

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

ROBERT JURADO, Petitioner,

vs.

RONALD DAVIS, Warden, Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

**APPENDICES
(Vol. 1 of 2)**

(Capital Case)

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Robert JURADO

Petitioner-Appellant

v.

Ronald DAVIS

Warden

San Quentin State Prison

Respondent-Appellee

12 F.4th 1084

No. 18-99009.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 23, 2021 Pasadena, California.

Filed September 10, 2021.

Citing Cases 1

Appeal from the United States District Court for the Southern District of California; Janis L. Sammartino, District Judge, Presiding, D.C. No. 3:08-cv-01400-JLS-JMA.

Before: Sidney R. Thomas, Chief Judge, and Susan P. Graber and Richard R. Clifton, Circuit Judges.

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OPINION

THOMAS, Chief Judge.

Robert Jurado, a California inmate on death row, appeals the district court's denial of his petition for writ of habeas corpus. We review *de novo* a district court's denial of a habeas corpus petition and review for clear error any factual findings made by the district court. **Hurles v. Ryan, 752 F.3d 768, 777 (9th Cir. 2014)**. We review for abuse of discretion a

district court's decision whether to conduct an evidentiary hearing. **Stanley v. Cullen, 633 F.3d 852, 863 (9th Cir. 2011).**

Because Jurado's petition was filed in the district court after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "we may grant habeas relief only if the state court's decision (1) 'was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court ...; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" **Davis v. Woodford, 384 F.3d 628, 637 (9th Cir. 2004)**(quoting 28 U.S.C. § 2254(d)).

"A state court decision is 'contrary to' clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases or if the state court confronts a set of facts materially indistinguishable from those at issue in a decision of the Supreme Court and, nevertheless, arrives at a result different from its precedent." **Lambert v. Blodgett, 393 F.3d 943, 974 (9th Cir. 2004).** A state court's decision is an "unreasonable application" of federal law if it "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." **Lockyer v. Andrade, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)** (quotations and citation omitted). The Supreme Court has explained that the exceptions based on "clearly established" law refer only to "the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the *1091 relevant state-court decision." (Terry) **Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).**

With respect to § 2254(d)(2) claims, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." **Wood v. Allen, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010).** If "[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's ... determination.'" **Id.** (quoting **Rice v. Collins, 546 U.S. 333, 341-42, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006).**

"[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." **Harrington v. Richter, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).** "If this standard is difficult to meet, that is because it was meant to be." **Id.** As amended by AEDPA, § 2254(d) "preserves authority to issue the writ [only] in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents. It goes no further." **Id.** Under AEDPA, then, habeas corpus is a guard only "against extreme malfunctions in the state criminal justice systems," and is not a means for "ordinary error correction through appeal." **Id. at 103, 131 S.Ct. 770** (quoting **Jackson v. Virginia, 443 U.S. 307, 332 n.5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring in judgment).**

Applying these standards, we affirm the judgment of the district court.

I

On May 17, 1991, Teresa Holloway's body was found off of Highway 163 in San Diego County. The cause of death was determined to be "blunt force head injuries and strangulation."

According to the evidence adduced at trial, Petitioner Robert Jurado and his roommate, Denise Shigemura, hatched a plan to kill a drug dealer named Doug Mynatt, with whom the two had an ongoing dispute. Jurado and Shigemura became concerned that their acquaintance and Mynatt's former roommate, Teresa Holloway, would reveal their plan. Jurado, Shigemura, and Jurado's girlfriend, Anna Humiston, apparently killed Holloway in a car by strangling her with an 18-inch weed-eating cord and beating her with the car's scissor-jack. Jurado was interviewed by police soon after the murder, and he confessed to killing Holloway, cooperated with law enforcement, and took police to the scene of the crime where they located the tire jack.

Jurado was indicted on one count of conspiracy to commit murder and one count of first degree murder committed while lying in wait, a special circumstance that made him eligible for the death penalty. Jurado was tried separately from his co-defendants, Shigemura and Humiston. The jury convicted him of first degree murder and determined that death was the appropriate penalty. After denying a motion for new trial and to modify the verdict, the trial court sentenced Jurado to death.

The California Supreme Court affirmed the judgment in **People v. Jurado, 38 Cal. 4th 72, 41 Cal.Rptr.3d 319, 131 P.3d 400 (2006)**. Jurado petitioned for writ of certiorari, and the Supreme Court of the United States denied Jurado's petition in *Jurado v. California*, 549 U.S. 956, 127 S.Ct. 383, 166 L.Ed.2d 276 (2006). While his direct appeal was pending, Jurado filed a state habeas petition in the California Supreme Court, which was denied without an evidentiary hearing.

Jurado's first federal habeas petition was stayed in order to allow him to exhaust ***1092** his claims in state court. The California Supreme Court subsequently denied his second state petition.

The district court denied habeas relief on Jurado's second amended federal habeas petition, and also denied his motions for investigation, evidentiary development, and an evidentiary hearing. The district court subsequently issued a certificate of appealability, and stayed execution pending appeal. This timely appeal followed.

II

A

The California Supreme Court's conclusion that the Double Jeopardy Clause did not bar further prosecution of Jurado was not an unreasonable application of clearly established federal law or an unreasonable determination of the facts within the meaning of § 2254(d).

After Jurado's indictment, the state trial court granted Jurado's motion to set aside the special circumstance based on insufficiency of the evidence, and Jurado immediately pleaded guilty to all pending charges. The prosecutor acknowledged that Jurado "can plead to the face at any time," but indicated that "the People would not be signing the change of plea form," and specified that "there's a possibility that the People may take a writ on the ruling by the court." Additionally, the prosecutor noted that he "wanted counsel to be aware that the plea could conceivably be set aside at a later time depending on how that procedure goes."

The following month, the prosecution sought reinstatement of the special circumstance allegation in the California Court of Appeal. **People v. Superior Court (Jurado), 4 Cal. App. 4th 1217, 6 Cal.Rptr.2d 242 (1992)**. The Court of Appeal held that the special circumstance had been improperly dismissed. See **id. at 1229, 6 Cal. Rptr.2d 242**. The Court of Appeal further held that double jeopardy posed no bar to the reinstatement of the special circumstance, relying on **Ohio v. Johnson, 467 U.S. 493, 500-02, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984)** (holding double jeopardy did not bar prosecution of more serious crimes when defendant pleaded to less serious crimes). **Id. at 1229-30, 6 Cal.Rptr.2d 242**. The California Supreme Court denied Jurado's petition for review, and Jurado withdrew his guilty plea and entered a plea of not guilty. Jurado raised this issue again on direct appeal, and the California Supreme Court rejected it, relying on **Johnson**.

In **Johnson**, the defendant was indicted on one count of murder, one count of involuntary manslaughter, one count of aggravated robbery, and one count of grand theft. **Id. at 495, 104 S.Ct. 2536**. At his arraignment, the defendant offered to plead guilty to the involuntary manslaughter and grand theft charges, and despite the prosecutor's objection, the trial court accepted the guilty pleas and sentenced the defendant to a term of imprisonment. **Id. at 496, 104 S.Ct. 2536**. The defendant subsequently requested that the trial court dismiss the murder and aggravated robbery charges on the ground that involuntary manslaughter and grand theft were lesser included offenses, and that the continued prosecution of the greater offenses after acceptance of the defendant's guilty pleas on the lesser offenses was barred by the Double Jeopardy Clause. **Id.** The trial court dismissed the charges and the Ohio Court of Appeals and the Ohio Supreme Court affirmed because under Ohio law, a defendant can only be found guilty of either murder or involuntary manslaughter (but not both), and either aggravated robbery or grand theft (but not both). **Id. at 496-97, 104 S.Ct. 2536**.

The Supreme Court reversed. It concluded that, contrary to the Ohio Supreme Court's determination, the case did not *1093 concern the double jeopardy protection prohibiting multiple punishments for the same offense. Id. at 497, 104 S.Ct. 2536. It found that the "trial court's dismissal of [the] more serious charges did more than simply prevent the imposition of cumulative punishments; it halted completely the proceedings that ultimately would have led to a verdict of guilt or innocence on [those] more serious charges." Id. at 499-50, 104 S.Ct. 2536. This went beyond the Double Jeopardy Clause's "principles of finality and prevention of prosecutorial overreaching," id. at 501, 104 S.Ct. 2536, and "den[ied] the State its right to one full and fair opportunity to convict those who have violated its laws." Id. at 502, 104 S.Ct. 2536. The Court stated that no interest protected by the Double Jeopardy Clause was implicated by continuing prosecution on the remaining charges where the defendant offered only to resolve part of the charges against him and the state objected to disposing of any of the charges without a trial. Id. at 501, 104 S.Ct. 2536. And it ultimately held that "the Double Jeopardy Clause [did] not prohibit the State from continuing its prosecution of respondent on the charges of murder and aggravated robbery." Id. at 502, 104 S.Ct. 2536.

A substantially similar situation is presented here. The state trial court dismissed the special circumstance, and Jurado unconditionally pleaded guilty to the remaining charges. The State appealed. Applying Johnson, the California Court of Appeal allowed reinstatement of the special circumstance, and Jurado withdrew his guilty plea. As in Johnson, the Double Jeopardy Clause is not implicated because Jurado was not subject to multiple punishments for the same offense. Moreover, on direct appeal, the California Supreme Court specifically found that the prosecutor had not acquiesced in Jurado's plea, and accordingly, Jurado's case was indistinguishable from Johnson. Jurado, 38 Cal. 4th at 97, 41 Cal.Rptr.3d 319, 131 P.3d 400.

Jurado argues that Johnson does not apply because more serious charges did not remain pending against him at the time he pleaded guilty. However, Johnson explained that where multiple charges are "embraced within a single prosecution," they are not "capable of being infinitely subdivided" such that "a determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded." Johnson, 467 U.S. at 501, 104 S.Ct. 2536. Regardless of the timing of Jurado's plea, this is the same course of events that occurred in his prosecution —the special circumstance was an included part and parcel of the initial prosecution —and the California Supreme Court was not unreasonable in concluding that the rationale in Johnson applied to Jurado's case.

Jurado also attempts to distinguish Johnson because the prosecutor in this case did not explicitly object to his plea. However, the California Supreme Court's conclusion that the prosecutor's actions in this case were equivalent to an objection was not objectively unreasonable, as it was clear that the prosecution was opposed to the guilty plea and wanted to pursue prosecution of the special circumstance allegation. In sum, the district

court correctly concluded that the California Supreme Court's determination that Johnson's holding controlled was not unreasonable.¹ *1094

B

The California Supreme Court's conclusion that Jurado's rights to due process and a reliable penalty determination were not violated by the admission at trial of Brian Johnsen's videotaped conditional examination was not an unreasonable determination of facts within the meaning of § 2254(d)(2).

The state trial court permitted the prosecution to play Johnsen's videotaped conditional examination at trial, after specifically finding that Johnsen's life would be in jeopardy if he were to testify at trial. Johnsen, who was Holloway's boyfriend at the time of her murder, testified that Mynatt had previously kidnapped and threatened to kill Jurado, and he explained details about the conspiracy to kill Mynatt. Johnsen also discussed his telephone conversation from jail with Holloway the day she was killed. Jurado's counsel cross-examined Johnsen throughout the conditional examination.

On appeal, the California Supreme Court concluded that, with respect to Johnsen's conditional examination, the prosecutor satisfied the requirements of California Penal Code § 1335(b) and § 1336(b) by submitting a declaration stating that Johnsen's life was in danger from Mynatt, Jurado, and Jurado's co-defendants and associates. Jurado, 38 Cal. 4th at 114, 41 Cal.Rptr.3d 319, 131 P.3d 400. The court also concluded that since Jurado had a full and fair opportunity to cross-examine Johnsen during his conditional examination, his constitutional rights were not violated. Id. at 115, 41 Cal.Rptr.3d 319, 131 P.3d 400.

"[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Additionally, the admission of particular evidence provides a basis for habeas relief only when it "render[s] the trial fundamentally unfair in violation of due process," Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (quoting Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995)).

It was not objectively unreasonable for the state courts to determine, on the basis of the prosecutor's declaration, that Johnsen's life would be at risk if he testified. As demonstrated by the circumstances of the case, both Mynatt and Jurado and his associates would be highly motivated to kill or harm Johnsen—a direct threat was not necessary to draw this inference. Moreover, the admission of the conditional evidence did not violate Jurado's rights to due process or a reliable penalty determination because, as the California Supreme Court held, Jurado and his counsel had a full and fair opportunity

to cross-examine Johnsen during the conditional examination. **Jurado, 38 Cal. 4th at 115, 41 Cal. Rptr.3d 319, 131 P.3d 400.**

C

The California Supreme Court's conclusion that Jurado's constitutional rights were not violated by Steven Baldwin's testimony at trial regarding Denise Shigemura's out-of-court statements was not an unreasonable determination of the facts or an unreasonable application of clearly established federal law.

Baldwin testified that Shigemura came over to his house a couple days before the murder. Shigemura asked him if he could get her a "gat" (a slang term referring to a gun) because she had a problem that she needed to take care of. Baldwin also testified that the day after the murder, he let Jurado, Shigemura, and Mark Schmidt into his home. Baldwin testified that, while *1095 in Jurado's presence, Shigemura, sitting next to Jurado on the couch, told Baldwin, "I no longer need what it was I asked you for. We took care of the problem and we dumped the body at Balboa Park." Jurado remained silent during and after this statement was made. The trial court held that the statement was admissible as an adoptive admission by Jurado, and Shigemura's earlier statement requesting a "gat" was admissible as a co-conspirator statement.

The California Supreme Court held that the trial court correctly admitted Shigemura's statement to Baldwin in Jurado's presence as an adoptive admission. **Jurado, 38 Cal. 4th at 116-17, 41 Cal.Rptr.3d 319, 131 P.3d 400.** The court concluded that Shigemura's request for the "gat" was not hearsay because "a request, by itself, does not assert the truth of any fact, [and] it cannot be offered to prove the truth of the matter stated," but that the statement "was hearsay insofar as it asserted that Shigemura had a problem that she needed to take care of." **Id. at 117, 41 Cal.Rptr.3d 319, 131 P.3d 400.** The court also concluded that Jurado suffered no prejudice as a result of the admission of the pre-crime statement because the substance of that statement was repeated in the post-crime statement made in Jurado's presence and which Jurado adopted through his conduct. **Id. at 118, 41 Cal.Rptr.3d 319, 131 P.3d 400.**

The California Supreme Court's conclusion that the trial court's admission of Shigemura's pre-crime statement—asking Baldwin if he had a "gat" and explaining that she had a problem she needed to take care of—amounted to harmless error did not rest on an unreasonable determination of the facts or an unreasonable application of clearly established law. To grant relief on this basis, we would need to conclude that "*the harmlessness determination itself* was unreasonable." See **Davis v. Ayala, 576 U.S. 257, 269, 135 S.Ct. 2187, 192 L.Ed.2d 323 (2015)** (quotations and citation omitted). The state court's harmlessness determination was not unreasonable here because the substance of the pre-crime statement was repeated in the post-crime statement. Thus, even if the pre-crime statement had not been admitted at trial, the jury still would have known that

Shigemura previously indicated to Baldwin that she had a problem she needed to take care of and that she (and Jurado) subsequently took care of that problem by dumping a body in Balboa Park.

The California Supreme Court decision also did not rely on an unreasonable determination of the facts or an unreasonable application of clearly established law in concluding that Shigemura's post-crime statement was properly admitted as an adoptive admission. Shigemura's post-crime statement—"I no longer need what it was I asked you for. We took care of the problem and we dumped the body at Balboa Park"—accused Jurado of committing a crime, in particular, because of her use of "we" and because of her location next to Jurado on a couch. There is no indication that Jurado could not hear Shigemura's statement, or that he did not understand that she was implicating him in the crime described. Therefore, he should have been compelled to reply or object if Shigemura's statement was incorrect, and it was not "objectively unreasonable" for the state court to construe his silence as an adoptive admission. **Miller-El, 537 U.S. at 340, 123 S.Ct. 1029**. As the statement was properly admitted as an adoptive admission, it did not cause the trial to be "fundamentally unfair," in violation of due process. See **Holley, 568 F.3d at 1101**; see also **Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)**. Likewise, its admission did not violate Jurado's clearly established Confrontation Clause rights. The Sixth Amendment's Confrontation Clause protections focus on testimonial statements, or statements that "bear testimony." See **Crawford v. Washington, 541 U.S. 36, 51-53, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)**. Supreme Court precedent, however, has yet to address whether adoptive admissions are testimonial statements that fall within the Confrontation Clause's protections.

D

The California Supreme Court's conclusion that Jurado's constitutional rights were not violated by the trial court's exclusion of his videotaped confession at the penalty phase does not warrant relief under § 2254(d).

During the penalty phase, defense counsel sought to admit a videotape of the confession Jurado gave to police officers. During the interrogation, Jurado wept as he admitted he "did it," and when the detectives asked if Jurado knew Holloway was still alive when he dumped her in a ditch, he said, "I don't know. Only God knows that, man." When the detectives asked if Jurado sustained any injuries during the fight, he replied, "The only injury I got is from my, just from my conscience." The defense asserted this evidence of remorse was needed to rebut the prosecution's evidence that after Jurado was arrested, he called Christine Medlin and sang something like "On, on, the bitch is gone" to the tune of a rap song, and he also said that he did not care if he had to spend the rest of his life in prison because "it was worth it."

The trial court refused to admit the videotape because it determined that, under **Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979)**, the statements made on the confession tape were inadmissible hearsay, and that no applicable hearsay exception applied. It further concluded that, as to the non-assertive emotions contained in the tape, there was no compelling need for the evidence, and no substantial evidence of inherent trustworthiness or reliability. The trial court noted that "nowhere does [Jurado] expressly articulate any emotion, if you will, or concern or remorse about the victim or her family," and instead, he only "express[ed] concern about not wanting to go to jail, not wanting to be labeled as a snitch," or other fears that he or his family might be harmed.

The California Supreme Court held the trial court's exclusion of the interrogation did not violate Jurado's right to a fair trial and reliable penalty determination because capital defendants have no constitutional right to the admission of evidence lacking trustworthiness. **Jurado, 38 Cal. 4th at 130, 41 Cal.Rptr.3d 319, 131 P.3d 400**. The court held that the trial court had correctly determined that the circumstances of the interrogation lacked indicia of trustworthiness. **Id. at 129-30, 41 Cal.Rptr.3d 319, 131 P.3d 400** (citing **Cal. Evid. Code §§ 1250 & 1252**).

The California Supreme Court decision did not rely on an unreasonable determination of the facts within the meaning of § 2254(d)(2), nor did the decision involve an unreasonable application of clearly established federal law. "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." **United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)**. Such reasonable restrictions may include the requirement that certain evidence be excluded if it is not sufficiently reliable. See **id. at 308-12, 118 S.Ct. 1261** (upholding application of Military Rule of Evidence 707, which operated to exclude polygraph evidence defendant sought to introduce because "there is simply no consensus that polygraph evidence is reliable"). The California Supreme ***1097** Court did not unreasonably conclude that the videotaped interrogation lacked persuasive assurances of trustworthiness. Therefore, its decision to affirm the exclusion of the videotape was not contrary to or an unreasonable application of clearly established federal law.

E

The California Supreme Court's conclusion that Jurado was not denied his constitutional right to a fundamentally fair sentencing hearing was not contrary to, or an unreasonable application of Supreme Court precedent. Jurado argues that his right was violated by the admission of evidence at the penalty phase that Holloway was seventeen weeks pregnant at the time she was killed.

The California Supreme Court affirmed the admission of the pregnancy evidence at the penalty phase because, under **Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)**, the Eighth Amendment "permits the prosecution, in a capital case, to

present evidence about the murder victim and the specific harm the defendant caused as relevant to the jury's penalty decision." **Jurado, 38 Cal. 4th at 130, 41 Cal.Rptr.3d 319, 131 P.3d 400**. The pregnancy evidence was relevant because the "facts concerning the victim that are admissible at the penalty phase of a capital trial as circumstances of the crime are not limited to those known to or reasonably foreseeable by the defendant at the time of the murder." **Id. at 131, 41 Cal.Rptr.3d 319, 131 P.3d 400**. It found that the evidence was not unduly prejudicial because, in murdering Holloway, the "defendant also terminated the life of a healthy 17-week-old fetus she was carrying," and that this was "part of the harm caused by defendant's crime and thus was a legitimate, though emotional, consideration for the jury in making its penalty decision." **Id.** The court also noted that Jurado had not challenged the manner in which the evidence was presented, and confirmed that the evidence was "not presented in an unnecessarily inflammatory way." **Id.**

The California Supreme Court correctly concluded that victim impact evidence is permissible at sentencing in a capital case. See **Payne, 501 U.S. at 824-25, 111 S.Ct. 2597** ("[A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."). The decision also did not rely on an unreasonable determination of the facts. The state court weighed the impact the evidence likely had on the jury, but it reasonably concluded that the pregnancy evidence "was part of the harm caused by defendant's crime and thus was a legitimate, though emotional, consideration for the jury in making its penalty decision." **Jurado, 38 Cal.4th at 131, 41 Cal.Rptr.3d 319, 131 P.3d 400**. This determination was not objectively unreasonable within the meaning of § 2254(d)(2).

F

The California Supreme Court concluded that Jurado's rights to due process, a fair penalty trial, and a reliable sentence were not violated by the admission of evidence concerning Jurado's prior incidents of violence. This determination was not contrary to and did not involve an unreasonable application of clearly established federal law.

At trial the prosecution introduced evidence of two physical altercations that had taken place between Jurado and his mother, Josephine Jurado. As a result, Josephine applied for a restraining order to have Jurado removed from the house. The application indicated that Jurado "threatened to obtain weapons during this incident and shoot up [her] house," "threatened to kill *1098 [her]," and "raised his hand as if to strike [her]."

Under California law at the time of Jurado's trial, "[i]f [a] defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true... the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole." **Cal. Penal**

Code § 190.3. In determining the penalty, if relevant, the trier of fact "shall take into account" "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." ***Id.* § 190.3(b).** "A habeas petitioner who challenges a state court's admission into evidence of prior acts of misconduct is not entitled to habeas corpus relief unless the state court's admission of this evidence violated the petitioner's federal due process right to a fair trial under the Constitution." ***Gordon v. Duran*, 895 F.2d 610, 613 (9th Cir. 1990).** Simple state law error does not warrant federal habeas relief. ***Estelle*, 502 U.S. at 67-68, 112 S.Ct. 475.**

The admission of evidence of prior acts of violence did not render the penalty phase of Jurado's trial fundamentally unfair in violation of due process. The evidence complied with **§ 190.3(b)**'s requirements: Jurado's conduct amounted to battery and/or assault.

The admission of this evidence also does not run afoul of Supreme Court precedent holding that aggravating circumstances that renders a defendant *eligible* for the death penalty "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." ***Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).** Here, the evidence was introduced only after the jury had already found Jurado eligible for the death penalty. Accordingly, the requisite narrowing function had already taken place. *See, e.g., id. at 878, 103 S.Ct. 2733* ("But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among [the class of persons eligible for the death penalty], those defendants who will actually be sentenced to death.").

G

The California Supreme Court's rejection of Jurado's challenge to the instructions given to the jury in his case was not contrary to or an unreasonable application of clearly established federal law.

At trial, the prosecution introduced evidence under **California Penal Code § 190.3(b)** showing that Jurado aided and abetted an assault that occurred while Jurado was in jail by instigating other inmates to attack Steven Baldwin for being a snitch. The attack resulted in Baldwin losing consciousness, and a physician testified as to the injuries Baldwin suffered as a result.

Jurado claims that the trial court's failure to instruct the jury *sua sponte* on the law of assault and aiding and abetting liability left the jury to consider whether Jurado had aided and abetted assault without having a legal framework to rely upon, which in turn, caused the jury to find an unconstitutionally vague aggravating circumstance in violation of due process. Alternatively, he asserts that counsel's decision to withdraw the request

for instruction on this issue amounted to ineffective assistance of counsel, in violation of Jurado's Sixth Amendment right to counsel. *1099

"The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal."

Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). "The question in such a collateral proceeding is `whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether `the instruction is undesirable, erroneous, or even universally condemned.'" **Id.** (quoting **Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)**). Further, "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." **Id. at 155, 97 S.Ct. 1730.**

The trial court's *sua sponte* failure to instruct on aiding and abetting assault fails to satisfy this demanding standard. There is no evidence that the omission of a specific instruction addressing aiding and abetting assault—one of four nonadjudicated criminal acts the prosecution presented separate and apart from the aggravating circumstances related directly to the murder —"so infected" the sentencing proceeding such that Jurado's sentence violates due process. The jury was still instructed that it could not consider prior criminal activity alleged in aggravation unless it was convinced beyond a reasonable doubt that Jurado had engaged in that activity; sufficient evidence was presented at trial regarding the Baldwin assault such that the jury could reasonably reach that conclusion.

Jurado also has not shown that the California Supreme Court's rejection of the ineffective assistance of counsel claim was unreasonable. Even assuming that counsel's failure to request the instruction constituted ineffective assistance, Jurado cannot demonstrate prejudice because the state court reasonably could have concluded that the evidence of aiding and abetting was overwhelming.

H

The California Supreme Court's rejection of Jurado's ineffective assistance of counsel claim based on his attorney's concession that Jurado intentionally killed Holloway was not contrary to or an unreasonable application of clearly established federal law.^{2, 3}

During voir dire, defense counsel conceded Jurado's involvement in killing Holloway. In his guilt phase opening statement, counsel also conceded Jurado's involvement in the killing—stating that Jurado killed Holloway in a manner that suggested rage resulting from the use of methamphetamine, as opposed to a manner that suggested premeditation and deliberation —and he argued that he would request a verdict of less than first degree murder. In support of this argument, counsel put on evidence at the

guilt phase regarding Jurado's methamphetamine use, including the presence of methamphetamine in his system at the time of the murder—although there was evidence that ***1100** suggested that Jurado likely ingested the methamphetamine days before the crime.

Trial counsel requested a jury instruction addressing the effect of voluntary intoxication on specific intent. At the time, voluntary intoxication was a defense to first and second degree murder. Cal. Penal Code § 22(a), (b); **People v. Whitfield, 7 Cal.4th 437, 450-51, 27 Cal.Rptr.2d 858, 868 P.2d 272 (1994)**. The trial court, however, refused to give the instruction because it concluded counsel had set forth insufficient evidence establishing that Jurado was intoxicated by methamphetamine or any other substance at the time of the murder.

During guilt phase closing arguments, counsel told the jury that Jurado committed second degree murder. He argued that Jurado had only committed second degree murder, and not first degree murder, because he killed Holloway in an unplanned struggle in the car that got "out of hand."

In assessing allegedly deficient performance under **Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)**, we are required "to affirmatively entertain" the range of possible reasons counsel might have proceeded as he did. **Cullen v. Pinholster, 563 U.S. 170, 196, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011)**. **Strickland** applies a strong presumption of effective assistance of counsel, a reviewing court must be highly deferential to the judgment below, and wide latitude is given to defense counsel in making tactical decisions. **466 U.S. at 689, 104 S.Ct. 2052**. "[I]f counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the **Strickland** standard, that is the end of the matter; no tenable claim of ineffective assistance [will] remain." **Florida v. Nixon, 543 U.S. 175, 192, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004)**.

Jurado has failed to show that trial counsel's actions were objectively unreasonable such that counsel's performance was constitutionally deficient under **Strickland**. Defense counsel's decision to concede second degree murder at the cost of the voluntary intoxication defense was not objectively unreasonable under the circumstances. Even though counsel had presented evidence that theoretically laid the foundation for the voluntary intoxication defense, that evidence was so unpersuasive that the trial judge refused to instruct the jury on it. At that point, it would have been unreasonable for counsel to continue making decisions based on a likely-unsuccessful defense. Considering the possible tactical reasons that counsel chose to concede this point, it was not objectively unreasonable for him to do so in order to bolster his credibility with the jury, or alternatively, to do anything to discourage a jury verdict of first degree murder.

Jurado's argument that defense counsel's failure to prepare and present evidence in support of the voluntary intoxication case amounted to deficient performance is likewise unpersuasive. Jurado has not explained with any level of specificity how counsel's

investigation into the methamphetamine intoxication issue was inadequate. Moreover, he does not cite any other available evidence that could have been discovered or presented in support of that defense. The best evidence supporting the defense—the results of the blood and urine tests from Jurado's arrest—was presented at trial. That evidence suggested only that Jurado had ingested methamphetamine at some point in the days before his arrest, and no evidence established that Jurado had in fact ingested methamphetamine the day of the murder or that he was intoxicated at the time of the murder. If anything, the evidence of intoxication was so thin that counsel might have considered not presenting it at all; there was no reason counsel needed to exert additional *1101 effort in its presentation, and an expert testifying to the effects of intoxication on the brain—without additional evidence of Jurado's actual intoxication—would not have been useful. Thus, this argument does not support Jurado's claim of deficient performance.

Jurado's claim that counsel's concession regarding second degree murder gratuitously helped the prosecution also does not amount to deficient performance. Although conceding second degree murder necessarily conceded a number of the elements of first degree murder, it was not unreasonable given the circumstances. By the time Jurado's case went to trial, most of the material elements of both second and first degree murder had been established; an abundance of evidence demonstrated that Jurado had killed Holloway—the primary issue was Jurado's culpability for the killing.

Although a criminal defendant has a Sixth Amendment right to decide whether to maintain his innocence, see McCoy v. Louisiana, U.S. , 138 S. Ct. 1500, 1509, 200 L.Ed.2d 821 (2018), "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest[,] and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." Nixon, 543 U.S. at 192, 125 S.Ct. 551. Here, there is no evidence Jurado opposed this strategy; therefore, counsel's tactics did not run afoul of Nixon or McCoy.

I

The California Supreme Court's rejection of Jurado's claim of ineffective assistance of counsel at the penalty phase was not contrary to or an unreasonable application of clearly established federal law. Jurado argues that his counsel should have presented evidence of: (1) family background and social history; (2) depression, polysubstance abuse, and addiction; (3) decompensation and homelessness; (4) psychological and emotional immaturity; and (5) exposure to toxins as a child.

However, we need not reach the issue of whether counsel's performance was deficient, as Jurado has not adequately established that any of counsel's alleged deficiencies resulted in prejudice within the meaning of Strickland. To establish prejudice under Strickland, a petitioner must "show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **466 U.S. at 694, 104 S.Ct. 2052**. Here, the crime itself was brutal and premeditated. Jurado killed in order to facilitate a second murder. The prosecution presented substantial evidence in aggravation, including evidence of Jurado's felony conviction, assaults against his own mother, and the victim's pregnancy. The evidence Jurado claims should have been introduced was not so different in quality or kind that it would have necessarily shifted the jury's view of Jurado as an individual or his responsibility for the killing. The jury knew Jurado had a difficult childhood and home life, they knew he had a strained relationship with his father, they knew that he was a regular drug user, they knew he was twenty years old. Given these factors, Jurado has failed to establish a "reasonable probability that ... the result of the proceeding would have been different." **Id.**

J

The district court did not abuse its discretion in denying Jurado's request for evidentiary development, discovery, and an evidentiary hearing. If a claim has been adjudicated on the merits in state court, a ***1102** federal habeas petitioner seeking discovery or an evidentiary hearing must first overcome the relitigation bar of § 2254(d)(1) and (d)(2) based solely on the record that was before the state post-conviction court. See **Pinholster, 563 U.S. at 181, 131 S.Ct. 1388** ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). "Where a habeas petitioner has not failed to develop the factual basis of his claim as required by 28 U.S.C. § 2254(e)(2), an evidentiary hearing is required if (1) the petitioner has shown his entitlement to an evidentiary hearing pursuant to **Townsend v. Sain, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)**, and (2) the allegations, if true, would entitle him to relief." **Hurles, 752 F.3d at 791.**

Jurado has not demonstrated that any of his claims survive the § 2254(d) relitigation bar on the basis of the record before the state court; therefore, the district court properly considered only the state court record in reviewing Jurado's claims for relief. See **Sully v. Ayers, 725 F.3d 1057, 1067 n.4 (9th Cir. 2013)**. As these claims had not stated even a prima facie claim for relief, evidentiary development was not necessary for the district court to deny them.

Additionally, because both the California Supreme Court and the district court addressed the merits of Jurado's claims without regard to any procedural defaults, the independence and adequacy of any procedure bars is not at issue, and any argument under **Martinez v. Ryan, 566 U.S. 1, 13-14, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012)** is moot. Therefore, there was no need to develop additional evidence related to **Martinez** cause and prejudice.

In sum, the district court did not abuse its discretion in denying Jurado's requests for evidentiary development and an evidentiary hearing.

III

The district court properly denied Jurado's petition for a writ of habeas corpus in thoughtful, detailed opinions. It properly concluded that the California Supreme Court's decisions were not (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). The district court did not abuse its discretion in denying requests for an evidentiary hearing and related relief.

We affirm the judgment of the district court.

AFFIRMED.

¹ Because the California Supreme Court's decision rested on application of Johnson, we need not and do not reach Jurado's argument regarding whether the special circumstance was a different offense or a greater element of capital murder.

² To the extent Jurado challenges counsel's failure to investigate Jurado's LSD use, we decline to address his arguments. Jurado raised these claims only in the context of Claim 1.D in of his Second Amended Petition, but this claim was not certified on appeal by the district court, and Jurado has not requested that we expand the COA to consider that claim now.

³ Jurado raised this claim in his 2010 state habeas petition, and the California Supreme Court denied it on the merits without explanation and also concluded it was barred as untimely and successive.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCT 25 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT JURADO,

Petitioner-Appellant,

v.

RONALD DAVIS, Warden, San Quentin
State Prison,

Respondent-Appellee.

No. 18-99009

D.C. No.

3:08-cv-01400-JLS-JMA

Southern District of California,
San Diego

ORDER

Before: THOMAS, Chief Judge, and GRABER and CLIFTON, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing. Fed. R. App. P. 40. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed R. App. P. 35. The petition for panel rehearing or rehearing en banc, (Dkt. No. 43), is therefore DENIED.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT JURADO,

Petitioner,

v.

RON DAVIS, Warden of San Quentin
State Prison,

Respondent.

Case No.: 08CV1400 JLS-JMA

FINAL ORDER:

**(1) DENYING PETITION FOR WRIT
OF HABEAS CORPUS;**

**(2) ISSUING CERTIFICATE OF
APPEALABILITY; AND**

**(3) ORDERING STAY OF
EXECUTION PENDING APPEAL**

For the reasons discussed in the Court's November 19, 2015 Order (see ECF No. 171) and September 17, 2018 Order (see ECF No. 208), the Petition for Writ of Habeas Corpus is **DENIED** as to all claims in the Second Amended Petition. The Court **ISSUES** a Certificate of Appealability ["COA"] on Claims 1 (limited to subparts 1.J, 1.M-1.O, 1.U, and 1.Y), 7, 11-12, 29-30, 33, and 37 and **DENIES** a COA on Claims 1 (subparts 1.A-1.I, 1.K-1.L, 1.P-1.T, 1.V-1.X, and 1.Z-1.AA), 2-6, 8-10, 13-28, 31-32, 34-36, and 38-48. See 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000); (see also ECF No. 171 at 153; ECF No. 208 at 287-88.) The Court also **ISSUES** a COA on the Order denying Petitioner's motion for investigation, discovery and an evidentiary hearing on procedural

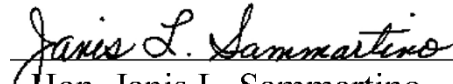
1 default as it relates to Claims 1.J, 1.M-1.O, 1.U, 1.Y and 33, and **ISSUES** a COA on the
2 Order denying Petitioner's motion for evidentiary development, discovery and/or an
3 evidentiary hearing on Claims 1.J, 1.M-1.O, 1.U, 1.Y, 7, 11-12, and 29-30. See 28 U.S.C.
4 § 2253(c); Ayestas v. Davis, 584 U.S. ___, 138 S.Ct. 1080, 1088 n.1 (2018); (see also ECF
5 No. 208 at 287-88.)

6 Pursuant to Civil Local Rule HC.3(g)(6), the Court **ORDERS** a stay of execution
7 "which will continue in effect until the court of appeals acts upon the appeal of the order
8 of stay."

9 The Clerk is **ORDERED** to enter Judgment for Respondent and close Case No. 08-
10 cv-1400.

11 **IT IS SO ORDERED.**

12 Dated: September 17, 2018

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14 Hon. Janis L. Sammartino
15 United States District Judge
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT JURADO,

Petitioner,

v.

RON DAVIS, Warden of San Quentin
State Prison,

Respondent.

