of whether defendant raped Palmer — an issue relevant to the felony murder theory of first degree murder; to the rape conviction and special circumstance; and to the burglary conviction and special circumstance.

Here too, however, there was no prejudice. The jury heard Calhoun's testimony that defendant admitted he had "beat the pussy up." Clearly admissible physical evidence corroborated that confession. As discussed above, a criminalist testified at trial that the DNA analysis she performed linked defendant to sperm fractions extracted from an aqua-colored blanket and towel cutting found near Palmer's body. The profile common to defendant and the sperm fraction from the towel, she explained, would be expected to appear in only one in 740 quadrillion Caucasians. The criminalist also extracted a sperm fraction from cuttings of Palmer's underwear and concluded that defendant could "[]not be excluded" as the source of the partial profile she created from that fraction. None of that analysis was

performed at the Germantown or Dallas labs at issue in this claim of error. All of it was performed by an analyst who testified at trial, subject to cross-examination.

Moreover, the jury heard ample evidence demonstrating defendant's propensity to commit sexual assault, something he did to "all of his women." And it learned the state of Palmer's clothing when she was found — shirt off, jeans pulled down to the thighs, fully exposing her underwear. Viewed in this context, any error in admitting additional DNA evidence was harmless beyond a reasonable doubt.

The harmlessness of any error in admitting the Germantown evidence is further confirmed by the jury's verdicts. The jury *acquitted* defendant of sexual penetration by foreign object. It found *not* true the sexual penetration by foreign object special circumstance allegation. Because the Germantown evidence — most significantly, evidence regarding the vibrator — did not persuade the jury that defendant had committed sexual penetration by a foreign object, it is difficult to see that evidence causing the jury to conclude that defendant committed rape or entered with intent to commit rape. Accordingly, even assuming error, no basis for reversal appears.

F. Sufficiency of the Evidence that Defendant Raped Palmer

Defendant contends there is insufficient evidence that he raped or attempted to rape Palmer. As discussed, we disagree.

"The test for evaluating a sufficiency of evidence claim is deferential: 'whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We must 'view the evidence in the light most favorable to the People' and 'presume in support of the judgment

the existence of every fact the trier could reasonably deduce from the evidence.' [Citation]. We must also 'accept logical inferences that the jury might have drawn from the circumstantial evidence.'" (*People v. Flores* (2020) 9 Cal.5th 371, 411.)

As noted, evidence that defendant raped Palmer included the sperm discovered in her apartment and on items found with her body; defendant's admission to Calhoun that he had "beat the pussy up"; defendant's propensity to commit sexual assault; and the state of Palmer's clothing when she was found.

Defendant argues that any sexual intercourse might have been consensual. The jury could have rejected that contention based on the evidence that Palmer had ended her relationship with defendant and was afraid of him. The fact of her murder — and the scratches observed on defendant's face — also suggest that any intercourse around the time she disappeared was rape.

Defendant contends there is no evidence regarding when any sperm was deposited. But defendant's statement to Calhoun tended to indicate that he had sex with Palmer close in time to her disappearance, after their relationship had ended. The jury also heard testimony that the acid phosphatase in semen "is water soluble and it tends to wash out." Accordingly, the fact that a towel and aqua blanket found near Palmer's body both screened positive using an acid phosphatase test tended to indicate that the sperm found on those items was deposited after the last time those items were washed. Testimony similarly conveyed that although sperm may remain after washing, each wash diminishes the likelihood of finding sperm.

Defendant next asserts that if Palmer had been raped, "it is likely that sperm would have been deposited in the crotch

area" of her underwear, adding that the presence of sperm elsewhere in the underwear was "indicative of sexual conduct other than rape." (See *People v. Holt* (1997) 15 Cal.4th 619, 676 ["In this state rape and sodomy are distinct crimes"].) Putting this speculation aside, the jury was not required to conclude that the "sexual penetration, however slight," that is "sufficient to complete the crime" of rape resulted in any sperm at all, let alone sperm in a particular area of Palmer's underwear. (Pen. Code, § 263.) Nor was the jury required to assume that if defendant committed sodomy, he did not also commit rape. For example, the jury convicted defendant of both raping and sodomizing Kathleen S. during the incident in the garage.

