SUPREME COURT COPY

In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. **VERONICA UTILIA GONZALES,** **Defendant and Appellant.**	S072316 **CAPITAL CASE**

San Diego County Superior Court No. SCD114421
The Honorable Michael D. Wellington, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
ANNIE FEATHERMAN FRASER
Deputy Attorney General
State Bar No. 144662
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2427
Fax: (619) 645-2271
Email: Annie.Fraser@doj.ca.gov
Attorneys for Plaintiff and Respondent

DEATH PENALTY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS

Page

CASES

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

STATUTES

TABLE OF CONTENTS
(continued)

Page

INTRODUCTION

Genny Rojas came to live with her aunt, Veronica Gonzales (Gonzales), her uncle, Ivan Gonzales (Ivan) and their six children in Chula Vista, California, in early 1995. The Gonzales family lived in a two-bedroom apartment. The apartment was cockroach infested, and there was no food or beds. The Gonzaleses were not employed, and did not have enough money to meet their monthly expenses and buy food, but had enough money for their monthly methamphetamine habit. In spite of these living conditions, Gonzales agreed to allow her sister's daughter, Genny, to live with them because her sister could not care for Genny due to her own drug problems.

Within about four months, after being repeatedly tortured, Genny was murdered in the Gonzales home. Gonzales and Ivan placed Genny in a scalding bathtub, causing her toenails and the outer layer of her skin to burn off from her waist to her toes. Although Genny was severely burned, she had a 90 percent chance of survival had she received medical attention. Instead, Gonzales allowed Genny to go into shock and die.

The torture leading up to her fatal injury included the Gonzaleses burning Genny's head with hot water causing a severe burn, burning her face and body with a blow dryer and curling iron, tying her hands together with rope, handcuffing her, pulling her hair out, hanging her from a hook in a closet, strangling her and putting her in a small wooden box in a closet. Genny had injuries all over her small body, including second degree burns to her head that caused hair loss and infection, black eyes, injuries to her ears so deep the cartilage was exposed, and ligature marks from being tied and bound. Gonzales raises numerous claims of error in the guilt and penalty phase, none of which require reversal.

STATEMENT OF THE CASE

On July 25, 1995, the San Diego County District Attorney filed a complaint against Gonzales and her husband, Ivan Gonzales, charging them with the murder of Genny Rojas. (1 CT 1.) On February 27, 1997, the trial court granted the Gonzaleses request to sever their trials. (30 RT 3311.)[1]

On December 17, 1997, the San Diego County District Attorney filed an amended information charging Gonzales with the murder of Genny Rojas. (Pen. Code, § 187, subd. (a).) The information alleged two special circumstances: (1) that the murder was intentional and involved the infliction of torture, within the meaning of Penal Code section 190.2, subdivision (a)(18); and (2) that the murder was committed while Gonzales was engaged in the commission and attempted commission of the crime of mayhem, within the meaning of Penal Code section 190.2, subdivision (a)(17). (10 CT 2120.) On May 4, 1998, a jury found Gonzales guilty of first degree murder, and found both special circumstances to be true. (16 CT 3518-3520.)

At the conclusion of the penalty phase, the jury recommended Gonzales be sentenced to death. (16 CT 3721.) On July 20, 1998, the trial court denied Gonzales' motion for new trial and for modification of the verdict under Penal Code sections 190.4, subdivision (7) and 1385. (93 RT 12193, 12229.) The court sentenced Gonzales to death. (93 RT 12235.)

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

---

[1] Ivan Gonzales, in his separate trial, was also sentenced to death, and is the subject of a separate automatic appeal pending before this Court in Case No. S067353.

STATEMENT OF THE FACTS

A. The Gonzales Home

Beginning in early 1995, Genny lived with the Gonzaleses in their small apartment on Hilltop Drive in Chula Vista. (13 CT 2943; 56 RT 6066; 57 RT 6147.) Genny's mother, Mary Rojas, was in drug rehabilitation and her father was in custody for child molestation. (13 CT 2940-2941; 57 RT 6103-6104; 72 RT 9042, 9087.) Rojas's other five children were with Gonzales and Rojas's mother, Utilia Ortiz. (13 CT 2934, 2937.) Gonzales said she agreed to care for Genny because her mother was getting old. (13 CT 2942.) She told her mother she would take good care of Genny. (13 CT 2943.)

The Gonzales apartment had two bedrooms. (13 CT 2969.) There were no beds or furniture in either of the bedrooms. (56 RT 6076; 57 RT 6169, 6177; 68 RT 8094.) The six Gonzales children slept in one bedroom on the floor with blankets. (15 CT 3317, 3357-3358, 3387; 68 RT 8094.) Gonzales and Ivan slept in the living room. (14 CT 3040; 15 CT 3317.) Genny slept in the other bedroom on the floor by the wall, in the closet, or in the bathroom. (15 CT 3317, 3340, 3387; 67 RT 7947-7948.) She slept with a dirty blue blanket, containing blood, urine and feces; the blanket smelled and was described by Gonzales as "disgusting." (57 RT 6186-6187; 66 RT 7647; 67 RT 7894, 7948; 14 CT 3041.)

The apartment was dirty and cockroach infested. (65 RT 7455, 7460; 66 RT 7647; 68 RT 8091, 8094.) It smelled. (71 RT 8760-8761.) Gonzales claimed she could not clean the apartment because she was using drugs and was "pretty out of it." (65 RT 7455; 68 RT 8091.) There were clothes and dirty dishes everywhere. (66 RT 7647, 7679; 67 RT 7940.) In 1995, Gonzales and Ivan's drug expenses were about $200 per month. (66 RT 7551.) Their electricity had been cut off. (66 RT 7551.) At times, the

Gonzaleses did not have enough money for food, and had to borrow food from neighbors or Ivan's parents. (66 RT 7554.)

There was no food in the house for the children on the day Genny was murdered except bread that Ivan bought when he went to the store to buy beer after Genny was fatally burned. (57 RT 6238; 66 RT 7641; 67 RT 7757.) The toilet was not working properly. (67 RT 7757; 68 RT 7993.) When the police officers came to the apartment, there were feces in the toilet. (67 RT 7757.) One neighbor testified that Gonzales, Ivan and the children were all dirty and smelled. (71 RT 8760.)

B. The Murder

Patti Espinoza lived across the courtyard from the Gonzaleses, in apartment No. 1. (60 RT 6706, 6714.) Her sister, Naomi Espinoza, and a niece, Marisa Lozano, lived in apartment No. 4. (60 RT 6704, 6715, 6723.) In the early evening hours of July 21, 1995, Lozano was with some cousins near her aunt Naomi's apartment. (60 RT 6724-6725; 72 RT 8985.) It was still light out but was getting dark.[2] (60 RT 6725.) They heard a child crying in Gonzales's apartment. (60 RT 6725; 72 RT 8985.) After a few seconds of crying, Lozano heard a bang as if something hit a wall pretty hard. (60 RT 6726, 6739-6740; 72 RT 8985.) Ivan looked out the window, then closed the window and shut the curtains. (60 RT 6726-6727; 72 RT 8985.) A couple of minutes later, Ivan came out of the apartment, slammed the door behind him and left the apartment complex, walking towards Hilltop Liquor. (60 RT 6726, 6728-6729; 72 RT 8985.) When Ivan left, he looked "pissed off." (60 RT 6729; 72 RT 8986.) Lozano went back to her apartment prior to her 8:00 p.m. curfew. (60 RT 6715, 6730.) Ivan went to Hilltop Liquor twice on the evening of Genny's murder. (58 RT 6364, 6367-6368; 60 RT 6973-6975.)

---

[2] The sun set at 7:55 that evening. (60 RT 6752.)

No more than an hour after Lozano went home, she heard a commotion. (60 RT 6731.) Naomi heard her nephew's girlfriend, Denise, call from downstairs. (60 RT 6706-6707.) Naomi went downstairs and saw Ivan carrying Genny. She asked him what happened and Ivan said Genny had been burned with hot water because she didn't know how to regulate the water. (60 RT 6707.) Naomi told him to bring Genny into Patti's apartment. (60 RT 6707-6708.) Ivan brought Genny into Patti's apartment and put her on the floor. (60 RT 6708.)

Naomi was a trained Certified Nurse's Assistant and knew how to perform CPR. (60 RT 6708.) Genny's skin was very cold and dry; she was not breathing and did not have a pulse. (60 RT 6708-6709, 6711, 6715.) Nonetheless, Naomi and her nephew attempted CPR. (60 RT 6710-6711.) Naomi believed Genny had been dead for a while. (60 RT 6711.) Naomi told her husband to call 911. (60 RT 6711.) Gonzales told Naomi (in front of other witnesses) not to call 911 because they would get blamed for Genny's death. (60 RT 6712, 6732; 72 RT 8991.) Naomi's husband called 911 in spite of Gonzales's request not to do so. (60 RT 6712.)

At 9:20 p.m. Chula Vista Police Officer William Moe and Sergeant Barry Bennett responded to apartment No. 1. (56 RT 6065; 58 RT 6301.) As they quickly approached, they saw Gonzales standing outside the apartment. (56 RT 6066-6067; 58 RT 7302-6303.) Gonzales told the officers she put the baby in the bathtub and subsequently found the baby was not breathing. (56 RT 6067.)

They quickly assessed Genny. (58 RT 6304.) She had visible signs of trauma on her body and was pulseless and lifeless. (56 RT 6070, 6305; 58 RT 6305.) She had injuries on her scalp, including open wounds on the top of her head, patches of missing hair, signs of facial trauma, scrapes and a visible ligature mark under her throat. (58 RT 6306.) Genny was cold and dry. (56 RT 6070-6072, 58 RT 6305.) She was wearing only a dry

shirt. (56 RT 6071, 58 RT 6305.) She was obviously dead, so Officer Moe did not attempt CPR. (56 RT 6070; 58 RT 6305, 6306-6307.) Her body felt rigid; Sergeant Bennett believed rigor mortis was setting in. (58 RT 6307.) A few minutes after the police officers arrived, the fire department personnel arrived. (58 RT 6316, 6344.) An emergency medical technician (EMT) immediately assessed Genny and found she had no pulse and was cold. (58 RT 6342, 6346-6347.) Nevertheless, the EMT tilted Genny's head back in an attempt to establish an airway. Her teeth were tightly clenched and her jaw was locked, which is a sign of rigor mortis. (58 RT 6347-6348.) He did not perform CPR because it was obvious she had been "down" for too long and it would be futile given Genny was pulseless, and had rigor and cold skin. (58 RT 6352.)

Genny had a deep, thermal burn from her chest to her toes. (56 RT 5914, 5952, 5956.) It was a third degree[3] immersion burn caused by being dipped into hot water. (56 RT 5956-5957.) An immersion burn is one caused by contact with a hot liquid in which some of the body parts are dipped or entered into a basin of hot liquid. (59 RT 6562.) Genny had a sharply demarcated burn where the superficial layer of her skin had burned off. (56 RT 5952; 59 RT 6563.) Her skin was missing from the waist down, and her toenails had come off. (56 RT 5990.) There was residue in the bottom of the tub that was later determined to be skin and a toenail. (57 RT 6156, 6158, 6276; 62 RT 7003.) Genny had other injuries on every part of her body, with particularly noticeable injuries on her face. (56 RT 5914.)

---

[3] A first degree burn causes superficial damage to the skin, resulting in reddening. A second degree burn causes damage that extends through the first layer of cells to form a blister. A third degree burn causes damage that extends into the dermis, which is the layer of connective tissue beneath the skin cells. (56 RT 5987.)

Genny experienced pain when she was burned. (59 RT 6576; 62 RT 7004.) There is a reflex withdrawal from a painful stimulus. (59 RT 6562.) Genny brought her legs up to protect herself as much as she could, but she could not get out of the water. (56 RT 5957.) If a child is held in hot water, there will be areas of sparing. (59 RT 6563.) Sparing is where an extensive area of burn is uniform with an area within the burn that is not burned, like an island of untouched skin. (56 RT 5921; 59 RT 6559.) There were two diamond shaped areas that were not burned behind Genny's knees. (56 RT 5952; 59 RT 6566.) The sparing pattern was consistent with Genny doubling up her knees. (56 RT 5952; 59 RT 6570.) Her knees were completely burned indicating her knees were below the water surface. (59 RT 6570.) There was also sparing in the inguinal regions in the groin from her legs being tucked up thereby pressing the skin together. (56 RT 5953; 59 RT 6566.) Her buttocks was not burned as badly as the rest of her body, probably because she was sitting against the bottom of the bathtub. (56 RT 5989; 59 RT 6566.) The surface and walls of the bathtub tend to be cooler than the water inside, so if Genny was forcibly held down with contact at the bottom of the tub then there may be a lesser degree of burn injury on her buttocks. (59 RT 6566-6567.)

The burn was a little higher on the front of Genny's body than her back, which showed she was leaning or arched forward. (59 RT 6569-6570.) The bathtub was filled 8 - 8 ½ inches. (59 RT 6615.) Genny was held down and could not use her arms.

Had Genny attempted to get out of the water as would be expected, her hands would have been burned. Her hands, however, were not burned. (56 RT 5957; 59 RT 6573.) Had she been unconscious in the bathtub, she would not have sparing. (56 RT 6048; 59 RT 6571.) There were two splash mark burns on Genny's breastbone. (59 RT 6611.) This indicated the water was 140-150 degrees because it was hot enough that it did not

dissipate when it separated from the bath water and still had enough heat energy to burn. (59 RT 6567-6568, 6572, 6611.) The splash marks showed Genny was either violently put into the water or that she had enough mobility to create splashes on her own. (59 RT 6611.) The forced immersion was from five to ten seconds. (59 RT 6572, 6614.) The pain would have been instantaneous. (59 RT 6614.)

Later testing of the bathtub showed the maximum temperature to be 156 degrees. (57 RT 6161, 6163-6164.) It took approximately 15 minutes to fill the bathtub to 8 ½ inches. (57 RT 6164, 6165-6166.) After five minutes, the water came out of the faucet at 148 degrees, and was 140 degrees in the middle of the bathtub. (57 RT 6165.) At that temperature, the bathroom was steamy and uncomfortable. (57 RT 6167.) The heat could be felt coming up off the water. (57 RT 6167.) Had someone placed their hand in the water to drain the water at that temperature, it would have burned. (57 RT 6167.) There was a plunger in the Gonzales's bathroom, and a plastic medicine cup that was used to cover the drain. (57 RT 6156, 6161; 69 RT 8209; 14 CT 3063-3064; 15 CT 3450-3451.)

Genny's burn was consistent with being burned at 140-148 degrees for 3 to 10 seconds. (56 RT 5958.) It would be painful to be immersed in a hot bathtub. (56 RT 6015.) The person holding Genny in the water would have recognized she was in pain. (59 RT 6640.)

The manner of Genny's death was homicide. (56 RT 5962.) The immersion burn was not consistent with an accidental burn. (56 RT 5963.) The cause of her death was thermal burns of approximately 50 percent of her body surface area. (56 RT 5962.) With treatment, Genny would have had a 90 percent chance of survival. (56 RT 5962; 59 RT 6577.) Treatment would have included fluid replacement, preventing infection, and skin grafting. (56 RT 5962-5963; 59 RT 6576-6578.) Burn victims require morphine or another very strong pain reliever. (59 RT 6577.) Had

she survived, it would have been traumatic. (59 RT 6578.) She would have had a long term hospitalization and would have been at risk of developing long-term growth problems, joint deformities and considerable scarring. (59 RT 6578.)

Because she no longer had skin, fluid oozed and seeped out of her legs. (56 RT 6047; 59 RT 6580.) Within a matter of hours (one to three) after she was immersed in the hot water, due to the weeping and oozing, Genny went into shock. (56 RT 5964-5965; 59 RT 6581, 6623.) Shock is progressive–the level of consciousness slowly decreases. (56 RT 5964-5965.) Before losing consciousness, Genny would have been pale, cold, clammy, and she would have been drowsy and possibly confused. (56 RT 5964-5965; 59 RT 6581.) After she went into shock, it took at least three hours for Genny to die. (56 RT 5965.) The medical examiner opined that Genny died about six hours after being immersed in hot water. (56 RT 6035.) Indeed, the bathtub was dry when the police arrived. (56 RT 6075; 58 RT 6311.)

A few hours after death, the muscles begin to stiffen (rigor mortis). (56 RT 5965-5966.) Rigor mortis becomes fully developed after eight hours. (56 RT 5966.) Based on Genny's size, it took two to three hours for rigor mortis to occur. (56 RT 5966.)

Inside the apartment, Gonzales told the officers that she had drawn a bath for Genny, then put her in the bath. Genny took a bath while Gonzales prepared dinner. (57 RT 6104; 58 RT 6307.) Gonzales said the bath water was lukewarm. (57 RT 6105.) Gonzales said she was mashing potatoes, and after about ten or twenty minutes she checked on Genny and found Genny submerged under water. (57 RT 6104; 58 RT 6307.) Gonzales took Genny out of the bathtub and brought her to apartment No. 1 to call the police. (57 RT 6105; 58 RT 6307.)

There was no evidence that Genny drowned. (56 RT 5966; 59 RT 6568.) There was no fluid or water in her airway, and she did not have wet, heavy lungs. (56 RT 5966.)

C. The Torture

When Genny came to live with the Gonzales's, she did not have any marks or bruises on her, and had a full head of hair. (15 CT 3389-3399.) By the time of her murder, Genny had injuries consistent with child abuse, including intentional acts such as burning her with a blow dryer. (59 RT 6601.)

Genny was isolated from the other children. In the northeast bedroom, there was a small triangle that was created between the west wall, the bedroom door and the nightstand. (57 RT 6187.) A twine-type string was attached to the doorknob and tied to the nightstand bureau handle. (57 RT 6176, 6178.) Gonzales "made" Genny stay in this area because she was picking and rubbing her head wound.[4] (13 CT 2970.) The walls had blood on them from Genny's head wound. (57 RT 6187; 66 RT 7647-7648; 67 RT 7896.) Gonzales admitted Genny slept there with her hands cuffed behind her back a couple of times but claimed Ivan put the handcuffs on her. (14 CT 3109-3110.)

In this triangular area where Genny slept, there appeared to be blood 38 inches from the ground and below. (57 RT 6186; 58 RT 6397.) Genny was 38 inches tall. (57 RT 6253.) There were transfer patterns, consistent with blood, on the wall. (58 RT 6390.) There was also diluted blood that flowed down the wall to the baseboard. (58 RT 6391.) The blood patterns were consistent with Genny rubbing her head on the wall. (58 RT 6392.)

The injuries and abuse included the following:

---

[4] Indeed, the dirty blue blanket Genny slept with was found by police in this triangular area. (57 RT 6186-6187.)

1. The burn to Genny's head

Genny had a thermal third degree burn on her left scalp, that continued on the back and right side of her head. (56 RT 5918-5919, 5923; 59 RT 6584.) Her head was described as a bloody, oozy mess. (58 RT 6436.) It was infected. (56 RT 5918-5919, 5961.) The injury looked like it was caused by a flowing water or liquid. (59 RT 6583-6584.) It appeared the liquid came off the back of her scalp and flowed down onto her shoulders. (59 RT 6584.) The injury was at least six days old, and could have been up to seven or eight weeks old. (56 RT 5920, 6000; 59 RT 6583-6584.) Genny's hair fell out as a result of the burn. (56 RT 5921.)

On the top of Genny's shoulders were scars consistent with being burned at the same time her head was burned. (56 RT 5922.) If Genny's head was held back, it would have burned deeply in the infected area on her scalp, and there would be a burn on her shoulders. (56 RT 5922.) Genny had some hair on the back of her head below the burn that had been spared. (56 RT 5922-5923.) The areas on her neck appeared to be shallow second degree burns. (59 RT 6585.)

The burn was very painful. (59 RT 6588.) Proper treatment would have required a skin graft if it was initially a third degree burn (as opposed to becoming a third degree injury due to infection or other damage). (59 RT 6585, 6588.) If it started out as a deep second degree burn, treatment would have required protecting it from infection. The treatment would have been painful. (59 RT 6588-6589.) This injury was a dramatic injury that had been there for a long time and had not been properly treated. (59 RT 6601-6602.)

2. Facial injuries caused by the blow dryer

Gonzales admitted she put the blow dryer on Genny's face but claimed she did so after her fatal bath to blow some air on her. (14 CT 3101, 3103.) Genny had grid-like injuries on each of her cheeks that were recent thermal burns. (56 RT 5934-5935.) The injuries looked like what occurs when something is put on a hot grill to barbeque. They were black lines that were charred tissue. (58 RT 6466.) There were two sets of burns on Genny's left cheek, occurring hours before her death. (56 RT 5935.) A burn on her right cheek curved which was consistent with Genny moving. (56 RT 5936.) They were at least second degree and possibly third degree burns. (56 RT 5934.)

Genny had similar burns on her right shoulder, her left shoulder and her left biceps. (56 RT 5945, 5949-5950.) These burns were also recent burns. (56 RT 5949-5950.) It appeared she had been burned twice in the left biceps. (58 RT 6475.) The burns on her biceps were more superficial than the burn on her cheeks, and were probably first or second degree burns. (56 RT 5950-5951.)

A blow dryer was collected from Gonzales's apartment. (57 RT 6131-6132; Exh. 23.) It had three settings: low, medium and high. (57 RT 6132.) The blow dryer had reddish-brown, faint stains on it that appeared to be blood. (57 RT 6139-6140.) Tests performed on the blow dryer revealed it reached 181 degrees on contact on the high setting. (57 RT 6137-7139.)

An expert witness made plaster impressions of the burns and compared them to the blow dryer recovered from Gonzales's apartment. (58 RT 6460, 6463-6465.) The burns were consistent with and corresponded to the bars of the blow dryer. (58 RT 6469-6471, 6476.) These were painful injuries. (59 RT 6598.)

3. Genny's head injuries

Genny had a subdural hematoma, defined as bleeding between the lining of the skull. (56 RT 5924; 59 RT 6591.) A subdural hematoma is life threatening. (56 RT 5924.) It is generally caused by significant force such as a motor vehicle accident, a blow to the head, a fall, or violent shaking. (56 RT 5925, 6020; 59 RT 6593.) An expert witness explained it could not be caused by any appropriately intended act, and was "really at the extremes of violence of what an adult can do to a child." (59 RT 6622.) The subdural hematoma was only a few hours old. (56 RT 5926.)

Genny also had an older brain injury, a subarchnoid hemorrhage, that occurred weeks to perhaps months before she died. (56 RT 5927-5928; 59 RT 6595.) It was caused by a direct impact to her head (as opposed to the subdural hematoma, which is caused from motion). (56 RT 5928.)

In the triangular area where Genny slept, there was an indentation in the wall behind the door approximately 36 inches high consistent with Genny's head going through the wall. (57 RT 6180, 6183; 58 RT 6393, 6895.) The indentation would have required Genny to be hit "pretty hard" on the wall. (58 RT 6431.) The indentation was about four inches tall and 8 to 10 inches wide. (57 RT 6182.) There appeared to be blood on the wall near the indentation that was consistent with wispy hair being transferred before or at the time the wall was indented. (57 RT 6184, 6190; 58 RT 6390, 6394.)

4. Genny's shoulder/arm injuries

In addition to the burns on her shoulders from the blow dryer, Genny had scrapes on her shoulders. (56 RT 5945-5946.) There was an abrasion where the top layer of skin was scraped or pressed off. There was also a bruise with some superficial abrasions along it, in a triangular shape. (56 RT 5948-5950.) These injuries appeared to be caused within a day or so of

her death. (56 RT 5949.) There were some older injuries further down her left arm that were diagonal in shape. (56 RT 5949.)

5. Genny's eye injuries

Genny suffered a blow to her right eye within days of her death, causing a black eye. (56 RT 5930.) A bruise on Genny's left eye occurred within a few days of her death. (56 RT 5931.) Both of Genny's eyebrows had similar looking abrasions. (56 RT 5930-5931.)

6. Other facial injuries

There were abrasions and scrapes all over Genny's face. (56 RT 5932.) There was no skin on her ears. (56 RT 5919; 67 RT 7940, 7943.) There were two lines coming from her left ear where her skin had eroded. (56 RT 5932.) The skin erosion was caused by an object pressing or rubbing against her ear, which rubbed her skin off down to the cartilage. (56 RT 5919, 5932.) The medical examiner opined that it would take a great deal of force over a short period of time, or a significant amount of pressure over a longer time to cause this type of injury. (56 RT 5919.) There was an abrasion on the bridge of Genny's nose where the skin was worn away by a scrape or persistent pressure. (56 RT 5933.) These injuries could have been caused by a tight band extending from around her head and across the bridge of her nose. (56 RT 5934.)

Gonzales admitted she put Genny in a "little bonnet." (13 CT 2983.) When Gonzales was arrested, she was wearing purple cutoff jeans. (57 RT 6258-6259.) A circular cloth that appeared to be from Gonzales's purple cutoff jeans was in the northeast bedroom. (57 RT 6259-6261.) Also in the northeast bedroom was another cutoff section of a pants leg with a "scrunchie-type device" with strands of dark hair with dark brown stains that appeared to be blood. (57 RT 6261-6262, 6271.) The pants leg made a complete circle and formed a cap or hood type garment. (56 RT 6262.)

There was also a belt and another cutoff pant leg with dark brown stains on it on the floor in the closet. (56 RT 6263-6264.)

There was a bruise on Genny's chin that was caused by blunt trauma within a few days of her death. (56 RT 5933.) In addition to the blow dryer burns on Genny's cheeks, she had circular marks on both cheeks consistent with being hit by a hairbrush. (56 RT 5936.)

7. Genny's mouth injuries

There was a several day old laceration on Genny's lower lip and gum that extended into the gutter between her lip and gum. (56 RT 5936-5937.) It may have been a repetitive injury–occurring several times over a period of time. (56 RT 5937.) It may have been caused from the lip being pushed against the lower teeth or a blow that sheered the lip off the gum. (56 RT 5937; 59 RT 6599.) It was from a powerful blow. (59 RT 6599.) There was a tear in the lower part of the lip that could have been a separate injury, or could have been caused at the same time. (56 RT 5937.)

8. Genny was hung by a hook in the closet

Gonzales admitted that Genny was forced to sleep in the closet, and was hung in the closet by a hook. (13 CT 2980; 14 CT 3117, 3119, 3120, 3123-3126, 3128.) Gonzales said the hook was used "in a way" for punishment. (14 CT 3123.) There were no shoes or clothes in the closet in the northeast bedroom. (57 RT 6196.) The closet door was off its track, and was placed inside the track, leaning against the wall. (57 RT 6191-6192.)

There was a hole in the closet door, which was at the level of the hook in the closet, approximately 5'4" off the floor. (57 RT 6192, 6196.) There was a wooden box inside the closet next to the door. (57 RT 6192; Exh. 43 [the wooden box].) There was a bar in the closet 5'1" from the floor, and 37 inches from the top of the wooden box. (57 RT 6203; 58 RT 6416.)

Gonzales explained that Genny was hung in the closet from the hook by her neck, with her feet on each side of the wooden box. The wooden box did not have a lid. (66 RT 7605-7608, 7612-7615, 7624; 68 RT 8002.)

The hook in the closet was a strong, stainless steel type bar, approximately eight inches, that had been bent. (57 RT 6209-6210, 6240; Exh. 44 [the hook].) There was a substance that appeared to be blood on the hook. (57 RT 6210, 6251.) There were no handprints in those areas. (57 RT 6212; 58 RT 6410.) There were no finger or digit marks on top of the bar. (58 RT 6404.) There was blood underneath the bar, but not on top. (57 RT 6251-6252; 58 RT 6404.) The blood transfer patterns were consistent with Genny's neck being at the bottom of the hook with her wispy hair and head rubbing up against the bar. (58 RT 6403, 6409.) The blood patterns indicated Genny had been suspended from the hook more than once and that her arms were immobilized while she was suspended. (58 RT 6410.)

Genny had extensive injuries to her neck consistent with being hung by her neck. (56 RT 5938-5939.) On the back of her neck was a linear, red mark (scar) where the skin eroded across and upward towards her left ear. (56 RT 5938.) The injuries were from one to three weeks old. (56 RT 5940.) They were consistent with long-term pressure being placed on her neck while at the same time being able to support herself somewhat. (56 RT 5940.)

Genny had a similar injury on her chin, starting at her right cheek. (56 RT 5940.) It was consistent with a ligature slipping up and going under her chin. (56 RT 5941, 5999.)

There was a blood clot inside the closet that appeared to be diluted with fluid. (58 RT 6401.) There appeared to be smeared blood inside the closet door and drips as though Genny shook her bloodied head or hand from side to side. (57 RT 6195; 58 RT 6399.) The blood stains showed

there were multiple events where blood was transferred to the closet door. (58 RT 6400.) There appeared to be blood or fecal matter on the wall in the closet. (57 RT 6197.) There were red stains on a piece of fabric that was on the bar. (57 RT 6211.)

There was a three to four inch stain on the wood box that was consistent with a foot or a toe resting on it, and appeared to be a toeprint. (57 RT 6205-6206, 6252; 58 RT 6406.) There was a bloodstain that appeared to be in the shape of a footprint on the wall a few inches above the wooden box. (57 RT 6201, 6252-6253; 58 RT 6402.)

Genny had small pinpoint hemorrhage in the whites of her right eye (petechiae). (56 RT 5929.) This injury, usually caused by strangulation, was a few days old. (56 RT 5929.) It could have been caused by having more pressure on one side of her neck. (56 RT 6015-6016.)

9. Genny was forced into a wooden box

Gonzales admitted that Genny was put into the small wooden box for punishment, but claimed that Ivan did it. (14 CT 3118.) Inside the box were stains consistent with blood or fecal matter. (57 RT 6206; 58 RT 6407.) There were additional stains on the inner surface of the box consistent with blood or fecal material that had been wiped. (57 RT 6206.) Under a shelf in the wooden box was a tennis shoe and a newspaper dated July 2, 1995. (57 RT 6208.)

10. Genny's injuries from being bound

Gonzales admitted she bound Genny with cloth from her shorts and with handcuffs. (13 CT 2980, 3114.) Genny had a linear ulcerated injury on her right biceps consistent with being bound with handcuffs. (56 RT 5941-5943.) The medical examiner opined this was a very painful injury. (56 RT 5943.)

Genny's right wrist was scarred with an ulcerated defect. There were three linear ulcers consistent with being bound by a linear object, possibly handcuffs or a cord. (56 RT 5946-5947.)

Two sets of handcuffs were found; one in the closet and one in the northeast bedroom. (57 RT 6151, 6233.) Ivan bought handcuffs similar to the ones recovered from the Gonzales's apartment at Hilltop Liquor. (58 RT 6365, 6371, 6379.)

The marks on Genny's arms were consistent with the handcuffs that were recovered from the Gonzales's apartment. (58 RT 6477, 6479-6480.) The injuries showed the handcuffs were applied to Genny at least two times. (58 RT 6480.)

Genny's ankles had ulcers where the skin had died due to pressure on her skin. (56 RT 5955.) This injury occurred several days to a few weeks prior to Genny's murder. (56 RT 5956.)

11. Genny's thymus gland

The thymus gland is in the upper chest behind the breastbone, and is responsible for a lot of the immune response in the body. (56 RT 5959.) It can atrophy in response to stress, such as being injured over a long period of time. (56 RT 5959.) Genny's thymus gland was severely atrophied. (56 RT 5960-5961.) It was consistent with long-term abuse and protracted stress. (56 RT 5959, 5961.)

12. Other injuries

In addition to the hair loss from being burned on her head, there was additional hair loss that could have been from being pulled out or from a lack of nutrition. (56 RT 5921-5922.) Ivan Jr. explained that Genny lost her hair when Gonzales burned her and pulled her hair out. (15 CT 3399.) Genny was very thin, and was in less than the fifth percentile for weight in her age group. (56 RT 5976-5977.)

There was a series of four bruises, about ½ inch in diameter, on the front of her legs on the inside. (56 RT 5954.) The bruises, that were incurred within two to three days of Genny's death, were from pressure being applied very hard, and were consistent with fingertip marks. (56 RT 5955.) There was more than one set of bruises indicating her leg was grabbed more than once or repositioned. (56 RT 5955.)

D. Gonzales's Statement

After waiving her *Miranda*[5] rights (13 CT 2938-2939; 14 CT 3036, 3047), Gonzales spoke to detectives. Gonzales's videotaped interviews conducted on July 22 and July 24, 1995 were played for the jury. (59 RT 6528-6529; Exhs. 77 & 80.) One of the detectives explained that when Gonzales was asked questions that were non-threatening she was clear, but when she was asked questions about Genny, Gonzales mumbled, rambled and was almost incoherent. (59 RT 6673.)

Gonzales said she put Genny in the bath about 7:30 p.m. (13 CT 2945-2946; 14 CT 3062.) The water was not hot; it was warm. (13 CT 2954; 14 CT 3063.) Gonzales turned the water off. (14 CT 3064.) Gonzales was making dinner but checked on Genny every five to ten minutes. (13 CT 2945; 14 CT 3066.) Ivan went to the store to buy bread and milk. (13 CT 2945; 14 CT 3070.) Gonzales lost track of time and Genny was in the bath about 45 minutes.[6] (13 CT 2945, 2949-2950.) By the time Gonzales went back, Genny was floating in the bathtub. (13 CT

---

[5] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]

[6] Towards the end of the second interview, Gonzales claimed that Ivan went in the bathroom to yell at Genny to hurry up and she heard Genny say, "please don't drown me." (14 CT 3141-3142.) She then found Genny in the bathtub about 15 minutes later. (14 CT 3144.)

2945, 2952.) She was laying on her back and her head was under the water.[7] (13 CT 2953.)

Gonzales said she pulled Genny out of the bathtub and slapped her to "wake her up." (13 CT 2954-2955.) Gonzales claimed she got rubbing alcohol and put it on Genny's body to cool her off.[8] (13 CT 2951, 2954; 14 CT 3057, 3078-3079.) Ivan put a shirt on Genny so the children would not "bug" them. (13 CT 2953, 3001, 3022; 14 CT 3082.) Gonzales also claimed Ivan attempted CPR on Genny, and water was coming out of her mouth. (13 CT 2959; 14 CT 3078.) After five or ten minutes of trying to resuscitate Genny, Gonzales said she ran to Patty Espinoza's apartment to get help. (13 CT 2951; 14 CT 3081.) Patty called her sister, then Ivan took Genny to Patty's house. (13 CT 2951; 14 CT 3082.) When asked whether Gonzales told anyone not to call the police, Gonzales claimed she said "no don't call the police. Call the ambulance" because she was scared and shocked and wanted the ambulance. (14 CT 3149.)

Gonzales admitted numerous times that she put Genny in the bathtub (13 CT 2937, 2994; 14 CT 3063, 3096), she ran the bath water (13 CT 2946, 2997; 14 CT 3063), and she got her out of the bathtub (13 CT 2938, 2950, 2954, 2997-2998, 3008, 3012; 14 CT 3076-3077, 3082, 3096, 3154).

---

[7] During Gonzales's second interview, she stated that when she went to check on Genny she could see and smell the steam on top of the shower. (14 CT 3074.) She reached in the water and pulled Genny out, burning her hands. (14 CT 3073, 3076.) She claimed Genny was in the bathtub for 45 to 60 minutes. (14 CT 3077.) It is not plausible that there was a already a fair amount of water in the tub then hot water got added to it. (59 RT 6574-6575.)

[8] Gonzales asked Ivan Jr. to get rubbing alcohol from the neighbors. (15 CT 3347, 3285; 76 RT 9886.) Ivan Jr. went to Patti Espinoza's house between 6 and 7:00 p.m. on the day of the murder and asked for rubbing alcohol. He had a "very weird, blank stare" (that Espinoza interpreted to mean he was scared). (60 RT 6714, 6717; 71 RT 876-8777.)

Gonzales said both she and Ivan disciplined the children. She disciplined them by spanking them on their "butt" and hitting them with a belt on their butt and legs. (13 CT 2961-2962; 14 CT 3131, 3139.) Gonzales said Genny was a good girl. (13 CT 2965.) Genny was disciplined the same as her own children. (13 CT 2964.) Gonzales said Ivan had a "heavier arm" but that they both "beat her." (14 CT 3092, 3099, 3137, 3139.) Gonzales said she hit Genny on the hand or butt if she rubbed her head on the wall and left blood. (13 CT 2977.)

Gonzales said Genny had a lot of scars when she came to live with them. (13 CT 2981.) Genny had a lot of lice that was "eating up her head" before Genny burned her head. (13 CT 2937.)

Initially Gonzales said she put Genny in the closet so she would not rub her head on the furniture or hard surfaces. (13 CT 2979.) Then Gonzales admitted that Genny slept in the closet, and said she put Genny in the closet to scare her, so she could think. Then she said, "but there was no torture there." (13 CT 2980.)

Gonzales admitted she cut up her shorts and used them to bind Genny's hands. (13 CT 2982.) She initially denied using anything other than cloth to bind her. (13 CT 2984.) Genny was able to free her hands, so Ivan suggested they use handcuffs. (14 CT 3113.) Initially, Gonzales said the handcuffs she and Ivan possessed were "for the dirty movies." She denied either she or Ivan used them on Genny. (13 CT 2989.) Gonzales later said Ivan bought the handcuffs from the liquor store and put them on Genny to keep her from picking her sores. (14 CT 3108-3109.) Gonzales admitted she put the handcuffs on Genny one time while she was in the triangular area behind the bedroom door. (14 CT 3114.)

Gonzales said Genny's injuries to her ears were from cutting herself on a shelf in the corner of the room. (14 CT 3152.) Gonzales claimed she did not notice the patch of skin missing on the bridge of Genny's nose. (14

CT 3153.) Gonzales admitted, however, that she put her in a "little bonnet." (13 CT 2983.)

Gonzales explained that one time she spanked Genny because she had diarrhea and had a potty accident. (13 CT 2965.) Gonzales later explained that she only made Genny lay in the bath one time after she ate oranges on a hot day and got diarrhea to "scare her" and "show her ugly butt." (13 CT 2985.) She initially denied Genny's hands were bound when she did this. (13 CT 2985-2986.) Gonzales then said if she did bind her hands it was with a loose figure-eight. (13 CT 2986-2987.) Later yet, Gonzales admitted that she and Ivan had Genny sleep in the bathtub with her hands bound. (14 CT 3115-3117.)

Gonzales initially said the box in the closet was for the dog (although she admitted at trial they did not have a dog (67 RT 7901)), then said it was to store blankets. (13 CT 2978.) She later said it was used as a television stand. (13 CT 3016.) She then claimed it was used for her makeup. (14 CT 3118.) Gonzales denied Genny was put in the box. (13 CT 2979, 3014.) Gonzales later claimed, however, that Genny sometimes crawled in the box and went to sleep. (14 CT 3118.) When asked if Genny was put in the box for punishment, Gonzales claimed that Ivan had done so. (14 CT 3118.) Gonzales said the first time she found Genny in the box she was tied around her waist. (68 RT 8166.) She said Ivan made her sleep in the box a couple of times. (14 CT 3119, 3122.) Gonzales acknowledged that Genny's feces was inside the box. (67 RT 7906.)

Gonzales said that Genny had to sleep on the closet floor because she would not listen and she would rub her head on everything. (14 CT 3117.) Gonzales admitted she wanted Genny to sleep in the closet to scare her. (14 CT 3119.) Gonzales also said Genny was not allowed to go in the children's room because she was afraid they would hit Genny's head. (14 CT 3118.)

Gonzales initially denied that she or Ivan ever put Genny on the hook in the closet. (13 CT 3017.) She said the hook was for drying her underclothes. (13 CT 3014.) During the second interview, Gonzales claimed that one time Genny went on the hook by herself, and another time Gonzales put her on the hook. (14 CT 3124.) Gonzales said one time Genny stayed on the hook overnight, and Gonzales took her down the next morning. (14 CT 3125-3126, 3128.) When they saw the mark on Genny's neck they got a little scared and were worried that next time she might choke and die. (14 CT 3129.)

Gonzales said Genny lost her hair because she had "bugs" and Genny's mother shaved it. Gonzales then cut Genny's hair short because Genny burned herself. (13 CT 2966-2968.) Gonzales said Genny burned herself in March. (14 CT 3130.) There was spaghetti or beans in a pot on the stove and Genny climbed on the stove and burned herself. (13 CT 2967-2968; 14 CT 3131.) When asked if Genny cried, Gonzales responded, "shit yea she cried." (13 CT 3024.) Gonzales said Ivan was not home when Genny burned her head.[9] (14 CT 3129.) Genny almost passed out after being burned on her head. (14 CT 3130.) Gonzales called a 24-hour nurse hotline and was told to put cold cloths on it and take her to the doctor. (13 CT 2968, 3024; 14 CT 3134.) Gonzales initially said she did not take Genny to the doctor because she did not have Medi-Cal for her (13 CT 2968), but then claimed it was because Genny had some scars on her when she came to live with them and she did not want the doctor to think

[9] The stove was 35 inches high. (59 RT 6585; 60 RT 6753.) Expert testimony revealed that had Genny pulled something hot off the stove, it would have probably resulted in injury to the front of her body, not the back. (59 RT 6585.) There was not a related burn on her chest. (59 RT 6586.)

that she had injured Genny (14 CT 3134). Gonzales put peroxide on the wound and claimed the wound was healing. (13 CT 2968.)

Gonzales claimed she did not notice the circular burn marks from the blow dryer on Genny's face. (13 CT 2974.) She later admitted the blow dryer burned Genny's face. (13 CT 3007.) Later yet, she admitted that she "did put the blow dryer on her," to blow some air on her. (14 CT 3101, 3103.)

Gonzales denied that either she or Ivan burned Genny in the bathtub. (13 CT 2994.) She said she did not see Ivan do anything to cause injuries to Genny's face. (13 CT 3020.)

Gonzales said Ivan was handsome, a very nice man, that he helped her a lot, they had a good relationship, and she loved him. (13 CT 2948, 2966.) She explained that she and Ivan try to spend as much time as they can together, laugh together, and are affectionate towards each other. (14 CT 3059.) Gonzales never told the police she was afraid of Ivan. (57 RT 6106, 6108-6109, 6288; 58 RT 6311.)

E. Defense

The focus of Gonzales's defense was that she was a battered woman, suffering from Battered Woman's Syndrome (BWS). BWS was not offered to show why Gonzales committed the crime; rather, her defense was that Ivan tortured and murdered Genny, and BWS evidence was offered to explain why Gonzales did not intervene in the torture and/or murder or get medical help, and how she acted afterwards in her statements to the police. (74 RT 9514-9516; 81 RT 10602; 80 RT 10632 [limiting instruction to jury]; 83 RT 10821-10822 [defense closing argument].)

Cynthia Bernee, an expert witness on domestic violence, and Kenneth Ryan, a clinical psychologist, each described BWS and the cycle of violence. (64 RT 7241, 7245-7247, 7249-7257, 7260-7262; 73 RT 9206, 9216-9225, 9228, 9250, 9255, 9273-9274, 9282-9285; 74 RT 9444, 9470,

9472-9475.) Dr. Ryan evaluated Gonzales over a two and a half year period. (73 RT 9229-9230.) He administered the MMPI twice. (73 RT 9230.) The first MMPI was invalid because it showed numerous complaints, and that Gonzales was psychotic, which she was not. (73 RT 9231-9234.) Dr. Ryan opined that Gonzales suffered from post traumatic stress disorder (PTSD) and BWS. (73 RT 9240, 9243.) Bernee also evaluated Gonzales and opined that she suffered from BWS. (73 RT 9401, 9403.)

Gonzales grew up in Corona, CA. (65 RT 7342.) Her father died of a heroin overdose when she was a baby. (72 RT 9103-9104.) Within a few months, her mother became involved with and eventually married Gonzales's stepfather, Isias Ortiz. (72 RT 9107.)

Gonzales testified and presented evidence about her childhood abuse by her alcoholic mother (65 RT 7347-7349; 67 RT 7782, 7786; 69 RT 8260-8264, 8266, 8311-8312, 8329, 8359-8363, 8365; 72 RT 9008, 9010, 9013-9016, 9105-9114, 9126), and her physical and sexual abuse by her stepfather (65 RT 7343-7346, 7350, 7357-7358, 7360; 67 RT 7781; 68 RT 8177; 69 RT 8313, 8364, 8366; 72 RT 9008, 9017-9019, 9115, 9121-9123). Gonzales started drinking in 7th grade. (65 RT 7354.) She dropped out of high school in 11th grade and started cosmetology school. (65 RT 7360, 7364.) When she was in cosmetology school, Gonzales confronted her stepfather about the sexual abuse in front of her mother and her friend, Shirley Leon. (65 RT 7367; 69 RT 8315, 8321-8322.) Her stepfather denied the abuse, and told Gonzales's mother that if she believed Gonzales, he would leave her. (65 RT 7368; 69 RT 8323.) Gonzales's mother told Gonzales she had to leave. (65 RT 7368.) Gonzales reported the abuse to the Sheriff's department. (65 RT 7369, 7373.) Gonzales's stepfather was not prosecuted, however, Gonzales's sister, Mary (Genny's mother), who was five years older than Gonzales, became Gonzales's legal guardian

through dependency court proceedings. (65 RT 7351, 7373-7375.) Gonzales was 15 years old at the time. (65 RT 7376.)

Gonzales also described her relationship with her husband, Ivan Gonzales, who was from San Diego. (65 RT 7376, 7378-7381.) Gonzales dropped out of cosmetology school and became pregnant with her oldest son, Ivan, Jr. (65 RT 7381-7382.) Gonzales and other witnesses described Ivan's abuse of Gonzales (65 RT 7382-7387, 7389, 7391-7392, 7402-7404, 7406, 7414, 7417, 7429; 66 RT 7530-7531, 7534-7535, 7536-7537, 7603; 67 RT 7811, 7851; 71 RT 8764, 8793; 72 RT 9037, 9053-9054) and their children (65 RT 7388, 7414-7417, 7419-7421, 7423, 7425, 7429; 66 RT 7530; 71 RT 8708-8709; 72 RT 9034-9035). Gonzales claimed she left Ivan numerous times, and that he threatened to kill her and hurt their children. (65 RT 7388.) In 1986, when Gonzales told Ivan she was going to leave him, Ivan threatened to kill himself and climbed up an electric pole. (65 RT 7532; 69 RT 8383.)

Gonzales admitted hitting Ivan and throwing things at him. (67RT 7816.) Gonzales said she hit Ivan back in front of other people because she knew Ivan would not hit her in front of other people. (65 RT 7394-7397.) Gonzales and others described how Ivan was controlling of her (65 RT 7460; 66 RT 7535-7536, 7537-7539, 7542; 71 RT 8701, 8761), jealous (66 RT 7561; 71 RT 8700-8701, 8723; 72 RT 9027, 9084), possessive (71 RT 8700; 72 RT 9029), and isolated her from her family and neighbors (66 RT 7533, 7539-7540). In public, however, Ivan acted quiet and as if they were a happy couple. (66 RT 7541.) Witnesses testified that they thought Gonzales and Ivan were a happy couple, affectionate, and that Ivan was respectful to Gonzales. (69 RT 8339-8340; 71 RT 8735, 8752, 8754, 8802.) Raymond Aguilar, a second cousin of Gonzales who was very close to her, testified, however, that on the two times he saw Gonzales and Ivan together, Ivan gave him a dirty look and pulled Gonzales's hair. (69 RT

8350-8355.) Other witnesses testified to seeing Gonzales with bruises; some of the witnesses testified that Gonzales said the bruises were inflicted by Ivan. (69 RT 8378-8380; 71 RT 8680-8681, 8737-8739, 8756, 8758, 8861-8863; 72 RT 8982-8983, 9030, 9129-9131.)

Gonzales admitted, however, that she never called the police or was hospitalized as a result of Ivan's abuse. (67 RT 7809.) She also admitted that in 1994, she told a social worker that Ivan was a sweet person, a good father, and one of the most patient and best husbands around. (67 RT 7794.) After being arrested for Genny's murder, Gonzales told a social worker that although Ivan was abusive to her, he was good to the children. (67 RT 7793.)

Gonzales claimed she wanted to get her tubes tied after her third child was born but she was only 19 years old, so she was too young to have it done. (65 RT 7406-7407.)

Both Gonzales and Ivan used crystal methamphetamine and cocaine and smoked marijuana, even during Gonzales's pregnancies. (65 RT 7407-7410; 69 RT 8240.) They had been using methamphetamine regularly for about four years. (66 RT 7560.) In 1994 and 1995, the Gonzaleses drug use was "getting heavy." (65 RT 7412.) Ivan stopped working in 1990 or 1991. (65 RT 7412.) They were on AFDC and used their money to pay their bills and to buy drugs. (65 RT 7412.) When they received their check in the beginning of the month, they would buy drugs. (65 RT 7412-7413.) They sometimes got groceries on credit then would trade the groceries for drugs. (65 RT 7413.)