Case No.: 08cv1400 JLS (JMA)

DEATH PENALTY CASE

ORDER:

**(1) DENYING PETITIONER'S
REQUEST FOR EVIDENTIARY
DEVELOPMENT, DISCOVERY
AND/OR EVIDENTIARY HEARING
AND**

**(2) DENYING HABEAS RELIEF ON
CLAIMS 2-4, 7-13, 15-32, 35-42, 44,
AND 46-48 IN THE SECOND
AMENDED PETITION**

Presently before the Court are the remaining claims in the Second Amended Petition ["SAP"], namely Claims 2-4, 7-13, 15-32, 35-42, 44, and 46-48; Claims 1, 5-6, 14, 33-34, 43 and 45 were previously adjudicated in the Group One Order. (See ECF No. 171.) Petitioner has filed a Group Two Merits Brief ["Pet. Br."], providing additional briefing on Claims 2-4, 7-8, 10-12, 19, 29-30, 38 and 47-48 in the SAP and requesting evidentiary

development and/or an evidentiary hearing. (ECF No. 182.) Respondent filed a Response [“Resp.”] to Petitioner’s Group Two Merits Brief, and Petitioner has filed a Reply [“Reply”]. (ECF Nos. 187, 194.) The Court held oral arguments on May 22, 2018. Subsequent to oral arguments and pursuant to the Court’s request, Petitioner filed a Supplemental Brief on June 5, 2018, outlining the claims on which Petitioner requests a COA. (ECF No. 205.) On June 19, 2018, Respondent filed a Response to Petitioner’s Supplemental Brief. (ECF No. 206.)

For the following reasons, based on the arguments presented in the pleadings, including relevant portions of the SAP, Answer [“Ans.”], and Memorandum of Points and Authorities in Support of the Answer [“Ans. Mem.”], as well as at oral argument and in the supplemental briefs, the Court **DENIES** Petitioner’s request for evidentiary development, discovery, and/or an evidentiary hearing on Claims 2-4, 7-8, 10-12, 19, 29-30, 38, and 47-48 and **DENIES** habeas relief on Claims 2-4, 7-13, 15-32, 35-42, 44, and 46-48 in the SAP.

I. PROCEDURAL HISTORY

By an Amended Information filed on October 11, 1991, Petitioner Robert Jurado and co-defendants Denise Shigemura and Anna Humiston were charged with first-degree murder and conspiracy to commit murder in the death of Teresa Holloway. (CT 49-51.) Petitioner was tried separately from his co-defendants.

Petitioner was convicted on May 23, 1994, of one count of first-degree murder pursuant to California Penal Code § 187 and one count of conspiracy to commit murder pursuant to California Penal Code §§ 182 and 187. (CT 1656-58.) The jury found that Petitioner used a deadly and dangerous weapon to commit the murder. (CT 1658.) The jury also found true the special circumstance allegation that the murder was committed while lying in wait under California Penal Code § 190.2(a)(15). (CT 1659.) On June 14, 1994, the jury returned a sentence of death. (CT 1676.) On October 7, 1994, the trial court denied Petitioner’s motions for a new trial, to set aside the special circumstance finding, and for modification of the verdicts, and sentenced him to death. (CT 1682-83.)

1 On automatic appeal (hereinafter “direct appeal”) of this conviction and judgment to
2 the California Supreme Court, Petitioner filed an opening brief on July 9, 2003, raising
3 twenty-six (26) claims for relief. (Lodgment No. 72.) Petitioner also filed a reply brief on
4 February 15, 2005. (Lodgment No. 74.) The California Supreme Court affirmed
5 Petitioner’s conviction and sentence in a decision issued on April 6, 2006. People v.
6 Jurado, 38 Cal. 4th 72 (2006). On October 10, 2006, the Supreme Court of the United
7 States denied his petition for a writ of certiorari. Jurado v. California, 549 U.S. 956 (2006).
8 On August 11, 2005, while his direct appeal was pending, Petitioner filed a habeas petition
9 with the California Supreme Court, raising thirty-two (32) claims for relief. (Lodgment
10 No. 76.) Petitioner also filed a reply brief on July 9, 2007. (Lodgment No. 78.) The
11 petition was denied on July 23, 2008, without an evidentiary hearing. (Lodgment No. 79.)

12 On July 31, 2008, Petitioner filed motions for the appointment of counsel and for a
13 stay of execution with this Court. (ECF No. 1.) On August 6, 2008, the Court granted
14 Petitioner’s motions and referred the matter to the Selection Board for the suggestion of
15 one or more attorneys to represent Petitioner on federal habeas review, and appointed
16 counsel on June 23, 2009. (ECF Nos. 2, 23.) On July 18, 2009, Petitioner filed a Protective
17 Petition for a Writ of Habeas Corpus. (ECF No. 42.) After hearing and adjudicating
18 Petitioner’s request for equitable tolling, Petitioner filed an Amended Petition and
19 accompanying exhibits on February 22, 2010. (ECF Nos. 73, 74.) On March 9, 2010, the
20 parties submitted a joint statement regarding exhausted claims and a joint stipulation to
21 stay the federal proceedings and hold the case in abeyance pending the exhaustion of those
22 claims. (ECF No. 78.) On March 10, 2010, the Court granted a stay of the federal
23 proceedings. (ECF No. 79.)

24 On January 16, 2013, the California Supreme Court denied Petitioner’s state
25 exhaustion petition. (Lodgment No. 91.) On February 14, 2013, Petitioner filed the Second
26 Amended Petition, the operative pleading in this action, and accompanying exhibits. (ECF
27 Nos. 94-95.) On August 14, 2013, Respondent filed an Answer and accompanying
28 Memorandum of Points and Authorities. (ECF Nos. 104, 104-1.)

1 On November 19, 2015, after briefing and oral argument, the Court issued an Order
 2 denying Respondent's request to dismiss Claims 1.J, 1.K, 1.T through 1.AA, 5-6, 14, 33-
 3 34, 43 and 45 on the basis of state procedural bars, denying Petitioner's motion for
 4 investigation, discovery and an evidentiary hearing on procedural default, denying
 5 Petitioner's motion for evidentiary development and/or an evidentiary hearing on Claims
 6 1.A through 1.K, 1.M through 1.W, 1.Y through 1.AA, 5 and 6, denying Petitioner's
 7 request for stay and abeyance, and denying habeas relief on the Group One Claims, Claims
 8 1, 5-6, 14, 33-34, 43 and 45. (ECF No. 171.)

9 Pursuant to the Court's request, the parties submitted a joint statement with respect
 10 to setting a briefing schedule for the claims remaining in the SAP. (ECF No. 172.) Based
 11 on the parties' respective proposals and the claims remaining in the SAP, the Court ordered
 12 one additional round of briefing, limited to Claims 2-4, 7-8, 10-12, 19, 29-32, 38 and 47-
 13 48. (ECF No. 173.) As noted above, on June 12, 2016, Petitioner filed the Group Two
 14 Merits Brief, addressing Claims 2-4, 7-8, 10-12, 19, 29-30 and 47-48,¹ along with an
 15 attached exhibit. (ECF Nos. 182, 182-1.) On December 1, 2016, Respondent filed a
 16 response, and on March 9, 2017, Petitioner filed a Reply with attached exhibits. (ECF Nos.
 17 187, 194.) On June 5, 2018, Petitioner filed a Supplemental Brief, and on June 19, 2018,
 18 Respondent filed a Response to Petitioner's Supplemental Brief. (ECF Nos. 205, 206.)

19 **II. TRIAL PROCEEDINGS**

20 The Court refers the parties to the statement of evidence issued by the California
 21 Supreme Court in Jurado, 38 Cal. 4th at 82-93. The California Supreme Court's factual
 22 findings are presumptively reasonable and entitled to deference in these proceedings. See
 23 Sumner v. Mata, 449 U.S. 539, 545-47 (1981).

24 ///

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 26
 27 ¹ In the Group Two Merits Brief, Petitioner notes that he did not submit additional
 28 briefing on Claims 31-32, "as those claims are fully briefed in the Second Amended
 Petition." (Pet. Br. at 16 n.1.)

1 In order to provide a context for the Court's discussion of the claims addressed in
 2 the instant order, restated below is the California Supreme Court's summary of evidence
 3 presented during the guilt and penalty phases.

4 On May 17, 1991, a stranded motorist saw the body of Teresa (Terry)
 5 Holloway in a culvert beneath Highway 163 in San Diego County. She had
 6 been strangled and beaten to death two days earlier. As the prosecution's
 7 evidence at trial established, defendant killed Holloway, with the help of
 8 Denise Shigemura and Anna Humiston, to prevent her from disclosing their
 9 plan to kill a drug dealer named Doug Mynatt.^{FN2}

10 FN2. Shigemura pled guilty to first degree murder and was
 11 sentenced to 25 years to life in state prison. Humiston, who was
 12 17 years old at the time of the killing, was tried as an adult,
 13 convicted of first degree murder and conspiracy to commit
 14 murder, and sentenced to 25 years to life in state prison. (See
 15 *People v. Humiston* (1993) 20 Cal.App.4th 460, 465, 24
 16 Cal.Rptr.2d 515.)

17 *A. Prosecution's Guilt Phase Case-in-Chief*

18 In October 1989, Brian Johnsen met Teresa Holloway; a month later,
 19 they began living together and continued living together until late April 1991.
 20 Throughout this time, Holloway was using methamphetamine on a regular
 21 basis. In December 1989, Holloway met Doug Mynatt at a bar and introduced
 22 him to Johnsen.

23 In July or August of 1990, Brian Johnsen met defendant and bought
 24 crystal methamphetamine from him at Mark Schmidt's house. Defendant was
 25 sharing an apartment with Denise Shigemura, but his girlfriend was Anna
 26 Humiston, a high school student who lived with her parents. Johnsen and
 27 Teresa Holloway socialized and shared drugs with defendant, Shigemura, and
 28 Humiston. Johnsen later introduced defendant to Mynatt.

29 In October 1990, Denise Shigemura was arrested and remained in
 30 federal custody until April 1991, when she was released to a halfway house.
 31 During her time in custody, Shigemura exchanged letters and telephone calls
 32 with Teresa Holloway. When Shigemura obtained overnight passes from the
 33 halfway house, she stayed at the house where Teresa Holloway lived with
 34 Brian Johnsen.

35 ///

1 In February 1991, Teresa Holloway argued with defendant, and their
2 relationship became strained. Holloway's relationships with Anna Humiston
3 also became strained, and on one occasion they had a quarrel that almost
4 turned violent. Around the same time, Doug Mynatt moved on a temporary
5 basis into the house that Brian Johnsen and Holloway shared. Johnsen had
6 been buying methamphetamine from Mynatt.

7 In late March 1991, defendant gave Doug Mynatt a .38-caliber handgun
8 in exchange for drugs. When Mynatt learned that defendant had stolen the
9 gun, he insisted that defendant take it back and instead pay money for the
10 drugs. A few weeks later, Mynatt and Johnsen took defendant from his
11 apartment to Johnsen's house. Mynatt made him stay there overnight until
12 defendant agreed to pay Mynatt and to sell methamphetamine for him. Mynatt
13 threatened to kill defendant if he did not agree.

14 On April 11, 1991, Brian Johnsen was arrested during a drug raid and
15 spent five days in custody. He was arrested because drugs were found under
16 a couch at his house. Some of the drugs belonged to defendant, but defendant
17 did not admit they were his. Johnsen felt that defendant owed him something
18 because of this incident, and defendant agreed to compensate Johnsen with
19 marijuana.

20 In late April 1991, Brian Johnsen made Teresa Holloway move out of
21 the house they had shared because of her continuing drug use, and he offered
22 to let Doug Mynatt remain in the house on a more permanent basis as his
23 roommate. Holloway approached Thomas Carnahan, who agreed to let her
24 live in his apartment temporarily. He did not give her a key, and he insisted
25 that she either be in the apartment by 11:00 p.m. or telephone him before that
26 time to let him know when she would be arriving.

27 On May 6, 1991, Brian Johnsen began serving a 14-day jail sentence
28 for driving with a suspended license. Doug Mynatt continued to live in
Johnsen's house. Defendant still owed Mynatt money.

On May 13, 1991, during a telephone conversation, Denise Shigemura
told Brian Johnsen (who was still in custody) that Doug Mynatt had stolen her
purse, which contained \$80, a key to the business where she was then working,
and the combination to the business's safe. According to Shigemura, Mynatt
admitted taking the purse and said he did it because he suspected Shigemura
of stealing \$450 from him. Shigemura seemed very upset about the incident
and was worried about what Mynatt might do with the business key and the
safe combination. During this conversation, defendant phoned Shigemura,

1 and a three-way conversation ensued between defendant, Shigemura, and
2 Johnsen, during which they discussed possibly killing Mynatt. They were
3 worried about potential retaliation, however, because Mynatt had claimed to
4 have a friend who was affiliated with the Hell's Angels. They agreed to
5 discuss the matter further the next day. They decided not to tell Teresa
Holloway about the plan to kill Mynatt because of concern that she would
reveal it to the police.

6 On the same day, Monday May 13th, defendant telephoned David
7 Colson, with whom he had used methamphetamine, and he asked to borrow a
8 shotgun. Defendant said he "needed to do somebody up," which Colson
9 understood to mean that defendant intended to kill someone. Colson told
10 defendant that he did not own a shotgun, although his brother did, and he gave
11 defendant his brother's telephone number. Defendant called Colson's brother
and asked to borrow his shotgun, saying he "had a job to do," but the brother
refused to lend the shotgun to defendant.

12 Around the same time, Denise Shigemura asked Steven Baldwin if he
13 could get her a "gat" (a slang term for a gun). Shigemura explained that she
14 had a problem she needed to take care of. Baldwin told her he could not help
her with her problem.

15 On Tuesday, May 14th, Brian Johnsen telephoned his house from the
16 county jail and spoke to Denise Shigemura. They decided to contact defendant
17 so the three of them could discuss what to do about Doug Mynatt. Johnsen
18 telephoned Anna Humiston's house and spoke briefly to defendant about the
19 plan to kill Mynatt. Defendant said he was still deciding whether to go through
with it.

20 Later on the same day, Tuesday May 14th, Holloway was at the
21 apartment complex where defendant lived. Larissa Slusher and Ted Meier
22 managed the complex, and they occupied an apartment next to defendant's.
23 Slusher had known Teresa Holloway as a casual acquaintance for seven or
24 eight months. Holloway asked Meier if she could spend the night in their
25 apartment, because it was after 11:00 p.m., and she had been locked out of the
26 apartment where she had been staying. Meier agreed. The next morning,
Holloway left the apartment around 8:00 or 9:00 a.m., taking with her a dress
that Slusher had loaned her. Before she left, Holloway said she would return
later that day, May 15th, but she never did.

27 On Wednesday evening, May 15th, Brian Johnsen telephoned Mark
28 Schmidt and asked him to bring defendant and Denise Shigemura to

1 Schmidt's house so he could talk to them. Schmidt ran about two and a half
2 blocks to defendant's apartment, where he found Teresa Holloway and
3 Shigemura with defendant. Anna Humiston arrived in a blue Geo Metro while
4 Schmidt was speaking to defendant. Defendant agreed to take Johnsen's call,
5 and he came to Schmidt's apartment in Humiston's car with Humiston,
6 Shigemura, and Holloway.

7 At 8:17 p.m. that evening, Brian Johnsen telephoned Schmidt's
8 apartment. Schmidt answered and passed the phone to Shigemura, who said
9 she was still unsure about the plan to kill Mynatt. Defendant then got on the
10 phone and told Johnsen that he could not wait and that it (meaning the killing
11 of Mynatt) would probably happen before Johnsen was released from jail.
12 Johnsen said that was fine with him. Teresa Holloway then got on the phone
13 and asked whether there was a plan to kill Mynatt. Johnsen told her not to get
14 involved.

15 While Teresa Holloway was speaking on the telephone to Brian
16 Johnsen, defendant had a "forceful talk" with Anna Humiston; he seemed
17 angry about something; she seemed both angry and scared. Defendant then
18 asked Schmidt for a chain that defendant could use to tie up Johnsen's
19 motorcycle so Doug Mynatt could not steal it. Schmidt offered defendant an
20 18-inch length of plastic weed-eater cord. Defendant wrapped the cord around
21 his own neck, with one end in each fist clenched at shoulder height. He said:
22 "It will do." Denise Shigemura needed to return to her halfway house by 9:00
23 p.m. At defendant's request, Schmidt told Holloway to get off the phone
24 because he needed to leave the apartment. They all left Schmidt's apartment
25 around 8:45 p.m.

26 At 9:31 p.m., defendant telephoned Christie Medlin at her apartment.
27 He told her that he was stranded and needed a ride, and that he was calling
28 from a 7-Eleven store. Medlin asked David Silva, her boyfriend, to pick up
defendant and his friends. Silva found defendant with Denise Shigemura and
Anna Humiston at the 7-Eleven store at Spruce and Fifth Streets. He drove
them to Medlin's apartment; when they arrived, Humiston was holding her
stomach and appeared to be ill; she told Medlin she had an upset stomach.
Defendant seemed bothered by something, and Shigemura seemed agitated.
Noticing what appeared to be blood on defendant's socks, Medlin asked him
what had happened. Defendant said he "got into a fight." Humiston used
Medlin's telephone to call her father to tell him that the blue Geo Metro had
broken down. Silva drove Humiston home. Medlin then drove defendant and
Shigemura to defendant's apartment.

1 On Thursday morning, May 16th, around 9:30, a tow truck driver met
2 defendant, Anna Humiston, and Denise Shigemura on Highway 163 near the
3 Quince Street Bridge, where the blue Geo Metro was parked. The driver towed
4 the car to the apartment complex where defendant lived. He observed nothing
unusual about their demeanor. Humiston signed the towing receipt.

5 On the afternoon of the same day, Thursday May 16th, defendant and
6 Denise Shigemura went to David Silva's apartment, and the three shared pizza
7 and beer. Shigemura asked defendant and Silva to "bruise her up" so she could
8 say she had been beaten and would have an excuse for not returning to her
9 halfway house the previous night. Defendant and Silva then hit Shigemura
10 with their fists. When defendant and Shigemura later went to Mark Schmidt's
11 apartment, Shigemura removed her shirt to show Schmidt the bruises on her
12 chest and arms. She told Schmidt that she had been "jumped" the previous
13 night.

14 During the same day, defendant and Denise Shigemura went to Steven
15 Baldwin's house with Mark Schmidt. They sat in the living room, with
16 Baldwin and Schmidt on one couch, defendant and Shigemura on another.
17 Shigemura said to Baldwin: "I no longer need what it was I asked you for. We
18 took care of the problem and we dumped the body at Balboa Park." Defendant
19 said nothing; his face had what Baldwin described as an "empty look."

20 On Friday morning, May 17th, Joseph Hedley experienced engine
21 trouble as he was driving a van on Highway 163 through Balboa Park. He
22 parked the van beside the freeway and began walking to a telephone call box
23 about 100 yards away. As he neared the call box, he noticed a human foot
24 protruding from a culvert that ran beneath the freeway. Approaching closer,
25 he saw a woman's body inside the culvert, where it was not visible to persons
26 traveling on the freeway. He called to her but received no response. Using the
27 call box, Hedley reported what he had seen. Police officers arrived 15 minutes
28 later and found that the body was Teresa Holloway's.

During the autopsy of Teresa Holloway's body, Mark A. Super, a
deputy medical examiner employed by the San Diego County Medical
Examiner's Office, saw many injuries on the face, torso, and extremities.
Contusions and abrasions were on the chest and on both legs and both arms,
with the right hand being particularly bruised and swollen. Some of the
abrasions showed clusters of short parallel linear marks suggesting they were
made by an object with threads. There were many bruises and abrasions on
the neck, including some marks that could have been made by ligature or
manual strangulation. The hyoid bone was fractured and there were

1 hemorrhages in the eyeballs; both of these findings were consistent with
2 strangulation. There was a bite mark in the center of the back. The most
3 extensive injuries were to the face and head. The jaw and all the facial bones
4 were fractured and some had caved in. There were many deep lacerations on
5 the scalp, and the skull was fractured. In Super's expert opinion, a scissor jack
6 had "all the characteristics that one would expect" in the weapon that inflicted
7 the injuries he observed. The cause of death was "blunt force head injuries
8 and strangulation."

9 On Friday evening, May 17th, James R. Manis, a sergeant with the San
10 Diego Police, found defendant with Anna Humiston outside defendant's
11 apartment complex. He told defendant he was investigating the death of
12 Teresa Holloway. Defendant said that he knew Holloway, that he had last seen
13 her about three days before at a party at the house of a man named Mark, that
14 she was a drug user who owed money to drug dealers, and that he did not trust
15 her because she had stolen from him. Defendant led Sergeant Manis to
16 Holloway's car, which was parked about three or four blocks from
17 defendant's apartment.

18 On Saturday morning, May 18th, defendant and Anna Humiston
19 arrived at David Silva's apartment in a new car that Humiston's parents had
20 just given her. They then drove to defendant's apartment, where Sergeant
21 Manis arrested them. Later that day, Sergeant Manis found a scissor jack in a
22 tree midway between the place where Teresa Holloway's body was found and
23 the 7-Eleven store at the corner of Spruce and Fifth Streets where David Silva
24 had found defendant, Shigemura, and Humiston on the night of the murder.
25 The jack was covered with red stains and had hair attached to it. Denise
26 Shigemura was arrested on the same day.

27 After his arrest, defendant made telephone calls from the jail to Brian
28 Johnsen, Christie Medlin, and David Silva. When Johnsen asked defendant
why he had killed Teresa Holloway, defendant said it had to be done. To
Medlin, defendant sang "On, on, that bitch is gone." According to Medlin's
trial testimony, defendant said "something like he doesn't really care if he has
to spend the rest of his life paying for this, the bitch is gone." When Silva
asked defendant about Holloway's death, defendant told him that Holloway
was killed in a car, that he had been sitting in the back seat with Humiston
while Shigemura was driving and Holloway was sitting in the front passenger
seat, and that an argument "got out of hand."

Around May 19th, Larissa Slusher saw the dress she had loaned Teresa
Holloway in a dumpster about 100 feet from defendant's apartment. With the

1 dress were Holloway's purse, her wallet, her identification papers,
2 photographs of her daughter, a sandal that matched one found at the murder
3 scene, and a pair of shoes belonging to defendant.

4 Gary Mark Dorsett, an evidence technician for the San Diego Police
5 Department Crime Lab, examined the blue Geo Metro. He collected samples
6 of red stains from the front passenger seat cover and seatbelt harness and from
7 the rear floorboard carpet on the passenger side. There was no jack in the car.

8 Norman Donald Sperber, a forensic dentist, compared the bite mark on
9 Holloway's back with dental impressions from defendant, Denise Shigemura,
10 and Anna Humiston. In Sperber's opinion, defendant's teeth were "highly
11 consistent" with the bite mark, but neither Shigemura nor Humiston could
12 have made it.

13 At trial, as part of the prosecution's case, the parties stipulated to the
14 results of blood analysis. The blood on the scissor jack and on the rear
15 floorboard of the blue Geo Metro was consistent with Teresa Holloway's
16 blood, but inconsistent with the blood of defendant, Denise Shigemura, and
17 Anna Humiston. Blood on the sandal and purse found in the dumpster, and on
18 the front passenger seat cover of the blue Geo Metro, was consistent with the
19 blood of all four of these individuals.

20 The parties also stipulated to the results of hair comparison analysis.
21 Ten of the hairs found in Teresa Holloway's hand were consistent with the
22 hair of Anna Humiston but not with the hair of defendant, Denise Shigemura,
23 or Teresa Holloway. Four of the hairs were consistent with the hair of both
24 Humiston and Holloway, but not with the hair of defendant or Shigemura, and
25 three of the hairs were inconsistent with Humiston's hair and were not
26 compared to the hair of defendant, Shigemura, or Holloway.

27 *B. Defense Case at the Guilt Phase*

28 After defendant's arrest, Brian Johnsen went to the house of Josephine
Jurado, defendant's mother, and knocked on the door of her house one night
around 9:30. Without opening the door, she asked Johnsen who he was and
what he wanted. Johnsen said he wanted a helmet he had lent to defendant.
She told him she did not have the helmet and did not know where it was, but
Johnsen would not leave. She was frightened because she knew that Teresa
Holloway had been Johnsen's girlfriend and that defendant had been charged
with her murder. Johnsen eventually left after defendant's mother telephoned
the police.

1 On May 19, 1991, during a 10-minute interview, San Diego Police
2 Officer David Swiskowski asked Mark Schmidt to describe what happened at
3 Schmidt's apartment on the evening of May 15, 1991, before Teresa
4 Holloway's murder, but Schmidt's replies were vague and evasive. Schmidt
5 said that defendant, Holloway, Anna Humiston, and Denise Shigemura came
6 to his apartment that evening around 8 o'clock, and that he received a phone
7 call from Brian Johnsen. Schmidt told Swiskowski that he gave the phone to
8 defendant, and that defendant and Holloway were alone in his bedroom with
9 the phone for about 10 minutes. Schmidt did not say anything to Swiskowski
10 about having to leave the apartment, or making up a story about having to
11 leave the apartment, or that defendant put a cord around his neck.

12 On the same day, May 19th, during an interview that lasted 10 to 15
13 minutes, David Silva told Officer Swiskowski that defendant had called him
14 from jail after being arrested for Teresa Holloway's murder. Silva told
15 Swiskowski that during that conversation defendant did not talk about the
16 murder except to say that he had been charged with it. Silva did not tell
17 Swiskowski that defendant said Holloway was killed because she was a
18 snitch, nor did Silva say that defendant had described where persons were
19 seated in Humiston's car before or during the murder.

20 On September 10, 1991, Tony Bento, an investigator for the San Diego
21 District Attorney, interviewed David Silva for around 25 minutes. During
22 the interview, Silva said he had talked to defendant on several occasions after
23 defendant's arrest, and that defendant had always denied killing Teresa
24 Holloway and never said that she had been killed because she had overheard
25 a conversation, or that she was killed because an argument got out of hand. At
26 the end of the interview, however, Silva mentioned a conversation with
27 defendant before Holloway's death during which defendant had said that
28 Holloway had overheard something and she "was going to snitch him off
about something."

On September 16, 1991, Tony Bento interviewed Brian Johnsen for at
least an hour, during which Johnsen said that after defendant's arrest,
defendant called and told him to stay away from defendant's family or "the
same thing would happen to them." Bento understood "them" as a reference
to Johnsen and his friends. In this interview, Johnsen never said that defendant
told him that Terry Holloway was killed because it had to be done. Johnsen
also told Bento that he had discussed with Jeffrey Latimer the plan to kill
Doug Mynatt.

///

1 Jeffrey Latimer was a childhood friend of Brian Johnsen and through
2 him met defendant and Doug Mynatt. Latimer testified that he never discussed
3 with Johnsen a plan to kill Mynatt, and that to his knowledge Johnsen had
4 “never really been honest” and “was always the crook and the thief.”

5 In 1991, Richard Whalley, a forensic scientist and toxicologist,
6 arranged to have a private laboratory retest the urine sample taken from
7 defendant after his arrest. The urine was found to contain methamphetamine
8 at a very low level (130 nanograms) that would not have caused any effect but
9 which suggested that defendant had probably used methamphetamine during
10 the previous two to four days.

11 In January 1992, Marion Louise Pasas, a licensed private investigator
12 whom Anna Humiston’s attorney had retained, interviewed Christie Medlin
13 at her apartment. Medlin told Pasas that after Teresa Holloway’s murder
14 defendant had called Medlin from jail on one occasion, but during that
15 conversation defendant did not talk about the murder. Medlin did not tell
16 Pasas that defendant said he was glad Holloway was dead or that he said he
17 did not care whether he spent the rest of his life in jail or in prison.

18 *C. Prosecution’s Penalty Phase Case in Aggravation*

19 Before August 1988, while defendant was living with his mother and
20 his sister in an apartment in San Marcos, he once became highly agitated and
21 upset, pushed his mother slightly against a bed, and spit in her face. Another
22 incident occurred later while defendant was living with his mother and sister
23 in a house in San Diego. On this occasion, defendant came home very upset
24 after having broken up with his girlfriend, threatened to obtain weapons and
25 shoot up the house, threatened to kill his mother, and advanced toward her
26 with a raised hand as if to strike her. Defendant’s friends restrained him and
27 took him outside. When defendant’s sister tried to telephone the police,
28 defendant grabbed the phone from her hand. After this incident, in December
1989, defendant’s mother applied for a restraining order to have him removed
from her house.

In October 1990, defendant was convicted of felony possession of
marijuana for sale.

In May 1991, during the autopsy of Teresa Holloway’s body, she was
found to have been pregnant. The fetus, which was around 17 weeks old, was
too young and too small to have survived outside the womb, but it showed no
evidence of traumatic injury or other condition that would have precluded its

1 survival to full term and birth had Holloway not died. Some weeks before her
2 death, Holloway had told defendant that she was pregnant, but defendant did
3 not believe her. Holloway said she was planning to get a pregnancy test and
4 that when she got the test result she would show it to defendant to prove she
5 was pregnant.

6 On July 21, 1991, Steven Baldwin was booked into the county jail for
7 a probation violation. As a deputy was escorting him to a holding tank,
8 defendant, who was inside the tank, saw him and said to another inmate: "I
9 know that dude. He's the reason I'm in here. He told the cops I killed that
10 bitch." After the deputy had placed Baldwin in the tank, an inmate named
11 Richard Janssen, whom Baldwin did not know, approached him and struck
12 him. Baldwin was then hit several times, from different directions, on the back
13 of the head and the side of the face. Defendant did not strike him, but when
14 the beating stopped, defendant came out of a side cell and told Baldwin: "You
15 can't be in this cell. You got to roll up out of this cell." Baldwin lost
16 consciousness, and the next thing he remembered was being outside the tank
17 on a gurney. As a result of the beating, Baldwin suffered injuries to the left
18 side of his face, including bruising and swelling both above and below the
19 eye, a laceration below the eye, and a nondisplaced fracture of the malar bone.

20 On September 5, 1993, a fight broke out among inmates in module 5-B
21 of the county jail in San Diego. Deputies arriving at the module observed
22 15 to 20 Hispanic inmates on one side of the module faced off against eight to 10
23 Black inmates on the other side of the module. The inmates were yelling and
24 throwing things back and forth, and some inmates had bloodstained towels
25 wrapped on their arms. Defendant was in the group of Hispanic inmates and
26 was one of at least four inmates holding metal bars, 12 to 18 inches in length
27 and one-quarter inch in diameter, that had been removed from inmate bunks.
28 The inmates were slamming these bars against bunks and making stabbing
motions with them toward Black inmates, although defendant was not seen to
strike anyone. After the inmates were removed, the deputies found many items
that could be used as weapons scattered throughout the module, including 13
metal bars, seven wooden mop handle pieces, two razors, one razor blade
attached to a comb, three wooden window grate pieces, and two socks
containing soap bars.

Teresa Holloway's murder deeply affected her parents, James and Joan
Cucinotta, and her daughter, who at the time of Teresa Holloway's death was
four years old and lived with her father. After the daughter learned of her
mother's death, she became sad and withdrawn and cried a lot. She often said:
"I want my Mommy, I want my Mommy."

1 A police detective came to the home of James and Joan Cucinotta to
2 tell them of Teresa Holloway's death. At first Joan could not accept it; she
3 was very upset and angry, and she tried to hit the detective. When he said they
4 had identified Teresa Holloway's body through fingerprints, Joan fell apart
5 and became hysterical. Some friends and family came over to be with her.
6 That night and for days afterwards, she was unable to eat or sleep. She just
7 cried and smoked cigarettes. She was unable to deal with making the funeral
8 arrangements or telephoning relatives, so James Cucinotta did those things.

9 James Cucinotta, Terry Holloway's father, was also seriously affected
10 by her murder. At the time of her death, he worked in law enforcement as an
11 investigator, but within two weeks after learning of the murder, he lost his job
12 because he was no longer able to function. He began drinking heavily until
13 eventually he went into a treatment center. He and his wife Joan both received
14 treatment from psychiatrists for their grief. The murder also deeply affected
15 their two other children, Teresa Holloway's brother and sister, and family
16 holidays became very painful. At the time of his testimony, more than four
17 years after Teresa Holloway's death, James Cucinotta and his wife continued
18 to visit Teresa's grave every week. Joan Cucinotta sometimes took Teresa's
19 daughter to the grave.

20 *D. Defense Penalty Phase Case in Mitigation*

21 Calvin Bruce was one of the inmates in module 5-B of the county jail
22 in San Diego on September 5, 1993. He was talking on the phone to his wife
23 when he saw two inmates, one Black and the other Hispanic, have a
24 confrontation that became physical and resulted in a face-off between groups
25 of Black and Hispanic inmates during which inmates in both groups wielded
26 and threw metal pipes. According to Bruce, defendant was not one of the
27 original combatants, he did not have any weapon in his hand during the
28 incident, and he tried unsuccessfully to persuade other inmates to stop the
fighting.

Defendant's parents-Robert Jurado, Sr., and Josephine Jurado-married
in 1968. Defendant was born in June 1970, and his sister Oralia in November
1973. At that time, the family lived in Los Banos. Once, when he was around
four years old, defendant saw his father hit his mother. Defendant ran up to
his mother and hugged her.

In 1973, defendant's parents separated, and defendant began to
experience "tremendous headaches that would make him cry a lot." He also
developed a fear of sleeping in the dark, and he became more rebellious with

1 his mother. After the separation, defendant's father saw his children no more
2 than once or twice a year.

3 In 1977, defendant's parents finalized their divorce. In 1984,
4 defendant's mother moved to San Diego. His father never went there to visit,
5 and he telephoned very seldom. Around 1985, defendant's father remarried.
6 In 1986, defendant's grades began to fail and he began to use drugs. In 1987
7 or 1988, defendant's mother placed him in a drug treatment program. When
8 he learned that defendant was using illegal drugs, defendant's father cut all
9 ties with defendant. Around this time, a psychiatrist told defendant's mother
10 that defendant was suicidal and needed to be hospitalized right away. When
11 defendant's mother telephoned his father to get some insurance papers to
12 cover defendant's hospitalization, defendant's father said something to the
13 effect that it might be better if defendant did commit suicide.

14 Defendant's father testified that he had seen defendant once since his
15 arrest and could now form a relationship with him because defendant was no
16 longer using drugs.

17 Before moving to San Diego with his mother in 1984, defendant had
18 close relationships with his aunt, Patricia Camacho, and his two
19 grandmothers, Josefina Martinez and Paz Jurado. They each testified that they
20 love defendant very much and intended to visit him in prison. Defendant's
21 mother and his sister Oralia both testified that they love defendant very much,
22 that they had visited defendant weekly since his arrest, and that they intended
23 to continue visiting him in prison.

24 Jurado, 38 Cal. 4th at 82-93.

25 **III. PROCEDURAL BARS**

26 **A. Teague v. Lane**

27 "Unless they fall within an exception to the general rule, new constitutional rules of
28 criminal procedure will not be applicable to those cases which have become final before
the new rules are announced." Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality
opinion); see also Stringer v. Black, 503 U.S. 222, 227 (1992) ("Subject to two exceptions,
a case decided after a petitioner's conviction and sentence became final may not be the
predicate for federal habeas corpus relief unless the decision was dictated by precedent
existing when the judgment in question became final.") A new rule "breaks new ground

unreasonable determination of the facts. Neither habeas relief nor an evidentiary hearing is warranted on Claim 4. Sully, 725 F.3d at 1075; Totten, 137 F.3d at 1176.

C. Claims Alleging Errors During Pretrial Proceedings or Jury Selection

1. Claim 7

Petitioner argues that his guilty plea after the dismissal of the lying in wait special circumstance raised a double jeopardy bar to his subsequent prosecution for capital murder once the special circumstance was reinstated by the state appellate court. (SAP at 303.)

On direct appeal, the California Supreme Court held that the California Court of Appeal's decision denying this claim was the law of the case and rejected Petitioner's contention that either exception to the law of the case doctrine was present, as follows:

The District Attorney of San Diego County filed an amended information charging defendant with murder (§ 187) and conspiracy to commit murder (§§ 182, 187), and alleging a lying-in-wait special circumstance (§ 190.2, subd. (a)(15)) making defendant eligible for the death penalty. Defendant filed a motion under section 995 to set aside the conspiracy count and the lying-in-wait special circumstance allegation on the ground that they were not adequately supported by the evidence presented at the preliminary hearing. The prosecution filed written opposition to the motion, and the trial court, after a hearing, denied the motion to dismiss as to the conspiracy count, but the court granted the motion as to the special circumstance allegation.