Moreover, the jury heard Calhoun's testimony that defendant admitted to "beat[ing] the pussy up." Defendant argues that "no reasonable juror could have reasonably inferred" that defendant's statement to Calhoun meant that defendant had raped Palmer. But a reasonable juror could have understood the statement to be an admission that defendant and Palmer had vaginal sex — and relied on the surrounding circumstances to conclude that the sex was not consensual.

Finally, defendant contends there was no evidence that Palmer was alive when any intercourse occurred. " ' "[I]n the absence of any evidence suggesting that the victim's assailant intended to have sexual conduct with a corpse [citation], we believe that the jury could reasonably have inferred from the evidence that the assailant engaged in sexual conduct with the victim while [she] was still alive rather than after [she] was already dead." ' " (*People v. Ghobrial* (2018) 5 Cal.5th 250, 280.) Likewise, the jury could have reasonably inferred that because

defendant committed the rape before killing Palmer, he also formed the intent to commit rape before she was dead.[7]

G. Burglary Felony Murder Instructions

The jury was permitted to find defendant guilty of first degree felony murder on a theory that the murder was committed during the commission of a burglary. The jury was also tasked with considering the truth of a burglary special circumstance allegation. In both contexts, the jury was instructed that defendant was guilty of burglary only if he entered with intent to commit (i) theft, (ii) rape, (iii) sexual penetration by a foreign object, or (iv) sodomy. Defendant argues that "[n]either a burglary-based felony murder nor a burglary special circumstance can properly be based on an entry with the intent to commit sexual assault." We disagree.[8]

The felony murder rule makes certain homicides murder (rather than manslaughter) and makes a subset of those homicides murder of the first degree. As relevant here, "[m]urder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "Manslaughter is the unlawful killing of a human being without malice." (§ 192.) "Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature."

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[7] Our conclusion that there was substantial evidence of a rape also addresses defendant's argument that the trial court should not have relied on the premise that the murder took place in the course of a rape when ruling on the automatic motion to modify the verdict. (See *post*, pt. II.K.)

[8] Defendant contends that he may raise this issue on appeal even in the absence of an objection below. We assume without deciding that the claim of error has not been forfeited. (See *Daveggio, supra*, 4 Cal.5th at p. 845; Pen. Code, § 1259.)

(§ 188, subd. (a)(1).) "Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188, subd. (a)(2).) " 'The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life.' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1184 (*Chun*).) A homicide committed during the perpetration of certain felonies enumerated by statute — including rape and burglary — is murder of the first degree. (§ 189, subd. (a).) A homicide committed during the perpetration of unenumerated inherently dangerous felonies is murder of the second degree. (*People v. Bryant* (2013) 56 Cal.4th 959, 966.) Only felonies "inherently dangerous to human life" are eligible for the felony murder rule. (*Id.* at p. 965; see *People v. Ford* (1964) 60 Cal.2d 772.) The merger doctrine applies to a subset of those felonies.

If construed broadly, the felony murder rule could threaten to collapse the distinction between murder (which requires malice) and manslaughter (which does not). The merger doctrine limits this threat. The thrust of the doctrine is that certain felonies " 'merge' with the homicide and cannot be used for purposes of felony murder." (*Chun*, *supra*, 45 Cal.4th at p. 1189; see also *People v. Wilson* (1969) 1 Cal.3d 431, 442, fn. 5 (*Wilson*) ["felonies that are an integral part of the homicide are merged in the homicide (italics omitted)"].) "In explaining the basis for the merger doctrine, courts and legal commentators reasoned that, because a homicide generally results from the commission of an assault, every felonious assault ending in death automatically would be elevated to murder in the event a felonious assault could serve as the predicate felony for purposes of the felony-murder doctrine. Consequently, application of the