Gonzales admitted she had an affair with Gene Luna, Jr., a co-worker of Ivan's (who was also a second cousin of Gonzales's) when she was 19 and Luna was 16. (65 RT 7440-7444; 67 RT 7820.) Gonzales got pregnant, and did not know whether the pregnancy was as a result of her affair with Luna. (65 RT 7445-7447.) Gonzales told Ivan that she was

pregnant, and about her affair, and she and her children moved in with her mother for a few weeks. (65 RT 7447-7448.) About a week and a half later, Ivan asked Gonzales to reconcile. (65 RT 7448.) Ivan said he would treat the baby as his own, and they could move to San Diego. (65 RT 7449.) Gonzales agreed to reconcile and they moved to Chula Vista. (65 RT 7452.) Ivan's name was listed on the birth certificate as the father of the child. (65 RT 7450.)

Gonzales admitting hitting her children with a brush and a belt and spanking them. (65 RT 7432-7436.) Although she said she loved her children very much, Gonzales admitted she was not a good mother. (65 RT 6439.)

The children had lice in their hair. (65 RT 7456.) Gonzales claimed she did not do the laundry, which was necessary to get rid of the lice, because Ivan did not allow her to go to the laundromat, so she had to wash clothes in the bathtub. (65 RT 7457.)

Gonzales claimed there were holes in the apartment walls because Ivan punched, kicked and put his head through the walls when he was really mad. (65 RT 7458.)

When Gonzales was contacted by a social worker in 1994 regarding placement of Mary's children (including Genny) with Gonzales's mother, Gonzales claimed she lied about her stepfather's sexual abuse. (66 RT 7544-7545; 67 RT 7782-7783.) Gonzales explained to the social worker that she lied about being molested because Mary put her up to it. (67 RT 7783.) Gonzales also lied to the social worker and said she did not use drugs. (69 RT 8270.)

Gonzales claimed that although she was worried Mary's children would be abused living with her mother and stepfather, she lied to the

social worker because her mother told her to in order to place the children there.[10] (66 RT 7545; 67 RT 7783.)

When Gonzales's mother called her and said she could not handle all the children, Gonzales agreed to take Genny because she felt sorry for her mother and loved her. (66 RT 7546, 7562.) When Gonzales told Ivan that her mother would pay them $100 per month to pay for Genny's food (Genny's share of welfare benefits), Ivan agreed to take in Genny as long as Gonzales took care of her. (66 RT 7546, 7553.)

Gonzales said when Genny first lived with them, Ivan treated her like their own children–he spanked and yelled at her. (66 RT 7563.) Gonzales denied she pulled Genny's hair, kicked her, hit her with a bat or shoved her against the wall. (66 RT 7563-7564.) Gonzales said she spanked her on her butt. (66 RT 7563.) Gonzales said Ivan hit Genny with the bat. (66 RT 7564.)

Gonzales said she was in the kitchen when Ivan burned Genny's head in April, 1995. (66 RT 7564, 7573.) Gonzales claimed she heard Ivan yelling and cussing at Genny because Genny spilled his marijuana. (66 RT 7565.) Ivan yelled at the other children to get out of the way, and said he was going to "get" Genny. (66 RT 7565.) Ivan got black electrical tape out of the closet. (66 RT 7565-7566.) When Gonzales asked Ivan what he was up to, he told her, "shut the fuck up. I'm going to do something." (66 RT 7566.)

Gonzales's son called her into the bathroom, and when she walked in, Ivan told her to "get the fuck out of the way." (66 RT 7566-7567; 68 RT 8121.) Genny was face down in the water with her hands tied together,

---

[10] Anita Negrette, Gonzales's other sister, testified she told the social worker at the time of the molest allegations that she did not believe Gonzales was molested because her mother begged her to say so. (72 RT 9102-9103.)

moving her head from side to side trying to pull herself up. (66 RT 7567; 68 RT 8119.) Gonzales claimed she pulled Genny out of the steamy, hot water. (66 RT 7567.)

Ivan left to pick up their daughter from school. (66 RT 7664, 7567.) Gonzales took the tape off Genny's hands. The tape was very tight. (66 RT 7567-7568.) Gonzales held and rocked Genny as Genny started to pass out. (66 RT 7567-7568.) Genny was really red, and her face was swollen. (66 RT 7568; 68 RT 8133.) When Ivan put Genny in the bathtub, she was wearing a little white jacket that she loved. (66 RT 7566.) Gonzales claimed she untied the hood of the jacket. (66 RT 7568.) Genny was hot and swollen. (66 RT 7568.)

Gonzales said the top of Genny's head was severely burned, and looked as if it was melting and was "kind of gooey." (66 RT 7569; 67 RT 7745.) Her hair was sliding off her head. (66 RT 7569-7570.) Genny appeared to be in pain; she was crying and moaning. (66 RT 7574-7575.)

Gonzales called the nursing line, and at Ivan's direction, told them a pot of hot water fell on Genny's head. (66 RT 7572.) Gonzales was told to bring Genny to the doctor right away. (66 RT 7572.) In spite of that medical advice and Genny's serious injuries, Gonzales did not get help for Genny either because when Ivan left he told her to stay there (66 RT 7570), because Ivan would not let her get help (66 RT 7572; 68 RT 8124), because she was afraid of Ivan and that he would hurt Genny or the other children (66 RT 7602), or because they did not have Genny's Medi-Cal card and Ivan did not want to pay for her medical care (66 RT 7578, 7581). Gonzales claimed she believed Ivan when he told her that if she got help for Genny they would blame her for the injuries and take her children away. (66 RT 7571.)

Gonzales testified she stayed near Genny for the next few weeks and tried to hold and comfort her. (66 RT 7575; 69 RT 8237.) After a week or

a week and a half, Genny was able to move more and wanted to sit up, although she continued to lose more hair. (66 RT 7576-7577.) Genny continued to be in pain and the burn was itchy. (66 RT 7577.) After two or three weeks, Genny was able to walk again and started eating and playing again. (66 RT 7582.) However, in June and July, Genny did not run around and act like a normal child. She did not have a lot of energy. (67 RT 7897.)

Almost all of Genny's hair fell out after the burn. (66 RT 7636.) It appeared painful for Genny when Gonzales washed her hair, so Gonzales stopped washing it. (66 RT 7637.) Gonzales believed Genny needed medical attention but still did not seek it. (66 RT 7637.)

Gonzales said Genny was abused more severely after she was burned on her head. (66 RT 7564.) She no longer slept with the other children because Ivan did not want her next to their children. (66 RT 7583.) According to Gonzales, Ivan did not want to see Genny, so he would not allow her to watch television with the other children. (66 RT 7651.) Ivan continued abusing Genny by hitting her in the head, pushing her and kicking her. (66 RT 7582, 7584.)

Genny's head was so tender that it bled. (66 RT 7596.) The blood on the walls was from Genny rubbing her head. (66 RT 7586.) Gonzales claimed it was Ivan who bound Genny's hands to prevent her from itching her head. (66 RT 7586.) He initially did it with long, thick shoelaces with her hands in front of her body. When that did not work he bound her in handcuffs as tight as he could with her hands behind her. (66 RT 7586-7587, 7589; 67 RT 7950.) Gonzales claimed she was scared because it hurt Genny, and Gonzales took off the restraints. (66 RT 7586-7587, 7591.) Gonzales said the marks around Genny's arm from the handcuffs were pretty deep. (66 RT 7590.) Gonzales described one time where Genny was sitting on the floor, handcuffed, and crying. (66 RT 7591.) Gonzales

denied putting the handcuffs on Genny, but admitted using her pant leg that she had cut off (to make shorts) to bind Genny's hands using a figure-eight. (66 RT 7596-7597; 68 RT 7973, 7980.) Gonzales claimed Ivan got mad, however, because that restraining device was not tight enough and Genny could take it off. (66 RT 7596-7597.)

Gonzales described one time when she and Ivan were on methamphetamine and Ivan handcuffed Genny and put her in the bathtub so they could have sex. (66 RT 7598-7599.) When they finished having sex and Gonzales went in the bathroom, Genny looked like she was in pain and said the handcuffs hurt her. (66 RT 7598-7599, 7602.) Gonzales claimed she thought Genny was in the living room with the other children watching videos while they were having sex and further claimed she pleaded with Ivan not to abuse Genny anymore. (66 RT 7601.)

Gonzales also claimed it was Ivan who hung Genny in the closet, although Gonzales admitted she was there and saw Genny hanging in the closet on two separate occasions. (66 RT 7605, 7622.) The first time, Gonzales said Ivan Jr. told her Genny was crying, and Gonzales walked into the bedroom and saw Genny, leaning forward, with a shirt tied around her waist and tied to the clothes pole, standing with one foot on each side of the box (with the lid broken off) in the closet. (66 RT 7605-7608, 7612-7615; 68 RT 8002.) There was a cloth tied on the hook that went around Genny's neck. (68 RT 8003.) Genny was crying, scared, tired and in pain. (66 RT 7616, 7618; 67 RT 7931.) Genny's head had not healed, and could have been rubbing against the clothes pole. (66 RT 7620.) Gonzales claimed she took Genny down off the hook. (66 RT 7621.)

The second time Genny was hung in the closet, according to Gonzales, Gonzales was passed out on the living room floor due to her methamphetamine addiction. (66 RT 7623.) The older children were at school, and the younger ones were running around, unsupervised. (66 RT

7623.) Gonzales's three-year-old son, Anthony, woke her up and said, "mama, mama. Genny." (66 RT 7623.) Gonzales woke up off the floor and ran to the room where Genny was standing on the box, hanging from her neck, crying. (66 RT 7624.) Her face was red and swollen and she was in pain. According to Gonzales, Genny "was just crying and crying." (66 RT 7624.) Genny had a mark on her neck and on her chin. (66 RT 7627; 68 RT 8148.) Genny told Gonzales the injuries hurt her. (68 RT 8149.)

According to Gonzales, she swore and yelled at Ivan, and told him he was going to hurt Genny. She said, "Ivan, you can kill her. You're going to do something." (66 RT 7625.) Then Gonzales and Ivan got into a physical fight. (66 RT 7626.)

Gonzales claimed she put a "bonnet" on Genny's head once or twice to stop Genny from scratching her head, to stop her sores from bleeding, and to keep the blood and pus from Genny's open wound from oozing out and getting all over (so Ivan would not get mad at Genny). (66 RT 7631-7632, 7634-7635; 67 RT 7937.) The "bonnet" was dirty when Gonzales put it on her head. (67 RT 7938.)

The "bonnet" was on for about two hours, and Genny wanted it removed because it itched. (67 RT 7948.) Gonzales denied the "bonnet" caused the deep mark on the bridge of Genny's nose. (66 RT 7633-7634.) Gonzales explained that the second time she put the "bonnet" on Genny, her skin and hair stuck to the "bonnet" and came off when she took it off. (66 RT 7635.) Genny said it hurt when she took the "bonnet" off. (66 RT 7635.)

Gonzales claimed the abrasions on Genny's eyebrows were healing, and that Genny told her they were from Ivan hitting her. (68 RT 8150.) Gonzales claimed Genny did not have an injury on her lip when she put her in the bathtub. (68 RT 8153.) Gonzales claimed she did not remember seeing the injuries on the back of Genny's ankles. (68 RT 8153.)

Gonzales claimed she wanted to send Genny back to live with Gonzales's mother but Ivan said "no," because he did not want the abuse to be discovered. (66 RT 7622.)

Gonzales testified there was stress in their household in 1995. (66 RT 7550, 7556-7557.) They had financial stress stemming from their welfare benefits decreasing (66 RT 7550, 8104-8105; 69 RT 8249-8255) and their rent increasing (66 RT 7550; 68 RT 8101; 69 RT 8245, 8289). They had a $500-$800 grocery bill (66 RT 7550, 7556), their drug expenses were about $200 per month (66 RT 7551), and their electricity had been shut off, forcing them to run their electricity through their neighbor's. (66 RT 7551, 7556-7557; 71 RT 8769-8770.) They bought groceries on credit. (66 RT 7552.) Their expenses exceeded their welfare benefits. (66 RT 7552.) They sometimes ran out of food, and had to borrow food from their neighbors or Ivan's parents. (66 RT 7554.)

In July 1995, pressure was mounting because their drug debt was about $200, their electric bill of $100 was due (their electricity had just been turned on) and they owed money to the liquor store. (66 RT 7556-7557.) In spite of this financial pressure, Gonzales stated they were spending money on drugs because she needed to do drugs "to help me to numb me, to help me to keep up with everything, you know, with Ivan and with the kids and what was going on." (66 RT 7559.) Ivan was angry because Gonzales's mother did not send the $100 per month for Genny, as promised. (66 RT 7553.)

Gonzales testified Ivan's abuse of Genny was escalating. (68 RT 8163-8164.) For the two or three days prior to Genny's murder, Gonzales and Ivan did methamphetamine continuously, and had not slept. (66 RT 7639-7640, 7641, 7643.) The day Genny was murdered, the Gonzaleses had no food for the children. (66 RT 7641.) In spite of that, they were running out of their drugs, so Ivan left to get more. (66 RT 7640.)

Gonzales explained they were doing drugs all day, beginning at 6:30 a.m. (66 RT 7640-7641, 7644, 7671.)

The Gonzaleses bought their groceries on credit from Juan Banuelos,[11] who owned the Calimax on Hilltop Drive. (71 RT 8662-8664.) They would repay Banuelos on the first of the month when they received their welfare check. (71 RT 8663.) Up to May, 1995, the Gonzaleses always paid their bill, but at the time of Genny's murder, they owed Banuelos $800. (71 RT 8665-8666.) In June and July, they cashed their check elsewhere so Banuelos would not know they had been paid. (66 RT 7656.)

On the afternoon of Genny's murder, Banuelos came over and knocked on the Gonzaleses door to collect the $800 debt. (66 RT 7654-7655, 7657; 71 RT 8669-8770.) When no one answered the door, Banuelos pounded on the door, and said he knew Ivan was in there. (66 RT 7657, 7659; 71 RT 8670.) Ivan told Gonzales and the children to shut up. (66 RT 7658.) Eventually Ivan went outside to talk to Banuelos. (66 RT 7659; 71 RT 8671.) According to Gonzales, Banuelos yelled at Ivan. Ivan was mad but quiet. When Ivan came back in the house, he was very angry that Banuelos had yelled at him in front of the neighbors and embarrassed him. (66 RT 7660-7661.) The children went in their room because Ivan was angry. (66 RT 7662.) Ivan was pacing in the apartment and banging his hand on the table. (66 RT 7663.)

Gonzales described how Ivan wanted to have sex, but was frustrated because he could not ejaculate. (66 RT 7665-7666.) Ivan went to the store, and when he came back he was still very angry; he continued pacing back and forth. (66 RT 7669, 7673.) Ivan threw things and hit and kicked the

---

[11] His real name was Juan Banuelos (71 RT 8662) but Gonzales referred to him as Manuel.

children, including Genny. (66 RT 7674, 7676.) Ivan wanted to finish having sex so he wanted the children in bed. (66 RT 7674-7675.) Gonzales ran the water for Genny, and checked it before Genny got in the bath. (66 RT 7679, 7685; 68 RT 8026, 8171.) The water was lukewarm. (66 RT 7685; 68 RT 8044.) Gonzales turned off the water and Genny got in the bath; the water came up to her hip. (66 RT 7684-7685; 68 RT 8029, 8044, 8171.)

Ivan locked the other children in their room. (66 RT 7685; 67 RT 7898-7899; 68 RT 8088.) The younger children tried to get out but were unable to. (68 RT 8088.) Gonzales was making dinner while Genny played in the bathtub. (66 RT 7686.) Ivan was yelling at Genny to hurry up in the bath. (66 RT 7687-7688.) Ivan told Gonzales to "make some lines out" and tell the children to go to sleep. (66 RT 7688-7689.) While Gonzales was preparing their methamphetamine, Ivan continued to yell at Genny to hurry up. (66 RT 7689-7691.) Gonzales claims she then heard Genny say, "Tio, Tio, please don't drown me," then heard Genny scream. (66 RT 7691; 68 RT 8063.) It was a "big" scream; she sounded scared. (66 RT 7692.) When Gonzales finished doing her "line" of methamphetamine, she went toward the bathroom and saw Ivan holding Genny down by her shoulders.[12] (66 RT 7692-7693; 68 RT 8063; 69 RT 8222.) Genny was laying there motionless with her head back and her arms on the side of the bathtub. She was red. (66 RT 7692.) Gonzales claimed she did not know if Ivan knew whether the water was hot. (69 RT 8223.) Gonzales testified she yelled at Ivan and picked Genny up. (66 RT 7693-7694; 68 RT 8050, 8171.)

---

[12] Pediatrician Kenneth Feldman, a burn expert, testified that it was not plausible that there was already a fair amount of water in the bathtub then hot water got added to it. (59 RT 6574-6575.)

Genny was unconscious. (66 RT 7694.) According to Gonzales, she took Genny to her room and held her. (66 RT 7695.) She shook and rocked her to try to wake her up. (66 RT 7695; 68 RT 8035-8037.) Gonzales knew that it was bad and that Genny was dying. (68 RT 8071.) She was missing her skin from her chest down to her feet. (68 RT 8071.)

Ivan told Gonzales to shut up and he closed the sliding door and the window. (66 RT 7695.) Ivan shook Genny and attempted CPR. (66 RT 7696; 69 RT 8230.) Ivan then told Gonzales he was going to the store and to stay there, otherwise she would get blamed. (66 RT 7697-7698; 68 RT 8045.) Gonzales claimed she thought Ivan was going to get help. (66 RT 7697.) The other children were still locked in their bedroom. (66 RT 7699.)

Gonzales claimed she did not get help for Genny because she thought Ivan went to get help. (66 RT 7699; 68 RT 8072.) Instead, Ivan returned from the store with beer, bread and cigarettes. (66 RT 7700; 68 RT 8073.) Gonzales was mad at Ivan because he did not seem to care what was happening to Genny. (66 RT 7700-7701.) Gonzales yelled at Ivan, then ran to Patti's house because at that point she did not care if Ivan hurt or killed her. (66 RT 7701.) On cross-examination, Gonzales admitted that when she went to Patti's apartment, Genny was not breathing or moving and was cold. (68 RT 8076.)

Gonzales said she told the neighbors not to call the police because that was what Ivan told her to say. (66 RT 7702.) Gonzales testified that Ivan told her to say that Genny drowned, and that the injuries to her head were from a hot pot falling on her head. (66 RT 7703.) While they were at Patti's apartment, Ivan told Gonzales he "took care of" the

methamphetamine that had been in their apartment so the police would not find it.[13] (68 RT 8050.)

Gonzales claimed that Ivan sent Ivan Jr. to Patti's house earlier in the day to get rubbing alcohol (prior to Genny's fatal burn). (66 RT 7704.)

Gonzales claimed she lied in both interviews to the police because she was afraid of Ivan, was confused, shocked, overwhelmed, and was on methamphetamine. (66 RT 7706.) She later testified she lied to the police because she was trying to say what Ivan either told her to say or would want her to say and she was afraid. (68 RT 8180- 8181.) She also denied Ivan hit her to the police because she was afraid. (66 RT 7709.) Gonzales said she lied to the police when she told them Ivan Jr. was playing with the blow dryer. (69 RT 8210.)

Gonzales denied burning Genny with the blow dryer. She claimed Genny did not have the marks on her face before she went in the bathtub, when she pulled her out of the bathtub, or when Ivan left to go to the store. (66 RT 7712.) She said Ivan was alone with Genny after he came back from the store (leaving the jury with the impression that Ivan burned her with the blow dryer). (66 RT 7712.) Gonzales later testified that Ivan blew air on Genny with the blow dryer. (67 RT 7888.) She also later said she used the blow dryer to cool Genny off but did not put it close to her. (67 RT 7890.)

Gonzales admitted that she lied to both Cynthia Bernee and Dr. Ryan. (68 RT 8178.) Gonzales said she lied to them because it took her a while to

---

[13] Christina Robles, a defense witness, testified that Ivan asked Gonzales if he had any "shit in his nose." (72 RT 8990.) Gonzales then said to Ivan, "We left the shit out." (72 RT 8991.) Ivan then went back to the Gonzales apartment. (72 RT 8892-8893.) Nevertheless, the police recovered from the closet a babywipe container with a straw, a razor blade, drug paraphernalia and pornographic material. (57 RT 6148, 6235.)

talk about all the things that had happened. (68 RT 8052, 8178-8179.) She told both Bernee and Dr. Ryan that when she went to check on Genny she found her laying in the bathtub, and that she saw water coming out of Genny's mouth. (68 RT 8052, 8059-8061; 73 RT 9319-9320, 9322.) Gonzales also told Bernee that Genny had spilled water on her head. (68 RT 8128.)

Gonzales presented testimony from relatives that Genny loved Gonzales and Gonzales was affectionate towards Genny. (71 RT 8705-8706; 72 RT 9044-9045.) Gonzales's brother-in-law testified that she was a loving mother. (72 RT 9036.)

Michael Maloney, a licensed psychologist, explained suggestibility and contamination of children witnesses. (62 RT 7064, 7066, 7067, 7070-7072, 7075.) Ivan Jr.'s numerous interviews and his preliminary hearing testimony were then played for the jury. (Exh. K [videotape of July 22, 1995 interview]; Exh. L [transcript]; Exh. M [audiotape of July 23, 1995 interview]; Exh. N [transcript]; Exh. O [videotape of July 26, 2996 interview]; Exh. P [transcript]; Exh. Q [videotape of October 15, 1995 interview]; Exh. R [transcript]; Exhs. S & T [videotapes of November 8, 1995 preliminary hearing testimony]; Exh. U [transcript]; 62 RT 7088-7089; 63 RT 7093-7097, 7099-7100, 7106.)

Ivan Jr. was eight years old at the time of Genny's murder. (15 CT 3353.) When he was first interviewed, Ivan Jr. said his mother drew a warm bath for Genny, then Genny put in hot water and she burned herself and drowned. (15 CT 3356, 3360.) Ivan Jr. and his siblings were locked inside their bedroom from a lock on the outside of their door.[14] (15 CT 3370-3372, 3328.) Ivan Jr. heard Genny say "ow" four or five times. (15

[14] Indeed, the door to the children's bedroom had a lock on the outside. (57 RT 6171-6172.)

CT 3373, 3328.) His father told him Genny could not breathe and his mother told him she drowned. (15 CT 3335, 3362, 3374, 3345.)

Ivan Jr. later explained that his parents were torturing Genny and he thought she was going to die one day; then she did. (15 CT 3277.) He explained Gonzales and Ivan spent their money on cocaine and marijuana instead of food. (15 CT 3277.) On the day of Genny's murder, both his parents put Genny in the hot water. (15 CT 3281-3282.) Although Ivan Jr. and his siblings were locked in his bedroom, the bedroom door had no doorknob, and through the hole in the door, Ivan Jr. could see the bathroom.[15] (15 CT 3388-3389, 3395.)

Genny was injured on her head when both of Ivan Jr.'s parents burned her with hot water in the bathtub. (15 CT 3442-3443.) His father held Genny down and his mother helped. (15 CT 3445-3446.) Ivan Jr. said Genny's hands were tied together "a lot of times." (15 CT 3342-3343.) He said that when she had an accident, she was spanked. She was forced to clean up her feces and eat it. (15 CT 3308, 3275-3276.) Both his parents hit Genny, cut her skin with a knife and pulled her hair out. (15 CT 3277-3280.) They hit her all over with a belt. (15 CT 3400.) He explained that Genny slept in the bathtub or in the other bedroom. (15 CT 3278, 3405-3406.) Both of Ivan Jr.'s parents put Genny in the bathtub with her hands and feet bound. (15 CT 3406-3407.) Ivan Jr. explained that his parents tied Genny's hands with rope, causing scars. (15 CT 3279.) Both his parents bound Genny's hands and tied her up, suspended, on the bar in the closet for hours. (15 CT 3288-3289, 3402, 3409-3410, 3451.) Genny screamed and cried. Her arms bled and then scarred. (15 CT 3290.) Genny slept in

[15] It was uncontested there was no doorknob on the bedroom door. (57 RT 6171-6172; 67 RT 7898.) There was a clear and full view from the hole where the doorknob had previously been into the bathroom. (57 RT 6173.)

a box in the closet one time with her hands bound. (15 CT 3408.) His parents told them to throw a hard ball at Genny. Ivan Jr. threw it but intentionally missed. (15 CT 3291-3292, 3403-3404.) If Ivan Jr. and his siblings did not throw the balls at Genny, the Gonzales's would hit them. (15 CT 3404-3405, 3438, 3440.) Genny did not eat with the other children. (15 CT 3400.) When Genny ate, she ate in the bedroom. (15 CT 3400-3401.) Ivan Jr. explained that his parents did not give Genny any food, or would give her food with hot sauce on it. The children would give Genny a sandwich, but when their parents found out, they would get hit.[16] (15 CT 3296, 3401.)

Ivan Jr. explained that he told the truth about what happened to Genny "because I was feeling sad in my heart and I wanted to let it out." (15 CT 3447.)

Maloney hypothesized that Ivan Jr. changed his statement either (1) because he initially was trying to protect his parents and then later more accurately reported what he saw; (2) that he was so traumatized he initially could not talk about the incident and later became more comfortable doing so; (3) there was influence or contamination; or (4) a combination of these factors. (70 RT 8548.)

Robert Bucklin, a forensic pathologist, testified that Genny's burns could have occurred in three to five seconds. (62 RT 6988.) Dr. Bucklin also opined that Genny could have received a blow to her face that rendered her unconscious and caused her black eyes. (62 RT 6988.) If she was

---

[16] During her testimony, Gonzales admitted that Genny was not allowed to eat very much food because Ivan would get mad. (66 RT 7668.) She also admitted that after the burn to her head, Genny was not allowed to be with the other children and was confined to the room. (66 RT 7668.) Gonzales said she tried to keep Genny in the room so Genny would not get on Ivan's nerves. (66 RT 7668.)

unconscious, an adult could have shaken her to revive her and caused her subdural hematoma. (62 RT 6989.) Dr. Bucklin also opined that Genny could have died within a hour of receiving the burns. (62 RT 6992.)

The parties stipulated that Gonzales had 143 nanograms per milliliter of methamphetamine in her blood on the night she was arrested.[17] (72 RT 8936.) Terrence McGee, M.D., an addiction medicine specialist, testified that using methamphetamine impairs ones judgment. (72 RT 8937, 8945.) Long-term use would result in impairment in many ways, including a loss of judgment. (72 RT 8951.) Methamphetamine use also can result in violent acts. (72 RT 8956.)

F. Rebuttal

The prosecution presented Ivan as an exhibit for the jury to view. (75 RT 9653.) Additionally, witnesses described incidents where Gonzales was violent towards Ivan, including pushing him, pulling his hair, scratching him on his arms and face, hitting him in the mouth, slamming the hood of his car down on his head, and throwing a plate at him that hit him on the mouth. (75 RT 9675, 9764-9766, 9770, 9808-9810, 9812-9813, 9855-9856; 76 RT 9891, 9914.) In addition, Ivan's sisters testified Gonzales was verbally abusive to Ivan, including calling him a coward, lazy and a "motherfucker." (75 RT 9854; 76 RT 9891.) The witnesses also testified that Ivan did not fight back. (75 RT 9810; 76 RT 9891.)

One witness described an incident, after a night of drinking, in which Gonzales got frustrated because she was unable to roll her car window up, and she went "wild." (75 RT 9657-9659.) Ivan tried to calm Gonzales

---

[17] On the night of the murder, Gonzales was exhibiting symptoms of being under the influence of methamphetamine. (57 RT 6281.) She was fidgety, spoke rapidly, had a short attention span, was thirsty, and had an elevated pulse. (57 RT 6284, 6286-6287.) Gonzales was upset and crying. (57 RT 6284-6285.)

down, but she pulled his hair. (75 RT 9659-9660.) Gonzales kicked the dashboard of the car, cried and screamed, resulting in the police showing up with their guns drawn. (75 RT 9660-9661.) Gonzales charged an officer. (75 RT 9662.) She was arrested. (75 RT 9662.)

Witnesses testified that Gonzales had the upper hand in the relationship and that Ivan got Gonzales anything she needed. (75 RT 9677-9678, 9770, 9792-9795, 9836, 9867.) Gonzales controlled the money in the relationship. (76 RT 9899, 9919.)

Eugene Luna, Jr. testified about his affair with Gonzales. (75 RT 9666-9671.) Evidence was also presented that Gonzales told a friend that she thought Ivan Jr.'s biological father was Gonzales's ex-boyfriend, David Cardenas. (75 RT 9831.)

A friend of Gonzales's, Lorena Peevler, testified that Gonzales never told her Ivan abused her. (75 RT 9807.) Witnesses who knew Gonzales (friends and relatives) also testified that they never saw any bruises on Gonzales. (75 RT 9833, 9866; 76 RT 9892.)

Guadalupe Baltazar, one of Ivan's sisters, testified that she saw scratches and bruises on Ivan. (76 RT 9887, 9892.) She also testified that one time Gonzales threatened to kill herself. (76 RT 9892-9893.) Additionally, when Gonzales got angry, she would direct her anger towards her children by grabbing them on the arm or tugging on their hair. (76 RT 9898.) Gonzales told Baltazar that she did not want to get a tubal ligation because if she ever left Ivan, she wanted to have children with another man. (76 RT 9899.)

Virgilio Imson, an eligibility worker for the County of San Diego's food stamp and AFDC program, explained how much in welfare benefits the Gonzaleses received. (76 RT 9938, 9941-9946.) The net decrease in welfare benefits for the Gonzaleses in June 1995 was $16.00, but in July

1995 they were increased to their previous amount of $1580 per month. (76 RT 9945.)

Forensic psychiatrist Mark Mills defined malingering as an attempt to deceive somebody. (77 RT 10024-10033.) Dr. Mills explained PTSD. (77 RT 10037, 10039, 10044-10045.) He did not evaluate Gonzales, nor did he offer an opinion as to Gonzales's current diagnosis. (77 RT 10041-10042.) He did, however, give many examples of Gonzales's conflicting statements (regarding whether she was molested and abused as a child, and her statements regarding the hook, the handcuffs, and the blow dryer), and opined that, based on the conflicting data, there was insufficient evidence to reliably conclude that Gonzales had PTSD. (77 RT 10047, 10049-10051.)

Clinical psychologist Nancy Kaser-Boyd interviewed Gonzales. (78 RT 10137, 10144.) Dr. Kaser-Boyd testified that it was difficult to diagnose whether Gonzales suffered from BWS because she exaggerated and changed her story. (78 RT 10157, 10215.) Moreover, even assuming everything Gonzales said was true, Dr. Kaser-Boyd did not believe the violence approached the level where she would be immobilized by terror. (78 RT 10214.)

Dr. Kaser-Boyd agreed with the defense experts that Gonzales suffered from PTSD. (78 RT 10149-10150.) Gonzales had psychological and pathological issues, which could be from being abused as a child rather than from BWS. (78 RT 10215.) Dr. Kaser-Boyd described BWS, and explained that it can be malingered or exaggerated. (78 RT 10146-10147.) Psychological tests can help determine whether a woman truly suffered from BWS. (78 RT 10147.) Gonzales was above average in intelligence. (78 RT 10153.)

Dr. Kaser-Boyd believed that for battered women, it was very risk-oriented behavior to have an affair because most batterers are jealous, and it would push their buttons. (78 RT 10162-10163.) She also believed that

Gonzales's statements to the police were not consistent with someone attempting to protect her batterer. (78 RT 10180.) Gonzales exercised control in her life by having the affair with Luna and by getting sterilized. (78 RT 10211.)

Dr. Kaser-Boyd administered some tests to Gonzales. The tests raised the specter that Gonzales was exaggerating. (78 RT 10210-10211, 10215-10216.) On the Levenson IPC scale, Gonzales reported she had no control in her life, which was inconsistent with the 400 battered women in the test sample. (78 RT 10189-10191.) Gonzales's endorsement to a much greater degree than the battered women in the sample of her lack of control raised the question of exaggeration. (78 RT 10191.) Similarly, Gonzales's attitudes of women's roles were more consistent with women in college than battered women. (78 RT 10193.) Gonzales also rated herself as much more helpless and submissive than battered women in the study. (78 RT 10194-10195.) Gonzales was very guarded on the Rorschach test, which is unusual for a battered woman. (78 RT 10195-10197.) Dr. Kaser-Boyd felt it showed Gonzales was not interested in meaningful participation in the test by not allowing Dr. Kaser-Boyd to see Gonzales's personality structure. (78 RT 10210-10211.) In the Million Clinical Multiaxial Inventory, the computer scored Gonzales in three out of four protocols as exaggerating her symptoms. (78 RT 10198-10202.)

Dr. Kaser-Boyd also analyzed the two MMPI tests that Dr. Ryan gave, in 1995 and 1997. (78 RT 10203-10204, 10206.) The first MMPI had a very elevated profile, that invalidated the test. It would most likely be considered malingering or a "fake bad" profile. (78 RT 10204-10205.) Someone scoring as Gonzales did would be delusional, and may have hallucinations, would probably be suicidal, with psychiatric hospitalization or antipsychotic medication. (78 RT 10205.) Dr. Kaser-Boyd scored the second MMPI administered by Dr. Ryan in two ways: first based on how

Gonzales originally answered the questions, then again after Gonzales changed some answers that she said she should have answered differently or on which she had made a mistake. (78 RT 10206.) The second test was a valid profile. Gonzales was high on a scale for someone who is angry, has authority problems, comes from family discord, and is impulsive. Persons scoring high on this scale often have drug or alcohol problems, marital problems, and act out instead of internalize their anger. (78 RT 10207-10208.) Gonzales's profile was not consistent with what Dr. Kaser-Boyd had seen in other battered women as Gonzales did not show hopelessness, helplessness and guilt. (78 RT 10210.)

G. Surrebuttal

Clinical psychologist Thomas Mac Speiden looked at Dr. Kaser-Boyd's test results and materials. (80 RT 10363-10364, 10372.) The MMPI and the Millon Multi Clinical Inventory III require an eighth grade reading level or above. (80 RT 10376.) Dr. Mac Speiden administered an intelligence test to Gonzales (Wechsler Adult Intelligence Scale III) and a reading achievement test.[18] (80 RT 10373.) Gonzales had a verbal IQ of 87 (the 19th percentile) and a performance IQ of 90 (the 25th percentile) for an overall score of 88 (the 21st percentile). (80 RT 10375.) On the reading test, Gonzales scored a 78, which was the 7th percentile range for her age, and corresponded to someone who was beginning eighth grade. (80 RT 10376.)

Dr. Mac Speiden questioned Dr. Kaser-Boyd's analysis because she read and explained some of the portions of the MMPI to Gonzales, thereby affecting the results. (80 RT 10378.) Dr. Mac Speiden testified it was highly questionable the MMPI was valid. (80 RT 10382.) The pattern of

---

[18] The tests were given after Dr. Kaser-Boyd testified. (80 RT 10407.)

Gonzales's answers was sawtooth, which showed an invalid protocol as a result of random answering. (80 RT 10380, 10383-10384.) Additionally, Dr. Mac Speiden questioned whether Gonzales would have understood the questions on the MMPI, and the other tests such as the Rorschach. (80 RT 10384, 10386.) Dr. Mac Speiden went through the other tests administered by Dr. Kaser-Boyd and believed the Millon Multi Clinical Inventory III and the Attitudes Toward Women tests were not valid. (80 RT 10387, 10391, 10394.) Dr. Mac Speiden also opined there were cultural biases on the MMPI. (80 RT 10394-19396.)

H. Penalty Phase

The prosecutor did not present any additional evidence in the penalty phase, and relied on the aggravating nature of the crimes, as presented in the guilt phase. (88 RT 11677.)

Gonzales presented witnesses who worked in the jail that Gonzales was a model inmate. She was respectful, quiet, and never had a rule violation. (88 RT 11682-11684, 11697, 11699, 11726; 89 RT 11821-11822.) Witnesses who supervised Gonzales's visits from her children testified that Gonzales's children were happy to see her when they visited, and Gonzales seemed happy to see her children. (88 RT 11684; 11698-11699, 11708-11710; 89 RT 11826, 11831-11834, 11838-11840.)

Gonzales attended the jail church services every Sunday, and Bible Studies classes every Saturday. (88 RT 11715-11716.) The jail chaplains testified Gonzales was encouraging to other inmates. (88 RT 11707, 11717, 11731-11732, 11742.) She had strong faith. (88 RT 11707.) Gonzales prayed for her children, her family, her sisters, and Genny. (88 RT 11714-11715, 11735-11736, 11750.) Carol Rainy, who worked in the Chaplain's office at the jail, testified that Gonzales was not the same person as when she first was there, and was compassionate, resolved, and empathetic. (88 RT 11745, 11749.) Gonzales expressed remorse to her for

the state of affairs that took place, and said that she wished she had been stronger and left the situation and sought help. (88 RT 11751.)

Victor and Anita Negrette, Gonzales's sister and brother-in-law, both testified they loved Gonzales and Gonzales was close to them and their sons. (88 RT 11759-11760, 11771, 11773; 89 RT 11982, 11984.) Gonzales babysat her nephews (the Negrette's children) and took care of them. (88 RT 11760.) Anita testified Gonzales's children love, miss and need their mother. (88 RT 11772.) Victor testified to the affect of Gonzales receiving the death penalty: it would shatter his heart, and affect his younger two sons; Anita would be hurt; and Gonzales's children would be negatively affected. (89 RT 11983, 11985.)

The Negrette's 17-year-old son, Victor, and 15-year-old son, Gabriel, testified Gonzales treated them and their brothers well and was never mean to them. (88 RT 11787, 11789, 11795, 11796, 11798, 11802.) Gonzales treated them like one of her own sons, and was like a second mother to them. (88 RT 11795, 11798, 11802.) Gonzales also treated her own children well. (88 RT 11791.) Victor testified that if he lost Gonzales, he would lose a part of himself. (88 RT 11795.) Gabriel testified that he once was at Gonzales's apartment and Genny and Gonzales were hugging. (88 RT 11799, 11801.)

The treating therapists for Ivan, Jr. and Michael Gonzales, the two oldest children, testified that if the death penalty were imposed on Gonzales, it would have a severe, negative, lifelong impact on Ivan Jr. and Michael. (89 RT 11841-11844, 11848; 11868, 11870-11872.)

Mary Rojas, Gonzales's sister and Genny's mother, testified about her and Gonzales's childhood abuse by their mother and their sexual abuse by their stepfather. (89 RT 11897-11898, 11900-11901-11903.) Rojas described her drug and alcohol problems that led to Genny and her other children being removed from her custody. (89 RT 11904-11908.) Rojas

testified she had been sober for four years and was raising her children. (89 RT 11910.) Although Rojas loved and missed her daughter, Genny, and she was a "little bit angry" at Gonzales, it would hurt her children if Gonzales were given the death penalty. (89 RT 11913, 11915, 11918.) Carmen Lara, Rojas's substance abuse counselor, testified that Rojas had remained sober and was a good mother, considering her circumstances. (89 RT 11971-11974.)

Photographs and a videotape were admitted showing Gonzales with her children and Negrette's children. (88 RT 17761-11770.) Gonzales also presented her children's baby bracelets and numerous papers, including her children's school work, notes and cards written by the children to Gonzales. (89 RT 11990-11991.)

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE SHOWING THAT GONZALES AND HER HUSBAND BLAMED EACH OTHER FOR GENNY'S MURDER; AND THE PROSECUTOR DID NOT COMMIT MISCONDUCT; GONZALES'S NUMEROUS OTHER CLAIMS ARE MERITLESS AND/OR DO NOT REQUIRE REVERSAL

In her Opening Brief, Gonzales combines numerous unrelated claims of error and argues that those errors together synergistically eviscerated her defense. (AOB 185-190.) Gonzales acknowledges that some of the rulings were not erroneous in isolation, but claims that they compounded the unfair impact of other errors. (AOB 190.) Specifically, Gonzales claims the prosecutor committed prejudicial misconduct by insinuating untrue facts during his cross-examination of Gonzales (AOB 229-252) and asking an improper hypothetical question (AOB 255). She claims the trial court committed error by allowing the prosecutor to ask the defense expert witness whether he was aware that two experts evaluated Ivan for BWS and came to different conclusions (AOB 252-275), ordering Gonzales to undergo two psychological examinations to rebut her claim of BWS (AOB 275-286), instructing on Gonzales's failure to submit to one of the examinations (AOB 286-291), allowing an expert witness to testify to improper profile evidence that Gonzales was a malingerer and by telling the jury what to believe (AOB 294-307), and excluding Ivan's post-arrest hearsay statements (AOB 308-315). Lastly, Gonzales claims the errors individually or in combination were prejudicial. (AOB 315-317.)

The only claim Gonzales raises that has merit is the claim regarding the trial court's order for her to submit to a psychological examination. Although in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, this Court recently held there is no statutory authorization to order a psychological

evaluation to rebut a defendant's mental defense, that decision should not be applied retroactively. If it is applied retroactively, Gonzales's constitutional rights were not violated, and the error was harmless.

A. The Prosecutor Did Not Commit Misconduct During His Cross-Examination of Gonzales

Gonzales claims the prosecutor's cross-examination of her about her interpretation of a letter with a drawing she received from Ivan, and whether she and Ivan agreed to blame each other for Genny's murder, implied facts not in evidence. (AOB 229-230.) The letter upon which the cross-examination was based was properly admitted into evidence, and the prosecutor's questions of Gonzales about the meaning of the letter and whether Ivan did in fact blame Gonzales for Genny's murder were based on reasonable inferences from the evidence. As the prosecutor did not imply facts not in evidence, Gonzales's claim of prosecutorial misconduct fails.

While in custody awaiting trial, Ivan wrote Gonzales a series of letters. In one letter, dated October 11, 1995, he wrote,

> You look Great, as beautiful as ever, but you looked very disturb[ed] the day of our court . . . and what you told me really hurt me, but I think I understand why. But I'm not a finger you know that. That attorney of your is trying to turn you against me.

Ivan then told Gonzales that her attorney was a "two faced SOB" and said "he's either gonna turn you against me or he'll try to screw you over to convict you." (37 CT 8362, grammar and punctuation errors in original.) Ivan then explained to Gonzales how to file a *Marsden*[19] motion. (37 CT 8362.) Ivan gave Gonzales an example of what to file. (37 CT 8360-8361.) At the end of the letter, Ivan wrote the following:

---

[19] *People v. Marsden* (1970) 2 Cal.3d 118.

> But sweetheart one idea I heard that you can write to me is, on the envelope, address it to Mother's house, as if you were writing to her. And she'll take the letter, put it in a different envelope, as if she were writing to me. You get the idea? Try it! but still watch what you write. I Love you and would never point any Finger at you. I LOVE YOU TOO MUCH.

At the end of the letter it said, "P.S. IF it comes down to it," followed by a drawing of a hand with a finger pointing towards a "smiley" face (but the face was not smiling), and an arrow with "me" on the other side, pointing to the "smiley" face. (37 CT 8361, grammar and punctuation errors in original.) Clearly Ivan was telling Gonzales how to send him mail without it being apparent it was written to him, and telling her that she could point the finger at him. Equally as clear, Ivan was telling Gonzales it was okay for her to shift the blame to him.

The prosecutor discussed this letter in opening statement.[20] (55 RT 5768-5769.) The defense lawyer also discussed it in opening statement, and provided a different interpretation for the jury. He argued it showed that Ivan felt like he had control over Gonzales "because the way he performs sex on her is he uses his finger on her and puts his finger in her to do what he thinks to control her and gets her under his power." (55 RT 5892-5893.)

Gonzales admitted 26 pages of letters Ivan wrote to her from jail, including the letter with the notation about the "finger." (66 RT 7722-7730; Exhs. II, JJ & KK.) Gonzales testified on direct examination that the

---

[20] The facts underlying Gonzales' claim need to be discussed in chronological order in order to put them in proper context. In Gonzales's AOB, the discussion of the prosecutor's cross-examination is laced with editorial comments that are not part of the record, and the recital of the cross-examination is piecemeal, which fails to place the examination in proper context.

"finger" reference meant that Ivan "has me by the finger, to continue saying what he's saying, what he tells me to say, and to Ivan, you know, he–he uses his finger as a sexual thing. And it implies that, too." (66 RT 7728.)

On cross-examination, the prosecutor asked Gonzales about the letter, particularly the part that said, "if it comes down to it" [graphic of a finger], "me." (67 RT 7861-7862.) Gonzales confirmed Ivan wrote the letter to her. (67 RT 7861.) The examination proceeded as follows:

> Q: It says, 'if it comes down to me,' point the finger at me, doesn't it?
>
> A: It don't say, 'point the finger at me.'
>
> Q: What do you think it says?
>
> A: He's telling me to, in his words, he's telling me to stick to the story and he has me by his finger. It's to– it's a sexual thing with Ivan.
>
> Q: It's a sexual thing?
>
> A: Yes, because he's always using his fingers. It don't, it don't mean like it says right there, if it–

The prosecutor further cross-examined Gonzales about whether the "finger" reference had a sexual connotation, asking her whether she testified during direct examination that Ivan digitally manipulated her to control her. (67 RT 7862.) The prosecutor then asked Gonzales to "explain to me and the jury how this is some form of sexual innuendo," how it was sexual, and to explain what she meant. (67 RT 7863.) Gonzales responded, "That's the way Ivan is. He has me by his finger . . . wrapped around his finger." (67 RT 7863.) Gonzales further explained that Ivan was telling her that Mr. Popkins (defense counsel) wanted her to point the finger at Ivan, but Ivan has her by the finger. (67 RT 7864.)

The cross-examination continued as follows:

Q: Now, farther down in the letter, it says, Mr. Gonzales writes- . . . It says, 'by the way,' it says that 'you need the finger.' Then there's a 'me' on top of this. [pointing to the highlighted part of the letter that is Exhibit JJ]. 'I got your meaning after a few seconds, but I didn't get a chance to tell you.' So he's saying to you, 'you need your finger,' 'me.' What's he saying there?

A: He's saying that I need him. He always told me that I need him.

Q: Now, when you look at both of these together, ma'am, isn't he saying, 'P.S., if it comes down to it,' point the finger to me, and he got your meaning that you were going to be pointing the finger at him?"

A: That's not the way it was.

Q: That's not the way you see it, huh?

A: That's not the way it was. That's not the way he–

(67 RT 7866.)

An objection was raised that the last question was argumentative, and the court sustained the objection. Then the cross-examination continued:

Q: Well, you knew that Ivan Gonzales claimed he was a battered man, didn't you?

A. He never testified to that; no, I didn't.

Q: He didn't testify to it, but he claimed that, didn't he?

(67 RT 7866-77867.)

Defense counsel objected, stating, "I think she answered the question, he never testified to it, asked and answered." The court sustained the objection "on the grounds that we shouldn't go through with that line." (67 RT 7867.)

The prosecutor then asked a different question, "Well, were you aware that that was his defense?" Defense counsel objected and requested a sidebar conference. (67 RT 7866-7867.) At the sidebar conference, the court stated that it was concerned about the "thicket of issues" raised by this line of questioning, one of which was the parties had tried to stay away from what happened at Ivan's trial. The second issue was that Ivan entered a plea of not guilty, and the defense was based on what the attorneys did, so it was not relevant. (67 RT 7867.) The prosecutor responded that he was asking about the letter where Ivan gave Gonzales permission to "point the finger" at him, and it had "always been the people's theory that both these people are merely pointing the fingers at each other. . . . I'm asking about her knowledge of what he claimed," which was circumstantial evidence that the "finger" reference in the letter was not about Ivan's digital penetration of Gonzales, and was rather that the Gonzaleses were pointing their fingers at each other. (67 RT 7868.)

The court noted how "irrational" it would be for anyone to believe that the passages in the letter were anything other than, "if it comes down to it, point the finger at me," and stated this part of Gonzales's testimony was not its "shining hour." (67 RT 7868.) However, to avoid revealing what occurred in Ivan's trial,[21] the court sustained the objection. (67 RT 7868-7869.)

Defense counsel asked for a mistrial and noted that Gonzales's defense "has been established since the beginning, and we feel that [Ivan's

---

[21] Later in the trial, the court, with the parties' agreement, informed the jury that Ivan was convicted of first degree murder with special circumstances and sentenced to death. (71 RT 8785-8789.) The court told the jury that they could consider it only for the limited purpose of determining whether any witnesses were biased against either the prosecution or defense. (71 RT 8789.)

defense team] created the bogus defense after they found out what we were doing." (67 RT 7869-7870.) Counsel noted that Ivan did not put on an expert to say he was a battered man, and Ivan did not testify that he was a battered man, and instead, "everything was by implication." (67 RT 7870.)