Immediately after the court made its ruling dismissing the special circumstance allegation, defendant announced his intention to plead guilty to the remaining charges. The prosecutor stated that his office might seek appellate review of the ruling setting aside the special circumstance by petitioning the Court of Appeal for a writ of mandate, and that for this reason he would not sign the change of plea form if defendant pled guilty to the remaining charges. Defendant then withdrew his previous not-guilty pleas and pled guilty to the remaining charges.

To challenge the ruling setting aside the special circumstance allegation, the prosecution petitioned the Court of Appeal for a writ of mandate. (See *People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 6 Cal.Rptr.2d 242.) The Court of Appeal stayed defendant's sentencing hearing, which had been scheduled for December 23, 1991. In his opposition to the writ petition, defendant argued that because he had already pled guilty

1 to the remaining charges, any further prosecution of the special circumstance
 2 allegation would violate the double jeopardy clauses of the federal and state
 3 Constitutions (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15), and for this
 4 reason the special circumstance allegation could not be reinstated even if the
 5 trial court had erred in dismissing it. (See *People v. Superior Court (Jurado)*,
supra, at p. 1229, 6 Cal.Rptr.2d 242.)

6 The Court of Appeal held that the trial court had erred in dismissing the
 7 special circumstance allegation under section 995 (*People v. Superior Court*
 8 (*Jurado*), *supra*, 4 Cal.App.4th at p. 1229, 6 Cal.Rptr.2d 242) and also that
 9 there was no double jeopardy bar to reinstatement and prosecution of the
 10 special circumstance allegation (*id.* at pp. 1235-1236, 6 Cal.Rptr.2d 242). In
 11 granting the petition for writ of mandate, the Court of Appeal directed the trial
 12 court to enter a new order denying defendant's section 995 motion in its
 13 entirety, thereby reinstating the special circumstance allegation. (*People v.*
Superior Court (Jurado), *supra*, at p. 1236, 6 Cal.Rptr.2d 242.) This court
 14 denied defendant's petition for review. (*Ibid.*) Defendant then withdrew his
 15 guilty pleas, pled not guilty to the charges, and denied the special
 16 circumstance allegation.

17 Defendant here raises the same double jeopardy issue he raised
 18 unsuccessfully in opposing the prosecutor's pretrial writ petition in the Court
 19 of Appeal. The Attorney General argues that defendant's claim is barred by
 20 the law of the case doctrine.

21 Under the doctrine of the law of the case, a principle or rule that a
 22 reviewing court states in an opinion and that is necessary to the reviewing
 23 court's decision must be applied throughout all later proceedings in the same
 24 case, both in the trial court and on a later appeal. (*People v. Turner* (2004) 34
 25 Cal.4th 406, 417, 20 Cal.Rptr.3d 182, 99 P.3d 505; *People v. Barragan* (2004)
 26 32 Cal.4th 236, 246, 9 Cal.Rptr.3d 76, 83 P.3d 480; *People v. Stanley* (1995)
 27 10 Cal.4th 764, 786, 42 Cal.Rptr.2d 543, 897 P.2d 481.) We apply the doctrine
 28 even in death penalty cases, and even when the previous decision was
 rendered by a Court of Appeal, but we do not apply it when an intervening
 decision has altered or clarified the controlling rules of law, or when the rule
 stated in the prior decision was a "manifest misapplication" of the law
 resulting in "substantial injustice." (*People v. Stanley, supra*, at p. 787, 42
 Cal.Rptr.2d 543, 897 P.2d 481; accord, *People v. Gray* (2005) 37 Cal.4th 168,
 197, 33 Cal.Rptr.3d 451, 118 P.3d 496.)

Defendant argues that both of the recognized exceptions to the doctrine
 of the law of the case-intervening change in the law and manifest

1 misapplication of existing legal principles resulting in substantial injustice-
2 are present here. To evaluate his arguments, we begin by reviewing the Court
3 of Appeal's decision.

4 The Court of Appeal framed the issue this way: "Jurado's response to
5 the People's petition presents the question of whether the prejeopardy
6 dismissal of the special circumstance allegation pursuant to Jurado's motion
7 under section 995 and his immediate guilty plea without the concurrence of
8 the prosecutor and before the prosecutor could seek pretrial review of that
9 dismissal would result in a 'second prosecution' for the same offense after
10 'acquittal' or 'conviction.'" (*People v. Superior Court (Jurado)*, *supra*, 4
11 Cal.App.4th at pp. 1229-1230, 6 Cal.Rptr.2d 242.) The court concluded, first,
12 that dismissal of the special circumstance allegation under section 995 was a
13 prejeopardy rather than a postjeopardy determination. (*People v. Superior
14 Court (Jurado)*, *supra*, at pp. 1230-1231, 6 Cal.Rptr.2d 242.) The court
15 concluded, second, that the lying-in-wait special circumstance was not "an
16 added element which would create a greater offense out of the charged
17 murder," but instead was a "penalty enhancement." (*Id.* at p. 1231, 6
18 Cal.Rptr.2d 242.) Third, the court concluded, after distinguishing certain
19 decisions that defendant cited, that this case "most closely resembles" *Ohio v.
20 Johnson* (1984) 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (*Johnson*).
21 (*People v. Superior Court (Jurado)*, *supra*, at p. 1233, 6 Cal.Rptr.2d 242.)

22 In *Johnson*, a defendant charged with four offenses arising from the
23 same incident pled guilty to two of the offenses-involuntary manslaughter and
24 grand theft-after which, on the defendant's motion, the trial court dismissed
25 the other two charges-murder and aggravated robbery-"on the ground that
26 because of his guilty pleas, further prosecution on the more serious offenses
27 was barred by the double jeopardy prohibitions of the Fifth and Fourteenth
28 Amendments." (*Johnson, supra*, 467 U.S. at p. 494, 104 S.Ct. 2536.) The
United States Supreme Court concluded, to the contrary, that "prosecuting
[the defendant] on the two more serious charges would not constitute the type
of 'multiple prosecution' prohibited by the Double Jeopardy Clause." (*Ibid.*)

29 The high court explained that the federal Constitution's double
30 jeopardy clause protects against (1) a second prosecution for the same offense
31 after acquittal or conviction and (2) multiple punishment for the same offense.
32 (*Johnson, supra*, 467 U.S. at p. 498, 104 S.Ct. 2536.) The bar against a
33 subsequent prosecution after acquittal or conviction "ensures that the State
34 does not make repeated attempts to convict an individual, thereby exposing
35 him to continued embarrassment, anxiety, and expense, while increasing the
36 risk of an erroneous conviction or an impermissibly enhanced sentence,"

1 while the bar against multiple punishment for a single offense “is designed to
 2 ensure that the sentencing discretion of courts is confined to the limits
 3 established by the legislature.” (*Id.* at pp. 498-499, 104 S.Ct. 2536.) The court
 4 concluded that the issue of multiple punishment was not yet presented because
 5 the defendant had never been tried for, convicted of, or sentenced for the more
 6 serious offenses of murder and aggravated robbery. (*Id.* at pp. 499-500, 104
 7 S.Ct. 2536.) “While the Double Jeopardy Clause may protect a defendant
 8 against cumulative punishments for convictions on the same offense, the
 9 Clause does not prohibit the State from prosecuting respondent for such
 10 multiple offenses in a single prosecution.” (*Id.* at p. 500, 104 S.Ct. 2536.)

11 The court also rejected the argument that further prosecution of the
 12 murder and aggravated robbery charges would violate the double jeopardy
 13 prohibition against successive prosecutions: “No interest of respondent
 14 protected by the Double Jeopardy Clause is implicated by continuing
 15 prosecution on the remaining charges brought in the indictment. Here
 16 respondent offered only to resolve part of the charges against him, while the
 17 State objected to disposing of any of the counts against respondent without a
 18 trial.... There simply has been none of the governmental overreaching that
 19 double jeopardy is supposed to prevent. On the other hand, ending prosecution
 20 now would deny the State its right to one full and fair opportunity to convict
 21 those who have violated its laws.” (*Johnson, supra*, 467 U.S. at pp. 501-502,
 22 104 S.Ct. 2536.)

23 Here, the Court of Appeal rejected defendant’s attempts to distinguish
 24 *Johnson, supra*, 467 U.S. 493, 104 S.Ct. 2536. Defendant argued that the
 25 prosecutor here did not sufficiently object to defendant’s guilty pleas. As the
 26 Court of Appeal pointed out, however, the prosecutor advised the trial court
 27 that his office might seek appellate review of the dismissal of the special
 28 circumstance allegation, and the trial court advised defendant of the
 possibility that the special circumstance would be reinstated. (*People v.*
Superior Court (Jurado), supra, 4 Cal.App.4th at pp. 1234-1235, 6
 Cal.Rptr.2d 242.) The Court of Appeal concluded: “Jurado was never in
 jeopardy for the special circumstance, nor was he ever convicted or acquitted
 of that charge. Since the special circumstance is not in a lesser- or greater-
 offense relationship to the murder, there is no reason to allow Jurado’s tactical
 maneuver to deny the People the right to a trial on the merits of that
 allegation.” (*Id.* at pp. 1235-1236, 6 Cal.Rptr.2d 242.)

Defendant argues, first, that the United States Supreme Court’s
 decision in *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d
 556, constitutes an intervening change in the law establishing that a special

1 circumstance making a defendant eligible for the death penalty is the
2 functional equivalent of an element of a greater offense of capital murder. We
3 need not decide whether defendant is correct that a special circumstance is,
4 for double jeopardy purposes, the functional equivalent of an element of a
5 greater offense. Even if that is true, and the Court of Appeal erred in stating
6 otherwise, it does not assist defendant because it is not a basis for
7 distinguishing *Johnson, supra*, 467 U.S. 493, 104 S.Ct. 2536. There, the high
8 court accepted the Ohio Supreme Court's determination that the defendant
9 could not be convicted of both murder and involuntary manslaughter for the
10 same killing, but it nonetheless concluded that a guilty plea to involuntary
11 manslaughter did not bar prosecution for murder under the facts of that case.
(*Johnson, supra*, 467 U.S. at pp. 496-497 & fn. 6, 104 S.Ct. 2536.) So also
here, for purposes of double jeopardy analysis under the facts shown, it makes
no difference whether a special circumstance is or is not an element, or the
functional equivalent of an element, of a greater offense.

12 Defendant's second argument is that *Johnson, supra*, 467 U.S. 493, 104
13 S.Ct. 2536, is distinguishable, and that the Court of Appeal's reliance on that
14 decision was a manifest misapplication of the law, because unlike the
15 defendant in *Johnson*, he pled guilty to all charges then pending against him
16 and the prosecutor openly and actively participated in the taking of these
17 pleas. We are unpersuaded that these slight differences are significant. The
18 prosecution charged defendant with murder with a special circumstance
19 allegation, it timely sought review of the trial court's erroneous dismissal of
20 the allegation, and it did not acquiesce in defendant's guilty plea to the murder
21 charge. The prosecutor's participation in the taking of the guilty plea,
22 primarily in the form of insisting that an adequate factual basis be
23 demonstrated, was not an "effort to prosecute the charges seriatim" (*Johnson,*
24 *supra*, 467 U.S. at p. 500, fn. 9, 104 S.Ct. 2536) and did not pose the risks that
25 the successive prosecution aspect of the double jeopardy bar was intended to
26 guard against—"repeated attempts to convict an individual, thereby exposing
him to continued embarrassment, anxiety, and expense, while increasing the
risk of an erroneous conviction or an impermissibly enhanced sentence" (*id.*
at pp. 498-499, 104 S.Ct. 2536). As in *Johnson*, there was "none of the
governmental overreaching that double jeopardy is supposed to prevent," and
imposing a double jeopardy bar "would deny the State its right to one full and
fair opportunity to convict those who have violated its laws." (*Id.* at pp. 501-
502, 104 S.Ct. 2536.)

27 Because defendant has not shown that the Court of Appeal's decision
28 rejecting his double jeopardy claim was a manifest misapplication of the law,
that it resulted in substantial injustice, or that there has been an intervening

1 change in the controlling law, the Court of Appeal's decision is the law of the
2 case on that issue.

3 Jurado, 38 Cal. 4th at 93-97 (alteration in original). This claim was later re-raised in the
4 second state habeas petition and denied on procedural grounds, but for the reasons
5 discussed above in section III.B., the Court will address this claim on the merits.

6 As an initial matter, Petitioner asserts that "[t]he California Court of Appeal's
7 opinion is the 'last reasoned opinion' in this matter for purposes of the AEDPA. (Pet. Br.
8 at 54; Reply at 37, citing Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991).) In Ylst, the
9 Supreme Court stated that: "Where there has been one reasoned state judgment rejecting a
10 federal claim, later *unexplained orders* upholding that judgment or rejecting the same claim
11 rest upon the same ground." 501 U.S. at 803 (emphasis added). The Supreme Court
12 reasoned that: "The essence of unexplained orders is that they say nothing. We think that
13 a presumption which gives them *no* effect- which simply 'looks through' them to the last
14 reasoned decision- most nearly reflects the role they are ordinarily intended to play." Id.
15 at 804 (emphasis in original). Respondent appears to concur with Petitioner's contention,
16 and similarly relies on Ylst, stating that: "The 'look through' doctrine does not readily
17 apply here because the California Supreme Court's decision on this issue was not
18 unexplained. However, the lower court's decision is still the last reasoned judgment based
19 on the California Supreme Court holding that the lower court's decision was the law of the
20 case." (Resp. at 41 n. 14.)

21 By the plain language of Ylst, the Supreme Court indicated that the "look through"
22 doctrine applies when one court rejects a claim in an "unexplained order" that another court
23 addressed in a reasoned decision. See Ylst, 501 U.S. at 803-04. Here, the California
24 Supreme Court clearly issued a reasoned and lengthy decision, as detailed above. Neither
25 Petitioner nor Respondent¹² provide a persuasive reason for this Court to eschew the state
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28 ¹² In response to inquiry on this matter at oral arguments, Respondent indicated that
that the Court could look to both decisions, noting that the two decisions were in agreement

1 supreme court's decision in favor of reviewing only the California Court of Appeal's
2 decision, much less compelling authority supporting that course of action. It is also unclear
3 how the Court could "look through" the California Supreme Court's reasoned decision
4 denying Petitioner's claim on direct appeal. The Ylst Court indicated that such an approach
5 was appropriate when facing an "unexplained" order, which is clearly not the situation
6 presented here.

7 Although not the sole focus of the Court's review, it is evident that the California
8 appellate court decision remains highly pertinent to this Court's consideration of this
9 matter, as the California Supreme Court not only explicitly referenced that decision to
10 determine whether an exception to the law of the case doctrine applied, but also clearly
11 incorporated the state appellate court's reasoning in its own analysis of the claim. See e.g.
12 Jurado, 38 Cal. 4th at 96 ("Defendant argued that the prosecutor here did not sufficiently
13 object to defendant's guilty pleas. As the Court of Appeal pointed out, however, the
14 prosecutor advised the trial court that his office might seek appellate review of the
15 dismissal of the special circumstance allegation, and the trial court advised defendant of
16 the possibility that the special circumstance would be reinstated.") "Although 'AEDPA
17 generally requires federal courts to review one state decision,' if the last reasoned decision
18 adopts or substantially incorporates the reasoning from a previous state court decision, we
19 may consider both decisions to 'fully ascertain the reasoning of the last decision.'" Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc), quoting Barker v.
20 Fleming, 423 F.3d 1085, 1093 (9th Cir. 2005); see also Hedlund v. Ryan, 854 F.3d 557,
21 565 (9th Cir. 2017) (same). Thus, the Court will consider the reasoning of both decisions
22 in evaluating the California Supreme Court's rejection of this claim under AEDPA.
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26 and the California Supreme Court decision relied on the reasoning of the appellate court.
27 Petitioner disagreed and asserted that because the decision of the Court of Appeal was the
28 last and only reasoned decision on the merits, the state appellate court decision was the
appropriate focus of the Court's review.

1 The Double Jeopardy clause of the Fifth Amendment states that “nor shall any
 2 person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S.
 3 Const. Am. V. “It protects against a second prosecution for the same offense after acquittal.
 4 It protects against a second prosecution for the same offense after conviction. And it
 5 protects against multiple punishments for the same offense.” North Carolina v. Pearce,
 6 395 U.S. 711, 717 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794
 7 (1989); see also Brown v. Ohio, 432 U.S. 161, 165 (1977).

8 Petitioner contends that his claim of double jeopardy is meritorious and that the state
 9 court rejection of his claim involved both an unreasonable application of clearly established
 10 federal law as well as an unreasonable determination of the facts. (SAP at 303; Pet. Br. at
 11 54-55, 58; Reply at 40.) Petitioner argues that “the state appellate court was incorrect in
 12 ruling that the special circumstance was not an element of capital murder” and erred in its
 13 application of Ohio v. Johnson, 467 U.S. 493 (1984), to his case. (Reply at 40; Pet. Br. at
 14 59-60, 65-66; SAP at 305.) Petitioner also asserts that the appellate court made
 15 unreasonable factual findings in: (1) holding the special circumstance was not a lesser
 16 included offense or added element of the charged murder, (2) finding Petitioner’s decision
 17 to plead guilty was an attempt to “cut off” the prosecutor’s ability to get the lying in wait
 18 special circumstance reinstated, and (3) failing to recognize the prosecutor’s “active”
 19 participation in the plea proceedings. (Pet. Br. at 66-70; Reply at 40.)

20 Petitioner first asserts that the state appellate court erred in ruling that the special
 21 circumstance was not a lesser included offense or added element of first-degree murder,
 22 and that this holding was both an unreasonable application of law as well as an
 23 unreasonable factual determination. Upon review, the California Supreme Court explicitly
 24 found that the appellate court’s holding on this matter was not determinative of the
 25 outcome, stating: “We need not decide whether defendant is correct that a special
 26 circumstance is, for double jeopardy purposes, the functional equivalent of an element of
 27 a greater offense. Even if that is true, and the Court of Appeal erred in stating otherwise, it
 28 does not assist defendant because it is not a basis for distinguishing *Johnson, supra*, 467

1 U.S. 493, 104 S.Ct. 2536.” Jurado, 38 Cal. 4th at 96. The state court reasoned that “for
 2 purposes of double jeopardy analysis under the facts shown, it make[s] no difference
 3 whether a special circumstance is or is not an element, or the functional equivalent of an
 4 element, of a greater offense.” Id. at 97. Thus, because the California Supreme Court’s
 5 adjudication of this issue did not rest on the state appellate court’s finding concerning the
 6 special circumstance, Petitioner fails to show that the asserted error by the state appellate
 7 court implicates either section 2254(d)(1) or (d)(2).

8 Because the California Supreme Court did not rest its decision on whether the special
 9 circumstance was an element of a greater offense, Petitioner’s reliance on Sattazahn v.
 10 Pennsylvania, 537 U.S. 101 (2003), is misplaced. Petitioner notes that the Sattazahn Court
 11 stated that “for purposes of the Sixth Amendment’s jury-trial guarantee, the underlying
 12 offense of ‘murder’ is a distinct, lesser included offense of ‘murder plus one or more
 13 aggravating circumstances,’” and that the same understanding extended for purposes of a
 14 double jeopardy analysis. (Pet. Br. at 59-60, quoting Sattazahn, 537 U.S. at 111.)
 15 Petitioner asserts that “Sattazahn demonstrates that the appellate court’s double jeopardy
 16 analysis is erroneous.” (Id. at 60.) Yet again, the California Supreme Court clearly
 17 resolved Petitioner’s double jeopardy claim on other grounds, finding that even if the
 18 appellate court erred in this respect, it was not a basis for distinguishing Johnson.¹³ Again,
 19 the Court is reviewing the reasonableness of the California Supreme Court’s decision that
 20 regardless of the appellate court’s finding on the special circumstance, Johnson was not
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 23 ¹³ Moreover, while Sattazahn was a majority decision in Parts I-II and IV-V,
 24 Petitioner’s citation above is to Part III, which was not joined by a majority. See Sattazahn,
 25 537 U.S. at 103. As the parties acknowledged at oral arguments, that portion of Sattazahn
 26 is not controlling. Thus, it is of limited utility in reviewing the state court resolution of this
 27 issue. See Smith v. Hedgpeth, 706 F.3d 1099, 1104-06 (9th Cir. 2013) (“Justice Scalia’s
 28 statements in Part III are part of a plurality opinion and are not a binding declaration of the
 Court.”); see also Andrade, 538 U.S. at 71 (“Section 2254(d)(1)’s ‘clearly established’
 phrase ‘refers to the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions
 at the time of the relevant state-court decision.’”), quoting Williams, 529 U.S. at 412.

1 distinguishable from Petitioner's case and the appellate court's application of Johnson was
2 appropriate and constituted the law of the case.

3 Petitioner contends that Johnson is distinguishable and asserts that the California
4 Court of Appeal erred in its application of Johnson to his case, offering a variation on the
5 same argument rejected both by that court as well as by the California Supreme Court.
6 Petitioner argues that "unlike the defendant in *Johnson*, Petitioner pleaded guilty to *all* of
7 the charges pending against him at the time of his plea," and that "the prosecutor in *Johnson*
8 affirmatively objected to entry of the respondent's guilty plea to the lesser charges," but in
9 Petitioner's case, "while the prosecutor did not sign the change of plea form and said there
10 was a 'possibility' his office would consider filing a writ petition challenging the court's
11 ruling striking the special circumstance allegation (PRT 290), the record clearly
12 demonstrates the prosecutor's open and active participation in the taking of Petitioner's
13 plea." (SAP at 309-10) (footnote omitted.) The California Supreme Court addressed this
14 matter, namely Petitioner's argument that "unlike the defendant in *Johnson*, he pled guilty
15 to all charges then pending against him and the prosecutor openly and actively participated
16 in the taking of these pleas." Jurado, 38 Cal. 4th at 97. The California Supreme Court
17 recognized that the two situations differed but nonetheless held that: "We are unpersuaded
18 that these slight differences are significant." Id. The state court reasonably noted that the
19 prosecution was "timely" in seeking review of the trial court's dismissal of the special
20 circumstance, "did not acquiesce" in Petitioner's plea, and noted that the prosecutor's
21 participation in the plea proceedings, rather than attempting to prosecute the pending
22 charges, was "primarily in the form of insisting that a factual basis be demonstrated." Id.

23 While Petitioner continues to insist that Johnson is distinguishable from his situation,
24 he fails to persuasively explain how the California Supreme Court's rejection of that
25 argument was unreasonable. Because this claim is presented on federal habeas review, the
26 question before the Court is not simply the applicability of Johnson, but is instead the
27 reasonableness of the California Supreme Court's determination that Johnson is not
28 distinguishable and that the state appellate court's decision was the law of the case.

1 The California Supreme Court found that the prosecutor's actions at the plea
 2 proceedings "did not pose the risks that the successive prosecution aspect of the double
 3 jeopardy bar was intended to guard against-'repeated attempts to convict an individual,
 4 thereby exposing him to continued embarrassment, anxiety, and expense, while increasing
 5 the risk of an erroneous conviction or an impermissibly enhanced sentence.'" Jurado, 38
 6 Cal. 4th at 97, quoting Johnson, 467 U.S. at 498-99. The state court also reasoned that:
 7 "As in *Johnson*, there was 'none of the governmental overreaching that double jeopardy is
 8 supposed to prevent,' and imposing a double jeopardy bar 'would deny the State its right
 9 to one full and fair opportunity to convict those who have violated its laws.'" Id., citing
 10 Johnson, 467 U.S. at 501-02.

11 The Court similarly finds that the situation in Johnson bears favorable comparison
 12 to the instant case and does not implicate double jeopardy concerns- i.e., prosecution after
 13 acquittal, multiple prosecutions for the same offense, or multiple punishments.¹⁴ In both
 14 cases, the trial court dismissed the charges at issue prior to their prosecution, as opposed to
 15 disposition by acquittal or other verdict after prosecution. See Sattazahn, 537 U.S. at 109
 16 ("[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is
 17 whether there has been an 'acquittal.'") Moreover, in both cases, the actions were
 18 prompted by the defense. In Johnson, the defendant offered to plead guilty to the lesser
 19 charges and moved to dismiss the greater charges, which the trial court granted. In
 20

21
 22 ¹⁴ At oral arguments, Petitioner argued that Grady v. Corbin, 495 U.S. 508 (1990),
 23 supported their argument as in order to prove the special circumstance, the prosecutor
 24 would have to prove conduct for which Petitioner had already pled guilty. In Grady, the
 25 Supreme Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to
 26 establish an essential element of an offense charged in that prosecution, the government
 27 will prove conduct that constitutes an offense for which the defendant has already been
 28 prosecuted." Grady, 495 U.S. at 510, overruled by United States v. Dixon, 509 U.S. 688
 (1993). However, as Respondent accurately noted at oral arguments, the Supreme Court
 overruled the "same conduct" test established in Grady. Dixon, 509 U.S. at 704.
 Accordingly, Grady does not assist Petitioner in this regard.

Petitioner's case, the defense moved to dismiss the special circumstance, which when granted by the trial court was promptly followed by the defendant's guilty plea to the remaining charges. As discussed in greater detail below, in neither case did the prosecutor assent to the guilty plea and in both situations, the prosecution sought review of the trial court's decision. Nor was Petitioner subject to multiple punishments, as sentencing was stayed due to the prosecution's appeal of the special circumstance dismissal and Petitioner later withdrew his guilty plea when it was reinstated. Instead, as in Johnson, "[t]he trial court's dismissal of these more serious charges did more than simply prevent the imposition of cumulative punishments; it halted completely the proceedings that ultimately would have led to a verdict of guilt or innocence on these more serious charges." Johnson, 467 U.S. at 499-500. Petitioner has not demonstrated that the state supreme court erred in its application of Johnson, much less that the decision was an unreasonable application of clearly established law. See Williams, 529 U.S. at 413 ("[A]n *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law.")

In addition to arguing that the state appellate court erred in applying Johnson, Petitioner also asserts that the appellate court made unreasonable factual findings in (1) holding the special circumstance was not a lesser included offense or added element of the charged murder, (2) finding Petitioner's decision to plead guilty was an attempt to "cut off" the prosecutor's ability to get the lying in wait special circumstance reinstated, and (3) failing to recognize the prosecutor's "active" participation in the plea proceedings. (Pet. Br. at 66-70; Reply at 40.) As noted above, given that the California Supreme Court's rejection of this claim did not rest on the whether the special circumstance was or was not a lesser included offense or added element, the reasonableness of the appellate court's factual finding on this matter is not pertinent to this Court's analysis under AEDPA. With respect to the remaining assertions, Petitioner specifically argues that: "Jeopardy attached by virtue of Jurado's plea to all remaining charges combined with the state's action in (1) failing to unequivocally state an objection thereto and (2) actively participating in the plea to first-degree murder." (Reply at 40.)

1 Petitioner contends that rather than immediately appealing the trial court's ruling,
2 requesting a continuance, or voicing a clear objection to the plea, the prosecutor only
3 "stated an intent to *possibly* seek review of the superior court's ruling, and then actively
4 participated in the plea hearing." (Pet. Br. at 68.) Petitioner details the prosecutor's
5 participation in the plea proceedings, including that he asked to see change of plea form,
6 offered input and concerns, requested a factual basis for the plea, and questioned Petitioner
7 during the plea proceedings concerning the factual basis. (Id. at 68-70.)

8 Petitioner fails to explain how, given the timing of events and Petitioner's right to
9 enter a plea regardless of the prosecutor's agreement or lack thereof, the prosecutor's
10 decision to voice his disagreement, refuse to sign the plea form, and raise the possibility of
11 appeal was somehow tantamount to acquiescence in those proceedings sufficient to raise a
12 double jeopardy bar. A review of the trial record reflects that the court's decision to dismiss
13 the special circumstance was immediately followed by Petitioner stating an intention to
14 plead guilty to first degree murder. (See PRT 287) (trial court's decision granting motion
15 to dismiss the special circumstance); (PRT 288) (defense states Petitioner's intention to
16 plead guilty to first degree murder). After this sequence of events, the prosecutor promptly
17 indicated that "just for the record, I've advised counsel that the People would not be signing
18 the change of plea form. I know he can plead to the face at any time, but consulting with
19 Mr. Fisher [another member of the prosecution], there's a possibility that the People may
20 take a writ on the ruling by the Court, so I just wanted counsel to be aware that the plea
21 could conceivably be set aside at a later time depending on how that procedure goes." (PRT
22 290.) Even Petitioner acknowledges that the prosecutor's agreement was not needed for
23 the plea, stating that: "As the appellate court noted, Petitioner was entitled to plead guilty
24 to the 'face' of the remaining pleading, and there was no requirement that the prosecution
25 consent to that plea." (SAP at 310, n. 20, citing Jurado, 4 Cal. App. 4th at 1234.)

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1 The record also reflects that while the prosecutor participated in the plea
2 proceedings, he clearly did not concur in the plea and indicated several times a possible
3 intent to appeal. The prosecutor remained present for the plea proceedings, but described
4 himself as simply “interested” and again indicated he would not sign the plea form; the
5 trial court similarly described him as an “interested party.” (PRT 296.) The record also
6 reflects that the exchanges during the first portion of the proceeding took place almost
7 entirely between Petitioner and the trial court, including Petitioner’s admission to the
8 crimes, the consequences of the plea, his satisfaction with defense counsel’s advice, and
9 his rights, including his right to a jury trial, to confront witnesses against him, to remain
10 silent, to testify, present evidence and witnesses, and the maximum possible penalty. (PRT
11 298-312.) It was only after the trial court and defense counsel were discussing completion
12 of the change of plea form, and defense counsel submitted the preliminary hearing
13 transcript to provide a factual basis for the plea, that the prosecutor stated: “We would ask
14 the court to get a factual basis from Mr. Jurado. We would not be inclined to stipulate to
15 a factual basis.” (PRT 312-13.) The trial court agreed that it would require Petitioner to
16 state a factual basis, but then first inquired of the prosecution whether they agreed that
17 Petitioner could withdraw his plea in the event they pursued a writ and the court of appeal
18 reversed the dismissal of the special circumstance, and whether statements he made could
19 or could not be used against him. (PRT 314-16.) In response to the trial court’s inquiry,
20 the prosecution responded that “any statement he makes here cannot be used against him
21 later if the plea is withdrawn.” (PRT 316.) The trial court then inquired as to the factual
22 basis for the plea and Petitioner responded- the prosecutor interjected during this portion
23 of the proceedings to ask Petitioner to “elaborate” on his conversations with co-defendant
24 Shigemura, asked a few questions on that point, asked for comment on the overt acts
25 alleged, and specifically inquired as to whether Petitioner’s statement that “it was me” who
26 killed the victim was a sufficient factual basis for the conspiracy charge, to which Petitioner
27 stated that he and Shigemura conspired, but that he killed the victim. (PRT 317-26.) The
28 trial court then resumed his direct exchange with Petitioner, asking for his plea to each

1 charge, and accepting the plea. (PRT 327-33.) Finally, within a few weeks of the plea
2 proceedings and prior to sentencing, the prosecution petitioned the state appellate court for
3 review and that court stayed sentencing and ordered additional filings on the matter. (See
4 PRT 337; CT 141-42.)

5 On this record, it was not unreasonable for the state court to intimate that the timing
6 of Petitioner's guilty plea was an attempt to head off a potential appeal. See Jurado, 38
7 Cal. 4th at 95. Almost immediately after the trial court's dismissal of the lying in wait
8 special circumstance, which was the sole special circumstance alleged, the defense stated
9 that Petitioner wished to plead guilty to the remaining charges, and entered the plea even
10 in the wake of the prosecutor's indication that the ruling might be challenged. While it is
11 quite possible that Petitioner's actions were not aimed at curtailing a potential appeal, it
12 was not unreasonable for the state court to surmise otherwise in light of the record.
13 California law provides for an appeal by the prosecution under the circumstances presented
14 here. See Cal. Penal Code § 1238 (stating in relevant part that: "(a) An appeal may be
15 taken by the people from any of the following: (1) An order setting aside all or any portion
16 of the indictment, information, or complaint. (2) An order sustaining a demurrer to all or
17 any portion of the indictment, accusation, or information. . . .") Also, as noted above and
18 contrary to Petitioner's assertion, the California Supreme Court acknowledged Petitioner's
19 attempt to distinguish Johnson in part on the grounds that "the prosecutor openly and
20 actively participated in the taking of these pleas." Jurado, 38 Cal. 4th at 97. However, the
21 state court found that "[t]he prosecutor's participation in the taking of the guilty plea,
22 primarily in the form of insisting that an adequate factual basis be demonstrated, was not
23 an 'effort to prosecute the charges seriatim'" and did not fall under the double jeopardy
24 prohibition against successive prosecution. Id. In view of the record, this finding was not
25 unreasonable. It is evident from this Court's review of the trial proceedings that the vast
26 majority of the exchanges during the plea colloquy took place between Petitioner and the
27 trial court, the prosecutor's participation was limited, either taking place in response to the
28 trial court's inquiry, or clearly directed at ensuring adherence to the law and procedure,

1 including noting that a factual basis was required for the plea and inquiring as to the factual
 2 basis on certain counts.¹⁵ The California Supreme Court reasonably concluded that these
 3 actions did not amount to an effort to prosecute the charges so as to violate double jeopardy,
 4 and that decision was not based on an unreasonable determination of the facts.

5 For the reasons discussed throughout this claim, the state court correctly and
 6 reasonably found that Petitioner's situation was akin to, and governed by, the Supreme
 7

8
 9 ¹⁵ Petitioner has also attached as Exhibit A to his merits brief transcripts from co-
 10 defendant Humiston's trial proceedings. (See ECF No. 182-1.) He notes that during
 11 Humiston's trial, the parties stipulated that Petitioner had pled guilty and contends that
 12 "[t]he state's use of Mr. Jurado's plea of guilty-during the pendency of the appellate court
 13 writ proceedings and *by the same prosecutor*-supports the double jeopardy claim because
 14 it shows that the state was using the plea of guilty to its own advantage. Indeed, in this
 15 instance, the state was using Mr. Jurado's plea as a sword." (Pet. Br. at 64) (emphasis in
 16 original.) Respondent, in turn, argues first that the exhibit cannot be considered unless it
 17 was in the state court record at the time the state court adjudicated this claim, and second
 18 that the record does not reflect why the parties entered into that stipulation and therefore
 19 does not support a contention that the prosecutor was using the stipulation to his advantage.
 20 (Resp. at 43.)

21 The Court need not decide whether or how the stipulation materially impacts
 22 Petitioner's argument, as it is clear that in Pinholster, the Supreme Court held that "review
 23 under § 2254(d)(1) is limited to the record that was before the state court that adjudicated
 24 the claim on the merits." Id., 563 U.S. at 181. Review under section 2254(d)(2) is
 25 explicitly limited to "the evidence presented in the State court proceeding." 28 U.S.C.
 26 § 2254(d)(2). Because Petitioner fails to show that this exhibit was part of the state record
 27 at the time this claim was decided, this Court cannot consider Exhibit A in deciding whether
 28 the California Supreme Court's rejection of this claim was contrary to, or an unreasonable
 application of, clearly established federal law, or was based on an unreasonable
 determination of the facts. Petitioner acknowledges this limitation, as he indicates in the
 reply brief that "based solely on the evidence that was before the state court, that the state
 court's adjudication of the claim was based on an unreasonable determination of the facts,"
 and that "[o]n de novo review of the claim, this Court can thus consider the prosecutor's
 use of Jurado's plea of guilty to first degree murder." (Reply at 39.)

For the reasons outlined in the discussion of this claim, because Petitioner fails to
 satisfy section 2254(d) on the record which was before the state court, the Court will not
 consider Exhibit A in adjudicating this claim.

1 Court's decision in Johnson. Given the timing of the dismissal of the special circumstance,
 2 immediately followed by a guilty plea to the remaining counts over the prosecutor's
 3 objection and with awareness of a potential appeal of that dismissal, the state court
 4 reasonably concluded that: "As in *Johnson*, there was 'none of the governmental
 5 overreaching that double jeopardy is supposed to prevent,' and imposing a double jeopardy
 6 bar 'would deny the State its right to one full and fair opportunity to convict those who
 7 have violated its laws.'" Jurado, 38 Cal. 4th at 97, citing Johnson, 467 U.S. at 501-02.
 8 This Court finds similarly, and concludes that as in Johnson, "[n]otwithstanding the trial
 9 court's acceptance of [Petitioner's] guilty pleas, [Petitioner] should not be entitled to use
 10 the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution
 11 on the remaining charges." Johnson, 467 U.S. at 502. The Court cannot conclude that the
 12 California Supreme Court's adjudication was either contrary to, or an unreasonable
 13 application of, clearly established federal law, or that it was based on an unreasonable
 14 determination of the facts. Habeas relief is not available on Claim 7.

