C.A. No. 03-99010

D. Ct. No. CR-01-1062-PCT-MHM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEZMOND MITCHELL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

REPLACEMENT BRIEF OF APPELLEE

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Date Mailed: August 31, 2006

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III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 based on an 11 count Second Superseding Indictment charging defendant with offenses against the United States. (CR 130; ER 18.)[1]

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) for Counts 1 and 3 through 11, and 18 U.S.C. § 3595 for Count 2, based on the jury's verdicts of guilt and the entry of the final judgment by the district court on September 15, 2003. (CR 424; ER 960-71.)

C. Timeliness of Appeal

Following the entry of the judgment on September 15, 2003, defendant filed a notice of appeal on September 22, 2003. (CR 426; ER 973.) The notice was timely pursuant to Fed. R. App. P. 4.

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[1]The abbreviation "CR" refers to the Clerk's Record and will be followed by the pertinent document number(s). The abbreviation "RT" will refer to the Reporter's Transcript and will be followed by relevant page number(s) for pretrial hearings. Trial transcripts were sequentially numbered. The abbreviation "ER" refers to the Excerpts of Record and will be followed by the relevant page number(s). The abbreviation "SER" refers to the Supplemental Excerpts of Record and will be followed by the relevant page number(s). A separate volume of the SER containing a seal juror questionnaire is filed under seal.

IV. ISSUES PRESENTED

A. Whether the Federal Death Penalty Act is unconstitutional on its face? (Defense issues X, AA, DD EE, HH, and II)

B. Whether the Federal Death Penalty Act is unconstitutional as applied to this defendant? (Defense issues A, B, FF, CC)

C. Whether the jury empanelment and selection process afforded defendant a fair panel with adequate representation of Native Americans? (Defense issues C, D, E, F, and H)

D. Whether the district court abused its discretion in denying defendant's motion to sever accounts or rejoining those counts for trial? (Defense issue J)

E. Whether the district court abused its discretion in failing to continue trial *sua sponte*? (Defense issue K)

F. Whether the district court abused its discretion in denying a motion for mistrial or failing to grant appropriate remedies for alleged discovery abuses? (Defense issue L)

G. Whether the district court abused its discretion in admitting or excluding evidence? (Defense issues I, M, N, O, and P)

H. Whether defendant was denied a fair trial and the jury was improperly influenced by the questioning of witnesses or arguments of prosecution counsel? (Defense issues Q and S)

I. Whether the jury instructions were sufficient? (Defense issues R and Y)

J. Whether introductory comments by the district court improperly shifted the burden to the defense or lessened the government's burden of proving that the defendant was an Indian and the offenses occurred in Indian Country? (Defense issue G)

K. Whether the district court abused its discretion by discussing in defendant's absence court security with a representative of the United States Marshal's Service and conducting proceedings after the defendant waived his presence? (Defense issues T, U, and V)

L. Whether jurors were subjected to improper external influence? (Defense issue BB)

M. Whether the district court abused its discretion in denying defense counsel's motion to withdraw after the guilt phase and before the penalty phase of the trial? (Defense issue W)

N. Whether the district court abused its discretion in evidentiary rulings during the penalty phase? (Defense issue Z)

O. Whether the sentences imposed on the non death penalty eligible counts must be remanded pursuant to United States v. Booker? (Defense issue GG)

P. Whether this court has jurisdiction to consider defendant's current conditions of confinement in the absence of any record or determination of that issue by a lower court? (Defense issue JJ)

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings.

On November 27, 2001, a grand jury in Phoenix, Arizona, returned a redacted, eleven-count indictment charging Lezmond Mitchell (defendant), Jason Kinlicheenie and Gregory Nakai with Premeditated First Degree Murder, Counts 1 and 5; Armed Carjacking, Count 2; Felony Murder - Robbery, Count 3; Robbery, Counts 4, 8 and 10; Felony Murder - Kidnaping, Count 6; Kidnaping , Count 7; and Use of a Firearm During a Crime of Violence, Counts 9 and 11. (CR 1; ER 996.) The name of the juvenile murder victim was redacted from this indictment and all further court pleadings. (CR 2; ER 996.)

On November 29, 2001, defendant made his initial appearance, was arraigned and had counsel appointed to represent him. Defendant was ordered temporarily detained. On December 4, 2001, defendant was ordered detained as a danger pending trial. (CR 3, 5; ER 996)

On July 2, 2002, a superseding indictment was returned naming Johnny Orsinger as a co-defendant in Counts 1 through 7. (CR 47; ER 9.)

On August 13, 2002 the government filed a Notice of Intent to Seek the Death Penalty against defendant, based on the charge of Armed Carjacking which resulted

in a death, a violation of 18 U.S.C. 2119, as charged in Count 2 of the superseding indictment. (CR 87; ER 14.)

On November 19, 2002, a second superseding indictment was returned. The grand jury made special findings in this indictment in support of the death penalty against defendant. (CR 130; ER 18.)

On April 1, 2003, the court severed co-defendant Johnny Orsinger from defendant's trial. Lezmond Mitchell was the only defendant to proceed to trial before District Judge Mary H. Murguia. (CR 267; ER 166.) On May 8, 2003, following a 19-day trial, defendant was convicted on all counts, including Armed Carjacking as charged in Count 2. (CR 311; ER 715.) Defendant was eligible for the death penalty by virtue of his conviction for Count 2. (CR 87; ER 14.)

On May 14, 2003, the penalty phase began before the same jury, and on May 20 that jury returned a recommendation of a sentence of death as to each victim. (CR 327; ER 941-59.)

On September 15, 2003, defendant was sentenced to death on Count 2 and to life imprisonment on Counts 1, 3, 6 and 7. A life sentence also was imposed on Count 5 and ordered to run consecutively to the life sentences imposed on Counts 1, 3, 6 and 7. A sentence of 300 months was imposed on Count 11 and ordered to run consecutively to the sentence imposed on Count 9. A sentence of 180 months was

imposed in Counts 4, 8 and 10. Finally, an 84 month sentence was imposed on Count 9 and ordered to run consecutively to the sentence imposed on Count 5. Defendant also was ordered to serve a period of supervised release of 60 months, assessed $1,100, and ordered to pay restitution of $22,069.19. (CR 425; ER 960.)