felony-murder rule to felonious assaults would usurp most of the law of homicide, relieve the prosecution in the great majority of homicide cases of the burden of having to prove malice in order to obtain a murder conviction, and thereby frustrate the Legislature's intent to punish certain felonious assaults resulting in death (those committed with malice aforethought, and therefore punishable as murder) more harshly than other felonious assaults that happened to result in death (those committed without malice aforethought, and therefore punishable as manslaughter)." (*People v. Hansen* (1994) 9 Cal.4th 300, 311–312, overruled by *Chun*, at p. 1199.) Some decisions also take the position that deterrence concerns cannot justify the felony murder rule when certain types of assaultive felonies are at issue, demanding "a felony independent of the homicide" to render the merger doctrine inapplicable. (*Wilson*, at p. 440; see also *ibid.* ["Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule"]; but see *People v. Farley* (2009) 46 Cal.4th 1053, 1120 (*Farley*).)

This court embraced a version of the merger doctrine in *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*). The instructions in *Ireland* permitted the jury to find a second degree murder if a killing resulted from an assault with a deadly weapon. (*Id.*, at p. 538.) We concluded that allowing the "use of the felony-murder rule" in such a case "would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault — a category which includes the great majority of all homicides." (*Id.*, at p. 539.) We forbade such "bootstrapping" in the circumstances relevant there. (*Ibid.*; see also *Wilson*, *supra*, 1 Cal.3d at p. 441 ["In *Ireland*, we

rejected the bootstrap reasoning involved in taking an element of a homicide and using it as the underlying felony in a second degree felony-murder instruction"].)

Several months later, we extended *Ireland* to reach certain first degree felony murders based on burglary. (See *Wilson*, *supra*, 1 Cal.3d at p. 431.) The prosecution in *Wilson* "sought to apply the felony-murder rule on the theory that the homicide occurred in the course of a burglary, but the only basis for finding a felonious entry [was] the intent to commit an assault with a deadly weapon." (*Id.*, at p. 440.) We forbade reliance on a felony murder theory when, among other things, "the entry would be nonfelonious but for the intent to commit the assault." (*Ibid.*; see also *id.*, at p. 442 ["an instruction on first degree felony murder is improper when the underlying felony is burglary based upon an intention to assault the victim of the homicide with a deadly weapon"].) We reached this result even though, then as now, Penal Code section 189 defined first degree murder to include "[a]ll murder . . . which is committed in the perpetration or attempt to perpetrate . . . burglary." (*Wilson*, at p. 441, fn. 4; see § 189.)

Stressing the clear language of Penal Code section 189, we eventually held in *Farley* that *Wilson* "erred in extending the merger doctrine to first degree felony murder." (*Farley*, *supra*, 46 Cal.4th at p. 1117; see *id.*, at pp. 1111–1122.) Because the defendant in *Farley* had committed his crimes in 1988, "at which time it was unforeseeable that we would overrule *Wilson*," our *Farley* decision did not apply to that defendant retroactively. (*Farley*, at p. 1122.) Likewise here: Although the merger doctrine no longer applies to first degree murder, we will apply *Wilson* as though it had not been overruled.

In the decades that *Wilson* remained good law, the contours of our merger doctrine evolved — and not always consistently. (See *Chun*, *supra*, 45 Cal.4th at pp. 1188–1201.) Regardless, defendant's position lacks merit under either of the analytical approaches we applied at the time he committed his offenses. First, defendant offers no reason to conclude that rape, sodomy, or penetration by foreign object are involved in "a high percentage of all homicides" (*id.*, at p. 1198), such that application of the felony murder rule to those offenses would remove the issue of malice aforethought from myriad homicide cases (*Ireland*, *supra*, 70 Cal.2d at p. 539). And second, in this particular case, there was evidence from which the jury could conclude that defendant had an independent purpose to commit rape, sodomy, or penetration by foreign object, separate and apart from any intent to assault or kill. (See *People v. Gonzales* (2011) 51 Cal.4th 894, 942 [even before *Farley*, *Wilson* was limited to situations in which "the defendant's *only* felonious purpose was to assault or kill the victim" (italics added)]; see also *Chun*, at pp. 1193–1195, 1197–1200; *People v. Smith* (1984) 35 Cal.3d 798, 806–807 ["child abuse of the assaultive variety" merged when court could "conceive of no independent purpose for the conduct"].)