The court denied the motion for a mistrial. (67 RT 7871.) The court noted that the only testimony that was elicited was Gonzales's statement that Ivan did not testify "to that." The court did not feel there was an impression left with the jury that Ivan offered the exact same defense. (67 RT 7871-7872.) The court then discussed how it did not want to get into Ivan's trial, and whether some other remedial action was required. (67 RT 7872.) The court then said,

> if there is some way to set the record straight in a way that's appropriate, although I have some doubts that we can do that, but if there's some way to make it clear that Ivan's position was that Veronica did it, you'll want to do that or I'll consider all that. ¶ But my inclination at this time is to think what we need to do is get back in so as not to telegraph this as too big a deal to them, to present the rest of the evidence and then let it go.

(67 RT 7873.) Defense counsel then asked the court to admonish the jury that questions asked by counsel are not evidence, nor are answers to questions where objections are sustained. (67 RT 7873-7874.) The court so admonished the jury. (67 RT 7874-7875.)

On re-direct, defense counsel again asked Gonzales about the meaning of the letters. Defense counsel acknowledged that it looked like what "the District Attorney said" and that "it looks, obviously, like, you know, 'finger me,' kind of a reference to culpability or blame in this case." Counsel asked Gonzales whether she agreed that the interpretation by the prosecutor was what it looked like, and Gonzales responded, "Yes. But– But if you don't know Ivan the way I know Ivan, you would know it's not

what he meant." (69 RT 8273.) Gonzales then testified that Ivan never told her what he intended when he wrote the letter, therefore she would be speculating as to what the letter meant. (69 RT 8273.) Gonzales then explained that although it seemed like he was talking about blaming each other, that was not what he meant. (69 RT 8274.)

In further cross-examination about the letter, Gonzales said she did not know what the letter meant. (69 RT 8276-8278.) Gonzales then testified that it meant that Ivan would not let her take the blame for something she did not do, and he was going to accurately tell what happened. (69 RT 8276.) She also testified that Ivan was writing about how he needed her. (69 RT 8278-8279.)

Again, in further re-direct, Gonzales was asked about the reference to "finger" in the letter and she stated that Ivan "always use[d] his finger" in sex. She failed to elaborate further how the letter had a sexual reference. (69 RT 8302-8303.)

1. The prosecutor's cross-examination of Gonzales's interpretation of the letter was proper

Based on the "finger" pointing references in the letter, a reasonable inference was that Ivan and Gonzales decided to blame each other for Genny's murder. Thus, the prosecutor theorized that "both these people are just merely pointing the fingers at each other." (67 RT 7868.) Nevertheless, Gonzales characterizes the prosecutor's theory as "unsupported," "speculative," "sensational," (AOB 232, 237, 243) and also contends "no scenario is apparent in which the prosecutor could have believed in good faith that he would be able to prove his speculative theory" (AOB 243-244, fn. 100).

Gonzales's argument focuses on the prosecutor's cross-examination of her about the letter, which was unobjected to. Her claim of error, however, is on the follow-up questions where she was asked whether Ivan

claimed he was a battered spouse. To the extent Gonzales claims the prosecutor's examination about the letter was misconduct, Gonzales concedes she did not object. (AOB 230.) Therefore, Gonzales has forfeited any claim of error as to the cross-examination about the letter. (*People v. Young* (2005) 34 Cal.4th 1149, 1184-1185; *People v. Visciotti* (1992) 2 Cal.4th 1, 51-52.)

Moreover, although Gonzales discusses the questions about the letter in great length, and argues they were improper, her claim is not supported by any authority.[22] (AOB 230-231, 235-236.) Gonzales's perfunctory claim that the questions on cross-examination about the letter were improper or inappropriate can also be rejected on its merit because the questions were clearly asking Gonzales's interpretation of the letter by Ivan, not what Ivan meant, therefore, they were not speculative or based on hearsay, as Gonzales contends. (AOB 230.)

The analysis and authority provided by Gonzales is based on the two questions that followed, which asked Gonzales about whether Ivan claimed, and used as a defense, that he was a battered man. Gonzales argues it was an unsupported theory, which was not true, not relevant, and based on inadmissible hearsay. (AOB 232-233.)

Gonzales did not object to the initial question she now contends was error, i.e., whether Gonzales knew that Ivan claimed he was a battered man.

---

[22] It is not clear whether Gonzales is raising a claim based on this line of questioning or provides the detail with the editorial comments as background. Beyond failing to properly preserve her claim below with a specific and timely objection in the trial court, this Court should reject any assignment of error on the basis it is not properly presented as it is a perfunctory assertion without development. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; See also, Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Gray* (2005) 37 Cal.4th 168, 198; *People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8.)

(67 RT 7866.) Therefore, any claim of error to that question has been forfeited. (*People v. Young*, *supra*, 34 Cal.4th 1149 at pp. 1184-1185; *People v. Visciotti*, *supra*, 2 Cal.4th 1 at pp. 51-52.) Gonzales did object to the two follow-up questions--whether, even though Ivan did not testify to being a battered man, he claimed that and used that as his defense. (67 RT 7866-7867.) While Gonzales's challenge to the two follow-up questions were not forfeited, both questions were proper.

"[T]he permissible scope of a prosecutor's cross-examination of a defendant is 'very wide.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 755, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 822.) However, a prosecutor "may not examine a witness solely to imply or insinuate the truth of the facts about which questions are posed." (*People v. Young*, *supra*, 34 Cal.4th at pp. 1149, 1186; *People v. Visciotti*, *supra*, 2 Cal.4th at pp. 1, 52.) A prosecutor may ask a witness questions which are based on the evidence or reasonable interpretations which may be drawn from the evidence. (*People v. Stewart* (2004) 33 Cal.4th 425, 491-492.)

Here, the prosecutor did not violate the federal Constitution because he did not have "a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gray*, *supra*, 37 Cal.4th at pp. 168, 215; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Nor did the prosecutor violate state law because his conduct did not render Gonzales's trial fundamentally unfair nor did he use "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

The letter that formed the basis of the cross-examination was properly admitted into evidence. The prosecutor was entitled to ask Gonzales what the references in the letter, written to her, meant, or for her interpretation of

the drawings. Because the letter was properly admitted into evidence, and a reasonable inference of the drawings in the letter were that Ivan and Gonzales decided to "point the finger" at each other, the prosecutor was entitled to ask Gonzales whether this interpretation was true. The prosecutor was also entitled to ask Gonzales whether she and Ivan did, in fact, blame each other for Genny's murder. Therefore, the prosecutor's questions did not insinuate or imply facts, it merely asked Gonzales if Ivan carried out their plan, as written in the letter, to blame each other for Genny's murder.

Gonzales claims that the question about whether Ivan claimed he was a battered man was "inexcusable" and that it was not true that Ivan blamed Gonzales and claimed he was a battered man. (AOB 232.) Gonzales also claims that she would not have such knowledge, and if she did, it was hearsay. (AOB 232-233.) Gonzales bases her argument on a faulty factual premise: that Ivan did not present such a defense. (AOB 232-234, 248.)

Prior to their cases being severed, in Gonzales's presence, Ivan's counsel stated his "entire" defense was that Gonzales was criminally responsible, not Ivan. (13 RT 1010.) Gonzales's counsel admitted that Ivan's "whole defense was blaming her." (67 RT 7912.) There were numerous other discussions for which Gonzales was present where there were lengthy discussions that Ivan was going to have a Battered Spouse Syndrome defense. (18 RT 1832 [defense theory that Gonzales was responsible for Genny's death]; 18 RT 1851; 28 RT 3056-3057 [court and counsel discuss Ivan's request to present Battered Spouse Syndrome evidence]; 28 RT 3060-3061 [Ivan's counsel stated the Battered Spouse Syndrome and Ivan's fear of Gonzales explains why Ivan did not report accurately to the police when initially interviewed and why Ivan failed to protect Genny]; 28 RT 3067 [Ivan's counsel stated they are going to present evidence about "Battered Male Syndrome"]; 28 RT 3081 [Ivan's defense

evidence will include Battered Spouse Syndrome]; 28 RT 3086-3087 [discussion of Ivan's Battered Spouse Syndrome defense]; 28 RT 3090 [Ivan's counsel discusses Battered Spouse Syndrome evidence]; 29 RT 3151-3155, 3162, 3164, 3177 [discussion that Gonzales and Ivan were both tendering battered spouse defenses]; 29 RT 3196 [Ivan's counsel says it is his "clear intention" to put on Battered Spouse Evidence; "it will be our defense, yes."]; 29 RT 3197-3198, 3204-3206, 3262; 30 RT 3288].) As Gonzales was present for these conversations, she had knowledge of Ivan's intended defense.

Gonzales's argument that her knowledge of these events was hearsay (AOB 232-233) is unavailing because the prosecutor's question did not call for hearsay, it merely called for Gonzales's knowledge of whether Ivan did carry out their plan, as thinly disguised in the letter, to blame each other for the murder. Moreover, the relevant inquiry was what *Gonzales knew* about Ivan's defense, not the truth of whether Ivan was a battered man. Thus, the question did not call for hearsay, it was focused on Gonzales's state of mind: what she knew about Ivan's defense.

To bolster her claim of misconduct, Gonzales claims the prosecutor failed to respect the court's ruling after it sustained an objection to the prosecutor's question whether Ivan claimed he was a battered spouse. (AOB 236-237.) When the prosecutor asked Gonzales whether Ivan claimed he was a battered man, defense counsel objected that the question had been asked and answered. The court sustained the objection "on the grounds that we shouldn't go through with that line." The prosecutor's next question was, "Well, were you aware that that was his defense?" (67 RT 7867.) Based on this follow-up question, Gonzales claims the prosecutor "blatant[ly] disregard[ed] the court's ruling." (AOB 237.) The follow-up question that the prosecutor asked was a different question, and in no way did the prosecutor argue with the court, or threaten to disobey its

order. (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1374.) Nor was the prosecutor's conduct similar to that in the contempt action of an attorney in *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126, cited by Gonzales. (AOB 237.) In *Hawk*, the attorney persisted in repeating questions after the court had sustained objections thereto, and after he had been admonished not to ask such questions. (*Ibid.*) Thus, contrary to Gonzales's contention, there was no misconduct for failure to respect the court's ruling.

As support for her position that the prosecutor committed misconduct, Gonzales cites *Douglas v. Alabama* (1965) 380 U.S. 415 [85 S.Ct. 1074, 13 L.Ed.2d 934], *People v. Shipe* (1975) 49 Cal.App3d 343, and *People v. Blackington* (1985) 167 Cal.App.3d 1216. (AOB 241-243.) In both *Douglas* and *Shipe*, the prosecutor cross-examined a defense witness who asserted his privilege against self-incrimination. In *Douglas*, the prosecutor asked the witness numerous questions, reciting in considerable detail the circumstances that led to and surrounded the crime, including naming the defendant as the person who fired the shotgun blast. (*Douglas v. Alabama*, *supra*, 380 U.S. at p. 417.) In *People v. Shipe*, the prosecutor asked numerous and detailed questions to two accomplices about how he believed the crime occurred "getting before the jury a vivid picture of what he believed actually occurred on the night of the murder" and creating the "distinct impression" that the witnesses had talked to the authorities and vividly described the events. (*People v. Shipe*, *supra*, 49 Cal.App.3d at pp. 345-349, 355.) In each of these cases, the prosecutor, knowing the witness would not answer the question, was able to place statements in front of the jury that were not subject to cross-examination. Thus, in both cases, the defendant's Sixth Amendment right to cross-examination was violated. (*Douglas v. Alabama*, *supra*, 380 U.S. at p. 419; *People v. Shipe*, *supra*, 49 Cal.App.3d at p. 350.)

Here, Gonzales is not raising a claim that her Sixth Amendment right to cross-examination was violated. Nor are the facts of *Douglas* or *Shipe* similar. Gonzales did not refuse to answer questions posed to her or invoke a privilege. Thus, the cases relied on by Gonzales are inapposite.

In *People v. Blackington*, the prosecutor cross-examined the defendant about statements made by a non-testifying co-defendant that discredited the defendant's self-defense theory. (*People v. Blackington, supra,* 167 Cal.App.3d at p. 1220.) The court held it was misconduct because, as in *People v. Lo Cigno* (1961) 193 Cal.App.2d 360, 388, the questions suggested

> the existence of facts which would have been harmful to defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied.

(*People v. Blackington, supra,* 167 Cal.App.3d at pp. 1221-1222.) Here, in contrast, the letter was properly admitted evidence that showed the Gonzaleses discussed blaming each other for Genny's murder. The questions asked on cross-examination were appropriate to probe the meaning of the properly admitted evidence. Moreover, the questions did not suggest facts of the murder that were never sought to be proved. They were merely questions to ascertain the meaning and Gonzales's interpretation of Ivan's letter.

Gonzales also cites *People v. Earp* (1999) 20 Cal.4th 826, 859-860 (AOB 245), in which this Court explained that a prosecutor commits misconduct by asking

> a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable ground to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. [Citation.] For a prosecutor's question

> implying facts harmful to the defendant to come within this form of misconduct, however, the question must put before the jury information that falls outside the evidence and that, but for the improper question, the jury would not have otherwise heard.

In *Earp*, this Court found that the prosecutor's questions were "based on evidence already before the jury or inferences fairly drawn from the evidence." (*Id.* at p. 860.) Similarly, here, the prosecutor's questions were based on inferences fairly drawn from the evidence–that Gonzales and Ivan discussed blaming each other for Genny's death. Viewed in context, the only insinuation that could possibly be drawn was that Gonzales and Ivan decided to blame each other for Genny's death. This fact was fairly inferred from the letter, therefore, there was no misconduct.

2. If there was misconduct, Gonzales was not prejudiced

Even if this Court were to find the prosecutor committed misconduct, that misconduct was harmless. Reversal is required when prosecutorial misconduct implicates constitutional rights unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1130, citing *Chapman v. California* (1967) 386 U.S. 18, 23-24 [87 S.Ct. 824, 17 L.Ed.2d 704].) Misconduct that violates state law requires reversal only to the extent it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Hines* (1997) 15 Cal.4th 997, 1037-1038; *People v. Haskett* (1982) 30 Cal.3d 841, 866; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Under either standard, any error was harmless.

In *Darden v. Wainwright, supra,* 477 U.S. at p. 168, the United States Supreme Court stated that,

> [i]t 'is not enough that the prosecutor's remarks were undesirable or even universally condemned.' [Citation.] The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'

(*Id.* at p. 181.)

> 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.

(*People v. Brown* (2003) 31 Cal.4th 518, 553-554.)

Here, there was no prejudice and Gonzales received a fair trial. Gonzales testified that Ivan did not testify to being a battered man. (67 RT 7866.) When the prosecutor followed-up and asked whether Ivan claimed he was a battered spouse, the court sustained Gonzales's objection, so Gonzales did not answer the question. (67 RT 7866- 7867.) When the prosecutor asked whether Gonzales was aware "that that was [Ivan's] defense," the court again sustained Gonzales's objection. (67 RT 7867.) After a sidebar conference, at Gonzales's request, the court admonished the jury that questions asked by counsel are not evidence. (67 RT 7873-7875.) The court also gave a similar admonishment in the beginning and at the end of the trial. (52 RT 5485; 82 RT 10629 [16 CT 3623].) Because the court sustained Gonzales's objection and admonished the jury, any prejudice was cured. (*People v. Chatman* (2006) 38 Cal.4th 344, 385.)

Gonzales next claims the harm from the misconduct was "indistinguishable" from *Aranda/Bruton*[23] error. (AOB 247-247.) *Aranda/Bruton* error occurs when two defendants are tried together, and one defendant's incriminating extrajudicial statement is admitted that would otherwise be inadmissible against the other defendant. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1207.) Gonzales contends that "what happened in the present case is even worse than the danger perceived in *Aranda* and *Bruton.*" Gonzales explains that the prosecutor "effectively" informed the jury that Ivan made statements that exonerated himself and tended to incriminate Gonzales. (AOB 247.) The prosecutor did not so inform the jury. Even if the prosecutor's statements were taken as evidence, the statements were not exonerating to Ivan, nor were the statements inculpatory to Gonzales. What was inculpatory to Gonzales was the reasonable inference from the letter that she and Ivan had a plan to blame each other for Genny's murder. Thus, Gonzales's comparison to *Aranda/Bruton* error is unavailing.

Gonzales claims the defense was left with no effective means to overcome the false insinuation. (AOB 248.) The prosecutor's cross-examination of Gonzales focused on what Gonzales knew about Ivan's trial and defense, so Gonzales could very easily have testified on re-direct what she knew about Ivan's trial and his defense. "If one party believes that questions on cross-examination leave the jury with an incorrect impression, it can ask clarifying questions on redirect examination." (*People v. Valencia* (2008) 43 Cal.4th 268, 283.)

Gonzales claims the admonishment to the jury that questions were not evidence was not sufficient to overcome the harm by the questions. (AOB

---

[23] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476].

250-251.) The jury is presumed to have understood and followed the court's curative instructions. (*People v. McDermott* (2002) 28 Cal.4th 946, 999.) As support for her argument that the admonishment did not cure the harm, Gonzales claims the prosecutor took full advantage of the harm caused because he argued that Gonzales and Ivan pointed the finger at each other. (AOB 251 & 251 fn. 101.) The prosecutor's argument was not based on the "insinuations," the argument was based on the letter Ivan wrote to Gonzales that was properly admitted and the admissibility of that letter is not challenged in this appeal.

As support, Gonzales also points to the judges comment that he "doubted whether there was any appropriate way to set the record straight." (AOB 250.) Gonzales takes the court's comment out of context. The implication from reading Gonzales's Opening Brief is that the judge was concerned about the prosecutor's questions. Viewed in context, however, it is clear the court was not talking about the prosecutor's questions. Rather it said "if there is some way to set the record straight in a way that's appropriate, although I have some doubts that we can do that, **but if there's some way to make it clear that Ivan's position was that Veronica did it**, you'll want to do that or I'll consider all that." (67 RT 7873, emphasis added.) Thus, the court was referring to Gonzales's denial that Ivan blamed her for Genny's murder, and the false impression this left with the jury. The court did not say or imply that the prosecutor created a false impression with the jury.

The harm to Gonzales was caused by the properly admitted letter, wherein Ivan discussed his and Gonzales's plan to blame each other for Genny's murder. The prosecutor's cross-examination of Gonzales about the letter was also damaging to Gonzales. The court noted Gonzales's "irrational" explanation of the letter. (67 RT 7868.) The few questions about whether Ivan claimed he was a battered man were not harmful. They

were brief and fleeting (*People v. Brown*, *supra*, 31 Cal.4th at p. 554), and the trial court instructed the jury that statements of attorneys were not evidence (67 RT 7874-7875). Thus the court's instructions dispelled any potential prejudice. (*People v. Hinton* (2006) 37 Cal.4th 839, 863.) Moreover, Gonzales already testified that Ivan did not testify to being a battered spouse. Although Gonzales claims this question was improper, there was no objection, therefore any claim this information was not properly in front of the jury was forfeited.

Additionally, the evidence against Gonzales was compelling. Gonzales agreed to take and care for Genny in spite of the fact she did not have beds or furniture. (13 CT 2942; 56 RT 6076; 57 RT 6169, 6177; 68 RT 8089.) Instead of caring for her, she and Ivan tortured Genny. Gonzales admitted that she and Ivan both "beat" Genny. (14 CT 3092, 3099, 3137, 3139.) Genny had severe injuries on her head, her face, and all over her body. (56 RT 5914.)

The evidence was uncontradicted that Genny was forcefully immersed in the bathtub.[24] (56 RT 5957; 59 RT 6572-6573, 6614.) Genny suffered third degree burns, and her skin was burned off from the waist down. (56 RT 5956-5957, 5990.) Genny's toenails burned off. (56 RT 5990.) Gonzales consistently maintained that she put Genny in the bathtub, ran the bathwater, and took Genny out of the bathtub. (13 CT 2937-2938, 2946, 2950, 2954-2955, 2994, 2997-2998, 3008, 3012; 14 CT 3062-3063, 3076-3077, 3082, 3095, 3154; 56 RT 6067; 57 RT 6104-6105; 58 RT 6307.)

---

[24] Gonzales's story to the police that she put Genny in a lukewarm bathtub, then checked on her and found her submerged in water, suggesting Genny drowned, was contradicted by the physical evidence. (56 RT 5966; 57 RT 6104-6105; 58 RT 6307; 59 RT 6568.) Her lies to the police were not intended to help with medical treatment for Genny, or to assist in the investigation. Rather, her story was to claim Genny's death was accidental in order to take the focus off herself.

Ivan Jr. said that both of his parents put Genny in the bathtub. (15 CT 3281-3282.) There was no evidence, besides Gonzales's self-serving, inconsistent testimony at trial, that Ivan acted alone in murdering Genny.

In spite of the serious burn and the pain Genny was in, Gonzales failed to get medical assistance for six hours. (56 RT 6015, 6035, 6048; 59 RT 6571, 6614.) When Gonzales did get assistance, she told the neighbors not to call the police because "they" did not want to get blamed for Genny's death. (60 RT 6712; 14 CT 3149.)

There was no also question Genny was seriously abused and tortured leading up to and culminating in her murder. Gonzales admitted to many acts of abuse and torture. Gonzales admitted she put the blow dryer on Genny's face. (14 CT 3101, 3103.) The blow dryer caused grid-like injuries on each of Genny's cheeks. (56 RT 5934-5935.)

Gonzales admitted she put Genny in a "little bonnet." (13 CT 2983.) There was no skin on her ears and on the bridge of her nose, and there were lines coming from her left ear where the skin had eroded. (56 RT 5919, 5932-5933; 67 RT 7940, 7943.)

Gonzales admitted that Genny slept in the closet, and said she put Genny in the closet to scare her, so she could think. (13 CT 2980.) Gonzales admitted that both she and Ivan hung Genny in the closet by a hook. (13 CT 2980; 14 CT 3117, 3119- 3120, 3123-3126, 3128.) Gonzales said the hook was used "in a way" for punishment. (14 CT 3123.) Gonzales explained that Genny was hung in the closet from the hook by her neck, with her feet on each side of the open wooden box. (66 RT 7605-7608, 7612-7615, 7624; 68 RT 8002.) Gonzales said Genny was put on the hook for two days in a row for two to three hours at a time. (14 CT 3124.) Gonzales said one time Genny stayed on the hook overnight, and Gonzales took her down the next morning. (14 CT 3125-3126, 3128.) When she and

Ivan saw the mark on Genny's neck they got a little scared and were worried that next time she might choke and die. (14 CT 3129.)

Gonzales admitted she bound Genny with cloth from her shorts and with handcuffs. (13 CT 2980; 14 RT 3114.) Genny had a linear ulcerated injury on her right biceps consistent with being bound with handcuffs, a very painful injury. (56 RT 5941-5943.) Gonzales admitted she put the handcuffs on Genny one time while Genny was confined to the triangular area behind the bedroom door. (14 CT 3114.) Later yet, Gonzales admitted that she and Ivan had Genny sleep in the bathtub with her hands bound. (14 CT 3115-3117.)

Gonzales said Ivan was not home when Genny burned her head. (14 CT 3129.) Gonzales claimed Genny climbed on the stove and there was spaghetti or beans in a pot that burned Genny. (13 CT 2967-2968; 14 CT 3131.) When asked if Genny cried, Gonzales responded, "shit yea she cried." (13 CT 3024.) Although Genny almost passed out (14 CT 3130) and Gonzales was told by a nurse to take Genny to the doctor (13 CT 2968, 3024; 14 CT 3134), Gonzales did not seek medical assistance because she did not want the doctor to think she had injured Genny (14 CT 3134).

By the time the case went to trial, Gonzales's story about the abuse, torture and murder of Genny changed dramatically. Gonzales testified about how she and Ivan spent money on drugs even though they did not have enough money for food for their children. (66 RT 7554, 7559, 7641.) Gonzales claimed Ivan inflicted the abuse and murdered Genny, even though she had not told this to the police either at the scene or in either of her interviews. Gonzales testified that it was Ivan, alone, who abused and tortured Genny. (66 RT 7582, 7584, 7586, 7605, 7622; 68 RT 8150, 8163-8164.)

Instead of her initial statement that Ivan was not home when Genny accidentally burned her head, Gonzales claimed Ivan burned Genny's head.

(66 RT 7564, 7567, 7573; 68 RT 8119.) Gonzales testified in graphic detail about the pain and injuries Genny sustained from the burn to her head, and that Gonzales did not take Genny for medical care. (66 RT 7567-7570, 7572, 7637; 7574-7575, 7577, 7602; 67 RT 7745; 68 RT 8124, 8133.)

Gonzales testified that on the night of the murder, she drew the bathwater for Genny, but was in the closet doing methamphetamine when Ivan went in the bathroom with Genny. (66 RT 7679, 7685, 7688-7691; 68 RT 8026, 8171.) When Gonzales finished doing her "line," she went into the bathroom. Gonzales claimed Ivan was holding Genny in the bathtub by her shoulders. (66 RT 7692-7693; 68 RT 8063; 69 RT 8222.) Expert testimony that it was not plausible that there was already a fair amount of water in the bathtub, and had hot water added to it, was uncontradicted. (59 RT 6574-6575.) Thus, Gonzales's story at trial was not credible, based on uncontradicted expert testimony.

Even though Gonzales knew the burn was bad and that Genny was missing her skin from her chest down to her feet, she did not seek medical help until Genny had died, after she was not moving and was cold. (66 RT 7699; 68 RT 8071-8072, 8076.)

Thus, Gonzales's testimony was contradictory, internally inconsistent, and inconsistent with the physical evidence. It was not credible. Moreover, her BWS evidence was based on her statements and story to the expert witnesses, Cynthia Bernee and Dr. Ryan, after she was charged with Genny's murder. Gonzales admitted that she lied to both Bernee and Dr. Ryan. (68 RT 8178.) Moreover, her claims of being abused by Ivan (which her BWS defense was based on) were contradicted by numerous eyewitnesses that testified to incidents where Gonzales was abusive towards Ivan. (75 RT 9657-9662, 9675, 9764-9766, 9770, 9808-9810, 9812-9813, 9854-9856; 76 RT 9891, 9914.) Witnesses also testified that Gonzales had the upper hand in the relationship, and controlled the money,

both of which are inconsistent with Gonzales's BWS defense. (75 RT 9677-9678, 9770, 9792-9795, 9836, 9867, 9899, 9919.) Thus, the evidence against Gonzales was compelling and her defense evidence was weak. Even if the prosecutor's questions on cross-examination were improper, Gonzales was not prejudiced.

B. The Trial Court Did Not Abuse Its Discretion in Admitting Testimony That Expert Witnesses Had Reached Conflicting Opinions on Whether Ivan Was a Battered Man

Gonzales complains about the trial court's admission of a question of Gonzales's BWS expert witness as to whether he was aware that two different experts came to conflicting opinions regarding whether Ivan was a battered man. (AOB 252-275.) She also argues the prosecutor asked an improper hypothetical of Gonzales's other BWS expert witness. (AOB 254-257.) Neither contention has merit.

1. Relevant facts

During his cross-examination of Cynthia Bernee, the defense BWS expert, the prosecutor asked the following questions:

> Q: Help–let me give a hypothetical. Okay? Let's say you've got a husband and a wife; and, both are involved in a crime; and, both claim that each individual is a battered spouse; and, let's say, even, to throw into the hypothetical, that there's experts that say the husband's a battered spouse and the wife is a battered spouse. To even further complicate things, let's say there would be prosecution experts to say that neither one of them is a battered spouse suffering from battered spouse syndrome. Are you with me on this type of hypothetical?
>
> A: Yes.
>
> Q: What's a jury suppose to do?

The court sustained an objection that the question was outside the witness's scope of expertise. The prosecutor then asked: "How would you expect a jury to evaluate a situation like that?" The court sustained an objection that the question was argumentative. (64 RT 7288-7289.) The court then explained that there

> may be some other ways for you to properly get at that subject matter, but it still appears to me to be a proper thing for you to inquire about, if at all, after she has given testimony that relates specifically to the facts of this case and the defendant.[25]

(64 RT 7289-7290.)

During a break, defense counsel argued that it was an improper hypothetical because it had not yet been decided whether evidence would be adduced that the expert witnesses disagreed. (64 RT 7315.) The prosecutor stated that the questions "were completely hypothetical and never had any factual basis. I wasn't talking about actual facts that existed in this case. And the jury's free to accept any hypothetical." (64 RT 7319-7320.) The court stated it thought the questions "boiled down to don't you have situations where different mental health professionals have different views on the same person?" which the court thought was argumentative. The court did not believe the questions gave the jury the impression that a mental health professional evaluated Ivan, but believed the questions were foundational for the prosecutor to use if that information about Ivan were later admitted. (64 RT 7322, 7324.) The court did not believe the questions constituted misconduct. (64 RT 7324.)

---

[25] Based on the trial court's previous rulings, initially Bernee testified generically about BWS, then after Gonzales testified and laid the foundation for her opinion, Bernee testified again, specifically about Gonzales. (51 RT 5368, 64 RT 7315-7319.)

The other area of inquiry Gonzales complains of concerns the prosecutor's cross-examination of the defense expert witnesses about the existence of two reports on Ivan Gonzales: one from an expert that concluded Ivan was a battered man and the other from an expert that concluded Ivan was not a battered man. (AOB 256-275.) Prior to the expert's testimony the prosecutor inquired of the court whether it would allow such questions. (71 RT 8883.) The prosecutor explained it was impeachment evidence that shed light on the reliability of mental health experts. (71 RT 8883, 8885.) The second reason for which the prosecutor sought to admit the evidence was to show that Gonzales used violence or counter-violence. (71 RT 8890.) He argued that for there to be a battered spouse, there must necessarily be a batterer. (71 RT 8885, 8889.)

Gonzales objected that any expert opinion about whether Ivan was a batterer was hearsay because the expert opinion would be based on what Ivan told an expert witness. (71 RT 8899-8900.) She also argued it was inadmissible because it contained privileged materials (Ivan's). (71 RT 8900.) Additionally, there was no method for Gonzales to "fight the evidence" because Ivan would not consent to an examination with Gonzales's experts. (71 RT 8906-8907.)

The court determined, because the cross-examination could shed light on the value of the expert's opinion, and the court could give a limiting instruction regarding any hearsay, the "crunch issue" was the application of Evidence Code section 352. (72 RT 8922.) The court engaged in a thorough analysis. It stated the value of the cross-examination to the prosecutor was that it showed that different experts had different opinions; it showed the defense experts ignored the reports of Drs. Mills and Weinstein (who evaluated Ivan), which was relevant if it was something that the expert failed to consider; and it showed that Ivan was not a battering husband within the concept of BWS, because one expert found

him to be a battered man. (72 RT 8922-8924.) The court noted that the latter issue would require the expert to testify to hearsay, therefore, it would not allow the evidence to be used for that purpose. (72 RT 8924.) The downside to the cross-examination was the potential for confusing the jurors because they were to focus on Gonzales's case, not Ivan's. (72 RT 8924.) There was also potential confusion because both parties in Gonzales's case took the position that Gonzales was not a battered man. (72 RT 8924-8925.) If the court were to allow the report on its merits–that Ivan was a battered man, that would consume an undue amount of time. (72 RT 8925.) Also, there would be some prejudice to Gonzales because the jury would be presented with evidence that Ivan was a battered man, and there was a limited opportunity for Gonzales to address that issue. (72 RT 8925.) Additionally, if the jury were presented with evidence Ivan was a battered man, it would be difficult for the jury to follow a limiting instruction not to consider that information for its merit. (72 RT 8925-8926.)

The court proposed a middle ground that would meet the prosecutor's "legitimate concerns" while at the same time leave the court confident that a limiting instruction could be followed. (72 RT 8926.) The court proposed the prosecutor ask the expert "whether experts sometimes disagree on these issues in individual cases," and "in fact, in this case, aren't you aware of two conflicting reports as to Ivan Gonzales, one concluding that he's a battered man and the other concluding that he's not a battered man" without including any details or the names of the experts. (72 RT 8926, 9178.) The court also proposed a limiting instruction that the jury was only to consider the information for the reliability of expert opinion in general, and not on the factual question of whether Ivan was or was not a battered man or a batterer, and to remind the jury that they were to decide Gonzales's case, not Ivan's. (72 RT 8927, 9178.) At the defense

request, the court agreed to also instruct the jury that neither party was going to be arguing that Ivan was a battered man. (72 RT 9190-9091.)

After considerable discussion, the court found that the purpose of the questions, as proposed by the court, was to show that experts differed on this issue. (72 RT 9177.) The court found there would be no prejudice to the defense. (72 RT 9177.)

Defense psychologist Kenneth Ryan testified on cross-examination that, in his opinion, Ivan was a batterer. (73 RT 9286.) Dr. Ryan admitted there was considerable controversy over psychology in the courtroom (73 RT 9301) and that mental health experts can differ greatly in their opinions, even on the same individual (73 RT 9303). The prosecutor asked Dr. Ryan whether he read a series of articles about psychology in the courtroom, but Dr. Ryan had not read them. (73 RT 9302.) The following colloquy then occurred, which is the basis for Gonzales's claim of error:

> Q: Okay. In fact, in this case, you're aware of conflicting opinions, correct:
>
> A: I am.
>
> Q: Okay, and, in fact, in this case, you're aware of conflicting opinions regarding Ivan Gonzales?
>
> A: That is correct.
>
> Q: And one opinion that he was a battered man?
>
> A: Correct.
>
> Q: Another opinion that he wasn't a battered man?
>
> A: That's correct.

(73 RT 9303.)

The prosecutor continued his cross-examination on the weaknesses of psychology in the courtroom. (73 RT 9304-9305.) Before the next jury break, the court instructed the jury as follows:

> The doctor has testified to other opinions that he is aware of with regard to Ivan Gonzales. You are allowed to use that and consider that for only a limited purpose. You are allowed to consider it only for the limited purpose of considering the reliability of such expert testimony in this area in general. You are not to consider it on the question of whether Ivan Gonzales is or is not a battered person.
>
> The–I emphasize to you that you are to decide only Veronica Gonzales' issues in this case. It is her status, her case, that is before you. In this case, both sides will be arguing to you at the end of the case that Ivan Gonzales is not a battered man. So the reasons for your not considering it on that issue are obvious and, I think, clear to you.

(73 RT 9306-9307.)

2. The prosecutor's hypothetical question to the expert did not constitute prejudicial misconduct

Gonzales claims the prosecutor's hypothetical question of Cynthia Bernee, detailed above, constituted "outrageous prosecutorial misconduct" because it did not have a factual basis, and that the trial court failed to provide any meaningful relief for the misconduct. (AOB 255-256.) The hypothetical was based on reasonable inferences from the evidence, therefore, the prosecutor did not commit misconduct. Moreover, the court sustained an objection to the question, therefore, any misconduct did not result in prejudice.

> Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]

(*People v. Richardson* (2008) 43 Cal.4th 959, 1008, quoting *People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

> A hypothetical question . . . may be 'framed upon any theory which can be deduced' from *any* evidence properly admitted at trial, including the assumption of 'any facts within the limits of the evidence,' and a prosecutor may elicit an expert opinion by employing a hypothetical based upon such evidence.'

(*People v. Boyette* (2002) 29 Cal.4th 381, 449, emphasis original.)

The prosecutor's hypothetical assumed facts that could be deduced from the evidence–that a husband and wife are both involved in the crime, they blamed one another, and expert witnesses disagreed on which, if any, spouse suffered from BWS. Given the conflicting expert opinions, the prosecutor asked what a jury is suppose to do, and how a jury to ought to evaluate such a situation. (64 RT 7289.)

Gonzales's argument focuses not on the prosecutor's question but on the prosecutor's response to the defense objection, where the prosecutor stated that the question was hypothetical and did not have any factual basis. (AOB 255.) The prosecutor's statement, outside the presence of the jury, does not show he engaged in misconduct. The question had a factual basis–a reasonable inference based on the letter Ivan wrote to Gonzales that they were going to blame each other for Genny's murder. The prosecutor's explanation of his question does not undermine the reasonable inference from the letter.

Moreover, the court sustained the defense objection to the question. (64 RT 7289.) Additionally, the jury was instructed numerous times that counsel's questions were not evidence, that if an objection to a question is sustained, not to speculate as to what the answer may have been, and not to assume to be true any insinuation suggested by a question. (52 RT 5485; 67 RT 7874-7875; 82 RT 10629 [16 CT 3624].) There is no reason to believe the jury disregarded these instructions. (*People v. Holloway* (2004) 33 Cal.4th 96, 145-146.)

The jury was also instructed with CALJIC No. 2.82 that

> in examining an expert witness, counsel may ask a hypothetical question. This is a question in which the witness is asked to assume the truth of a set of facts and then to give an opinion based on that assumption.
>
> In permitting such a question, the court does not rule and does not necessarily find that all the assumed facts have been proved; it only determines that those assumed facts are within the possible range of the evidence.
>
> It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have in fact been proved.
>
> If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and the weight of the expert opinion based on the assumed facts.

(82 RT 10640-10641; 16 CT 3648.) As the jury was instructed not to assume that the facts underlying the hypothetical question were true, any prejudice was dispelled. (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 452.) Thus, if there was any misconduct from the prosecutor's hypothetical, it was not prejudicial.

3. The trial court properly allowed the prosecutor to cross-examine the expert witness on whether he was aware that other expert witnesses had evaluated Ivan and come to different opinions on whether he was a battered man

The prosecutor's cross-examination of Dr. Ryan was also proper. It was aimed at exposing weaknesses in psychology, and particularly in diagnosing BWS.

> [I]t is well settled that the scope of cross-examination of an expert witness is especially broad; a prosecutor may bring in facts beyond those introduced on direct

> examination in order to explore the grounds and reliability of the expert's opinion.

(*People v. Loker* (2008) 44 Cal.4th 691, 739; *People v. Lancaster* (2007) 41 Cal.4th 50, 105.) Moreover,

> [a] party 'may cross-examine an expert witness more extensively and searchingly than a lay witness, and the prosecution was entitled to attempt to discredit the expert's opinion. [Citation.] In cross-examining a psychiatric expert witness, the prosecutor's good faith questions are proper even when they are, of necessity, based on facts not in evidence. [Citation.]'

(*People v. Wilson* (2005) 36 Cal.4th 309, 358, quoting *People v. Dennis* (1998) 17 Cal.4th 468, 519.)

The prosecutor's questions were asked in good faith, after getting advance approval from the court. The court's ruling allowing cross-examination of the expert witness on the conflicting opinions on whether Ivan was a battered man were proper, as it showed the inherent weakness in evaluating someone for BWS–that expert witnesses could come to different conclusions in evaluating the same person, in this case, Ivan Gonzales.

In support of her position, Gonzales attempts to distinguish the cases the prosecutor cited and on which the court relied. (AOB 257-260.) Although the prosecutor cited *People v. Rich* (1988) 45 Cal.3d 1036, the trial court did not rely on it, nor does it provide support for or against admission of the testimony. (See AOB 257-258 [Gonzales discusses case].) As to the other cases, the court stated they were not very useful (72 RT 8921), therefore, it did not base its decision on them.

In *People v. Montiel* (1993) 5 Cal.4th 877, 923, this Court held it was proper for a prosecutor to cross-examine a psychiatric expert about a report and the testimony of a psychiatrist that had testified at an earlier trial of the defendant. Here, the trial court recognized the factual distinction between what was done here and what was done in *Montiel* (71 RT 8898-8899,

8908-8910), however, it found the factual difference did not have any legal significance, as it relied on *Montiel* for the general principal that broad cross-examination of experts is allowed to test their credibility. (72 RT 8921.) The court found the cross-examination contemplated here would shed light on the value of the expert's opinion. (72 RT 8922, 9177.)

In *People v. Bell* (1989) 49 Cal.3d 502, 531-534, an expert witness testified on the reliability of eyewitness identification. (*Id.* at p. 531.) On cross-examination, the prosecutor asked the expert whether he was aware of a statement in a police report from an informant who observed the defendant the day before the crime cleaning a gun. (*Id.* at pp. 531-532.) This Court held the prosecutor's question was misconduct because whether someone saw the defendant cleaning a gun the previous day was not relevant to whether eyewitness identification is reliable. (*Id.* at p. 532.)

Gonzales claims that *Bell* supports her position that the cross-examination was improper because it was not relevant whether a non-witness formed the opinion that Ivan Gonzales was a battered spouse. (AOB 258-259.) Gonzales misses the point for which the court admitted the evidence, and for which the jury was admonished: that the information was only for the purpose of considering the reliability of such expert testimony in this area, not whether Ivan Gonzales was a battered man. (73 RT 9306-9307.) The reliability of expert testimony was relevant. Moreover, this case is unlike *Bell* because the prosecutor asked the questions after the trial court ruled they were proper, therefore, there was no misconduct.

The trial court relied on *People v. Coleman* (1985) 38 Cal.3d 69, 92, for the proposition that courts have traditionally given both parties wide latitude in the cross-examination of experts in order to test their credibility. (72 RT 8921.) Gonzales claims the court should have relied on a different portion of *Coleman* to guide its ruling, that which addresses exercising

discretion pursuant to Evidence Code section 352. (AOB 260.) Contrary to Gonzales's argument, the trial court engaged in a lengthy analysis pursuant to Evidence Code section 352, which the court referred to as the "crunch issue." (72 RT 8922.) The court discussed the probative value of the evidence, which was to show (1) that different experts had different opinions; (2) that the defense expert witnesses failed to consider the reports of the expert witnesses that evaluated Ivan in their determination of whether Gonzales was a battered woman; and (3) that Ivan was not a battering husband within the concept of BWS. (72 RT 8922-8924.) The latter issue would require the expert to testify to hearsay, therefore, the court determined testimony that Ivan was not a battering husband would not be allowed or considered. (72 RT 8924.)

The court determined the evidence had the potential to confuse jurors because their focus needed to be on evaluating Gonzales's case, not Ivan's. (72 RT 8924.) There was also the potential of confusion because both parties in Gonzales's case took the position that Ivan was not a battered man. (72 RT 8924-8925.) If the court were to allow the reports of Ivan to come in on their merits, i.e., that Ivan was a battered man, it would consume an undue amount of time, and be prejudicial to Gonzales because there would be a limited opportunity for Gonzales to respond to the claim that Ivan was battered. (72 RT 8925.) Additionally, if the jury were presented with evidence Ivan was a battered man, it would be difficult for the jury to follow a limiting instruction that they could not consider the evidence for its truth. (72 RT 8925-8926.) Based on these concerns, the court proposed a middle ground that would meet the prosecutor's "legitimate concerns" while at the same time leave the court confident that a limiting instruction would be followed. (72 RT 8926.)

The court proposed the prosecutor ask the expert "whether experts sometimes disagree on these issues in individual cases," and "in fact, in this

case, aren't you aware of two conflicting reports as to Ivan Gonzales, one concluding that he's a battered man and the other concluding that he's not a battered man" without including any details or the names of the experts. (72 RT 8926, 9178.) The court gave a limiting instruction that the jury was only to consider the information for the reliability of expert opinion in general, and not on the factual question of whether Ivan was or was not a battered man or a batterer, and to remind the jury that they were to decide Gonzales's case, not Ivan's. (73 RT 9390-9307.) At the defense request, the court instructed the jury that neither party was going to be arguing that Ivan was a battered man. (72 RT 9190-9091; 73 RT 9306-9307.)

Based on the limited nature of the evidence and the limiting instruction, the court determined that there was probative value to the evidence in showing that experts differed on this issue, and that there would be no prejudice to the defense. (72 RT 9177.)

Gonzales focuses on the court's findings of prejudice in its analysis (AOB 260-263), without seeming to recognize that the court alleviated the prejudice by limiting the purpose for which it was admitted–that it was not admitted for the truth of whether Ivan was battered or not.

Gonzales's argument that the trial court abused its discretion under Evidence Code section 352 (AOB 269) is without merit.

> Under Evidence Code section 352, a trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. 'Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome. [citation].''

(*People v. Riggs* (2008) 44 Cal.4th 248, 289-290, quoting *People v. Waidla* (2000) 22 Cal.4th 690, 724.) A trial court's rulings are reviewed for an

abuse of discretion. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 290.) The trial court did not abuse its discretion. After weighing the pertinent factors, the trial court limited the scope of the evidence, thereby eliminating the potential for prejudice, confusion, and consumption of time. As described below, the evidence was not unduly prejudicial, and did not render Gonzales's trial unfair or unreliable.

Gonzales complains that "all that would be accomplished would be a broad trashing of experts in general," (AOB 263) and that the prosecutor "exploited" the evidence by arguing that psychology in the courtroom is not reliable (AOB 264). She also argues that the trial court was "seriously mistaken" in finding there was no prejudice to the defense and faults the court for failing to see how the evidence could prejudice the defense. (AOB 268, 270.) It may have been damaging to Gonzales's defense, but was not unduly prejudicial. Just because the evidence showed BWS evidence was not scientific and was subjective, therefore, not reliable, it did not render it prejudicial. "The circumstance that evidence is adverse to a defendant's case does not render it prejudicial within the meaning of section 352." (*People v. Salcido* (2008) 44 Cal.4th 93, 148.) The evaluation centers on "undue" prejudice,

> that is, 'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,' 'not the prejudice 'that naturally flows from relevant, highly probative evidence. [Citations]''

(*Ibid.*)

Gonzales claims her constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to present a defense, to confront and cross-examine witnesses, to due process of law, and to fundamental fairness were violated because the court allowed the questions on cross-examination without allowing her to present "logical rebuttal," i.e., that the experts who

disagreed with defense experts' credibility should be questioned. (AOB 269.) Really what Gonzales is questioning is the report Ivan was a battered man. Had the trial court admitted the experts' opinions who evaluated Ivan for the substance of their opinion, Gonzales would have a legitimate argument. Since the evidence was not admitted for that purpose, but only to show the experts disagree, Gonzales's argument is without merit. The flipside of that argument, which Gonzales was not precluded from showing, was that experts did not disagree on such issues. Because BWS is not a science, is subjective, and is primarily based on what the person being evaluated reports to the expert, it would be impossible to show it was not subject to disagreement. In fact, Gonzales implicitly agrees with this proposition, and argues that the fact that expert witnesses could disagree on this subject was cumulative. (AOB 262.)

Gonzales claims the prosecutor "used the evidence as if it had been admitted for the truth of the matter." (AOB 264.) Given the limiting instruction, the prosecutor appropriately argued the evidence was to show "why psychiatry and psychology have had such a bad name in the courtroom." (83 RT 10979, quoted at AOB 264.) This quote belies Gonzales's assertion that the prosecutor used the evidence for the truth of the matter. The prosecutor did not argue whether or not Ivan was a battered man, he merely argued that psychiatric evidence was not very reliable.

Gonzales claims the judge agreed it would be impossible for the jury to obey a limiting instruction. (AOB 265.) This contention, too, is belied by the record as Gonzales takes the judge's comment out of context. The court stated that if the prosecutor were to cross-examine the expert with the substance of what Weinstein said (the underlying facts of Weinstein's conclusion that Ivan was a battered spouse), it would be difficult for the jury to follow an instruction not to consider that for its merit. (72 RT 8925-8926.) The court did not admit evidence that Ivan was a battered man, nor

did it allow the prosecutor to address the substance of Weinstein's conclusion; it specifically precluded the prosecution from presenting such evidence. It limited the purpose of the evidence–only to consider the reliability of expert testimony. The court specifically instructed the jurors they could not consider it on whether Ivan was or was not a battered man, and instructed them that both parties would argue he was not a battered man. (73 RT 9306-9307.)

Citing *People v. Reyes* (1974) 12 Cal.3d 486, 503, Gonzales contends admission of the evidence was unfair, in violation of her Fifth, Sixth, and Fourteenth Amendment rights to due process, a fundamentally fair trial, and to confront and cross-examine witnesses against her. (AOB 266-267.) Gonzales reasons that because Dr. Weinstein, one of the experts who rendered an opinion about Ivan, was not subject to cross-examination, she could not explore the factors that led Weinstein to his conclusion. (AOB 267.) *Reyes* addressed the admissibility of a twenty-year-old report of a victim's psychiatric diagnosis. (*People v. Reyes*, *supra*, 12 Cal.3d at pp. 502-503.) One basis for exclusion was because the diagnosis of sexual psychopathology was merely an opinion, not an act, condition, or event within the meaning of Evidence Code section 1271 (allowing admission of business records as an exception to the hearsay rule). (*Id.* at p. 503.)

This Court noted that a psychiatric diagnosis can come from many different factors and that a psychiatric diagnosis is based on the thought process of the psychiatrist. In *Reyes*, there was no opportunity to cross-examine the psychiatrist to determine what factors led him to his conclusion and his qualifications to make his conclusion. (*People v. Reyes*, *supra*, 12 Cal.3d at p. 503.) *Reyes* does not support Gonzales's position. To the contrary, it supports the trial court's determination to preclude evidence by cross-examination of the underlying diagnosis of Ivan (whether he suffered from BWS). The trial court merely allowed the

evidence to show what *Reyes* pointed out: psychiatric diagnoses (particularly BWS) are subjective and nonscientific. Thus, it was appropriate cross-examination for an expert witness to acknowledge such. Gonzales misconstrues the limited purpose for which the evidence was admitted. Since Weinstein's diagnosis was not admitted for its truth (that Ivan was a battered spouse), there was no need to cross-examine Weinstein, as argued by Gonzales. (AOB 267.)