B. Statement of Facts.

The plan to get a truck to use in a robbery

Lezmond Mitchell, Johnny Orsinger, Gregory Nakai, Jakegory Nakai, and Jason Kinlicheenie concocted a plan to rob a trading post located on the Navajo Reservation in Arizona. (RT 2778; ER 436.) As part of the plan, according to Kinlicheenie, Lezmond Mitchell ("defendant") agreed to travel to Gallup, New Mexico, with Johnny Orsinger to steal a truck to use during the robbery. (RT 2779-80; ER 437-8.) Orsinger and defendant left for Gallup on October 27, 2002. When he returned, defendant told Kinlicheenie that he had gotten a truck and had parked it in the mountains. (RT 2782-3; ER 440-1.) Defendant said that they had "taken out" an old lady and a small person to get the truck. (RT 2783; ER 441.)

The Discovery of the Bodies

On November 4, 2001, approximately six days after they were last seen alive, the headless, handless, nearly nude bodies of 63 year old Alyce Slim and her nine year old grand-daughter (the juvenile victim) were discovered near near Tsaile, Arizona, in the mountains of the Navajo Indian Reservation. (RT 2584, 3024;

SER 44, 129.) Their severed heads and hands were later discovered, along with a pair of latex gloves, buried near the bodies. DNA found on the gloves did not exclude defendant as its source. (RT 3055, 3058, 3219; ER 551, 553, 3065, 613; SER 134.)

Ms. Slim had been savagely stabbed, receiving approximately 33 wounds to her neck and upper body. (RT 3336, 3287-3303; SER 218, 169-85.) The injuries she suffered were consistent with infliction by two attackers from two different directions. (RT 3304, 3364; SER 186, 232.) She also suffered approximately 16 wounds to her hands consistent with defensive injuries, such as trying to parry or grab a knife. (RT 3305-09; SER 187-91.)

The juvenile victim (Doe) suffered multiple fractures that shattered her skull into many small pieces. (RT 3342; SER 224.) Her brain suffered hemorrhaging and bruising indicating very forceful impacts to her head. (RT 3344; SER 226.) The damage was similar to that seen in a body ejected from a high speed car crash, and could have been caused by rocks or boulders weighing at least 20 pounds. (RT 3347-48; SER 229-30.) Doe also had neck wounds consistent with a sharp object being drawn across the skin. (RT 3338-39; SER 220-21.)

Both victims had suffered what apparent *post mortem* chopping wounds that severed their heads and hands. (RT 3313, 3322; SER 195, 204.)

The Last Hours for Slim and Doe

On Sunday, October 28, 2001, Alyce Slim and her nine year old granddaughter, Jane Doe, left their home in Fort Defiance, Arizona, to travel to Tohatchi, New Mexico, so Alyce could seek the assistance of Betty Dennison to treat some of her ailments. (RT 2568-2571; SER 33-6.) Jane Doe did not wish to go but her mother persuaded her to go along. (RT 2572-73; SER 37-8.)

Ms. Slim met with Ms. Dennison at approximately 4:00 pm in Tohatchi. Ms. Dennison could not help Ms. Slim's particular leg problems, but she knew a medicine lady named Marie Dale, whom she thought might help. (RT 2587-88, 2593; SER 45-6, 49.) The three traveled to Twin Lakes, New Mexico, where Alyce made an appointment for the next evening with Ms. Dale. (RT 2596; ER 412.)

The trio returned to Ms. Dennison's house to drop her off at approximately 5:00 pm. (RT 2589; SER 47.) Ms. Slim and her granddaughter then left. (RT 2590; ER 410.) It was the last time anyone they knew saw them alive.

A Search for Slim and Doe

Later that evening, Jane Doe's mother, Marlene, became concerned that the two had not returned, and tried to call her mother (Ms. Slim) on her cell phone. (RT 2576; SER 39.) The next morning she tried to call her mother's house, but got no answer. (RT 2577; SER 40.) She later drove to her mother's house. No one was there, and it appeared that no one had spent the night there. (RT 2578; SER 41.) She

checked at Doe's elementary school, finding the little girl had not been there. (RT 2578; SER 41.) She considered calling the police but decided to wait. (RT 2580; SER 42.) Tuesday morning, Marlene drove to the bus barn where her mother was a school bus driver, and discovered that her mother failed to report for work. (RT 2580; SER 42.) Eventually, Marlene called the police and filed a missing persons report. (RT 2581; SER 43.) Police found the bodies of Slim and Doe, but not before the trading post had been robbed.

The Trading Post Robbery

On Wednesday, October 31, 2001, Charlotte Yazzie was working at the Red Rock Trading Post located in Arizona on the Navajo Indian Reservation. (RT 2599-2600; SER 51-2.) As she mopped the floor, a male wearing a mask ran into the store, came up behind her, said "This is a stickup," and struck her in the head with a gun. (RT 2606; SER 53.) Another male also wearing a mask joined the first gunman. (RT 2608-09; SER55-6.) One of them forced Ms. Yazzie to open the registers. (RT 2615; SER 58.)

Another trading post employee, Kimberly Allen, saw Charlotte struck with the gun. (RT 2634; SER 64.) The second armed robber, carrying a rope, grabbed Ms. Allen, pushed her against the counter, and demanded the combination to the safe. When Ms. Allen told him she didn't know the combination, he told her "If you lie to

me or don't cooperate with us, we are going to kill you." (RT 2636; SER 66.) He then forced her to turn on the gas pumps. As she did so, she observed a beige, double-cab Chevrolet pickup truck at the pumps, and another male standing nearby. (RT 2637; SER 67.)

A third masked robber joined the two in the store. All wore purple latex gloves. (RT 2615, 2635; SER 58, 65.) They took Ms. Yazzie into a back room and demanded more money. She told them where to find it, and the robbers took cash and coins. (RT 2617; SER 59.) They tied up the two women with rope and pointed guns at their heads. Ms. Yazzie was convinced they were going to be shot. (RT 2612SER 57.) The heavy-set male told them they would be shot if they did anything wrong. (RT 2622; SER 60.)

The two women were locked in the backroom, and escaped only after another woman came into the store. (RT 2623-24; SER 61-2.) In total, the robbers took $5,530 and Ms. Yazzie's purse. (RT 3166, 2625; ER 589; SER 63.)

A customer saw two masked gunman in the Trading Post, at least one wearing purple gloves. (RT 2647-49; SER 68-70.) Someone took down the license number of an extended cab pickup and gave to the people at the Trading Post. (RT 2651, 2653; SER 71, 73.) Another witness saw the getaway truck and gave the license

number to the police when they arrived. The police broadcast a description of the truck and the license number. (RT 2660, 2665; ER 419, 424.)