True: rape, sodomy, and penetration by foreign object may fairly be termed "sexual assault," and so in some sense an intent to commit those offenses is assaultive in nature rather than independent of an assault. But as used in the context of the merger doctrine — a doctrine which, at least in part, guards the line between murder and manslaughter — the term "assault" captures only felonies that are more likely to prove fatal; if the felony is not sufficiently likely to prove fatal, it does not merge. We do not announce any precise test to determine which

offenses trigger application of what remains of the merger doctrine after *Farley*. The point is merely that intent to commit rape, sodomy, and penetration by foreign object are not "assaultive" in the relevant sense; they reflect an independent intent for purposes of the merger doctrine. (Cf. *People v. Morgan* (2007) 42 Cal.4th 593, 619 [no merger problem because "unlawful penetration with a foreign object . . . embodies a separate felonious purpose apart from the intent to injure or kill"]; *People v. Holloway* (2004) 33 Cal.4th 96, 140 [no merger problem when the jury could find burglary only if there was entry with intent to commit rape].)

A notable omission from defendant's argument underscores the point. There is a certain symmetry between *Ireland* and *Wilson*: If assault with a deadly weapon merges (*Ireland*), then perhaps entry with intent to commit assault with a deadly weapon should merge as well (*Wilson*). (See *People v. Burton* (1971) 6 Cal.3d 375, 388.) But here, defendant does not dispute that rape itself may provide the basis for special-circumstance first degree felony murder. And if rape does not merge, it is difficult to see why entry with intent to commit rape would.[9]

Defendant also argues there was insufficient evidence to support the court's instruction that the jury could consider

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[9] The nature of defendant's argument that the special circumstance should merge is not entirely clear. He does not appear to argue that if the felony murder instruction was permissible, the special circumstance instruction was nevertheless flawed. The existence of an independent purpose would undermine any such argument as well. (See *People v. Farmer* (1989) 47 Cal.3d 888, 915; see also *People v. Clark* (1990) 50 Cal.3d 583, 608–609 & fn. 15.)

whether defendant entered with intent to commit theft. He does not frame this as a standalone attack on the verdict, perhaps because any error here would obviously be harmless: The exacting *Chapman* harmlessness standard would not apply (see *People v. Guiton* (1993) 4 Cal.4th 1116, 1129–1130), and in any event, the rape conviction (with the burglary allegation) and rape special circumstance leave no reasonable doubt that the jury found defendant entered with intent to commit rape.

Instead, we understand defendant's insufficiency argument to be in service of his merger argument: The burglary was not based on entry with intent to commit theft, therefore it was based on entry with intent to commit sexual assault, thus the merger doctrine applies. Because the argument fails at the final step — there being no merger problem even if the burglary was based on entry with intent to commit rape, sodomy, or sexual penetration by foreign object — we need not catalog the evidence relevant to the theft instruction (such as the jewelry described by Calhoun and the theft from Lorna T.).

H. Parole Revocation Fine

The trial court imposed a $10,000 parole revocation fine. Defendant claims that the fine is improper because, as a person sentenced to death, he is ineligible for parole. The claim fails under *People v. Brasure* because defendant was also sentenced to a determinate term. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 (*Brasure*).) Defendant concedes that *Brasure* so holds and makes no effort to distinguish it. He instead criticizes *Brasure*'s statutory interpretation and contends that the case is in tension with *People v. McWhorter* (2009) 47 Cal.4th 318, 380 (*McWhorter*).