15 At oral arguments, Petitioner specified that he requests both evidentiary
 16 development and an evidentiary hearing on Claim 7. Specifically, Petitioner indicated that
 17 he requests discovery of District Attorney files relating to this matter and depositions of
 18 the trial prosecutors concerning why the District Attorney did not file an immediate writ,
 19 move for continuance, object to the plea or request that the plea be conditioned on the
 20 outcome of any writ proceedings, as well as whether or how the prosecution used the plea
 21 in any other manner, such as in other proceedings. However, because Petitioner fails to
 22 satisfy section 2254(d) on the basis of the state record, an evidentiary hearing is not
 23 available on Claim 7. Sully, 725 F.3d at 1075; Totten, 137 F.3d at 1176. Nor does this
 24 claim merit discovery. See Kemp v. Ryan, 638 F.3d 1245, 1260 (9th Cir. 2011)
 25 ("[B]ecause the district court was not authorized to hold an evidentiary hearing on Kemp's
 26 deliberate elicitation claim, obtaining discovery on that claim would have been futile.")

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1 circumstance must be proved beyond a reasonable doubt. [¶] In other words, before an
2 inference essential to establish a special circumstance may be found to have been proved
3 beyond a reasonable doubt, each fact or circumstance upon which such inference
4 necessarily rests must be proved beyond a reasonable doubt.”)

5 Even were there any potential for confusion in the passages Petitioner highlights in
6 the challenged instructions, the jury was repeatedly and properly instructed that the
7 prosecution bore the burden of proof and that each of the elements of the charged crimes,
8 special circumstances, and other allegations must be proven beyond a reasonable doubt in
9 order to establish guilt. Considering the jury instructions as a whole, as the Supreme Court
10 has specifically directed, Petitioner fails to show that the instructions at issue here were
11 erroneous, much less that they “so infected the entire trial that the resulting conviction
12 violates due process.” McGuire, 502 U.S. at 72, quoting Cupp, 414 U.S. at 147. Nor has
13 Petitioner shown that the asserted error had a “substantial and injurious effect or influence
14 in determining the jury’s verdict.” Brecht, 507 U.S. at 637.

15 Petitioner fails to demonstrate that the California Supreme Court’s rejection of this
16 claim was contrary to, or involved an unreasonable application of, clearly established
17 federal law, or that it was based on an unreasonable determination of the facts. Habeas
18 relief is unavailable on Claim 18.

19 **E. Claims Alleging Error During Penalty Phase Proceedings**

20 **1. Claim 29**

21 Petitioner argues that the trial court erred in excluding Petitioner’s videotaped
22 confession as hearsay, arguing that “Petitioner’s non-assertive conduct, as seen in the
23 videotape, was not hearsay. Moreover, even assuming it was hearsay, the videotape was
24 still admissible in the penalty phase of this capital trial under the United States Supreme
25 Court’s holdings in *Green v. Georgia*, 442 U.S. 95 (1979) and *Chambers v. Mississippi*,
26 410 U.S. 284, 302 (1973).” (SAP at 515.) Petitioner contends that this error prevented
27 the jurors from hearing all available mitigation evidence and deprived him of rebuttal
28 evidence to counter the State’s evidence in favor of the death penalty. (Id. at 516.)

1 On direct appeal, the California Supreme Court rejected this claim on the merits,
2 reasoning as follows:

3 Defendant contends that the trial court erred in excluding a videotape
4 of his interrogation by police detectives on May 18, 1991, shortly after his
5 arrest for the murder of Terry Holloway. He further contends that this error
6 violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments
7 to the federal Constitution.

8 As part of its case in mitigation, the defense proposed to have the jury
9 watch a videotape that was made, without defendant's knowledge, while he
10 was being interrogated by police detectives about the murder of Terry
11 Holloway. During the interrogation, defendant at first denied any involvement
12 in the murder, but eventually he admitted killing Holloway, and he insisted
13 that he had done it entirely on his own and that neither Denise Shigemura nor
14 Anna Humiston was present. He said he killed Holloway because he was in
15 danger and his family was in danger. He expressed fear that Brian Johnsen
16 had friends in prison who would kill him or his mother or other family
17 members in retaliation for killing Holloway. He also expressed concern that
18 he would be perceived in prison as a snitch and killed for that reason, or that
19 he would have to spend his entire life in prison. During this part of the
20 interrogation, defendant displayed considerable emotion, sobbing and at one
21 point grasping an interrogating officer's hand. The defense argued that the
22 evidence of defendant's emotional responses was admissible to show his
23 remorse for the killing.

24 The prosecution objected that the videotape was inadmissible under the
25 hearsay rule (Evid. Code, § 1200), because defendant's emotional displays
26 were assertive conduct, and also under Evidence Code section 352, because
27 the evidence's probative value was substantially outweighed by the risk of
28 undue prejudice and jury confusion. After viewing the videotape, the trial
court sustained the hearsay objection and excluded the evidence. The court
agreed with the prosecution that defendant's emotional displays were a form
of hearsay and not within any exception to the hearsay rule. The court also
rejected the defense argument that defendant's constitutional right to present
mitigating evidence in a capital case overrode the hearsay rule in this instance.
The court noted there was no compelling need for the evidence, because
defendant could testify to any remorse he might have felt, and that the
evidence was not particularly trustworthy as evidence of remorse because on
the videotape defendant never articulated any feelings of sorrow or regret for
killing Teresa Holloway, or any sympathy for Holloway or her family,
although he did indicate concern for his own safety and well-being, and also

1 concern for his mother and for Anna Humiston. Thus, in the court's view, it
2 was by no means clear that defendant's emotional display was in any way
3 caused by remorse, and it seemed more likely that it was caused entirely by
4 concern for his own predicament.

5 The defense raised the issue again after both sides had rested at the
6 penalty phase and the prosecutor had given his closing argument to the jury.
7 Defense counsel requested permission to reopen the evidence to play the
8 videotape for the jury to rebut the prosecutor's assertion, in argument to the
9 jury, that defendant "lacked a conscience." Defense counsel pointed out that
10 during the videotaped interview defendant said, in response to a question
11 asking whether he had received any injuries in his struggle with Teresa
12 Holloway, "The only injury I got is from my, just from my conscience." The
13 trial court denied the request to reopen.

14 The defense raised the issue a final time after the jury had returned the
15 penalty verdict of death. In a motion for a new trial, the defense argued that
16 the trial court had erred in excluding the videotape. To demonstrate prejudice,
17 the defense submitted declarations by three trial jurors stating that evidence
18 that defendant lacked remorse for killing Teresa Holloway was an important
19 factor in aggravation, and that evidence that defendant had an emotional
20 reaction to the murder and talked about his conscience would have
21 counterbalanced that evidence. The trial court denied the motion for a new
22 trial.

23 Defendant is correct that, *by themselves*, defendant's emotional
24 displays were nonassertive conduct, and thus not within the hearsay rule. For
25 purposes of the hearsay rule, conduct is assertive if the actor at the time
26 intended the conduct to convey a particular meaning to another person. (Evid.
27 Code, § 225 [defining statement to include "nonverbal conduct of a person
28 intended by him as a substitute for oral or written verbal expression"].) For
example, a nod of the head in response to a question calling for a yes-or-no
answer, or a gesture pointing to a particular person when asked to identify a
perpetrator, are examples of assertive conduct. Here, nothing in the videotape
suggests that defendant's emotional responses were voluntary or that he
intended them to convey any particular meaning to the interrogating officers.

But the defense sought to introduce more than just evidence of the
emotional displays themselves. To explain the significance of the emotional
displays, and particularly defendant's statement that as a result of the murder
he had received an "injury from [his] conscience," the defense sought to
introduce the statements defendant made during the videotaped interview. As

defendant must concede, those statements, including assertions and descriptions of his own feelings and other mental states, were hearsay. They were not admissible under the state-of-mind exception to the hearsay rule (Evid. Code, § 1250) if they were made under circumstances indicating a lack of trustworthiness (*id.*, § 1252). As the trial court correctly determined, the circumstance that defendant made his statements during a postarrest police interrogation, when he had a compelling motive to minimize his culpability for the murder and to play on the sympathies of his interrogators, indicated a lack of trustworthiness. In past decisions, we have upheld the exclusion of self-serving postcrime statements made under similar circumstances. (*People v. Livaditis* (1992) 2 Cal.4th 759, 779-780, 9 Cal.Rptr.2d 72, 831 P.2d 297; *People v. Edwards* (1991) 54 Cal.3d 787, 820, 1 Cal.Rptr.2d 696, 819 P.2d 436; *People v. Whitt* (1990) 51 Cal.3d 620, 642-643, 274 Cal.Rptr. 252, 798 P.2d 849.)

We have also rejected the argument that exclusion of this sort of hearsay evidence violates a capital defendant's right to a fair trial and a reliable penalty determination under the federal Constitution. As we have explained, a capital defendant has no federal constitutional right to the admission of evidence lacking trustworthiness, particularly when the defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross-examination. (*People v. Stanley, supra*, 10 Cal.4th at pp. 838-840, 42 Cal.Rptr.2d 543, 897 P.2d 481; *People v. Livaditis, supra*, 2 Cal.4th at p. 780, 9 Cal.Rptr.2d 72, 831 P.2d 297; *People v. Edwards, supra*, 54 Cal.3d at pp. 820-821, 1 Cal.Rptr.2d 696, 819 P.2d 436; *People v. Whitt, supra*, 51 Cal.3d at p. 644, 274 Cal.Rptr. 252, 798 P.2d 849.)

In excluding the entire videotape of defendant's postarrest interrogation, the trial court did not err under state law, nor did it violate defendant's rights under the federal Constitution. The defense never offered to redact the videotape to show only the nonassertive conduct, and, even if it had done so, any error in excluding the admissible portions of the videotape was harmless.

Jurado, 38 Cal. 4th at 128-30 (alterations in original). Petitioner also later raised this claim in the second state habeas petition and the state court imposed procedural bars (see Lodgment No. 91), but for the reasons discussed above in section III.B., the Court will address the claim on the merits.

///

1 Petitioner asserts that the California Supreme Court correctly found that his
2 emotional responses during the interrogation were not within the scope of the hearsay rule,
3 but erred in concluding the evidence was unreliable and untrustworthy, and thus properly
4 excluded, because the statements and responses were made during an interrogation just
5 after his arrest. (Pet. Br. at 119, citing Jurado, 38 Cal. 4th at 130.) Petitioner contends that
6 “[t]he state court’s opinion fails to analyze the material fact that the police had *secretly*
7 recorded the interview, and thus since Mr. Jurado was in fact unaware that he was being
8 videotaped the circumstance of the videotaped interrogation presents significant indicia of
9 reliability.” (Id. at 119-20) (italics in original.)

10 This first assertion, that the California Supreme Court “implicitly- and correctly-
11 found the videotaped interrogation was admissible” under an exception to the hearsay rule
12 warrants clarification and correction. Petitioner, citing the direct appeal opinion, maintains
13 that “[t]he California Supreme Court agreed with the defense that ‘defendant’s emotional
14 displays were *nonassertive conduct, and thus not within the hearsay rule.* Here, (unlike
15 conduct that is assertive in nature,) nothing in the videotape suggests that defendant’s
16 emotional responses were voluntary or that he intended them to convey any particular
17 meaning to the interrogating officers.[’] Jurado, 38 Cal. 4th at 129, italics added.” (Id. at
18 118.) However, a review of the California Supreme Court’s opinion shows that Petitioner’s
19 reference to, and quotation from, the state court’s opinion is incomplete. The state supreme
20 court found that while, “*by themselves*, defendant’s emotional displays were nonassertive
21 conduct, and thus not within the hearsay rule,” the defense was at the same time attempting
22 to introduce the statements Petitioner made to provide context for and explain the
23 significance of his emotional responses, and that “those statements, including assertions
24 and descriptions of his own feelings and other mental states, were hearsay.” Jurado, 38
25 Cal. 4th at 129 (emphasis in original.)

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1 As the Court previously discussed in the Group One Order with respect to Claim
2 1.R.,²⁴ while Petitioner contends that his behavior during the interrogation did not constitute
3 hearsay and provided reliable evidence of remorse, both the trial court and the California
4 Supreme Court rejected that argument, as follows:

5 When the defense attempted to introduce the video into evidence, the trial
6 court ruled that the tape constituted inadmissible hearsay and questioned the
7 reliability of the statements, as follows: “So I think that for this evidence to
8 have any relevance it really has to have a hearsay purpose, that is, to
9 communicate his mental or emotional state, either through express words or
10 conduct which is a substitute for words. () So I think there is the inherent
11 danger and mischief in hearsay. I think the circumstances under which the
12 statement was made raise serious, serious questions about the reliability of the
13 trustworthiness of the statements.” (RT 3133.) The trial court acknowledged
14 that the decision was “a close call,” yet reasoned that: “But I just think any
way you cut it, it’s a - - its either hearsay or so close to hearsay that the hearsay
analysis is relevant, really, and applicable.” (RT 3135.) The California
Supreme Court agreed that the statements were hearsay. See Jurado, 38 Cal.
4th at 129-30.

15 (ECF No. 171 at 120.) In the Group One Order, the Court also noted the difficulty in
16 attempting to introduce only the non-hearsay aspects of the interrogation:

17 Had counsel redacted or muted the video in an attempt to show only the
18 nonassertive conduct, the lack of context would have deprived the evidence
19 of relevance. The trial court recognized this difficulty when it elaborated on
20 the reasons for excluding the videotape, concluding that it was impossible to
divorce the emotional displays from the surrounding circumstances:

21 Again I think here, for this to really have any meaning or
22 relevance in this case, the emotional response and display of
23 emotion requires some explanation or interpretation for it to have
24 relevance. It - - its relevance is not in my view just some general
display of emotion or - - or - - or the crime here. (¶) I mean it’s

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26 ²⁴ In Claim 1.R, which the Court rejected in the Group One Order, Petitioner asserted
27 that trial counsel should have sought to introduce Petitioner’s videotaped confession
28 without sound, which would have addressed the hearsay issue and allowed the jury to view
his emotional responses and remorse, and that the failure to do so constituted ineffective
assistance of counsel. (ECF No. 171 at 119-23.)

1 not a contention that he's a - - completely emotionless, that he
2 can never cry or never display emotion, it's whether he has
3 displayed any emotion concerning the crime here and the victim.
4 And particularly that's - - I think on all theories advanced that's
5 the relevancy. Certainly that's the relevancy if it's intended to
6 rebut the testimony of the prosecution witness, but I think also
7 under the expanded "k" factor relevance and the sub "a"
8 relevance it's only relevant if it's emotion concerning the crime
and the victim and what he did here. And that demands cross-
examination in my view, that demands being tested on the anvil
of truth, cross-examination.

9 (Id. at 121, quoting RT 3256-57.) As the Court previously noted in the Group One Order,
10 (see id. at 122), Petitioner fails to persuasively explain how his non-verbal conduct during
11 the interrogation, including any emotional responses, could be effectively separated from
12 his statements in order to satisfy the hearsay exception while still offering relevant evidence
13 of remorse. Moreover, as the California Supreme Court observed, the trial court was not
14 persuaded that remorse was the impetus for Petitioner's emotional behavior at the
15 interrogation, as follows:

16 The court noted there was no compelling need for the evidence, because
17 defendant could testify to any remorse he might have felt, and that the
18 evidence was not particularly trustworthy as evidence of remorse because on
19 the videotape defendant never articulated any feelings of sorrow or regret for
20 killing Teresa Holloway, or any sympathy for Holloway or her family,
21 although he did indicate concern for his own safety and well-being, and also
22 concern for his mother and for Anna Humiston. Thus, in the court's view, it
was by no means clear that defendant's emotional display was in any way
caused by remorse, and it seemed more likely that it was caused entirely by
concern for his own predicament.

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24 Jurado, 38 Cal. 4th at 128-29. This passage also undercuts Petitioner's second argument,
25 that the California Supreme Court's decision involved an unreasonable factual
26 determination concerning the reliability and trustworthiness of the videotape based on the
27 circumstances surrounding the interrogation. As noted above, Petitioner also argues that
28 "[t]he state court's opinion fails to analyze the material fact that the police had *secretly*

1 recorded the interview, and thus since Mr. Jurado was in fact unaware that he was being
2 videotaped the circumstance of the videotaped interrogation presents significant indicia of
3 reliability.” (Pet. Br. at 119-20.) He contends that “[t]he court’s factual finding- i.e., that
4 the statement was untrustworthy because it was made during a postarrest police
5 interrogation-also was erroneous in that it ignored the trial court’s own statements showing
6 strong indicia of trustworthiness.” (Id. at 120.)

7 The Supreme Court has held that in certain circumstances, the exclusion of hearsay
8 evidence may rise to the level of a due process violation, such as when “[t]he excluded
9 testimony was highly relevant to a critical issue in the punishment phase of the trial . . . and
10 substantial reasons existed to assume its reliability.” Green v. Georgia, 442 U.S. 95, 97
11 (1979), citing Chambers, 410 U.S. at 302 (“[T]he hearsay rule may not be applied
12 mechanistically to defeat the ends of justice.”) Yet, the Ninth Circuit has since clarified
13 that decisions such as Green and Chambers “do not stand for the proposition that a
14 defendant must be allowed to put on any evidence he chooses.” LaGrand v. Stewart, 133
15 F.3d 1253, 1266 (9th Cir. 1998); see also Crane v. Kentucky, 476 U.S. 683, 690 (1986)
16 (“[W]e have never questioned the power of the States to exclude evidence through the
17 application of evidentiary rules that themselves serve the interests of fairness and
18 reliability- even if the defendant would prefer to see the evidence admitted.”)

19 Petitioner fails to show that the evidence in question satisfies Green, as the Court is
20 not persuaded that the tape was both relevant to the jury’s penalty phase determination and
21 reliable. Petitioner cites portions of the motion hearing in trial court in support of his
22 argument that the trial court found the tape trustworthy. However, upon review, the
23 citations in question are from the trial court’s questioning of the parties’ arguments, and
24 are not the actual “findings” of the trial court. For instance, Petitioner cites to a portion of
25 the record where the trial court generally stated that “[t]he presence of remorse is relevant”
26 to assert that the trial court found the tape itself “clearly” relevant, when the record reflects
27 the trial court immediately added that relevance alone was insufficient, as “you have to
28 prove it by admissible evidence.” (Pet. Br. at 120, citing RT 3138.) The trial court’s

1 ultimate conclusion was that the tape constituted inadmissible hearsay, reasoning that: “I
2 think for this evidence to have any relevance, it really has to have a hearsay purpose, that
3 is, to communicate his mental or emotional state, either through express words or conduct
4 which is a substitute for words,” and that: “I think the circumstances under which the
5 statement was made raise serious, serious questions about the reliability of the
6 trustworthiness of the statements.” (RT 3133.) The California Supreme Court similarly
7 concluded that Petitioner’s statements were not reliable, reasoning that: “As the trial court
8 correctly determined, the circumstance that defendant made his statements during a
9 postarrest police interrogation, when he had a compelling motive to minimize his
10 culpability for the murder and to play on the sympathies of his interrogators, indicated a
11 lack of trustworthiness. In past decisions, we have upheld the exclusion of self-serving
12 postcrime statements made under similar circumstances.” Jurado, 38 Cal. 4th at 130.

13 Petitioner argues that the California Supreme Court’s decision was unreasonable
14 because Petitioner did not minimize his involvement, but instead, as the trial court noted,
15 admitted to strangling and bludgeoning the victim. (Reply at 56-58, citing RT 3117.)
16 However, this admission about his physical actions does not preclude a conclusion that
17 Petitioner at the same time sought to minimize his moral culpability during that interview.
18 A review of the interrogation transcript reveals that Petitioner first denied and then
19 admitted committing the murder, but he also rationalized his behavior and lied about the
20 circumstances of the crime. Petitioner claimed at one point that “all I know is I’m in
21 danger, my family’s in danger,” stating that he had been kidnapped earlier and the victim
22 had something to do with it. (CT 1387-89.) When asked by the interrogating officer if
23 “this is because you got threats to your family,” Petitioner replied that: “It’s the only reason
24 man. I could never do this to nobody.” (CT 1393.) The evidence at trial showed that the
25 murder was committed because the victim discovered Petitioner’s plan to kill another
26 individual, Doug Mynatt, and was planned and carried out to prevent her from informing
27 Mynatt of that plot rather than out of fear for his family’s safety or due to threats to him or
28 his family.

Petitioner also argues that his lack of knowledge that the statement was recorded by the police increases its reliability, but offers no clearly established authority in support of this contention. He simply asserts that “[s]tatements made by individuals accused of committing crimes are routinely introduced into evidence in California trial courts- and in trial courts around the county- on the basis that the statements made during postarrest police interrogations are made under circumstances indicating trustworthiness,” and cites Arizona v. Fulminante, 499 U.S. 279, 296 (1991) and Colorado v. Connelly, 479 U.S. 157, 182 (1982) (dis. opn. Brennan, J.), as well as several California Supreme Court cases. (Pet. Br. at 120.) However, while both Fulminante and Connelly constitute clearly established authority binding on this Court, a review of those decisions reveals that neither supports Petitioner’s argument or compels the result he urges. Instead, in both decisions, the Supreme Court expressed concern about the reliability of confessions, particularly given the potential import and power of such evidence, and emphasized that a reviewing court must take careful pains to examine the trustworthiness of such statements. Fulminante involved a question as to whether the admission of a coerced confession was harmless error, while Connelly involved a voluntariness question about a confession; in neither case did the Supreme Court state that that a police interrogation was inherently reliable, much less support Petitioner’s argument that an unknowingly recorded interrogation resulting in a confession is reliable simply because the suspect was unaware of the recording. See Fulminante, 499 U.S. at 296 (“A confession is like no other evidence. . . . In the case of a coerced confession . . . , the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.”); Connelly, 479 U.S. at 167 (“[C]oercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.”) Both cases are also easily distinguished from Petitioner’s assertion that his post-arrest statement to police should have been considered reliable. While the Connelly decision, like Petitioner’s case, involved a confession to the police, the

1 Supreme Court acknowledged that the issue in that case was the voluntariness of that
2 confession given the defendant's mental state and coercive police actions, factors not
3 asserted in Petitioner's case. See Connelly, 479 U.S. at 165-67. Meanwhile, neither of the
4 two confessions at issue in Fulminante was the result of post-arrest police interrogation.
5 See Fulminante, 499 U.S. at 283-84.

6 Additionally, as Petitioner acknowledges, his citation of Connelly is to the dissenting
7 opinion. (See Pet. Br. at 120.) Even in that dissent, Justice Brennan acknowledged that:
8 "Our distrust for reliance on confessions is due, in part, to their decisive impact upon the
9 adversarial process," stated that "[b]ecause the admission of a confession so strongly tips
10 the balance against the defendant in the adversarial process, we must be especially careful
11 about a confession's reliability," and like the Fulminante Court, articulated the need for
12 caution in admitting such evidence. Id. at 182-83. For the reasons discussed, the Court
13 finds no support in either decision for Petitioner's contention that a post-arrest police
14 statement is inherently reliable, much less that it is somehow more reliable because
15 Petitioner was unaware it was recorded.

16 Regardless of whether the interrogation was recorded with or without Petitioner's
17 knowledge, the fact remains that it took place just after Petitioner's arrest and that situation
18 weighed against finding the statements reliable.²⁵ This Court is limited to reviewing the
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20

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22 ²⁵ At oral arguments, Petitioner cited Lilly v. Virginia, 527 U.S. 116 (1999), in which
23 the Supreme Court noted that the "against penal interest" hearsay exception "is founded on
24 the broad assumption 'that a person is unlikely to fabricate a statement against his own
25 interest at the time it is made.'" Lilly, 527 U.S. at 126-27, quoting Chambers, 410 U.S. at
26 299. While the Supreme Court acknowledged in Lilly that "[s]tatements in the first
27 category-voluntary admissions of the declarant-are routinely offered into evidence against
28 the maker of the statement and carry a distinguished heritage confirming their admissibility
when so used," see id. at 127, any attempt by Petitioner to leverage this as support for an
argument that expressions of remorse made in such a statement are similarly reliable is
unpersuasive. Whether or not the prosecutor contemplated attempting to introduce
Petitioner's statement at the guilt phase, as Petitioner contended at oral arguments, the fact

1 reasonableness of the state court's determination, not rendering a decision on the merits of
2 the matter in the first instance. Thus, in light of the trial court's explicit and reasonable
3 finding that Petitioner's police interrogation took place under circumstances that
4 undermined the reliability of the statements he sought to admit, Petitioner fails to
5 demonstrate that the California Supreme Court's decision to affirm the trial court's
6 conclusions on similar grounds was unreasonable.

7 Petitioner also asserts that, contrary to the California Supreme Court's conclusion,
8 the tape was relevant to show his humanity, remorse and acceptance of responsibility. As
9 the trial court and the California Supreme Court each found, the tape did not offer
10 compelling evidence of remorse for his actions, as any concern or emotion Petitioner
11 displayed appeared related to what would happen to him and his own loved ones, such as
12 his family and Anna Humiston, rather than any regret or concern for the victim or her
13 family. After viewing the tape, the trial court stated: "I did note that nowhere does he
14 expressly articulate any emotion, if you will, or concern or remorse about the victim or her
15 family." (RT 3251.) The trial court recounted that Petitioner expressed concerns about
16 being labeled a snitch, expressed fear and concern for his family and Humiston, and
17 indicated that he did not want to go to jail, "[b]ut never, I say, did he articulate or express
18 in words any mention of the victim herself or the victim's family." (RT 3251-52.) After
19 reviewing the tape, the trial court reaffirmed its earlier ruling excluding the tape as hearsay
20 and stated: "[U]nder Green versus Georgia there must be some compelling need for the
21 evidence, reason for the evidence - - and some significant, substantial evidence of inherent
22 trustworthiness or reliability. And I don't think there's either in this case." (RT 3255.)
23 The trial court stated that:

24 Again I think here, for this to really have any meaning or relevance in this
25 case, the emotional response and display of emotion requires some
26 explanation or interpretation for it to have relevance. It - - its relevance is not

27
28 remains that Petitioner fails to demonstrate the evidence at issue was reliable or trustworthy
for the purpose of mitigation.

1 in my view just some general display of emotion or - - or - - or some emotional
2 response, it has to be related to the victim or - - or - - or the crime here. [¶] I
3 mean it's not a contention that he's a - - completely emotionless, that he can
4 never cry or never display emotion, it's whether he has displayed any emotion
5 concerning the crime here and the victim. And particularly that's - - I think
6 on all theories advanced that's the relevancy. Certainly that's the relevancy
7 if it's intended to rebut the testimony of the prosecution witness, but think also
8 under the expanded "k" factor relevance and the sub "a" relevance it's only
relevant if it's emotion concerning the crime and the victim and what he did
here. And that demands cross-examination in my view, that demands being
tested on the anvil of truth, cross-examination.

9 (RT 3256-57.) The California Supreme Court affirmed this decision, similarly concluding
10 that "a capital defendant has no federal constitutional right to the admission of evidence
11 lacking trustworthiness, particularly when the defendant seeks to put his own self-serving
12 statements before the jury without subjecting himself to cross-examination." Jurado, 38
13 Cal. 4th at 130.

14 This Court's own review of the interrogation transcript affirms the reasonableness
15 of that decision. While at one point Petitioner mentions an injury to his "conscience" from
16 the crime and expresses emotions by crying, at no point does Petitioner articulate any
17 feelings of regret or remorse over his actions or their impact on the victim or her family.
18 Indeed, almost immediately after mentioning an "injury" from his "conscience," the officer
19 leaves the room and Petitioner says to himself: "Lord help me get out early. I don't want
20 to waste my life in prison." (CT 1398.) As such, the Court's review of the record does not
21 support Petitioner's assertion that the California Supreme Court acted unreasonably in
22 upholding the exclusion of the tape.

23 Finally, Petitioner separately argues that the "[t]he due process violation amounts to
24 clear error under *Eddings* [v. *Oklahoma*, 455 U.S. 104 (1982)] and *Skipper* [v. *South*
25 *Carolina*, 476 U.S. 1 (1986)] because petitioner proffered the videotaped confession as
26 relevant evidence in mitigation for a sentence of less than death." (Reply at 62.) Petitioner
27 argues the tape was relevant evidence in mitigation, as it showed that he took and accepted
28 responsibility for the murder as well as demonstrated remorse. (Id. at 62-63.)

1 “[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be
2 precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character
3 or record and any of the circumstances of the offense that the defendant proffers as a basis
4 for a sentence less than death.” Eddings, 455 U.S. at 110, quoting Lockett v. Ohio, 438
5 U.S. 586, 604 (1978) (emphasis in original). In Skipper, the Supreme Court reaffirmed
6 those earlier decisions and added that “[e]qually clear is the corollary rule that the sentence
7 may not refuse to consider or be precluded from considering ‘any relevant mitigating
8 evidence.’” Skipper, 476 U.S. at 4, quoting Eddings, 455 U.S. at 114.

9 The Court remains unpersuaded that the tape constituted relevant evidence in
10 mitigation either with respect to Petitioner’s acceptance of responsibility or demonstration
11 of remorse. Petitioner sought during his interrogation to characterize the murder as being
12 committed out of fear or due to threats, when the available evidence shows Holloway was
13 instead murdered to conceal Petitioner’s plan to commit another murder, and that while
14 Petitioner may have demonstrated concern for his own future and well-being, and that of
15 his family and of Humiston, as well as dismay about how his actions would affect him and
16 his own loved ones, he did not articulate any such concern about Holloway or her family.
17 As such, the Court finds an absence of error under Eddings or Skipper.

18 Because Petitioner fails to demonstrate that the California Supreme Court’s rejection
19 of this claim was contrary to, or involved an unreasonable application of, clearly
20 established federal law, or that it was based on an unreasonable determination of the facts,
21 habeas relief is not available on Claim 29. At oral arguments, Petitioner requested
22 discovery and an evidentiary hearing²⁶ on this claim, including discovery of notes or
23

24
25 ²⁶ At oral arguments, Petitioner also requested discovery and an evidentiary hearing
26 on Claim 1.R, a related ineffective assistance of counsel claim previously denied in the
27 Group One Order. (See ECF No. 171 at 119-23.) In that prior Order, the Court also denied
28 Petitioner’s request for an evidentiary hearing and discovery on a number of claims,
including Claim 1.R (see id. at 123, 150-51), and Petitioner fails to provide grounds for
reconsideration of those decisions.

documents concerning the use of the videotaped interrogation in other cases, such as Humiston's or Shigemura's. As Petitioner fails to satisfy section 2254(d) on the basis of the state record, an evidentiary hearing is not warranted on Claim 29. Sully, 725 F.3d at 1075; Totten, 137 F.3d at 1176. Petitioner's request for discovery is also denied. Kemp, 638 F.3d at 1260.

2. Claim 30

Petitioner alleges that while the trial court excluded evidence of Teresa Holloway's pregnancy and the death of her fetus at the guilt phase, the trial court erred in admitting that same evidence during the penalty phase, arguing that "[t]he evidence presented at Petitioner's penalty phase trial established that Petitioner did not believe Teresa Holloway was pregnant at the time of her death" and that it was thus "irrelevant to the jurors' reasoned moral response to Petitioner's crime." (SAP at 558.) Alternately, he argues that "even *assuming* that evidence of Holloway's pregnancy was relevant to the jury's individualized determination of whether Petitioner should die, this evidence was so inflammatory and created such a substantial danger of undue prejudice that any probative value the evidence may have had clearly was outweighed by its harmful effects." (*Id.*) (emphasis in original.)

On direct appeal, the California Supreme Court rejected this claim on the merits, reasoning as follows:

Before defendant's trial began, the trial court denied his motion to exclude from the penalty phase any evidence that Teresa Holloway was pregnant when defendant murdered her. Defendant contends that the ruling was error because the evidence was irrelevant and unduly prejudicial. He further contends that admission of the evidence violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The trial court did not err in admitting evidence of the murder victim's pregnancy at the penalty phase as a circumstance of the offense. The Eighth Amendment to the federal Constitution permits the prosecution, in a capital case, to present evidence about the murder victim and the specific harm that the defendant caused as relevant to the jury's penalty decision. (*Payne v. Tennessee* (1991) 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720; *People v. Harris, supra*, 37 Cal.4th at p. 351, 33 Cal.Rptr.3d 509, 118 P.3d 545.) In California, the prosecution may introduce evidence of the specific harm

conditional examination testimony was not the same as presenting false testimony; meanwhile, the Court found Schmidt testified consistently with his statements with respect to Petitioner's involvement in the crime and the addition of details did not sustain a claim that his testimony was false. (See Claim 4, supra.) The Court also found no evidence that the prosecution's decision to seek the death penalty was vindictive, as the record supported a conclusion that the decision was based on the evidence offered in Johnsen's conditional examination and the presentation of evidence at Humiston's trial rather than as any sort of punishment for Petitioner's decision to plead guilty after the special circumstance was dismissed. (See Claim 8, supra.)

Even considering Petitioner's allegations of error cumulatively, including the errors alleged in Claims 19 and 47 as well as those alleged in this claim, Petitioner fails to offer a persuasive showing that these errors resulted in a "fundamentally unfair" guilt or penalty phase trial proceeding in violation of his constitutional right to due process. See Parle, 505 F.3d at 928 ("[T]he combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal.")

Thus, based on a review of the record, the Court cannot conclude that the California Supreme Court's rejection of this claim was contrary to, or an unreasonable application of, clearly established law, or that it was based on an unreasonable determination of the facts. Petitioner is not entitled to habeas relief or an evidentiary hearing on Claim 48. Sully, 725 F.3d at 1075; Totten, 137 F.3d at 1176.

VI. CERTIFICATE OF APPEALABILITY

In a habeas case, a certificate of appealability ["COA"] may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A certificate of appealability should issue if 'reasonable jurists could debate whether' (1) the district court's assessment of the claim was debatable or wrong; or (2) the issue presented is 'adequate to deserve encouragement to proceed further.'" Shoemaker v. Taylor, 730 F.3d 778, 790 (9th Cir. 2013), quoting Slack v. McDaniel, 529 U.S. 473, 484

(2000); see also Miller-El, 537 U.S. at 338 (“Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.”) Meanwhile, the Ninth Circuit has repeatedly characterized the standard required for granting a COA as “relatively low” or “modest.” See e.g. Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002), Silva v. Woodford, 279 F.3d 825, 832 (9th Cir. 2002), quoting Lambricht v. Stewart, 220 F.3d 1022, 1024 (9th Cir. 2000).

In the November 19, 2015 Order on the Group One Claims (Claims 1, 5-6, 14, 33-34, 43 and 45 in the Second Amended Petition), the Court indicated that: “In the final order, the Court will **GRANT** a COA on Claim 1 (limited to subparts 1.J, 1.M-1.O, 1.U, 1.Y) and Claim 33.” (ECF No. 171 at 153.) At oral arguments on the instant matter, Petitioner indicated that he is requesting a COA on a number of claims and decisions by the Court, including several claims and motions adjudicated in the Group One Order as well as claims and motions presently at issue. Subsequent to oral arguments and pursuant to the Court’s request, Petitioner filed a Supplemental Brief outlining the claims and matters on which he requests a COA and Respondent filed a Response to that brief. (See ECF Nos. 205, 206.) In that brief, Petitioner requests a COA on the claims the Court previously identified in the Group One Order as suitable for a COA, and additionally lists Claims 7, 10, and 29 from the instant set of claims and Claims 1.R, 1.S., and 1.Y³⁹ from the Group One claims. (ECF No. 205 at 4-5.) Petitioner also requests a COA on several Orders issued by the Court, including the Court’s Order denying Petitioner’s motion for investigation, discovery and an evidentiary hearing on procedural default and Order denying Petitioner’s motion for evidentiary development and an evidentiary hearing on Claims 1.A-1.K, 1.M-1.W, 1.Y-1.AA, 5 and 6. (ECF No. 205 at 6.) Petitioner also states that “[i]f the Court denies

³⁹ In the Group One Order, the Court indicated it will grant a COA on Claim 1.Y (see ECF No. 171 at 153), and Petitioner appears to acknowledge this ruling in the supplemental brief. (See ECF No. 205 at 4.) As such, this request appears moot.

1 Petitioner's request for evidentiary development of Claims 7, 10 and 29, as requested
2 during oral argument on May 22, 2018, Petitioner requests a COA on the Order denying
3 such relief." (Id.) Respondent maintains that "[t]his Court should reject Jurado's request
4 for a COA because he has failed to demonstrate that reasonable jurists would find this
5 Court's denials of the claims and orders debatable and wrong." (ECF No. 206 at 4.)