The Discovery of the Getaway Vehicle–Alyce Slim's Pickup

On Thursday, November 1, 2001, a Navajo Tribal Police officer located an abandoned pickup truck near Wheatfills, Arizona, on the Navajo Indian Reservation. (RT 2668-69; SER 76-7.) The license number of the truck matched the one seen during the Trading Post robbery. When the officer opened the door he noticed that the interior had been partially burned and smelled of fuel. (RT 2673-74, 3004; SER 78-9, 127.) He found purple gloves, clothes and masks inside the truck. (RT 2903-04; SER 114-15.) The truck was later identified as Ms. Slim's pickup truck.

The Scientific Evidence from the Truck

Defendant's palm print was found on the truck. (RT 3190; SER 152.) The masks found in the truck yielded DNA evidence. Defendant could not be excluded as a contributor of the DNA. (RT 3217, 2792; ER 611, 450.) Samples taken from various locations in the truck, such as the floor mat, the rear seat, the driver's seat, windows and armrest were identified as Alyce Slim's blood. (RT 3205-11; ER 599-605.)

The Trading Post Robbery Arrests

On the morning of Sunday, November 4, 2001, based on tips and investigation at the scene of the robbery, Tribal arrest warrants were served. Defendant was found and arrested at the residence of Gregory Nakai. (RT 2698; SER 83.) Defendant had been sleeping, and was only wearing a shirt and boxer-type underwear when arrested. (RT 2960; ER 527.) When asked where his pants were so they could be brought to him, he said they were in the bedroom between a door and the bunk bed. (RT 2962; ER 528.) As an agent picked up the pants to bring them to defendant, a silver-handled butterfly knife fell out of the pants and onto the floor. Alyce Slim's blood was later found on the knife. Defendant's wallet was in the pants. (RT 2967, 2977, 3215; SER 120, 122; ER 69.)

During a consent search of the residence, a newspaper detailing the robbery of the trading post was seized along with a police scanner tuned to the Chinle police department frequency, police radio codes and a $200 money wrapper. (RT 2979, 2982-2983, 3017; SER 124-25, 128.) A blood-stained, black-handled butterfly knife also was found. DNA analysis demonstrated that Ms. Slim could not be excluded as the source of the blood. (RT 2965, 2972, 3211-12; SER 119, 121; ER 605, 606.) Also found in the residence was Ms. Slim's cell phone. (RT 2972, 3101.) DNA

evidence was found on the earpiece of the phone, and defendant could not be excluded as a possible contributor of that DNA. (RT 3216; ER 610.)

Defendant's First Admission

Defendant was advised of his rights on Sunday following his arrest, and flipped a nickel to decide whether he would talk to the investigators. (RT 3108; SER 142.) He admitted that he was present during the murders of Alyce Slim and juvenile Doe, but blamed the murders on 16 year old Johnny Orsinger. Defendant confirmed that he had participated in the robbery of the trading post. He explained that during the robbery he wore a mask and was armed with a 12-gauge shot gun. He took money and tied up one of the clerks. (RT 2722-23; SER 88-89.) Later, he offered to assist the agents in finding the bodies of Alyce Slim and Doe. (RT 2723; SER 89.)

Orsinger's Arrest and the Pace of the Investigation Picks Up

The next day co-defendant Johnny Orsinger was arrested. He agreed to take agents to the bodies of Slim and Doe. (RT 2724; SER 90.) When Orsinger had difficulties finding the location, agents called for defendant to be brought out to assist. Orsinger led the agents to the bodies shortly before defendant arrived. (RT 3310, 2710-12; SER 192, 84-6.)

Defendant's Second Admission

At the bodies' discovery site, defendant was reminded of his Miranda warnings and agreed to talk. (RT 3112-13; SER 143.) Agents told him that they had

interviewed Orsinger. (RT 2726-27; SER 9192.) Defendant, in a measured response, stated that he had stabbed the "old lady" and the evidence would show or witnesses would say that he had cut the young girl's throat twice. (RT 2727; SER 92.) Defendant further conceded that he told Doe to "lay down and die," and then he and Orsinger dropped large rocks or boulders on her head as she lay on the ground. (RT 2727; SER 92.)

Defendant explained that they took the body of Ms. Slim from the rear of the truck and dragged her away to the woods. He recounted that after Orsinger found a shovel and an axe, defendant dug a hole while Orsinger severed the heads and hands. They dropped the severed body parts into the hole and buried them. (RT 2728; SER 93.) Later they burned the victim's clothing, jewelry, glasses and any other identifiable items. (RT 2728; SER 93.) Defendant said he and Orsinger went to a nearby stream where they washed the blood from the knives, their faces and hands. (RT 2729; SER 94.) Defendant said the next day he washed the knives with alcohol to remove any blood. (RT 2729; SER 94.)

Jane Doe's neck bore an incised wound consistent with sharp a object being drawn across the skin (RT 3337-38; SER 219-20), as described by defendant. Twenty pound rocks containing blood and hair were found near with the bodies. (RT 3086; SER 135; RT 3114; ER 564.) Jane Doe's blood was found on both rocks. (RT 3220-

21; ER 614-15.) Investigators later found a burn site, as described by defendant, with remnants of items belonging to Ms. Slim. (RT 3031, 3035; SER 130-31.)

Defendant's Third Confession

Several weeks later, after he was once again read his *Miranda* rights, defendant advised two other agents that on the weekend of the murders, he and Orsinger hitchhiked from Round Rock, Arizona, to Gallup, New Mexico. (RT 3120; ER 566.) He purchased a knife while Orsinger stole one. They caught a ride to Ya Ta Hey, New Mexico, as they headed home. (RT 3120; ER 566.) They were next picked up by an older lady and a young girl near the Arizona-New Mexico border. (RT 3120; ER 566.) According to defendant, he asked to be let off near the Navajo Reservation town of Saw Mill, Arizona. (RT 3120, 3123; ER 566, 569.) When the truck stopped, Defendant said Orsinger attacked the woman with a knife. (RT 3121; ER 567.) Defendant admitted that he, too, stabbed the woman four or five times. (RT 3121, 2990; ER 567; SER 126.) They dragged the woman over the seat and put her body on the rear seat with the little girl. (RT 3122; ER 568.) Defendant drove the truck into the mountains on the Navajo Indian Reservation in Arizona, where they dragged Ms. Slim's body out of the car. (RT 3122, 3123; ER 568-69.) He confirmed that they threw rocks on the little girl's head even though he knew she was still alive. (RT 3122; ER 568; RT 2990; SER 126.) Defendant admitted they severed the

victims' heads and hands, but denied that it was his idea. He stated that he also would have severed the feet. (RT 3122-23; ER 568-69.) Finally, he admitted having a discussion about robbing the trading post prior to traveling to Gallup. (RT 3124; SER 150.)