We decline to reconsider *Brasure*. As relevant here, *Brasure* reasoned that a determinate term carries with it a period of parole, triggering a parole revocation fine under Penal Code section 1202.45. (See *Brasure*, *supra*, 42 Cal.4th at p. 1075; see also Pen Code., § 1202.45, subd. (a) [requiring a fine "[i]n every case" in which a person's "sentence includes a period of parole"].) In *McWhorter*, we embraced a capital defendant's claim that a parole revocation fine should be stricken, reasoning, in full, that defendant "is correct. (See *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1184–1185 [83 Cal.Rptr.2d 157].) Respondent has conceded the point." (*McWhorter*, *supra*, 47 Cal.4th at p. 380.) As is apparent, *McWhorter* did not acknowledge the existence of *Brasure*; relied solely on a Court of Appeal decision (*Oganesyan*) that *Brasure* distinguished as involving "no determinate term of imprisonment imposed under [Penal Code] section 1170" (*Brasure*, at p. 1075); and never considered the significance of any determinate term, omitting mention of whether one had been imposed in connection with McWhorter's robbery conviction (see *McWhorter*, at pp. 324, 380). Because " ' "cases are not authority for propositions not considered" ' " (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127), *McWhorter* casts no doubt on the significance *Brasure* afforded to a defendant's determinate term. We note, too, that "[d]efendant is in no way prejudiced by assessment of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked." (*Brasure*, at p. 1075.)[10]

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[10] Defendant does not contend that, and we do not address whether, any other intervening authority casts doubt on *Brasure*'s conclusion.

I. Error in Abstract of Judgment

Penal Code section 286 defines the crime of sodomy and addresses different circumstances in which the crime may be committed. One relevant circumstance is the age of the victim. (See, e.g., § 286, subd. (c).) The abstract of judgment indicates that defendant thrice committed sodomy with a person under 14 years of age. The parties agree that this was error; defendant's victims regarding the relevant counts (7, 10, and 16) were adults. "[A] court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts." (*In re Candelario* (1970) 3 Cal.3d 702, 705.) The abstract of judgment will be corrected to reflect that defendant was convicted under subdivision (c)(2) — sodomy by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury."

J. Evidence of Animal Abuse

Defendant complains that the trial court erred at the penalty phase by admitting evidence that he mistreated cats as a child. Even assuming the claim of error is preserved and has merit, any error was harmless beyond a reasonable doubt.

The prosecution sought to admit evidence of animal abuse through the testimony of defendant's half brother. The evidence relevant here concerned tying cats' tails together and throwing the cats over a clothesline. The prosecution contended that the evidence was relevant to the anticipated testimony of a defense expert psychologist. Defense counsel conceded that he had provided the expert with a transcript of an interview in which the half brother discussed the tying together of cats' tails. During a later colloquy, the prosecution stressed "that at no time have we said or do we intend to say that any of the things that

the defendant did as a youth . . . fall under Factor B. We are not characterizing them as aggravating factors." The court allowed inquiry about the subject, but encouraged the prosecution to "try to minimize this testimony," cautioning that the court would "put a halt to it if it becomes too inflammatory."

The defense was the first to question the half brother regarding the subject. In full: "Now, did you have occasion to see [defendant] — that you personally saw [defendant] get a couple cats and tie their tails and put them up on a clothesline or something? [¶] A[.] Yeah. It was getting ready to happen and I ran because I didn't want to see it. [¶] Q[.] Okay. Did you actually see any — did you actually ever see anything that happened? [¶] A[.] No. I ran. [¶] Q[.] Okay. [¶] A[.] But they were getting ready to do it."

The prosecution picked up where the defense left off. Questioning elicited that defendant and a few other boys were in a backyard discussing tying cats' tails together and throwing the cats over a clothesline in that yard. They were trying to catch the cats and had something like "rope or twine." The half brother did not see defendant harm animals on other occasions.