6 With respect to Petitioner's request for a COA on the Court's orders denying the
7 above motions, Petitioner cites Ayestas v. Davis, 584 U.S. ___, 138 S.Ct. 1080 (2018), in
8 which the United States Supreme Court recently considered whether it had jurisdiction in
9 a case where "petitioner appealed an order of the District Court that denied both his request
10 for funding under 18 U.S.C. § 3599 and his underlying habeas claims," and "[t]he Court of
11 Appeals denied a COA as to the merits of his request for habeas relief but held that a COA
12 was not required insofar as petitioner challenged the District Court's denial of funding
13 under § 3599." Id. at 1088 n.1. The Supreme Court "assume[d] for the sake of argument
14 that the Court of Appeals could not entertain petitioner's § 3599 claim without the issuance
15 of a COA." Id.

16 Upon review, the Court finds Claims 7, 11-12, 29-30 and 37 appropriate for a COA,
17 but remains unpersuaded that Claims 1.R or 1.S are suitable for a COA. In light of Ayestas,
18 and in an abundance of caution, the Court finds it appropriate to issue a COA on the Order
19 denying Petitioner's motion for investigation, discovery and an evidentiary hearing on
20 procedural default as it relates to Claims 1.J, 1.M-1.O, 1.U, 1.Y and 33. The Court also
21 finds it appropriate to issue a COA on the Order denying Petitioner's motion for evidentiary
22 development, discovery and/or an evidentiary hearing on Claims 1.J, 1.M-1.O, 1.U, 1.Y,
23 7, 11-12, and 29-30.

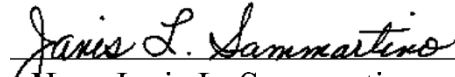
24 VII. CONCLUSION

25 For the reasons discussed above, the Court **DENIES** Petitioner's motion for
26 evidentiary development, discovery, and/or evidentiary hearing on Claims 2-4, 7-8, 10-12,
27 19, 29-30, 38 and 47-48 and **DENIES** habeas relief on Claims 2-4, 7-13, 15-32, 35-42, 44,
28 and 46-48 in the Second Amended Petition. In the final order, the Court will **GRANT** a

1 COA on Claims 7, 11-12, 29-30, and 37. The Court will also **GRANT** a COA on the Order
2 denying Petitioner's motion for investigation, discovery and an evidentiary hearing on
3 procedural default as it relates to Claims 1.J, 1.M-1.O, 1.U, 1.Y and 33, and on the Order
4 denying Petitioner's motion for evidentiary development, discovery and/or an evidentiary
5 hearing on Claims 1.J, 1.M-1.O, 1.U, 1.Y, 7, 11-12, and 29-30.

6 **IT IS SO ORDERED.**

7 Dated: September 17, 2018


8 Hon. Janis L. Sammartino
9 United States District Judge

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

October 10, 2006

Mr. Mark Hammond
801 K Street, Suite 1100
Sacramento, CA 95814

Re: Robert Jurado, Jr.
v. California
No. 06-5162

Dear Mr. Hammond:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,


William K. Suter, Clerk

THE PEOPLE

Plaintiff and Respondent

v.

ROBERT JURADO, JR.

Defendant and Appellant

38 Cal.4th 72
41 Cal.Rptr.3d 319
131 P.3d 400
[No. S042698.
Apr. 6, 2006.]

Citing Cases 525

(Superior Court of San Diego County, No. CR124438, David M. Gill, Judge.)

(Opinion by Kennard, J., with George, C. J., Baxter, J., Werdegarr, J., Chin J., Moreno, J., and Corrigan, J., concurring. Concurring opinion by Kennard, J. (see p. 145).)

Lynne S. Coffin and Michael T. Hersek, State Public Defenders, under appointments by the Supreme Court, and Mark Hammond, Deputy State Public Defender, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood, Larissa Karpovics Hendren and Marvin Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KENNARD, J.-

Defendant Robert Jurado, Jr., appeals from a judgment of death upon his conviction by jury verdict of one count of murder in the first degree (**Pen. Code, § 187**),¹ with the special circumstance of intentionally killing while lying in wait (**§ 190.2, subd. (a)(15)**), and one count of conspiracy to commit murder (**§§ 182, 187**). The jury found that defendant personally used a deadly and dangerous weapon to commit the murder. (**§ 12022, subd. (b)**.) The jury that returned these verdicts as to guilt and special circumstance also

returned a penalty verdict of death for the murder. The trial court denied the automatic motion to modify the penalty (**§ 190.4, subd. (e)**) and sentenced defendant to death. ***82**

This appeal from the judgment of death is automatic. (**§ 1239, subd. (b)**.) We affirm the judgment in its entirety.

I. FACTS AND PROCEEDINGS

On May 17, 1991, a stranded motorist saw the body of Teresa Holloway in a culvert beneath Highway 163 in San Diego County. She had been strangled and beaten to death two days earlier. As the prosecution's evidence at trial established, defendant killed Holloway, with the help of Denise Shigemura and Anna Humiston, to prevent her from disclosing their plan to kill a drug dealer named Doug Mynatt. ²

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

In October 1989, Brian Johnsen met Teresa Holloway; a month later, they began living together and continued living together until late April 1991. Throughout this time, Holloway was using methamphetamine on a regular basis. In December 1989, Holloway met Doug Mynatt at a bar and introduced him to Johnsen.

In July or August of 1990, Brian Johnsen met defendant and bought crystal methamphetamine from him at Mark Schmidt's house. Defendant was sharing an apartment with Denise Shigemura, but his girlfriend was Anna Humiston, a high school student who lived with her parents. Johnsen and Teresa Holloway socialized and shared drugs with defendant, Shigemura, and Humiston. Johnsen later introduced defendant to Mynatt.

In October 1990, Denise Shigemura was arrested and remained in federal custody until April 1991, when she was released to a halfway house. During her time in custody, Shigemura exchanged letters and telephone calls with Teresa Holloway. When Shigemura obtained overnight passes from the halfway house, she stayed at the house where Teresa Holloway lived with Brian Johnsen.

In February 1991, Teresa Holloway argued with defendant, and their relationship became strained. Holloway's relationships with Anna Humiston also became strained, and on one occasion they had a quarrel that almost turned violent. Around the same time, Doug Mynatt moved on a temporary ***83** basis into the house that Brian Johnsen and Holloway shared. Johnsen had been buying methamphetamine from Mynatt.

In late March 1991, defendant gave Doug Mynatt a .38-caliber handgun in exchange for drugs. When Mynatt learned that defendant had stolen the gun, he insisted that defendant take it back and instead pay money for the drugs. A few weeks later, Mynatt

and Johnsen took defendant from his apartment to Johnsen's house. Mynatt made him stay there overnight until defendant agreed to pay Mynatt and to sell methamphetamine for him. Mynatt threatened to kill defendant if he did not agree.

On April 11, 1991, Brian Johnsen was arrested during a drug raid and spent five days in custody. He was arrested because drugs were found under a couch at his house. Some of the drugs belonged to defendant, but defendant did not admit they were his. Johnsen felt that defendant owed him something because of this incident, and defendant agreed to compensate Johnsen with marijuana.

In late April 1991, Brian Johnsen made Teresa Holloway move out of the house they had shared because of her continuing drug use, and he offered to let Doug Mynatt remain in the house on a more permanent basis as his roommate. Holloway approached Thomas Carnahan, who agreed to let her live in his apartment temporarily. He did not give her a key, and he insisted that she either be in the apartment by 11:00 p.m. or telephone him before that time to let him know when she would be arriving.

On May 6, 1991, Brian Johnsen began serving a 14-day jail sentence for driving with a suspended license. Doug Mynatt continued to live in Johnsen's house. Defendant still owed Mynatt money.

On May 13, 1991, during a telephone conversation, Denise Shigemura told Brian Johnsen (who was still in custody) that Doug Mynatt had stolen her purse, which contained \$80, a key to the business where she was then working, and the combination to the business's safe. According to Shigemura, Mynatt admitted taking the purse and said he did it because he suspected Shigemura of stealing \$450 from him. Shigemura seemed very upset about the incident and was worried about what Mynatt might do with the business key and the safe combination. During this conversation, defendant phoned Shigemura, and a three-way conversation ensued between defendant, Shigemura, and Johnsen, during which they discussed possibly killing Mynatt. They were worried about potential retaliation, however, because Mynatt had claimed to have a friend who was affiliated with the Hell's ***84** Angels. They agreed to discuss the matter further the next day. They decided not to tell Teresa Holloway about the plan to kill Mynatt because of concern that she would reveal it to the police.

On the same day, Monday May 13th, defendant telephoned David Colson, with whom he had used methamphetamine, and he asked to borrow a shotgun. Defendant said he "needed to do somebody up," which Colson understood to mean that defendant intended to kill someone. Colson told defendant that he did not own a shotgun, although his brother did, and he gave defendant his brother's telephone number. Defendant called Colson's brother and asked to borrow his shotgun, saying he "had a job to do," but the brother refused to lend the shotgun to defendant.

Around the same time, Denise Shigemura asked Steven Baldwin if he could get her a "gat" (a slang term for a gun). Shigemura explained that she had a problem she needed to take care of. Baldwin told her he could not help her with her problem.

On Tuesday, May 14th, Brian Johnsen telephoned his house from the county jail and spoke to Denise Shigemura. They decided to contact defendant so the three of them could discuss what to do about Doug Mynatt. Johnsen telephoned Anna Humiston's house and spoke briefly to defendant about the plan to kill Mynatt. Defendant said he was still deciding whether to go through with it.

Later on the same day, Tuesday May 14th, Holloway was at the apartment complex where defendant lived. Larissa Slusher and Ted Meier managed the complex, and they occupied an apartment next to defendant's. Slusher had known Teresa Holloway as a casual acquaintance for seven or eight months. Holloway asked Meier if she could spend the night in their apartment, because it was after 11:00 p.m., and she had been locked out of the apartment where she had been staying. Meier agreed. The next morning, Holloway left the apartment around 8:00 or 9:00 a.m., taking with her a dress that Slusher had loaned her. Before she left, Holloway said she would return later that day, May 15th, but she never did.

On Wednesday evening, May 15th, Brian Johnsen telephoned Mark Schmidt and asked him to bring defendant and Denise Shigemura to Schmidt's house so he could talk to them. Schmidt ran about two and a half blocks to defendant's apartment, where he found Teresa Holloway and Shigemura with defendant. Anna Humiston arrived in a blue Geo Metro while *85 Schmidt was speaking to defendant. Defendant agreed to take Johnsen's call, and he came to Schmidt's apartment in Humiston's car with Humiston, Shigemura, and Holloway.

At 8:17 p.m. that evening, Brian Johnsen telephoned Schmidt's apartment. Schmidt answered and passed the phone to Shigemura, who said she was still unsure about the plan to kill Mynatt. Defendant then got on the phone and told Johnsen that he could not wait and that it (meaning the killing of Mynatt) would probably happen before Johnsen was released from jail. Johnsen said that was fine with him. Teresa Holloway then got on the phone and asked whether there was a plan to kill Mynatt. Johnsen told her not to get involved.

While Teresa Holloway was speaking on the telephone to Brian Johnsen, defendant had a "forceful talk" with Anna Humiston; he seemed angry about something; she seemed both angry and scared. Defendant then asked Schmidt for a chain that defendant could use to tie up Johnsen's motorcycle so Doug Mynatt could not steal it. Schmidt offered defendant an 18-inch length of plastic weed-eater cord. Defendant wrapped the cord around his own neck, with one end in each fist clenched at shoulder height. He said: "It will do." Denise Shigemura needed to return to her halfway house by 9:00 p.m. At defendant's request,

Schmidt told Holloway to get off the phone because he needed to leave the apartment. They all left Schmidt's apartment around 8:45 p.m.

At 9:31 p.m., defendant telephoned Christie Medlin at her apartment. He told her that he was stranded and needed a ride, and that he was calling from a 7-Eleven store. Medlin asked David Silva, her boyfriend, to pick up defendant and his friends. Silva found defendant with Denise Shigemura and Anna Humiston at the 7-Eleven store at Spruce and Fifth Streets. He drove them to Medlin's apartment; when they arrived, Humiston was holding her stomach and appeared to be ill; she told Medlin she had an upset stomach. Defendant seemed bothered by something, and Shigemura seemed agitated. Noticing what appeared to be blood on defendant's socks, Medlin asked him what had happened. Defendant said he "got into a fight." Humiston used Medlin's telephone to call her father to tell him that the blue Geo Metro had broken down. Silva drove Humiston home. Medlin then drove defendant and Shigemura to defendant's apartment.

On Thursday morning, May 16th, around 9:30, a tow truck driver met defendant, Anna Humiston, and Denise Shigemura on Highway 163 near the Quince Street Bridge, where the blue Geo Metro was parked. The driver *86 towed the car to the apartment complex where defendant lived. He observed nothing unusual about their demeanor. Humiston signed the towing receipt.

On the afternoon of the same day, Thursday May 16th, defendant and Denise Shigemura went to David Silva's apartment, and the three shared pizza and beer. Shigemura asked defendant and Silva to "bruise her up" so she could say she had been beaten and would have an excuse for not returning to her halfway house the previous night. Defendant and Silva then hit Shigemura with their fists. When defendant and Shigemura later went to Mark Schmidt's apartment, Shigemura removed her shirt to show Schmidt the bruises on her chest and arms. She told Schmidt that she had been "jumped" the previous night.

During the same day, defendant and Denise Shigemura went to Steven Baldwin's house with Mark Schmidt. They sat in the living room, with Baldwin and Schmidt on one couch, defendant and Shigemura on another. Shigemura said to Baldwin: "I no longer need what it was I asked you for. We took care of the problem and we dumped the body at Balboa Park." Defendant said nothing; his face had what Baldwin described as an "empty look."

On Friday morning, May 17th, Joseph Hedley experienced engine trouble as he was driving a van on Highway 163 through Balboa Park. He parked the van beside the freeway and began walking to a telephone call box about 100 yards away. As he neared the call box, he noticed a human foot protruding from a culvert that ran beneath the freeway. Approaching closer, he saw a woman's body inside the culvert, where it was not visible to persons traveling on the freeway. He called to her but received no response. Using the call box, Hedley reported what he had seen. Police officers arrived 15 minutes later and found that the body was Theresa Holloway's.

During the autopsy of Teresa Holloway's body, Mark A. Super, a deputy medical examiner employed by the San Diego County Medical Examiner's Office, saw many injuries on the face, torso, and extremities. Contusions and abrasions were on the chest and on both legs and both arms, with the right hand being particularly bruised and swollen. Some of the abrasions showed clusters of short parallel linear marks suggesting they were made by an object with threads. There were many bruises and abrasions on the neck, including some marks that could have been made by ligature or manual strangulation. The hyoid bone was fractured and there were hemorrhages in the eyeballs; both of these findings were consistent with strangulation. There was a bite mark in the center of the back. The most extensive injuries were to the face *87 and head. The jaw and all the facial bones were fractured and some had caved in. There were many deep lacerations on the scalp, and the skull was fractured. In Super's expert opinion, a scissor jack had "all the characteristics that one would expect" in the weapon that inflicted the injuries he observed. The cause of death was "blunt force head injuries and strangulation."

On Friday evening, May 17th, James R. Manis, a sergeant with the San Diego Police, found defendant with Anna Humiston outside defendant's apartment complex. He told defendant he was investigating the death of Teresa Holloway. Defendant said that he knew Holloway, that he had last seen her about three days before at a party at the house of a man named Mark, that she was a drug user who owed money to drug dealers, and that he did not trust her because she had stolen from him. Defendant led Sergeant Manis to Holloway's car, which was parked about three or four blocks from defendant's apartment.

On Saturday morning, May 18th, defendant and Anna Humiston arrived at David Silva's apartment in a new car that Humiston's parents had just given her. They then drove to defendant's apartment, where Sergeant Manis arrested them. Later that day, Sergeant Manis found a scissor jack in a tree midway between the place where Teresa Holloway's body was found and the 7-Eleven store at the corner of Spruce and Fifth Streets where David Silva had found defendant, Shigemura, and Humiston on the night of the murder. The jack was covered with red stains and had hair attached to it. Denise Shigemura was arrested on the same day.

After his arrest, defendant made telephone calls from the jail to Brian Johnsen, Christie Medlin, and David Silva. When Johnsen asked defendant why he had killed Teresa Holloway, defendant said it had to be done. To Medlin, defendant sang "On, on, that bitch is gone." According to Medlin's trial testimony, defendant said "something like he doesn't really care if he has to spend the rest of his life paying for this, the bitch is gone." When Silva asked defendant about Holloway's death, defendant told him that Holloway was killed in a car, that he had been sitting in the back seat with Humiston while Shigemura was driving and Holloway was sitting in the front passenger seat, and that an argument "got out of hand."

Around May 19th, Larissa Slusher saw the dress she had loaned Teresa Holloway in a dumpster about 100 feet from defendant's apartment. With the dress were Holloway's purse, her wallet, her identification papers, photographs of her daughter, a sandal that matched one found at the murder scene, and a pair of shoes belonging to defendant. *88

Gary Mark Dorsett, an evidence technician for the San Diego Police Department Crime Lab, examined the blue Geo Metro. He collected samples of red stains from the front passenger seat cover and seatbelt harness and from the rear floorboard carpet on the passenger side. There was no jack in the car.

Norman Donald Sperber, a forensic dentist, compared the bite mark on Holloway's back with dental impressions from defendant, Denise Shigemura, and Anna Humiston. In Sperber's opinion, defendant's teeth were "highly consistent" with the bite mark, but neither Shigemura nor Humiston could have made it.

At trial, as part of the prosecution's case, the parties stipulated to the results of blood analysis. The blood on the scissor jack and on the rear floorboard of the blue Geo Metro was consistent with Teresa's Holloway's blood, but inconsistent with the blood of defendant, Denise Shigemura, and Anna Humiston. Blood on the sandal and purse found in the dumpster, and on the front passenger seat cover of the blue Geo Metro, was consistent with the blood of all four of these individuals.

The parties also stipulated to the results of hair comparison analysis. Ten of the hairs found in Teresa Holloway's hand were consistent with the hair of Anna Humiston but not with the hair of defendant, Denise Shigemura, or Teresa Holloway. Four of the hairs were consistent with the hair of both Humiston and Holloway, but not with the hair of defendant or Shigemura, and three of the hairs were inconsistent with Humiston's hair and were not compared to the hair of defendant, Shigemura, or Holloway.

B. Defense Case at the Guilt Phase

After defendant's arrest, Brian Johnsen went to the house of Josephine Jurado, defendant's mother, and knocked on the door of her house one night around 9:30. Without opening the door, she asked Johnsen who he was and what he wanted. Johnsen said he wanted a helmet he had lent to defendant. She told him she did not have the helmet and did not know where it was, but Johnsen would not leave. She was frightened because she knew that Teresa Holloway had been Johnsen's girlfriend and that defendant had been charged with her murder. Johnsen eventually left after defendant's mother telephoned the police.

On May 19, 1991, during a 10-minute interview, San Diego Police Officer David Swiskowski asked Mark Schmidt to describe what happened at *89 Schmidt's apartment on the evening of May 15, 1991, before Teresa Holloway's murder, but Schmidt's replies were

vague and evasive. Schmidt said that defendant, Holloway, Anna Humiston, and Denise Shigemura came to his apartment that evening around 8 o'clock, and that he received a phone call from Brian Johnsen. Schmidt told Swiskowski that he gave the phone to defendant, and that defendant and Holloway were alone in his bedroom with the phone for about 10 minutes. Schmidt did not say anything to Swiskowski about having to leave the apartment, or making up a story about having to leave the apartment, or that defendant put a cord around his neck.

On the same day, May 19th, during an interview that lasted 10 to 15 minutes, David Silva told Officer Swiskowski that defendant had called him from jail after being arrested for Teresa Holloway's murder. Silva told Swiskowski that during that conversation defendant did not talk about the murder except to say that he had been charged with it. Silva did not tell Swiskowski that defendant said Holloway was killed because she was a snitch, nor did Silva say that defendant had described where persons were seated in Humiston's car before or during the murder.

On September 10, 1991, Tony Bento, an investigator for the San Diego District Attorney, interviewed David Silva for around 25 minutes. During the interview, Silva said he had talked to defendant on several occasions after defendant's arrest, and that defendant had always denied killing Teresa Holloway and never said that she had been killed because she had overheard a conversation, or that she was killed because an argument got out of hand. At the end of the interview, however, Silva mentioned a conversation with defendant *before* Holloway's death during which defendant had said that Holloway had overheard something and she "was going to snitch him off about something."

On September 16, 1991, Tony Bento interviewed Brian Johnsen for at least an hour, during which Johnsen said that after defendant's arrest, defendant called and told him to stay away from defendant's family or "the same thing would happen to them." Bento understood "them" as a reference to Johnsen and his friends. In this interview, Johnsen never said that defendant told him that Terry Holloway was killed because it had to be done. Johnsen also told Bento that he had discussed with Jeffrey Latimer the plan to kill Doug Mynatt.

Jeffrey Latimer was a childhood friend of Brian Johnsen and through him met defendant and Doug Mynatt. Latimer testified that he never discussed with Johnsen a plan to kill Mynatt, and that to his knowledge Johnsen had "never really been honest" and "was always the crook and the thief." *90

In 1991, Richard Whalley, a forensic scientist and toxicologist, arranged to have a private laboratory retest the urine sample taken from defendant after his arrest. The urine was found to contain methamphetamine at a very low level (130 nanograms) that would not have caused any effect but which suggested that defendant had probably used methamphetamine during the previous two to four days.

In January 1992, Marion Louise Pasas, a licensed private investigator whom Anna Humiston's attorney had retained, interviewed Christie Medlin at her apartment. Medlin told Pasas that after Teresa Holloway's murder defendant had called Medlin from jail on one occasion, but during that conversation defendant did not talk about the murder. Medlin did not tell Pasas that defendant said he was glad Holloway was dead or that he said he did not care whether he spent the rest of his life in jail or in prison.

C. Prosecution's Penalty Phase Case in Aggravation

Before August 1988, while defendant was living with his mother and his sister in an apartment in San Marcos, he once became highly agitated and upset, pushed his mother slightly against a bed, and spit in her face. Another incident occurred later while defendant was living with his mother and sister in a house in San Diego. On this occasion, defendant came home very upset after having broken up with his girlfriend, threatened to obtain weapons and shoot up the house, threatened to kill his mother, and advanced toward her with a raised hand as if to strike her. Defendant's friends restrained him and took him outside. When defendant's sister tried to telephone the police, defendant grabbed the phone from her hand. After this incident, in December 1989, defendant's mother applied for a restraining order to have him removed from her house.

In October 1990, defendant was convicted of felony possession of marijuana for sale.

In May 1991, during the autopsy of Teresa Holloway's body, she was found to have been pregnant. The fetus, which was around 17 weeks old, was too young and too small to have survived outside the womb, but it showed no evidence of traumatic injury or other condition that would have precluded its survival to full term and birth had Holloway not died. Some weeks before her death, Holloway had told defendant that she was pregnant, but defendant did not believe her. Holloway said she was planning to get a pregnancy test and that when she got the test result she would show it to defendant to prove she was pregnant.

On July 21, 1991, Steven Baldwin was booked into the county jail for a probation violation. As a deputy was escorting him to a holding tank, *91 defendant, who was inside the tank, saw him and said to another inmate: "I know that dude. He's the reason I'm in here. He told the cops I killed that bitch." After the deputy had placed Baldwin in the tank, an inmate named Richard Janssen, whom Baldwin did not know, approached him and struck him. Baldwin was then hit several times, from different directions, on the back of the head and the side of the face. Defendant did not strike him, but when the beating stopped, defendant came out of a side cell and told Baldwin: "You can't be in this cell. You got to roll up out of this cell." Baldwin lost consciousness, and the next thing he remembered was being outside the tank on a gurney. As a result of the beating, Baldwin suffered injuries to

the left side of his face, including bruising and swelling both above and below the eye, a laceration below the eye, and a nondisplaced fracture of the malar bone.

On September 5, 1993, a fight broke out among inmates in module 5-B of the county jail in San Diego. Deputies arriving at the module observed 15 to 20 Hispanic inmates on one side of the module faced off against eight to 10 Black inmates on the other side of the module. The inmates were yelling and throwing things back and forth, and some inmates had bloodstained towels wrapped on their arms. Defendant was in the group of Hispanic inmates and was one of at least four inmates holding metal bars, 12 to 18 inches in length and one-quarter inch in diameter, that had been removed from inmate bunks. The inmates were slamming these bars against bunks and making stabbing motions with them toward Black inmates, although defendant was not seen to strike anyone. After the inmates were removed, the deputies found many items that could be used as weapons scattered throughout the module, including 13 metal bars, seven wooden mop handle pieces, two razors, one razor blade attached to a comb, three wooden window grate pieces, and two socks containing soap bars.

Teresa Holloway's murder deeply affected her parents, James and Joan Cucinotta, and her daughter, who at the time of Teresa Holloway's death was four years old and lived with her father. After the daughter learned of her mother's death, she became sad and withdrawn and cried a lot. She often said: "I want my Mommy, I want my Mommy."

A police detective came to the home of James and Joan Cucinotta to tell them of Teresa Holloway's death. At first Joan could not accept it; she was very upset and angry, and she tried to hit the detective. When he said they had identified Teresa Holloway's body through fingerprints, Joan fell apart and became hysterical. Some friends and family came over to be with her. That night and for days afterwards, she was unable to eat or sleep. She just cried and smoked cigarettes. She was unable to deal with making the funeral arrangements or telephoning relatives, so James Cucinotta did those things. ***92**

James Cucinotta, Terry Holloway's father, was also seriously affected by her murder. At the time of her death, he worked in law enforcement as an investigator, but within two weeks after learning of the murder, he lost his job because he was no longer able to function. He began drinking heavily until eventually he went into a treatment center. He and his wife Joan both received treatment from psychiatrists for their grief. The murder also deeply affected their two other children, Teresa Holloway's brother and sister, and family holidays became very painful. At the time of his testimony, more than four years after Teresa Holloway's death, James Cucinotta and his wife continued to visit Teresa's grave every week. Joan Cucinotta sometimes took Teresa's daughter to the grave.

D. Defense Penalty Phase Case in Mitigation

Calvin Bruce was one of the inmates in module 5-B of the county jail in San Diego on September 5, 1993. He was talking on the phone to his wife when he saw two inmates, one Black and the other Hispanic, have a confrontation that became physical and resulted in a face-off between groups of Black and Hispanic inmates during which inmates in both groups wielded and threw metal pipes. According to Bruce, defendant was not one of the original combatants, he did not have any weapon in his hand during the incident, and he tried unsuccessfully to persuade other inmates to stop the fighting.

Defendant's parents--Robert Jurado, Sr., and Josephine Jurado--married in 1968. Defendant was born in June 1970, and his sister Oralía in November 1973. At that time, the family lived in Los Banos. Once, when he was around four years old, defendant saw his father hit his mother. Defendant ran up to his mother and hugged her.

In 1973, defendant's parents separated, and defendant began to experience "tremendous headaches that would make him cry a lot." He also developed a fear of sleeping in the dark, and he became more rebellious with his mother. After the separation, defendant's father saw his children no more than once or twice a year.

In 1977, defendant's parents finalized their divorce. In 1984, defendant's mother moved to San Diego. His father never went there to visit, and he telephoned very seldom. Around 1985, defendant's father remarried. In 1986, defendant's grades began to fail and he began to use drugs. In 1987 or 1988, defendant's mother placed him in a drug treatment program. When he learned that defendant was using illegal drugs, defendant's father cut all ties with defendant. Around this time, a psychiatrist told defendant's mother that defendant was suicidal and needed to be hospitalized right away. When *93 defendant's mother telephoned his father to get some insurance papers to cover defendant's hospitalization, defendant's father said something to the effect that it might be better if defendant did commit suicide.

Defendant's father testified that he had seen defendant once since his arrest and could now form a relationship with him because defendant was no longer using drugs.

Before moving to San Diego with his mother in 1984, defendant had close relationships with his aunt, Patricia Camacho, and his two grandmothers, Josefina Martinez and Paz Jurado. They each testified that they love defendant very much and intended to visit him in prison. Defendant's mother and his sister Oralía both testified that they love defendant very much, that they had visited defendant weekly since his arrest, and that they intended to continue visiting him in prison.

II. PRETRIAL AND JURY SELECTION ISSUES

A. Double Jeopardy

The District Attorney of San Diego County filed an amended information charging defendant with murder (**§ 187**) and conspiracy to commit murder (**§§ 182, 187**), and alleging a lying-in-wait special circumstance (**§ 190.2, subd. (a)(15)**) making defendant eligible for the death penalty. Defendant filed a motion under **section 995** to set aside the conspiracy count and the lying-in-wait special circumstance allegation on the ground that they were not adequately supported by the evidence presented at the preliminary hearing. The prosecution filed written opposition to the motion, and the trial court, after a hearing, denied the motion to dismiss as to the conspiracy count, but the court granted the motion as to the special circumstance allegation.

Immediately after the court made its ruling dismissing the special circumstance allegation, defendant announced his intention to plead guilty to the remaining charges. The prosecutor stated that his office might seek appellate review of the ruling setting aside the special circumstance by petitioning the Court of Appeal for a writ of mandate, and that for this reason he would not sign the change of plea form if defendant pled guilty to the remaining charges. Defendant then withdrew his previous not-guilty pleas and pled guilty to the remaining charges.

To challenge the ruling setting aside the special circumstance allegation, the prosecution petitioned the Court of Appeal for a writ of mandate. (See ***People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217**.) The Court of Appeal stayed defendant's sentencing hearing, which had ^{*94} been scheduled for December 23, 1991. In his opposition to the writ petition, defendant argued that because he had already pled guilty to the remaining charges, any further prosecution of the special circumstance allegation would violate the double jeopardy clauses of the federal and state Constitutions (U.S. Const., 5th Amend.; **Cal. Const., art. I, § 15**), and for this reason the special circumstance allegation could not be reinstated even if the trial court had erred in dismissing it. (See ***People v. Superior Court (Jurado)*, *supra*, at p. 1229**.)

The Court of Appeal held that the trial court had erred in dismissing the special circumstance allegation under **section 995** (***People v. Superior Court (Jurado)*, *supra*, 4 Cal.App.4th at p. 1229**) and also that there was no double jeopardy bar to reinstatement and prosecution of the special circumstance allegation (***id.* at pp. 1235-1236**). In granting the petition for writ of mandate, the Court of Appeal directed the trial court to enter a new order denying defendant's **section 995** motion in its entirety, thereby reinstating the special circumstance allegation. (***People v. Superior Court (Jurado)*, *supra*, at p. 1236**.) This court denied defendant's petition for review. (***Ibid.***) Defendant then withdrew his guilty pleas, pled not guilty to the charges, and denied the special circumstance allegation.

Defendant here raises the same double jeopardy issue he raised unsuccessfully in opposing the prosecutor's pretrial writ petition in the Court of Appeal. The Attorney

General argues that defendant's claim is barred by the law of the case doctrine.

[1] Under the doctrine of the law of the case, a principle or rule that a reviewing court states in an opinion and that is necessary to the reviewing court's decision must be applied throughout all later proceedings in the same case, both in the trial court and on a later appeal. (**People v. Turner (2004) 34 Cal.4th 406, 417; People v. Barragan (2004) 32 Cal.4th 236, 246; People v. Stanley (1995) 10 Cal.4th 764, 786.**) We apply the doctrine even in death penalty cases, and even when the previous decision was rendered by a Court of Appeal, but we do not apply it when an intervening decision has altered or clarified the controlling rules of law, or when the rule stated in the prior decision was a " 'manifest misapplication' of the law resulting in 'substantial injustice.' " (**People v. Stanley, supra, at p. 787; accord, People v. Gray (2005) 37 Cal.4th 168, 197.**)

Defendant argues that both of the recognized exceptions to the doctrine of the law of the case--intervening change in the law and manifest misapplication of existing legal principles resulting in substantial injustice--are present here. To evaluate his arguments, we begin by reviewing the Court of Appeal's decision. *95

The Court of Appeal framed the issue this way: "Jurado's response to the People's petition presents the question of whether the prejeopardy dismissal of the special circumstance allegation pursuant to Jurado's motion under **section 995** and his immediate guilty plea without the concurrence of the prosecutor and before the prosecutor could seek pretrial review of that dismissal would result in a 'second prosecution' for the same offense after 'acquittal' or 'conviction.' " (**People v. Superior Court (Jurado), supra, 4 Cal.App.4th at pp. 1229-1230.**) The court concluded, first, that dismissal of the special circumstance allegation under **section 995** was a prejeopardy rather than a postjeopardy determination. (**People v. Superior Court (Jurado), supra, at pp. 1230-1231.**) The court concluded, second, that the lying-in-wait special circumstance was not "an added element which would create a greater offense out of the charged murder," but instead was a "penalty enhancement." (**Id. at p. 1231.**) Third, the court concluded, after distinguishing certain decisions that defendant cited, that this case "most closely resembles" **Ohio v. Johnson (1984) 467 U.S. 493 (Johnson).** (**People v. Superior Court (Jurado), supra, at p. 1233.**)

In **Johnson**, a defendant charged with four offenses arising from the same incident pled guilty to two of the offenses--involuntary manslaughter and grand theft--after which, on the defendant's motion, the trial court dismissed the other two charges--murder and aggravated robbery--"on the ground that because of his guilty pleas, further prosecution on the more serious offenses was barred by the double jeopardy prohibitions of the Fifth and Fourteenth Amendments." (**Johnson, supra, 467 U.S. at p. 494.**) The United States Supreme Court concluded, to the contrary, that "prosecuting [the defendant] on the two more serious charges would not constitute the type of 'multiple prosecution' prohibited by the Double Jeopardy Clause." (**Ibid.**)

[2] The high court explained that the federal Constitution's double jeopardy clause protects against (1) a second prosecution for the same offense after acquittal or conviction and (2) multiple punishment for the same offense. (**Johnson, supra, 467 U.S. at p. 498.**) The bar against a subsequent prosecution after acquittal or conviction "ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence," while the bar against multiple punishment for a single offense "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." (**Id. at pp. 498-499.**) The court concluded that the issue of multiple punishment was not yet presented because the defendant had never been tried for, convicted of, or sentenced for the more serious offenses of murder and aggravated robbery. (**Id. at pp. 499-500.**) "While the Double Jeopardy Clause may protect a defendant against cumulative punishments for *96 convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution." (**Id. at p. 500.**)

The court also rejected the argument that further prosecution of the murder and aggravated robbery charges would violate the double jeopardy prohibition against successive prosecutions: "No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on the remaining charges brought in the indictment. Here respondent offered only to resolve part of the charges against him, while the State objected to disposing of any of the counts against respondent without a trial. . . . There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws." (**Johnson, supra, 467 U.S. at pp. 501-502.**)

Here, the Court of Appeal rejected defendant's attempts to distinguish **Johnson, supra, 467 U.S. 493.** Defendant argued that the prosecutor here did not sufficiently object to defendant's guilty pleas. As the Court of Appeal pointed out, however, the prosecutor advised the trial court that his office might seek appellate review of the dismissal of the special circumstance allegation, and the trial court advised defendant of the possibility that the special circumstance would be reinstated. (**People v. Superior Court (Jurado), supra, 4 Cal.App.4th at pp. 1234-1235.**) The Court of Appeal concluded: "Jurado was never in jeopardy for the special circumstance, nor was he ever convicted or acquitted of that charge. Since the special circumstance is not in a lesser- or greater-offense relationship to the murder, there is no reason to allow Jurado's tactical maneuver to deny the People the right to a trial on the merits of that allegation." (**Id. at pp. 1235-1236.**)

Defendant argues, first, that the United States Supreme Court's decision in **Ring v. Arizona (2002) 536 U.S. 584**, constitutes an intervening change in the law establishing that a special circumstance making a defendant eligible for the death penalty is the functional equivalent of an element of a greater offense of capital murder. We need not

decide whether defendant is correct that a special circumstance is, for double jeopardy purposes, the functional equivalent of an element of a greater offense. Even if that is true, and the Court of Appeal erred in stating otherwise, it does not assist defendant because it is not a basis for distinguishing Johnson, supra, 467 U.S. 493. There, the high court accepted the Ohio Supreme Court's determination that the defendant could not be convicted of both murder and involuntary manslaughter for the same killing, but it nonetheless concluded that a guilty plea to involuntary manslaughter did not bar prosecution for murder under the facts of that case. (Johnson, supra, 467 U.S. at pp. 496-497 *97 & fn. 6.) So also here, for purposes of double jeopardy analysis under the facts shown, it make no difference whether a special circumstance is or is not an element, or the functional equivalent of an element, of a greater offense.