Accomplice Testimony

Kinlicheenie supplied the masks used in the robbery, as well as his parents' car for use after abandoning the stolen truck. (RT 2786; ER 444.) He drove them to the area where the truck was parked and waited for defendant to return. (RT 2788; ER 446.) They changed clothes there, got into the truck and, with defendant driving, headed for the Trading Post. (RT 2788-89; ER 446-47.) After they arrived at the Trading Post, they put on the masks and defendant, wearing an "old man" mask and carrying a 12-gauge shotgun, entered the store, along with Jakegory Nakai who was carrying a .22 caliber rifle. (RT 2790-92, 2797 448-50, 455.) Kinlicheenie initially remained outside to pump gas but the pump was off, so he entered the store and saw the other two pushing around the women and turning off the lights. He went in and tried to force open a register. (RT 2797-99; ER 455-57.) One of the women told him to push the "no sale" button; when it opened, Kinlicheenie took the cash. (RT 2799; ER 457.) The robbers drove back to Kinlicheenie's car and then he followed the truck to the dump, where defendant set the truck afire using kerosene stolen from the

Trading Post. (RT 2804; ER 462.) They returned to the Nakai residence and split the money; Kinlicheenie received $900. (RT 2807; ER 465.) The next day defendant asked for and received $300 from Kinlicheenie. (RT 2808; ER 465.)

VI. SUMMARY OF ARGUMENTS

A. The Federal Death Penalty Act is not unconstitutional on its face. The statute provides adequate guidance regarding aggravating factors which must be established before the defendant can be found eligible for the death penalty. A grand jury indictment of these factors is not constitutionally required; however one was obtained in this case. These factors ensure that the death penalty is reserved for a limited number of defendants, rationally and fairly applied. Although courts have approved statutes with mandatory proportionality reviews, there is no constitutional requirement for such a review. The fact that the Federal Rules of Evidence do not apply in the penalty phase is designed to ensure the broadest consideration of mitigating factors.

B. The Federal Death Penalty Act was appropriately applied in this case. Defendant was eligible for the death penalty because he committed an offense of nationwide application. In that circumstance, it is immaterial whether the Navajo nation "opted in" to accept the death penalty, or whether the death penalty might impact tribal sovereignty or Navajo religious beliefs. Tribal sovereignty and religious freedom may be legitimate concerns; however, they are not sufficient to displace an appropriate statute of nationwide application. Congress specifically limited the "opt-in" provision to offenses where jurisdiction was based solely on Indian Country

jurisdiction. The statutory procedures and the aggravating and mitigating factors permit the death penalty to be applied in a fair and limited fashion. Each death defendant should be judged on his own, and it is no defense to claim that another, more culpable defendant was not eligible for death.

C. The jury empanelment and selection process in this case afforded defendant adequate representation of Native Americans and a fair panel. No ethnic group of systematically excluded. Nor were Native Americans excluded based on religious beliefs. Those jurors who could not follow the court's instructions or were not death qualified were excused.

D. There was no abuse of discretion in denying defendant's motion to sever counts, or rejoining those counts for trial. The facts below show this was one comprehensive scheme to steal a vehicle by force, if necessary, in order to obtain a "clean" vehicle that could be used in robbing a trading post. Evidence of the trading post robbery was relevant to show the motive and purpose for the armed carjacking. The murders and kidnaping were a part of the carjacking. Were counts severed, it would not have changed the admissibility of evidence or otherwise affected the verdicts.

E. The district court did not abuse its discretion in failing to continue the trial *sua sponte*. Defendant raised no issue of prejudice or potential confusion, and there appeared none in the trial that followed.

F. The district court did not abuse its discretion in denying a motion for mistrial or failing to grant appropriate remedies for alleged discovery abuses. The defense was permitted adequate opportunity to assess and respond to the items in question. No prejudice or error has been shown.

G. The district court did not abuse its discretion in admitting or excluding evidence in the case. Defendant was not entitled to introduce self serving statements he made to law enforcement officers as those statements were hearsay. A co-defendant's statement was not improperly admitted against defendant. The trial court took strong measures to ensure that no *Bruton* violation occurred. Defendant had full and free opportunity to confront his accusers. The trial court's limitations on cross examination were reasonable and did not alter the course or outcome of the trial.

H. Defendant was not denied a fair trial and the jury was not improperly influenced by the questioning of witnesses or arguments of prosecution counsel. Defendant's counsel only objected to one instance in opening statement, and the trial court denied his motion for mistrial. The remaining claims were not raised below and did not change the course or outcome of the trial.

I. The jury instructions appropriately guided the jury's deliberations and were not misleading or inadequate.

J. Introductory comments of the court did not improperly shift a burden to the defense or lessen the government's burden of proving that the defendant was an Indian and that the offenses in question occurred in Indian Country.

K. The district court did not abuse its discretion in conducting proceedings outside the defendant's presence. The court's discussion of trial security with a U.S. Marshal was not a proceeding which the defendant or government had a right to attend. When the defendant determined he no longer wished to participate in the trial, the court took appropriate measures to ensure he was knowingly, voluntarily, and intelligently making that determination, and that he was competent to do so. Thereafter he was placed in a room next to the courtroom with immediate access to counsel and a closed circuit video and audio feed of the trial proceedings.

L. There is no evidence that jurors were subjected to any improper external influence. While defense counsel noted that some spectators had worn buttons with photographs of the victims, there is no indication these were seen by the jurors or had any impact on the proceeding.

M. The district court did not improperly deny defense counsel's motion to withdraw. Defendant and his counsel communicated effectively throughout the

proceeding. The defendant, however, did not agree with his counsel or the court that he should attend the penalty phase proceedings. This disagreement, standing alone, does not evidence a breakdown in communications sufficient to warrant appointing new counsel at a late stage in the proceedings.

N. The district court did not abuse its discretion in evidentiary rulings during the penalty phase. Under the Federal Death Penalty Act, relaxed evidentiary standards apply. The court appropriately excluded unfairly prejudicial matter but permitted probative information.

O. The court should not remand on *Booker* consideration. Eight of defendant's sentences are dictated by statutory minimums and do not implicate *Booker*. The record makes clear the remaining three would not change under an advisory guideline scheme.

P. There is no final judgment or record with respect to defendant's conditions of confinement during the appeal. That issue is not ripe for review or properly before this court.