The court later had doubts about its decision to admit this and other testimony regarding defendant's conduct during his childhood. The court ultimately instructed the jury that "[e]vidence has been presented regarding the defendant's background. This evidence may be considered by you, if at all, as mitigating evidence. [¶] I'm going to change that last sentence. [¶] This evidence may *only* be considered by you, if at all, as mitigating evidence." (Italics added.) The court also instructed that, other than certain crimes about which the jury heard evidence during the guilt phase, the jury should not

"consider any other evidence pertaining to any other crimes on any alleged victim, whether charged or uncharged."

Considering all these circumstances, no basis for reversal appears. The testimony at issue was brief. It concerned the behavior of a group of boys, not solely defendant, an adult whom the jury had already convicted of murder, rape, and sodomy. The witness did not testify that the plan regarding cats was defendant's idea. Nor did he testify that any cats were ever caught, tied, or thrown. The prosecution asserted at trial that it sought to elicit this testimony solely for impeachment purposes. There is no dispute that the prosecution did not rely on the evidence regarding cats as evidence in aggravation during closing argument. The defense, by contrast, emphasized that "background information" is, if anything, "mitigation and only mitigation." Likewise, the court's instructions limited the significance that the jury could have given to this evidence. Viewed in context, any error in admitting this evidence of (potential) animal abuse was harmless beyond a reasonable doubt.

K. Denial of Automatic Motion to Modify the Verdict

The trial court denied defendant's automatic motion to modify the verdict. (Pen. Code, § 190.4.) Defendant concedes that he did not object to the denial and that "[s]uch a failure generally constitutes forfeiture of the issue on appeal." (*People v. Sánchez* (2016) 63 Cal.4th 411, 485; *People v. Horning* (2004) 34 Cal.4th 871, 912 (*Horning*); *People v. Riel* (2000) 22 Cal.4th 1153, 1220.) He contends that the failure to object should be excused on grounds of futility, "given the trial court's adamant view of the case." We disagree. The trial court's belief that the motion should be denied does not indicate that the trial court

could not have been persuaded otherwise after objection. The futility argument is particularly unconvincing to the extent defendant argues that the trial court's reasoning was marred by legal error; if informed of an actual legal error by an objection, presumably the court would have revisited its reasoning and, thus, its conclusion.

Defendant's claim fails on the merits in any event. He notes that the trial court concluded that the murder was premeditated, surmising that the court's view was based on evidence suggesting that defendant formed an intent to kill before entering Palmer's apartment. From this, he argues that the burglary special circumstance was inapplicable, citing *People v. Seaton* (2001) 26 Cal.4th 598, 646 for the proposition that "the burglary-murder special circumstance do[es] not apply to a burglary committed for the sole purpose of assaulting or killing" the homicide victim. The problem with defendant's argument is revealed by the language he quotes: "*sole* purpose." (*Ibid.*, italics added.) That defendant may have entered with intent to kill does not eliminate the evidence of his entry with intent to commit sexual assault.

Defendant also faults the trial court for relying on a view that the treatment of Palmer's body made the crime " 'particularly heinous.' " In support, he relies on case law relevant to factors that render crimes death eligible; in the parlance of California law, special circumstances. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363–364; *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797; *People v. Green* (1980) 27 Cal.3d 1, 61 & fn. 51.) That authority is beside the point. As the other case he cites explains, "defendant argues that the trial court erred by considering the 'heinous' nature of the crimes as a factor in aggravation. . . . But the aggravating circumstance

addressed in *Maynard* was one that determined eligibility for the death penalty, which requires greater precision than the factors that govern the sentence-selection process, at issue here. [Citations.] In any event, the trial court merely used the word 'heinous' . . . as part of its explanation why it found the circumstances of the offense an aggravating factor." (*People v. Lucero* (2000) 23 Cal.4th 692, 737 (*Lucero*).)[11]

Defendant also points to "significant mitigating evidence reducing his culpability." The trial court took such evidence into account. Finally, defendant contends that the evidence that "Palmer was beloved by her family and was a kind, generous, and loving individual" was "not sufficient to justify the decision not to modify the verdict." The trial court did not rely solely on that evidence to justify its decision. Our independent review reveals no reason to disturb the trial court's denial of the motion. (*People v. Sánchez*, *supra*, 63 Cal.4th at p. 485.)