Similarly, Gonzales misconstrues the purpose for which the evidence was limited in her argument that the prosecutor "made his own hypocrisy even clearer" by telling the court he did not believe Ivan was a battered spouse. (AOB 268.) The prosecutor's position was that the parties engaged in mutual violence, and that neither of them were battered spouses. (72 RT 9168-9169.) The evidence was not admitted to show Ivan was a battered spouse, and the jury was specifically informed that neither party would argue Ivan was a battered man. (73 RT 9306-9307.) The evidence was admitted to show the weaknesses in expert testimony and BWS diagnoses. Thus, the prosecutor's statement was consistent with the purpose for which the evidence was admitted.

Again misconstruing the limited nature of the evidence, Gonzales claims her Fifth and Fourteenth Amendment rights to due process of law were violated because she was not allowed to present relevant and logical rebuttal evidence. (AOB 270-275.) It is not clear what evidence Gonzales believes the court precluded her from presenting. Apparently the evidence Gonzales argues she was not allowed to present was "put[ting] Dr. Weinstein's conflicting report in proper perspective." (AOB 273.) Dr. Weinstein was the expert who opined that Ivan was a battered man. (54 RT 5738.) Gonzales objected to the expert opinion coming into evidence. (71 RT 8899-8900, 8906-8907.) It is unclear, therefore, what evidence Gonzales claims the court precluded her from presenting. Gonzales did not

make an offer of proof in the trial court, and does not explain on appeal, what evidence she had that was excluded. Even if Gonzales had requested the court admit evidence to show Weinstein based his conclusion on incomplete and/or invalid information (AOB 273), it would not have been error to exclude such because it would not have been "relevant and logical rebuttal" because the evidence that was admitted was not for the purpose of showing Ivan was or was not a battered man. Thus, the cases cited by Gonzales that she is entitled to present relevant and logical rebuttal, and place evidence in proper perspective (AOB 270-275), have no application.

4. Even if the court abused its discretion, any error was harmless

Even if this Court were to find the trial court abused its discretion in admitting the testimony that expert witnesses had reached conflicting opinions on whether Ivan was a battered man, any error was harmless. The trial court admonished the jury that they could only consider the evidence for the limited purpose of considering the reliability of expert testimony, not whether Ivan was or was not a battered person. It was also advised that neither party would argue that Ivan was a battered man. (73 RT 9306-9307.) The jury is presumed to follow instructions. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 999.) Thus, the evidence merely showed different experts reached different results. As Gonzales acknowledges, this "point was vividly made by the fact that two prosecution experts . . . reached different conclusions about Veronica Gonzales than did two defense experts." (AOB 262.) Moreover, Dr. Ryan testified without objection that there was considerable controversy over psychology in the courtroom and that mental health experts can differ greatly in their opinions, even on the same individual. (73 RT 9301, 9303.) The effect of the complained of evidence was minimal because it was information that the jury already had, and, therefore, any error was harmless.

C. This Court Should Not Apply Its *Verdin* Holding Retroactively But If It Does, the Court's Ordering a Psychological Examination of Gonzales Did Not Violate Gonzales's Constitutional Rights and Was Harmless

Gonzales claims the trial court erred in (1) ruling that based on her BWS defense, she was required to submit to a psychological examination (AOB 275-286); (2) ordering two examinations (AOB 286-287); (3) ordering Dr. Mills to be one of the experts to evaluate Gonzales (AOB 291-293); (4) instructing the jury on Gonzales's refusal to submit to the examination by Dr. Mills (AOB 286-287); and (5) precluding Gonzales from explaining the details of why she refused the examination by Dr. Mills (AOB 289-290). Although the trial court understandably relied on existing caselaw to support its order for Gonzales to submit to a psychiatric examination, based on this Court's recent decision in *Verdin v. Superior Court, supra*, 43 Cal.4th at p. 1096, the court's order was error. This Court should not apply *Verdin* retroactively. Even if it is applied retroactively, the error did not violate Gonzales's constitutional rights and was harmless.

1. Relevant facts

Gonzales indicated her intention to present expert testimony from a Marriage, Family and Child Counselor and a psychologist to support her BWS defense. (39 RT 3725; 44 RT 3989.) Based on her defense and relying on *People v. Danis* (1973) 31 Cal.App.3d 782 and Evidence Code section 730, the prosecutor filed a motion to have Gonzales evaluated by mental health experts. (10 CT 2143-2154.) The prosecutor requested Gonzales submit to two examinations, one by Dr. Nancy Kaser-Boyd, a renown BWS expert, and one by Dr. Mark Mills, a psychiatrist who had previously interviewed Ivan. (39 RT 3726.)

Gonzales argued she should not be subject to an examination because her defense was not a mental defense that exonerated her; rather it was

testimony to explain her behavior. (39 RT 3716, 3719-3720; 11 CT 2346-2354.) She also objected to having more than one evaluator. (51 RT 5378-5379.) Additionally, Gonzales objected to an evaluation by Dr. Mills because he had a conflict of interest based on his previous evaluation of Ivan, and because Gonzales's defense team could not evaluate Ivan, they could not meet the evidence. (44 RT 3990, 3993-3994; 51 RT 5382, 5385-5390, 5404.)

The court issued a tentative decision that based on Gonzales's intent to present psychological testimony that she is a battered woman, "fairness requires the People have the opportunity to examine defendant to counter" her testimony. (12 CT 2779-2780.)

After argument, the court ruled Gonzales would be subject to an examination by the prosecution expert witnesses. (39 RT 3730-3731.) The court, in ordering the evaluations, noted that this Court had recently affirmed the "*Danis* process" in *People v. McPeters* (1992) 2 Cal.4th 1148, 1190 and *People v. Carpenter* (1997) 15 Cal.4th 312, 412-413. (51 RT 5374.) The trial court also noted *McPeters* and *Carpenter* both cited *Buchanan v. Kentucky* (1987) 483 U.S. 402 [107 S.Ct. 2906, 97 L.Ed.2d 336]. (51 RT 5374.) The trial court noted its "general authority to appoint experts under [Evidence Code section] 730 and to devise processes designed effectively to seek the ascertainment of truth." The court then said, "I think I probably have general authority to do that [appoint two experts]. But why should we in this case?" (51 RT 5375.) The prosecutor explained that he wanted an expert in BWS who had expertise in testing, and another expert who was experienced with other psychological or psychiatric dilemmas. (51 RT 5375.) The prosecutor explained that Dr. Mills was a Board Certified Forensic Psychiatrist, and was a "debunker." (51 RT 5376.) The prosecutor also noted that the defense used two

experts–a Marriage, Family, Child Counselor and a psychologist. (51 RT 5376-5377.)

The court found it was justified to have evaluations by both a BWS expert and a psychiatrist with a broader base of knowledge and experience that could explain Gonzales's behavior. (51 RT 5397, 5413; 61 RT 6908.) The court stated that

> assuming the defendant puts her mental condition at issue by putting on one of these experts, that is clearly viewed as a waiver of her Fifth Amendment rights, to whatever extent they might otherwise bar an interview. And then the court is authorized, under its supervisory powers and under Evidence Code [section] 730, to appoint experts. An expert, at least. I don't see any legal bar to two experts and it seems reasonable to me under these circumstances.

(51 RT 5397.)

It concluded that "this is a case that I should authorize the two experts the People have requested." (51 RT 5413.) The court found that there was no legal basis to preclude Dr. Mills as an expert witness. (51 RT 5414.) The court ruled Dr. Mills was a qualified expert, and any issue as to his expertise specifically in BWS went to the weight of his testimony. (44 RT 3992-3993.) The court, however, stated that it had substantial doubt whether it would allow Dr. Mills to testify to anything Ivan told him. (51 RT 5414-5415, 5421.) Thus, the court ordered Gonzales to submit to examinations by Drs. Kaser-Boyd and Miils.[26] (51 RT 5415.) Given the significance of Gonzales's waiver of her Fifth Amendment rights, the court ruled that the exams not be conducted until the defense actually presented the intended defense by way of testimony. (51 RT 5415-5416.)

---

[26] Gonzales took a writ to the Court of Appeal, and then to this Court, on the court's issuance of the examinations, which was denied. (51 RT 5421; 54 RT 5647-5650; 58 RT 6507, 6511; 63 RT 7112.)

Gonzales refused to be evaluated by Dr. Mills. (58 RT 6511-6512; 61 RT 6909.) Gonzales argued that she was not refusing to be evaluated--she was agreeing to be evaluated, just not by Dr. Mills. (61 RT 6906.) The trial court found that Gonzales's refusal to comply with its order constituted a refusal, and therefore triggered the consequences in *McPeters* and *Carpenter*, of informing the jury about such refusal. (61 RT 6908.) Thus, the court ruled the prosecutor could ask Gonzales whether she refused to be evaluated by Dr. Mills. (63 RT 7122, 7124.)

The court took judicial notice that it had ordered Gonzales to submit to an evaluation by both Drs. Mills and Kaser-Boyd. (77 RT 10041.) On direct examination, Gonzales testified she was ordered to undergo two evaluations by experts hired by the prosecution. Gonzales said she was evaluated by Dr. Kaser-Boyd, but did not submit to the examination by Dr. Mills "because my attorneys advised me not to because he–because he wasn't--" (66 RT 7715.) The court then sustained the prosecutor's objection as to her explanation why she refused the examination. (66 RT 7715-7716.) However, Gonzales clarified that she refused the examination by Dr. Mills because her attorneys advised her to do so. (66 RT 7716.)

The court instructed the jury on Gonzales's refusal as follows:

> The defendant was ordered to submit to examinations by Dr. Nancy Kaser-Boyd and Dr. Mark Mills. You've heard evidence that the defendant refused to submit to a psychiatric examination by Dr. Mark Mills. ¶ The defendant's refusal to be examined by the prosecution's doctor may be considered by you when weighing the opinions of the defense experts in this case. The weight which this factor is entitled is a matter for you to decide.

(82 RT 10641-10642.)

2. The trial court's order was error under *Verdin v. Superior Court*

Relying on *People v. Danis*, *supra*, 31 Cal.App.3d at p. 782, *People v. McPeters*, *supra*, 2 Cal.4th at pp. 1148, 1190, and *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 312, 412, the trial court ordered Gonzales to submit to a psychological examination because Gonzales raised an issue as to her mental state, which she sought to explain by way of expert psychological witnesses. (51 RT 5374, 5414.) This Court recently held such an examination is not authorized because it is a form of discovery, and when the discovery laws were changed by Proposition 115 in 1990, the new discovery laws were exclusive, and did not provide for such an evaluation. (*Verdin v. Superior Court*, *supra*, 43 Cal.4th at pp. 1102-1104, 1109.) Thus, this Court's order of Gonzales to submit to examinations by Drs. Kaser-Boyd and Mills was error.

3. This court should not apply *Verdin* retroactively

In *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, this Court addressed when a new rule of law should be applied retroactively. The threshold inquiry is whether a decision establishes new standards or a new rule of law. (*Id.* at p. 36.) "If it does not establish a new rule or standards, but only elucidates and enforces prior law, no question of retroactivity arises." (*People v. Watson* (2008) 43 Cal.4th 652, 688; *Donaldson v. Superior Court*, *supra*, 35 Cal.4th at p. 36.) In *Donaldson v. Superior Court*, this Court determined a new rule of law occurs "only when a decision explicitly overrules a past precedent of this Court [citations], or disapproves a practice this Court has arguably sanctioned in prior cases [citations], or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." (*Donaldson v. Superior Court*, *supra*,

35 Cal.3d at p. 37, quoting *United States v. Johnson* (1982) 457 U.S. 537 [102 S.Ct. 2579, 73 L.Ed.2d 202].)

Here, this Court in *Verdin* established a new rule of law because it disapproved a practice this Court had arguably sanctioned in prior cases, *McPeters* and *Carpenter*. In those cases, decided after Proposition 115 went into effect, this Court held it was not error for a trial court to order an examination of a defendant after he or she placed his or her mental state in issue. This Court held the defendants' constitutional rights under the Fifth and Sixth Amendments were not violated because they were waived "to the extent necessary to permit a proper examination of that condition." (*People v. McPeters*, *supra*, 2 Cal.4th 1148, 1190; *People v. Carpenter*, *supra*, 15 Cal.4th 312, 412.) This Court further explained in *McPeters*, "[a]ny other result would give an unfair tactical advantage to defendants, who could, with impunity, present mental defenses at the penalty phase, secure in the assurance they could not be rebutted by expert testimony based on an actual psychiatric examination. Obviously, this would permit and, indeed, encourage spurious mental illness defenses." (*People v. McPeters*, *supra*, 2 Cal.4th at p. 1190.)

Although *Verdin* was interpreting the discovery rules adopted by Proposition 115, as in *Donaldson*, this is not dispositive of the issue because *Verdin* was "clearly not a simple application of the statutory language." (*Donaldson v. Superior Court*, *supra*, 35 Cal.3d at p. 37.) Thus, it was a departure from past precedent, "even though in the context of statutory interpretation." (*Ibid.*; but see *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1023 [the general rule of retroactivity extends to decisions that establish the meaning of a statutory enactment].)

Once it is determined to be a new standard, whether to give it retroactive effect is based on this Court's adoption of the tripartite test in

Stovall v. Denno (1967) 388 U.S. 293, 297 [87 S.Ct. 1967, 18 L.Ed.2d 1199] that weighs the

> following factors: '(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of retroactive application of the new standards.'

(*Donaldson v. Superior Court*, *supra*, 35 Cal.3d at p. 38, quoting *Stovall v. Denno*, *supra*, 388 U.S. at p. 297.)

Here, the factors weigh in favor of having the rule applied prospectively only. The new rule was adopted based on statutory interpretation of Proposition 115, the Crime Victims Justice Reform Act, which added Penal Code section 1054 that "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." This Court held in *Verdin* that such an examination was a form of discovery, therefore, since it was not statutorily provided for, it was not allowed. (*Verdin v. Superior Court*, *supra*, 43 Cal.4th at p. 1103-1106.) Thus, the purpose to be served by the new standards would still be served, because future defendants would not be ordered to submit to a mental examination.

The other factors also weigh in favor of a prospective application of *Verdin*. Based on a reasonable interpretation of *Danis*, *McPeters* and *Carpenter,* the old rule was relied on, not by law enforcement, but by courts--in this case and presumably in other cases. (See e.g., *People v. Wallace* (2008) 44 Cal.4th 1032, 1084-1088.) Additionally, there would be no negative effect on the administration of justice if *Verdin* were applied prospectively. "[R]etroactivity is not customarily required when the interest to be vindicated is one which is merely collateral to a fair determination of guilt or innocence." (*Donaldson v. Superior Court*, *supra*, 35 Cal.3d at p. 38.) Application of *Verdin* retroactively would give an

"unfair tactical advantage to defendants," (*People v. McPeters*, *supra*, 2 Cal.4th at p. 1190), but would not further the truth-seeking function of a trial. Thus, this Court should rule, consistent with *Donaldson*, that *Verdin* not be applied retroactively.

4. The error did not violate Gonzales's constitutional rights and was not prejudicial

Even if *Verdin* were applied retroactively, the error was harmless, and Gonzales's constitutional rights were not violated. Because this Court held in *Verdin* that there was no statutory right to order a psychiatric examination, it did not reach whether such examination would violate a defendant's constitutional rights. Here, Gonzales's constitutional rights were not violated.

In *Buchanan v. Kentucky*, *supra*, the defendant relied on the defense of "extreme emotional disturbance" to charges of murder. (*Buchanan v. Kentucky*, *supra*, 483 U.S. at p. 408.) He called a social worker to testify from various reports and letters from evaluations of the defendant's mental condition. (*Id.* at pp. 408-409.) On cross-examination, the prosecutor asked the social worker about other psychological reports of the defendant. (*Id.* at p. 410.) The defendant argued his Fifth Amendment right to self-incrimination was violated because he had not been informed the results of the psychological examination could be used against him at trial, and his Sixth Amendment rights were violated because his counsel had not been present during the examination. (*Id.* at pp. 411-412.) The United States Supreme Court held that "if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." (*Id.* at p. 423.) Otherwise, the People "could not

respond to this defense unless it presented other psychological evidence." (*Buchanan v. Kentucky*, *supra*, 483 U.S. at p. 423.) The Supreme Court also rejected the defendant's argument that his Sixth Amendment right to counsel was violated because his counsel was informed about the scope and nature of the proceeding. (*Id.* at p. 424-425.)

Numerous courts that have considered the related issue that Gonzales raises, whether requiring a defendant to submit to an examination after presenting psychological testimony to support a mental defense, violates a defendant's constitutional rights, have rejected the argument. (*Gibbs v. Frank* (3rd Cir. 2004) 387 F.3d 268, 274-275; *United States v. Curtis* (4th Cir. 2003) 328 F.3d 141, 144-145; *United States v. Phelps* (9th Cir. 1992) 955 F.2d 1258, 1263; *Isley v. Dugger* (11th Cir. 1989) 877 F.2d 47, 49; *State v. Steiger* (Conn. 1991) 590 A.2d 408, 416-417; *Re v. State* (Del. 1988) 540 A.2d 423, 429-430; *Kearse v. State* (Fla. 2000) 770 So.2d 1119, 1126; *Durham v. State* (Ga. 2006) 636 S.E.2d 513, 516; *People v. Gacy* (Ill. 1988) 530 N.E.2d 1340, 1351; *Coffey v. Messer* (Ky. 1997) 945 S.W.2d 944, 947-948; *Estes v. State* (Nev. 2006) 146 P.3d 1114, 1121; *State v. Briand* (N. H. 1988) 547 A.2d 235, 237-240; *Commonwealth v. Morley* (Pa 1995) 658 A.2d 1357, 1359-1362; *State v. Martin* (Tenn. 1997) 950 S.W.2d 20, 22-27; *State v. Davis* (Wis. 2002) 645 N.W.2d 913, 922-927.) This Court should find, consistent with the other courts that have addressed this issue, that Gonzales's constitutional rights were not violated by requiring her to submit to the examinations.

Additionally, the court's error under *Verdin* was harmless. While this Court held ordering such an evaluation was error based on statutory analysis of the discovery provisions, it did not preclude a trial court from ordering a psychological examination under Evidence Code section 730. (*Verdin v. Superior Court*, *supra*, 43 Cal.4th at p. 1117.) Evidence Code section 730 provides:

> When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.

Verdin was in a much different procedural posture than this case. In *Verdin*, after the trial court granted the prosecutor's request for an examination, the defendant filed an alternative writ of mandate, which the Court of Appeal denied. This Court granted review and stayed the examination. (*Verdin v. Superior Court*, *supra*, 43 Cal.4th at pp. 1101-1102.) This Court rejected the People's reliance on appeal on Evidence Code section 730 because they did not invoke that section below, and the trial court did not appoint an expert pursuant to that section, but instead ordered the defendant to submit to an examination by an expert retained by the prosecution. (*Id.* at p. 1109-1110.) Nonetheless, this Court stated "[t]he People remain free on remand to move the trial court to appoint an expert pursuant to Evidence Code section 730 if, in its discretion, it decides that expert evidence 'is or may be required.'" (*Id.* at p. 1117.)

Here, had the court known it did not have the authority to order Gonzales to submit to the examinations under existing caselaw, it would have ordered her to submit to the examinations under Evidence Code section 730. The court referenced Evidence Code section 730, and it stated its purpose in ordering the examinations was to "ascertain[] the truth" (51 RT 5375) and to promote "fairness" (12 CT 2779-2789).

The court noted that it was "authorized, under its supervisory powers and under Evidence Code 730, to appoint experts." (51 RT 5397.) In the context of whether it had the authority to appoint two experts, the court stated,

> My sense is–and that is, in part, from the language in *Danis* and the courts general authority to appoint experts under 730 and *to devise processes designed effectively to seek the ascertainment of truth.* I think I probably have general authority to do that [appoint two experts].

(51 RT 5375, emphasis added.)

Based on the trial court's concern to "seek the ascertainment of truth" (51 RT 5375), it clearly would have appointed the experts under Evidence Code section 730, had it not appointed them under existing caselaw. The court stated that "fairness requires the People have the opportunity to examine" Gonzales's expert testimony. (12 CT 2779-2780.) The court referred twice to its authority under Evidence Code section 730 to order examinations. (51 RT 5397, 5375.) Thus, had the trial court known it was unable to order the expert witnesses under the discovery statute and *Danis*, it would have done so under Evidence Code section 730.[27]

---

[27] The court indicated that it was ordering the examinations under existing discovery laws. In the context of whether the court could order Dr. Kaser-Boyd to write a report within a certain time frame, the defense said to the court: "I think the exam is your exam." (61 RT 6912.) The court explained:

> Let me tell you what I'm thinking about this. There is some case law support that I have authority to do this, in part, because of–I forgot the Evidence Code section. There's an Evidence Code section giving the court authority to order–provide experts for the court and order exams.

(continued...)

Gonzales's argument that she did not place her mental state at issue, therefore, the examination was improper, is based primarily on language in *Danis*. (AOB 276-281.) Thus, the court could have properly ordered such an examination under Evidence Code section 730. By tendering an expert as to Gonzales's status suffering from BWS, the court could properly appoint an expert to evaluate her. Gonzales's argument that she did not put her mental state in issue because she denied participation in the crime (AOB 281) is unavailing. Gonzales's witnesses testified that she suffered from BWS, therefore, she waived her Fifth Amendment privilege against self-incrimination. Thus, it was necessary to "ascertain[] the truth" (51 RT 5375) by ordering Gonzales to submit to an examination on the same subject. Otherwise, Gonzales would have "an unfair tactical advantage . . . [and] could, with impunity, present mental defenses at the penalty phase, secure in the assurance they could not be rebutted by expert testimony based on an actual psychiatric examination." (*People v. McPeters*, *supra*, 2 Cal.4th at p 1190.)

(...continued)

> I'm not at all sure that that's the real basis for the *Danis* exam. It–it's not–I am ordering the exam. This is true. Although it's not for me. It's for the prosecution. And the–the constitutional case authority really focuses on balancing the scales when a defendant is raising a mental health issue.
>
> I've got some real doubts that I've got the authority to do that. I think the basic authority is discovery law, which would–requires the People to turn over what they got when they've got it.
>
> Judges have lots of authority to make orders without having any idea what the real world underlying those orders is.

(61 RT 6912-6913.)

Nor would it have "far-reaching" results, such as permitting examinations of sexual assault and domestic violence victims, as Gonzales contends. (AOB 281-283.) Had Gonzales merely put on evidence to explain BWS, including what it is, explaining the misconceptions, and testifying that Gonzales's behavior was consistent with BWS, she would not have waived her Fifth Amendment privilege against self-incrimination. Gonzales went one step further: the witnesses examined and evaluated her and opined that, based on their examinations, she suffered from BWS. Thus, only when there is a psychiatric or psychological evaluation does one waive their privilege, and allow the opposing party to have an examination for purposes of rebuttal. In the instances cited by Gonzales (rape or domestic violence victims), they are not subject to an examination by either side, therefore, they are not placing their mental state in issue in the same manner. Gonzales is confusing those who testify and place their credibility in issue with those who present psychiatric or psychological testimony after an examination. (See AOB 282.)

Gonzales's argument that even if an examination was warranted, it was error to order two examinations is also without merit. (AOB 286-287.) Had the court ordered the examination under Evidence Code section 730, it would not have abused its discretion in appointing two experts. A trial court has discretion in the selection and appointment of expert witnesses under Evidence Code section 730. (*People v. Crandell* (1988) 46 Cal.3d 833, 862; *In re Daniel C.H.* (1990) 220 Cal.App.3d 814, 835.) The statute contemplates "one or more experts." (Evid. Code, § 730.) The court believed it was justified to have both a BWS expert and a psychiatrist with a broader base of knowledge and experience evaluate Gonzales. (51 RT 5397, 5413; 61 RT 6908.) The court concluded that, "this is a case that I should authorize the two experts the People have requested." (51 RT

5413.) In ordering two experts to evaluate Gonzales, the court specifically referred to its authority under Evidence Code section 730. (51 RT 5397.)

Nor did the trial court abuse its discretion in ordering that one of those experts be Dr. Mills as Gonzales contends. (AOB 291-293.) Dr. Mills was a psychiatrist with broad experience in psychological disorders. (51 RT 5375-5376.) Dr. Mills's earlier evaluation of Ivan was immaterial because the trial court ruled it had "substantial doubt" it would allow Mills to testify to anything Ivan told him. (51 RT 5414-5415, 5421.)

Gonzales's argument that she was not allowed to explain her refusal to the jury (AOB 289-290) is belied by the record. Gonzales explained that her attorneys advised her to refuse to submit to the examination. (66 RT 7715-7716.) No further explanation was necessary.

Even if this Court were to determine the evidence would not have been admitted under either the existing caselaw or Evidence Code section 730, Gonzales still was not prejudiced because even had the examinations not been ordered, the result would have been the same. As it was state law error, reversal is only required if it is reasonably probable a result more favorable to Gonzales would have been reached absent the error. (*People v. Wallace, supra*, 44 Cal.4th at p. 1060 citing *People v. Watson, supra*, 46 Cal.2d at p. 836.)

The evidence about Gonzales's refusal to be interviewed by Dr. Mills was not harmful. Gonzales testified on direct examination that, although ordered to submit to two examinations, she did not submit to the examination by Dr. Mills "because my attorneys advised me not to because he–because he wasn't--" (66 RT 7715.) Gonzales then reiterated her refusal was on her attorneys' advice. (66 RT 7716.) The court's instruction merely informed the jury that,

> [t]he defendant's refusal to be examined by the prosecution's doctor may be considered by you when

> weighing the opinions of the defense experts in this case. The weight which this factor is entitled is a matter for you to decide.

(82 RT 10641-10642.) Gonzales's counsel explained in closing argument that Dr. Mills was not an expert on BWS, and that Gonzales refused his examination on advice of counsel. (83 RT 10813.) Moreover, because she did submit to an examination of Dr. Kaser-Boyd, the refusal instruction did not have much impact as the prosecutor was not able to argue that she was hiding something by refusing to be examined by another expert. Therefore, the court's order of the examination of Dr. Mills and the instruction on Gonzales's refusal was harmless. (See *People v. Wallace*, *supra*, 44 Cal.4th at pp. 1087-1088 [harmless error for psychiatrist retained by prosecutor to testify that defendant refused to be interviewed.])

Additionally, the evidence resulting from Dr. Kaser-Boyd's testimony was harmless. Although some of Dr. Kaser-Boyd's testimony was based on her examination of Gonzales, much of the testimony would have been admissible had Dr. Kaser-Boyd not interviewed her. That testimony includes: general testimony about BWS (78 RT 10146-10147), that it is difficult to form opinions and evaluate someone who lies over time (78 RT 10157), that Gonzales's affair with Luna was risk-oriented behavior and was not consistent with Ivan battering Gonzales because Luna was young and did not appear to be someone who would have a lengthy relationship with and help Gonzales get out of the abusive relationship, and after the affair, Ivan and Luna Jr. hung out for about a month (78 RT 10162-10165), Gonzales's statements to the police were not consistent with a battered woman who was protecting her abuser (78 RT 10180), and that the level of violence experienced by Gonzales, assuming her accounts were true, did not approach a level where women are immobilized by terror (78 RT 10214).

Additionally, Dr. Kaser-Boyd analyzed the MMPI tests Dr. Ryan (the defense expert witness) administered to Gonzales. (78 RT 10201, 10204.) Based on the tests Dr. Ryan gave Gonzales, Dr. Kaser-Boyd opined the elevated profile most likely was due to Gonzales's malingering or a "fake bad profile," that rendered the test invalid. (78 RT 10204.)

The testimony that was admitted that relied on Dr. Kaser-Boyd's examination of Gonzales included the following: she went over the second MMPI that Dr. Ryan gave Gonzales and concluded she was malingering (78 RT 10205-10206), in a Levinson IPC test about power and control, Gonzales answered the questions far different than other battered women (78 RT 10189-10191), in the "Attitudes Towards Women" scale that asks a woman's opinion about women's freedom and rights, Gonzales scored consistent with college women rather than battered women (78 RT 10192-10193), Gonzales rated herself much more helpless and submissive than other battered women in a study done on the "Semantic differential" (78 RT 10194-10195), Gonzales was very guarded in the Rorschach ink blot test which is unusual for battered women (78 RT 10195-10197), on the Millon Clinical Multiaxial Inventory, the computer that scored the rest rated three out of the four protocols "exaggeration of symptoms" (78 RT 10198-10202), and Dr. Kaser-Boyd's conclusion based on the tests that raised the "specter" Gonzales was exaggerating (78 RT 10210-10211).

Dr. Kaser-Boyd testified that it was difficult to diagnose whether Gonzales suffered from BWS because she exaggerated, changed stories, and presented with psychological and pathological issues which could be from her child abuse background rather than being battered. (78 RT 10215.)

To counter this evidence, Gonzales presented evidence from psychologist Thomas Mac Speiden that Dr. Kaser-Boyd's reading of the questions on the MMPI affected its validity because it is a standardized test.

(80 RT 10363-10364, 10378.) Dr. Mac Spieden testified the test was a sawtooth pattern, which indicated the responses were random, and therefore the test was probably not valid. (80 RT 10380, 10382-10383). He also testified Gonzales's reading level was at the beginning of 8th grade. (80 RT 10376.) The MMPI and MMCI both require an 8th grade reading level. (80 RT 10376.) Gonzales's limited intelligence factored into the Rorschach test and the MMCI. (80 RT 10386-10387.) The MMPI also contained cultural biases. (80 RT 10394-10395.) Dr. Mac Speiden opined that Gonzales was not malingering. (80 RT 10443.)

Thus, most of the damaging testimony of Dr. Kaser-Boyd was not based on the examination of Gonzales. The testimony about the tests was minimized by the uncontradicted rebuttal evidence questioning Dr. Kaser-Boyd's tests. Moreover, Dr. Kaser-Boyd's testimony about the tests merely corroborated her opinion that, based on the MMPI administered by Dr. Ryan, Gonzales was exaggerating and malingering.

Moreover, the evidence against Gonzales showed her sustained abuse, torture and the eventual murder of Genny was brutal. Gonzales was entrusted to care for a four-year-old niece, and instead, she and her husband burned, tortured, hit, hung, bound and murdered her. As detailed in Argument I, subdivision (A)(2), the evidence against Gonzales was compelling. Also detailed in that argument, the evidence Gonzales was a battered woman was very weak (even without Dr. Kaser-Boyd's testimony regarding her examination of Gonzales.) Numerous witnesses had seen Gonzales abuse Ivan and testified that Gonzales was the dominant person in the relationship. (75 RT 9657-9662, 9675, 9770, 9808-9810, 9812-9813, 9854-9856; 76 RT 9891, 9914.) Additionally, Gonzales's own expert testified Gonzales lied (74 RT 9502), and Gonzales admitted that she lied numerous times to numerous persons (67 RT 7734-7735), including her own expert witnesses (68 RT 8052, 8178), therefore Dr. Kaser-Boyd's

testimony that the tests showed Gonzales to exaggerate was information already known to the jury. Thus, even if this Court applies *Verdin* retroactively, any error in this case is harmless because the trial court would have ordered the evaluations of Gonzales under Evidence Code section 730. Moreover, had the information not been known to the jury, there is no reasonable probability a result more favorable to Gonzales would have been reached because although the jury knew Gonzales refused the examination by Dr. Mills, they knew it was based on her attorneys' advice, and that she submitted to the examination by Dr. Kaser-Boyd, therefore, they would not draw any negative inferences. The examination by Dr. Kaser-Boyd was also harmless because the jury was already aware of the compelling evidence against Gonzales, the weak and conflicting evidence supporting Gonzales's BWS defense, and Dr. Kaser-Boyd's opinion that Gonzales exaggerated separate and apart from any court ordered examination conducted by Dr. Kaser-Boyd.

D. Dr. Mills's expert testimony was proper

Gonzales claims the trial court abused its discretion by allowing Dr. Mills to testify to "improper profile evidence" that she was a malingerer and by telling the jury what to believe, in violation of Evidence Code section 352 and her constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 294, 306-307.) Gonzales also claims Dr. Mills's testimony was improper because he was not an expert in BWS, he did not have any expertise beyond the common experience of jurors (AOB 297), and that there was "clear error" because Dr. Mills testified that Gonzales had a great incentive to lie because she faced a potential death sentence (AOB 298). Gonzales forfeited her claims that her constitutional rights were violated and that Dr. Mills's testimony was improper profile evidence because she did not object on the specific bases that she now claims were error. Even if her claims were not forfeited, they are meritless.

Prior to Dr. Mills's testimony, Gonzales objected to his testifying about his review of Gonzales's statements and his opinion that her statements were unusually contradictory based on relevance, lack of foundation and Evidence Code section 352. (76 RT 9995-9997.) The prosecutor explained the proffered testimony was that no credible psychologist or forensic expert could form an opinion based on Gonzales's numerous inconsistencies. (76 RT 9998.) Thus, the testimony was proper to rebut the defense experts who testified that Gonzales's lies were consistent with being a battered woman, that Gonzales was credible, and that Gonzales's lies were to protect Ivan. (76 RT 9997.) Moreover, Dr. Mills would offer a different explanation for Gonzales's lies–i.e., that she was malingering. (76 RT 9997-9999.) The court stated it believed the prosecutor was entitled to have an expert opine that another expert would be unreasonable in drawing factual conclusions and forming a professional opinion based on certain facts. (76 RT 10000.) The court told the prosecutor to draw his questions carefully and talk to Dr. Mills so as not to tell the jury what they should believe. (76 RT 10002.)

The prosecutor intended to present fewer than ten specific examples of Gonzales's inconsistencies in relation to Dr. Mills's opinion. (76 RT 10004-10005.) Gonzales objected based on relevance and Evidence Code section 352. (76 RT 10001, 10003, 10006.) The court held it was reasonable rebuttal evidence, and did not raise "significant 352 issues," however, it would limit the number of examples Dr. Mills would testify to. (76 RT 10008.) The court stated it would not allow any testimony as to Gonzales's credibility as to any specific statement. (76 RT 10008.)

Gonzales also objected to Dr. Mills testifying that the incentives for malingering are very high in a capital case because the stakes are so high.[28] (76 RT 10002.) The court stated Dr. Mills could testify that was a factor that a reasonable, prudent professional would consider before drawing factual conclusions. (76 RT 10011.) In response to the court's ruling, Gonzales further argued such a statement would place an undue burden on the credibility of the defendant. The prosecutor responded that it did not want to inject penalty into the trial, so he would limit any such questions to someone facing a murder charge, not the death penalty. (76 RT 10012.)

Dr. Mills, a forensic psychiatrist, testified that malingering was a conscious attempt to deceive somebody. (77 RT 10033.) To detect malingering, one looks for inconsistency, whether the purported psychological symptoms dovetail with any objective signs, and whether the symptoms are consistent over time. (77 RT 10034, 10043.)

Dr. Mills testified that there is a bias or motive that you look to for malingering, and that

> as you all know, the defendant potentially faces the death penalty in this case. I think, for most of us, there's nothing more precious than our lives. And so that where one faces the death penalty, incentive for embellish [*sic*] or distorting, those can be conscious or unconscious or to outright fabricate is very, very high.

(77 RT 10043.)

Dr. Mills defined PTSD, and explained that those suffering from PTSD are in touch with reality and rational; it does not vitiate one's free

---

[28] Without citing to the record, Gonzales speculates that the basis for counsel's expectations regarding what Dr. Mills would testify to was their familiarity with Ivan's trial. (AOB 296 fn. 110.) The record is clear that counsel's expectations were from reading Dr. Mills's report prepared for his testimony in Gonzales's trial. (76 RT 10002.)

will. (77 RT 10037, 10039, 10044-10045.) To determine whether someone had PTSD or was malingering, you would also look to whether there are external indicators of PTSD. (77 RT 10044.) He also discussed "examiner effects" wherein the examiner can elicit certain kinds of information based on the examiner's personality. (77 RT 10036.)

Dr. Mills testified that Gonzales's inconsistencies gave rise to an unreliable data set upon which to evaluate her. (77 RT 10045-10046.) Dr. Mills gave some examples, such as Gonzales's account of her childhood abuse (77 RT 10047), placing Genny on the hook and in handcuffs (77 RT 10049) and the use of the blow dryer on Genny (77 RT 10050). For example, Gonzales initially told the detectives the handcuffs were for sexual foreplay with her husband, then in another interview she said she put them on Genny. Then in trial, she denied she put them on Genny. (77 RT 10049.) Dr. Mills opined that based on the conflicting data given by Gonzales, there was insufficient evidence to reliably conclude that she had PTSD. (77 RT 10051.)

Although Gonzales objected to Dr. Mills's testimony, she did so only on the basis of relevance, lack of foundation, and that the testimony was more prejudicial than probative under Evidence Code section 352. (76 RT 9995-9997.) She did not claim, as she does now, that it was improper profile evidence, nor did she raise the constitutional claims she now raises. As Gonzales did not object at trial on these specific grounds, she has forfeited her claims. (*People v. Riggs*, *supra*, 44 Cal.4th at pp. 248, 324; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 113.)

Even if Gonzales had not forfeited her claims, they fail on their merits. Dr. Mills did not testify to "improper profile evidence." Rather, his testimony was permissible expert testimony that explained PTSD, a disorder Gonzales's expert witnesses claimed she suffered from. (73 RT 9240-9242.) Dr. Mills did not testify that Gonzales had characteristics of a

child abuser or murderer. Additionally, Dr. Mills's testimony was properly admitted to rebut the conclusions of Gonzales's experts.

The admission of expert testimony is reviewed for an abuse of discretion. (*People v. Lindberg* (2008) 45 Cal. 4th 1, 45.) Experts can testify to their opinion "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Although expert testimony "is generally inadmissible on topics 'so common' that jurors of ordinary knowledge and education could reach a conclusion as intelligently as the expert, an expert may testify on a subject about which jurors are not completely ignorant." (*People v. Lindberg, supra*, 45 Cal.4th at p. 45.)

Gonzales's expert, Dr. Ryan, testified that Gonzales suffered from PTSD, which he described as an anxiety disorder caused by a highly traumatic event. (73 RT 9240.) Dr. Ryan testified that Gonzales was caught up in her PTSD as she was discussing Ivan's abuse, and that Gonzales's PTSD was lessening. (73 RT 9241-9242.) Thus, Gonzales's argument that the trial court abused its discretion in allowing Dr. Mills to testify even though he was not an expert in BWS (AOB 296-298, 300) is without merit. Although BWS was one area where expert witnesses testified, it does not prohibit expert witnesses from explaining other testimony.

Additionally, Dr. Mills's testimony further explaining PTSD and in particular explaining that it does not vitiate one's free will, was relevant, would assist the jury, and was not a subject that jurors of ordinary knowledge and education could reach as intelligently as the expert.

It was also within the trial court's discretion to admit Dr. Mills's testimony that Gonzales's inconsistencies gave rise to an unreliable data set upon which an expert could evaluate her, and to give some examples supporting that point. This testimony appropriately pointed out the

weaknesses in Gonzales's expert witnesses testimony. It is permissible to present expert testimony in rebuttal to challenge a defense experts methods. (*People v. Smithey* (1999) 20 Cal.4th 936, 967; *People v. Stoll* (1989) 49 Cal.3d 1136, 1159.) Thus, the testimony was proper.

Gonzales also claims it was "clear error" that Dr. Mills told the jury that Gonzales had a great incentive to lie because she faced the death penalty. (AOB 298.) Gonzales does not clarify who committed this "clear error." The prosecutor stated he did not intend to present such testimony, so the trial court never finally ruled on it (although it gave an initial indication that it would admit it). (76 RT 10011-10012.) Nor did Gonzales request a mistrial. (See 76 RT 10053-10056.) As can be seen from Dr. Mills's testimony, this information was not elicited by the prosecutor. The prosecutor asked whether there was a bias or motive that you look to in evaluating whether someone is malingering, and Dr. Mills stated that because Gonzales was facing the death penalty, the incentive to embellish or distort was very high. (77 RT 10043.) Thus, it is not clear to whom Gonzales attributes this "clear error."

Had the prosecutor elicited the testimony based on a trial court ruling, however, it would not have been error. As the trial court explained, it was appropriate testimony because it was a factor that a reasonable, prudent professional would consider before drawing factual conclusions (76 RT 10011), therefore, it was relevant. Nor was it "highly prejudicial" as Gonzales claims. (AOB 298.) Even if it were error, it was not harmful because it is merely stating an obvious point. As the trial court indicated, that Gonzales was facing the death penalty was "not news to this jury." The jurors were voir dired extensively on this issue. (77 RT 10055.) In arguing it was prejudicial error, Gonzales characterizes the testimony as that of "a forensic psychiatrist advis[ing] the jury that defendants facing death sentences are simply not to be believed." (AOB 298.) Gonzales

mischaracterizes Dr. Mills's testimony. Dr. Mills testified that the incentive to malinger was a factor in a capital case for an expert to consider because the stakes were so high for the defendant. (76 RT 10002.) He did not testify that capital defendants are not to be believed. Accordingly, even if the trial court had ruled on the admissibility of the statement, it would not have been error; if it were found to be error, it would be harmless under any standard.

Gonzales also mischaracterizes Dr. Mills's testimony that glaring inconsistencies in one person's account of an event can only be explained as lying or a brain defect. (AOB 299.) Dr. Mills testified that no one has a perfect memory, and everyone has a psychological reason to embellish or to minimize. (77 RT 10045.) He explained that to see if someone is being straightforward, you look to their testimony, statements and evaluations, and that it is not a precise test. (77 RT 10046.) He continued:

> But if one finds *glaring* discrepancies in the account that somebody has given, one either has to believe that at one or both of those occasions the person was lying or the person has some kind of significant memory problem the way somebody with advanced Alzheimers might or the person has some kind of other brain disease that allows them not to remember correctly.

(77 RT 20046, emphasis added.) Put in proper context, Dr. Mills's statement was not "hyperbole," nor did it "overlook[] the fact that there may be other good explanations, such as innocent mis-recollection." (AOB 299.) Dr. Mills acknowledged that no one has a perfect memory, and his statement only addressed *glaring* inconsistencies.

Nor did Dr. Mills testify that Gonzales was a liar, or tell the jury he was convinced she was a liar as Gonzales contends. (AOB 299.) Dr. Mills never even opined that Gonzales was malingering. He defined malingering. (77 RT 10033.) He also testified that Gonzales's inconsistencies gave rise

to an unreliable data set upon which to evaluate her. (77 RT 10045-10046.) Dr. Mills's testimony was directed towards the basis for the defense expert opinions. Moreover, the trial court instructed the jury that they were the sole judges of credibility (82 RT 10636; 16 CT 3636 [CALJIC No. 2.20]) and that they were not bound by an expert's opinion and were to give the opinion the weight it deserves (82 RT 10641; 16 CT 3646; [CALJIC No. 2.80]). (See *People v. Prince* (2007) 40 Cal.4th 1179, 1227 [instruction with CALJIC Nos. 2.20 and 2.80 relevant to refuting claim that expert testimony was in effect a directed verdict].) Therefore, Dr. Mills's testimony was put in proper context.

In support of her position that Dr. Mills's testimony was improper, Gonzales cites *People v. Chatman*, *supra*, 38 Cal.4th at pp. 344, 375-376. In *Chatman*, a defense psychologist subjected a prosecution witness to a whole day of psychological testing. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 374.) The defense sought to admit the test results to impeach the witness's credibility. The results showed the witness was moderately impaired and demonstrated signs of a character disorder, had chemical dependency, a marked inability to cope with life, and had some problems being in touch with reality. (*Id.* at p. 375.) The trial court excluded the testimony, which this Court held was "fully consistent with the general judicial policy disfavoring testimony of this nature." (*Id.* at p. 376.) Dr. Mills did not evaluate Gonzales, nor did he testify to impeach her credibility. Moreover, Gonzales injected her mental state into her trial by presenting evidence of psychological testing. Therefore, had Dr. Mills evaluated Gonzales and testified to her mental state in rebuttal, it would have been under far different circumstances than the witness who was evaluated in *Chatman*. Thus, *Chatman* does not support Gonzales's position.

Gonzales argues Dr. Mills "moved even further into the area of prosecutorial argument" because he testified that a good example of Gonzales's inconsistent statements was her statements whether she was molested as a child because "even the prosecution's own legitimate BWS expert recognized that there were very understandable explanations for these inconsistent statements." (AOB 300.) Dr. Mills did not testify as to which of the inconsistent statements were true. (77 RT 10047.) That the two experts would disagree on why Gonzales made inconsistent statements is legally inconsequential. Gonzales was free to argue her interpretation of the evidence based on the expert witnesses.

Next, Gonzales argues that Dr. Mills testified that she had the characteristics of a malingerer, which was improper profile evidence. (AOB 301-306.) Gonzales's argument that the trial court admitted improper "profile" evidence mischaracterizes the nature of Dr. Mills's testimony. Gonzales argues that although the purpose of Dr. Mills's testimony was to testify that no legitimate expert could have reached a conclusion based on Gonzales's statements, "Dr. Mills failed to express [such] an opinion." (AOB 301.) Gonzales's argument is belied by the record. That is precisely what Dr. Mills testified to at trial. (77 RT 10045-10051.) Dr. Mills explained that because the evaluation of PTSD relies in large part on the person being evaluated recounting their subjective explanation of their symptoms, it is difficult to do if the evidence is conflicting. (77 RT 10050-10051.) Thus, he concluded that there was insufficient evidence to reliably conclude Gonzales had PTSD. (77 RT 10051.)

The evidence adduced during Gonzales's trial was not the type of evidence the courts have held is inadmissible. Profile evidence "ordinarily constitutes a set of circumstances–some innocuous–characteristic of certain crimes or criminals, said to comprise a typical pattern of behavior. In

profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile." (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1179, 1226.) For example, in *People v. Derello*, an expert witness testified that the defendant fit the profile of a drug trafficker, in that he wore lots of gold jewelry, was carrying a large amount of cash, was youthful and dressed casually, and rented an expensive car. (*People v. Derello* (1989) 211 Cal.App.3d 414, 421.) The court held those characteristics of the suspect that indicated no ongoing criminal activity, such as the amount of jewelry worn, or the age or dress of the defendant, were not relevant and should not be admitted. (*Id.* at p. 426.)

Profile evidence is inadmissible because it is irrelevant, lacks sufficient foundation, or is more prejudicial than probative. It is not a separate ground for excluding evidence. (*People v. Smith* (2005) 35 Cal.4th 334, 357.) It "is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt." (*Id.* at p. 358.)

Dr. Mills's testimony was not profile evidence. He did not list characteristics of a child abuser or child murderer. He did not compare any listed characteristics to Gonzales's behavior to conclude she fit the profile of a child abuser or child murderer. He did not list characteristics that were as consistent with Gonzales's innocence as her guilt.

Nor did Dr. Mills testify to the "investigative techniques used by mental health experts" as Gonzales contends. (AOB 302.) Dr. Mills's testimony was proper rebuttal to show the weaknesses in the data relied on by Dr. Ryan, thus it was appropriate to challenge the defense experts methods. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 967; *People v. Stoll*, *supra*, 49 Cal.3d at p. 1159.)

The cases Gonzales cites do not support her position that the evidence was profile evidence. (AOB 302-306.) Unlike the cases cited, Dr. Mills

did not recite the general characteristics or stereotypes of child abusers or murders. Dr. Mills did not testify to factors "commonly displayed by malingerers" and conclude that Gonzales fit the profile of a malingerer. (AOB 306.) He defined malingering and explained how to detect it. (77 RT 10033-10034, 10043-10044.) He testified that you look to whether there was a bias or motive to malinger, and stated that where one faces the potential of the death penalty, there was incentive to embellish or distort. (77 RT 10043.) Dr. Mills's testimony about malingering was directly relevant to rebut Gonzales's evidence that she suffered from PTSD and BWS. The prosecution did not call a witness in its case-in-chief to testify that Gonzales has the characteristics of a child abuser or murderer, or even a malingerer. Thus, Gonzales's claim is meritless.

Even if the trial court erred in admission of Dr. Mills's testimony, Gonzales was not prejudiced. Dr. Mills testified generally in defining malingering and PTSD. (77 RT 10033-10034, 10037, 10039, 10044-10045.) Dr. Mills's testimony that one who is facing the death penalty has an incentive to fabricate or distort the truth is obvious and already known to the jurors. The jurors were also well aware of Gonzales's inconsistencies, as they were discussed during the testimony of Gonzales (67 RT 7783; 68 RT 8173, 8180; 69 RT 8270-8271) and with her experts (74 RT 9502). Moreover, Gonzales presented expert witness testimony that battered women lie, thereby lessening the impact of her lies. (73 RT 9273, 9285; 74 RT 9474.) Additionally, the jury could have reasonably inferred that Gonzales's conflicting data would affect the reliability of her experts' PTSD diagnosis. (77 RT 10051.) Thus, had the testimony of Dr. Mills not been presented, there is no reasonable probability that the outcome of the trial would have been different.