VII. ARGUMENTS

A. FDPA Is Not Unconstitutional on its Face.

Defendant raised six major arguments challenging the constitutionality of the the Federal Death Penalty Act ("FDPA") in his opening brief. Those arguments were listed in the Opening Brief as X at 165-70; AA at 180-2; DD at 185-6; EE at 186-8, HH at 190-9: and, II at 199-201. Those arguments are answered here.

Defendant raised one challenge to the constitutionality of the FDPA below, and appeals from the denial of that motion. Other challenges are asserted for the first time on appeal. Those issues not raised below were waived and are subject to a plain error analysis.

1. Challenge asserted below

a. Standard of Review

Challenges to the constitutionality of a criminal statute are reviewed *de novo*. *United States v. Koons*, 300 F.3d 985, 990 (8th Cir. 2002). Under a facial challenge to a legislative act, the challenger must establish that no set of circumstances exists under which the act would be valid, perhaps the most difficult challenge to make successfully. *United States v. Salerno*, 481 U.S. 739, 745 (1987). "Every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). Thus, if one construction of a

statute would raise serious constitutional problems, and an alternative acceptable interpretation of the statute is "'fairly possible,' [the Court] is obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). This is so because any act of Congress is presumed to be a constitutional exercise of legislative power until the contrary is clearly established. *United States v Morrison,* 529 U.S. 598, 607 (2000).

b. General Discussion

In *McCleskey v. Kemp*, 481 U.S. 279, 300-303 (1987) the Supreme Court observed that death penalty has been found constitutional under a variety of circumstances. The Supreme Court has affirmed death penalty statutes in numerous cases, provided the capital sentencing schemes satisfy two concerns: (1) the death penalty is appropriate given the circumstances of the case, and (2) it is not randomly imposed. *Romano v. Oklahoma*, 512 U.S. 1, 6-7 (1994); *Johnson v. Texas*, 509 U.S. 350, 359-360 (1993).

c. FDPA lacks no essential safeguards

Defendant argued below that FDPA fails to provide for the grand jury indictment of aggravating factors. (OB Argument X, p 167.) He cited no authority to support his argument then, nor does he now.

(1) Grand Jury consideration of statutory aggravating factors is both allowed and required in this matter

In this case, and in response to *Ring v. Arizona*, 536 U.S. 584 (2002), the government sought and obtained a second redacted Superseding Indictment, alleging gateway intent factors and statutory aggravating factors. (CR 130; ER 18.)[2] The law not only allows an indictment to allege aggravating factors; in this case, allegation of such statutory factors is required.

Courts have agreed that a grand jury may consider the requisite mental states and statutory aggravating factors, and return an indictment alleging them. *United States v. Bourgeois*, 423 F.3d 501, 507 (5th Cir. 2005); *United States v. Purkey*, 428 F.3d 738, 750-51 (8th Cir. 2005). This Court, in *United States v. Buckland,* 289 F.3d 558 (9th Cir. 2002), concluded that, while there was no requirement in 21 U.S.C. 841 that the grand jury return an indictment alleging the amount and quantity of drugs involved in the offense, there was no legal impediment to a grand jury doing so. Indeed, under case law it was required. In line with the holdings of *Jones*, *Apprendi* and *Ring*, the essential facts of a capital offense must include the mental culpability and statutory aggravating factors specified in FDPA.

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[2] Originally, the government had filed the statutorily required notice of intent to seek a sentence of death and listed the appropriate aggravating factors, both statutory and non-statutory. (CR 87; ER 14.)

Conversely, no authority supports defendant's argument that all non-statutory aggravating factors must be included in an indictment. *United States v. Purkey*, 428 F.3d 738, 749 (8th Cir. 2005); *United States v. Bourgeois*, 423 F.3d 501, 507 (5th Cir. 2005); and *United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003), all stand for the contrary. Non-statutory factors alone cannot make a defendant eligible for a death sentence. They only become part of the decision making process once a jury has found the requisite intent and at least one statutory aggravating factor beyond a reasonable doubt. *Jones v. United States*, 527 U.S. 373, 376-79 (1998).

(2) FDPA is not unconstitutional because it does not require that Federal Rules of Evidence be applied during the penalty phase

Defendant raised this issue below; the district court found that the Federal Rules of Evidence were not constitutionally mandated and that the evidentiary standard in Section 3593(c) comported with Supreme Court precedent. It further found that it still retained the authority to exclude evidence on a constitutional basis or if it was unfairly prejudicial. (CR 233; SER 117-19.) The court's findings were correct.

Title 18 U.S.C. § 3593(c) provides, in pertinent part, that at a sentencing hearing conducted under FDPA, information may be presented as to any matter relevant to sentencing and that this information

> is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its **probative value is outweighed** by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.

(Emphasis added). Moreover, Fed. R. Evid. 1101(d)(3) specifically provides the Rules of Evidence do not apply to sentencing proceedings.

The Federal Rules of Evidence are not constitutionally mandated. Congress, within constitutional limits, has the power to determine what evidentiary standards should apply at the penalty phase. "[W]here Congress has spoken, [the courts] have deferred to the 'traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts' absent countervailing constitutional constraints." *Steadman v. S.E.C.*, 450 U.S. 91, 95 (1981)(emphasis added). The Supreme Court has stated, in the context of a capital sentencing procedure, "the due process clause should not be treated as a device for freezing the evidential procedure of sentencing to the mold of trial procedure." *Williams v. New York*, 337 U.S. 241, 251 (1949).

FDPA's evidentiary standard is constitutional because it permits a court to exclude constitutionally inadmissible evidence, yet exercise its traditional authority to control the mode and order of witness interrogation and the presentation of evidence. The language of 18 U.S.C. § 3593(c), though it mandates that the Federal

Rules of Evidence are not controlling, does not interfere with a court's obligation to impose appropriate constitutional limits on the type of information that may be introduced, and the manner of introducing it. Those constitutional limits, in conjunction with FDPA's own statutory evidentiary restrictions, would still be available to the court at a penalty hearing.[3]

Finally, defendant ignores that all evidence of intent and statutory aggravating factors had been introduced in the guilt phase. For example, the heinous nature of the crimes was established by the testimony of a medical examiner and photos in establishing the cause of death. (RT 3289-3349; SER 171-231.) The aggravating factors that multiple victims were killed and that they were vulnerable victims also were established during the trial.