Defendant's second argument is that Johnson, supra, 467 U.S. 493, is distinguishable, and that the Court of Appeal's reliance on that decision was a manifest misapplication of the law, because unlike the defendant in Johnson, he pled guilty to all charges then pending against him and the prosecutor openly and actively participated in the taking of these pleas. We are unpersuaded that these slight differences are significant. The prosecution charged defendant with murder with a special circumstance allegation, it timely sought review of the trial court's erroneous dismissal of the allegation, and it did not acquiesce in defendant's guilty plea to the murder charge. The prosecutor's participation in the taking of the guilty plea, primarily in the form of insisting that an adequate factual basis be demonstrated, was not an "effort to prosecute the charges seriatim" (Johnson, supra, 467 U.S. at p. 500, fn. 9) and did not pose the risks that the successive prosecution aspect of the double jeopardy bar was intended to guard against--"repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence" (id. at pp. 498-499). As in Johnson, there was "none of the governmental overreaching that double jeopardy is supposed to prevent," and imposing a double jeopardy bar "would deny the State its right to one full and fair opportunity to convict those who have violated its laws." (Id. at pp. 501-502.)

Because defendant has not shown that the Court of Appeal's decision rejecting his double jeopardy claim was a manifest misapplication of the law, that it resulted in substantial injustice, or that there has been an intervening change in the controlling law, the Court of Appeal's decision is the law of the case on that issue.

B. Vindictive Prosecution

On July 6, 1992, after the Court of Appeal's decision reinstating the special circumstance allegation became final, the prosecutor announced that his office had decided to seek the death penalty against defendant. On August 20, 1992, defendant filed a motion to bar the prosecutor from seeking the death penalty on the ground that the decision to do so was vindictive. On September 4, 1992, the prosecutor filed written opposition to the motion,

and on September 11, 1992, defendant withdrew his guilty pleas and entered pleas of not guilty. Also on September 11, 1992, the trial court denied the motion alleging vindictive prosecution. Defendant now claims the trial court erred in so ruling. *98

[3] "Absent proof of invidious or vindictive prosecution, as a general matter a defendant who has been duly convicted of a capital crime under a constitutional death penalty statute may not be heard to complain on appeal of the prosecutor's exercise of discretion in charging him with special circumstances and seeking the death penalty." (**People v. Lucas (1995) 12 Cal.4th 415, 477.**) But the due process clauses of the federal and state Constitutions (U.S. Const., 5th & 14th Amends.; **Cal. Const., art. I, §§ 7, 15**) forbid the prosecution from taking certain actions against a criminal defendant, such as increasing the charges, in retaliation for the defendant's exercise of constitutional rights. (**United States v. Goodwin (1982) 457 U.S. 368, 372; In re Bower (1985) 38 Cal.3d 865, 880, fn. 7.**) It is not a constitutional violation, however, for a prosecutor to offer benefits, in the form of reduced charges, in exchange for a defendant's guilty pleas, or to threaten to increase the charges if the defendant does not plead guilty. (**Bordenkircher v. Hayes (1978) 434 U.S. 357, 365; see People v. Collins (2001) 26 Cal.4th 297, 309, fn. 4.**) In the pretrial setting, there is no presumption of vindictiveness when the prosecution increases the charges or, as here, the potential penalty. (**United States v. Goodwin, supra, at pp. 381-382; People v. Michaels (2002) 28 Cal.4th 486, 515.**) Rather, the defendant must "prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do." (**United States v. Goodwin, supra, at p. 384, fn. omitted; People v. Michaels, supra, at p. 515.**)

The only evidence defendant submitted to the trial court to prove his claim of vindictive prosecution was a declaration by his trial attorney recounting certain events leading up to the prosecutor's announcement of the decision to seek the death penalty. On August 16, 1991, when defendant was arraigned on an information charging him with the murder of Teresa Holloway and alleging the special circumstance of lying in wait, the prosecutor, Deputy District Attorney Mark Pettine, announced that his office was not seeking the death penalty. On October 11, 1991, an amended information was filed adding the charge of conspiracy to commit murder. On November 15 through 19, 1991, Brian Johnsen testified at a conditional examination, describing how he and defendant had discussed a plan to kill Doug Mynatt and how defendant later admitted killing Teresa Holloway because "it had to be done." Two days later, on November 21, the trial court dismissed the special circumstance allegation and defendant pled guilty to the remaining charges.

The prosecution then challenged the dismissal of the special circumstance allegation by petitioning the Court of Appeal for a writ of mandate. In late March or early April of 1992, after the Court of Appeal had granted the petition, but before its decision had become final, Deputy District Attorney *99 Pettine told defendant's trial attorney that if defendant withdrew his guilty pleas, Pettine would talk to the District Attorney about whether to seek the death penalty, but if defendant did not withdraw the guilty pleas it was likely that the death penalty would not be sought. ³ A few weeks later, however,

Pettine advised defense counsel that he intended to discuss the death penalty with the district attorney whether or not defendant withdrew his guilty pleas, but he implied that the death penalty might not be sought if defendant admitted the special circumstance allegation. On July 6, 1992, at a hearing in superior court to discuss the status of the case, after defense counsel announced that this court had denied defendant's petition for review of the Court of Appeal's decision reinstating the special circumstance allegation, Deputy District Attorney Pettine stated that he had again met with the district attorney, who had decided to seek the death penalty against defendant, and that he had immediately advised defense counsel of that decision.

Like the trial court, we see in this sequence of events no evidence that the prosecution's decision to seek the death penalty against defendant was motivated by a desire to punish defendant for making the motion to dismiss the special circumstance allegation under **section 995**, for pleading guilty and attempting to assert a double jeopardy bar, for opposing the prosecution's writ petition in the Court of Appeal, or for petitioning this court to review the Court of Appeal's decision. Although the discussions between Deputy District Attorney Pettine and defense counsel suggest that the decision to seek the death penalty may have been influenced to some extent by defendant's decision to deny the special circumstance allegation, this was not an impermissible consideration.

(Bordenkircher v. Hayes, supra, 434 U.S. at p. 365; People v. Collins, supra, 26 Cal.4th at p. 309, fn. 4.)

Defendant argues, in substance, that the prosecution's decision to seek the death penalty against defendant must have been motivated by a desire to punish him for challenging the validity of the special circumstance allegation through his **section 995** motion because nothing else of significance occurred between August 16, 1991, when the prosecutor said his office was not seeking the death penalty, and July 6, 1992, when the prosecutor said it was. We disagree. In September 1991, Brian Johnsen told prosecution investigators of defendant's involvement in a plan to kill Doug Mynatt; in November 1991, the *100 prosecutor conditionally examined Brian Johnsen and assessed the credibility of his testimony; and, in early 1992, at Anna Humiston's trial for the murder of Teresa Holloway, the prosecution had an opportunity to assess the strength of its case. These events could well have caused the prosecution to reassess its decision about the appropriate penalty in this case.

Defendant argues that Brian Johnsen's information could not have been significant because the prosecution did not decide to seek the death penalty until many months after receiving that information. We disagree. Because of its concerns for the safety of Brian Johnsen and Doug Mynatt, the prosecution decided to conditionally examine Johnsen immediately after disclosing the information obtained from him. Two days after that conditional examination ended, the trial court dismissed the special circumstance allegation. It was only months later that the special circumstance was reinstated, and the prosecution then immediately reassessed its decision and announced its intention to seek the death penalty. Thus, the actual window of time for the prosecution to act on Brian

Johnsen's information was not many months, as defendant asserts, but only a few days. No inference of improper motive arises from the prosecution's failure to act during this brief period. Moreover, the decision to seek the death penalty ultimately did not rest on Johnsen's information alone, but also on the prosecution's opportunity to preview its case at the Humiston trial, including the testimony of Denise Shigemura.

Because defendant did not present evidence of a vindictive motive for the prosecution's decision to seek the death penalty, the trial court did not err in denying defendant's motion to bar the prosecution from seeking that penalty.

C. Voir Dire Procedures

[4] In **Hovey v. Superior Court (1980) 28 Cal.3d 1, 80**, this court decided that in capital prosecutions the death-qualification portion of each prospective juror's voir dire should be sequestered, meaning that it should be conducted out of the presence of other prospective jurors. This court did not hold that sequestered voir dire was constitutionally required; instead, we mandated this practice as a rule of procedure. (See **People v. Vieira (2005) 35 Cal.4th 264, 286-287**; **People v. Cudjo (1993) 6 Cal.4th 585, 628**.) In 1990, however, the voters abrogated this aspect of **Hovey** by enacting Proposition 115, which added **section 223** to the Code of Civil Procedure. That statute provides, in part, that "where practicable" the trial court must conduct voir dire "in the presence of the other jurors in all criminal cases, including death penalty cases." (**Code Civ. Proc., § 223**.) *101

The jury selection process in this case began with hardship screening, after which the remaining prospective jurors filled out a lengthy juror questionnaire. To comply with the statutory mandate that voir dire occur in the presence of other jurors "where practicable" (**Code Civ. Proc., § 223**), the trial court decided to conduct voir dire, including questioning about the death penalty, with small groups of 10 prospective jurors. Before the voir dire of the first small group, the defense requested individual voir dire of five prospective jurors who, in the view of defense counsel, had "expressed very strong attitudes toward the death penalty" in their questionnaire responses. The trial court denied the request but stated that it would reconsider the matter based on the individual jurors' answers during voir dire. Thereafter, however, the court agreed to separate ⁴ or sequestered voir dire of prospective jurors whose questionnaire responses indicated strong opposition to the death penalty, and the court said that it would do the same if questionnaire responses indicated a bias in favor of the death penalty. The court followed this procedure during the remainder of the voir dire, providing sequestered death-qualification voir dire for any juror who had expressed particularly strong views about the death penalty, either for or against, in filling out the questionnaire, and inviting counsel to assist in identifying the prospective jurors for whom sequestered voir dire would be appropriate. After nearly 100 prospective jurors had been questioned on voir dire in this manner, and challenges for cause had been made and ruled upon, the jury selection process was completed by the

exercise of peremptory challenges. The defense expressed satisfaction with the jurors selected, and they were sworn to try the case.

Defendant contends that the trial court's failure to conduct sequestered death-qualification voir dire--that is, to question each prospective juror on subjects relating to the death penalty out of the presence of other prospective jurors--violated his rights under the federal Constitution to due process, equal protection, jury trial, effective assistance of counsel, and a reliable penalty verdict, and his right under California law to individual juror voir dire when group voir dire is not practical.

Insofar as defendant contends that the federal Constitution requires sequestered death-qualification voir dire of every prospective juror in a capital case, the claim has been frequently rejected by this court and is without merit. (**People v. Stitely (2005) 35 Cal.4th 514, 536-537; People v. Vieira, supra, 35 Cal.4th at pp. 286-287; People v. Box (2000) 23 Cal.4th 1153, 1180.**) *102

Insofar as defendant contends that the trial court violated his rights under the federal Constitution and under California law by failing to exercise its discretion to consider whether group voir dire was "practicable," the record in this case does not support his claim. Rather, the trial court clearly understood it had discretion to order individual voir dire, and it did so for those jurors whose questionnaire responses suggested strong and possibly disqualifying views regarding imposition of the death penalty. The trial court did not abuse its discretion under **Code of Civil Procedure section 223**, nor did it violate defendant's constitutional rights. (**People v. Box, supra, 23 Cal.4th at pp. 1180-1181.**)

D. Batson/Wheeler Claim

During jury selection, after the prosecution used its ninth peremptory challenge to excuse B.J., a Black woman, the defense made an objection under **People v. Wheeler (1978) 22 Cal.3d 258**. The trial court stated that it would hear argument on the objection at the next recess. The prosecution then used its eleventh peremptory challenge against N.M., another Black woman. After the prosecutor had exercised 12 peremptory challenges and the defense had exercised 13 peremptory challenges, both sides expressed satisfaction with the jury as constituted, and the jurors were sworn to try the case. Alternate jurors were then selected and sworn.

During the next recess, the defense presented argument on the **Wheeler** objection. Defense counsel stated that the objection was under **Batson v. Kentucky (1986) 476 U.S. 79 (Batson)** as well as **Wheeler** and that "[t]he racial group we are talking about in this instance is African American, specifically African American women." The court asked whether the challenge was "based on the race of the two jurors who were excused." Defense counsel replied that it was based on "race and gender," that the prosecutor had excused two of the three African-American women who were on the jury panel, and that

defense counsel believed this was sufficient to raise an inference of impermissible discrimination.

In response, the prosecutor argued that the defense was improperly "interrelating classes" and that the presence of seven women on the jury showed there had been no discrimination against women. The prosecutor also noted that of the four African-Americans on the initial panel, he had challenged two, the defense had challenged one, and one was seated on the jury. Defense counsel responded that, as to gender, the prosecution had used eight of 12 peremptory challenges against women. The trial court stated that "out of an abundance of caution" it was giving the prosecution "the opportunity to offer whatever nongender-based or nonracially based rationale you care to offer for the challenges." *103

The prosecutor said he challenged N.M. because she "indicated that she thought there was some problems with the district attorney's office handling high-profile cases" and because she "indicated that she had a brother that had been arrested and prosecuted for drugs." The prosecutor said he challenged B.J. because her "son was prosecuted by our office, and she was an alibi witness in that case" and because "she's probably one of the most hostile jurors that I've ever questioned." The prosecutor added: "I think that she feels very, very upset with the prosecution of her son." Defense counsel declined the trial court's invitation to comment on these reasons, stating: "We would submit for the court's ruling on it." The trial court then ruled on this aspect of the challenge, stating: "I think the People--their explanation I think convinces me that the challenges to [B.J.] and [N.M.] were not racially motivated or based upon their race."

The trial court then "out of an abundance of caution" asked the prosecutor to provide reasons for its peremptory challenges against the other six women. The prosecutor asked for time to review his notes and papers, and the court agreed to take up the matter later. The prosecutor noted that the defense had used most of its peremptory challenges against men, possibly as many as 11 out of 13 challenges. The court replied, in substance, that it did not think that was relevant in ruling on the defense challenge: "I'm not sure two wrongs make a right . . ."

The next day, the prosecutor provided reasons for the remaining six peremptory challenges to women. The prosecutor said he challenged L.J. "because she indicated on five different places on the questionnaire that she was against the death penalty." He challenged J.O. because she "indicated on her questionnaire that she felt she was a wishy-washy person," that she "had difficult[y] making up her mind," that "pressure from other jurors might start her to doubt herself," and that "she thinks she is a bad judge of character." He challenged N.J. because she stated on her questionnaire that "the burden of deciding a person's life was really just too great a decision for her to make." He challenged F.C. because she stated on her questionnaire that she would "find it difficult" to vote for death and the prosecutor thought she had "a clear leaning against the death penalty." He challenged L.H. because "a fair reading of her questionnaire is that she hasn't made up

her mind" about the death penalty, and because "a fair reading of her statements in court was that she really is much opposed to the death penalty." He challenged B.B. because she wrote on her questionnaire that "she had religious and philosophical views so that she would always vote against the death penalty" and because he thought she might have difficulty understanding spoken English. Finally, he challenged M.B. because she was 73 years old and appeared to be "basically overwhelmed" and because she had apologized for believing in the death penalty. *104

After hearing defense counsel's argument in response, the trial court overruled the defense objection, stating: "I'm satisfied that the district attorney has made an explanation for each of these challenges which persuades me that they were not solely or sufficiently based on gender that they should be held to have violated [defendant's] constitutional rights."

Defendant contends that the trial court erred in overruling the Batson/Wheeler objection because the prosecutor's reasons for the peremptory challenges "found little or no support in the record" and because the trial court "failed in its duty to seriously evaluate the credibility of the prosecutor's excuses and make a reasoned determination of whether purposeful discrimination existed." Defendant contends that this error violated his rights under the federal Constitution to a fair trial, to due process of law, and to equal protection of the law, and his rights under the state Constitution to trial by a jury drawn from a representative cross-section of the community.

[5] The use of peremptory challenges to remove prospective jurors because of their race or gender violates both the federal and the California Constitutions. (J. E. B. v. Alabama ex rel. T. B. (1994) 511 U.S. 127, 129; Powers v. Ohio (1991) 499 U.S. 400, 409; Batson, supra, 476 U.S. at p. 89; People v. McDermott (2002) 28 Cal.4th 946, 969.) The United States Supreme Court has set out a three-step process to be followed when a party claims that an opponent has improperly discriminated in the exercise of peremptory challenges. First, the complaining party must make out a prima facie case of invidious discrimination. Second, the party exercising the challenge must state nondiscriminatory reasons for the challenge. Third, the trial court must decide whether the complaining party has proved purposeful discrimination. (Johnson v. California (2005) 545 U.S. ____ [125 S.Ct. 2410, 2416]; Purkett v. Elem (1995) 514 U.S. 765, 767; People v. Silva (2001) 25 Cal.4th 345, 384.)

By asking the prosecutor to explain the peremptory challenges, the trial court here implicitly found that defendant had made a prima facie showing of impermissible discrimination in the exercise of peremptory challenges. (People v. Cash (2002) 28 Cal.4th 703, 723.) Once the trial court ruled on the credibility of the prosecutor's stated reasons, the issue of whether the defense had made a prima showing became moot. (Hernandez v. New York (1991) 500 U.S. 352, 359; People v. Arias (1996) 13 Cal.4th 92, 135.)

When a trial court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror, we accord great *105 deference to its ruling,

reviewing it under the substantial evidence standard. (**People v. McDermott, supra, 28 Cal.4th at p. 971; People v. Cash, supra, 28 Cal.4th at p. 725.**)

We consider each of the eight challenged jurors, taking them in the order in which the prosecutor provided reasons for the peremptory challenges.

The prosecutor's stated reasons for challenging N.M. were that she "indicated that she thought there was some problems with the district attorney's office handling high-profile cases" and because she "indicated that she had a brother that had been arrested and prosecuted for drugs." These reasons are neutral as to race and gender, they are not inherently implausible, and substantial evidence supports the trial court's finding on the credibility of this explanation. In response to a question on the juror questionnaire asking whether she had "any specific feeling for or against . . . prosecutors (district attorneys)," she marked "yes" and explained: "There seems to be many problems with high-profile cases." In response to another question, she indicated that a close relative or friend had been arrested, charged, and tried for a crime, and she explained: "Brother arrested for possession of drugs."

Defendant argues that the prosecutor's reasons for challenging N.M. are not credible because other jurors whom the prosecutor did not challenge, and who were ultimately seated on the jury, also had relatives who had been arrested for drug-related offenses. Even if we assume we must conduct a comparative juror analysis for the first time on appeal (see **Miller-El v. Dretke (2005) 545 U.S. _____, fn. 2 [125 S.Ct. 2317, 2326, fn. 2]; People v. Schmeck (2005) 37 Cal.4th 240, 270; People v. Gray, supra, 37 Cal.4th at pp. 188-189**), defendant does not identify any seated juror who gave responses similar to N.M.'s on both of the topics mentioned by the prosecutor. Although some of the seated jurors had relatives who had been arrested for drug-related offenses, none of these jurors also expressed any feelings against prosecutors.

The prosecutor said he challenged B.J. because her "son was prosecuted by our office, and she was an alibi witness in that case" and because "she's probably one of the most hostile jurors that I've ever questioned." The prosecutor added: "I think that she feels very, very upset with the prosecution of her son." These reasons are neutral as to race and gender, they are not inherently implausible, and substantial evidence supports the trial court's finding on the credibility of this explanation. On voir dire, B.J. said that she had been an alibi witness in her son's trial in San Diego County, that the case was dismissed after two trials resulted in hung juries, and that her experiences with the police in that case "were not very favorable," although she denied having negative feelings toward the prosecutor or the criminal justice system. *106 When the prosecutor stated that B.J. was "probably one of the most hostile jurors" he had ever questioned, the trial court said, "I recall having that same impression when we were talking to her." Defense counsel did not dispute this characterization of B.J.'s demeanor on voir dire, instead merely submitting the matter.

The prosecutor's stated reason for challenging L.J. was that "she indicated on five different places on the questionnaire that she was against the death penalty." The record supports this statement, which provides a credible and gender-neutral ground for challenge. Skepticism about the death penalty is a permissible basis for a prosecutor's exercise of a peremptory challenge. (**People v. Panah (2005) 35 Cal.4th 395, 441; People v. McDermott, supra, 28 Cal.4th at pp. 970-971.**)

The prosecutor's stated reasons for challenging J.O. were that she "indicated on her questionnaire that she felt she was a wishy-washy person," that she "had difficult[y] making up her mind," that "pressure from other jurors might start her to doubt herself," and that "she thinks she is a bad judge of character." The record supports these reasons, which provide credible and gender-neutral grounds for challenge. A prosecutor could reasonably be concerned about a juror who said she was a bad judge of character because she would "believe any hard luck story."

The prosecutor's stated reason for challenging N.J. was her questionnaire response that "the burden of deciding a person's life was really just too great a decision for her to make." This is an accurate description of one of N.J.'s questionnaire responses, in which she marked the "no" response to a question asking whether she would like to serve as a juror on this case, adding this explanation: "The burden of decision for a person's life--either the death sentence or life imprisonment." This response provides a legitimate and credible reason for the challenge.

The prosecutor said he challenged F.C. because she stated on her questionnaire that she would "find it difficult" to vote for death and the prosecutor thought she had "a clear leaning against the death penalty." In response to a question asking for her "feelings about the death penalty," F.C. wrote on her questionnaire, "In a few cases it may be necessary, but in general I would find it difficult to give this recommendation." These reservations about the death penalty provided a permissible basis for a prosecutor's exercise of a peremptory challenge. (**People v. Panah, supra, 35 Cal.4th at p. 441; People v. McDermott, supra, 28 Cal.4th at pp. 970-971.**)

The prosecutor said he challenged L.H. because "a fair reading of her questionnaire is that she hasn't made up her mind" about the death penalty, *107 and because "a fair reading of her statements in court was that she really is much opposed to the death penalty." In response to the question asking for her "feelings about the death penalty," L.H. wrote this response: "Well, it seems that killing a person by the death penalty for killing someone else is confusing. What will sentencing someone to die do for our society? I'm not sure of this 'eye for an eye' sentence." In response to a question asking what purpose or purposes the death penalty serves, she wrote: "I'm not sure it does serve a valid purpose. Unfortunately, it seems to be disproportionately given to non-whites. Also, there's no going back once it's done--what if new evidence comes to light?" Her responses on voir dire also revealed skepticism about the death penalty. These reservations about the death

penalty provided a legitimate, credible, gender-neutral basis for a prosecutor's exercise of a peremptory challenge.

He challenged B.B. because she wrote on her questionnaire that "she had religious and philosophical views so that she would always vote against the death penalty" and because he thought she might have difficulty understanding spoken English. The record supports these reasons. The questionnaire asked the prospective jurors whether they had "any moral, religious, or philosophical opposition to the death penalty so strong that [they] would be unable to impose the death penalty regardless of the facts." In response to this question, B.B. put a check mark next to "yes," with this explanation: "Thou shalt not kill, one of the 10 commandments of God." She also indicated that she had been born in the Philippines, thereby suggesting that English might not be her first language. These are permissible, neutral, and credible reasons for the peremptory challenge of B.B.

Finally, the prosecutor said he challenged M.B. because she was 73 years old and appeared to be "basically overwhelmed" and because she had apologized for believing in the death penalty. The record supports these reasons, which are credible and gender neutral. The questionnaire asked the prospective jurors to state their "feeling about the death penalty." M.B. wrote in response: "I am sorry to say but I am for the death penalty." She also indicated on the questionnaire that she would not like to serve as a juror on this case. On voir dire, when the prosecutor asked her about this response, she said: "I have served on juries before and I also been on election boards, I think somebody else should do it. You know, my years living."

[6] We are unpersuaded by defendant's argument that the trial court erred in deferring argument on defendant's Batson/Wheeler motion until the next recess, which occurred after the jury selection process had been completed and a jury had been sworn to try the case. Defense counsel did not object to this procedure at the time, and in fact indicated that the defense was satisfied with the jury that was sworn to try the case. Moreover, the swearing of the *108 jury would not have made it impossible for the trial court to grant effective relief in the event the court granted the Batson/Wheeler motion. Although jeopardy attached with the swearing of the jury, a Batson/Wheeler motion may be deemed a motion for mistrial and thus a waiver of any double jeopardy defense. (See People v. Batts (2003) 30 Cal.4th 660, 679 [a defendant's request for a mistrial waives any double jeopardy claim]; see also People v. Yeoman (2003) 31 Cal.4th 93, 115 [Wheeler motions often termed motions for mistrial].)

We conclude that substantial evidence supports the trial court's rulings rejecting defendant's Batson/Wheeler challenges on the basis of race and gender.

III. ISSUES RELATING TO GUILT AND SPECIAL CIRCUMSTANCES

A. Conditional Examination Testimony

Defendant contends that the trial court erred under state law in overruling his objection to admission at trial of the conditional examination testimony of Brian Johnsen, and that this error violated defendant's constitutional rights to due process, to counsel, to confrontation, and to fair and reliable determinations of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

1. Factual background

On November 1, 1991, the trial court granted the prosecutor's request under section 1054.7 for an in camera hearing out of the presence of defendant and his attorney to consider postponement or limitation of discovery. At the hearing, the prosecutor told the court that in September 1991, during an interview with a prosecution investigator, Brian Johnsen had said that defendant had killed Holloway to prevent her from revealing a plan to kill a man named Doug Mynatt, who was believed to have ties to the Hell's Angels and whose whereabouts was unknown. The prosecutor expressed concern that disclosure of this information to the defense through the discovery process could endanger Mynatt's life or cause Mynatt to become a threat to the lives of Johnsen and Anna Humiston, who was not then in custody. The prosecutor also stated his intention to secure Johnsen's testimony by conditional examination. The trial court granted the prosecutor a one-week extension of the deadline for disclosure of the information obtained during the September interview of Johnsen.

At a hearing on November 8, 1991, the prosecutor gave the defense an investigator's report of the September interview of Brian Johnsen, and the *109 prosecutor submitted a written motion for a conditional examination of Johnsen on the ground that his life was in jeopardy (§ 1336, subd. (b)). Defendant's attorney asked for more time to study the report and the motion, but the trial court granted the motion for conditional examination. The court observed, however, that under section 1341, if the magistrate was convinced, on the date set for the conditional examination, that Johnsen's life was not in jeopardy, then the conditional examination would not take place.

The conditional examination of Brian Johnsen, which was recorded on videotape, began on November 15, continued on November 18, and concluded on November 19, 1991. Thereafter, on July 6, 1992, the prosecutor announced that he was seeking the death penalty against defendant, in part because of the evidence disclosed at the conditional examination. On September 10, 1993, the defense filed a motion to exclude the conditional examination at trial, primarily on the ground that conditional examinations are not permitted in capital cases. After receiving opposition to the motion from the prosecution, and holding a hearing, the trial court denied the motion on October 29, 1993.

Defendant petitioned the Court of Appeal for a writ of mandate barring use of the conditional examination at trial. The Court of Appeal denied the petition in an unpublished opinion on December 2, 1993. This court granted defendant's petition for review of the Court of Appeal's decision and transferred the matter back to the Court of Appeal to reconsider in light of **People v. Municipal Court (Ahnemann) (1974) 12 Cal.3d 658** (stating that mandate is unavailable to resolve an issue as to the admissibility of evidence). After reconsideration, the Court of Appeal again denied the mandate petition, this time citing **Ahnemann**.

On March 22, 1994, defendant filed a motion asking the trial court to reconsider his motion to exclude the conditional examination on the ground that the controlling law had been clarified by the Court of Appeal's decision in **Dalton v. Superior Court (1993) 19 Cal.App.4th 1506** (holding that in a capital case the prosecution could not conditionally examine a witness whose life was in jeopardy). The trial court agreed to reconsider its ruling, but after reconsideration it again denied the motion to exclude the conditional examination.

Defendant sought appellate review of this ruling by again petitioning the Court of Appeal for a writ of mandate. The Court of Appeal summarily denied the petition, and this court denied defendant's petition for review.

At trial, the parties stipulated to Brian Johnsen's unavailability as a witness. Over defendant's continuing objection, the videotape of the conditional examination was played for the jury. In his conditional examination *110 testimony, Johnsen described how he and Teresa Holloway had become acquainted with defendant, Denise Shigemura, Anna Humiston, and Doug Mynatt, and how their relationships had developed. His testimony provided the only evidence of the telephone conversations in which the plan to kill Mynatt was discussed and concern was expressed that Holloway not be told about the plan for fear she would disclose it. His testimony also described a telephone conversation after Holloway's murder in which Johnsen asked defendant why he had killed Holloway and defendant had replied that it had to be done.

2. Conditional examinations in capital cases

Defendant contends that conditional examinations are not permitted in capital cases. He relies on **section 1335, subdivision (a)**, which provides: "When a defendant has been charged with a public offense triable in any court, he or she in all cases, and *the people in cases other than those for which the punishment may be death*, may, if the defendant has been fully informed of his or her right to counsel as provided by law, have witnesses examined conditionally in his or her or their behalf, as prescribed in this chapter." (Italics added.) Defendant argues that this provision bars the prosecution from conditionally examining any of its witnesses in a capital case. In ruling the conditional examination admissible, however, the trial court relied on subdivision (b) of the same section, which at

the time of defendant's trial provided: "When a defendant has been charged with a serious felony, the people may, if the defendant has been fully informed of his or her right to counsel as provided by law, have a witness examined conditionally as prescribed in this chapter if the people have evidence that the life of the witness is in jeopardy." (**§ 1335, former subd. (b)**, as amended by Stats. 1985, ch. 783, § 2, p. 2525.) ⁵

On first reading, **subdivision (a) and former subdivision (b) of section 1335** appear inconsistent. Subdivision (a) appears to generally prohibit the prosecution from conditionally examining witnesses in cases "for which the punishment may be death," whereas former subdivision (b) appears to allow the prosecution to conditionally examine a witness whose life is in jeopardy in any case in which the defendant is charged with a serious felony.

[7] To resolve this apparent inconsistency, we view the provisions in their statutory context as part of an overall statutory scheme for conditional ***111** examinations in criminal cases, seeking to harmonize the provisions in light of the apparent legislative purpose. (**Robert L. v. Superior Court (2003) 30 Cal.4th 894, 901**; **People v. Acosta (2002) 29 Cal.4th 105, 112**; **People v. Murphy (2001) 25 Cal.4th 136, 142.**)

[8] The statutory scheme for conditional examinations includes **section 1336**. At the time of defendant's trial, subdivision (a) of that section provided: "When a material witness for the defendant, or for the people, is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, the defendant or the people may apply for an order that the witness be examined conditionally." (Stats. 1985, ch. 783, § 3, p. 2525.) **Subdivision (b) of section 1336** provided: "When the people have evidence that the life of a prosecution witness is in jeopardy, the people may apply for an order that the witness be examined conditionally." (Stats. 1985, ch. 783, § 3, p. 2525.) ⁶

Reading **sections 1335** and **1336** together, it appears that the Legislature may have intended to prohibit the prosecution in a capital case from taking a conditional examination of a witness for any of the reasons stated in **subdivision (a) of section 1336**--illness, dependency, age, or impending departure from the state--but to permit the prosecution in a capital case to conditionally examine a witness whose life is in jeopardy. This reading would resolve the apparent inconsistency between **subdivision (a) and former subdivision (b) of section 1335** and harmonize those provisions with **section 1336**.

Arguing against this construction, defendant relies on **Dalton v. Superior Court, supra, 19 Cal.App.4th 1506**. The Court of Appeal there expressed the view that allowing the prosecution to conditionally examine a witnesses in a death penalty case only when the witness's life was in jeopardy "would create a distinction in the use of preserved testimony which seemingly would have no justification" in that "the testimony of a witness who is to die before the death penalty trial because of natural causes could not be preserved, while that same witness's testimony could be preserved if the threat of

nonattendance at trial *112 were based upon possible kidnap or murder." (*Dalton, supra, at p. 1512.*) We do not view this distinction as irrational, however. When a prosecution witness may die before trial from natural causes, the prosecution risks the loss of important evidence. This same interest is at stake when the witness's life is in jeopardy from criminal violence, but there is in addition the strong public interest in deterring criminal conduct in the form of an actual or attempted murder of the witness. Recognizing the presence of this additional interest, the Legislature could reasonably decide to authorize prosecutorial conditional examinations in capital cases when the witness's life is in jeopardy from criminal violence, to remove the incentive a capital charged defendant or his or her allies might otherwise have to murder prosecution witnesses to prevent them from testifying.

This construction is also consistent with the history of conditional examinations in criminal cases in California. As enacted in 1879, the California Constitution granted the Legislature power to authorize prosecutorial conditional examinations "in criminal cases, other than cases of homicide." (Cal. Const., former art. 1, § 13, repealed Nov. 5, 1974.) In 1905, the Legislature exercised this constitutionally granted authority by providing, in **section 1335**, for conditional examinations of prosecution witnesses in cases "other than homicide." (Stats. 1905, ch. 540, § 1, p. 702.) In 1951, **section 1335** was amended to permit conditional examinations of prosecution witnesses in cases other than "those for which the punishment may be death." (Stats. 1951, ch. 96, § 1, p. 354.) In 1974, the state Constitution was amended to remove the prohibition on conditional examinations in capital cases. The relevant provision now reads: "The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel." (Cal. Const., art. 1, § 15, cl. 4.) In 1985, the Legislature amended **section 1335** to permit the prosecution to take a conditional examination when the defendant has been charged with a serious felony and there is evidence the witness's life is in jeopardy. (Stats. 1985, ch. 783, § 2, p. 2525.) We infer that, after the 1974 constitutional amendment removed the blanket prohibition on conditional examinations by the prosecution in capital cases, the Legislature used its new authority in 1985 to authorize the prosecution to take conditional examinations in capital cases in the limited situation where the witness's life is threatened.

The 1985 amendment of **sections 1335** and **1336** was included in Assembly Bill No. 2059 (1985-1986 Reg. Sess.), which also added **section 1350** to the Evidence Code. That provision establishes an exception to the hearsay rule for a statement by an unavailable declarant when, among other things, "[t]here is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant." (**Evid. Code, § 1350, subd. (a)(1).**) Like the "life in jeopardy" *113 provision for conditional examinations (**§ 1335, subd. (b).**), the hearsay exception of **Evidence Code section 1350** applies in criminal proceedings in which a serious felony is charged (*id.*, subd. (a)), and "serious felony" is defined to include felonies listed in **subdivision (c) of**

section 1192.7. (Compare **Evid. Code, § 1350, subd. (d)**, with **Pen. Code, § 1335, subd. (c)**.) Those listed felonies include "any felony punishable by death . . ." (**§ 1192.7, subd. (c)(7)**.) Because they were packaged together, it is reasonable to infer that the adoption of the hearsay exception in **Evidence Code section 1350** and the amendment of the conditional examination provisions of **Penal Code sections 1335** and **1336** address a common problem and result from a common Legislative concern--criminal violence against prospective prosecution witnesses to prevent their testimony. The risk that this will occur likely increases in proportion to the potential punishment for the charged offense, and thus it is greatest in capital cases. Absent language expressly barring application of these provisions to capital cases, therefore, it is reasonable to infer that the Legislature intended to permit the prosecution to conditionally examine witnesses in capital cases when there is evidence that their lives are in serious danger.

[9] We conclude, therefore, that under **subdivision (b) of section 1335**, conditional examination of a prosecution witness is permitted in a capital case when the witness's life is in jeopardy.⁷

3. Required showing for conditional examination

Defendant argues, next, that the prosecution should not have been allowed to conditionally examine Brian Johnsen because there was no evidence that his life was in jeopardy.

[10] **Section 1335, subdivision (b)**, permits the prosecution to conditionally examine a witness "if there is evidence that the life of the witness is in jeopardy." (Italics added.) **Section 1336, subdivision (b)**, similarly requires the prosecution to produce evidence to support a claim that a witness's life is jeopardy. **Section 1337** provides that an application for conditional examination "shall be made upon affidavit stating" among other things "that the life of the witness is in jeopardy." **Section 1338** requires that the application be made on "three days' notice to the opposite party," and **section 1339** provides that "[i]f the court or judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally, at a specified time and place, and before a magistrate designated therein."