Even if Gonzales preserved her constitutional arguments, they are also without merit. She argues the court's ruling violated her constitutional

rights to a fundamentally fair trial in accordance with due process of law, to present a defense, to present witnesses on her behalf and to a reliable verdict under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 307.) "Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1229.) Thus, "they are without merit for the same reasons that [Gonzales's] state law claims" are without merit. (*Ibid.*) Further, even assuming erroneous admission, any constitutional error would also be harmless because, for the same reasons discussed above, there is no reasonable possibility of a different outcome absent the admission of the evidence.

E. The Trial Court Properly Excluded Ivan's Post-Arrest Statements to Police Because They Were Hearsay

Next, Gonzales contends the trial court erred by excluding Ivan's post-arrest statements to the police. Gonzales claims the statements were offered for legitimate non-hearsay purposes, and were also admissible because they were statements against penal interest. (AOB 308, 314.) Ivan's statements were only relevant if offered for their truth. Moreover, at trial Gonzales did not offer the statements for the nonhearsay purposes she now advances. The trial court correctly exercised its discretion in excluding Ivan's statements because they were not against his penal interests and they were self-serving and unreliable. Moreover, Gonzales specifically requested her trial be severed from Ivan's because admission of Ivan's statements would violate her constitutional rights, including denying her right to a fair trial because the statements made by Ivan "would be highly incriminating" to Gonzales. (3 CT 418-438.) Thus, what Gonzales wanted to do was to only admit those statements Ivan made that were beneficial to her, while excluding those portions of Ivan's statements that incriminated her.

When interviewed, Ivan said both he and Gonzales put Genny in the bathtub. (3 CT 456-457.) He said he then went to the store to get bread and beer, and when he returned Gonzales told him to check on Genny, however, he got sidetracked and forgot. (3 CT 457.) He said Gonzales checked on Genny and took her out of the bathtub. (3 CT 460, 490.) Ivan denied that he or Gonzales forced Genny into the bathtub or held her down. (3 CT 509, 512.) Although he said he ran the bath for Genny, Ivan surmised that maybe she turned the dial up with burning hot water. (3 CT 457-458, 473, 493.)

Ivan said the injuries on Genny were from his children ganging up on her and from her falling on a mop. (3 CT 464, 468, 514.) He explained the injuries to her neck were from a neighbor's candy necklace (3 CT 469) and the burn injury to her head occurred when Gonzales was making dinner, and Genny pulled a pot of beans or chicken on Genny's head. (3 CT 466.)

Ivan denied that either he or Gonzales handcuffed Genny. (3 CT 480, 518.) He said Gonzales tied her hands with a cloth. (3 CT 483, 515-516, 535.) He admitted he put the hook up in the closet to scare her (3 CT 503) and that he tried to scare her by putting her in the box (3 CT 501). Ivan said that they both put Genny in the box (3 CT 500, 535) and in the closet (3 CT 506), and that Gonzales was the main disciplinarian with Genny because he was watching the other children. (3 CT 532).

Prior to trial, Gonzales moved to admit certain, but not all, of Ivan's statements he made to the police after his arrest. (6 CT 1306-1317; 20 RT 1650, 1658.) Specifically, Gonzales wanted to admit those statements of Ivan's where he said he and Gonzales left the bathroom together after putting Genny in the bathtub, that he came back into the bathroom alone and Genny was alive, that he did not think the water was hot, that Genny made a noise that he believed was because she did not like taking baths, that he set the water temperature and if Genny had told him it was too hot

he would have taken her out and put cooler water in the bathtub, that Genny may have been too afraid of Ivan to say anything, and that he yelled at her to take a bath and not come out. (6 CT 1307.) Gonzales wanted to exclude Ivan's statements where he denied holding Genny down or otherwise denied culpability for Genny's murder because they were self-serving and unreliable. (20 RT 1659-1660, 1670.) Gonzales acknowledged that the statements were not "admissions" but argued they were statements that indirectly indicated Ivan was responsible for Genny's murder. (20 RT 1652-1653.)

The court expressed its concern that Ivan's statements were not reliable. (20 RT 1650.) Ivan's statements were of "questionable accuracy" because they did not comport with the physical evidence that Genny was forcefully held down in the bathtub. (20 RT 1654.) The court ruled that the statements did not qualify as declarations against interest because Ivan's statements were not such that he would not have made the statements if they were not true. (20 RT 1673-1674.) The thrust of Ivan's statements were that neither he nor Gonzales committed the crime. (20 RT 1674.) Thus, the court concluded the statements were not reliable. (20 RT 1674-1675.)

Later, Gonzales renewed her request to admit portions of Ivan's statements. (44 RT 3943-3944.) Based on the trial court's initial reasons for denying Gonzales's request–that Ivan's statements were unreliable, it denied her renewed request. (44 RT 3951-3952; 80 RT 10533-10536.)

A trial court's ruling on the admissibility of a hearsay statement is reviewed for an abuse of discretion. (*People v. Williams* (2006) 40 Cal.4th 287, 317; *People v. Brown*, *supra*, 31 Cal.4th at pp. 518, 536 [declaration against interest exception].) The ruling "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."

(*People v. Geier* (2007) 41 Cal.4th 555, 585.) The trial court's resolution of questions of fact underlying its determination are reviewed for substantial evidence. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) Here, the trial court properly exercised its discretion. There was substantial evidence to support its determination that Ivan's statements were not against his penal interest, and were not trustworthy.

Evidence Code section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

In order for a statement to be admissible as a declaration against penal interest, the proponent of

> the evidence 'must show that the declarant is unavailable,[29] that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.'

(*People v. Elliot* (2005) 37 Cal.4th 453, 483, quoting *People v. Lawley* (2002) 27 Cal.4th 102, 153.) "The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the

---

[29] Ivan's counsel indicated it was not inclined to allow Ivan to testify in Gonzales's trial, and the court assumed, for purposes of its ruling, that he was unavailable. (20 RT 1675.)

declaration." (*People v. Geier*, *supra*, 41 Cal.4th at p. 584.) The court may take into account the circumstances under which the statement was made, the declarant's motivation, and the declarant's relationship to the defendant. (*Ibid*; *People v. Brown*, *supra*, 31 Cal.4th at p. 536.)

Ivan's statements were properly excluded because they were untrustworthy. Ivan's statements were made to absolve him of culpability by claiming that neither he nor Gonzales forced Genny into the bathtub or held her down (3 CT 509, 512), and that it must have been Genny who turned on the hot water (3 CT 457-458, 473, 493). If believed, Ivan's statements were exculpatory, rather than inculpatory. (See *People v. Elliot*, *supra*, 37 Cal.4th at p. 483.) "[T]he entire rationale underlying the against penal interest hearsay exception 'breaks down in a situation where a declarant in police custody seeks to exculpate himself by implicating another suspect.'" (*People v. Duarte* (2000) 24 Cal.4th 603, 618, quoting *People v. Campa* (1984) 36 Cal.3d 870, 882.) Similarly, Ivan's attempts to exculpate himself here renders his statements unreliable and untrustworthy.

Gonzales argues the trial court erred because a statement does not need to be a confession to be a statement against interest. (AOB 308-309.) Although the statements need not be confessions, they need to be trustworthy. Ivan's statement that neither he nor Gonzales forced Genny into the bathtub and held her down, and that it must have been Genny who turned on the water did not square with the physical evidence. Additionally, Ivan's statements were made to exonerate himself, and did not "so far subject[] him to the risk of . . . criminal liability." (Evid. Code, § 1230.) Ivan even claimed that he did not do anything wrong, and that it was an accident. (3 CT 530, 534.) "A hearsay statement 'which is in part inculpatory and in part exculpatory (e.g., one which admits some culpability but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible.'" (*People v. Duarte*, *supra*,

24 Cal.4th at p. 612 quoting *In re Larry C.* (1982) 134 Cal.App.3d 62, 69.) Thus, Ivan's attempt to blame Genny for turning on the water, and his denial that either he or Gonzales submerged Genny in hot water makes his statement unreliable.

Gonzales claims the trial court was "simply wrong" because it stated Ivan claimed no knowledge of how Genny was burned, when in fact, Ivan stated that Genny must have turned the dial herself, making the water hotter. (AOB 310.) Gonzales misconstrues the trial court's analysis, which focused on whether Ivan's statements were reliable. The physical evidence showed Genny was held down in the bathtub. (56 RT 5957; 59 RT 6572-6573, 6614.) The court explained Ivan denied holding Genny down, and his statements explaining how Genny burned herself were inconsistent with the physical evidence, therefore, Ivan's statements were not reliable. (20 RT 1652-1653.) Moreover, expert testimony was uncontradicted that it would be implausible for there to have been water in the bathtub, and hot water added to it. (59 RT 6574-6575.) Thus, the trial court was not "simply wrong."

Apparently conceding that Ivan's statements were not reliable, Gonzales then claims that because Ivan's statements were not a credible explanation for how Genny burned herself, it constituted further incriminating evidence of Ivan's consciousness of guilt. (AOB 310.) Gonzales concludes that because Ivan's statements must have been false, they "constituted highly probative evidence of his consciousness of guilt," therefore they were against his interest. (AOB 310.) Certainly Ivan's statements, with his explanations that were inconsistent with the physical evidence, were highly incriminating to him; thus they could be properly used by the prosecution in his trial. (Evid. Code, § 1220; *People v. Lewis* (2008) 43 Cal.4th 415, 497 [a defendant's own hearsay statements are admissible].) The issue, however, in admission of a statement against penal

interests, is not whether, taken with the other physical evidence, the statement incriminated the declarant. The issue is whether the statement itself "so far subjected" the declarant to criminal liability. (Evid. Code, § 1230; *People v. Duarte*, *supra*, 24 Cal.4th at p. 610.) Therefore, while the statements were incriminating to Ivan when viewed with the physical evidence, they were not statements against his penal interests since he did not make a statement that "so far" subjected him to the risk of criminal liability. As Gonzales acknowledges, Ivan's statements were false (AOB 310), therefore, they were not reliable.

Next Gonzales claims that Ivan's statements "did not even constitute hearsay, because their probative value turned only on whether the statements were made, not on whether they were true." Gonzales claims that Ivan's lies would have made it clear that one spouse would protect another spouse, even at great risk. (AOB 311.) Gonzales also claims that another non-hearsay basis to admit the statements was to "set the record straight" that Ivan admitted he was in the bathroom with Genny Rojas, thereby showing he did not use the same BWS defense as Gonzales. (AOB 314.) Gonzales did not proffer these nonhearsay bases for admission of the statements in the trial court, therefore, she has forfeited any argument that the evidence was admissible for these other purposes. (*People v. Morrison* (2004) 34 Cal.4th 698, 711-712; Evid. Code, § 354.)

Even had Gonzales not forfeited her claim that the statements were admissible for these non-hearsay bases, the trial court would not have abused its discretion in excluding Ivan's statements. In order to show the nonhearsay purpose Gonzales advances, i.e., that it would show how highly dependent spouses act when interviewed by police about a serious crime (AOB 311), it would necessitate admitting all of Ivan's statements, not just the specific statements Gonzales requested be admitted, consuming an inordinate amount of time. The probative value would be slim, because it

was not relevant how Ivan acted when interviewed about a serious crime. Furthermore, Gonzales specifically requested her trial be severed from Ivan's because Ivan's statements were "highly incriminating" to Gonzales. (3 CT 418-438.)

People v. Jackson (1989) 49 Cal.3d 1170, 1184-1187, relied on by Gonzales does not support her position. (AOB 310-311.) In that case, the issue was the admissibility of a defendant's statements he made to police shortly after shooting a police officer. The statements were not offered for the truth of the matter–that the defendant shot the police officer with a shotgun. The statements were offered as circumstantial evidence that the defendant had a memory of the shooting, since his defense was that he claimed he was unconscious due to drugs during the shooting and had amnesia after the shooting. This Court held that the statements were not admitted for their truth–that the defendant shot the officer with a shotgun. They were admitted as circumstantial evidence that the defendant had a memory of the shooting. Therefore, it was not hearsay. (*People v. Jackson*, *supra*, 49 Cal.3d at p. 1187.) *Jackson* did not address a statement against penal interest. It addressed admitting the defendant's statements for a relevant nonhearsay purpose. Gonzales's claimed nonhearsay purpose for admitting the evidence is of marginal relevance (if any), would consume an undue amount of time and cause confusion of the issues. Thus, *Jackson* does not support admission of Ivan's statements.

Gonzales's other non-hearsay basis for admission of the statements, even if proffered, would not have resulted in admission of the statements. Whether Ivan admitted being in the bathroom with Genny Rojas does not negate the assertion that he relied on a similar defense as Gonzales. As discussed either, the prosecutor did not create a "false impression" with the jury that Ivan utilized the same BWS defense that Gonzales used, as Gonzales contends. (AOB 314.) Thus, even had Gonzales proffered such a

non-hearsay basis for admission of Ivan's statements, the trial court would not have erred in excluding the statements.

Next Gonzales argues that because she anticipates respondent will argue that her statements to police are reliable as consciousness of guilt evidence, it follows that Ivan's statements were reliable enough to be presented to her jury. (AOB 312.) Gonzales is confusing two different exceptions to the hearsay rule: "admissions" and "declarations against interest." Under Evidence Code section 1220, "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity . . . ." There is not a requirement for unavailability or for reliability. Thus, whether Gonzales's statements were used in her trial has no bearing on the admissibility of Ivan's statements.

Moreover, although Gonzales's admissions were self-serving, taken with the rest of the evidence, they show that she tortured and murdered Genny. They were not reliable in the sense that they are completely truthful. It does not follow that Ivan's statements therefore were reliable and should be admitted. Particularly because Gonzales's argument is that only certain statements of Ivan's should have been admitted.

The statement must be viewed as a whole. Whether a statement is against the declarant's interest must be determined by viewing it in context. (*People v. Duarte*, *supra*, 24 Cal.4th at p. 612.) A declaration that contains self-serving and unreliable information is not rendered credible merely because it is coupled with an admission of criminal culpability. (*Id.* at p. 611.) "'A self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not.' [citation]" (*Ibid.*) Thus, it would not have been appropriate to allow Gonzales to admit only those statements which were favorable to her, while excluding the remainder of the statement that put the statement in context. "[R]edaction cannot

enhance the underlying or general trustworthiness of a declaration as a whole." (*People v. Duarte*, *supra*, 24 Cal.4th. at p. 614.)

Gonzales claims the trial court was incorrect because it stated it was not clear to Ivan when he made the statements that he was making the admission because that is not a requirement for admissibility. (AOB 312-313.) The trial court was correctly focusing on whether the statement, "*when made*, was against the declarant's penal interest." (*People v. Geier*, *supra*, 41 Cal.4th at p. 584, emphasis added.) The trial court stated that,

> I think the analysis I should be following asks whether Ivan himself at the time he made these statements knew that what he was doing was making an admission, it was so manifestly clear to him that what he was doing was making an admission, that no reasonable person would make such a statement unless it was true. And I don't think I can make that finding here.

(20 RT 1674.) The court was properly analyzing whether the statement was trustworthy by taking into account "not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Geier*, *supra*, 41 Cal.4th at p. 584.)

Gonzales also argues that the test should not be whether a declarant knew his statement was against interest, but whether the declarant should have known his statement was against his or her interest. (AOB 312-313.) The only case Gonzales cites to support her position is *People v. Jackson*, *supra*, a case which, as explained earlier, did not address declarations against interest, nor does it address or support Gonzales's proposition. Furthermore, Gonzales's argument misses the point for which the analysis is directed. The analysis is to determine whether the statement is trustworthy–and only those statements which "so far subject" someone to criminal liability are trustworthy because one would ordinarily not make

such a statement if it were not true. (Evid. Code, § 1230; see *People v. Geier*, *supra*, 41 Cal.4th at p. 584.) Thus, if the test were whether someone "should" know his statements were admissions, but that person did not know they were against their interest, the requirement of reliability and trustworthiness is absent.

Even if the trial court improperly excluded the statements, any error was harmless under either the *People v. Watson* standard for any state law error (only if it is reasonably probable a result more favorable to Gonzales would have been reached absent the error) or under *Chapman v. California* for any constitutional error (requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict). (*People v. Robinson* (2005) 37 Cal.4th 592, 627; *People v. Watson*, *supra*, 46 Cal.2d at pp. 818, 836; *Chapman v. California, supra,* 386 U.S.at pp. 18, 23-24.)

The trial court ruled that if it were to allow admission of Ivan's statement, it would allow his whole statement in so it could be viewed in context. (20 RT 1672-1673.) Had that been done, it would have been harmful to Gonzales. As Gonzales stated in requesting her trial be severed from Ivan's, "numerous references in [Ivan's] statement implicat[e] Gonzales as either a principle or an aider and abettor in the alleged prior incidents of torture and the events surrounding the death" of Genny (3 CT 421), which "cannot be alleviated by redaction" (3 CT 423).

Ivan stated that he and Gonzales put Genny in the bathtub prior to her death (3 CT 456-458, 499), and Gonzales pulled her out of the bathtub (3 CT 460, 463, 472, 490). Gonzales thus argued in her motion to sever that, "[a] jury could conclude from that statement that []Gonzales was the one who did the act of burning the child." (3 CT 423-424). Additionally, according to Gonzales's pre-trial motion, "[t]he tenor of Ivan's statement clearly sets the tone that his involvement was minimal while [Gonzales]

was the main actor in the torture and the murder." (3 CT 424.) Gonzales also explains how Ivan "implies it was his wife [] Gonzales who had committed some of the alleged torturous acts that took place prior to the date of the fatal tub burning." (3 CT 424.) Indeed, Ivan said that Gonzales bound Genny's hands with a cloth (3 CT 483, 515-516, 535), that they both put her in the box (3 CT 500, 535) and in the closet (3 CT 506), and that Gonzales was the main disciplinarian with Genny because he was watching the other children (3 CT 532). Given these statements that would have incriminated Gonzales, any error in excluding the statements was harmless.

As the trial court did not abuse its discretion in excluding Ivan's pre-trial self-serving hearsay statements based on their lack of trustworthiness, Gonzales's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a fundamentally fair trial, due process, to present a defense, to confront and cross-examine witnesses, and to a reliable verdict were not violated. (*People v. Geier*, *supra*, 41 Cal.4th at p. 585 [there was no error, therefore no need to examine claims of prejudice or constitutional error].) Moreover, "[a] defendant does not have a constitutional right to the admission of unreliable hearsay statements." (*People v. Ayala* (2000) 23 Cal.4th 225, 269.) Thus, because the hearsay statements were not reliable, Gonzales's constitutional rights were not violated by their exclusion.

F. There Was No Cumulative Error

Gonzales claims that all the errors set forth above alone or in combination, must be deemed prejudicial. (AOB 315-317.) Gonzales contends the errors violated her constitutional rights, therefore, the *Chapman* standard for harmless error is implicated. (AOB 316.) As explained previously, the only error was the trial court's order of Gonzales to submit to psychological testing, based on *Verdin v. Superior Court.* Assuming this Court applies *Verdin* retroactively, it was state law error, and

any error was harmless, as already explained. The remainder of Gonzales's contentions are without merit. "[A]ny number of 'almost errors,' if not 'errors' cannot constitute error." (*Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933.) Moreover, even assuming Gonzales's claims constitute error, taken individually or together, these errors do not require reversal of Gonzales's conviction. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1223; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094 [guilt phase instructional error did not cumulatively deny defendant a fair trial and due process]; *People v. Cooper*, *supra*, 53 Cal.3d at p. 830 ["little error to accumulate"].) Gonzales is entitled to a fair trial, but not a perfect trial. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 522.) Gonzales received a fair trial.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMISSION OF REBUTTAL TESTIMONY THAT CHILDREN MAY IMITATE BEHAVIOR THEY SEE IN THEIR HOMES NOR IN EXCLUDING HEARSAY STATEMENTS THAT IVAN WAS SEXUALLY MOLESTED AS A CHILD

Gonzales claims the trial court erred by admitting evidence that her childhood abuse was proof that she was more likely than Ivan to have murdered Genny, and by excluding cross-examination and hearsay statements that Ivan was sexually molested in his home. (AOB 318.) Gonzales mischaracterizes the evidence that was ultimately admitted. Gonzales's experts testified that her child abuse was a factor in her becoming a victim of domestic violence. Initially there was some discussion about the admissibility of rebuttal testimony to show that childhood abuse could also lead one to be abusive to his or her own children. However, this testimony was not ultimately admitted.

The only evidence that was admitted, and is the basis for Gonzales's claim of error, was Dr. Kaser-Boyd's testimony, in rebuttal, that most children learn behavior by imitating an adult role model, and if one had a

role model with poor emotional control who acted out in frustration, the child goes through terror, which causes changes in personality, and over the long term results in poor emotional control. (AOB 329-330.) The witness never testified, as Gonzales claims, that "such abuse would be expected to lead to violent behavior as an adult" (AOB 329), "that persons who are victims of childhood abuse often become abusers themselves when they become adults" (AOB 331) and that the changes in a child "tend to cause such persons to repeat the violent behavior against their own children" (AOB 334). The testimony admitted was proper rebuttal to Gonzales's expert witnesses, and in fact was consistent with Gonzales's expert witnesses, who testified that victims of abuse learn from their parents.

Gonzales's other contention, that the court erred in excluding evidence on cross-examination about whether Ivan was molested by a brother and uncle, is also without merit because the witness to which Gonzales requested to cross-examine about this never testified. Furthermore, the trial court correctly ruled Ivan's statement to his defense expert witness that he was molested was inadmissible hearsay, and was more prejudicial than probative.

A. Because Gonzales Presented Evidence Regarding the Effects on an Adult of Being Abused as a Child, the Trial Court Properly Allowed Rebuttal Evidence to Show Other Such Effects

The prosecutor objected to admission of Gonzales's childhood abuse in the guilt phase. (51 RT 5368-5370; 53 RT 5563.) Gonzales argued it was relevant because her expert witnesses would testify that early childhood experiences contributed to their findings that Gonzales was a battered woman suffering from BWS. (53 RT 5565.) Additionally, the experts would testify that Gonzales's experience with Ivan "mirrored her childhood abuse" and that Ivan's constant destructive criticisms reminded Gonzales of her abusive childhood. (53 RT 5566.)

Although the prosecutor initially requested to rebut Gonzales's proffered evidence with expert testimony about "battering parent syndrome," (41 RT 3702-3703; 51 RT 5369-5370) he "backed off" his position and instead just requested to admit evidence that children who grow up in violent homes would not just result in becoming a battered woman or man (as the defense suggested) but could also lead to being abusive to ones own children–in other words, they are as likely to develop into abusers as victims (54 RT 5670; 74 RT 9512, 9537-9539, 9567).[30] The testimony was necessary to rebut the defense expert witness testimony that child abuse affects a woman and sets her up for becoming a domestic violence victim—that is, the role of child abuse is somewhat correlated to becoming a domestic violence victim. (74 RT 9506, 9511, 9512.) He also explained he intended to offer evidence that abused children will learn to act out and that rage is essentially a reenactment of what a child learns from the role modeling of his or her parents; also that people in abusive relationships develop poor emotional control. (74 RT 9505, 9538.) He explained further his request to

> offer generic testimony about the relationship between violence and being a victim or witness of violence as a child and the role modeling that occurs by seeing that type of violence. . . . That there's this– you learn the school of terror. You learn reaction from how, as a child, you saw families react to stress, that in a normal–a normal person reacts to stress, let's say a child crying or something like that, with annoyance. A person who has gone through

[30] There were lengthy discussions about admission of the testimony both before and after the defense case-in-chief. Because they were largely repetitive, they will be combined in this discussion. Also, because the prosecutor did not ultimately request admission of "battering parent syndrome" evidence, that discussion is limited.

> tremendous experiences of violence may act with rage. And this becomes a reenactment type–

(74 RT 9579.)

Gonzales objected to such rebuttal testimony because it invaded the province of the jury and lowered the burden of proof. (74 RT 9518, 9577.) The court ruled that if Gonzales's childhood experiences were key aspects of the experts' conclusion that Gonzales was a battered woman, it would allow admission of Gonzales's childhood abuse. (53 RT 5567-5568; 74 RT 9544.) The court further ruled that the prosecution was entitled to rebut Gonzales's evidence, and the proffered evidence was relevant. (54 RT 5678; 74 RT 9544.) The defense evidence was that Gonzales's abusive childhood set her up in later life to be a victim. (74 RT 9544, 9585.) The overall picture was to tell the jury that on the occasions in question, Gonzales was acting as a battered woman, therefore it was reasonable rebuttal to limit the force of that, and to show that people from such backgrounds are not immune from being killers. (74 RT 9545.) The court noted it was "straight rebuttal" evidence (74 RT 9578) and was not character evidence because it did not relate specifically to Gonzales (74 RT 9555, 9585). It would not allow a suggestion that someone who had violent parents is likely to grow up violent, but would allow testimony that it is one consequence of what could happen, which would be "no surprise to anybody on the jury." (74 RT 9587.)

Further, the court stated it would allow the prosecutor to present testimony through cross-examination of the defense experts or on rebuttal that being abused as a child is not inconsistent with becoming a child abuser. (54 RT 5684-5686, 5689.) The court also explained the prosecutor could draw reasonable inferences from the evidence Gonzales presented– for example, that she learned how to abuse Genny from her own childhood abuse. (54 RT 5681-5682, 5689.)

Dr. Ryan, Gonzales's expert witness, testified that Gonzales was a battered woman suffering from BWS. (73 RT 9244.) The factors he relied on in formulating his opinion included her history and her upbringing. Her upbringing was a "strong, strong factor." (73 RT 9244.) According to Dr. Ryan, Gonzales was not wanted and was physically abused by her mother. (73 RT 9244.) This led to low self-worth and self-esteem, which are important factors in assessing BWS. (73 RT 9245.) Dr. Ryan also testified that sexual abuse and physical abuse are very destructive towards a child. (73 RT 9245.)

On cross-examination, Dr. Ryan was asked what ones childhood had to do with becoming a batterer. (73 RT 9339.) Dr. Ryan said that 80 percent of male batterers come from violent homes. The male child has a tendency to identify with the batterer and the female to identify with the battered spouse. (73 RT 9339-9340.) Children learn from their parents, which is called role-modeling. (73 RT 9340.) Children have a tendency to model after or imitate their parents–usually the males after the males and the females after the females. (73 RT 9341.) Growing up, a girl could learn from her mother about domestic violence and /or how to deal with her children. (73 RT 9343.)

On re-direct, Dr. Ryan testified that battered women frequently come from abusive homes. (73 RT 9381.) About 75 percent of battered women come from homes with domestic violence. (73 RT 9382.) Gonzales's childhood abuse and molest made it more likely she would become a battered woman because she was learning from and imitating her mother. (73 RT 9383.) One exposed to childhood abuse will more readily accept violence because he/she has experienced it. (73 RT 9383.)

Cynthia Bernee, Gonzales's other expert witness, testified that whether someone was physically abused as a child is an important factor in her assessment. (73 RT 9421.) Gonzales learned at an early age that she

had no control over her environment because of her abusive childhood. (73 RT 9421-9422.) Because she was unable to stop the abuse, and her mother disbelieved her about it, she learned she was not important and her thoughts did not count. (73 RT 9422.) Victims of childhood sexual abuse carry those thoughts into adulthood. (73 RT 9422.) Bernee testified that studies have been done that show victims of child sexual abuse learn how to be a victim in adulthood, which is what happened to Gonzales. (73 RT 9422.)

On rebuttal, and the basis for Gonzales's claim of error, Dr. Kaser-Boyd testified that most children learn behavior by imitating. A role model is somebody that a child might imitate. Parents are strong role models. (78 RT 10150.) Reenactment is repeating the behavior seen in ones home or when one repeats aspects of their own child abuse. (78 RT 10151.) Dr. Kaser-Boyd explained:

> If one has a role model with poor emotional control who acted out frustration in emotionally uncontrolled ways, let's say a parent who goes into a rage or a parent who is abusive in their actions, hits too hard, does things that make a child suffer, the child goes through terror, really, when they experience that. And the act of, or the experience of terror, we believe, causes changes in personality and it also causes changes in the developing brain. ¶ Little people who feel terrified have more cortisol in their brains. They have often the frequent tapping of adrenalin and, over the long term, that damages parts of the brain that are required for good emotional control.

(78 RT 10151.) She further explained that although it is not a one-for-one correlation, adults may do similar things as those that were done to them as children. (78 RT 10152.) She also testified that battered women can abuse children. (78 RT 10152-10153.)

The next day the jury was in session, the court instructed them as to the purpose they could consider the BWS evidence and the prosecutor's rebuttal.

> The defense has offered defendant's testimony that she did not commit the crimes for which she's charged. They've also offered extensive evidence regarding the BWS. ¶ The BWS evidence is not offered to show that someone suffering from the BWS could not or would not commit the crimes charged; rather, it is offered to prove a potentially innocent explanation for defendant's failure to protect Genny and failure to provide medical care for her as well as to provide a context for defendant's statements following Genny's death. ¶ Likewise, the People have offered evidence that a person's childhood physical abuse could result in that person growing up to be either a victim or an abuser. This is not offered to show that someone abused as a child is more likely to be an abuser as an adult; rather, it is offered to show that being a victim of physical abuse as a child is not inconsistent with commission of violent crimes as an adult. ¶ You must not consider this evidence for any purpose other than the purposes for which it was offered.

(80 RT 10362-10363.) The court repeated the instruction at the end of the case. (82 RT 10633-10634; 16 CT 3630-3631.)

The testimony of Dr. Kaser-Boyd regarding the effect of childhood abuse was proper rebuttal.

> Prosecution rebuttal evidence must tend to disprove a fact of consequence on which the defendant has introduced evidence. . . . The scope of rebuttal evidence is within the trial court's discretion, and on appeal its ruling will not be disturbed absent 'palpable abuse.'

(*People v. Wallace*, *supra*, 44 Cal.4th at p. 1088, citations omitted.) Gonzales introduced evidence that her abuse as a child was a "strong, strong factor" in her becoming a victim of domestic violence (73 RT 9244)

and that victims of child sexual abuse learn how to be victims in adulthood (73 RT 9422). Thus, the prosecution was entitled to present evidence explaining the phenomenon of reeanctment (that one repeats the behavior seen in ones home), and to put the testimony in context that battered women can also abuse children. (78 RT 10151-10153.) As the trial court aptly noted, it was "straight rebuttal" evidence. (74 RT 9578.)

In support of her argument that the evidence was improperly admitted, Gonzales relies exclusively on *People v. Walkey* (1986) 177 Cal.App.3d 268. (AOB 331-336.) The evidence that was presented here was not the same type of evidence that the Court of Appeal in *Walkey* held was improper. Here, the evidence was proper rebuttal evidence.

In *People v. Walkey*, the defendant was charged with murder and child endangerment of a two-year-old child, Nathaniel, that lived with him, his wife, and the mother of the murdered child (with whom Walkey was intimate). (*People v. Walkey*, *supra*, 177 Cal.App.3d at p. 271.) Nathaniel died while in the defendant's care, and had been severely beaten. He had recent bruising, old bruising, a fractured rib, and bite marks on his neck and arms. (*Id.* at p. 272.) The cause of death was by a penetrating blow, crushing and tearing open his intestines. (*Id.* at pp. 272-273.)

Expert testimony revealed the bite marks on Nathaniel were caused by the defendant, and that an average sized female would not have had enough force to inflict the injury from the blunt object. (*Id.* at p. 273.) Another expert witness, a physician who reviewed the photographs taken of Nathaniel, testified that Nathaniel was a battered child and that the injuries were inconsistent with accidental injuries. (*Id.* at p. 273.) He also testified about the various factors that make up the profile of a child abuser. (*Ibid.*) Specifically, he testified that the single most important factor constituting a child abuser is having been abused oneself in infancy or childhood. Other factors were social isolation, unreasonable expectations of young children

(such as toilet training at an early age), and stress. (*People v. Walkey*, *supra*, 177 Cal.App.3d at p. 277.) The prosecution put on evidence that Nathaniel was beat as a result of a toilet training accident and that the defendant was under stress. (*Id.* at p. 279, fn. 8.)

The defendant testified he did not hit Nathaniel and loved him very much. Nathaniel fell down the stairs, then the defendant bathed him. Nathaniel bit the defendant so the defendant bit him back. The defendant put Nathaniel on the waterbed, and when he returned about ten minutes later, Nathaniel had vomited and was not breathing. (*Id.* at p. 273.) After direct examination, a juror sent a note asking whether the defendant was abused as a child. The prosecutor then elicited testimony from the defendant that he was bitten and hit with a board as a child. During closing argument, the prosecutor argued the defendant fit the profile of a battering parent. (*People v. Walkey*, *supra*, 177 Cal.App.3d at p. 277.)

The Court of Appeal held the "battering parent syndrome" evidence was inadmissible. Although no California court had previously considered the admissibility of such evidence, other courts had disallowed it. The Court of Appeal explained:

> Such evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child . . . abuse, it is more likely the defendant committed the crime. (*State v. Maule* (1983) 35 Wash.App.287 [667 P.2d 96, 99.] Thus, the nature and extent of the potential prejudice to a defendant generated by character evidence renders it inadmissible. (*Michelson v. United States* (1948) 33 U.S. 469, 475-476 [93 L.Ed. 168, 173-174, 69 S.Ct. 213.] We agree with those courts holding the prosecution may not introduce character evidence of a defendant to show the defendant has the characteristics of a typical battering parent.

(*People v. Walkey*, *supra*, 177 Cal.App.3d at pp. 278-279.) The court noted that the defendant had not put his character in evidence, therefore, the prosecutor could not cross-examine him on specific matters to prove his bad character. (*Id.* at p. 279.) The evidence presented "clearly implicated" the defendant's character and "impermissibly allowed the jury to infer Walkey was a battering parent and therefore must have caused Nathaniel's injuries." (*Id.* at p. 279.)

In contrast, here the prosecution did not present evidence that implicated Gonzales's character. (*People v. Walkey*, *supra*, 177 Cal.App.3d at p. 279.) The testimony that was ultimately admitted was elaborating on and explaining Gonzales's expert testimony. In fact, it was similar to the testimony Gonzales admitted–that children learn behavior by imitating and role modeling after their parents. (73 RT 9340 [Dr. Ryan's testimony]; 78 RT 10150 [Dr. Kaser-Boyd's testimony].)

Moreover, unlike in *Walkey*, the prosecutor did not introduce the evidence–it was Gonzales who introduced the evidence of her abusive upbringing. The prosecutor objected to admission of such testimony. (51 RT 5368-5370; 53 RT 5563.) Once Gonzales presented the testimony, the prosecutor was entitled to rebut and/or explain the evidence.

Gonzales contends that proper rebuttal should have been limited to eliciting evidence that her child abuse background was just as likely to make her a spouse abuser as a battered woman. (AOB 335.) The trial court properly exercised its discretion regarding the scope of the rebuttal evidence. Gonzales's evidence directly addressed how her abusive upbringing affected her as an adult, therefore, it was proper to explain how it did so. Moreover, the testimony was not that she was likely to abuse a child as Gonzales implies. (AOB 335.) Additionally, the court instructed the jury that the testimony was not to show that she was more likely to be an abuser as an adult. (80 RT10363.) Thus, as the trial court's exercise of

discretion regarding the scope of rebuttal did not constitute "palpable abuse" (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1088), Gonzales's contention that rebuttal should have been narrowly limited is without merit.

Next Gonzales contends the rebuttal testimony was without evidentiary support because Dr. Kaser-Boyd's testimony focused on rage management as an adult, but there was no evidence Gonzales ever expressed inappropriate rage against any child. (AOB 336.) Dr. Kaser-Boyd's testimony did not discuss the rage management of an adult who was abused as a child. The context of Dr. Kaser-Boyd's discussion of rage management was of the abusive parent. She never testified that those children will grow up to have problems with rage management. (78 RT 10150-10153.) Thus, Gonzales's argument is based on a premise that is lacking–i.e., that Dr. Kaser-Boyd testified that child abuse would result in a child growing up to have poor rage management.

In addition, Gonzales overlooks the evidence that Genny was beaten, tortured and murdered at Gonzales's hands. Gonzales admitted she put the blow dryer on Genny's face (14 CT 3101, 3103), put her in a "little bonnet" (13 CT 2983), put her in the closet to scare her (13 CT 2980), hung her in the closet by a hook (13 CT 2980; 14 CT 3117, 3119-3120, 3123-3126, 3128), bound her with cloth and handcuffs (13 CT 2980; 14 CT 3114) and that she and Ivan had Genny sleep in the bathtub with her hands bound (14 CT 3115-3117). These acts show Gonzales expressed "inappropriate rage" against Genny.

Moreover, the BWS evidence was admitted to show Gonzales was a battered woman. The prosecutor rebutted that evidence with numerous incidents where Gonzales was abusive towards Ivan. (75 RT 9657-9662, 9675, 9764-9766, 9770, 9808-9810, 9812-9813, 9854-9856; 76 RT 9891, 9914.) Thus, contrary to Gonzales's claim, there was evidentiary support that Gonzales had poor "rage management."

Lastly, Gonzales claims any error should be evaluated under the stricter *Chapman* standard, but that under either standard, there was reversible error. (AOB 336-337.) Assuming there was error, it was harmless.

> Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.

(*People v. Partida* (2005) 37 Cal.4th 428, 439, citing *People v. Watson*, *supra*, 46 Cal. 2d at p. 836.) Under either standard, however, any error was harmless.

The evidence that was ultimately admitted was not particularly forceful, and was very similar to the evidence Gonzales presented. Gonzales's claim that the evidence was "probably the strongest evidence the prosecution had to place blame for Genny Rojas's death on Veronica Gonzales" (AOB 336) is vastly overstating the impact of the rather benign evidence. The evidence was very general. Dr. Kaser-Boyd's testimony that most children learn by imitating, and a role model is somebody that a child might imitate (78 RT 10150) was essentially the same as the expert testimony Gonzales presented (73 RT 9341 [Dr. Ryan's testimony that children have a tendency to model and imitate their parents, usually the male after the male and the female after the female].) The explanation of reenactment, repeating the behavior seen in ones home or repeating aspects of child abuse was a similar theme. (78 RT 10151.) Dr. Kaser-Boyd's explanation about having a role model with poor emotional control did not discuss how that would affect that child in later life. She merely said that it "causes changes in personality and it also causes changes in the developing brain. . . . and over the long term . . . damages parts of the brain that are required for good emotional control." (78 RT 10151.) There is nothing

harmful or detrimental to Gonzales about that statement. Lastly, Dr. Kaser-Boyd said that those adults may do similar things as those that were done to them as children and that battered women can abuse children. (73 RT 10152-10153.) That adults who grew up in abusive homes "may" abuse children or do similar things as were done to them as children was not in any way incriminating, harmful, or prejudicial to Gonzales.

To minimize the jury misusing the evidence, the trial court gave a limiting instruction that told the jury that the evidence was

> not offered to show that someone abused as a child is more likely to be an abuser as an adult; rather, it is offered to show that being a victim of physical abuse as a child is not inconsistent with commission of violent crimes as an adult. ¶ You must not consider this evidence for any purpose other than the purposes for which it was offered.

(80 RT 10363; 82 RT 10633-10634; 16 CT 3630-3631.)[31]

Not only was the proffered evidence fairly benign, as discussed and detailed in Argument I, subdivision (A)(2), the evidence against Gonzales

---

[31] Gonzales argues this limiting instruction could not have eliminated the harm because it was given four days after Dr. Kaser-Boyd's testimony. (AOB 336.) Dr. Kaser-Boyd finished her testimony on Thursday, April 16, 1998. (78 RT 10134.) At the end of the day, after Dr. Kaser-Boyd's testimony, the court excused the jury until Monday morning, April 20, 1998. (78 RT 10300.) The court gave the instruction first thing Monday morning. (80 RT 10362-10363.) Therefore, it was given to the jury the next time they were in court. Moreover, jurors are presumed to follow the court's instructions. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 999.) Also, *People v. Hogan* (1982) 31 Cal.3d 815, 847, the case cited by Gonzales to support her argument about the necessity of a prompt instruction (AOB 336) does not support her position, as that was a case in which inadmissible, prejudicial evidence inadvertently was given to the jury during deliberations. Gonzales has not overcome the presumption that the jurors followed the limiting instruction.

was compelling. Thus, any error from admission of Dr. Kaser-Boyd's testimony was harmless under either standard.

B. The Trial Court Did Not Abuse its Discretion in Excluding Evidence That Ivan Was Sexually Molested By His Uncle and Brother

According to a report prepared by Dr. Weinstein, Ivan's expert witness, Ivan claimed that he had been sexually molested by an uncle and sodomized by his brother for many years. (74 RT 9519.) Given the prosecutor was allowed to present evidence in rebuttal that child abuse can not just lead to being a domestic violence victim, but can also lead to be abusive, Gonzales argued it would deny her of due process, a fair trial and the ability to meet the evidence if she was not allowed to then present evidence of Ivan's claimed molests, particularly if the prosecutor were to portray Ivan's family in a good light, which Gonzales also objected to. (74 RT 9521-9522, 9529-9531, 9576, 9593-9594.) Particularly, Gonzales wanted to ask Armando (Ivan's brother), who was planning on testifying as a prosecution witness, whether he molested Ivan. (74 RT 9520, 9594.) Gonzales also requested to ask Dr. Mills if Ivan had told him about these molests, because she "would expect" Ivan had also told Dr. Mills of the molests. (74 RT 9604.)

The prosecutor explained that evidence pertaining to Ivan's family would rebut the evidence that Gonzales presented and would portray a different picture of Ivan. (74 RT 9607.) The prosecutor was not going to argue Ivan was a good guy, but that he was a nice guy before he met Gonzales. (74 RT 9605-9606.) The evidence would show that Gonzales was violent towards Ivan (74 RT 9606) and that Ivan was not violent until he met Gonzales. (74 RT 9607.) Moreover, the prosecutor objected to Gonzales questioning Armando about whether he molested Ivan. (74 RT 9608.)

The court ruled it would exclude evidence about the relationship between Ivan's parents or that Ivan had an idyllic childhood under Evidence Code section 352. (74 RT 9609, 9613-9614.) Furthermore, based on the same considerations, it ruled Gonzales could not ask Armando whether he molested Ivan. (74 RT 9607-9609, 9611, 9613-9614.)[32]

Gonzales claims, however, that the statements were admissible because they were statements against societal interests, thus an exception to the hearsay rule. (AOB 339.) A trial court's ruling on the admissibility of a hearsay statement is reviewed for an abuse of discretion. (*People v. Williams*, *supra*, 40 Cal.4th at p. 317; *People v. Brown*, *supra*, 31 Cal.4th at p. 536.) The ruling "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Geier*, *supra*, 41 Cal.4th at pp. 555, 585.) The trial court's resolution of questions of fact underlying its determination are reviewed for substantial evidence. (*People v. Phillips*, *supra*, 22 Cal.4th at pp. 226, 236.) Here, the trial court properly exercised its discretion. There was substantial evidence to support its determination that Ivan's statements were not against his social interest.

Initially Gonzales claims the trial court erred in its ruling that she would not be permitted to ask Armando Gonzales on cross-examination whether it was true that he sodomized Ivan. (AOB 339.) The trial court did not abuse its discretion, but even if it did, Gonzales would not have a claim of error because Armando did not testify for the prosecution. Gonzales never expressed a desire to call Armando as her witness, and made her request to cross-examine Armando Gonzales only after the

---

[32] The court did not specifically rule on Gonzales's request to admit the testimony of Dr. Mills but since it ruled the evidence was not admissible in this whole subject area, presumably it also was excluding the evidence from Dr. Mills.

defense had rested. (See RT 74 RT 9520, 9594.) Therefore, because Armando did not testify, Gonzales's claim of error regarding the scope of cross-examination is unavailing. Even if Gonzales had a concrete claim, it would be meritless, because, as discussed *post*, the trial court properly exercised its discretion under Evidence Code section 352.

Gonzales also contends the trial court erred because she should have been permitted to call Dr. Weinstein as a witness to ask him about the statements Ivan made to him regarding being molested. (AOB 339.) This argument does not fare any better. Gonzales requested to ask Dr. Mills, a rebuttal witness (who had previously interviewed Ivan) whether Ivan told him he had been sodomized by Armando. (74 RT 9604.) Gonzales never asked the court to allow Dr. Weinstein to testify. As to Dr. Mills, although Gonzales's counsel said he "would expect" Ivan told Dr. Mills this information, there is no information in the record that counsels expectations were accurate.

Assuming Dr. Mills had such information, the court did not abuse its discretion in excluding it as hearsay and under Evidence Code section 352. Ivan's statements to his expert witness were hearsay. Gonzales claims the statements were admissible as an exception to the hearsay rule as declarations against social interest under Evidence Code section 1230. (AOB 340-343.) Evidence Code section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position

> would not have made the statement unless he believed it to be true.

The statement was not admissible under Evidence Code section 1230 because Ivan did not make the statement at a time when it would create a risk "of making him an object of hatred, ridicule, or social disgrace in the community" such that a reasonable man would not have made it at the time unless it were true. (Evid. Code, § 1230.) Ivan made the statement after he was charged with Genny's murder, and was talking to a potential expert witness. If there was ever a time to embellish, or to make statements portraying himself as a victim deserving sympathy, it was when meeting with an expert witness in preparation for a capital trial, a point acknowledged by the trial court. (74 RT 9604.)

Gonzales claims that because he was living in jail, "one would expect that claiming to have been a victim of repeated sodomy would be the last thing a county jail inmate would contrive." (AOB 342.) This Court has held in similar situations that inmate testimony is not against social interest, noting prison inmates have various motives for making false statements. (*People v. Weber* (1974) 11 Cal.3d 703, 721-722 [holding that a statement from a prison inmate who became a "snitch" was not against social interests because it was not reliable]; *People v. Lawley*, *supra*, 27 Cal.4th at pp. 102, 155 [holding that a prison inmate's statement about killing to carry out the Aryan Brotherhood's will may have been to enhance his prestige, therefore, it was not admissible as a declaration against social interest].) Thus, Gonzales is speculating that Ivan's claim of being a victim of sodomy was against his social interests, particularly when he had a desire to "get . . . off the murder rap." (74 RT 9604.)

To support her position, Gonzales relies on *People v. Wheeler* (2003) 105 Cal.App.4th 1423. (AOB 340-342.) In *People v. Wheeler*, the defendant was charged with murder, attempted voluntary manslaughter, and

discharging a firearm for shooting at three men, one of which he believed had an affair with his wife. (*People v. Wheeler*, *supra*, 105 Cal.App.4th at p. 1425.) At issue was the admissibility of the defendant's wife's statement shortly before the murder that she committed adultery with the man he killed. (*Ibid.*) Although the Court of Appeal noted that the social interest exception to the hearsay rule is rarely invoked, it found the statement was sufficiently against her social interests to make such a statement, and was trustworthy when made; thus it was properly admitted. (*Id.* at pp. 1427-1428, 1431.)

Unlike in *People v. Wheeler*, Ivan had a motive to lie. In *People v. Wheeler*, in discussing the reliability of the statement, the court noted that the declarant had "no apparent motive to lie." (*Id.* at p. 1432.) The court contrasted the declarant to one discussed in *Lilly v. Virginia* (1999) 527 U.S. 116, 121-122 [119 S.Ct. 1887, 144 L.Ed.2d 117] who was in-custody and was "trying to shift blame to other people in a homicide investigation" who had every motive to lie. (*People v. Wheeler*, *supra*, 105 Cal.App.4th at p. 1431.) Thus, *People v. Wheeler* does not support Gonzales's position.

Even if the statements were an exception to the hearsay rule, that does not guarantee their admissibility.

> Under Evidence Code section 352, a trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. 'Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome. [citation].''

(*People v. Riggs*, *supra*, 44 Cal.4th at pp. 248, 289-290, quoting *People v. Waidla*, *supra*, 22 Cal.4th at pp. 690, 724.) A trial court's rulings under Evidence Code section 352 are reviewed for an abuse of discretion.

(*People v. Riggs*, *supra*, 44 Cal.4th at p. 290.) Gonzales does not address the court's exclusion of Ivan's statements under Evidence Code section 352.

Whether Ivan was molested as a child by a brother and/or an uncle had no relevance or probative value. Thus, the trial court properly exercised its discretion in prohibiting cross-examination of Armando, and excluding expert testimony about it. It was prejudicial in that it would be time consuming to litigate whether Ivan was molested. The only documentation of Ivan's statement was in Dr. Weinstein's report. Presumably, had Dr. Weinstein been called to testify, he would have asserted a patient privilege, thus resulting in further litigation and the real potential that the privilege would not be overcome. Thus, the trial court was within its discretion in excluding the proffered evidence that Ivan was molested as a child.