Defendant actually benefitted by the inapplicability of the Federal Rules of Evidence at his sentencing. He presented witness opinions that his life was worth saving, and the hearsay letter from Gregory Nakai to defendant's attorney, claiming that defendant was "not the bad guy" and Johnnie Orsinger was the main culprit. (RT 3811, 3827; SER 318, 331; RT 4153; SER 446.) Nakai and Orsinger previously

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[3] There are other constraints. The admissibility of hearsay evidence, for example, is limited by the Confrontation Clause of the Sixth Amendment. *See, e.g., Proffit v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir. 1982)(holding that "the [Sixth Amendment] right to cross-examine adverse witnesses applies to capital sentencing hearings").

had been convicted in a separate armed carjacking/murder case. Nakai's out of court statement, offered for its truth, was clearly inadmissible hearsay under Rule 801 Fed.R.Evid, but the sentencing jury heard it during the penalty phase.

2. Issues Not Raised Below

a. Standard of Review

Failure to raise an issue below permits only "plain error" review. *United States v. Chea*, 231 F.3d 531, 535 (9th Cir. 2000). "Plain error is '(1) error, (2) that is plain, and (3) that affects substantial rights.' If these three conditions of the plain error test are met, an appellate court may exercise its discretion to notice a forfeited error that (4) 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Ameline,* 409 F.3d 1073, 1078 (9th Cir. 2005) (citations, alterations, and internal quotation marks omitted).

b. Discussion

(1) The death penalty is not unconstitutional in this case simply because the sentence is rarely sought

Defendant argues that death sentences are arbitrary and capricious because they rarely are sought or imposed. (OB Argument X.1.a, at 165.) Although he offers language from Supreme Court Justices expressing concern about the infrequency with which the death penalty is applied, prevailing case law holds that the death penalty

is constitutional. *Jones v. United States*, 527 U.S. 373, 381 (1999)(Eighth Amendment only requires that a sentence of death not be imposed arbitrarily).

(2) Death penalty is not unconstitutional because it is not irrationally applied

He next argues that the FDPA is unconstitutional because it is applied irrationally. (OB Argument X.1.b, at 166.) He contends, in part, that because he is the first Native American to be sentenced to death for a crime which occurred on an Indian Reservation that the penalty is irrationally applied. Defendant misconstrues the basis upon which the law provides for imposing the death penalty on him. He was not eligible for a death sentence because he was a member of the Navajo Nation or because the murders took place on the Navajo Indian Reservation, as explained more fully in Argument B.1.b(1) below. Defendant was convicted of the death-eligible offense of Armed Carjacking resulting in a death, an offense applicable to *anyone*, regardless where the offense occurred or who committed it.

Defendant next argues that while Gregory Nakai was eligible for the death penalty, it was not sought against him. (OB at 167.) In *McKleskey v. Kemp*, the Supreme Court rejected that very argument, holding no constitutional violation occurred simply because another, similarly situated defendant did not receive the death penalty. 481 U.S. 279, 306-07 (1987). Defendant properly was sentenced to death for his own heinous conduct against Alyce Slim and Jane Doe.

(3) FDPA is not unconstitutional because it does not expressly afford defendant a rebuttal argument opportunity on proof of mitigation

Defendant contends that 18 U.S.C. § 3593 is unconstitutional because it does not allow him an opportunity to rebut the government's argument against mitigation even though he has the burden of proof. (OB Argument AA at 181.) He ignores that Section 3593(c) also provides

> the government and defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor....

(emphasis added). Especially in light of this safeguard, the mere procedure whereby the government is allowed to go last in argument does not violate defendant's constitutional rights.[4] Moreover, defendant here failed to ask for surrebuttal, which trial courts may grant–and therefore cannot show he would have been refused.

Finally, defendant cannot show that Section 3593's alleged deficiency hurt him, as he prevailed in showing several mitigating factors at trial. In this case the jury

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[4] Defendant appears to argue that the party with the burden of proof on an issue has a constitutional right to argue last on that point. This is not correct. For example, several states, including within this circuit, impose on a defendant raising an insanity defense in a criminal trial that *defendant* has some burden of proof on insanity. *See generally, e g., Leland v. Oregon*, 343 U.S. 790 (1952); *Phillips v. Hocker*, 473 F.2d 395, 397 (9th Cir. 1973)(Nevada). Yet no defendant has successfully challenged the right of the government to argue last in the guilt phase of such a criminal case, even though defendant has a burden.

unanimously found that defendant had met his burden by finding several mitigating factors including: he did not have a significant criminal history; another, equally culpable co-defendant would not be punished by death; and, the alternative sentence of life without parole was available. (RT 4199-00, 4204; ER 945-46, 955-56.) Several jurors found that defendant would adapt to life in prison and there were factors in his childhood, background and character that might mitigate against the death penalty. Additionally, several jurors found the Navajo Nation letter asking the U.S. Attorney to refrain from seeking the death penalty a mitigating factor. (RT 4200, 4205; ER 946, 956.)

Defendant does not demonstrate how an opportunity, that he did not request, to rebut the government's argument concerning the proffered mitigation evidence would have altered the jury's determination of mitigation. There was no plain error, and no effect on his substantial rights.

(4) Death by lethal injection does not constitute cruel unusual punishment

Defendant now contends, for the first time, that death by lethal injection constitutes cruel and unusual punishment. (OB Argument EE at 186.) This Court, however, has upheld as constitutional death by lethal injection. *LaGrande v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998). Moreover, defendant offers only arguments, unsupported by any evidence in the record, that his case is outside the ambit of

LaGrande. Ordinarily the appellate court will not render a decision on direct appeal if there is an incomplete or non-existent record. *United States v. Bauer*, 84 F.3d 1549, 1563 (9th Cir .1996). Defendant's failure to raise this issue and his failure to present an adequate factual record for review preclude this Court's consideration of the matter under a plain error standard.

(5) The aggravating factors were not unconstitutional facially or as applied

Defendant argues that FDPA gives the jury too much latitude in finding statutory and non-statutory aggravating factors. (OB Argument HH at 190.) Decisions of the Supreme Court and this Court have foreclosed that argument.

The government is required to limit the class of murderers to which the death penalty may be applied. *Arave v. Creech*, 507 U.S. 463, 474, 113 S. Ct. 1534, 1542 (1993). FDPA accomplishes this by listing a set of circumstances from which the trier of fact finds at least one case-specific, statutorily defined eligibility factor at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994). "As long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster." *Jones v. United States*, 527 U.S. 373, 400 (1999).

Pecuniary gain

Defendant argues for the first time that the statutory aggravating factor of pecuniary gain fails to narrow the class of offenders eligible for the death penalty. (OB at 191.) He contends that anyone who commits an armed carjacking offense resulting in a death would be automatically eligible for a death sentence because the offense necessarily involves a taking.