L. Victim Impact Evidence

Defendant contends that victim impact evidence must be limited to the facts or circumstances known to the accused at the time of the offense. The trial court's failure to embrace this principle, he continues, resulted in evidentiary and instructional error. We have rejected this contention in the past and see no persuasive reason to revisit our precedent. (See, e.g.,

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[11] Defendant also asserts that "a contention that a murder was 'particularly heinous' is vague and cannot support imposition of the death penalty." He identifies no authority in support of this proposition — a deficiency that would forfeit the issue on appeal even if it had not been forfeited below. (See *Daveggio*, *supra*, 4 Cal.5th at p. 830, fn. 6.)

People v. Henriquez (2017) 4 Cal.5th 1, 37–38; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.) Accordingly, there was no error.

M. Cumulative Error

We have assumed that the trial court erred in admitting certain DNA evidence at the guilt phase and in admitting evidence of (potential) animal abuse at the penalty phase; held, in the alternative to a finding of no error, that any error in imposing a parole revocation fine was harmless; and confirmed that the abstract of judgment reflects a clerical error. We further conclude that, even viewed in combination, these errors (found or assumed) were not prejudicial. It is especially clear that the parole revocation fine and abstract of judgment could not have affected the jury's guilt or penalty verdict, and that the admission of animal abuse evidence at the penalty phase could not have affected the guilt phase verdict.

N. Miscellaneous Challenges to the Death Penalty

Defendant raises several challenges to the legality of California's death penalty. We decline to revisit our precedent as follows:

Neither Penal Code section 190.2 nor Penal Code section 190.3 (including its factor (a)) is unconstitutionally vague. (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 198 (*Sivongxxay*); *People v. Myles* (2012) 53 Cal.4th 1181, 1224.) Section 190.3 "is not invalid for failing to specify which factors are mitigating and which are aggravating, to limit aggravation to the specified aggravating factors, or to define aggravation or mitigation." (*Horning*, *supra*, 34 Cal.4th at p. 913.) "Nor do these asserted deficiencies impermissibly allow the jury to consider mitigating evidence, or its absence, in aggravation." (*Myles*, at p. 1223.) "Moreover, neither the use of the adjective 'extreme' in 'extreme

mental or emotional disturbance' under factor (d), nor the absence of language explaining that these identified circumstances are mitigating rather than aggravating, renders that factor unconstitutionally vague. Nor does the same asserted deficiency invalidate factor (h), regarding impairment due to mental disease, defect, or intoxication." (*Ibid.*) Defendant's further claim that "all the remaining factors in section 190.3 fail to pass constitutional scrutiny" is too cursory to require our discussion of each factor individually. (See *Myles*, at p. 1223, fn. 16; *People v. Jones* (2003) 30 Cal.4th 1084, 1129.)

"California's sentencing statute sets forth a constitutionally adequate burden of proof concerning the aggravating factors and the sentencer's ultimate decision." (*Sivongxxay*, *supra*, 3 Cal.5th at p. 198.) Written findings in support of the verdict are not required. (*Id.*, at p. 199; *People v. Potts* (2019) 6 Cal.5th 1012, 1061 (*Potts*).)

" ' "Comparative intercase proportionality review by the trial or appellate courts is not constitutionally required." ' " (*Potts*, *supra*, 6 Cal.5th at p. 1061.) A lack of such "review does not deny a defendant the constitutional right to equal protection." (*People v. Romero* (2008) 44 Cal.4th 386, 429.)