Gonzales argues that it was relevant to show, based on the expert testimony that children role model after their parents, that Ivan grew up in an abusive home, too, to show he was more likely to have tortured and murdered Genny. (AOB 337-339.) There was no evidence Genny was sexually molested, however, therefore, it is difficult to see how evidence of role modeling pertained to Ivan. Gonzales points out that evidence came in that Gonzales told Karen Oetken, a social worker, that Ivan had a good childhood, but these statements were made in the context of keeping her six children together after her arrest. (AOB 338-339.) Gonzales was able to explain her motives in telling Oetken that Ivan had a good home. She testified that she had nowhere else to send them and wanted them to stay together. (69 RT 8271.) Thus, this information was put in proper context. Moreover, the trial court prohibited the prosecutor from presenting any further information about Ivan's upbringing. (74 RT 9609, 9613-9614.)

Gonzales concludes that exclusion of Ivan's statements violated her constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a fair trial in accordance with due process of law, to present a defense, to confront and cross-examine witnesses and to a reliable sentence. (AOB 343.) "Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (*People v. Prince, supra*, 40 Cal.4th at p. 1229.) Thus, Gonzales's constitutional arguments "are without merit for the same reasons that [Gonzales's] state law claims" are without merit. (*Ibid.*)

III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE REQUIRED MENTAL STATES FOR MURDER AND THE SPECIAL CIRCUMSTANCES AND THE INSTRUCTIONS WERE NOT INCOMPREHENSIBLE

Without citing any authority to support her position, and by merely reciting the instructions, Gonzales contends the jury instructions were incomprehensible and confusing. She does not argue they were not correct statements of the law or were otherwise improper. (AOB 345-368.) The jury instructions were all correct statements of the law, and were proper. The instructions were not confusing and incomprehensible. Moreover, Gonzales requested a number of the instructions, so she is barred by the invited error doctrine from challenging them on appeal. Additionally, she did not raise the objection she now raises to the instructions, therefore, she has forfeited her claim of error.

Normally, a defendant forfeits errors regarding jury instructions by his or her failure to object at trial. An appellate court, however, may consider instructional errors if "substantial rights" of the defendant are affected. (Pen. Code, §§ 1259, 1469; *People v. Prieto* (2003) 30 Cal.4th 226, 247.) As Gonzales did not object on the bases she now raises, and her substantial rights were not affected, she has forfeited her claim of error.

Additionally, a defendant is barred from challenging instructions that were requested based on a conscious and deliberate tactical choice. (*People v. Harris* (2008) 43 Cal.4th 1269, 1293.) Here, Gonzales requested numerous instructions. (14 CT 3174-3266.) Many of the complaints on appeal are about the instructions she submitted, including CALJIC No. 3.31 (14 CT 3211), CALJIC No. 3.31.5 (14 CT 3212), CALJIC No. 8.21 (14 CT 3224), CALJIC No. 8.24 (14 CT 3225), CALJIC No. 9.30 (14 CT 3250), CALJIC No. 8.24 (14 CT 3225), CALJIC No. 8.27 (14 CT 3226), CALJIC No. 8.32 (14 CT 3229), CALJIC No. 8.34 (14 CT 3230), CALJIC No. 8.80.1 (14 CT 3242), CALJIC No. 8.81.7 (14 CT 3224), CALJIC No. 8.81.18 (14 CT 3245), and CALJIC No. 9.90 (14 CT 3256). As detailed below, Gonzales requested these instructions based on a conscious and deliberate tactical choice. Accordingly, the doctrine of invited error bars her from challenging them on appeal. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1293.) Even if Gonzales was not barred from raising the issues on appeal, and had not forfeited her claims, they also fail on the merits.

Gonzales's argument starts with a lengthy recap of the discussion between counsel and the court on jury instructions. (AOB 345-352.) Then she lays out various CALJIC instructions, with modifications specific to this case, and argues they were confusing. (AOB 353-368.) These were all proper instructions. Gonzales first seems to question CALJIC Nos. 3.31 and 3.31.5, the instructions pertaining to the requirement of a concurrence of her acts and her mental state for the various crimes, although she does not specify why she finds the instructions confusing, nor does she claim the instructions were not legally correct. (AOB 353-354.) The instructions given were a correct statement of the law, and the court is required to instruct the jury on the concurrence of act and intent. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220; *People v. Ford* (1964) 60 Cal.2d 772, 792-793.) Had the court not instructed that there needed to be a concurrence of

specific intent and the act, it would have been error. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 220.)

Next Gonzales goes through a discussion of the murder instructions, and concludes that because the jury was instructed that first degree felony murder requires a specific intent to commit mayhem, "[t]hat would have surely left the jury believing that any felony-murder found with mayhem as the felony must be first degree felony-murder." (AOB 354-355.) Gonzales requested the complained of instruction, therefore, she is barred by the invited error doctrine from challenging the instruction on appeal. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1293.) Moreover, because those murders committed during the perpetration or attempt to perpetrate mayhem are first degree murders (Pen. Code, § 189), the jury was properly instructed on the law. Gonzales's argument that this was somehow improper or confusing is not supported by the law or facts.

The jury was also properly instructed on first degree felony murder based on mayhem. Thus, Gonzales's argument that the instructions were circular[33] is without merit. (AOB 356.) The jury was instructed as follows:

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

[33] With this argument, as with the other arguments in this section, it is difficult to discern the exact nature of Gonzales's claim of error. She has not cited any support for her claims, and it is not a claim of error that an instruction is "circular." Thus, respondent is limited to showing that the court correctly instructed the jury.

(16 CT 3664; 82 RT 10650; CALJIC No. 8.21.) The court then instructed the jury pursuant to CALJIC No. 9.30 as follows:

> Every person who unlawfully and maliciously deprives a human being of a member of his or her body, or disables, permanently disfigures, or renders it useless, or who cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of the crime of mayhem.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. One [*sic*] person unlawfully and by means of physical force deprived a human being of a member of his or her body or, disabled, permanently disfigured, or rendered it useless; and
>
> 2. The person who committed the act causing the bodily harm, did so maliciously, that is, with an unlawful intent to vex, annoy, or injure another person.
>
> It is not a defense that a disfigurement has been or may be medically alleviated.

(16 CT 3665; 82 RT 10650-10651.) The court properly instructed the jury on the intent required for felony murder. Given the court's CALJIC No. 8.21 instruction, there is "no reasonable likelihood the jury would parse the instruction in a way that did not require the intent to commit the underlying felony." (*People v. Kelly* (2007) 42 Cal.4th 763, 791.)

Additionally, the court properly instructed the jury in its modified instruction of CALJIC No. 8.81.17, at Gonzales's request (80 RT 10513) that to prove the special circumstance of murder in the commission of mayhem, it was required that "the perpetrator had the specific intent to commit mayhem." (16 CT 3693; 82 RT 10668.) Thus, Gonzales's argument that "it would appear that the special circumstance required no

more than the intent to vex or annoy or injure" is without merit. (AOB 356.)

Without analysis or argument, Gonzales claims the first degree torture murder instruction was "relatively complicated." (AOB 356.) The trial court instructed the jury pursuant to CALJIC No. 8.24 as follows:

> Murder which is perpetrated by torture is murder of the first degree.
>
> The essential elements of murder by torture are:
>
> 1. One [*sic*] person murdered another person;
>
> 2. The perpetrator committed the murder with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose; and
>
> 3. The acts or actions taken by the perpetrator to inflict extreme and prolonged pain were the cause of the victim's death.
>
> The crime of murder by torture does not require any proof that the perpetrator intended to kill his victim, or any proof that the victim was aware of pain or suffering.
>
> The word 'willful' as used in this instruction means intentional.
>
> The word '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.
>
> The word 'premeditated' means considered beforehand.

(16 CT 3666; 82 RT 10651-10652.) This instruction adequately instructed the jury on first degree murder by torture. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 220-221.)

Gonzales's next claim is that CALJIC No. 8.27, instructing the jury on aider and abettor liability for felony murder, "added more aspects to the myriad state-of-mind determinations facing the jury," again without a specific argument or any analysis. (AOB 357.) CALJIC No. 8.27 instructed the jury that

> if a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of mayhem, all persons, who either directly and actively commit the act constituting the crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental.

(16 CT 3667; 82 RT 10652.) This standard instruction correctly stated the law. (*People v. Pulido* (1997) 15 Cal.4th 713, 728.)

Gonzales next describes the jury instructions on second degree murder, and notes that second degree felony murder with mayhem as the underlying felony was expressly not included. (AOB 357-358.) As stated earlier, felony murder based on mayhem is first degree murder (Pen. Code, § 189), thus, the instructions correctly stated the law.

Again without any authority or analysis, Gonzales claims that the instructions on first degree murder by torture and second degree murder by torture "could not have been discerned by anybody without a law degree." (AOB 358.) As noted above, the trial court correctly instructed the jury on first degree torture murder. Defense counsel requested the jury be instructed on second degree torture murder (80 RT 10536-10539; 14 CT 3175.) The prosecutor objected. (80 RT 10537.) Defense counsel argued that the instruction was necessary because

> if you commit the crime of torture under [Penal Code section] 206 and in the course of that crime a murder occurs, it's second degree felony murder. The difference between that and torture murder in the first degree is that torture murder in the first degree requires a premeditation and a deliberate intent to cause prolonged pain.
>
> Torture second degree felony murder does not require the premeditation and deliberation at all. You just commit the crime of torture. Murder happens. It's automatic. Its not one of the specific enumerated felonies. It's not first degree felony murder. It is second degree felony murder.

(80 RT 10537.)

Based on defense counsel's request, the trial court instructed the jury with the standard CALJIC No. 8.32 instruction on second degree felony murder that

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of torture is murder of the second degree when the perpetrator had the specific intent to commit that crime.
>
> The specific intent to commit torture and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(16 CT 3670; 82 RT 10653.) The court defined torture pursuant to CALJIC No. 9.90 as being committed when the perpetrator with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury upon the person of another" and further instructed that

> the crime of torture does not require any proof that the perpetrator intended to kill the other person or the person upon whom the injury was inflicted suffered pain.

> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person inflicted great bodily injury upon the person of another; and
>
> 2. The person inflicting the injury did so with the specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.

(16 CT 3681; 82 RT 10657-10658.)

Because Gonzales specifically requested the jury be instructed on a second degree torture murder theory based on a conscious and deliberate tactical choice, the doctrine of invited error bars her from challenging the instructions. (*People v. Harris*, *supra,* 43 Cal.4th at pp. 1269, 1293.) Even if she could challenge the instructions, they were proper and were not confusing. The difference in the two instructions Gonzales now claims were confusing (AOB 358), as defense counsel noted, was that second degree murder based on torture did not require "the perpetrator commit[] the murder with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain" upon the victim. (16 CT 3666; 82 RT 10651 [defining first degree murder].)

Defense counsel explained it to the jury as follows:

> It's real simple. As I said to you, there's certain felonies that, by law, if you do them and someone dies, it's first degree murder. Of those that aren't listed in there–mayhem is one of them. Those who aren't listed in that group of the law, which includes torture, the felony crime of torture, are second degree felony murders. That's where the torture comes in.
>
> How does this differ from first degree murder under torture, for instance? How does it differ? Well, here you have to have an unlawful killing of a human being, whether intentional, unintentional or accidental, during the crime of torture. That's

> murder of the second degree. The difference is really simple.
>
> Remember I told you about for torture murder first degree you had to have the premeditated and deliberate intent to commit torture? Here you don't have to do that. All right? Here, all you have to do is say, 'oh. I torture this person, and if they die as a result of that torture, its second degree.'
>
> You don't have to premeditate and deliberate. . . .

(83 RT 10939.) As defense counsel noted, it was simple, therefore, Gonzales's claim that the jury instructions were confusing is without merit.

Although torture was defined for the jury, Gonzales contends that because "torture itself was not defined, [] the jury was left to wonder what the specific intent to commit torture entailed." (AOB 358-359.) Gonzales acknowledges in a footnote that torture was defined, but complains it was eleven instructions later (AOB 359) and that it was introduced with the statement that torture was a lesser related crime (AOB 362). The jury would certainly realize the crime of torture, defined by the court, applied to the earlier instruction referencing the crime of torture.

> When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.

(*People v. Wilson* (2008) 44 Cal.4th 758, 803.) There is no reasonable likelihood the jurors would not have understood the crime of torture as defined applied to the instruction on second degree felony murder based on torture.

Comparing the instruction on torture, which requires an "intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose," (16 CT 3681; 82 RT

10658; CALJIC No. 9.90) and murder by torture, which requires "a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose" (16 RT 3666; 82 RT 10651; CALJIC No. 8.24), Gonzales asks a number of questions about the differences in the language (for example, extreme and prolonged pain versus cruel or extreme pain and suffering) presumably to make her point that the different language is confusing. (AOB 362-363.) Both instructions were correct statements of the applicable law. (*People v. Whisenhunt*, *supra*, 44 Cal.4th at pp. 220-221 [CALJIC No. 8.24 adequately instructs on first degree murder by torture]; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1206 [CALJIC No. 9.90 correctly sets forth the elements for torture].)

That murder by torture requires a willful, deliberate, and premeditated intent and torture does not contain such requirements does not render the instructions confusing. Additionally, that murder by torture requires an intent to "inflict extreme and prolonged pain" and torture requires intent to cause "cruel or extreme pain" does not render the instructions confusing. (See *People v. Cook* (2004) 33 Cal.4th 1158, 1226-1228 [upholding torture-murder special circumstance against claim that it required premeditation and deliberation as in murder by torture]; *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 223 [use of the word "extreme" not unconstitutionally vague].) Moreover, the words "cruel" "extreme" and "prolonged" have "commonsense meanings that the jury may be expected to use in applying the instructions." (See *People v. Tafoya* (2007) 42 Cal.4th 147, 197 [referring to the words "extreme" and "substantial"].)

In *People v. Aguilar*, *supra*, 58 Cal.App.4th at pp. 1196, 1204-1205, the court held torture, as defined by Penal Code section 206 (and incorporated into CALJIC No. 9.90) was not vague even though torture, unlike murder by torture, does not require an intent to inflict prolonged

pain. Based on the court's analysis in *Aguilar*, where it discussed the difference between torture and murder by torture, Gonzales argues that the jury could not have understood there was a difference. (AOB 363.) Gonzales seems to be suggesting the jury should have been more fully instructed on the differences between torture and murder by torture. To the extent Gonzales is suggesting there should have been more specific instructions, she has forfeited her claim by failing to request such instructions. (*People v. Coddington* (2000) 23 Cal.4th 529, 584 [where the jury instructions correctly state the law but the defendant claims they were too general or incomplete, any claim of error is forfeited unless the defendant requested clarifying language at trial].) Moreover, Gonzales does not elaborate on what instructions she would request. Just because the defendant in *Aguilar* challenged the instructions, and the court explained the difference, does not mean the existing instructions were inadequate.

The next instruction Gonzales complains about is the standard instruction on aider and abettor liability for second-degree felony murder, CALJIC No. 8.34. (AOB 359-360.) Again, Gonzales does not argue it is an incorrect statement of the law. She claims that it was confusing, because it was nearly identical to the instruction on first degree mayhem murder. (AOB 360.) The instructions were similar, with some differences, but they were not confusing. The jury was told pursuant to CALJIC No. 8.27 that if someone aids and abets in the crime of mayhem, it is first degree murder (16 CT 3667, 82 RT 10652), and pursuant to CALJIC No. 8.34 that if someone aids and abets in torture, a felony inherently dangerous to human life, it is second degree murder (16 CT 3671; 82 RT 10653-10654). There is nothing confusing about these instructions.

The instruction for the mayhem special circumstance was also proper and not confusing, as Gonzales claims. (AOB 364-365.) The court

instructed the jury with a modified version of CALJIC No. 8.81.17 as follows:

> To find that the special circumstance, referred to in these instructions as murder in the commission of mayhem, is true, it must be proved:
>
> 1. The murder was committed while the defendant was engaged in or was an accomplice in the commission of mayhem; and
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of mayhem or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the mayhem was merely incidental to the commission of murder.
>
> 3. The perpetrator had the specific intent to commit mayhem.
>
> If you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> However, if you find that the defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the mayhem special circumstance to be true as to the defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of mayhem which resulted in the death of a human being.

> A defendant acts with reckless indifference to human life when that defendant knows or is aware that her acts involve a grave risk of death to an innocent human being.

(16 CT 3693-3694; 82 RT 10667-10669.) The first two paragraphs were taken from the standard CALJIC No.8.81.17 instruction, and were proper. (See *People v. Thornton* (2007) 41 Cal.4th 391, 440; *People v. Monterroso* (2004) 34 Cal.4th 743, 766-777.) The third paragraph, requiring the specific intent to commit mayhem, was based on Gonzales's request (78 RT 10134; 14 CT 3244), and inured to her benefit. Because Gonzales requested that instruction based on a conscious and deliberate tactical choice, she has invited any error and is therefore barred from challenging the instruction. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1293.)

The remainder of the instruction was the standard CALJIC No. 8.80.1 instruction on the requirements for finding the special circumstance true based on aider and abettor liability. Defense counsel agreed to the court giving the instruction. (81 RT 10580-10581.) The instruction correctly informed the jury that the special circumstances only apply to an aider and abettor if she has the intent to kill (*People v. Bonilla* (2007) 41 Cal.4th 313, 333) or was a major participant and acted with reckless indifference to human life (*People v. Lancaster*, *supra*, 41 Cal.4th at pp. 50, 90).

Thus, the instructions properly explained that if Gonzales was an accomplice, the perpetrator must still have had the specific intent to commit mayhem, and Gonzales must have had the intent to kill by her assistance (or be a major participant with reckless indifference to human life). If the jury found Gonzales was the actual killer, the jury did not have to find intent to kill. Gonzales's argument that the jurors would be puzzled by these instructions, and that they were hopelessly complicated and incomprehensible (AOB 365) is without merit.

The last jury instruction Gonzales takes issue with is CALJIC No. 8.81.18, on the special circumstance of murder involving the infliction of torture. The court instructed the jury:

> To find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:
>
> 1. The murder was intentional; and
>
> 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose.
>
> Awareness of pain by the deceased is not a necessary element of torture.

(16 CT 3696; 82 RT 10669; CALJIC No. 8.81.18.) Gonzales acknowledges it is uncomplicated, but then questions the difference between the verbiage used–"extreme and prolonged pain" for first degree murder based on torture versus "extreme cruel physical pain and suffering" for the special circumstance. (AOB 365-366.) This standard instruction correctly and sufficiently defines the special circumstance of torture murder. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1160-1161.) Gonzales's argument that the verbiage used rendered the instructions too complicated to be understood is without merit. The terms used have "commonsense meanings that the jury may be expected to use in applying the instructions." (See *People v. Tafoya*, *supra*, 42 Cal.4th at p. 197 [referring to the words "extreme" and "substantial"].) Moreover, there was no issue that Genny did not suffer "extreme cruel physical pain and suffering" and "extreme and prolonged pain."

As the instructions were all correct statements of the law, and were understandable, Gonzales's claim of error is without merit. Therefore, her constitutional rights were not violated, as she claims. (AOB 367-368.)

IV. SUFFICIENT EVIDENCE SUPPORTS GONZALES'S MURDER CONVICTION AND THE SPECIAL CIRCUMSTANCE FINDINGS

Gonzales contends there was insufficient evidence to support her murder conviction on theories of murder by torture and mayhem felony-murder and to support the special circumstance findings that the murder was intentional and involved the infliction of torture, and that the murder was committed while Gonzales was engaged in the commission and attempted commission of the crime of mayhem, thereby violating her due process guaranteed by the Fifth and Fourteenth Amendments and a reliable penalty determination guaranteed by the Eighth Amendment. (AOB 369, 389.) The evidence showed Gonzales, either acting alone, or in conjunction with Ivan, abused, tortured, maimed and murdered Genny. The type, number, and increasing frequency of injuries and abuse leading up to and culminating in Genny's death provided compelling evidence that Gonzales intended to torture and maim Genny.

In assessing a claim for insufficient evidence, the reviewing court must "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence–evidence that is reasonable, credible and of solid value–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The reviewing court will presume in support of the court's judgment the existence of every fact the trier of fact reasonably could infer from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Johnson* (1980) 26 Cal.3d 557, 575-578.) The focus of the substantial evidence test is on the whole record of

evidence presented to the trier of fact, rather than on isolated bits of evidence. (*People v. Slaughter*, *supra*, 27 Cal.4th at pp. 1187, 1203.) That the evidence might lead to a different verdict does not warrant a conclusion that the evidence supporting the verdict is insubstantial. (*People v. Holt* (1997) 15 Cal.4th 619, 669; *People v. Berryman* (1993) 6 Cal.4th 1048, 1084.) The same standard of review applies for the special circumstance finding. (*People v. Chatman*, *supra*, 38 Cal.4th at pp. 344, 389.)

It is the exclusive function of the trier of fact to assess the credibility of witnesses. (*People v. Alcala* (1984) 36 Cal.3d 604, 623; *People v. Lopez* (1982) 131 Cal.App.3d 565, 572.) The reviewing court is not to substitute its evaluation of a witness' credibility for that of the factfinder. (*People v. Koontz*, *supra*, 27 Cal.4th at pp. 1041, 1078.) It is not the function of the reviewing court to reweigh the evidence. (*People v. Perry* (1972) 7 Cal.3d 756, 785.)

> Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of the judgment. It is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends.

(*People v. Thornton* (1974) 11 Cal.3d 738, 754; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1126 [Even if the reviewing court might have made contrary findings or drawn different inferences, it is the jury, not the appellate court, that must be convinced beyond a reasonable doubt].)

A. There Was Sufficient Evidence Gonzales Intended to Maim Genny

Penal Code section 203 provides:

> Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

Penal Code section 189 provides: "All murder . . . which is committed in the perpetration of, or attempt to perpetrate . . . mayhem . . . is murder of the first degree." In *People v. Sears* (1965) 62 Cal.2d 737, 744, this Court held a felony murder based on mayhem must include an intent to maim. Moreover, there must be evidence that a mayhem resulting from a battery was not simply an indiscriminate attack but resulted from the perpetrator's specific intent to maim the victim of the battery. (*People v. Nichols* (1970) 3 Cal.3d 150, 164-165.)

Here, the evidence showed Gonzales intended to maim Genny by forcefully immersing her in scalding hot water. There is no question the burn to Genny was disfiguring and disabling. Even Gonzales's expert witness acknowledged as much. (62 RT 7004-7005.) As previously detailed, Gonzales admitted to numerous acts of torture and abuse leading up to the fatal bath, including putting the blow dryer on Genny's face (14 CT 3101, 3103), putting her in a "little bonnet" (13 CT 2983), putting her in the closet to scare her (13 CT 2980), hanging her in the closet by a hook (13 CT 2980; 14 CT 3117, 3119-3120, 3123-3126, 3128), binding her with cloth and handcuffs (13 CT 2980; 14 CT 3114) and that she and Ivan had Genny sleep in the bathtub with her hands bound (14 CT 3115-3117).

Although Gonzales initially claimed Ivan was not home when Genny's head was burned (14 CT 1329), at trial she claimed it was Ivan who burned Genny's head. (66 RT 7565-7567). Regardless, Gonzales described the injuries to Genny and how Genny was in pain. (66 RT 7574-7576, 7577.) Gonzales described the top of Genny's head as "gooey" and that it seemed to be melting. (66 RT 7569.) Genny's hair was sliding off her head. (66 RT 7569-7570, 7576-7577.) Genny had trouble holding her head up (66 RT 7574), sitting up, and moving (66 RT 7576) for a few weeks. Thus, the evidence showed Gonzales knew the damage a burn would cause. Nevertheless, Gonzales and/or Ivan (with Gonzales aiding

and abetting) forcefully immersed Genny in a bathtub, and Gonzales then failed to seek medical help as Genny slowly died. Given these facts, the only reasonable inference from the act of immersing Genny in the bathtub, and failing to seek medical assistance, was that Gonzales intended to disable or disfigure her.

Ignoring the evidence of the torture and abuse leading up to the fatal burn, Gonzales argues "the likeliest explanation of the state of mind of the perpetrator would appear to be a loss of temper causing the person to blindly turn on the hot water in order to get the attention of a misbehaving child." Thus, Gonzales concludes the fatal burn was an indiscriminate attack. (AOB 372.) Gonzales also argues that the only explanation for the prosecutor not proceeding on a theory of a deliberate and premeditated intent to kill was that there was no evidence of premeditation and deliberation, and therefore there was also insufficient evidence of intent to main. (AOB 372-373.)

Based on the torture and abuse leading up to the murder, a reasonable inference is Gonzales intended to main Genny by placing her in the bathtub. The evidence showed placing Genny in the bathtub was not an indiscriminate act. To the contrary, it was thought out and took some planning. The bathtub took 10 to 15 minutes to fill up to the height that it was when Genny was placed in it. (57 RT 6164-6166; 59 RT 6571; 60 RT 6756.) It was at least 140 degrees. (59 RT 6572.) At that temperature, it would be very hot in the bathroom, and steamy. (57 RT 6167.) There was no reason for the water to be run at such a high temperature, unless it were to be used as a means to disfigure and disable Genny. This was not, as Gonzales claims, "a loss of temper causing the person to blindly turn on the hot water in order to get the attention of a misbehaving child." (AOB 372.)

As support for her position, Gonzales compares the facts here to the facts in *People v. Anderson* (1987) 193 Cal.App.3d 1653 and *People v.*

Sears, *supra*, and concludes that here, like in *Sears* and *Anderson*, there was insufficient evidence of intent to maim. (AOB 373-375.) In *People v. Sears*, the defendant went to his estranged wife's house at nighttime with a steel pipe under his shirt. (*People v. Sears*, *supra*, 62 Cal.2d at p. 740.) As the defendant hit his estranged wife with the steel pipe in the head and face, his wife's daughter came into the room. The defendant's wife tried to place herself between the defendant and her daughter, but the defendant grabbed the little girl as he continued to strike his wife. (*Id.* at p. 741.) The defendant struck the little girl several times with the pipe, resulting in lacerations of her lip and nose. (*Id.* at p. 745.) She died as a result of a knife wound which punctured her jugular vein. (*People v. Sears*, *supra*, 62 Cal.2d at p. 741.) This Court held such evidence showed an indiscriminate attack, not that the defendant intended to maim the victim. (*People v. Sears*, *supra*, 62 Cal.2d. at p. 745.)

Immersing Genny in the hot bathtub does not resemble the emotional, indiscriminate attack in *Sears*.

> There [in *Sears*], the attack on the girl appears to have been serendipitous. It occurred when the girl tried to protect her mother from the defendant. By using the steel pipe on the girl, the defendant did not intend to maim the girl; he apparently only wanted to remove an obstacle to his attack on his intended victim, the mother.

(*People v. Park* (2003) 112 Cal.App.4th 61, 70.) Here, the torture and abuse was repeatedly and consistently inflicted on Genny, who was singled out. It was an ongoing pattern that showed Gonzales and Ivan intended to harm, torture and maim Genny.

In *People v. Anderson*, the defendant lived with a woman and her three children, including a ten-year-old girl. (*People v. Anderson*, *supra,* 63 Cal.2d at p. 355.) The defendant, who had been drinking and had a blood alcohol level of .34 a few hours after the murder, inflicted 41 stab wounds

over the entire body of the ten-year-old girl. (*People v. Anderson, supra,* 63 Cal.2d at pp. 355-356, 358.) One of the cuts extended from her rectum to her vagina. (*Id.* at p. 356.) The defendant, who admitted he had previously sexually molested the girl, told the police he must have killed her, but did not remember doing so. (*Id.* at p. 356.) This Court held that the evidence disclosed no more than an indiscriminate attack, therefore, there was insufficient evidence of intent to commit mayhem, as required for felony-murder. (*Id.* at p. 359.) *Anderson* does not support Gonzales's position. In *Anderson*, there was no physical abuse or torture that occurred prior to the attack. There was no evidence the defendant had to prepare for the act that constituted the mayhem–such as Gonzales's act of filling up the steamy, hot bathtub for 10-15 minutes.

In *People v. Campbell* (1987) 193 Cal.App.3d 1653, the Court of Appeal upheld a felony-murder conviction because there was evidence the defendant had intent to commit mayhem on the victim. In that case, the defendant beat the victim with a brick and a screwdriver in the face, tearing off her ear. (*Id.* at p. 1668.) The court explained that the attack focused on the victim's face and head, and indicated the defendant "limited the amount of force he used with the screwdriver rather than stabbing with his full force, and limited the scope of the attack with the brick to the head and face, rather than randomly attacking" the victim's body. (*Id.* at p. 1668.) The court concluded, "[t]he controlled and directed nature of the attack supports an inference Campbell intended to disfigure [the victim's] face, including her right ear." (*Id.* at pp. 1668-1669.)

Gonzales argues that *Campbell* contrasts sharpy with the present case because there was nothing limited or controlled about what was done to Genny Rojas. (AOB 374.) To the contrary, Genny's torture, abuse, mayhem and murder were all limited and controlled. The abuse was ongoing and systematic. It was very controlled, including handcuffing a

four-year-old, stuffing her into a box, and hanging her from a hook on a closet. During the fatal immersion burn, Genny's arms were not burned, even though the experts would expect them to be burned trying to get out of the scalding water, or from splashing. The inference was that Genny's arms were bound while she was immersed in the bathtub. (56 RT 5957; 59 RT 6573.) Thus, the evidence showed the abuse, torture, mayhem and murder were very controlled, and were not an indiscriminate attack.

Relying on the prosecutor's closing argument that given the previous burn the Gonzaleses inflicted on Genny, they must have known what would have happened when they immersed Genny in the bathtub, Gonzales argues there is a flaw because knowledge of what is to result is not sufficient to prove intent to maim. (AOB 374-375.) Gonzales misses the point of the prosecutor's argument. Because the Gonzaleses knew what would happen if they immersed Genny in a hot bathtub, the only reason they would do so would be with the intent to maim her. Knowing the consequences, there is no other possible purpose or reason to hold her down in boiling water other than to maim her. Unlike in *Sears* or *Anderson*, there is no evidence they forcefully immersed her in an indiscriminate attack. Thus, there was sufficient evidence that Gonzales intended to commit mayhem by disabling and/or disfiguring Genny; ergo there is sufficient evidence to support the first degree murder on a felony-murder/mayhem theory and sufficient evidence to support the mayhem special circumstance.

B. There Was Sufficient Evidence Gonzales Intended to Torture Genny to Support Murder by Torture

Penal Code section 189 provides that murder by torture is of the first degree. (Pen. Code, § 189.) For murder by torture, it must be proven the killing was "with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." (*People v. Chatman*, *supra*,

38 Cal.4th at p. 389.) "The jury may infer the intent to inflict extreme pain from the circumstances of the crime, the nature of the killing, and the condition of the body." (*Id.* at p. 390.)

The evidence showed Gonzales repeatedly beat, burn, hanged and bound a helpless four and a half-year-old child. Given the brutal nature of the crime, the jury could infer Gonzales's intent to inflict extreme pain on Genny, particularly her act of forcefully submerging her in a scalding bath, then failing to obtain medical assistance.

Ignoring the torture and abuse leading up to the murder, the time it took to fill up the steamy, scalding bathtub, and the failure to seek medical treatment while Genny was dying, Gonzales claims Genny's death "consisted of a single act that consumed at most just a few seconds" (AOB 379), and concludes there is no evidence of intent to inflict extreme and prolonged pain (AOB 381). Considering the "whole record in the light most favorable to the judgment" as is required (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1129), there was sufficient evidence to show Gonzales intended to inflict extreme and prolonged pain on Genny.

In a detailed discussion, Gonzales argues based on *People v. Steger* (1976) 16 Cal.3d 539, that the evidence was insufficient because here the evidence was that the perpetrator put Genny in the tub out of frustration and anger, with a lack of calculation. (AOB 375-381.) Gonzales claims this case is similar to *Steger* because both involved a child beating that resulted in death. (AOB 376, 378, 380-381.)

In *Steger*, the defendant beat her three-year-old step-daughter to death. (*People v. Steger*, *supra*, 16 Cal.3d at pp. 542-543.) The fatal injury was from trauma causing a subdural hemorrhage covering almost the entire left half of her brain. The child also had numerous cuts, bruises and other injuries, "most of which could only have been caused by severe blows." Her injuries included hemorrhaging of the liver, adrenal gland, intestines,

diaphragm, a laceration of her chin, and fractures of her left cheek bone and right forearm. (*People v. Steger*, *supra*, 16 Cal.3d at p. 543.)

Based on the following quote from *Steger*, Gonzales claims the same is true here: "The evidence introduced by the People paints defendant as a tormented woman, continually frustrated by her inability to control her stepchild's behavior. The beatings were a misguided, irrational and totally unjustifiable attempt at discipline; but they were not in a criminal sense wilful, deliberate, or premeditated." (AOB 381, quoting *People v. Steger*, *supra*, 16 Cal.3d at p. 548.) The next paragraph in *Steger*, however, is enlightening. This Court goes on to note that in some cases a child's wounds inflicted over a long period of time might lend support to a torture murder conviction.

> For example, if a defendant had trussed up his victim, proof that pain was inflicted continuously for a lengthy period could well lead to a conclusion that the victim was tortured. But in the present case the fact that [the victim] was injured on numerous occasions only supports the theory that several distinct 'explosions of violence' took place, as an attempt to discipline a child by corporal punishment generally involves beating her whenever she is deemed to misbehave.

(*People v. Steger*, *supra*, 16 Cal.3d at pp. 548-549.)

Here, Gonzales had "trussed up" her victim. Not only did Gonzales bind her victim, she and Ivan inflicted the same type of injuries on Genny that the defendant in *Steger* did, but then tortured Genny by hanging her in a closet, handcuffing her, burning her with a blow dryer, and forcing her in a box. There were no such torturous acts in *Steger*. Furthermore, Genny did not die as a result of the beatings. In addition to being continually abused and beaten, she was forcefully immersed into a scalding hot bathtub. It is difficult to see how this act, which took 10-15 minutes to prepare for (57 RT 6164-6166; 59 RT 6571; 60 RT 6756), was not

calculated, but resulted from frustration or anger, as Gonzales claims. (AOB 380-381.) Genny was intentionally burned with a blow dryer on both of her cheeks, her shoulder, her neck, and her arm hours before her fatal bath. (56 RT 5935; 58 RT 6469-6477; 59 RT 6601.) Burning her with a blow dryer, and then forcefully immersing her in hot water suggests a meticulous, controlled approach, and "strongly implies the use of controlled force designed to torture." (*People v. Elliott*, *supra*, 37 Cal.4th at pp. 453, 467.) Gonzales is looking at isolated bits of evidence instead of looking at the whole record presented to the trier of fact. (*People v. Slaughter*, *supra*, 27 Cal.4th at p. 1203 [the focus in reviewing a claim for substantial evidence is on the whole record of evidence, rather than isolated bits of evidence].)

Thus, contrary to Gonzales's assertions, this was not a case where the intent was inferred merely from the substantial injuries. (AOB 378.) There was detailed evidence of binding, burning and beating, in addition to other calculated, torturous acts such as hanging Genny from a hook and stuffing her into a box. While this Court has held that binding a victim alone is not sufficient to show torture, numerous cases have relied on the defendant binding the victim to show the defendant's sadistic intent. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1138 and cases cited therein.)

Gonzales's reliance on *People v. Walkey*, *supra*, does not fare much better. (AOB 381-383.) As discussed in detail in Argument II, subdivision (A), the defendant in *Walkey* lived with his wife and another woman with whom he was intimate, and her two-year old son. (*People v. Walkey*, *supra*, 177 Cal.App. 3d at p. 271.) While in the defendant's care, the two-year-old was severely beaten. He was covered with bruises and lacerations, he had a fractured rib and bite marks, and his abdomen was distended. He had received a penetrating blow, crushing and tearing open his intestines. (*Id.* at pp. 272-273.) There also was evidence of injuries occurring

approximately two weeks before he was killed. (*People v. Walkey*, *supra*, 177 Cal.App. 3d at p. 273.)

The Court of Appeal relied on *People v. Steger* in finding there was insufficient evidence of murder by torture because, like in *Steger*, the evidence merely showed the beatings the defendant inflicted on the child were "'a misguided, irrational and totally unjustifiable attempt at discipline'" and showed explosive violence. (*People v. Walkey*, *supra*, 177 Cal.App.3d at p. 276, quoting *People v. Steger*, *supra*, 16 Cal.3d at p. 548.) In *Walkey*, there was no evidence of the type of torture Gonzales engaged in leading up to the fatal immersion in the bathtub. There was no evidence here that Gonzales showed explosive violence. The types of abuse and torture of Genny was calculating and controlled. It included hanging her in a closet, stuffing her in a box, burning her head, burning her with a blow dryer and beating her. It is hard to imagine how hanging a four-year-old child in a closet or putting her in a small wooden box can be a result of frustration and explosive violence. Thus, the abuse here showed Gonzales intended to torture Genny. It is far different than the beatings the court in *Walkey* found did not show intent to torture.

This case is more akin to *People v. Mincey* (1992) 2 Cal.4th 408, where the defendant beat his girlfriend's five year old step-son to death. (*Id.* at p. 426.) The evidence showed the defendant beat the child repeatedly over an appreciable period of time. (*Id.* at p. 433.) The child had incurred hundreds of injuries within 24 to 48 hours of his death. He had been beaten for hours with hands, belts, and a board. He had a tear in the tissue of his buttocks caused by substantial force being applied with a straight edge, and a tear inside his rectum consistent with a tear caused by a fingernail, and there were puncture marks behind both of his knees. There was blood throughout a bedroom, and belts and a board with blood and

feces on them. (*People v. Mincey*, *supra*, 2 Cal.4th 408 at p. 435.) This Court found there was sufficient evidence of murder by torture.

> From the circumstances surrounding [the victim's] death–including the number and nature of the wounds, and the length of time over which they were inflicted–and the expert testimony presented, the jury could have reasonably found beyond a reasonable doubt that defendant's acts were premeditated and deliberate, involved a high probability of death, and were committed with the intent to cause cruel pain and suffering for a sadistic purpose.

(*Id.* at p. 436.) In rejecting the defendant's argument that the evidence showed an explosion of violence, this Court noted that "[j]ust as child abuse can involve torture, a misguided attempt at discipline can involve an intent to cause cruel pain and suffering. There is no legal immunity from conviction for first degree torture murder because the victim happened to be a child." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 434.).

The prosecutor did not give undue weight to the severity of the wounds as Gonzales contends. (AOB 379.) Genny's injuries were one factor to show the different types of injuries and the severity of the abuse. But the prosecutor specifically argued Gonzales's acts of torture, not just the injuries she suffered, rendered her culpable. He argued it was a tremendously vile, violent act to put a blow dryer on a child's face. (82 RT 10687.) He argued Gonzales was acting with ill will, hatred and malice in putting the cut off pant leg so tight on Genny's face that it eroded the skin off her nose. (82 RT 10688.) He argued "it was not just the physical acts that happened to her. There's a mental function that goes on. Its not enough to hurt. You need to see your victim suffer. Whether it be for power or domination and control, whatever lust a defendant has, that is the underpinnings of torture." (82 RT 10678.) He argued, "You put a little kid on that hook and tie her around the neck, that's a hanging. . . . It's still

torture. It's still the intent to inflict pain. It's still the intent to harm. It is still the intent to have a mental effect on this little girl." (82 RT 10682.) He argued that while Gonzales was filling up the bathtub, the purpose "was power and it is the intent to inflict pain." (82 RT 10714.) He argued Gonzales's intent was to disfigure and maim Genny. (82 RT 10719.) Thus, Gonzales's contention that the prosecutor gave undue weight to the severity of the injuries is belied by the record.

C. There Was Sufficient Evidence Gonzales Intended to Kill Genny to Support the Torture Special Circumstance

To prove the torture-murder special circumstance, the jury must find the murder was intentional and involved the infliction of torture. (Pen. Code, §190.2, subd. (a)(18); *People v. Chatman*, *supra*, 38 Cal.4th at p. 391.) There must be an intent to kill, an intent to torture, and infliction of an extremely painful act on a living victim. (*People v. Bemore* (2000) 22 Cal.4th 809, 839.) As discussed above, there was sufficient evidence Gonzales intended to torture Genny. The evidence was uncontradicted that being immersed in the bathtub was extremely painful. (56 RT 6015, 6038; 59 RT 6562, 6576-6577, 6614, 6640; 62 RT 7004.) There was also sufficient evidence that Gonzales intended to kill Genny. The evidence showed Gonzales repeatedly beat, burned, hanged and bound a helpless four and a half-year-old child.

Given the brutal nature of the crime, the jury could infer Gonzales's intent to inflict extreme pain on Genny, particularly her act of forcefully submerging her in a scalding bath, then failing to obtain medical help. Gonzales testified that when she pulled Genny out of the bathtub, she was missing her skin from her chest down to her feet. She acknowledged that she knew it was bad and that Genny was dying. (68 RT 8071.)

Nevertheless, Gonzales did not seek medical help and allowed Genny to die.

The type of abuse inflicted on Genny was that likely to cause death. Genny was abused over a period of time, with the abuse and injuries increasing until she died. Many of the injuries and much of the abuse was itself life-threatening. Genny had a subdural hematoma on her brain, that was a few hours old, which was life threatening. (56 RT 5924.) It was caused by a blow to the head or a fall, or a violent shaking. (56 RT 5925-5926, 6020.) The expert witness described this injury as "at the extremes of violence of what an adult can do to a child." (59 RT 6622.) Genny was intentionally burned with a blow dryer on both of her cheeks, her shoulder, her neck, and her arm hours before her fatal bath. (56 RT 5935; 58 RT 6469-6477; 59 RT 6601.) Within a few days of her murder, she was hit in the eye, resulting in a black eye (56 RT 5930), there was blunt trauma to her chin causing bruising (56 RT 5933), and she was grabbed so hard on the back of her thighs that it left four bruises, each about ½ inch in diameter (56 RT 5953-5954). Also within a few days of her murder, her skin on her shoulder had been rubbed off, resulting in an abrasion. (56 RT 5948-5949.)

Gonzales hanged Genny from a hook in the closet for a long enough period of time, and with enough resistance, that the skin on her neck eroded from the pressure. (56 RT 5938-5940.) Gonzales said that after seeing the marks on Genny's neck from being hanged, they got scared and thought that next time she could choke and die. (14 CT 3129.) Gonzales handcuffed Genny with enough pressure that it left marks; it appeared to be a painful injury. (56 RT 5942-5944.) Genny's head was burned so badly she almost passed out. (14 CT 3130.) After the burn, Genny was in pain. (59 RT 6588; 66 RT 7574, 7577.) Her hair fell out, her head was infected, and it caused Genny to be tired and weak. (56 RT 5921-5923, 5961; 58 RT 6306, 6436; 66 RT 7569-7570, 7574-7577, 7582.) Even though the injury

was inflicted seven or eight weeks earlier, it was still a "bloody, oozy mess." (56 RT 6000; 58 RT 6436.) Although advised to do so, Gonzales did not seek medical assistance. (13 CT 3024; 66 RT 7581.) In addition to being violently shaken or hit, hanged and burned, there was evidence that Genny had been strangled. (56 RT 5929.) In her testimony where she blamed Ivan for the torture and murder of Genny, Gonzales claimed she told Ivan he could kill her by his acts. (66 RT 7625.) A reasonable inference of this tacit admission is that Gonzales knew the torturous acts and abuse of Genny could and would result in her death. Continuing the abuse and escalating it shows an intent to kill Genny, particularly by placing her in a scalding hot bathtub.

Given the evidence that Gonzales strangled, violently shook or hit, burned, and hanged Genny, a reasonable inference is that these acts were done with the intent to kill Genny. It is hard to conceive of any other reasonable inference. Gonzales acknowledged that Genny could choke and die from hanging her (14 CT 3129), yet the abuse continued until she died. The escalating violence, coupled with Gonzales's failure to seek medical treatment for Genny's already serious injuries, does not lend itself to any other reasonable conclusion than the act of submerging her in scalding hot water was with the intent to kill her. Thus, there was sufficient evidence to support the torture special circumstance finding.

D. There Was Sufficient Evidence That Gonzales Aided and Abetted Ivan in Genny's Murder

One who aids and abets the commission of a crime is a "principal" and shares the guilt of the actual perpetrator. By becoming part of the criminal activity, the accomplice forfeits his or her personal identity and in essence, says "your acts are my acts." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) An aider and abettor acts 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, supra*, 14 Cal.4th at pp. 248, 259.)

Here, it is undisputed that either Gonzales or Ivan inflicted the abuse and torture on Genny. Even if there was insufficient evidence Gonzales were not the actual perpetrator, there was sufficient evidence she aided and abetted Ivan in committing the crimes. Given Gonzales's admissions to numerous acts of abuse and torture, the evidence shows she knew of Ivan's unlawful purpose, and intended to, and did, facilitate and encourage it.

As previously detailed, Gonzales admitted to numerous acts of torture and abuse leading up to the fatal bath, including putting the blow dryer on Genny's face (14 CT 3101, 3103), putting her in a "little bonnet" (13 CT 2983), putting her in the closet to scare her (13 CT 2980), hanging her in the closet by a hook (13 CT 2980; 14 CT 3117, 3119-3120, 3123-3126, 3128), binding her with cloth and handcuffs (13 CT 2980; 14 CT 3114) and that she and Ivan had Genny sleep in the bathtub with her hands bound (14 CT 3115-3117). Given these acts, and the numerous visible injuries on Genny, even if Ivan was the perpetrator, a reasonable inference is that Gonzales knew of such unlawful purpose. In her testimony, Gonzales acknowledged as much. She did not deny that Genny was abused, rather she claimed Ivan perpetrated the abuse. (66 RT 7563-7569, 7582, 7584, 7586-7595, 7598-7599, 7605, 7621, 7624, 7629.) Gonzales acknowledged that Genny was in pain while Ivan was abusing her, yet she did not take her to the doctor or intervene. (66 RT 7602.) Thus, there was evidence that Gonzales knew of Ivan's unlawful purpose in abusing Genny, and ultimately murdering her.

The evidence also showed Gonzales acted with the intent or purpose of committing, encouraging, or facilitating the commission of the abuse and ultimate murder of Genny, and by her acts or advice aided, promoted,

encouraged or instigated the commission of the crime. Gonzales repeatedly stated that she turned on the bathtub. (66 RT 7679, 7685; 68 RT 8026, 8171.) Turning on the water, which was used to murder Genny, even if Ivan forcefully placed her in the bathtub, shows Gonzales instigated and facilitated the murder. Moreover, it is undisputed Gonzales, knowing Genny was dying, failed to seek medical treatment for her (66 RT 7699; 68 RT 8071), which was likely to have saved her life (56 RT 5962; 59 RT 6577). Failure to get medical treatment for Genny, when she knew she was dying, shows Gonzales aided and facilitated Ivan in murdering Genny. Gonzales claimed she had wanted to send Genny back to her mother, but Ivan said not to because they would find out what he had done to her. (66 RT 7622.) To hide their acts of abuse, Gonzales and Ivan murdered Genny. If there was insufficient evidence that Gonzales was the direct perpetrator, there was sufficient evidence she aided and abetted Ivan in murdering Genny.

Engaging in circular reasoning, Gonzales argues that there was insufficient evidence she aided and abetted Ivan in murdering Genny because to find Ivan was the direct perpetrator, the jurors must have believed Gonzales's testimony, and if they believed Gonzales's testimony, Ivan did not possess the requisite intent. (AOB 388-399.) There is no requirement for the jurors to either accept or reject all of a witnesses testimony. They can reject only such testimony that is not worthy of belief, and accept other testimony. (*People v. Beardslee* (1991) 53 Cal.3d 68, 94-95.) The jury here was instructed consistent with that principle that they could "reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless from all the evidence, [they] believe[d] the probability of truth favor[ed] his or her testimony in other particulars." (82 RT 10637; 16 CT 3639; CALJIC No. 2.21.1.) Thus, Gonzales's

argument there was insufficient evidence on an aiding and abetting theory also fails.

As there was sufficient evidence to support Gonzales's conviction for murder on theories of murder by torture, felony murder/mayhem, and aiding and abetting Ivan, and there was sufficient evidence to support the special circumstances of torture and mayhem, Gonzales's constitutional rights were not violated.

V. THE MAYHEM USED AS THE PREDICATE OFFENSE FOR FIRST DEGREE FELONY MURDER DID NOT MERGE INTO THE HOMICIDE WITHIN THE MEANING OF *PEOPLE V. IRELAND*

Gonzales contends her conviction for first degree murder under the felony murder theory with mayhem as the predicate felony violated the principle of *People v. Ireland* (1969) 70 Cal.2d 522, because the mayhem was not independent of the homicide. (AOB 390, 394.) Because the crime of mayhem had an independent felonious purpose, it did not merge into the homicide within the meaning of *People v. Ireland.*

In *People v. Ireland*, the defendant shot his wife, killing her. (*Id.* at p. 527.) The court gave an instruction on second degree felony murder with assault with a deadly weapon as the predicate felony. (*Id.* at p. 538.) This Court held it was error to give a second degree felony-murder instruction

> when it is based upon a felony which was an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged.