This Court rejected a similar claim made in connection with Arizona's death penalty scheme in a robbery-felony murder case. *Woratzeck v. Stewart*, 97 F.3d 329, 334 (9th Cir. 1996). In *Woratzeck*, this Court said

> [i]t is not true that everyone convicted of robbery felony-murder is automatically death-eligible. The State needs to prove at sentencing that the killing was done with the expectation of pecuniary gain. . . . A defendant is free to argue that the killing was motivated by reasons unrelated to pecuniary gain."

Id. The Tenth Circuit, noting *Woratzeck*, agreed that under 18 U.S.C. § 3592(c)(8), pecuniary gain applies where the gain was expected as result of the death of the victim. *United States v. Chanthadara*, 230 F.3d 1237, 1263 (10th Cir. 2000). The Fifth Circuit adopted the same position in *United States v. Bernard*, 299 F.3d 467, 483 (5th Cir. 2002).

Especially heinous, cruel or depraved

Defendant's contention that 18 U.S.C. § 3592(c)(6) is unconstitutionally vague is contrary to law. The statute expressly directs a jury making its decision whether to impose the death penalty to consider whether "the defendant committed the offense in an especially heinous, cruel, or depraved manner *in that it involved torture or serious physical abuse to the victim.*" 18 U.S.C. § 3592(c)(6)(emphasis added). The Supreme Court has repeatedly upheld the constitutionality of this formulation as limited by the "torture or serious physical abuse to the victim" language. *E.g., Maynard v. Cartwright*, 486 U.S. 356, 363-65(1988); *see also Profitt v. Florida*, 428 U.S. 242, 255-256 (1976) ("especially heinous, atrocious, or cruel" provision construed as "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" provided adequate guidance).

The Supreme Court's decision in *Jones v. United States*, 527 U.S. 373 (1999), also supports the constitutionality of 18 U.S.C. § 3592(c)(6). In *Jones*, the defendant kidnaped a young servicewoman from an army base, raped her, drove her to a secluded location, and then beat her to death with a tire iron. *Id.* at 376. The government alleged and proved statutory aggravating factors, including that the defendant committed the offense in an especially heinous, cruel and depraved manner in that it involved torture or serious physical abuse, 18 U.S.C. § 3592(c)(6). *Id.* at

377. The Fifth Circuit criticized the wording of non-statutory aggravating factors as vague, but held the statutory aggravating factors, including the "heinous, cruel, or depraved" factor, were sufficiently specific to support the jury's death sentence. The Supreme Court affirmed. *Id.* at 404-05.

Substantial planning and premeditation

Defendant argues the substantial planning factor is vague and overbroad.

The jury was instructed:

> The third statutory aggravating factor alleged by the government is that the defendant committed the offense after substantial planning and premeditation to cause the death of Alyce Slim and/or Tiffany Lee.
>
> "Planning" means mentally formulating a method for doing something or achieving some end.
>
> "Premeditation" means thinking or deliberating about something and deciding beforehand whether to do it.
>
> "Substantial" planning and premeditation means a considerable or significant amount of planning and premeditation.
>
> To find that the government has satisfied its burden of proving beyond a reasonable doubt that the defendant engaged in substantial planning and premeditation to cause the death of a person, you must unanimously agree that the particular object of the substantial planning and premeditation was to cause the death of a person.

(RT 4090; ER 876.) The jury was instructed in terms of everyday meaning and understanding. The evidence was clear to the jury that defendant started out with a

plan to steal a truck to commit another robbery. They were clearly able to distinguish defendant's long range plan from a spur of the moment armed carjacking in an attempt to make a getaway.

Vulnerability

Defendant argues–for the first time–that the statutory aggravating factor of vulnerability is vague and overbroad when describing a 65 year old grandmother with a sore leg and a nine year old girl. (OB Argument HH at 195.)

The jury was instructed:

> The fourth statutory aggravating factor alleged by the government is that the defendant committed the offense on victims who were particularly vulnerable due to old age, youth, or infirmity.
>
> The words "old age, youth, or infirmity" should be given their ordinary, everyday meaning
>
> "Old age" means having lived beyond the middle period of life.
>
> "Youth" refers to the period when one is young and has not reached adulthood. A juvenile is a youth.
>
> "Infirmity" means a physical or mental weakness or flaw. A person who has an infirmity may be physically or mentally handicapped or have a particular disease or condition.
>
> ...
>
> To find that the government has satisfied its burden of proving beyond a reasonable doubt that the defendant committed the offense on a victim who was particularly vulnerable due to old age, youth, or infirmity, you must unanimously agree that the victim was vulnerable due to one or more of these conditions and that there was a connection between the victim's vulnerability

> and the offense committed upon the victim. A connection does not mean that the defendant targeted the victim because of the vulnerability. It means that, once targeted, the victim was more susceptible to death due to the vulnerability.

(RT 4090-01; ER 876-77.)

In the instant case, the term "vulnerable victim" was directed to the evidence and victims in the case and had a "core meaning that criminal juries should be capable of understanding." *Jones*, 527 U.S. at 400. Defendant never argued that his victims were not vulnerable.

Single criminal episode

Defendant complains that the statutory aggravating factor of defendant killing more than one person in a single criminal episode is vague and overbroad. (OB at 196.) The jury was instructed:

> The fifth statutory aggravating factor alleged by the government is that the defendant intentionally killed more than one person in a single criminal episode.
>
> To establish the existence of this factor, the government must prove beyond a reasonable doubt that the defendant intentionally killed both Alyce Slim and [Jane Doe] in a single criminal episode.
>
> "Intentionally killing" a person means ... killing a person on purpose. That is willfully, deliberately, or with a conscious desire to cause a person's death, and not just accidentally or involuntarily.
>
> "A single criminal episode" is an act or series of related criminal acts which occur within a relatively limited time and place, or are directed at the same

person or persons, or are part of a continuous course of conduct related in time, place, or purpose.

(RT 4091-92; ER 877-78.)

The terms were self-explanatory and had core meaning easily understood by a jury. The victims were killed during a single criminal episode of armed carjacking. Defendant never argued otherwise.

Harmless error

The presence of an invalid aggravating factor does not affect a death sentence where the jury is able to "give weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." *Brown v. Sanders*, __ U.S. __, 2006 WL 47402 (U.S. Jan. 11, 2006). Thus, even if this Court concludes one or more of the Section 3592(c) factors was infirm, the resulting error would be harmless, as each of the facts and circumstances discussed above are universally applicable to the remaining factors.