Here, the prosecution's application to conditionally examine Brian Johnsen was supported by evidence in the form of a declaration of Deputy District *114 Attorney Pettine stating, in relevant part: "I am informed that witness Brian Johnsen was directly involved with defendants Shigemura and Jurado in a plot to kill Doug Mynatt. According to Mr. Johnsen, the defendants, acting on their own and without the knowledge of Mr. Johnsen, killed victim Teresa Holloway so that she would not disclose the plan to murder Mr. Mynatt. Mr. Mynatt's current whereabouts is unknown. Mr. Johnsen, who was in

custody on the date of the Holloway murder, is currently out of custody. [¶] Declarant believes that once this information becomes known, witness Brian Johnsen's life will be jeopardized by Mr. Mynatt, the defendants, and/or their associates."

The trial court granted the application without allowing the defense the three days' notice specified in section 1338, but the court said that under section 1341 the conditional examination would not take place if, on the day set for the conditional examination, the defense was able to show to the magistrate's satisfaction that Johnsen's life was not in danger.⁸ The conditional examination began a week later. Before it began, defendant offered no evidence that Johnsen's life was not in danger.

The prosecution satisfied the requirements of sections 1335, 1336, and 1337 by submitting a declaration stating that Johnsen's life was in danger from Doug Mynatt, defendant and his codefendants, and their associates. In granting the prosecutor's application for a conditional examination, the trial court did not abuse the broad discretion with which the statutory scheme vested it. In particular, it was not necessary, under the circumstances of this case, for the prosecution to present evidence that anyone had expressly threatened Johnsen or conspired to harm him. Because of the evidence that defendant, Shigemura, and Humiston had killed Holloway to prevent her from exposing a plot to kill Mynatt, the trial court--who both granted the application for conditional examination and served as magistrate in the taking of the examination--could justifiably conclude that defendant and the persons with whom he associated would be likely to use deadly force against anyone perceived as a threat, and that the substance of Johnsen's proposed testimony made him an actual or potential threat to defendant and his codefendants, and also to Mynatt.

Although defendant did not receive the three days' notice to which section 1338 entitled him, he was not prejudiced by the shortened notice because seven days elapsed before the conditional examination began during which, ^{*115} under section 1341, defendant could have presented evidence to contradict the prosecutor's declaration that Brian Johnsen's life was in danger. We conclude that defendant has failed to show that any prejudicial error occurred in the taking of Brian Johnsen's conditional examination.

4. Admission of conditional examination at trial

The prosecutor argued below, and the Attorney General argues in this court, that even if the prosecution is prohibited from taking conditional examinations in capital cases, that prohibition did not apply here because the prosecutor had not yet decided to seek the death penalty, and indeed had announced the death penalty would not be sought, when the trial court granted the prosecution's application for a conditional examination and when Brian Johnsen was conditionally examined. In response to this argument,

defendant argues that even if it was proper to conditionally examine Johnsen because the prosecutor was not then seeking the death penalty, it was error to admit Johnsen's conditional examination in evidence at defendant's capital trial. Because we have concluded that the prosecution in a capital case may conditionally examine a witness whose life is in jeopardy, we need not address this issue.

Defendant also argues that admission of Brian Johnsen's conditional examination in evidence at trial denied him his rights under the federal Constitution to due process, confrontation of adverse witnesses, and reliable guilt and penalty determinations in a capital case. But Johnsen testified under oath at the conditional examination, and defendant had a full and fair opportunity to cross-examine him at that time. For purposes of due process, confrontation, and reliability, the situation is no different than if Johnsen or any other witness had testified at the preliminary hearing or at an earlier trial and then, because he had become unavailable, his prior testimony was admitted at trial. When a defendant has had an adequate opportunity for cross-examination and the witness is unavailable at trial, use of prior testimony does not violate the defendant's rights under the federal Constitution. (**People v. Wilson (2005) 36 Cal.4th 309, 343**; see **Crawford v. Washington (2004) 541 U.S. 36, 55-57.**)

Defendant asserts that he did not have an adequate opportunity to cross-examine Brian Johnsen at the conditional examination because his attorneys later acquired additional information that would have been useful in cross-examining Johnsen. In particular, he calls our attention to the statements that *116 Johnsen later made, after he had been charged with capital murder, ⁹ admitting that he was aware of and agreed with defendant's plan to kill Holloway. Again, however, the situation is no different than if Johnsen had testified at defendant's preliminary hearing or at a prior trial of defendant on the same charges. Absent wrongful failure to timely disclose by the prosecution, a defendant's subsequent discovery of material that might have proved useful in cross-examination is not grounds for excluding otherwise admissible prior testimony at trial. (See **People v. Samayoa (1997) 15 Cal.4th 795, 851** [admission of prior testimony does not violate the right of confrontation "regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony."].)

B. Shigemura's Out-of-court Statement

Defendant contends that the trial court erred in overruling defense hearsay objections to the testimony of Steven Baldwin relating out-of-court statements by Denise Shigemura. Baldwin testified that on the day after Holloway's murder, defendant and Shigemura came to his house with Mark Schmidt. As the four of them sat together in the living room, Shigemura said to Baldwin: "I no longer need what it was I asked you for. We took care of the problem and we dumped the body at Balboa Park." Baldwin testified that he thought Shigemura was referring to a conversation a few days earlier during which she had asked him if he could get her a "gat" because she had a problem she needed to take care of. The

trial court admitted this evidence under the adoptive admissions exception to the hearsay rule.

[11] "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (**Evid. Code, § 1221.**) When a defendant remains silent after a statement alleging the defendant's participation in a crime, under circumstances that fairly afford the defendant an opportunity to hear, understand, and reply, the statement is admissible as an adoptive admission, unless the circumstances support an inference that the defendant was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution. (**People v. Riel (2000) 22 Cal.4th 1153, 1189; People v. Mayfield (1997) 14 Cal.4th 668, 741.**)

Denise Shigemura's out-of-court statement--"We took care of the problem and we dumped the body at Balboa Park"--was admissible as an adoptive admission by defendant. He must have heard and understood the statement because he was sitting on the same couch with Shigemura, the circumstances called for a denial or protest if the statement was inaccurate, nothing prevented him from making a response, and nothing supports an inference that he was relying on a constitutional right of silence. In this situation, the jury could properly view defendant's silence as adopting Shigemura's statement.

Defendant claims that admission of this evidence violated his right of confrontation under the Sixth Amendment to the federal Constitution. He did not, however, make a specific objection on constitutional grounds at trial. Assuming without deciding that the issue is preserved for appellate review (see **People v. Champion (1995) 9 Cal.4th 879, 908, fn. 6;** see also **People v. Partida (2005) 37 Cal.4th 428**), the claim is without merit. The right of confrontation is not violated when the jury hears evidence, from a witness subject to cross-examination, relating a defendant's own out-of-court statements and adoptive admissions. (**People v. Roldan (2005) 35 Cal.4th 646, 711, fn. 25; People v. Combs (2004) 34 Cal.4th 821, 842-843.**)

[12] As defendant points out, he was not present a few days before when Shigemura asked Baldwin for a "gat" and said she needed it to take care of a problem, so this earlier statement was not admissible as an adoptive admission. The request for the gun, by itself, was not hearsay, however, because an out-of-court statement is hearsay only when it is "offered to prove the truth of the matter stated." (**Evid. Code, § 1200.**) Because a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated. (See **People v. Mayfield, supra, 14 Cal.4th at p. 741** [pleas for help "were not hearsay because they were not admitted for the truth of the matter stated"]; **People v. Bolden (1996) 44 Cal.App.4th 707, 714-715** [request that defendant "not come around the house anymore" was not hearsay because it was not offered for the truth of matter stated]; **People v. Reyes (1976) 62 Cal.App.3d 53, 67** ["words of direction or authorization

do not constitute hearsay since they are not offered to prove the truth of any matter asserted by such words"].) Thus, Shigemura's request for a gun was not hearsay.

Shigemura's earlier out-of-court statement to Baldwin was hearsay insofar as it asserted that Shigemura had a problem that she needed to take care of. The Attorney General argues that it was admissible under the coconspirator exception to the hearsay rule (**Evid. Code, § 1223**) because it was made to further a conspiracy between defendant, Shigemura, and Brian Johnsen to kill Doug Mynatt. There was no substantial evidence at trial, however, that these *118 three individuals reached any agreement to kill Doug Mynatt until the evening of May 15, 1991, shortly before Holloway's murder, whereas Shigemura's statement to Baldwin occurred a day or two earlier. Accordingly, this statement was not admissible under the coconspirator exception to the hearsay rule, and the trial court erred in not excluding it.

Even if we assume this error violated defendant's right of confrontation under the federal Constitution, reversal is not required because defendant suffered no prejudice. Shigemura repeated the substance of the earlier hearsay statement (that she had a problem she needed to take care of) in defendant's presence ("We took care of the problem and we dumped the body at Balboa Park") and defendant by his conduct adopted that statement as his own. We conclude the error was harmless beyond a reasonable doubt.

C. Sufficiency of the Evidence

Defendant contends that the evidence presented at the guilt phase was insufficient to establish the premeditation element of first degree murder, the lying-in-wait special circumstance, and the conspiracy conviction, and he asserts that basing a conviction or special circumstance finding on insufficient evidence violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution to due process of law, a fair trial, and reliable verdicts in a capital case.

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (**People v. Kipp (2001) 26 Cal.4th 1100, 1128**; accord, **People v. Silva, supra, 25 Cal.4th at p. 368**.)

[13] A murder that is premeditated and deliberate is murder of the first degree. (**§ 189**.) "In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" (**People v. Mayfield, supra, 14 Cal.4th at p. 767**.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash

impulse." (**People v. Stitely, supra, 35 Cal.4th at p. 543.**) A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported--preexisting motive, planning activity, and manner of killing--but "[t]hese factors need not be present in any particular combination to find substantial evidence of *119 premeditation and deliberation." (**Ibid.**; see also **People v. Combs, supra, 34 Cal.4th at p. 850; People v. Silva, supra, 25 Cal.4th at p. 368.**)

The evidence of preexisting motive was ample. During the days before Holloway's murder, defendant had talked to Brian Johnsen and Denise Shigemura about whether they should kill Doug Mynatt, but they had decided not to tell Teresa Holloway about this because of concern that she would reveal it to the police. On the night of the murder, defendant told Johnsen that he had decided to proceed with the plan to kill Mynatt and that it could not wait until Johnsen was released from jail. Teresa Holloway then got on the phone and asked Johnsen whether there was a plan to kill Mynatt. From this evidence, a rational juror could infer that defendant had a motive to kill Holloway, to prevent her from revealing his planned killing of Mynatt.

The evidence of planning activity was ample as well. Shortly before the murder, defendant asked Mark Schmidt for a chain. When Schmidt offered defendant an 18-inch length of plastic weed-eater cord, defendant wrapped the cord around his own neck, with one end in each fist clenched at shoulder height, and said: "It will do." From these actions, a rational juror could infer that defendant had already decided to use the cord to strangle Holloway. Defendant then asked Schmidt to tell Teresa Holloway to get off the phone because he (Schmidt) needed to leave the apartment. A rational juror could infer that defendant made this request so that Holloway would be forced to leave Schmidt's apartment and then could be lured into Anna Humiston's car, where the fatal attack would take place. In the car, defendant positioned himself directly behind Holloway. A rational juror could infer that defendant did so to facilitate his planned strangulation of Holloway.

Because this evidence of preexisting motive and planning activity was by itself sufficient to support the first degree murder conviction on a theory of premeditation and deliberation, we need not review the evidence concerning the manner of killing.

[14] The lying-in-wait special circumstance requires proof of "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (**People v. Morales (1989) 48 Cal.3d 527, 557;** accord, **People v. Combs, supra, 34 Cal.4th at p. 853; People v. Michaels, supra, 28 Cal.4th at p. 516.**)

There is sufficient evidence that defendant concealed from Holloway his purpose to kill her. As explained earlier, there is substantial evidence from which a rational juror could infer that defendant had already formed this *120 purpose when he obtained a cord from

Mark Schmidt that could be used to strangle Holloway. He did not reveal that purpose to Holloway immediately by attacking her, but instead lured her into Humiston's car.

There is sufficient evidence of a substantial period of watching and waiting for an opportune time to act. The place where Teresa Holloway's body was found was two to three miles from Mark Schmidt's apartment. A rational juror could infer that defendant did not attack Holloway immediately after luring her into Humiston's car, but instead waited for a substantial period while the car was driven to a location where there was little risk that the attack would be observed by other motorists or by pedestrians.

Finally, there is substantial evidence that once the car reached a suitable location, defendant immediately launched a surprise attack on an unsuspecting victim from a position of advantage. Defendant ensured a position of advantage by occupying the back seat of Humiston's car, directly behind Teresa Holloway. From the blood evidence found in the car, the very nature of the planned attack, and the lack of injury to defendant, Humiston, or Shigemura, a rational juror could infer that Holloway was taken by surprise, with little or no opportunity to escape or fight back.

In concluding that the evidence is sufficient to support the lying-in-wait special circumstance, we are guided by this court's decisions in **People v. Combs, supra, 34 Cal.4th 821**, and **People v. Morales, supra, 48 Cal.3d 527**, which involved nearly identical facts. In **Combs** and **Morales**, as here, the defendant armed himself with a weapon suitable for use in strangulation, lured an unsuspecting victim into the front seat of an automobile, positioned himself directly behind the victim, waited until the car reached a suitable location, and then launched a surprise attack on the unsuspecting victim. (**People v. Combs, supra, at p. 853**; **People v. Morales, supra, at p. 554**.) In **Morales**, as here, the defendant bludgeoned the victim to death after an initial attempt at strangulation was unsuccessful. (**People v. Morales, supra, at p. 554**.)

We consider next defendant's challenge to the sufficiency of the evidence to support the conspiracy conviction.

[15] "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (**People v. Morante (1999) 20 Cal.4th 403, 416**; accord, **People v. Russo (2001) 25 Cal.4th 1124, 1131**.) "Disagreement as to who the coconspirators were or who did an *121 overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy." (**People v. Russo, supra, at p. 1135**.)

Here, defendant's plan to attack and kill Teresa Holloway in Anna Humiston's car required the cooperation of Humiston and Denise Shigemura. There is ample evidence

that one or both of them did agree or conspire to commit the murder. Shigemura shared defendant's motive to kill Holloway, because she also had been part of the plot to kill Doug Mynatt and, like defendant, would be put at risk if Holloway revealed that plot. Although there is no direct evidence that defendant and Shigemura discussed in advance the killing of Holloway, there was evidence that they were alone together at Mark Schmidt's residence shortly before the killing, during which a discussion and agreement could have taken place. Shigemura's later conduct provided additional evidence that she agreed to the murder. She was driving Humiston's car at the time of the fatal attack, she did not separate herself from defendant or report the killing afterward, and with defendant's help she concocted a false story to explain why, on the night of Holloway's murder, she failed to return to the halfway house where she was then required to live. As for Humiston, there was evidence that defendant engaged in an intense conversation with her at Schmidt's residence, that she allowed Shigemura to drive her car, and that she did not report the murder afterward and continued to associate with defendant. From this evidence, a rational juror could conclude beyond a reasonable doubt that defendant and either Shigemura or Humiston (or both) had the specific intent to agree or conspire to murder Holloway, as well as the specific intent to commit the elements of murder.

The overt act requirement was also satisfied. The prosecution alleged five overt acts in support of the conspiracy charge. Two alleged overt acts occurred before Holloway's murder (defendant, Denise Shigemura, and Anna Humiston met with Teresa Holloway at Mark Schmidt's residence and defendant, Shigemura, Humiston, and Holloway left Schmidt's residence in Humiston's car); two alleged acts occurred after the murder (defendant, Shigemura, and Humiston placed Holloway's body in the culvert and walked to a nearby phone from which defendant called to request a ride); and one alleged act was the murder itself. The jury returned "not true" findings on the preoffense overt acts allegations, but it found each of the other overt act allegations to be true.

Commission of the target offense in furtherance of the conspiracy satisfies the overt act requirement. (**People v. Padilla (1995) 11 Cal.4th 891, 966.**) Because the jury found that defendant committed the murder itself in furtherance of the conspiracy, and because *122 substantial evidence supports that finding, the overt act requirement is satisfied. Although defendant is correct that the overt act requirement may not be satisfied by conduct occurring after the target offense is complete (**People v. Zamora (1976) 18 Cal.3d 538, 560**), defendant was not prejudiced by the jury's consideration of the invalid postoffense overt act allegations, and the valid finding of a single overt act is sufficient to support the conspiracy verdict. (**People v. Padilla, supra, at pp. 965-966.**)

Defendant argues that the jury's "not true" findings on the preoffense overt act allegations conclusively demonstrate the jury's rejection of the prosecution's theory that defendant had agreed with Shigemura or Humiston (or both) to kill Holloway before Holloway was lured into Humiston's car, and that this inconsistency fatally undermines the conspiracy verdict. We disagree. An inconsistency between a "not true" finding on an overt act and a verdict or another finding is not a ground for overturning the inconsistent

verdict or finding. (**People v. Hernandez (2003) 30 Cal.4th 835, 862**; see **People v. Santamaria (1994) 8 Cal.4th 903, 911** [recognizing that an apparently inconsistent not true finding may be the result of mistake, compromise, or lenity].)

D. Instructions on Conspiracy

Defendant contends that the trial court's instructions to the jury defining the charged offense of conspiracy omitted part of the specific intent element of that crime and that, during jury deliberations, the trial court erred in failing to dispel the jurors' confusion about the overt act element of conspiracy. He further contends that these errors denied him his rights under the federal Constitution to due process, to proof of each element beyond a reasonable doubt, to a fair and impartial jury trial, and to reliable factfinding in a capital case.

The trial court instructed the jury with two modified versions--one spoken, one written--of CALJIC No. 6.10 defining the crime of conspiracy. As here relevant, the spoken version stated: "A conspiracy is an agreement entered into between two or more persons with the *specific intent to commit* a crime, in this case alleged to be the crime of murder, the murder of Teresa Holloway, followed by an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement." (Italics added.) As here relevant, the written version stated: "A conspiracy is an agreement entered into between two or more persons with the *specific intent to agree to commit* the public offense of murder, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement." (Italics added.) The written version was given to the jury for its use during deliberations. *123

As this court has explained, the crime of conspiracy requires dual specific intents: a specific intent to agree to commit the target offense, and a specific intent to commit that offense. (**People v. Russo, supra, 25 Cal.4th at p. 1131**; **People v. Swain (1996) 12 Cal.4th 593, 600.**) We have cautioned trial courts not to modify CALJIC No. 6.10 to eliminate either of these specific intents. (**People v. Marks (1988) 45 Cal.3d 1335, 1345.**)

[16] Here, neither of the modified versions of the standard instruction expressly mentioned both of the required specific intents. The written instruction mentioned only the specific intent to agree, while the spoken instruction mentioned only the specific intent to commit the target offense of murder. As defendant points out, when the jury has received an instruction in both spoken and written forms, and the two versions vary, we assume the jury was guided by the written version. (**People v. Davis (1995) 10 Cal.4th 463, 542**; **People v. Crittenden (1994) 9 Cal.4th 83, 138**; **People v. McLain (1988) 46 Cal.3d 97, 111, fn. 2.**)

Although the trial court erred in modifying CALJIC No. 6.10 to delete mention of the required specific intent to commit the target offense of murder, defendant suffered no

prejudice. For a conspiracy to commit murder, intent to commit the target offense means an intent to kill. (**People v. Swain, supra, 12 Cal.4th at p. 607.**) As defendant concedes, the jury's verdict that defendant was guilty of the first degree murder of Teresa Holloway necessarily included a finding that defendant himself had that intent. He argues, however, that the jury made no similar finding for either Denise Shigemura or Anna Humiston, the other alleged conspirators. But defendant does not identify any evidence in the record that could lead a rational juror to conclude that Shigemura and Humiston agreed to kill Holloway, with the specific intent to agree to do so, but without a specific intent to actually kill her. Because we find in the record no evidence that could rationally lead to such a finding, we are satisfied that the instructional error was harmless beyond a reasonable doubt. (**Neder v. United States (1999) 527 U.S. 1, 9; People v. Davis (2005) 36 Cal.4th 510, 564.**)

During guilt phase deliberations, the jury sent a note to the trial judge. It read: "Is the jury merely deciding whether the overt acts alleged actually occurred, or are we also determining whether or not the acts do indeed meet the requirements of being overt acts as defined in CALJIC 6.10[?]" The trial court sent the jury this written response: "As [CALJIC No.] 6.10 states, in order to find Mr. Jurado guilty of conspiracy, you must unanimously find to be true at least one of the alleged Overt Acts, *as that term is defined in 6.10.*" (Italics added.) *124

Defendant maintains that this response did nothing to answer the jury's question, and that there is an unacceptable risk that the jury merely determined whether the conduct charged as overt acts occurred, without also determining whether any of the acts was committed in furtherance of the conspiracy. We disagree. The trial court's response expressly directed the jury's attention to the definition of an overt act in CALJIC No. 6.10, which stated that " 'overt act' means any step taken or act committed by one or more of the conspirators . . . *in furtherance of the accomplishment of the object of the conspiracy.*" (Italics added.) That the jury so understood the court's response is conclusively shown by the jury's findings on the overt acts. The jury found "not true" the overt act allegations that defendant, Denise Shigemura, and Anna Humiston met with Teresa Holloway at Mark Schmidt's residence and that they left Schmidt's residence with Holloway in Humiston's car. Because undisputed evidence established that both of these acts occurred, the jury's "not true" finding can be explained only by inferring that the jury was not satisfied beyond a reasonable doubt that these acts were done in furtherance of the conspiracy.

E. Instruction on Motive

The trial court instructed the jury with this slightly modified version of CALJIC No. 2.51: "Motive is not an element of either one of the crimes charged and, therefore, need not be proved. However, you may consider motive or lack of motive as a circumstance in the case. Presence of motive may tend to establish that an accused is guilty. Absence of

motive may tend to establish that he is not guilty of a charged offense. You will therefore give the presence or absence of motive, as you find the case to be, the weight to which you find it to be entitled."

Defendant contends that this instruction improperly allowed the jury to convict him of the charged offenses of capital murder and conspiracy based solely on evidence of motive, and in so doing it violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution to due process, a fair trial, and a reliable verdict in a capital case. He points out that in contrast to certain other instructions that the trial court read to the jury--relating to consciousness of guilt based on falsehoods, efforts to suppress evidence, and flight after a crime--each of which included an admonition that the specified circumstance was insufficient by itself to prove guilt--the instruction on motive included no admonition that motive alone was insufficient to prove guilt.

Because it challenges merely the clarity of the instruction, and because defendant did not ask the trial court to modify or clarify the instruction, defendant's contention is not preserved for appellate review. (**People v. *125 Cleveland (2004) 32 Cal.4th 704, 750.**) Had defendant preserved the contention, we would reject it on the merits. What we wrote in **People v. Cleveland** applies with equal force here: "The court fully instructed the jury on the reasonable doubt standard. We find no reasonable likelihood the jury would infer from the motive instruction that motive alone could establish guilt. Moreover, given the strong evidence of guilt aside from motive, the jury certainly did not base its verdicts solely on motive." (**Ibid.**)

F. Instruction on Lesser Offense

Defendant contends the trial court erred when it instructed the jury, in the language of CALJIC No. 8.75, that it would not accept a verdict that defendant was guilty of second degree murder unless the jury also unanimously returned a verdict that he was not guilty of first degree murder. Defendant maintains that this "acquittal first" instruction violated his federal constitutional rights to due process and to a fair and reliable jury consideration of lesser included offenses in a capital case.

As defendant concedes, this court has repeatedly rejected the same contention. (E.g., **People v. Nakahara (2003) 30 Cal.4th 705, 715.**) As we stated in **Nakahara**, "[w]e see no reason for reconsidering these decisions." (**Ibid.**)

G. Instructions on Consciousness of Guilt

Defendant contends that the trial court's instructions to the jury on consciousness of guilt were impermissibly argumentative, permitted the jury to draw irrational inferences, were potentially misleading, and were unsupported by the evidence.

The trial court instructed the jury that it could infer consciousness of guilt from efforts to suppress evidence (CALJIC No. 2.06), from flight after a crime (CALJIC No. 2.52), and from the telling of a falsehood (CALJIC No. 2.03). The trial court declined defense requests to modify the instructions to state that they were inapplicable to fix the degree of a crime.

[17] We have repeatedly rejected contentions that these standard jury instructions on consciousness of guilt were impermissibly argumentative or permitted the jury to draw irrational inferences about a defendant's mental state during the commission of the charged offenses. (E.g., **People v. Benavides (2005) 35 Cal.4th 69, 100**; **People v. Nakahara, supra, 30 Cal.4th at p. 713**; **People v. Kipp (1998) 18 Cal.4th 349, 375**.) We see no reason to reconsider these decisions. Because the instructions as given correctly stated *126 the law and did not invite the jury to draw irrational inferences about defendant's mental state, the trial court did not abuse its discretion in declining the defense requests to modify them.

Whenever the prosecution relies on evidence of flight as tending to show a defendant's guilt, the trial court must instruct the jury substantially in this language: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." (**§ 1127c**.) In this context, flight "requires neither the physical act of running nor the reaching of a faraway haven" but it does require "a purpose to avoid being observed or arrested." (**People v. Crandell (1988) 46 Cal.3d 833, 869**; accord, **People v. Bradford (1997) 14 Cal.4th 1005, 1055**.) "Mere return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the *circumstances* of departure from the crime scene may sometimes do so." (**People v. Turner (1990) 50 Cal.3d 668, 695**; accord, **People v. Bradford, supra, at p. 1055**.)

Here, the circumstances of defendant's departure from the scene of Teresa Holloway's murder were sufficient to support an inference that his purpose was to avoid being observed or arrested, and thus an inference of consciousness of guilt for her death. Although there was a call box around 20 yards from the culvert in which Holloway's body had been placed, defendant did not use the call box to summon aid after Anna Humiston's car broke down. Instead, defendant, Humiston, and Denise Shigemura walked a half-mile to a 7-Eleven Store, along the way hiding in a tree the scissors jack that had been used to kill Holloway, before calling a friend for assistance. Defendant's failure to use the call box, and the secreting of the murder weapon, support an inference that in leaving the crime scene defendant acted with a purpose to avoid observation and arrest. The flight instruction was properly given.

H. Instructions Affecting Burden of Proof

Defendant contends that certain of the trial court's instructions to the jury misled the jury regarding the reasonable doubt standard of proof and impermissibly lightened the prosecution's burden of proof. He maintains that these instructions violated his federal constitutional rights to due process, a fair trial, a unanimous jury verdict, and reliable guilt and penalty determinations.

[18] We have previously rejected each of the claims that defendant makes, and we decline to reconsider these decisions. Contrary to defendant's *127 arguments, CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1, which direct the jury to accept reasonable inferences and to reject unreasonable ones, do not permit the jury to base a determination of guilt on something less than proof beyond a reasonable doubt. (*People v. Harris* (2005) 37 Cal.4th 310, 351; see also *People v. Crew* (2003) 31 Cal.4th 822, 847; *People v. Nakahara, supra*, 30 Cal.4th at pp. 713-714.) CALJIC No. 1.00, which directs the jury not to "infer or assume" that defendant "was more likely to be guilty than not guilty" merely because he had been arrested, charged, or brought to trial, does not undercut the burden of proof. (*People v. Crew, supra*, at pp. 847-848; *People v. Nakahara, supra*, at p. 714.) CALJIC No. 2.21.2, the standard instruction on willfully false testimony, does not lighten the prosecution's burden of proof. (*People v. Cleveland, supra*, 32 Cal.4th at p. 751; *People v. Nakahara, supra*, at p. 714; *People v. Maury* (2003) 30 Cal.4th 342, 428-429.) CALJIC No. 2.22, the standard instruction on weighing conflicting testimony, does not undermine the standard of proof beyond a reasonable doubt. (*People v. Cleveland, supra*, 32 Cal.4th at p. 751; *People v. Nakahara, supra*, at p. 714; *People v. Maury, supra*, at p. 429.) Finally, CALJIC No. 8.20, defining premeditation and deliberation, does not suggest that a defendant must absolutely preclude the possibility of premeditation rather than merely raising a reasonable doubt. (*People v. Nakahara, supra*, at p. 715.)

I. Cumulative Effect of Errors at Guilt Phase

Defendant argues that even if no single error requires reversal of the guilt verdicts, the cumulative effect of the errors at the guilt phase must be deemed sufficiently prejudicial to warrant reversal of the guilt verdicts. Defendant has demonstrated few errors, and we have found each error or possible error to be harmless when considered separately. Considering them together, we likewise conclude that their cumulative effect does not warrant reversal of the guilt verdicts.

J. Constitutional Validity of Lying-in-wait Special Circumstance

Defendant contends that the lying-in-wait special circumstance (**§ 190.2, subd. (a)(15)**), as interpreted by this court, violates the Eighth Amendment to the federal Constitution by failing to appropriately narrow the class of persons eligible for the death penalty. "We

have repeatedly rejected this contention, and defendant fails to convince us the matter warrants our reconsideration." (*People v. Nakahara, supra*, 30 Cal.4th at p. 721; see also *People v. Vieira, supra*, 35 Cal.4th at p. 303; *People v. Gutierrez (2002) 28 Cal.4th 1083, 1148-1149.*) *128

IV. ISSUES RELATING TO PENALTY

A. *Exclusion of Videotape of Interrogation*

Defendant contends that the trial court erred in excluding a videotape of his interrogation by police detectives on May 18, 1991, shortly after his arrest for the murder of Terry Holloway. He further contends that this error violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

As part of its case in mitigation, the defense proposed to have the jury watch a videotape that was made, without defendant's knowledge, while he was being interrogated by police detectives about the murder of Terry Holloway. During the interrogation, defendant at first denied any involvement in the murder, but eventually he admitted killing Holloway, and he insisted that he had done it entirely on his own and that neither Denise Shigemura nor Anna Humiston was present. He said he killed Holloway because he was in danger and his family was in danger. He expressed fear that Brian Johnsen had friends in prison who would kill him or his mother or other family members in retaliation for killing Holloway. He also expressed concern that he would be perceived in prison as a snitch and killed for that reason, or that he would have to spend his entire life in prison. During this part of the interrogation, defendant displayed considerable emotion, sobbing and at one point grasping an interrogating officer's hand. The defense argued that the evidence of defendant's emotional responses was admissible to show his remorse for the killing.

The prosecution objected that the videotape was inadmissible under the hearsay rule (**Evid. Code, § 1200**), because defendant's emotional displays were assertive conduct, and also under **Evidence Code section 352**, because the evidence's probative value was substantially outweighed by the risk of undue prejudice and jury confusion. After viewing the videotape, the trial court sustained the hearsay objection and excluded the evidence. The court agreed with the prosecution that defendant's emotional displays were a form of hearsay and not within any exception to the hearsay rule. The court also rejected the defense argument that defendant's constitutional right to present mitigating evidence in a capital case overrode the hearsay rule in this instance. The court noted there was no compelling need for the evidence, because defendant could testify to any remorse he might have felt, and that the evidence was not particularly trustworthy as evidence of remorse because on the videotape defendant never articulated any feelings of sorrow or regret for killing Teresa Holloway, or any sympathy for Holloway or her family, although he did indicate concern for his own safety and well-being, and also concern for his mother

and for Anna Humiston. Thus, in the court's view, it ***129** was by no means clear that defendant's emotional display was in any way caused by remorse, and it seemed more likely that it was caused entirely by concern for his own predicament.

The defense raised the issue again after both sides had rested at the penalty phase and the prosecutor had given his closing argument to the jury. Defense counsel requested permission to reopen the evidence to play the videotape for the jury to rebut the prosecutor's assertion, in argument to the jury, that defendant "lacked a conscience." Defense counsel pointed out that during the videotaped interview defendant said, in response to a question asking whether he had received any injuries in his struggle with Teresa Holloway, "The only injury I got is from my, just from my conscience." The trial court denied the request to reopen.

The defense raised the issue a final time after the jury had returned the penalty verdict of death. In a motion for a new trial, the defense argued that the trial court had erred in excluding the videotape. To demonstrate prejudice, the defense submitted declarations by three trial jurors stating that evidence that defendant lacked remorse for killing Teresa Holloway was an important factor in aggravation, and that evidence that defendant had an emotional reaction to the murder and talked about his conscience would have counterbalanced that evidence. The trial court denied the motion for a new trial.

Defendant is correct that, *by themselves*, defendant's emotional displays were nonassertive conduct, and thus not within the hearsay rule. For purposes of the hearsay rule, conduct is assertive if the actor at the time intended the conduct to convey a particular meaning to another person. (**Evid. Code, § 225** [defining statement to include "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression"].) For example, a nod of the head in response to a question calling for a yes-or-no answer, or a gesture pointing to a particular person when asked to identify a perpetrator, are examples of assertive conduct. Here, nothing in the videotape suggests that defendant's emotional responses were voluntary or that he intended them to convey any particular meaning to the interrogating officers.

But the defense sought to introduce more than just evidence of the emotional displays themselves. To explain the significance of the emotional displays, and particularly defendant's statement that as a result of the murder he had received an "injury from [his] conscience," the defense sought to introduce the statements defendant made during the videotaped interview. As defendant must concede, those statements, including assertions and descriptions of his own feelings and other mental states, were hearsay. They were not admissible under the state-of-mind exception to the hearsay rule (**Evid. Code, § 1250**) if they were made under circumstances indicating a lack of ***130** trustworthiness (***id.*, § 1252**). As the trial court correctly determined, the circumstance that defendant made his statements during a postarrest police interrogation, when he had a compelling motive to minimize his culpability for the murder and to play on the sympathies of his interrogators, indicated a lack of trustworthiness. In past decisions, we have upheld the

exclusion of self-serving postcrime statements made under similar circumstances.

(People v. Livaditis (1992) 2 Cal.4th 759, 779-780; People v. Edwards (1991) 54 Cal.3d 787, 820; People v. Whitt (1990) 51 Cal.3d 620, 642-643.)

[19] We have also rejected the argument that exclusion of this sort of hearsay evidence violates a capital defendant's right to a fair trial and a reliable penalty determination under the federal Constitution. As we have explained, a capital defendant has no federal constitutional right to the admission of evidence lacking trustworthiness, particularly when the defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross-examination. **(People v. Stanley, supra, 10 Cal.4th at pp. 838-840; People v. Livaditis, supra, 2 Cal.4th at p. 780; People v. Edwards, supra, 54 Cal.3d at pp. 820-821; People v. Whitt, supra, 51 Cal.3d at p. 644.)**

In excluding the entire videotape of defendant's postarrest interrogation, the trial court did not err under state law, nor did it violate defendant's rights under the federal Constitution. The defense never offered to redact the videotape to show only the nonassertive conduct, and, even if it had done so, any error in excluding the admissible portions of the videotape was harmless.

B. Murder Victim's Pregnancy

Before defendant's trial began, the trial court denied his motion to exclude from the penalty phase any evidence that Teresa Holloway was pregnant when defendant murdered her. Defendant contends that the ruling was error because the evidence was irrelevant and unduly prejudicial. He further contends that admission of the evidence violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

[20] The trial court did not err in admitting evidence of the murder victim's pregnancy at the penalty phase as a circumstance of the offense. The Eighth Amendment to the federal Constitution permits the prosecution, in a capital case, to present evidence about the murder victim and the specific harm that the defendant caused as relevant to the jury's penalty decision. **(Payne v. Tennessee (1991) 501 U.S. 808, 827; People v. Harris, supra, 37 Cal.4th at p. 351.)** In California, the prosecution ***131** may introduce evidence of the specific harm caused by a defendant's crime at the penalty phase in aggravation as a circumstance of the crime (**§ 190.3**, factor (a)). **(People v. Panah, supra, 35 Cal.4th at p. 494; People v. Fierro (1991) 1 Cal.4th 173, 235.)**

Defendant argues that evidence of the pregnancy was irrelevant because, although the prosecution presented evidence that Terry Holloway told him she was pregnant, there was also uncontradicted evidence that he did not believe it. This court has concluded, however, that facts concerning the victim that are admissible at the penalty phase of a capital trial as circumstances of the crime are not limited to those known to or

reasonably foreseeable by the defendant at the time of the murder. (**People v. Pollock (2004) 32 Cal.4th 1153, 1183**; accord, **People v. Roldan, supra, 35 Cal.4th at p. 732.**)

[21] We also reject defendant's argument that the trial court abused its discretion by not excluding the pregnancy evidence as unduly prejudicial. We have explained the parameters of the trial court's discretion in these situations in this way: "'On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (**People v. Edwards, supra, 54 Cal.3d at p. 836**, quoting **People v. Haskett (1982) 30 Cal.3d 841, 864**; accord, **People v. Panah, supra, 35 Cal.4th at pp. 494-495**; see also **People v. Pollock, supra, 32 Cal.4th at 1180** [evidence admissible if it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case"].) That in murdering Teresa Holloway defendant also terminated the life of a healthy 17-week-old fetus she was carrying was part of the harm caused by defendant's crime and thus was a legitimate, though emotional, consideration for the jury in making its penalty decision. We note also that defendant does not challenge the manner in which the evidence was presented, and we conclude it was not presented in an unnecessarily inflammatory way. Therefore, we reject defendant's claim that the trial court abused its discretion in admitting evidence of the victim's pregnancy.