(*People v. Ireland*, *supra*, 70 Cal.2d at p. 539, emphasis original.) "To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault–a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law." (*Ibid.*)

The merger doctrine has been traditionally applied when the underlying felony is assault. (*People v. Robertson* (2004) 34 Cal.4th 156, 170.) The rule has been adopted because otherwise all assaults where the victim died would be elevated to murder. (*Ibid.*) The merger doctrine does not apply when the underlying felony has an independent purpose than the murder; i.e., the felony has a "collateral and independent felonious design." (*Id.* at p. 170, quoting *People v. Mattison* (1971) 4 Cal.3d 177, 185.)

In *People v. Wilson* (1969) 1 Cal.3d 431, 440, this Court applied the merger doctrine in a first degree felony murder case where the predicate crime was burglary. The felonious purpose of the burglary was assault with a deadly weapon. (*Id.* at p. 440.) This Court held that "the same bootstrapping is involved in instructing a jury that the intent to assault makes the entry burglary and that the burglary raises the homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation." (*People v. Wilson, supra*, 1 Cal.3d at p. 441.)

Here, Gonzales was convicted of first degree murder based on a felony murder theory with mayhem as the predicate felony. All murder committed in the perpetration of, or attempt to perpetrate certain enumerated felonies (arson, rape, carjacking, robbery, burglary, mayhem, kidnaping, train wrecking, torture, and certain sex crimes) is first degree murder. (Pen. Code, § 189.) The mental state required is the specific intent to commit the underlying felony. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

Of the enumerated felonies in Penal Code section 189, only burglary when the felonious purpose was an assault with a deadly weapon, has been held to be subject to the merger doctrine. (*People v. Wilson, supra*, 1 Cal.3d at p. 440.) The other crimes listed in Penal Code section 189 all have an independent felonious purpose.

> [I]n the case of armed robbery, as well as the other felonies enumerated in section 189 of the Penal Code, there is an independent felonious purpose, namely in the case of robbery to acquire money or property belonging to another.

(*People v. Burton* (1971) 6 Cal.3d 375, 387.)[34]

> Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning–if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances.

(*People v. Burton*, *supra*, 6 Cal.3d at pp. 387-388; *People v. Cavitt*, *supra*, 33 Cal.4th at pp. 187, 197.)

> This court has reiterated numerous times that '[t]he purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. [Citation.].'

(*People v. Burton*, *supra*, 6 Cal.3d at p. 388.)

> The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or

---

[34] Although this Court in *Burton* noted that the other crimes in Penal Code section 189 have an independent felonious purpose, this Court has not specifically ruled on each crime. This Court cited with approval *People v. Kelso* (1976) 64 Cal.App.3d 538, 542 holding that kidnaping has an independent felonious purpose. (*People v. Smith* (1984) 35 Cal.3d 798, 805.) In *Burton*, this Court also explained that robbery and rape have independent felonious purposes, and would not fall under the *Ireland* doctrine. (*People v. Burton*, *supra*, 6 Cal.3d at p. 387.) In *People v. Morgan* (2007) 42 Cal.4th 593, 619 this Court held Penal Code section 289 (unlawful penetration with a foreign object--one of the enumerated felonies in Penal Code section 189) has an independent felonious purpose.

> accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.

(*People v. Burton*, *supra*, 6 Cal.3d at p. 388; *People v. Cavitt*, *supra*, 33 Cal.4th at p. 197.) This Court further explained:

> *Wilson*, when properly understood, does not eliminate this rule as urged by defendant, but merely excludes from its effect one small area of conduct, which would be irrationally included, due to the unusual nature of burglary. The key factor as indicated earlier in the enumerated felonies is that they are undertaken for a felonious purpose independent of the homicide. . . . We regard the holding in *Wilson* as specifically limited to those situations where the entry is coupled with the intent to commit assault with a deadly weapon.

(*People v. Burton*, *supra*, 6 Cal.3d at p. 388.)

Thus, the merger doctrine should not be extended to mayhem, which is specifically enumerated in Penal Code section 189. Mayhem has a purpose independent of murder–to deprive a human being of a member of his or her body or disable or disfigure the victim. To commit mayhem, one has to go above and beyond an ordinary assault. The jury was instructed that to convict Gonzales of first degree felony murder based on mayhem that they must find that she had the specific intent to commit mayhem, which was defined as permanently disfiguring or disabling a human being of a member of his or her body. (16 CT 3664-3665; 82 RT 10650-10651; CALJIC Nos. 8.21 & 9.30.) Thus, the felonious purpose independent of the homicide is to deprive a human being of a member of his or her body or disfigure or disable a victim.

Nonetheless, Gonzales contends the mayhem was not independent of the homicide. (AOB 394.) If this Court were to adopt Gonzales's approach, a person who intended to put out a victim's eye, or slit someone's tongue, would escape a murder conviction if the victim died in the course of the mayhem–clearly not a result intended by the Legislature, which listed mayhem as one of the enumerated felonies in Penal Code section 189. In this case, burning the skin off a four-year-old victim, had an independent purpose to deprive a human being of a member of her body or disable and disfigure her, thus, it did not merge into the homicide.

Contrary to Gonzales's claim (AOB 394-404), this Court's holding in *People v. Smith*, *supra*, 35 Cal.3d at p. 798, and the Court of Appeal's decisions in *People v. Shockley* (1978) 79 Cal.App.3d 699 and *People v. Northrop* (1982) 132 Cal.App.3d 1027 addressing whether the *Ireland* rule applies when the underlying felony is child abuse does not compel a different result.

In *People v. Shockley*, *supra*, the defendant was convicted of second degree murder for the death of one of her twin 21-month old boys, who died of dehydration and malnutrition. (*People v. Shockley*, *supra*, 79 Cal.App. at pp. 673-674.) The court held it was justified using the felony-murder rule because "[t]he act of leaving the child in a position that endangers its person or health is clearly collateral and independent of any design to cause death." (*Id.* at p. 677.)

In *People v. Northrup*, *supra*, the court held the *Ireland* doctrine did not prohibit a conviction for second degree murder wherein the underlying felony was child abuse based on a beating that resulted in the death of the defendant's 22-month old child. (*People v. Northrup*, *supra*, 132 Cal.App.3d at pp. 1031, 1037.) The holding in *Northrup* was disapproved by this Court in *People v. Smith*, *supra*. In *People v. Smith*, the defendant was also convicted of second degree murder where the underlying felony

was child abuse based on the defendant beating her two-year-old child resulting in the child's death. (*People v. Smith*, *supra*, 35 Cal.3d at pp. 801-802.)

This Court noted that child abuse contains a wide variety of situations including active conduct by assaulting a child and passive conduct by extreme neglect. (*Id.* at p. 806.) In cases where the conduct was a direct assault on the child resulting in death, the *Ireland* doctrine applied because the purpose of the child abuse "was the 'very assault that resulted in death.'" (*Ibid.*, quoting *People v. Burton*, *supra*, 6 Cal.3d at p. 387.) The only difference between the assault in *Ireland* and the assault in *Smith* was that the victim was a child, therefore, it would be illogical to allow the assault on a child to be bootstrapped into felony murder. (*People v. Smith*, *supra*, 35 Cal.3d at p. 806.)

This Court distinguished *People v. Shockley*, *supra*, because the death of the child resulted from malnutrition and dehydration, not a severe beating, therefore, in that situation, the *Ireland* doctrine did not bar a felony murder conviction with child abuse as the underlying felony. (*People v. Smith*, *supra*, 35 Cal.3d at p. 808.)

Because mayhem has an independent felonious purpose–aside from an assault–to deprive a *human* being of a member of his or her body, or disfigure or disable a victim, it is not analogous to the child abuse in *Smith*–which was an assault. It is not "the very same assaultive conduct that caused death" as Gonzales contends. (AOB 396.) It requires more than an assault. Depriving a human being of a member of his body, or disabling or disfiguring a victim, requires much more than an assault. It has an independent felonious purpose. Just because mayhem will include assaultive conduct does not mean it does not have an independent felonious purpose. Armed robbery includes assaultive conduct, but it is not included within the *Ireland* doctrine. (*People v. Burton*, *supra*, 6 Cal.3d at p. 387.)

Thus, because mayhem has an independent felonious purpose, it does not merge into the homicide, and can be a predicate felony for first degree felony murder, as Penal Code section 189 expressly provides. As such, Gonzales's constitutional rights were not violated. (*People v. Morgan*, *supra,* 42 Cal.4th at pp. 93, 620 [rejecting defendant's constitutional claims of due process of law and a fair trial based on his conviction for first degree felony murder where the underlying felony (unlawful penetration with a foreign object) was held not to merge with the homicide under the *Ireland* doctrine].)

VI. THERE WAS NO CUMULATIVE ERROR IN THE GUILT PHASE

Gonzales contends that because the evidence against her was weak and it was a close case, any errors in the guilt phase, individually or cumulatively, were prejudicial. (AOB 406-415.) Gonzales's claim that the case was close is speculative. Moreover, the evidence against Gonzales was compelling. Thus, any errors were not prejudicial, whether viewed individually or cumulatively, and whether viewed under the *Chapman* standard as Gonzales advances (AOB 406) or under the *Watson* standard for state law error.

As explained previously, the only error was the trial court's order of Gonzales to submit to psychological testing, based on *Verdin v. Superior Court.* Assuming this Court applies *Verdin* retroactively, it was state law error, and any error was harmless, as already explained. The remainder of Gonzales's contentions are without merit. "[A]ny number of 'almost errors,' if not 'errors' cannot constitute error." (*Hammond v. United States, supra,* 356 F.2d at pp. 931, 933.) Moreover, even assuming Gonzales's claims constitute error, taken individually or together, these errors do not require reversal of Gonzales's conviction. (*People v. Slaughter*, *supra*, 27 Cal.4th at pp. 1187, 1223; *People v. Koontz*, *supra*, 27 Cal.4th at pp. 1041, 1094 [guilt phase instructional error did not cumulatively deny defendant a

fair trial and due process]; *People v. Cooper*, *supra*, 53 Cal.3d at p. 830 ["little error to accumulate"].) Gonzales is entitled to a fair trial, but not a perfect trial. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 522.) Gonzales received a fair trial.

Furthermore, it was not a close or weak case. As described in detail in Argument I, subdivision (A)(2), the evidence against Gonzales was compelling. Gonzales's argument that the evidence was weak "put[s] aside" her statements made to the police after her arrest. (AOB 407.) The statements made by Gonzales to the police were incriminating and cannot be ignored, as Gonzales would like. Gonzales claims her false statements that showed her consciousness of guilt were countered by her trial testimony. (AOB 408.) She also claims her expert testimony was "strong." (AOB 409.) Gonzales's self-serving testimony was not credible. Gonzales admitted she had lied numerous times, including to her own experts. (67 RT 7734-7735; 68 RT 8052, 8278.)

Gonzales next argues the statements by Ivan Jr. were not credible. (AOB 408.) Ivan Jr.'s testimony was not presented by or relied on by the prosecution. The defense presented Ivan Jr.'s testimony. Moreover, many of Ivan Jr.'s statements regarding the abuse and torture of Genny were corroborated by the physical evidence and/or were admitted by Gonzales. (15 CT 3277 [Ivan Jr. said his parents spent their money on drugs instead of food]; 65 RT 7412-7413; 66 RT 7554, 7641 [Gonzales testified she spent her money on drugs and sometimes ran out of money for food]; 15 CT 3278, 3405-3406 [Ivan. Jr. said Genny slept in the bathtub]; 66 RT 7598-7599 [Gonzales admits that Genny was put in the bathtub in handcuffs while she and Ivan had sex]; 15 CT 3279, 3402 [Ivan Jr. said his parents tied Genny's hands with rope and when they removed the rope Genny had scars]; 13 CT 2980, 3114 [Gonzales admitted she bound Genny with cloth from her shorts and with handcuffs]; 56 RT 5941-5943 [Genny had a linear

ulcerated injury on her right biceps consistent with being bound with handcuffs];15 CT 3288-3289, 3409-3410 [Ivan Jr. said his parents hung Genny from the rod in the closet, suspended, with her hands tied up]; 13 CT 2980; 14 CT 3117, 3119, 3120, 3123-3126, 3128 [Gonzales admitted that Genny was forced to sleep in the closet and was hung in the closet by a hook]; 58 RT 6410 [the blood patterns indicated Genny had been suspended from the hook more than once and that her arms were immobilized while she was suspended]; 56 RT 5938-5939 [Genny had extensive injuries to her neck consistent with being hung by her neck].)

Because the jury deliberated for a few days, Gonzales concludes it was a close case. (AOB 410-413.) Given the complexities and length of the case, and the numerous hours of videotaped interviews that the jury requested, the deliberations were not long.

The trial lasted 27 court days over approximately a month and a half between March 11, 1998, and April 23, 1998. (18 CT 3979-4048.) The prosecution admitted 90 exhibits (18 CT 4001, 4039.) The defense admitted 46 exhibits. (18 CT 4030, 4044.)

The jury began deliberations on April 23, 1998, at 4:08 p.m. and ended at 4:30 p.m. (18 CT 4046-4047.) The next day, the jury resumed deliberations, and shortly thereafter sent a note to the court requesting the videotaped interviews of Gonzales and Ivan, Jr., the corresponding transcripts, Ivan's letters to Gonzales, the wall (which had been admitted into evidence), all photographs, and an easel. They also asked the court whether Gonzales had written any letters to Ivan, and if so whether they could see them. (18 CT 4049.) The jurors also asked for and received a VCR. (18 CT 4050.) The requested exhibits were delivered to the jury, and the court told the jurors that there were no other letters between Ivan and Gonzales. (18 CT 4049-4050.) Later that same day, the jury requested

and received "evidence gloves." (18 CT 4050.) At the end of the day, the jurors recessed for the weekend. (18 CT 4050.)

On Monday morning, the jurors resumed deliberations and requested twelve copies of the transcripts of Gonzales's trial testimony. The jurors also requested assistance in connecting the VCR. (18 CT 4051.)

On Tuesday, the jurors requested a dictionary, however, the court instructed them that they were to rely on the instructions for all words with special legal meanings, and all other words have their ordinary, everyday meanings. (18 CT 4053.) Later that day, pursuant to their request, the court delivered five volumes comprising Gonzales's trial testimony to the jurors. (18 CT 4054.) Due to a personal obligation of one of the jurors, they stopped deliberations that day at 3:30 p.m. (18 CT 4054.)

The jury continued its deliberations on Wednesday, April 29, 1998 (18 CT 4055), and Thursday, April 30, 1998 (18 CT 4056). On Friday morning at 10:30 a.m., the jury reached a verdict. (18 CT 4057.) With the exception of 30 minutes the first day, and less than an hour and a half the last day, the jury deliberated for three days.

The length of deliberations reflect the length of the trial, the numerous exhibits, and show that jurors carefully weighed the evidence. Given that the jurors requested the videotapes of Gonzales's and Ivan Jr.'s interviews, and a VCR, presumably they reviewed the interviews. The video and audiotaped portion of Ivan Jr.'s statements consumed 5 hours, 54 minutes of trial time. (18 CT 4001-4004.) The videotaped portion of Gonzales's interviews consumed six hours, ten minutes of trial time. (18 CT 3990-3994.) Additionally, the jurors asked for and received Gonzales's trial testimony, consisting of five volumes. Gonzales testified for five full court days. (18 CT 4008-4009, 4011-4018.) Reviewing the evidence the jury requested would have taken more than a few days.

Therefore, the lengthy deliberations was more a reflection of the jury's thoroughness in going through the evidence than their having a problem coming to a unanimous verdict. They even requested "evidence gloves" to review the evidence. Thus, it cannot be concluded that the length of deliberations was because the jurors were having difficulty, or as Gonzales contends because the jurors had "doubts about the sufficiency of the evidence." (AOB 411.) It appears more likely it was because they carefully analyzed the evidence and testimony. This was a lengthy, complex, capital case, thus the length of deliberations "demonstrates nothing more than that the jury was conscientious in its performance of high civic duty." (*People v. Cooper*, *supra*, 53 Cal.3d at pp. 771, 837.)

Gonzales also argues that because her lifestyle of using the family welfare benefits for drugs instead of clothes or food for her children would cause the jury not to like her, regardless of the extent of her involvement in inflicting injuries on Genny. (AOB 411-412.) Gonzales seems to be advocating a lower standard for prejudice when the evidence shows the defendant is not likeable. Gonzales quotes the following passage from *People v. Thompson* (1980) 27 Cal.3d 303, 317, to support her position: "the jury might not be able to identify with a defendant of offensive character, and hence to disbelieve the evidence in his favor." (AOB 412.) This Court was discussing the policies for excluding evidence of uncharged conduct. It has no applicability to the standard of prejudice. Here, the evidence Gonzales claims made her unlikeable was evidence she presented in her defense. She does not claim any error in admission of the evidence. Thus, she cannot complain that it made her unlikeable, and therefore, contributed to her prejudice. Gonzales's argument that it was a close case is based on pure conjecture and speculation. To the contrary, given the complexities and length of the case, and the jury's requests, a more likely

explanation is that they engaged in a careful, thorough review of the evidence.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE PENALTY PHASE BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE MARY ROJAS ON RELEVANT SUBJECT MATTERS; THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN HIS ARGUMENT[35]

Mary Rojas (Gonzales's sister and Genny's mother) testified in the penalty phase "that, despite what happened to her daughter, she still love[d] her sister and believe[d] she and her family would be better off if her sister were allowed to live." In spite of this testimony, Gonzales contends the prosecutor improperly cross-examined Mary about (1) whether Mary was a good mother; (2) whether Mary had a headstone or plaque on Genny's gravestone; (3) whether Mary had another baby that she named "Genny" with her husband, a convicted child molester (who had been convicted of molesting one of Mary's daughters); and (5) that no one, including Mary, wanted Genny (AOB 424, 426-427, 430-432.) Gonzales also claims the prosecutor's closing argument was improper because he argued that Mary was not a mother to Genny (AOB 433-434), that naming another child

---

[35] Gonzales begins her penalty phase argument with an Introduction (AOB 416-421) that contains irrelevant and inappropriate arguments and comments. For example, she discusses the plea negotiations that occurred prior to the trial and makes numerous disparaging comments about the prosecutor. Respondent will not respond to the Introduction, as there is no claim of error made in the Introduction. Any pertinent argument will be addressed in connection with Gonzales's actual substantive claims. The plea negotiations and surrounding circumstances are irrelevant to a penalty phase, and therefore, irrelevant to a penalty phase argument. "Evidence of this sort 'does not bear upon defendant's character, prior record, or the circumstances of his offense and thus, [does] not constitute mitigating evidence.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 735, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 989.) Thus, the discussion, as well as the disparaging comments about the prosecutor are inappropriate and irrelevant to Gonzales's claim of error.

"Genny" showed Genny Rojas was fungible to Mary Rojas (AOB 435-436), and reading a fictional letter to Genny (AOB 436-441). The prosecutor's cross-examination questions were proper to impeach and rebut Mary's testimony about the extent to which she cared about her daughter. Likewise, the prosecutor's arguments were proper comments on the evidence and did not unduly appeal to the juror's emotions.

A. The Cross-Examination of Mary Rojas Was Proper

Gonzales indicated to the court that she was going to call her sister, Mary Rojas, to testify to (1) events in her family home when she was growing up; (2) Ivan's abuse of Gonzales; (3) why she did not have custody of Genny; (4) the impact on her other children if Gonzales is executed; and (5) how she felt about her sister in spite of her daughter's death. (82 RT 11448-11450.) The prosecutor objected to Mary testifying to the impact of Gonzales's potential death sentence on Mary's children. (82 RT 11451.) The court ruled Mary could testify to the impact of Gonzales's potential death sentence on Gonzales's nieces and nephews--Genny's siblings. (82 RT 11620-11621.)

Anticipating Mary Rojas's credibility would be an issue, Gonzales moved prior to the penalty phase to have Lucy Lara, the director of Christ Extension Ministries, testify to efforts that Mary had made in keeping sober and Mary's progress in drug rehabilitation to bolster Mary's credibility. (86 RT 11444-11446.) The court ruled it would wait to see if Lara's testimony were relevant after Mary testified. (82 RT 11457-11458.) After hearing part of Mary's testimony, the court ruled Lara could testify. (89 RT 11944.)

On direct examination, Mary Rojas testified that she, Gonzales and their other sister, Anita were abused as children. (89 RT 11895-11897.) Mary and Gonzales were both sexually molested by their stepfather. (89 RT 11897-11902.)

At one point, Mary lived with Ivan and Gonzales in a hotel. (89 RT 11913.) Mary did not actually see Ivan hit Gonzales, but heard Gonzales say, "stop it," and saw bruises on Gonzales. (89 RT 11914-11915.)

Mary testified that she had problems with drinking and drugs, but had been sober for four years. (89 RT 11902-11905.) She had seven children, two of whom she named Genevieve Monique Rojas. (89 RT 11903-11904.)

Mary's children were taken away from her by the court two times. (89 RT 11904.) The first time was because her husband, Pete, whom she testified she had separated from, molested her older daughter. (89 RT 11905.) Mary testified that Pete was not allowed to live with her. (89 RT 11910.)

The second time the children were removed from her was as a result of her drug use. (89 RT 11907.) She went to Victory Outreach, a drug rehabilitation program, for eight months. (89 RT 11908.) Her children went to live with her mother. Mary did not tell the social workers that her mother was abusive because she did not want her children to be separated and placed in foster homes. (89 RT 11906.) Mary was not concerned that Genny was sent to live with Gonzales. (89 RT 11908.) Mary thought Gonzales was a good mother. (89 RT 11909.)

Mary explained that she did not arrange Genny's burial and funeral. (89 RT 11910.) She testified Genny's funeral expenses were paid for by she and Pete, along with money donated from the church. Genny was buried in Norco in a cemetery next to Mary's aunt. (89 RT 11911.) Mary said they still owed $156 toward the expenses, and were paying $15 or $16 per month towards that debt. (89 RT 11912.) After they paid that debt, they wanted to buy a tombstone for Genny. (89 RT 11912.)

Mary testified that she loved and missed her daughter, Genny. Mary explained it was hard for her to talk about Genny, and Genny's death had been hard on their family. (89 RT 11913.)

Gonzales meant a lot to Mary. Mary's children talked to Gonzales on the telephone. Mary explained that her family had been through a lot already, and it would hurt her children if Gonzales were given the death penalty. (89 RT 11915.)

On cross-examination, the prosecutor asked Mary the following questions, which form the basis of Gonzales's claim of error.

> Q: Tell us how you were a mother to Genevieve Rojas.
>
> A: Maybe I wasn't the greatest mother. I mean, I was on drugs.
>
> Q: Okay. So you weren't the greatest mother and you were on drugs. Tell us how you were a mother to Genevieve Rojas?
>
> The Court: You mean what did she do as a mother?
>
> [The prosecutor]: Yes, judge.
>
> A: Okay. I didn't have no food, so I would take them to church down the thing. They would eat at 5:00 and–
>
> Q: How come you didn't have any food?
>
> A: Because I was on drugs.
>
> Q: You were spending your money on drugs?
>
> A: Yeah.
>
> Q: What money did you have?
>
> A: What money did I have?
>
> Q: Where were you getting money?

A: Welfare.

Q: So you were spending your money on drugs?

A: My stamps.

Q: And your food stamps, too?

A: Yes, sir.

(89 RT 11923-11924.)

The prosecutor then asked Mary about Genny's burial. He asked about the money the church gave to bury Genny, then asked what happened to the money the state gave her. Mary said she did not know, "for reals." (89 RT 11927.) The prosecutor asked Mary whether she was aware that Tillie (Mary and Gonzales's mother) received $2000 for burial expenses from the Crime Victim's Fund. Mary said that she heard her mother received some money "but that's what–we were trying to get some money because we heard that, you know. There was no money. I mean, I don't know. I didn't see none of those, the—." The prosecutor then asked Mary whether she was given $2700 from the state Crime Victim's Fund, and Mary said that if they would have given her money, she would have bought a van. She then said, "I didn't get no money. Somebody said it was for counseling. I don't know who told me that." (89 RT 11928.) Mary then explained that they received some money for counseling. (89 RT 11928-11929.)

The prosecutor asked Mary whether Genny's burial plot had a headstone or plaque, and Mary responded, that "we're trying to get it on–like pay half and then pay the rest, but we have to finish paying off this." (89 RT 11929.) The prosecutor then asked, "So your–the old Genny, Genevieve, doesn't have a headstone, but you decide to have another child and name her Genny." (89 RT 11929.) Mary said, "yes." The prosecutor then said, "Can you –can you tell me why maybe you wouldn't want to

wait a while until you got the old Genny a headstone?" Defense counsel objected based on relevance, and the court sustained the objection but on the ground that it was argumentative. (89 RT 11929.)

At the lunch recess, the prosecutor requested the court mark four photographs of where Genny was buried. He explained he believed it was proper victim impact evidence. (89 RT 11935.) Defense counsel objected based on relevance and Evidence Code section 352. (89 RT 11935-11936.) The court noted the defense had raised the issue whether Mary's family was "hurt, affected by Genny's death, attempting to show that they're, caring people who were hurt by her death. The prosecution is entitled, I believe, to meet that to the extent that he can show that these are–there was either little feeling or mitigated feeling about it." (89 RT 11937.) The court concluded that given that the evidence had already been admitted about the gravestone, a visual portrayal of it was justified. (89 RT 11937.)

The prosecutor also requested to cross-examine Genny about the parentage of her new daughter named Genny because Mary testified that she did not allow Pete over to her house, and the prosecutor believed Pete was the father of her Mary's youngest child. (89 RT 11944.) Defense counsel objected on relevance grounds. (89 RT 11944-11945.) The court ruled that because direct examination ranged pretty wide, and included Pete Rojas no longer being in the home, and that he was the father of four of the children, it was within the scope of direct examination, and it would allow the cross-examination. (89 RT 11945.)

The prosecutor then elicited from Mary that it was her choice that she did not allow Pete over. (89 RT 11948.) She admitted that when interviewed by a District Attorney Investigator, however, Pete was at her house. (89 RT 11948.) She also admitted that Pete was the father of her youngest baby, "new Genny." (89 RT 11948-11949.) She was born approximately a year after Genny was murdered. (89 RT 11949.) The

prosecutor also asked Mary about the photographs of the cemetery where Genny was buried (89 RT 11950) and admitted the photographs into evidence (18 CT 4074).

The last area of cross-examination that Gonzales contends was error was the prosecutor's questions about where and with whom Genny had lived at various times in her life. (89 RT 11946.) He elicited that Genny first lived with Mary; then her grandmother, Tillie; then Mary's sister, Anita; back to Tillie; then to Ivan and Gonzales. (89 RT 11946-11947.) He then elicited that Tillie gave her up, Anita gave her up, and Mary had given Genny up. (89 RT 11947.) The following exchanged ensued:

> Q: Okay. Is if fair to say that nobody wanted Genny?
>
> A: No. I wanted Genny.
>
> Q: How much did you want her?
>
> A: You're saying nobody wanted Genny?
>
> Q: Well, it seems like–
>
> A: Well, I wanted Genny.
>
> Q: You wanted Genny. She was getting passed around to the various–
>
> A: Yeah, I know, because I was on drugs; yeah, you're right, because I was on drugs, yes.
>
> Q: You wanted your drugs more than you wanted Genny?
>
> A: I had an addiction problem; you're right.

(89 RT 11947.)

Gonzales then presented testimony from Carmen Lara, a substance abuse counselor, about Mary Rojas's completion of a substance abuse inpatient program. (89 RT 11971-11972.) Lara testified that Mary had

remained sober and regained custody of her children. (89 RT 11973.) Lara opined that Mary was an excellent mother, considering her circumstances. (89 RT 11973.) Mary sought counseling from Lara after Genny's death, and had been in denial about it for some time. (89 RT 11974.)

Many of the complained-of questions were not objected to, therefore, as to those claims, Gonzales has forfeited any claim of error. (Evid. Code, § 353; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 1, 113.) Specifically, the only questions that were objected to were (1) why Mary would not have waited a while to have another baby named Genny until after she bought a headstone for Genny; (2) questions about the photographs of the gravesite; and (3) whether Pete Rojas was the father of Mary's youngest child. The other questions were not objected to, therefore, Gonzales's claim of error is forfeited. Moreover, Gonzales's claims fail on the merits.

"It is settled that the trial court is given wide discretion in controlling the scope of relevant cross-examination." (*People v. Farnam* (2002) 28 Cal.4th 107, 187.) Most of the areas of cross-examination which Gonzales complains of were areas she testified to in direct examination. A witness may be cross-examined "upon any matter within the scope of the direct examination." (Evid. Code, § 773.) Additionally, the credibility of a witness may be attacked or supported by any party. (Evid. Code, § 785; *People v. Harrison* (2005) 35 Cal.4th 208, 229.)

Mary testified on direct examination that she loved and missed Genny, and her death had been hard on their family. (89 RT 11913.) By eliciting this information, the defense was portraying Mary as a caring mother to Genny. Thus, it was proper for the prosecutor to explore Mary's testimony on this subject matter, and the prosecutor's question on cross-examination "how [she] was a mother" to Genny was appropriate. (89 RT 11923.) Based on this question, Mary stated she had not been the greatest

mother. (89 RT 11923.) The prosecutor asked the question again, and Mary explained that she did not have any food for her children. (89 RT 11923.) The prosecutor was entitled to, and appropriately asked her to explain her answer–why she did not have any food. (89 RT 11923-11924.) Mary explained that she spent her money and food stamps on drugs. (89 RT 11924.) This line of questioning called into question Mary's testimony on direct examination that she loved and missed Genny.

Although she did not object at trial to the above line of cross-examination, on appeal Gonzales argues, "[i]t would probably be a rare case where a prosecutor would seek to impeach or rebut such evidence." (AOB 424.) Gonzales apparently takes issue because the prosecutor did what he was entitled to do–impeach or rebut evidence. Just because Gonzales's family testified on her behalf does not mean they are off limits to cross-examine. Gonzales has not cited any legal authority for her proposition that the cross-examination of Mary was improper. She merely states that Mary's character was not in issue. (AOB 424.) Although Mary's character was not in issue, her credibility was. (*People v. Harrison*, *supra*, 35 Cal.4th at p. 229.) Because Mary testified that she loved and missed Genny, the prosecutor was entitled to explore how she did so–how she was a mother to Genny.

Gonzales wanted the jury to hear testimony that Mary loved and missed her daughter, but that Gonzales's life should still be spared, even though Gonzales was convicted of murdering Mary's daughter. The testimony that Gonzales's life should be spared, in spite of her conviction, was more powerful if the jury perceived that Mary was grieving for Genny, was a good mother to her, and loved and cared about her. If Genny was disposable to Mary, then the testimony had less force. Therefore, it was proper for the prosecutor to explore whether Mary really was a mother to

Genny, and whether, as she claimed, she really loved and missed her. Thus, the cross-examination on that point was proper.

The next line of questioning that Gonzales complains of, which also was not objected to, was about where Genny was buried, whether she was aware her mother was given money for burial expenses, and whether she received $2700 from the state Crime Victim's Fund. (AOB 425-425.) Once again, because these matters were initially discussed on direct examination it is hard to understand Gonzales's claim of error. She merely concludes that "there appears to be no relationship at all between the manner in which the State funds were disbursed and the appropriate penalty for Veronica Gonzales." (AOB 426.) On direct examination, Mary testified that Genny was buried in a cemetery next to her aunt's, and that she and Pete, along with money donated by the church, paid for Genny's funeral expenses. (89 RT 11911.) She testified that after they paid off their debt, they wanted to buy a tombstone for Genny. (89 RT 11912.)

Again, the impression Gonzales wanted to leave for the jury was that she was a grieving, caring mother. If she loved and cared for her murdered daughter, yet was willing to ask for mercy for her sister who was convicted of her daughter's murder, it was much more compelling evidence. To show how much she loved and cared about her daughter, she testified about Genny's burial. The prosecutor, therefore, properly inquired about the same subject matter. Mary's knowledge of whether her mother received money for burial expenses was directly related to Genny's burial expenses. Additionally, Mary explained that she had received $2700 from the Crime Victim's Fund that was used for counseling. (89 RT 11928-11929.) Given Mary discussed how she paid for the funeral expenses, the prosecutor was entitled to inquire about the money she received, and whether it was used towards the funeral expenses. It was merely explaining Mary's direct examination testimony.

Next Gonzales complains about the prosecutor's question of Mary as to why she would not have waited until after she got the "old Genny" a headstone before naming another child Genny. Gonzales claims the question was "astonishing for its bad taste." (AOB 426.) Gonzales's objection to this question was sustained, therefore, Gonzales's claim that the trial court committed error in allowing the prosecutor to ask the question is without merit.

Gonzales next complains about the court's admission of four photographs of the plot where Genny was buried. (AOB 427.) Mary specifically testified about Genny's burial, explaining she was buried in a plot next to Mary's aunt. (89 RT 11911.) The prosecutor's admission of the photographs merely showed visually what Mary had already testified to. Gonzales wanted to portray Mary as someone who loved and missed her daughter. (89 RT 11913.) In doing so, Gonzales attempted to bolster Mary's love by describing Genny's burial. Thus, the prosecutor was entitled to ask Mary questions about the burial, and to admit photographs showing what Mary had testified to: Genny's burial site.

The trial court correctly found that Gonzales had raised the issue whether Mary's family was "hurt, affected by Genny's death, attempting to show that they're, caring people who were hurt by her death. The prosecution is entitled, I believe, to meet that to the extent that he can show that these are–there was either little feeling or mitigated feeling about it." (89 RT 11937.) Gonzales claims that the trial court was "simply incorrect" in such findings because whether Genny's family were caring people who were hurt by her death was "not important to the defense because that would not have been relevant to the issue of whether the appropriate penalty for Veronica Gonzales was death or life without parole." (AOB 428.) Gonzales mischaracterizes and/or minimizes the testimony elicited from Mary on direct examination. While she may now argue that it was not

important to her defense that Genny's family were hurt by her death and cared about Genny, her counsel elicited such testimony. The testimony was used to bolster Mary's credibility in asking the jury not to impose death on Gonzales because even Genny's mother was willing to ask for leniency for Gonzales. It was much more powerful testimony if Mary was a concerned mother who loved Genny, rather than someone who found Genny to be unlovable and disposable. Because Gonzales elicited such testimony on direct examination, the trial court properly ruled the prosecutor could show photographs of Genny's burial plot.

Gonzales argues that even if the court was correct in its description of the defense evidence, the photographs did not rebut the testimony because the money Tillie received had nothing to do with whether Mary was hurt by the death of her daughter or with the proper penalty for Gonzales. (AOB 428.) The photographs did not have anything to do with the money Tillie received. They had to do with Mary's testimony about Genny's burial: that the funeral expenses were covered by money she and Pete had, and donated money from the church, and that Genny was buried in a cemetery next to Mary's aunt. (89 RT 11911.) Given Mary was describing Genny's burial, the trial court did not abuse its discretion in allowing a visual depiction of the burial plot that Mary had described.

Relying on Penal Code section 190.3, Gonzales next claims the evidence of the photographs cannot be defended as victim impact evidence. (AOB 428-429.) Penal Code section 190.3 provides, in pertinent part:

> Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may

> be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

To the extent that Gonzales complains about the lack of notice of the evidence, she is barred from challenging the ruling because she did not object in the trial court on the basis that she did not receive adequate notice. (*People v. Howard* (2008) 42 Cal.4th 1000, 1016.) Moreover, because the questions were asked of Gonzales's own witness on cross-examination, they were proper rebuttal and no notice was required. (*People v. Osband* (1996) 13 Cal.4th 622, 713.)

Gonzales argues that any attempt to rely on the evidence as rebuttal, thereby not requiring notice, produces a "conundrum" because if the evidence was rebuttal evidence, it was not victim impact evidence; if it was victim impact evidence, then notice was required. (AOB 429.) This circular reasoning would render the last sentence in the quoted paragraph of Penal Code section 190.3 meaningless. Here, the evidence was rebuttal to Mary's direct testimony, therefore, there was no requirement under Penal Code section 190.3 to give Gonzales notice. Thus, Gonzales's argument that it was not proper victim impact evidence is unavailing. (AOB 429-430.)

Next Gonzales claims the trial court erred in allowing the prosecutor to cross-examine Mary on whether Pete was the father of Mary's youngest child. (AOB 430.) Mary testified on direct examination that her husband, Pete, with whom she had separated, molested their oldest daughter. (89 RT 11905.) She also testified that Pete was not allowed to live with her. (89 RT 11910.) The prosecutor's cross-examination of Mary about this subject was proper. Mary admitted that when she was interviewed by a District Attorney Investigator, Pete was at her house, and that Pete was the father of her youngest child. (89 RT 11948-11949.) The questions on cross-examination went directly to Mary Rojas's credibility. Mary gave the jury

the impression that after Pete was released from prison for molesting her child, she did not see him anymore. That she had a child by him after he was released from prison, showed otherwise. "[A]lways relevant for impeachment purposes are the witness's capacity to observe and the existence or nonexistence of any fact testified to by the witness." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) Because Mary testified to not seeing Pete, it was proper to impeach her about whether she had a subsequent child fathered by Pete to show her lack of credibility.

The last area of cross-examination that Gonzales complains of was the line of questioning about Genny being passed from relative to relative, and concluding by asking Mary whether it was fair to say that nobody wanted Genny, and whether Mary wanted her drugs more than she wanted Genny. (AOB 431-432.) Gonzales has forfeited any claim of error as to this line of questioning because she did not object. (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 113.) Even had she preserved her claim, it is without merit. Mary testified on direct examination that her children were removed from her care by the court two different times, and described the surrounding circumstances. (89 RT 11904-11910.) Because Mary testified to this subject on direct examination, it was proper for the prosecutor to cross-examine Mary on the specifics of where Genny went when she was removed from her home.

Furthermore, it was appropriate for the prosecutor to ask, based on Genny getting passed from relative to relative, whether it was fair to say that no one wanted her. (89 RT 11947.) Mary answered, "No. I wanted Genny." Mary then explained that Genny was getting passed around because Mary was on drugs, and the prosecutor followed-up by asking, "You wanted your drugs more than you wanted Genny?" Mary responded, "I had an addition problem; you're right." (89 RT 11947.) These were merely follow-up questions to the direct examination regarding Mary's

children being removed from her care. It also explained Mary's testimony that she loved and missed her daughter by putting her testimony into perspective. Gonzales presented the evidence that Mary loved and missed Genny, then argues it should not be inquired into or explained on cross-examination. The trial court properly allowed Mary to be cross-examined on issues she testified to on direct examination.

Even if the trial court erred in allowing the prosecutor to ask the questions, any error was harmless. Most of the testimony that was presented that Gonzales complains about was admitted in direct examination. Any additional testimony that was elicited on cross-examination was not prejudicial, particularly given the compelling evidence against Gonzales.

B. The Prosecutor Did Not Commit Misconduct in Closing Argument

Gonzales claims the prosecutor committed misconduct in his closing argument by improperly appealing to the juror's emotions, in violation of her Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair jury determination of the penalty in accordance with due process of law, and to a reliable penalty determination. (AOB 432-444.) The portions of the closing argument that Gonzales claims were improper are as follows:

> As we sat here on Thursday and listened to the victim's mother come into this trial, it had to be the most offensive and repulsive testimony ever heard in a courtroom. It was shocking. It was without humanity, and it was without compassion.
>
> Now, think about this, don't think about it in this case setting; just think about it generically. We had a victim's mother, a victim's mother come in and testify for the defense in a case where a daughter was horribly murdered–that, that is different again than any reality that we will ever know outside of a

> courtroom like this, a victim's mother testifying for the defense–we didn't just have any victim's mother, it was Genny's mother, this little girl's, in this last photograph that we have of her, her mother.
>
> And I hate even saying those words, "mother." Let's call her the biological mother because that's all she is. She is genetically related to what was Genevieve Rojas, not Genny Rojas, Genevieve Rojas, the old Genny.
>
> She took the stand. She knew that her daughter had been mutilated, had been tortured and maimed by the defendant. She even said that her daughter looked like a punk rock monster. And she said that she was a little angry. You don't have to be smart to feel empathy. You don't have to be a brain surgeon to feel compassion. Genny Rojas never had a chance.
>
> The utter lack of humanity that was expressed in this courtroom, the utter lack of caring and empathy for this child was simply amazing. Mary Rojas did not, she didn't care about Genny Rojas, and she never will.
>
> Real parents who lose a child freak out. They lose their minds. They wear their child's death on their sleeve as a badge. They never get over it. It alters their lives forever. They lose their marriages. They lose their jobs. They end up with alcohol problems. They commit suicide because, when you lose a child, you lose a part of you. That's what being a parent is.
>
> And if you remember in voir dire, back in February, when I asked you about–and it sounded like a stupid question–what's a parent? It was for Thursday. It was for Mary Rojas, because she's not a parent; she's biologically related to Genny Rojas, and that is it.

(90 RT 12024-12026.) The prosecutor continued to explain why Mary Rojas was not a credible witness, and how she did not care about her daughter or what happened to her. He explained that she did not even know Genny's birthday. (90 RT 12026.) He continued:

> Of course, then she names her daughter "Genny," her new Genny. She gets back together with her molesting husband, who molested one of the other daughters. And she testifies on direct that she never sees Pete anymore, Pete Rojas, and that's her choice. Of course, on cross, she finally admits, "Oh, yeah, he's the father of new Genny."
>
> New Genny, people who lose dogs and cats don't rename their new pets after their old pets. That shows you what a fungible item Genevieve Rojas was to Mary Rojas and this family, if that's what you want to call them.

(90 RT 12027.) The prosecutor argued that Mary was not a good mother, that nobody cared about Genny, and that she was passed from relative to relative. (90 RT 12027-12028.) He then said, "Genny, a four-year-old, was passed around like a piece of meat or a sack of potatoes by these people." (90 RT 12029.) Gonzales objected, and the court overruled her objection. (90 RT 12029.)

Later in his argument, the prosecutor reminded the jury that the case was about Genny. He said, "she is special, and that's why it's a capital case. Genny didn't have a trial and she had no one to speak for her, no one in society to speak for her; so I wrote a letter to Genny about what society's outrage is regarding this case." The defense objected that it was inflammatory rhetoric, and the court overruled the objection. (90 RT 12033.) The prosecutor continued:

> Genny, perhaps it was a rainy, balmy day when you first cried in pain. Perhaps it was a day like this, a sunny day when happy children like to swing in swings, tumble down grassy banks and laugh and experience the freshness of life when the darkness we call child abuse crept into your life.
>
> Wherever it was, whenever it was, Genny, we were not there. We were too late to hear your cry for help.

> [Defense counsel]: Objection, your Honor. It's inflammatory rhetoric, ask for an admonition.
>
> The Court: Overruled.
>
> [The prosecutor]: You were too young to know that we would care, too young to know that you could reach out and we would help you.
>
> We hear your cries of pain now as the story of those horrible last weeks of your life begin to unfold. It is so painful to picture the life as you saw it, to picture the life of a beautiful little girl being destroyed.
>
> We know now what they did to you. Before your death, we never imagined any human being with a heart and a soul could do that to a human being.
>
> As if we were hearing a nightmare, we heard how you were handcuffed behind your back and until your tiny biceps bled. We heard how you were hung from a hook at night in a closet, alone and afraid. We felt your claustrophobic conditions when the defendant put you into a box, a closet, and a tub to scare you, that you were so frightened that you had diarrhea, which brought about more abuse and more torture. We know that now, too.

(90 RT 12033-12034.)

Defense counsel objected and asked for an admonition. (90 RT 12034.) The court overruled the objection, but told the jury it wanted to add a comment. It then said,

> It's impossible in a case like this for there not to be substantial emotions on both sides. ¶ No matter whose version of the events, no matter whose take on the event you hear, it will be loaded with emotion; so you will hear and feel emotion today. I only remind you that that emotion needs to be channeled through the factors in aggravation, mitigation that I've instructed you about.

(90 RT 12035.)

The prosecutor continued:

> We see the shattered remnants of your smiling face, scarred with burns from a blow dryer as the defendant inflicted unimaginable amounts of pain on what was once your cute little chubby cheeks.
>
> We see the bruises and wounds from people who embraced the pain of hitting a four-year-old in the face. We see your head, no longer with the wavy locks of a four-year-old child, but the grotesque red masses of a horrible burn.
>
> We try to conceptualize, rationalize and make sense of your maiming, yet we can never know what it feels like to have the skin burned off your naked, bruised body. We will never know the horror you went through as your skin weeped and your life slowly and methodically was taken away from you.
>
> How did it feel to stare at your abusers as your life ended? Did you have hope? Did you think of love? Did you think of your choice, your choice to live, your choice to die?
>
> Genny, we do not understand. All of us want to help. All of us want to hold you. All of us want to stop them from attacking you, but we can't. It is too late to stop them from hurting you. And for that, we are truly sorry.
>
> You must have been frightened. You must have been cold. You must have been lonely. You must have been tired and hungry; but worst of all, you must have felt abandoned by all of us.
>
> To know the agony, the humiliation and the intimidation and other abuse you suffered before you gave into death makes us angry. To think that death would be a merciful end to your pain only illuminates the torture and abuse that you suffered. That, too, angers us, anger that society sleeps while other young children like yourself suffer.

> [Defense counsel]: Objection, your Honor. It's irrelevant, ask for an admonition.
>
> The Court: Overruled.
>
> [The prosecutor]: That we did not hear you nor see your sadness in your eyes, your fear and your anxiety brings us shame. You had no spokesperson for life. And for that, we are truly sorry. For your whole life, not one person ever cared for you, cared for you as a parent and cared for you as a human being.
>
> You will never be able to go to a ball game, to play soccer, to play bobby sox softball or even go to a school play. When you needed it most, no one would hold you and love you, love you and tell you that everything would be all right.
>
> Genny, you will not be forgotten. We promise that you will not die in vain. We promise that you will always be in our hearts, in our souls. We choose, we collectively choose to adopt you and to care for you.

(90 RT 12035-12037.) Defense counsel objected that the argument was inflammatory rhetoric and a statement of personal opinion and asked for an admonition. The court overruled the objection, but told the jury that, "[w]ith regard to the statement of personal opinion, the personal opinion of none of the attorneys in this case is relevant to you, Ladies and Gentlemen. Your personal opinions are relevant, and I remind you of that." (90 RT 12037.)

The prosecutor continued:

> We choose as a group to adopt you and to take care of you. You are a member of our family, those of us who have lived with you here in Department 32. We refuse to reject you as your mother and father did for a life of drugs and molestation.
>
> We refuse to ignore you as your grandmother and other relatives did to you. You are us and we are a part of you. We will hold your torturers accountable,

> no matter what pain it puts us through, for we, Genny, will put you first and foremost in our souls.
>
> We will not allow the defendant to portray herself as a victim. We have seen your journey of torture and abuse–

An objection was overruled. (90 RT 12037-12038.)

> The defendant is not a victim. No one who does this to a child can ever be called a victim. No one who embraces inflicting pain upon your body should ever be allowed to portray herself as a victim.
>
> We know now what a victim is. A victim is someone who has a blow dryer placed against her face, who is hung in a closet and who is stuffed in a box. We, Genny, make a commitment, a commitment to stop the defendant and hold her accountable.
>
> Our strength will not wax nor wane despite the assaults on our logic and common sense. We see you as an example of courage and commitment. We will not let you go nor will we ever let you down.[36]

(90 RT 12038.)

While Gonzales objected to the prosecutor's argument regarding the letter to Genny, she did not object to the first portion of the argument she now complains of, wherein the prosecutor discussed Mary Rojas's

---

[36] In a later section of her argument, Gonzales claims another portion of the prosecutor's argument was error, where he said that Gonzales's child abuse history proved she was the perpetrator because she learned to discipline and learned to punish. (AOB 443.) Gonzales's perfunctory claim is not supported by any analysis or authority, therefore it is not properly presented and will not be responded to. (*People v. Turner*, *supra*, 8 Cal.4th at pp. 137, 214, fn. 19; See also, Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Gray*, *supra*, 37 Cal.4th at pp. 168, 198; *People v. Smith*, *supra*, 30 Cal.4th at pp. 581, 616, fn. 8.) To the extent Gonzales incorporates her arguments in Argument II, Respondent incorporates the response in the Respondent's Brief.

testimony. Thus, any claim of error as to that portion of closing argument is forfeited.

> 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion–and on the same ground–the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.'

(*People v. Huggins* (2006) 38 Cal.4th 175, 251-252, quoting *People v. Prieto*, *supra,* 30 Cal.4th at pp. 226, 259.)