The special circumstances that make an offense a capital crime adequately "narrow the class of persons eligible for the death penalty." (*People v. Mai*, *supra*, 57 Cal.4th at p. 1057; see also *People v. Stevens*, *supra*, 41 Cal.4th at p. 211; *Lucero*, *supra*, 23 Cal.4th at p. 740.) "Prosecutorial discretion to select those death-eligible cases in which the death penalty will actually be sought is not constitutionally impermissible." (*People v. Anderson* (2001) 25 Cal.4th 543, 601; see also *People v. Ayala* (2000) 23 Cal.4th 225, 304.) "To the extent defendant argues

that the same incident may not be considered as a special circumstance and as an aggravating factor, he is incorrect." (*People v. Salazar* (2016) 63 Cal.4th 214, 254; see also *People v. Whalen*, *supra*, 56 Cal.4th at p. 89 [double jeopardy].)

Finally, "[t]he imposition of the death penalty under California's law does not violate international law or prevailing norms of decency." (*People v. Krebs* (2019) 8 Cal.5th 265, 351; see also, e.g., *People v. Rhoades*, *supra*, 8 Cal.5th at p. 456; *People v. Johnson* (2019) 8 Cal.5th 475, 528; *People v. Capers* (2019) 7 Cal.5th 989, 1017; *People v. Molano* (2019) 7 Cal.5th 620, 679.)

III. DISPOSITION

The superior court is directed to amend the abstract of judgment to reflect the basis for defendant's convictions on counts 7, 10, and 16; and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

CANTIL-SAKAUYE, C. J.

We Concur:

CORRIGAN, J.
LIU, J.
CUÉLLAR, J.
KRUGER, J.

GROBAN, J.
HULL, J.*

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* Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PEOPLE v. BAKER

S170280

Concurring Opinion by Justice Liu

In rejecting defendant's claims under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258, today's opinion accords deference to the trial court's ruling. (Maj. opn., *ante*, at p. 39.) A trial court is required to make a " 'sincere and reasoned effort' " to assess the prosecutor's stated reasons for striking prospective jurors. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1159.) Today's opinion recites our precedent that " '[w]hen the trial court has inquired into the basis for an excusal, and a nondiscriminatory explanation has been provided, we . . . assume the court understands, and carries out, its duty to subject the proffered reasons to sincere and reasoned analysis, taking into account all the factors that bear on their credibility.' " (Maj. opn., *ante*, at p. 39, quoting *People v. Mai* (2013) 57 Cal.4th 986, 1049, fn. 26 (*Mai*).)

I continue to believe the better rule is to require the trial court to affirmatively demonstrate on the record that it has made a sincere and reasoned effort to evaluate the prosecutor's explanations for a contested strike. I see little in the way of meaningful appellate review when we assume, in the absence of any explicit record of reasoned analysis, that the trial court discharged its duty to undertake such analysis. (See *People v. Miles* (2020) 9 Cal.5th 513, 612 (dis. opn. of Liu, J.) ["[B]ecause [the trial court's] ruling is not accompanied by any reasons or analysis, there is nothing to defer to."]; *Mai*, *supra*, 57 Cal.4th at p. 1060 (conc. opn. of Liu, J.) ["There is no *reasoning* in the

trial court's statement that 'no discriminatory intent is inherent in the explanations, and the reasons appear to be race neutral.' "].) "There is a wide chasm . . . between the absence of reasons to conclude that the trial court did not conduct a proper *Batson* analysis and the presence of reasons to conclude that it did." (*Mai*, at p. 1061 (conc. opn. of Liu, J.); see *People v. Williams* (2013) 56 Cal.4th 630, 709–717 (dis. opn. of Liu, J.).)

In this case, the court's discussion of deference notes that "indications in the record support an inference that the trial court had in mind the prospective jurors' demeanor and questionnaire answers when it evaluated the prosecutor's strikes of Prospective Jurors R.T. and T.P." (Maj. opn., *ante*, at p. 42.) I would further note that even upon an independent review of the record, I would conclude that defendant has not shown by a preponderance of the evidence that the prosecutor's reasons for striking R.T. and T.P. were pretextual. Accordingly, defendant's *Batson/Wheeler* claims must be rejected.

LIU, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Baker

Unpublished Opinion
Original Appeal XXX
Original Proceeding
Review Granted
Rehearing Granted

Opinion No. S170280
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