C. Victim Impact

[22] Defendant contends that admission of detailed and emotional testimony about the impact of Teresa Holloway's murder on members of her family rendered his penalty trial unfair and unreliable, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the ***132** federal Constitution. He further contends that **section 190.3**, factor (a), which permits introduction of victim impact evidence as a circumstance of the crime, is unconstitutionally vague, and that retroactive application of case law allowing use of this evidence violates federal constitutional principles of ex post facto and due process.

We have rejected claims that **section 190.3**, factor (a), is unconstitutionally vague insofar as it permits introduction of victim impact evidence as a circumstance of the crime (**People v. Wilson, supra, 36 Cal.4th at p. 358**; **People v. Boyette (2002) 29 Cal.4th 381, 445, fn. 12**), and that use of victim impact evidence in trials for capital crimes committed before the United States Supreme Court's decision in **Payne v. Tennessee, supra, 501 U.S. 808**, violates federal constitutional principles of ex post facto and due process (**People v. Brown (2004) 33 Cal.4th 382, 394-395**). Defendant does not persuade us to reconsider these decisions.

Nor are we persuaded that the trial court erred in failing to exclude victim impact testimony that defendant claims was overly emotional or irrelevant. Three witnesses testified to the impact of Teresa Holloway's murder on members of her family. Carol Holloway, Teresa Holloway's mother-in-law, testified primarily about the impact of the murder on Teresa's young daughter, but also about its impact on herself. James and Joan Cucinotta, Teresa's parents, testified mainly about the impact of the murders on themselves, but also about its impact on their other two children and on their grandchild. The testimony of these three witnesses was relatively brief, comprising just 25 pages in the reporter's transcript. During their testimony, the defense made no objections to any questions put to the witnesses, nor did the defense move to strike any of the answers. During a break in proceedings immediately after the testimony of Carol Holloway, however, the defense moved for a mistrial or in the alternative to preclude any further victim impact testimony. Defense counsel pointed out that as the jury was leaving the courtroom for the break, four of the jurors were "very visibly crying." The trial court denied the motions, although it agreed with defense counsel that at least two of the jurors had been in tears, and the trial court added that defendant had been "crying and sobbing" as well. Later, out of the jury's presence, the trial court observed for the record that during the testimony of Teresa Holloway's parents it had been watching the four jurors that defense counsel had previously identified as crying and that it did not notice "nearly as much emotional response on their part, frankly."

As examples of testimony that was irrelevant, defendant cites, among other things, Joan Cucinotta's testimony that her mother died of cancer shortly after Teresa Holloway's death and that her husband lost his job two weeks after *133 Holloway's death. By failing to make timely objections during the witnesses' testimony, defendant forfeited the claim that any of the victim impact evidence was irrelevant. (People v. Wilson, supra, 36 Cal.4th at p. 357.) In any event, we are satisfied that all of that testimony was relevant. For example, Joan Cucinotta explained that because she did not want to upset her mother during her final illness, she had pretended that Holloway was still alive, which was "very difficult." And James Cucinotta explained that he lost his job "pretty much because of this [meaning Holloway's death]." Thus, all of this testimony was relevant to explain the direct impact of the murder on Holloway's family members.

Defendant provides examples of testimony he considers overly emotional. In the testimony of Teresa Holloway's mother, Joan Cucinotta, defendant cites, among other things, her statements that "there is nothing worse to me than the death of a child," that she lunged at and wanted to hit the detective who told her Holloway was dead, that she visits Holloway's grave every week and at first she would "cry, sobbing, cry and cry, throw [her]self on the grave," and that Holloway's daughter, when she visits the grave, "says a prayer and kisses her [mother's] picture." In the testimony of Holloway's father, James Cucinotta, defendant cites, among other things, his statements that he and his wife visit Holloway's grave every week, that they "couldn't take a look at her [Holloway] for the last time because of the condition that she was in . . . [a]nd of course she'd laid out in the road for a couple days," that while he was making the funeral arrangements for Holloway he

"had to stuff everything" (meaning suppress his emotions) and "because of that stuffing, [he] started to do a lot of inappropriate things," his "drinking got out of hand," and he "had to finally go to a treatment center and get that taken care of," that as a result of Holloway's death his son, who was 34 years old, was "not the same anymore" and was "in a recovery home here in San Diego," and that during the first year after Holloway's death he and his wife "didn't even have a holiday in the house," they "didn't have a turkey for Thanksgiving . . . didn't have a Christmas tree for Christmas."

This testimony was not dissimilar from, or significantly more emotion-laden than, other victim impact testimony that has been held admissible. For example, in **Payne v. Tennessee, supra, 501 U.S. 808**, the defendant was convicted of murdering a 28-year-old woman and her two-year-old daughter. At the trial, when asked how the woman's three-year-old son had been affected by the murders of his mother and sister, the boy's grandmother replied: "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie." (**Id. at pp. 814-815.**) In **People v. Harris, supra, 37 Cal.4th 310**, the murder victim's mother "described how she learned of the murder, and of the emotional and financial *134 costs involved in planning and attending the funeral." (**Id. at p. 328;** see also **id. at pp. 351-352** [holding this evidence properly admitted].) In **People v. Panah, supra, 35 Cal.4th 395**, the murder victim's father testified that before the victim's death, her 16-year-old brother "was the family athlete, and was a '4.0 student,' but, following her death, his grades deteriorated, 'he is drinking a lot and doing drugs,' and would not talk about his sister but 'kept it all inside himself,' and refused to go to counseling." (**Id. at p. 495.**) We concluded that this testimony was "neither irrelevant nor prejudicial but, in context, depicted the 'residual and lasting impact' he 'continued to experience' as a result of [the victim's] murder." (**Ibid.**) In **People v. Boyette, supra, 29 Cal.4th 381**, a murder victim's father "testified and related how close he was with the victim, how her eight-year-old son had said he wanted to die so he could be with his mother, how her six-year-old son had nightmares and would telephone wanting to know where his mother was, and how [the victim] had been in a drug rehabilitation program and had turned her life around." (**Id. at p. 440;** see also **id. at p. 444** [holding the evidence was properly admitted].) As in these cases, we conclude that the victim impact evidence here "did not surpass constitutional limits." (**Id. at p. 444.**)

The record does not support defendant's suggestion that after hearing the victim impact testimony the jurors were so overwhelmed by emotion that they were unable to make a rational determination of penalty. Of particular significance, the jury deliberated on penalty for five days before reaching its verdict. The length of their deliberations rather strongly implies that, rather than rushing to judgment under the influence of unbridled passion, the jurors arrived at their death verdict only after a full and careful review of the relevant evidence and of the legitimate arguments for and against the death penalty.

D. Jail Assault

Defendant contends that the trial erred in overruling his objections to admission of evidence of his assault on Steven Baldwin, and that this error violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

On April 14, 1994, the prosecution notified defendant that it intended to introduce in aggravation evidence of defendant's assault on Steven Baldwin, which had occurred in July 1991, soon after defendant's arrest. The defense moved to exclude evidence of the incident on the ground that the notice was untimely. After a hearing, the trial court denied the motion without prejudice to its renewal if the trial reached the penalty phase.

Defendant renewed the motion to exclude after the jury returned its guilt verdicts and made its special circumstance finding. In support of the motion, ***135** defendant informed the court that jail documents listing the inmates who were housed in the module where the assault occurred and the employees who worked in that module had been destroyed on or before July 1993, although a report relating to the incident had been preserved. The trial court denied the renewed motion to exclude, rejecting defendant's argument that, in light of the document destruction, use of the incident in aggravation would violate his constitutional right to due process of law. Defendant contends the trial court erred in denying the motions to exclude.

[23] "**Section 190.3**, factor (b) provides for the admission, during the penalty phase of a capital trial, of evidence of any criminal activity by the defendant involving the use or attempted use of force or violence." (***People v. Kraft* (2000) 23 Cal.4th 978, 1070.**) **Section 190.3**, factor (b), imposes no time limitation on the introduction of unadjudicated violent crimes; rather, it permits the jury to consider a capital defendant's criminally violent conduct occurring at any time during the defendant's life. (***People v. Barnett* (1998) 17 Cal.4th 1044, 1174; *People v. Williams* (1997) 16 Cal.4th 153, 233.**) Thus, evidence of violent criminal activity is admissible even though prosecution of the crime would be time-barred (***People v. Williams, supra*, at p. 233**), the right to a speedy trial is not implicated (***People v. Rodrigues* (1994) 8 Cal.4th 1060, 1161**), and the defense of laches is not available (***People v. Koontz* (2002) 27 Cal.4th 1041, 1087-1088**). As we have explained, the remoteness in time of a prior incident "goes to its weight, not to its admissibility." (***People v. Catlin* (2001) 26 Cal.4th 81, 172.**) Defendant asks us to reconsider these decisions, but he does not persuade us to do so.

Here, as defendant concedes, defendant's assault on Steven Baldwin was not remote in time; indeed, it occurred *after* the charged capital offense, the murder of Teresa Holloway. Defendant nonetheless contends that the trial court should have excluded evidence of the incident because the prosecutor's lack of diligence in discovering the incident and in providing notice of his intention to offer evidence of the incident in aggravation resulted

in the destruction of relevant jail records, thereby compromising defendant's ability to defend against the charge.

The prosecutor told the trial court that he first learned of the incident in December 1993 during an interview of Steven Baldwin while preparing the case for trial. Although defendant argues that the prosecutor *could have* discovered the incident earlier, he cites no authority for the proposition that a prosecutor in a death penalty case has an obligation to promptly and diligently search for all available aggravating evidence, or that, if such a duty ***136** exists, exclusion of evidence is an appropriate and lawful sanction for its violation. Thus, defendant fails to persuade us that he suffered any legally cognizable harm as a result of the prosecution's failure to discover the incident at an earlier time.

[24] The prosecution is required to notify a capital defendant of its intended penalty phase evidence "within a reasonable period of time as determined by the court, prior to trial." (**§ 190.3**.) Notice provided before jury selection begins is generally considered timely, and the purpose of the notice provision is satisfied if the defendant has a reasonable chance to defend against the charge. (***People v. Stitely, supra*, 35 Cal.4th at p. 562.**) Here, the prosecutor gave notice to defendant of his intention to introduce evidence of the Baldwin assault 11 days before jury selection began. Defendant then received, or had already received, a report that described the incident and included the names of two inmates, in addition to Baldwin and defendant, who had been present in the module and were questioned about the incident. The trial court did not abuse its discretion in concluding that defendant received timely and adequate notice.

[25] Defendant also argues that the incident was inadmissible because it did not constitute a crime by defendant. Evidence of other criminal activity introduced in the penalty phase under **section 190.3** factor (b), must demonstrate "the commission of an actual crime, specifically, the violation of a penal statute." (***People v. Phillips (1985) 41 Cal.3d 29, 72***; see also ***People v. Kipp, supra*, 26 Cal.4th 1100, 1133; *People v. Boyd (1985) 38 Cal.3d 762, 772.***) The prosecution did not argue that defendant personally assaulted Baldwin, but instead that he aided and abetted an assault on Baldwin by loudly referring to Baldwin as a "snitch," knowing that snitches are commonly the targets of assault in jail. "[A]n aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' " (***People v. Prettyman (1996) 14 Cal.4th 248, 259***, quoting ***People v. Beeman (1984) 35 Cal.3d 547, 561.***) On the evidence presented, the jury could reasonably conclude that defendant, acting with the intent to have Baldwin assaulted, and with knowledge that other inmates would likely do so if told that Baldwin was a snitch, encouraged or instigated the assault by openly announcing to the other inmates that Baldwin was a snitch. Defendant's remark to Baldwin after the assault ("You can't be in this cell") supports an inference that defendant orchestrated the assault to achieve his own purposes, intimidation of Baldwin and his removal from the module.

Therefore, we reject defendant's argument that the evidence was insufficient to show that defendant violated a penal statute. *137

E. Weapon Possession in Jail

In regard to the prosecution's evidence at the penalty phase that defendant illegally possessed a weapon in the county jail, defendant claims, first, that the evidence was insufficient to establish that the weapon he possessed was a deadly weapon within the meaning of **section 4574**; second, that the trial court misinstructed the jury regarding the elements of a **section 4574** violation; and, third, that the trial court should not have permitted the jury at the penalty phase to consider the **section 4574** violation as an aggravating circumstance because the offense does not necessarily involve an actual or implied threat of violence.

[26] **Section 4574** makes it a felony for a county jail inmate to possess a "deadly weapon." Within the meaning of this penal statute, an object is a deadly weapon if it has a reasonable potential of inflicting great bodily injury or death. (***People v. Pollock, supra, 32 Cal.4th at p. 1178***; see ***People v. Hughes (2002) 27 Cal.4th 287, 383.***)

Arguing that here the prosecution's evidence was insufficient to establish that the weapon he possessed had a reasonable potential of inflicting great bodily injury or death, defendant asserts that the evidence did not show which of several weapons he possessed and that some of the weapons, such as soap bars in socks, were incapable of inflicting great bodily injury. We disagree with defendant's characterization of the evidence.

Mark Thiede testified, on direct examination, that on September 5, 1993, he was working as a deputy sheriff at the county jail in San Diego when he saw groups of Black and Hispanic inmates facing off against each other in one of the tanks. Several Hispanic inmates had steel poles or posts that they were slamming against the steel bunks and using to make stabbing motions to keep the Black inmates in another part of the room. He later wrote a report identifying four inmates "who possessed weapons." Defendant was one of the four. Asked to describe "with a little more particularity what type of weapons . . . these inmates were possessing," Thiede replied: "The weapons that was used in the riot, they're bars about between 12 and 18 inches long, quarter inch in diameter. There was also socks. They take a sock and they put two, one or two bars of soap in the socks to make it weighted. You can use that as a clubbing instrument. Thin pieces about a half inch wide, five or six inches long with tape on the end that you can sharpen down to a point. Those are I believe the weapons *that were found.*" (Italics added.)

Defendant argues that from this testimony the jury could not determine which weapon, of the several that Deputy Thiede described, he had possessed during the riot, and thus the jury could not determine whether the weapon *138 satisfied the **section 4574** definition of a deadly weapon. The more likely interpretation of this testimony, we think,

is that defendant was one of four inmates that Thiede saw wielding the steel poles or posts and that the other weapons were merely found during a later search of the tank. Moreover, any confusion or uncertainty in this regard was dispelled by cross-examination. Defense counsel asked: "You never saw Mr. Jurado, or the person that you identified as Mr. Jurado, *that is, the person in the tank that you said had the pipe*, you never saw that individual strike anybody, did you?" (Italics added.) Thiede replied, "No, I didn't." Thus, the evidence before the jury sufficiently established that defendant possessed one of the steel objects 12 to 18 inches in length--variously described as poles, posts, bars, and pipes--that the inmates were slamming against bunks and using to make stabbing motions. As defendant does not dispute, an object of this sort is capable of inflicting great bodily injury or death, and thus it is a deadly weapon within the meaning of **section 4574**.

We next consider defendant's claim that the trial court misinstructed the jury regarding the elements of a **section 4574** violation. Specifically, the trial court instructed the jury that in reaching the penalty verdict it could consider evidence that defendant had engaged in criminal activity that involved the express or implied use of force or violence or the threat of force or violence. The court then stated: "And indeed, evidence has been introduced during this phase of the trial for the purpose of showing and proving that [defendant] committed the following criminal activity: . . . possession of a weapon in the county jail." Defendant contends that this instruction was inaccurate or at least misleading because it referred merely to "a weapon" rather than "a deadly weapon."

As defendant recognizes, we considered a similar claim in **People v. Hughes, supra, 27 Cal.4th 287**. There, the prosecution introduced evidence at the penalty phase of a capital trial that the defendant while in a county jail had possessed "a four-inch, slightly bent but straightened, hard, sharp object with a loop at the end." (**Id. at p. 381**.) The trial court instructed the jury that " 'evidence has been introduced for the purpose of showing that the defendant has committed the following criminal act: possession of a sharpened instrument while confined in the county jail . . . ' " (**Id. at p. 382**.) We concluded that the trial court had erred in instructing in these terms because possessing a sharpened instrument while confined in the county jail "was, at the time, and without more (that is, a showing that the object was a deadly weapon), not a crime." (**Id. at p. 383**.) The trial court's instruction "should have used the words 'deadly weapon' rather than 'sharpened instrument,' " an error we characterized as "minor." (**Id. at p. 384**.)

We also concluded, beyond a reasonable doubt, that the defendant was not prejudiced by the error. We observed that the object the defendant had ^{*139} possessed qualified as deadly weapon under **section 4754**. (**People v. Hughes, supra, 27 Cal.4th at p. 383**.) We reasoned: "To find prejudice, we would need to hypothesize two things, which tend to be self-canceling: (i) that the jury would consider the shank, although a sharpened instrument, not to be a deadly weapon, and (ii) that despite such a finding, the jury nonetheless considered the evidence to be so important that it affected the penalty determination. [¶] It is quite unlikely that the jury would find the object to be a sharpened instrument but not a deadly weapon. But if the jury made that improbable finding, thus

minimizing the seriousness of the evidence, it is also quite unlikely that it would then consider the evidence to be so important as to control, or even have a significant impact upon, the penalty determination." (Id. at p. 384; see also People v. Pollock, supra, 32 Cal.4th at p. 1179.)

Similarly here, we conclude that defendant was not prejudiced by the trial court's description of the alleged criminal conduct as defendant's possession of a "weapon" rather than a "deadly weapon." It is quite unlikely that the jury would view the object that defendant possessed--a steel rod or bar 12 to 18 inches in length--as a weapon but not a deadly weapon. It is also quite unlikely that if the jury made such an improbable finding, it would then nonetheless treat the incident as sufficiently aggravating to have affected the penalty verdict. The combination of these improbabilities persuades us beyond a reasonable doubt that the instructional error was harmless.

Defendant also argues that the instruction was erroneous insofar as it required the jury to treat defendant's possession of a deadly weapon in county jail as aggravating without making its own determination that the conduct involved actual or threatened force or violence. Defendant argues that the instruction precluded the jury from considering any possible innocent explanation for his weapon possession. We have previously rejected this argument (People v. Gray, supra, 37 Cal.4th at p. 235; People v. Monterroso (2004) 34 Cal.4th 743, 793), and defendant does not persuade us to reconsider these decisions.

Finally, we reject defendant's argument that the trial court should not have permitted the jury at the penalty phase to consider the section 4574 violation as an aggravating circumstance because the offense does not necessarily involve illegal violence. This court has consistently concluded, to the contrary, that a prisoner's possession of a weapon is conduct that necessarily involves an actual or implied threat to use force or violence. (E.g., People v. Hines (1997) 15 Cal.4th 997, 1057; People v. Ramirez (1990) 50 Cal.3d 1158, 1186-1187; People v. Harris (1981) 28 Cal.3d 935, 962-963.) "The trier of fact is free to consider any 'innocent explanation' for defendant's possession of the item, but such inferences do not render the *140 evidence inadmissible per se." (People v. Tuilaepa (1992) 4 Cal.4th 569, 589.)

F. Lack of Remorse

Defendant claims the death judgment must be reversed because the prosecutor improperly urged the jury to consider defendant's lack of remorse after the crime as an aggravating circumstance.

During his argument to the jury at the conclusion of the penalty phase, the prosecutor began to read the testimony of Christie Medlin about statements defendant had made to her during telephone calls after the murder of Teresa Holloway. Defense counsel interrupted and asked to approach the bench, where he argued that defendant's

postoffense statements were "inappropriate evidence in aggravation to show lack of remorse," and that the court should not permit the prosecutor to make an argument urging the jury to view defendant's postoffense lack of remorse as aggravating. The court overruled the objection, noting that defendant's postoffense statements could properly be used in aggravation insofar as they constituted circumstantial evidence of his state of mind during the crime. The prosecutor then quoted defendant's postoffense statements that "the bitch is gone" and that he did not care if he had to spend the rest of his life paying for it. The prosecutor argued that this showed "the state of mind of [defendant] at or about the time this crime occurred as to his idea of punishment."

The prosecutor then discussed evidence showing that defendant knew that killing Teresa Holloway was wrong. The prosecutor mentioned that there were seven factors in aggravation and mitigation that the jury would be asked to consider, and that the jury was not merely to count the factors on each side but was to weight them to determine their "convincing force." As factors in aggravation, the prosecutor mentioned and discussed the circumstances of the crime, including the victim impact testimony, the presence or absence of criminal activity involving force or violence, and the presence or absence of prior felony convictions. The prosecutor mentioned and discussed whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; whether at the time of the offense defendant had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and whether that capacity was impaired by intoxication; defendant's age at the time of the crime; and "the last factor," which was "any other circumstances which extenuate the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence of less than death." *141

In connection with this last factor, the prosecutor discussed the evidence that the defense had presented during its case in mitigation. During this discussion, the prosecutor made this argument, which defendant now challenges: "I listened as the defense witnesses testified yesterday for any evidence or testimony pertaining to the victim. And there was. There was. The defendant's grandmother testified, bless her heart, that she not only prays for [defendant] but she prays for the victim and the victim's family. What a nice thing. What a human thing. What a nice person from a nice family. [¶] When she testified to that I kind of thought back in the evidence that was presented in the guilt phase and the penalty phase, about the defendant and his view of the victim. After the murder of Terry Holloway, she had only been in the drainage ditch a matter of minutes, what was [defendant] doing at Christie Medlin's house? He was playing darts. What was he doing the next day with Denise Shigemura while the victim still lay cold in the drainage ditch? He was having pizza and beer. [¶] And after he got arrested and he talked to Christie Medlin on the telephone, how did he feel about the victim at that time, right around the time of the crime? 'On, on, the bitch is gone.' [¶] And when he identified Steve Baldwin as a snitch in the county jail, what were his words? 'That's the guy who told the cops I killed the bitch.' [¶] What's his grandmother doing during this time? She's praying for the

victim. [¶] Do you see what I mean? He's not like them. He doesn't share in their goodness, he doesn't share in their compassion, he doesn't share in their humanity. [¶] I think those statements that he made in the presence of Baldwin and in the presence or on the telephone to Christie Medlin tell you who the real Robert Jurado is. All right out there, very clear and open for you to understand and evaluate."

[27] Although a prosecutor in a capital case may not argue that a defendant's postcrime lack of remorse is an aggravating factor, a prosecutor may, as the prosecutor did here, argue that lack of remorse is relevant to the evaluation of mitigating factors. (**People v. Pollock, supra, 32 Cal.4th at p. 1186; People v. Mendoza (2000) 24 Cal.4th 130, 187.**) The prosecutor here never suggested that lack of remorse was an aggravating factor, and he did not refer to lack of remorse during the portion of his argument devoted to the discussion of aggravating factors. Instead, the challenged argument occurred during the course of the prosecutor's review of the defense case in mitigation and the potential mitigating factors. A reasonable juror likely would have understood the prosecutor's argument to be that defendant's failure to demonstrate any concern for the woman he had killed meant "that remorse was not available as a mitigating factor and also that defendant was not entitled to the jury's sympathy." (**People v. Pollock, supra, at p. 1186.**)

*142

G. Incidents Between Defendant and His Mother

Defendant argues that the trial court should have exercised its discretion to exclude, as inflammatory and lacking in probative value, the evidence that on one occasion he pushed and spit on his mother, and on another occasion he approached with raised arm as if to strike her and threatened to kill her and shoot up the house. He further argues that admission of this evidence violated his statutory and due process right that the penalty evidence admitted against him be limited to evidence relevant to a factor listed under **section 190.3**, and his constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to due process, a fair penalty trial, and reliability in the determination of capital punishment.

We reject the argument that defendant's conduct toward his mother was not admissible under **section 190.3**, factor (b), as criminal activity that involved the use or attempted use of force or violence or the express or implied threat to use force or violence. Defendant does not argue that his conduct did not violate a penal statute, nor does he argue that it did not involve the use or attempted use of force or violence or the express or implied threat to use force or violence. Instead, he argues that the evidence was "not the kind of evidence that justified sentencing [him] to execution," because it is "unfortunately not that uncommon for a teenager or a nineteen-year-old to have such confrontations with his parents." But the admissibility of **section 190.3**, factor (b), evidence does not depend on

how common or uncommon the criminal conduct is, or whether viewed in isolation it would be sufficient to justify a death sentence. The evidence met all statutory requirements for admission under **section 190.3**, factor (b).

We reject also defendant's argument that the trial court should have exercised its discretion under **Evidence Code section 352** to exclude the evidence on the ground that its probative value was substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. As we have explained, **Evidence Code section 352** does not give the trial court discretion to exclude all evidence of a criminal incident that is admissible under **section 190.3**, factor (b). (**People v. Cunningham (2001) 25 Cal.4th 926, 1017**; **People v. Anderson (2001) 25 Cal.4th 543, 586**; **People v. Sanders (1995) 11 Cal.4th 475, 542-543.**)

Nor are we persuaded by defendant's constitutional arguments, which are based on the unrealistic perspective of viewing this evidence in isolation from all the other evidence offered in aggravation and mitigation at the penalty phase, including the circumstances of the capital offense. In the context of the entire penalty determination process, we find nothing improper or unfair about ***143** allowing the jury to consider each occasion during defendant's life when he violated a penal statute by conduct that involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

H. Reasonable Doubt Standard

Defendant claims that his death sentence must be reversed because the trial court did not instruct the jurors to return a death verdict only if they were persuaded beyond a reasonable doubt that the aggravating circumstances were so substantial in comparison with the mitigating circumstances that the death penalty was justified. As defendant acknowledges, this court has held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, that they outweigh mitigating factors, or that death is the appropriate sentence." (**People v. Fairbank (1997) 16 Cal.4th 1223, 1255.**) Defendant urges us to reconsider this holding in light of the United States Supreme Court's decisions in **Apprendi v. New Jersey (2000) 530 U.S. 466**, **Ring v. Arizona, supra, 536 U.S. 584**, and **Blakely v. Washington (2004) 542 U.S. 296**. We have already done so, and we have concluded that these decisions do not require us to alter our previous conclusion on this point. (**People v. Cornwell (2005) 37 Cal.4th 50, 103-104**; **People v. Morrison (2004) 34 Cal.4th 698, 730-731.**)

I. Unanimity on Aggravating Circumstances

Defendant contends that the trial court erred in not instructing the jury that unanimity was required before a particular circumstance could be considered aggravating. As defendant acknowledges, this court has consistently rejected this argument (e.g., **People v. Gray, supra, 37 Cal.4th at p. 236**; **People v. Morrison, supra, 34 Cal.4th at pp. 730-731**), and he fails to persuade us to reconsider these holdings.

J. Aggravating and Mitigating Circumstances

Contrary to defendant's contention, "[t]he trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors." (**People v. Morrison, supra, 34 Cal.4th at p. 730**; accord, **People v. Gray, supra, 37 Cal.4th at p. 237**.) *144

Defendant argues, however, that certain instructions given in this case created an unacceptable risk that the jurors would treat as aggravating a circumstance that could only be mitigating. First, the trial court modified the standard jury instruction on penalty factors, CALJIC No. 8.85. After listing the seven factors that the parties had agreed were relevant to penalty determination in this case, the instruction stated: "The circumstances in the above list which you determine to be aggravating are the only ones which the law permits you to consider." The instruction also stated, however, that "[t]he absence of a statutory mitigating circumstances does not constitute an aggravating circumstance."

Second, during penalty deliberations, the jury sent the trial court a note with this question: "Can we consider the conspiracy to kill Doug Mynatt a 'circumstance of the crime,' as this term is used in CALJIC [No.] 8.85(a)?" The trial court replied: "Yes, it can be considered as a 'circumstance of the crime' under CALJIC [No.] 8.85(a), as either a circumstance in aggravation or mitigation." Defendant suggests that this reply would cause the jury to conclude that it could consider *any* of the statutory factors as either aggravating or mitigating. We disagree. On the same day, the jurors also sent the trial court a

note asking whether **section 190.3**, factor (k), as described in CALJIC No. 8.85 ("Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial") could be either mitigating or aggravating. The trial court replied that this factor was "mitigating only." Thus, no reasonable juror could have been misled into believing that any factor could be either aggravating or mitigating.

K. Absence of Written Findings

Defendant claims that California's death penalty law is unconstitutional because it does not require the jury to make a written statement of findings and reasons for its death verdict. This court has consistently rejected this claim (e.g., **People v. Gray, supra, 37 Cal.4th at p. 236**; **People v. Cornwell, supra, 37 Cal.4th at p. 105**; **People v. Morrison, supra, 34 Cal.4th at pp. 730-731**), and defendant does not persuade us to reconsider these decisions.

L. Cumulative Effect of Errors

Defendant claims that the judgment must be reversed because of the cumulative effect of errors at both the guilt and penalty phases of his trial. Defendant has demonstrated few errors at either phase of the trial, and we ***145** have found each error or possible error to be harmless when considered separately. Considering them together, we likewise conclude that their cumulative effect does not warrant reversal of the judgment.

V. DISPOSITION

The judgment is affirmed.

Kennard, J., with George, C. J., Baxter, J., Werdegarr, J., Chin J., Moreno, J., and Corrigan, J., concurred.

KENNARD, J., Concurring:

In 1993, in a concurring opinion in a noncapital case (**People v. Ceja (1993) 4 Cal.4th 1134**), I expressed a "growing concern" that the definition of lying in wait that this court had earlier adopted in **People v. Morales (1989) 48 Cal.3d 527** "may have undermined the critical narrowing function of the lying-in-wait special circumstance: to separate defendants whose acts warrant the death penalty from those defendant who are 'merely' guilty of first degree murder." (**People v. Ceja, supra, at p. 1147**.) I expressed this concern again in separate opinions in **People v. Hillhouse (2002) 27 Cal.4th 469, 512**, and **People v. Combs (2004) 34 Cal.4th 821, 869**. In none of these cases, however, did I indicate how I would decide this constitutional issue.

During the same period, without writing separately, I have concurred in decisions affirming judgments of death based in part on lying-in-wait special circumstances, including decisions rejecting claims that the lying-in-wait special circumstance is unconstitutional because it does not adequately narrow the class of death-eligible defendants. In each of these cases, however, the issue was not squarely presented because

other special circumstances had been found true and the lying-in-wait special circumstance had no effect on the evidence presented at the penalty phase. (See **Brown v. Sanders (2006) 546 U.S. [126 S.Ct. 884]**; **People v. Combs, supra, 34 Cal.4th 821, 869.**) Since I expressed concern about the lying-in-wait special circumstance in **People v. Ceja, supra, 4 Cal.4th 1134**, this court has not, until now, affirmed a judgment of death in which lying in wait was the only special circumstance. In this case, however, no other special circumstance was alleged, and defendant's eligibility for the death penalty is based solely on the jury's finding that defendant murdered Teresa Holloway while lying in wait. For this reason, I have taken a careful look at the constitutional issue to which I alluded in 1993. *146

Since 1972, the United States Supreme Court has "required States to limit the class of murderers to which the death penalty may be applied." (**Brown v. Sanders, supra, 546 U.S. at p. [126 S.Ct. at p. 889]**.) The court announced that requirement in **Furman v. Georgia (1972) 408 U.S. 238**. Justice White's concurring opinion in **Furman** identified the problem in the death penalty systems of Georgia and other states as the absence of a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (**Id. at p. 313.**) In 1980, Justice Stewart's plurality opinion in **Godfrey v. Georgia (1980) 446 U.S. 420, 427**, converted this description into a requirement: "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' "

Over the ensuing years, the decisions of the United States Supreme Court gradually dispelled the impression that to satisfy the federal Constitution's narrowing requirement only a small percentage of murders may be punishable by death. (See, e.g., **Arave v. Creech (1993) 507 U.S. 463, 475.**) In 1994, the court summarized in rather precise terms the federal Constitution's requirements for death eligibility in a homicide case: "To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase. [Citations.] The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). [Citation.] As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. [Citation.] Second, the aggravating circumstance may not be unconstitutionally vague. [Citations.]" (**Tuilaepa v. California (1994) 512 U.S. 967, 971-972.**) Under California's death penalty law, the special circumstances listed in **Penal Code section 190.2** function as the "aggravating circumstances" making a defendant eligible for the death penalty. (**Brown v. Sanders, supra, 546 U.S. at p. [126 S.Ct. at p. 892]**; **People v. Bacigalupo (1993) 6 Cal.4th 457, 467-468.**)

The lying-in-wait special circumstance (**Pen. Code, § 190.2, subd. (a)(15)**), as this court defined it in **People v. Morales, supra, 48 Cal.3d at page 557**, satisfies the constitutional

requirements that the United States Supreme Court articulated in **Tuilaepa v. California, supra, 512 U.S. 967**. The special circumstance applies only to a subclass of murderers, not to all murderers, and it is not unconstitutionally vague; therefore, it satisfies the federal Constitution's narrowing requirement for a death-eligibility factor. (See **People v. Moon (2005) 37 Cal.4th 1, 44**; *147 **People v. Nakahara (2003) 30 Cal.4th 705, 721**; **People v. Gutierrez (2002) 28 Cal.4th 1083**; see also **Morales v. Woodford (9th Cir. 2004) 388 F.3d 1159, 1174-1178**, cert. den. sub nom. Morales v. Brown (Oct.11, 2005) __ U.S. __ [126 S.Ct. 420]; **People v. Earp (1999) 20 Cal.4th 826, 904-905**; **People v. Sanchez (1995) 12 Cal.4th 1, 60-61**.)

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Shigemura pled guilty to first degree murder and was sentenced to 25 years to life in state prison. Humiston, who was 17 years old at the time of the killing, was tried as an adult, convicted of first degree murder and conspiracy to commit murder, and sentenced to 25 years to life in state prison. (See **People v. Humiston (1993) 20 Cal.App.4th 460, 465**.)

³ On April 27, 1992, the trial court held a hearing to discuss the status of the case. Defense counsel announced that defendant intended to petition this court for review of the Court of Appeal's decision reinstating the special circumstance allegation, and that regardless of the outcome of that effort defendant did not intend to withdraw his guilty pleas. Deputy District Attorney Pettine announced that he had discussed with the district attorney whether to seek the death penalty, and the district attorney said that no decision would be made until defendant decided whether he would withdraw his guilty pleas. Pettine said he would discuss the matter with the district attorney again in light of defendant's decision not to withdraw his guilty plea, but he explained that "all options are still open."

⁴ In some instances, jurors who expressed strong death penalty views on the questionnaire responses were questioned with others who had expressed similar views but out of the presence of jurors who had not expressed such views.

⁵ The Legislature has since amended this subdivision to also allow a defendant to take a conditional examination of a witness whose life is in danger. (Stats. 2005, ch. 305, § 1.) It now reads: "When a defendant has been charged with a serious felony, the people or the defendant may, if the defendant has been fully informed of his or her right to counsel as provided by law, have witnesses examined conditionally as prescribed in this chapter, if there is evidence that the life of the witness is in jeopardy." (**§ 1335, subd. (b)**.)

⁶ Since defendant's trial, the Legislature has amended **section 1336** to include witnesses 65 years of age or older and dependent adults, and to authorize the defendant, as well as the prosecution, to take a conditional examination under subdivision (b). (Stats. 2005, ch. 305, § 2.) Those subdivisions now read: "(a) When a material witness for the defendant, or for the people, is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, or is a person 65 years of age or older, or a dependent adult, the defendant or the people may apply for an order that the witness be examined conditionally. [¶] (b) When there is evidence that the life of a witness is in jeopardy, the

defendant or the people may apply for an order that the witness be examined conditionally." (§ 1336, subds. (a)-(b).)

⁷ Dalton v. Superior Court, supra, 19 Cal.App.4th 1506, is disapproved.

⁸ In full, at the time of defendant's trial, section 1341 read: "If, at the time and place so designated, it is shown to the satisfaction of the magistrate that the witness is not about to leave the state, or is not sick or infirm, or that the life of the witness is not in jeopardy, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place." (Stats. 1985, ch. 783, § 5, p. 2525.) Since defendant's trial, section 1341 has been amended to include witnesses 65 years of age or older and dependent adults. (Stats. 2005, ch. 305, § 4.)

⁹ Brian D. Johnsen was sentenced to death on June 9, 1994, for crimes committed in Stanislaus County.