Even had Gonzales preserved the issue, she is not entitled to relief based on that line of argument, or the letter to Genny. The prosecutor did not violate the federal Constitution because he did not have "a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gray*, *supra*, 37 Cal.4th at p. 215; *Darden v. Wainwright*, *supra,* 477 U.S. at p. 168; *Donnelly v. DeChristoforo, supra,* 416 U.S. at pp. 637, 642.) Nor did the prosecutor violate state law because his conduct did not render Gonzales's trial fundamentally unfair nor did he use "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza*, *supra*, 3 Cal.4th at pp. 806, 820.) A prosecutor has wide latitude during the closing argument at the penalty phase. (*People v. Schmeck* (2005) 37 Cal.4th 240, 298-299.) Closing argument "may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Williams* (1997) 16 Cal.4th 153, 221.)

The argument commenting on Mary Rojas's lack of credibility was proper. "Even '[h]arsh and vivid attacks on the credibility of opposing witnesses are permitted.'" (*People v. Huggins*, *supra*, 38 Cal.4th at p. 253, quoting *People v. Dennis*, *supra*, 17 Cal.4th at pp. 468, 522.) There is no doubt the prosecutor's remarks were harsh and unbecoming, but that is not

error. "Although harsh and unbecoming, the challenged remarks constituted reasonable–if hyperbolic and tendentious inferences from the evidence. There is no reasonable likelihood that the jury understood the words otherwise." (*People v. Rowland* (1992) 4 Cal.4th 238, 277.) Even a personal attack about a witness that is somewhat "insulting in its implications" is not error where it does not amount to a deceptive or reprehensible method of persuasion. (*Ibid.*)

Gonzales contends that the argument about Mary Rojas "had nothing to do with the determination of the appropriate penalty for Veronica Gonzales" and was a blatant appeal to the juror's emotions. (AOB 434-435.) Because Gonzales presented Mary Rojas's testimony in an effort to spare Gonzales's life, Mary's credibility was at issue. Gonzales wanted to create an impression for the jury that even Genny's mother was willing to ask to spare Gonzales's life. This testimony was much more forceful if Mary was portrayed as a caring, loving mother who was grieving for the loss of her daughter. The prosecutor, in cross-examination, explored those areas, and it was appropriate to comment on the evidence in argument. The argument was relevant to Gonzales's punishment because Gonzales presented Mary as a witness.

Mary did not even know Genny's birthday. (89 RT 11916.) Thus, it was appropriate to comment that Mary lacked compassion for Genny, that she was not a true mother to her, that she lacked humanity, caring and empathy towards Genny, and that Mary did not have an appropriate reaction to the death of her child. (90 RT 12024-12026.) The argument was harsh but it contained reasonable inferences from the evidence. "At the penalty phase . . . considerable leeway is given for emotional appeal so long as it relates to relevant considerations." (*People v. Riggs*, *supra*, 44 Cal.4th at pp. 248, 323 quoting *People v. Sanders* (1995) 11 Cal.4th 475, 551.)

Here, the force of Mary's testimony was a relevant consideration given Gonzales presented her as a witness.

The argument in the form of a letter to Genny did not amount to misconduct either. The prosecutor explained that he wrote a letter to Genny about society's outrage in this case. (90 RT 12033.) Expressing society's outrage for Genny's murder is not an improper argument. (See *People v. Boyette, supra,* 29 Cal.4th at pp. 381, 456 [rejecting argument that it was improper for prosecutor to comment on murders in society in general and the jury's obligation to do something to stop the violence because such argument was not calculated to arouse passion or prejudice]; *People v. Fierro* (1991) 1 Cal.4th 173, 248-249 [argument was proper where prosecutor argued death penalty was morally appropriate because the community and society have the right to defend themselves against the defendant]; *People v. Kaurish* (1990) 52 Cal.3d 648, 715 [not improper argument to refer to jury as "the conscience of the community" and ask for death penalty to show that "society has the courage" to impose a just punishment in this case].)

The argument, in the format of a letter, explained what Genny must have experienced and how alone she must have felt. This was not misconduct. "The prosecutor is permitted to 'invite the jurors to put themselves in the place of the victims and imagine their suffering.'" (*People v. Rundle* (2008) 43 Cal.4th 76, 194, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 672.) It was not misconduct for the prosecutor to point out that Genny was vulnerable, and must have been frightened, lonely, cold, tired, hungry, and abandoned. All these factors made Genny a vulnerable victim.

> A prosecutor may identify those traits of the victim that made the victim vulnerable to crime when such characteristics are relevant to the charged crimes, and has no duty 'to shield the jury from all favorable

> inferences about the victim's life or to describe relevant events in artificially drab or clinical terms.'

(*People v. Guerra, supra*, 37 Cal.4th at pp. 1067, 1159, quoting *People v. Frye* (1998) 18 Cal.4th 895, 975.) Nor was it inappropriate for the prosecutor to point out that Genny's torture and murder made society angry and shameful, and to apologize to Genny because no one in her life cared for her. The circumstances of the crime include the fact that Genny's life was sad in that no one cared for her, she was passed from relative to relative, and she would never get to grow up and lead a normal life where she played sports or attended a school play. The argument was not misconduct in that it was pointing out how vulnerable the victim was.

The prosecutor's argument that society would not forget Genny, would not reject her, and will hold her torturers accountable was not misconduct. Nor was it misconduct to argue that Gonzales was not a victim, Genny was the victim.

> The prosecution has a legitimate interest in rebutting the mitigating evidence that the defendant is entitled to introduce by introducing aggravating evidence of the harm caused by the crime, 'reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society . . . .'

(*People v. Prince, supra*, 40 Cal.4th at p. 1286, quoting *People v. Robinson, supra*, 37 Cal.4th at pp. 592, 650.)

In order to assure the jurors did not allow their emotion to reign over reason, the court instructed them that it would be impossible in a case like this not to have substantial emotion on both sides, and reminded them that the emotion "needs to be channeled through the factors in aggravation, mitigation that I've instructed you about." (90 RT 12035.) Gonzales takes issue with this admonition (although she did not object to it at the time)

because it acknowledged that emotions would be at play, and the only way to interpret the court's instruction was "to let emotion be a factor in the determination whether aggravation outweighed mitigation." (AOB 438.) Gonzales's argument seems to be that emotion cannot enter into the sentencing determination at all. Her position is not consistent with the law.

> Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision. [Citation.] Emotion must not reign over reason and, on objection, courts should guard against prejudicially emotional argument. [Citation.] But emotion need not, indeed, cannot, be entirely excluded from the jury's moral assessment.

(*People v. Leonard* (2007) 40 Cal.4th 1370, 1418, quoting *People v. Smith*, *supra*, 30 Cal.4th at pp. 581, 634.) Indeed, "at the penalty phase, considerable leeway is given for emotional appeal so long as it relates to relevant considerations." (*People v. Riggs*, *supra*, 44 Cal.4th at p. 323, quoting *People v. Sanders*, *supra*, 11 Cal.4th at pp. 475, 551.) Thus, there is some room for emotion, it just cannot be such that it reigns over reason and be prejudicially emotional. The court accurately communicated this to the jury when it told them to channel any emotions through the factors in aggravation and mitigation. "Here the prosecutor's comments were emotional, but not excessively so." (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1418.)

Also, to alleviate any potential prejudice or misunderstanding, the court reminded the jury that the personal opinions of the attorneys were not relevant, only the jurors personal opinions were relevant. (90 RT 12037.) Again, although she did not object to the admonition at the time, Gonzales takes issue with it, claiming it was harmful "as it told the jurors directly that it was fine to act on their own personal opinions" and by using the pronoun

"we" instead of "I," the prosecutor spoke as if he was expressing the personal opinion of the jurors. (AOB 440.) It is unreasonable to think that the jurors would think the admonition meant they could adopt the personal opinions of the prosecutor because it specifically told them that the personal opinions of the attorneys were not relevant. Thus, Gonzales's argument that the admonition "exacerbated" any harm (AOB 440) is untenable.

In *People v. Ghent* (1987) 43 Cal.3d 739, 772, this Court held that isolated and brief references to community outrage and retribution did not constitute misconduct. Gonzales argues that in sharp contrast, here the letter to Genny was not brief or mild, therefore it was error. (AOB 442.) The portion of the letter dealing with community outrage was brief and mild, therefore, it was not in "sharp contrast" to that in *Ghent.*

Moreover, in *Ghent*, the primary focus of the defendant's claim of error relating to appealing to the juror's passion was based on the prosecutor's reference to the impact of the victim's death on her family. (*People v. Ghent, supra*, 43 Cal.3d at pp. 771-772.) This Court in *People v. Ghent* relied on *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] for its holding that the comments about the victim's family were inappropriate. (*People v. Ghent, supra*, 43 Cal.3d at pp. 771-772.) In 1991, however, the United States Supreme Court overruled *Booth* in *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] in holding that victim impact evidence was admissible. (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) Thus, Gonzales's reliance on *Ghent* is misplaced.

Furthermore, Gonzales's characterization of the "letter" did not constitute the centerpiece of the prosecutor's advocacy in favor of a death sentence. (AOB 442.) After his argument about the letter, the prosecutor discussed how the jurors were going to be engaging in a painful process (90

RT 12039), how it was an emotionally difficult case (90 RT 12039, 12066), how to weigh aggravating factors versus mitigating factors (90 RT 12040, 12056-12063), the circumstances of the crime (90 RT 12040-12043, 12047, 12053-12056), that the punishment should fit the crime (90 RT 12045), that Gonzales should not be viewed as a victim (90 RT 12050, 12052), and about Gonzales's lack of remorse (90 RT 12064-12065). Thus, it was not the centerpiece of the prosecutor's argument.

C. Any Misconduct Was Harmless

Even if this Court were to find the prosecutor committed misconduct, it was harmless. Reversal is required when prosecutorial misconduct implicates constitutional rights unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Lenart*, *supra*, 32 Cal.4th at pp. 1107, 1130, citing *Chapman v. California*, *supra*, 386 U.S. at pp. 23-24.) Misconduct that violates state law requires reversal only to the extent it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Hines, supra*, 15 Cal.4th at pp. 997, 1037-1038; *People v. Haskett* (1982) 30 Cal.3d 841, 866; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Under either standard, any error was harmless.

In *Darden v. Wainwright*, *supra,* 477 U.S. at p. 168, the United States Supreme Court stated that,

> [i]t 'is not enough that the prosecutor's remarks were undesirable or even universally condemned.' [Citation.] The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.

(*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.)

> 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.

(*People v. Brown*, *supra*, 31 Cal.4th at pp. 518, 553-554.)

Here, there was no prejudice and Gonzales received a fair trial. The trial court admonished the jury that any emotion needed to be channeled through the factors in aggravation and mitigation (90 RT 12035) and that the personal opinions of the attorneys were not relevant (90 RT 12037). The jury is presumed to have understood and followed the court's curative instructions. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 999.) Also, as detailed in Argument I, subdivision (A)(2), the evidence against Gonzales was compelling. Thus, even if this Court were to find the argument was misconduct, it was harmless.

VIII. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR TO ARGUE THIS WAS THE "WORST CASE" AND PROPERLY PROHIBITED DEFENSE COUNSEL FROM COMPARING THIS CASE TO OTHER WELL KNOWN CASES IN WHICH THERE WAS NO DEATH SENTENCE

Gonzales contends the trial court erred because it allowed the prosecutor to argue that if any murder case deserved the death penalty, this is it, and in not allowing her counsel to compare her case to other well known cases. (AOB 445.) Gonzales claims this error violated her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a fundamentally fair jury trial in accordance with due process of law, to a reliable penalty determination, and to the effective assistance of counsel. (AOB 454-455.) Gonzales's argument is without merit.

Prior to commencement of the penalty phase, the prosecutor requested counsel not be allowed to compare this case to other capital cases. Defense counsel stated he only intended to compare this case to other cases if the prosecutor argued that if there was ever a case that cried out for the death penalty, this is it. (87 RT 11635.) The prosecutor argued that he only intended to make a generic statement. Referring to specific other cases would be inappropriate. The court stated that it did not want counsel "to start testifying to this jury about other cases. That's where I'm going to draw the line." (87 RT 11636.) The court then stated it wanted to read some cases before making a final ruling. (87 RT 11637-11637.)

In further discussions, defense counsel explained he wanted to comment on two or three other cases in which the death penalty was not given to show that the death penalty is not required in every horrible case, such as for the murder of Dr. Martin Luther King, or of Wayne Williams in Atlanta, who murdered several children, Terry Nichols, who was instrumental in the Oklahoma City bombing, or Ted Kaczynski. (89 RT 12003-12004.) The prosecutor argued that the jury would not know what the death penalty statute was in those states, whether capital punishment was enforced at the time, or the various District Attorney's charging criteria. (89 RT 12004-12005.) The trial court, based on *People v. Pride* (1992) 3 Cal.4th 195, 261, held that reference to other cases is irrelevant. To allow such argument would take the focus away from the individual sentencing determination. (89 RT 12005.) The court also noted certain practical problems in referring to local cases in that it would become a shouting match between the parties on the District Attorney's charging policy. (89 RT 12005-12006.) The court also noted the practical problem that other cases presented different issues, and it was not proper to litigate why other defendants did not get the death penalty. (89 RT 12006.) The court distinguished the prosecutor's proposed argument as being a general,

non-specific statement. (89 RT 12007.) The court explained the defense could meet this argument by saying, "this is absolutely not the case justifying the death penalty" or referring to other cases in the media, without specifically naming them. (89 RT 12007-12008.)

The prosecutor, consistent with the court's ruling, argued that, "if any murder requires the death penalty, this is it. If this isn't an appropriate case for capital punishment, then nothing is." (89 RT 12042.)

The trial court properly exercised its discretion in limiting counsel's closing argument by prohibiting counsel from comparing this case to other well known cases. This Court has consistently upheld such a limitation. (*People v. Benavides* (2005) 35 Cal.4th 69, 110; *People v. Hughes* (2002) 27 Cal.4th 287, 398-400; *People v. Roybal* (1998) 19 Cal.4th 481, 528-529; *People v. Marshall* (1996) 13 Cal.4th 799, 854; *People v. Sanders*, *supra*, 11 Cal.4th at pp. 574, 554-555.)

> A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. [Citation.] '[The] right is not unbounded, however; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark.'

(*People v. Benavides*, *supra*, 35 Cal.4th at p. 110, quoting *People v. Marshall*, *supra*, 13 Cal.4th at p. 854.) "The sentences received by notorious defendants in other cases, based on different facts and evidence not before the jurors, is of dubious relevance." (*People v. Roybal*, *supra*, 19 Cal.4th at p. 529.)

> [W]hen, as here, a factual comparison with other notorious crimes cannot be made without a time-consuming inclusion of all of the facts in mitigation and aggravation, the trial court can exercise its discretion to control the scope of oral argument by refusing to allow defense counsel to compare the subject crime to other murders.

(*People v. Benavides*, *supra*, 35 Cal.4th at p. 110.)

Gonzales was not prohibited from making a general argument that this case was not deserving of the death penalty, or referring to other cases in the media generally without specifically naming them. (89 RT 12007-12008.) Thus, the trial court properly exercised its discretion in limiting Gonzales's argument, while still allowing her to make her "central point and to argue in general terms that there were 'worse cases' than [hers], in which the death penalty has not been meted out." (*People v. Hughes*, *supra*, 27 Cal.4th at p. 400; accord *People v. Roybal*, *supra*, 19 Cal.4th at p. 581; *People v. Marshall*, *supra*, 13 Cal.4th at p. 854.)

In spite of the case law cited above, Gonzales argues the trial court erred because it relied on *People v. Pride*, *supra*, which held it was a proper exercise of discretion to exclude expert testimony about cases in which there had been a miscarriage of justice, and here Gonzales wanted to refer in argument to matters of widespread public knowledge, so it is distinguishable. (AOB 447-448.)

Although the issue arose in a different context in *People v. Pride*, the trial court correctly discerned its holding: that reference to other cases is irrelevant, and to allow such argument would take the focus away from the individual sentencing determination. (89 RT 12005.) That is precisely what this Court held in *People v. Pride*:

> information about trials, verdicts, and sentences in unrelated criminal cases had no bearing on the appropriate penalty in this particular case. As we have said many times, such a determination rests on the jury's individualized assessment of the circumstances of the capital crime, and the character and background of the defendant.

(*People v. Pride*, *supra*, 3 Cal.3d at p. 261.) Even though the issue in *People v. Pride* was whether the trial court properly excluded expert testimony, the holding is still applicable to the scope of closing argument.

Moreover, Gonzales ignores the body of authority, cited above, specifically applying the same holding to restrictions on closing argument.

Gonzales argues that because the trial court misread *People v. Pride* as controlling, there was no exercise of discretion. (AOB 450-451.) Apparently Gonzales bases that argument on the court's statement that it was "pretty much black-letter law" that referring to other cases is irrelevant. (89 CT 12005.) Here, the trial court did not "misread" *People v. Pride*; nor did it misunderstand the legal principles involved. As discussed above, references to other death penalty cases is irrelevant. Moreover, after the court discussed the "black-letter law," it went on to state,

> but my real concerns here–real practical concerns in this case are, no. 1, I don't want and would not allow counsel to raise other local cases–and there are some that come to mind–where it might be inviting to say, 'here's a case that didn't result in a death penalty. Here's a case that didn't result in the D.A. even charging the death penalty.' ¶ I want that avoided from the standpoint–principally from the standpoint of not wanting to get into a shouting match between two sides as to the D.A.'s policy. I'm hearing no offer along that line. ¶ The other bottom-line consideration is I don't want cases raised that really beg the D.A., then, to say, 'well, but there's a reason why that case didn't get the death penalty.' Example–a simple one that you didn't raise is that if somebody were to say, 'well, Charles Manson is not on death row. He's still alive. Sirhan Sirhan is still alive.' The simple answer to that is
>
> [Defense Counsel]: He got the death penalty and it was just reversed when it was thrown out. I know that.
>
> [Court]: Exactly. I don't know exactly why Wayne Williams didn't get the death penalty. But I know why, at least from the newspapers, Ted Kaczynski didn't get the death penalty. And it has more to do with his state of mind and the fact that a plea was

> worked out than anything else. ¶ So the–my other bottom-line problem is I don't want counsel to get into a position of litigating–having to litigate other cases, why this case or that case was worthy of the death penalty. And its sort of hard for me to imagine how big, nationally-known cases could be raised without raising that concern.

Thus, the court clearly engaged in an analysis and exercised its discretion.

Again ignoring established authority and relying on *People v. Woodson* (1965) 231 Cal.App.2d 10, Gonzales argues that it "has long been deemed permissible to refer to such matters in argument." (AOB 448.) In *People v. Woodson*, the Court of Appeal held the trial court committed error because it did not allow defense counsel to refer to a newspaper article about a man who was wrongly convicted of three robberies. (*People v. Woodson*, *supra*, 231 Cal.App.2d at p. 15.) It stated, "[i]n our view, the attorney should have been permitted to refer to this as a part of legitimate argument that instances of convictions on the basis of mistaken identity are common." (*Id.* at p. 16.)

Since the basis of the decision in *Woodson* was that convictions based on mistaken identity are common, it is distinguishable because Gonzales's counsel was attempting to rely on argument about a subject that was not common–what the aggravating and mitigating facts were in other well known murder cases. (See *People v. London* (1988) 206 Cal.App.3d 896, 909 [Court of Appeal distinguished *People v. Woodson* in holding trial court did not abuse its discretion in not allowing counsel to refer in argument to a Time magazine article about mistaken identity because it was irrelevant to the case before it].)

Similarly, Gonzales relies on *People v. Guzman* (1975) 47 Cal.App.3d 380, 392 to support her position. (AOB 449.) In *People v. Guzman*, the Court of Appeal relied on *People v. Woodson* in holding that to the extent counsel was not permitted to refer to magazine and newspaper articles

reflecting illustrations of incidents of misidentification, "a matter of common knowledge," it was error. (*People v. Guzman*, *supra*, 47 Cal.App.3d at p. 392.) Again, here, *Guzman* does not support Gonzales's position, because counsel did not request to argue matters of common knowledge.[37]

Nor does *People v. Williamson* (1977) 71 Cal.App.3d 206, 215-217, support Gonzales's position, as she claims. (AOB 449.) In *People v. Williamson*, the Court of Appeal upheld the trial court's ruling prohibiting defense counsel from reading excerpts from an article in Scientific Magazine on misidentification. (*People v. Williamson*, *supra*, 71 Cal.App.3d 206, 215.) The court drew a distinction between arguing those things to the jury that are of common knowledge, and theories and experiments that are not matters of common knowledge. (*Id.* at pp. 215-216.) This is entirely consistent with the trial court's ruling. While counsel could refer generally to other cases, counsel could not specifically name those cases because it is not a matter of common knowledge what the aggravating and mitigating circumstances were in those other cases, and "it is not proper to litigate why other defendants did not get the death penalty." (89 RT 12006.)

Gonzales attempts to bolster her argument because the court in *People v. Woodson* relied on a decision from this Court, *People v. Love* (1961) 56 Cal.2d 720. (AOB 448.) In *People v. Love*, this Court held a prosecutor's remarks about capital punishment being a more effective deterrent than imprisonment were improper. (*People v. Love*, *supra*, 56 Cal.2d at pp. 730-731.) This Court stated that counsel "may state matters not in evidence that

---

[37] To the extent that the holdings in *People v. Woodson* and *People v. Guzman* are inconsistent with the holdings by this Court as cited above, this Court's precedents are to be followed. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

are common knowledge, or are illustrations drawn from common experience, history, or literature." (*People v. Love*, *supra*, 56 Cal.2d at p. 730.) As support for that proposition, this Court cited (without discussion), three cases, including *People v. Travis* (1954) 129 Cal.App.2d 29, 37-39.)

Thus, Gonzales argues that the Court of Appeal in *Woodson* concluded that this Court adopted the entire analysis in *People v. Travis*. The Court of Appeal, in *People v. Travis*, held the trial court erred because it confused argument with evidence, and therefore, did not allow the defense attorney to argue any matters that were not admitted in evidence, including reading from a current issue of Time magazine about the unreliability of confessions made under pressure, reading from a published opinion from this Court, and anecdotal stories of returning prisoners of war from Korea. (*People v. Travis*, *supra*, 129 Cal.App.2d at p. 35, 37-39.) The court concluded, "[i]f argument is to be so restricted, there could be no use made of the writings of philosophers, patriots, statesmen or judges." (*Id.* at p. 37.)

Even if, by citing to *People v. Travis* for a general proposition of law, this Court were adopting its holdings, it does not change the analysis. Here, counsel was not prohibited from referring to writings such as those by philosophers, patriots, statesmen or judges. Counsel was not prohibited from arguing in general terms that this case did not merit the death penalty, or referring generally to other cases, without specifically naming the cases. Thus, this Court's ruling was consistent with this Court's decision in *People v. Love*, and the Court of Appeal's decision in *People v. Travis*.

Although Gonzales acknowledges this Court, in *People v. Marshall*, *supra*, upheld the trial court's restriction on closing argument, she argues "different circumstances should lead to a different result" because here defense counsel did not propose to make any detailed comparison of the facts of different cases, as did defense counsel in *Marshall*. (AOB 449-

450.) The distinction Gonzales draws does not change the result. In both cases, the trial courts appropriately exercised their discretion. In *Marshall*, the trial court ruled defense counsel could compare the circumstances of the defendant's case with other local cases, but could not argue the other cases in detail. (*People v. Marshall, supra*, 13 Cal.4th at p. 854.) This Court in *Marshall* did not hold that the trial court was required to allow a general discussion of other trials. This Court held the court's ruling fell within its discretion to control the scope of closing argument "and did not preclude defendant from making his central point: that there have been murder cases involving more shocking, heinous, cruel or callous facts than those present here." (*Ibid.*)

Gonzales argues that the People on appeal in *Marshall* made an argument similar to the analysis of the present trial court, which this Court rejected--that this claim is covered by the settled rule that the death penalty law does not encompass intercase proportionality review. (AOB 449-450.) This Court noted that the issue raised was not the propriety of intercase proportionality review; it was whether the trial court impermissibly limited the scope of argument. (*People v. Marshall, supra*, 13 Cal.4th at p. 854.) This Court went on to find the trial court did not abuse its discretion. (*Id.* at p. 855.) Likewise, the trial court here did not analyze the issue as one of intercase proportionality review. The trial court held that references to other cases was irrelevant, and to allow such argument would take the focus away from the individual sentencing determination. It also found it would unnecessarily inject the District Attorney's charging policy, that other cases present different issues, and it was not practical to litigate why other defendants did not get the death penalty. (89 RT 12005-12006.)

Gonzales also argues the court did not properly exercise its discretion because it restricted the defense from arguing about other cases, "while simultaneously allowing the prosecutor to make the argument that if any

case ever deserved a death sentence, it was the present case" and that allowing the prosecutor's argument was inconsistent with the court's ruling that there must be an individualized sentencing determination based on the present defendant. (AOB 451-452.) Gonzales is comparing apples to oranges. The prosecutor did not compare this case to any other cases. His argument was general. It was short and simple: "If any murder requires the death penalty, this is it. If this isn't an appropriate case for capital punishment, then nothing is." (89 RT 12042.) It is clearly based on the present defendant, and that based on the crime, she was deserving of the death penalty. The prosecutor did not compare Gonzales's case to other murder cases.

This Court has held similar arguments were appropriate because they were reasonably fair comments on the evidence. In *People v. Hovey*, this Court held it was a fair comment on the evidence for the prosecutor to argue that "the defendant's crime was the 'worst possible' or the most 'incredibly horrible' crime one might commit." (*People v. Hovey* (1988) 44 Cal.4th 543, 579.) In *People v. Navarette*, this Court held it was not misconduct for the prosecutor to argue the murders were "brutal almost beyond imagination" and that "nothing . . . could even come close to showing the true horror of these acts." (*People v. Navarette* (2003) 30 Cal.4th 458, 518.)

Without citing any authority, Gonzales also argues that the prosecutor's argument told the jury to look only at the nature of the present murder, and not to consider the mitigating evidence. (AOB 452.) Gonzales's interpretation of the argument is irrational and illogical. Moreover, Gonzales has not cited any authority that it would be improper to argue that the circumstances of the crime outweigh any mitigating factors.

Again, without citing any authority, Gonzales claims the argument told the jurors that anybody who favored capital punishment in general must necessarily approve it in this particular case. (AOB 452.) Gonzales then concludes that because all the jurors in voir dire said they would be able to return a death verdict, the prosecutor was effectively arguing that any juror who failed to support a death verdict would be violating his or her oath. (AOB 452, fn. 126.) Again, Gonzales's argument is untenable. The prosecutor merely argued, as an advocate, that Gonzales was deserving of the death penalty; just like defense counsel asked the jury to spare Gonzales's life. (See 89 RT 12127, 12141-12142.) Moreover, Gonzales's conclusion that the prosecutor was impliedly arguing that a juror who failed to support a death verdict was violating his or her oath cannot be deduced from the prosecutor's statement. The prosecutor did not argue the jurors would be violating their oath; nor did he reference their statements in voir dire. (See *People v. Riggs*, *supra*, 44 Cal.4th at pp. 324-326 [prosecutors use of a chart containing blow ups of juror's statements in their questionnaires was improper].) Therefore, Gonzales's argument lacks merit.

Gonzales next takes issue with the following statement by the trial court:

> My sense of that is for the D.A. to say that, 'if there was ever a case, it's this case,' or anything of that nature–it's what we call hyperbole. It's puffing. It's a generalized, non-specific statement that this is the real deal from his standpoint.

(89 RT 12007; AOB 452.) Gonzales claims the court's reasoning was flawed because it was internally inconsistent (hyperbole and puffing are exaggerating which is the opposite of the "real deal"). She also claims the expression this was the "real deal" was an improper expression of the prosecutor's personal belief. (AOB 452-453.)

The court's statement was not the basis for its decision. It was an attempt to characterize the argument, and to explain to defense counsel that it was a general statement, which is permissible. Moreover, using a hyperbole, unless it is misleading, is not improper. (*People v. Navarette*, *supra*, 30 Cal.4th at p. 519 [this Court held that the characterization in argument of a telephone call that the defendant made "rejoicing celebration" and "brag[ging]" fell within the scope of permissible argument because it "was a hyperbole" and was not misleading to the jury].)

Additionally, the trial court's characterization of the prosecutor's intended statement does not change the nature of the statement. The prosecutor did not express his own belief. Gonzales claims the prosecutor expressed his own belief because "the jury could only infer that the prosecutor was basing his personal belief on expertise he had obtained in prosecuting a variety of cases that did not merit a death sentence" and that the prosecutor was "an unsworn expert witness on when a death sentence would be appropriate." (AOB 454.) The inferences Gonzales asks this Court to draw are not reasonable.

Gonzales relies on *People v. Bain* (1971) 5 Cal.3d 839, 848, to support her position. (AOB 453-454.) In *People v. Bain*, this Court held the thrust of the prosecutor's remarks were that he would not be prosecuting the case unless he personally believed the defendant to be guilty. (*People v. Bain*, *supra*, 5 Cal.3d at p. 848.) This Court noted that a prosecutor may not "express a personal opinion or belief in a defendant's guilt, where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial." (*Ibid.*) Here, the prosecutor did not mention or rely on any other cases or rely or infer he was relying on anything but the evidence presented in the case. To the contrary, he argued (based on the heinous nature of the murder and torture) that "if any murder requires the

death penalty, this is it. If this isn't an appropriate case for capital punishment, then nothing is." (89 RT 12042.)

In *People v. Mayfield*, *supra*, 14 Cal.4th at pp. 668, 804, this Court rejected a similar argument. In *Mayfield*, the prosecutor argued, "[i]f there was ever an individual who has blatantly displayed his disregard and his contempt for our laws, it's Dennis Mayfield. And if there was anyone in our society, because of that conduct, that warrants the death penalty, it's Dennis Mayfield. And I would ask you to return that verdict." This Court explained that the statements "were not couched as an expression of personal opinion but as a conclusion to be drawn from the evidence. In any event, it is not misconduct for a prosecutor in the penalty phase of a capital case to express in argument a personal opinion that death is the appropriate punishment, provided the opinion is grounded in the facts in evidence." (*Ibid.*; accord *People v. Rundle*, *supra*, 43 Cal.4th at pp. 76, 191.) Thus, Gonzales's argument fails.

Lastly, Gonzales claims the court's restriction on counsel's argument violated her constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to a fundamentally fair jury trial in accordance with due process of law, to a reliable penalty determination, and to the effective assistance of counsel. Because the court did not err, these claims fail. (*People v. Benavides*, *supra*, 35 Cal.4th at pp. 69, 111.)

Even if the trial court did err, any error was harmless, regardless of whether the error was of constitutional magnitude or not. As discussed in Argument I, subdivision (A)(2), the evidence against Gonzales was compelling. The facts of the crime, committed against a helpless four-year-old girl, were heinous. Comparing the murder of Genny to that of Dr. Martin Luther King, or comparing Gonzales to Wayne Williams from Atlanta, Terry Nichols, or Ted Kaczynski would not have changed the outcome. Nor would the outcome have been different had the prosecutor

not argued, "if any murder requires the death penalty, this is it. If this isn't an appropriate case for capital punishment, then nothing is." (89 RT 12042.) Gonzales was given the death penalty because the brutal nature of the torture and murder of such a vulnerable victim. Thus, any error is harmless.

IX. CALIFORNIA'S DEATH PENALTY DOES NOT CONTAIN FLAWS MANDATING REVERSAL OF GONZALES'S SENTENCE

Gonzales raises a number of challenges to the death penalty, which she acknowledges have previously been rejected by this Court. (AOB 456.) Gonzales has not presented sufficient reasoning to revisit these issues, therefore, extended discussion is unnecessary and Gonzales's claims should all be rejected consistent with this Court's previous rulings.

A. The Jury Is Not Constitutionally Required to Unanimously Find Beyond a Reasonable Doubt That The Aggravating Factor(s) Existed, That Aggravation Outweighed Mitigation, or That Death Was the Appropriate Punishment

Gonzales contends the failure of the jury to unanimously find beyond a reasonable doubt (1) on which aggravating circumstances they relied; (2) that death was the appropriate punishment; and (3) that aggravation outweighed mitigation, violated her Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, trial by jury, and reliability requirements. (AOB 456.) Although Gonzales acknowledges this Court has rejected this argument, she argues under *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] that such factual findings must be made beyond a reasonable doubt by a unanimous jury. (AOB 456-458.)

California's death penalty statute is constitutional, and this Court has determined that the United States Supreme Court decisions in *Apprendi* and *Ring* do not alter that conclusion.

As this Court's precedent makes clear:

> The death penalty law is not unconstitutional for failing to impose a burden of proof–whether beyond a reasonable doubt or by a preponderance of the evidence–as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.] Unlike the statutory schemes in other states cited by defendant, in California 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification. [Citations.] ¶ The jury is not constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.] ¶ Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered our conclusions regarding burden of proof or jury unanimity.

(*People v. Brown* (2004) 33 Cal.4th 382, 401-402.)

In California "once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole." (*People v. Ward* (2005) 36 Cal.4th 186, 221 quoting *People v. Prieto*, *supra*, 30 Cal.4th at pp. 226, 263.) The United States Supreme Court's decisions, including *Cunningham*, "interpreting the Sixth Amendment's jury trial guarantee [citations] have not altered our conclusions in this regard." (*People v. Whisenhunt*, *supra*, 44 Cal.4th at pp. 227-228.) *Cunningham* "involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law" (*People v.*

Prince, *supra*, 40 Cal.4th at p. 1297), and thus has no bearing on this Court's earlier decisions upholding the constitutionality of the state's capital sentencing scheme (*People v. Stevens* (2007) 41 Cal.4th 182, 212).

Thus, California's death penalty withstands constitutional scrutiny, even after reexamination in light of *Apprendi* and *Cunningham*. Gonzales has not presented any reason to reconsider this issue.

B. The Jury Is Not Constitutionally Required to Have Written Findings As To The Aggravating Factors or To Have Jury Unanimity on All Aggravating Factors

Gonzales argues the failure to require written findings by the jury as to the aggravating factors, and to require unanimity on all aggravating factors, "and the failure to provide a procedure enabling meaningful appellate review of the sentencing decision" violated her Fifth, Eighth, and Fourteenth Amendment rights to due process and reliability. (AOB 458.)

This Court has consistently rejected any claim that written findings are required by the jury as to aggravating factors. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 329; *People v. Smith*, *supra,* 35 Cal.4th at pp. 334, 374; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.) Likewise, this Court has consistently held that the jury need not be unanimous as to the aggravating factors. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 329; *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 228; *People v. Rundle*, *supra*, 43 Cal.4th at p. 198; *People v. Elliot*, *supra*, 37 Cal.4th at p. 487.) Gonzales has not presented any reason to reconsider this issue.[38]

---

[38] It is not clear from Gonzales's citation or argument what her argument is with regard to having a procedure enabling meaningful appellate review. (AOB 458.) This Court should reject any assignment of error on this ground as it is not properly presented. It is a perfunctory assertion without development. (*People v. Turner*, *supra*, 8 Cal.4th at pp. 137, 214, fn. 19; See also, Cal. Rules of Court, rule 8.204(a)(1)(B); *People* (continued...)

C. The Special Circumstances Are Not Overly Broad

Gonzales contends California's list of special circumstances include so many types of murders, and have been interpreted so broadly, that California's death penalty law fails to adequately narrow the class of persons who are death-eligible, in violation of the Eighth Amendment and article I, section 17 of the California Constitution. (AOB 458.) This Court has consistently rejected this claim. (*People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Cook* (2007) 29 Cal.4th 566, 617; *People v. Elliot*, *supra*, 37 Cal.4th at p. 487; *People v. Harris* (2005) 37 Cal.4th 310, 365.) Gonzales has not presented any reason to reconsider this issue.

D. Intercase Proportionality Review Is Not Constitutionally Required

Gonzales contends the failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 458-459.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 105; *People v. Elliot*, *supra,* 37 Cal.4th at p. 488; *People v. Smith*, *supra*, 35 Cal.4th at p. 374; *People v. Jones*, *supra*, 29 Cal.4th at p. 1267.)[39]

(...continued)
v. Gray, *supra*, 37 Cal.4th at pp. 168, 198; *People v. Smith*, *supra*, 30 Cal.4th at pp. 581, 616, fn. 8.)

[39] Gonzales also argues California's failure to provide intracase proportionality review renders the death penalty unconstitutional. (AOB 458-459.) Gonzales is mistaken in that intracase proportionality review is provided to determine whether the penalty is disproportionate to a defendant's culpability. (*People v Valencia*, *supra*, 43 Cal.4th at pp. 268, 310-311; *People v. Steele* (2002) 27 Cal.4th 1230, 1269.) Gonzales has not requested this Court engage in intracase proportionality review, however, if she did, given the heinous crime and its circumstances, Gonzales's penalty is not disproportionate to her culpability.

E. The Terms "Extreme" and "Substantial" Do Not Unconstitutionally Limit Mitigation Evidence

Gonzales contends the use of the words "extreme" and "substantial" in Penal Code section 190.3, subdivisions (d) and (g), defining when mental or emotional disturbance, or the dominating influence of another are mitigating factors, creates an impermissible barrier to considering mitigation evidence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 459.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Parson* (2008) 44 Cal.4th 332, 369-370; *People v. Salcido*, *supra*, 44 Cal.4th at pp. 93, 168; *People v. Prince*, *supra*, 40 Cal.4th at pp. 1179, 1298; *People v. Beames* (2007) 40 Cal.4th 907, 934.)

F. The Death Penalty Is Not Unconstitutional Because District Attorneys Exercise Discretion on When to Seek the Death Penalty

Next Gonzales contends because California grants unlimited discretion to prosecutors to decide when to seek the death penalty, it results in different standards in different counties, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 459-460.) This Court has considered and consistently rejected this argument. (*People v. Harris*, *supra*, 37 Cal.4th at p. 366; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Yeoman* (2003) 31 Cal.4th 93, 165; *People v. Holt*, *supra*, 15 Cal.4th at pp. 619, 702.) Gonzales has not presented any reason to reconsider this issue.

Relying on *Bush v. Gore* (2000) 531 U.S. 98, 104-111 [121 S.Ct. 525, 148 L.Ed.2d 388], a voting rights case that held it violated equal protection where procedures in counting ballots in various counties differed, Gonzales argues that the death penalty must also be applied reasonably from one

county to another. (AOB 460.) *Bush v. Gore*, a voting rights case, does not purport to suggest that prosecutorial discretion must be strictly circumscribed by a state in order to ensure uniform application of the death penalty laws. A case is not authority for an issue not considered by the court. (*People v. Dickey* (2005) 35 Cal.4th 884, 901.)

Moreover, this Court recently held *Bush v. Gore* does not warrant revisiting its prior holdings. (*People v. Bennett* (Jan. 29, 2009, S058472 ___ Cal.4th ___ [p. 68, fn. 19][2009 Cal. Lexis 338].) Thus, Gonzales's contention is without merit.

G. The Delay in Death Penalty Appeals Does Not Render it Unconstitutional

Gonzales contends the 60 month delay to appoint appellate counsel, and the lengthy time it will take to decide her automatic appeal, results in psychological brutality in violation of the Eighth and Fourteenth Amendments. (AOB 460.) The automatic appeal process in death penalty cases, which will result in the delay of which Gonzales complains, is a constitutional safeguard, not a constitutional defect. Thus, it does not constitute cruel and unusual punishment.

This Court has repeatedly rejected this identical claim. (*People v. Jones*, *supra,* 29 Cal.4th at pp. 1229, 1267; *People v. Anderson* (2001) 25 Cal.4th 543, 606 [defendant spent over twenty years on death row]; *People v. Massie* (1998) 19 Cal.4th 550, 574 [defendant spent 16 years on death row]; *People v. Frye*, *supra*, 18 Cal.4th at pp. 894, 1030-1031; *People v. Hill* (1992) 3 Cal.4th 959, 1014.) Moreover, Gonzales's argument is untenable because "[i]f the appeal results in reversal of the death judgment, [s]he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged [her] life." (*People v. Anderson, supra*, 25 Cal.4th at p. 606.) Thus, Gonzales's claim should be rejected consistent with this Court's longstanding authority.

H. Penal Code Section 190.3 Is Not Impermissibly Broad

Gonzales argues that Penal Code section 190.3, subdivision (a), which requires the finder of fact to consider "the circumstances of the crime" in determining the appropriate penalty in capital cases, has been applied in such a broad manner that they virtually apply to every feature of every murder, including those that contradict each other, which results in arbitrary and contradictory application, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 460-461.)

This Court has rejected this argument.

> It is not inappropriate . . . that a particular circumstance of a capital crime may be considered aggravating in one case, while a contrasting circumstance may be considered aggravating in another case. The sentencer is to consider the defendant's individual culpability; there is no constitutional requirement that the sentencer compare the defendant's culpability with the culpability of other defendants. [Citation.] The focus is upon the individual case, and the jury's discretion is broad.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1051; accord *People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Maury* (2003) 30 Cal.4th 342, 439.) Gonzales has not presented any reason to reconsider this issue, therefore, her claim should be rejected.

I. California's Death Penalty Law Is Not Unconstitutional Because There Is No Presumption of a Life Sentence

Gonzales contends her constitutional rights under the Fifth, Eighth and Fourteenth Amendments were violated because there is not a presumption of life in the penalty phase. (AOB 461.) This Court has repeatedly rejected Gonzales's argument that there is a presumption of life in the penalty phase of a capital trial that is analogous to the presumption of

innocence at the guilt trial. (*People v. Abilez* (2007) 41 Cal.4th 472, 532; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp* (2001) 26 Cal.4th 1000, 1137.) Gonzales has not presented any compelling reason for this Court to revisit these holdings.

J. Group Voir Dire is Constitutional

Gonzales contends the trial court's failure to grant her request to voir dire the jurors individually, pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, deprived her of her constitutional rights protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments because this Court's fairness rationale in *Hovey* could not simply disappear because the voters passed on initiative. (AOB 461-462.) In *Hovey*, this Court, "pursuant to its supervisory authority over California criminal procedure" mandated individual and sequestered voir dire on a juror's death penalty views. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 80.) This Court did so as a rule of procedure, not because it was constitutionally required. (*People v. Lewis*, *supra*, 43 Cal.4th at pp. 415, 493.) In 1990, the voters passed an initiative, Proposition 115, which abrogated the rule in *Hovey*. (*People v. Slaughter*, *supra*, 27 Cal.4th at pp. 1187, 1199.) This Court has consistently and repeatedly held abrogation of the *Hovey* procedure does not result in a violation of a defendant's constitutional rights. (*People v. Lewis*, *supra*, 43 Cal.4th at pp. 493-495; *People v. Slaughter*, *supra*, 27 Cal.4th at p. 1199, fn. 2; *People v. Box* (2000) 23 Cal.4th 1153, 1180-1181.) Gonzales has not presented any compelling reason for this Court to revisit these holdings.

K. The Automatic Appeal Process Is Not Impermissibly Influenced by Politics

Gonzales claims her constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated because this Court has proven itself unable to review death judgments without being unduly

influenced by political pressure. (AOB 462-464.) In particular, Gonzales notes that there was a widespread political campaign that was successful in unseating three sitting Justices, largely as a result of death penalty reversals, and subsequently, there was a much higher number of affirmances. (AOB 463.) This Court has repeatedly and consistently rejected this argument. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1299; *People v. Avila* (2006) 38 Cal.4th 491, 615; *People v. Samuels* (2005) 36 Cal.4th 96, 138; *People v. Kipp*, *supra,* 26 Cal.4th at pp. 1140-1141.) Gonzales has not presented any reason for this Court to reconsider these holdings.

L. California's Death Penalty Does Not Violate International Law

Lastly, Gonzales contends all the alleged violations of state and federal law also constitute violations of international law, including Articles 6 and 14 of the International Covenant on Civil and Political Rights and Articles 1, 2, and 6 of the American Declaration of the Rights and Duties of Man. (AOB 464.) This Court has repeatedly rejected similar arguments and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia*, *supra*, 44 Cal.4th at pp. 1101, 1143; *People v. Panah* (2005) 35 Cal.4th 395, 500; *People v. Ward*, *supra*, 36 Cal.4th at p. 222; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488.) Gonzales does not present any reason to revisit these holdings.

X. Even If There Was Error in The Guilt Phase, It Was Not Prejudicial, and Does Not Require Reversal of The Penalty Phase

Gonzales contends that even if her guilt phase claims are harmless error, they should be reconsidered in evaluating whether they were harmful

during the penalty phase. (AOB 465-476.) Gonzales argues that because this case was close and she relied on lingering doubt in the penalty phase, guilt phase errors that might have been harmless under traditional guilt phase tests of prejudice might nonetheless have had the effect of negating a lingering doubt as to guilt. (AOB 466-467.)

State law errors at the guilt phase are reviewed under the standard announced in *People v. Watson*, *supra*, 46 Cal.2d at p. 836, i.e., whether it is "reasonably probable" a result more favorable to the defendant would have been reached had the error not occurred. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; *People v. Brown* (1988) 46 Cal.3d 432, 446-447.) Because of the "fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination," a more exacting standard of review is applied. (*People v. Brown, supra*, 46 Cal.3d at pp. 446-447.) Thus, state law error occurring at the penalty phase of a capital trial "will be considered prejudicial when there is a 'reasonable possibility' such an error affected a verdict.'" (*People v. Jackson*, *supra*, 13 Cal.4th at pp. 1164, 1232, quoting *People v. Brown*, *supra*, 46 Cal.3d at p. 447.) This standard is the same, "in substance and effect" as the beyond-a-reasonable-doubt standard of *Chapman*. (*People v. Abilez*, *supra*, 41 Cal.4th at pp. 472, 526; *People v. Prince*, *supra*, 40 Cal.4th at p. 1299.)

As discussed previously, the only error in the guilt phase was the trial court's order of Gonzales to submit to psychological testing, based on *Verdin v. Superior Court*. Assuming this Court applies *Verdin* retroactively, it was state law error, and any error was harmless, as already explained, under either the *Watson* standard, or the *Chapman* standard. Also as discussed, the evidence against Gonzales was compelling. Her abuse, torture, and murder of a helpless four-year-old girl entrusted to her care was indefensible, even if Gonzales was abused as a child and in a

violent relationship with her husband. Gonzales's murderous conduct was despicable. The jury found Gonzales intentionally murdered Genny and it involved the infliction of torture, and was committed while Gonzales was engaged in the commission and attempted commission of the crime of mayhem. Although Gonzales did not have a prior criminal record, the conduct she engaged in was ongoing, occurring over a period of time.

Gonzales discounts the aggravating evidence because it only consisted of the circumstances of the crime. (AOB 474.) Based on the compelling nature of the circumstances of the crime, a different outcome would not have occurred. Gonzales placed Genny in a scalding bathtub, causing her toenails and the outer layer of her skin to burn off from her waist to her toes. Genny had a 90 percent survival rate had she received medical attention. Instead, Gonzales allowed Genny to go into shock and die.

The torture leading up to Genny's fatal injury included the Gonzaleses burning Genny's head with hot water causing a severe burn, burning her face and body with a blow dryer and curling iron, tying her hands together with rope, handcuffing her, pulling her hair out, hanging her from a hook in a closet, strangling her and putting her in a small wooden box in a closet. Genny had injuries all over her body, including second degree burns to her head that caused hair loss and infection, black eyes, injuries to her ears so deep the cartilage was exposed, and ligature marks from being tied and bound.

Regardless of whether the trial court committed error for ordering Gonzales to submit to psychological testing or any other errors Gonzales alleges, it is not reasonably possible there would have been a different outcome. Thus, Gonzales's claim is without merit.

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: February 6, 2009

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General

ANNIE FEATHERMAN FRASER
Deputy Attorney General
Attorneys for Plaintiff and Respondent

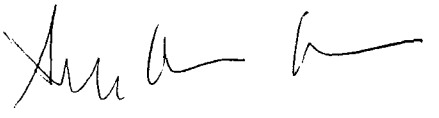
AFF:gnn
SD1998XS0008
80329166.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **77,288** words.

Dated: February 6, 2009

EDMUND G. BROWN JR.
Attorney General of California



ANNIE FEATHERMAN FRASER
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Veronica Gonzales** Case No.: **S072316**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 6, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Mark E. Cutler
Attorney at Law
P.O. Box 172
Cool, CA 95614-0172
Attorney for Appellant
Veronica Utiba Gonzales
(two copies)

Michael G. Millman, Executive Director
California Appellate Project
101 Second St., Ste. 600
San Francisco, CA 94105
(two copies)

San Diego County Superior Court
Hon. Michael D. Wellington, Judge
330 W. Broadway
San Diego, CA 92101

Bonnie M. Dumanis, District Attorney
San Diego County District Attorney's Office
330 West Broadway, Ste. 1320
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 6, 2009, at San Diego, California.

G. Nolan
Declarant

Signature

SD1998XX0006
80333272.doc