(6) FDPA is not unconstitutional due to the absence of mandatory proportionality review

Defendant claims, for the first time, that FDPA is unconstitutional because it does not require a proportionality review. (OB Argument II at 199.) The Supreme Court, however, has made clear that the Eighth Amendment's prohibition against cruel and unusual punishment does not require a proportionality review. *Pulley v.*

Harris, 465 U.S. 37, 51 (1984). In *Harris*, the Court observed that while it had upheld a Georgia death penalty statute which required a proportionality review (in *Zant v. Stephens*, 462 U.S. 862 (1983)), that ruling did not convert a proportionality review into a constitutional requirement; the Court simply upheld a statute that included such a review. *Harris* at 45. The narrowing of the jury's direction and discretion, along with prompt appellate review, is sufficient to avoid arbitrary and inconsistent results. *Id.* at 53.[5]

FDPA provides specific direction to the jury under Section 3591(a)(2) that it must find a gateway intent factor; that it may only consider a limited number of defined aggravating factors, along with an unlimited number of mitigating factors under Section 3592.[6] Section 3595(c)(1) requires an appellate court to determine, in writing, whether the death sentence was imposed "under the influence of passion, prejudice or any other arbitrary factor . . . " and whether the evidence supports the existence of an aggravating factor under Section 3592. In sum, there is no constitutional requirement of mandatory proportionality.

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[5] "We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991).

[6] The use of non-statutory aggravating factors under the FDPA was upheld in *Jones v. United States*, 527 U.S. 373, 400-01 (1999).

B. Arguments Attacking the Constitutionality of the Federal Death Penalty Act as Applied in this Case.

Defendant raised seven major arguments in his opening brief challenging the constitutionality of the Federal Death Penalty Act as applied. Those arguments were listed in the Opening Brief as A at 24-32; B at 32-4; X at 165-6; CC at 184; FF at 188; HH at 190-9: and, KK at 203-5, and are answered here.

1. Issues raised below

a. Standard of Review

The interpretation of statute is a question of law given *de novo* review. *United States v. Sarkisian*, 197 F.3d 966, 984 (9th Cir. 1999).

b. Discussion

(1) Defendant was subject to FDPA because he committed an offense which, if committed by anyone else, anywhere else in the United States, provided for the death penalty as punishment

Defendant was subject to the death penalty because he was convicted for Armed Carjacking in violation of 18 U.S.C. 2119, an offense applicable throughout the nation. Under Section 2119(c), "whoever" commits the offense shall, "if death results...be sentenced for any number of years or...sentenced to death." It matters not under Section 2119 who committed the offense, where the offense took place, or who was the victim.

Defendant asserts this Court got it wrong in *United States v. Juvenile Male*, 118 F.3d 1344, 1350-51 (9th Cir. 1997) when it held the federal RICO statute, which was applicable nationwide, also applied in Indian Country. (OB Argument A at 25.) The federal government, defendant contends, has no jurisdiction to prosecute an Indian defendant for any offense committed within Indian Country unless the Major Crimes Act ("MCA"), 18 U.S.C. 1153, permits it. (OB at 25.) This Court has rejected defendant's argument every time it has been presented, as in *Juvenile Male. See also United States v. Smith*, 387 F.3d 826, 828 (9th Cir. 2004)(retaliation against federal witness, 18 U.S.C. § 1513); *United States v. Begay,* 42 F.3d 486, 498 (9th Cir. 1994) (conspiracy, 18 U.S.C. § 371); *United States v. Young,* 936 F.2d 1050, 1055 (9th Cir. 1991)(assault on a federal officer and use of a firearm during a crime of violence, 18 U.S.C. §§ 111 and 924(c)). "Federal crimes of nationwide applicability apply to Indians within Indian country just as they apply elsewhere." *Smith*, 387 F.3d at 828.

While defendant purports to acknowledge the clear language of these cases, he nevertheless argues that this language doesn't mean what it says. He claims he is not subject to laws that apply everywhere else in the United States because these offenses occurred "on the Navajo reservation by and against tribal members." (OB at 25.) Defendant, not the government, is taking liberties with the language and its construction. The above cases hold that the Armed Carjacking statute applies to his

offense notwithstanding the place and parties involved. His arguments to the contrary turn the statutes and cases on their heads.

Defendant's argument is no more persuasive by its citation to the Constitution. He claims this statute is distinguishable on the grounds it does not refer to interstate or foreign commerce in the specific language of the Constitution's Commerce Clause. That language, he argues, gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art.1, § 8, cl. 3. (OB at 26.) He continues, without benefit of authority, that this must mean Congress, by not specifically mentioning Indian Tribes in Section 2119, did not intend that it apply in Indian Country.

The interstate or foreign commerce language of Section 2119, and virtually every other federal statute based on the commerce clause, is the same. See, 18 U.S.C. §§ 43 (Animal Enterprise Terrorism), 513 (Securities of States and Private Entities), 875 (Interstate Communications), 922 (Unlawful Firearm Acts), 1201 (Kidnapping), 1343 (Wire Fraud), 1962 (RICO), 2251 (Sexual Exploitation of Children), and 2312 (Transportation of Stolen Vehicles). This is not an exhaustive list. Of particular note is that Section 1201, Kidnapping, for which he was convicted, is included among those statutes. More pointedly, Section 1962, RICO, uses the "interstate or foreign

commerce" clause, and that was the very section charged and upheld as applying to Indians in Indian Country in Juvenile Male:

> [o]ur reading of §§ 1152 and 1153 leads us to reject Appellants' contention that Indians may not be charged for *any* criminal conduct beyond those crimes enumerated in § 1153···· [T]he [Indian] Major Crimes Act [ ] deals only with the application of federal enclave law to Indians and has no bearing on federal laws of nationwide applicability that make actions criminal wherever committed. *Id.* at 498 (quoting *United States v. Top Sky,* 547 F.2d 483, 484 (9th Cir.1976) (Bald Eagle Protection Act, a law of general applicability throughout the United States, applies to Indians even though conduct the Act proscribes is not an enumerated offense under § 1153)). Moreover, we have previously held that RICO applies to Indians on their reservations. *See United States v. Farris,* 624 F.2d 890, 893-94 (9th Cir.1980) (holding that 18 U.S.C. § 1955 applies to Indians' on-reservation gambling activities). Thus, the district court had subject matter jurisdiction over M.A.C.'s RICO charge.

U.S. v. Juvenile Male 118 F.3d 1344, 1351 (9th Cir. 1997).

The factual predicate for the application of Section 2119 is that the vehicle has moved in interstate or foreign commerce. Here, the defense did not contest that Alyce Slim's pickup truck was manufactured in Canada, was driven from Arizona into New Mexico where Slim visited a medicinewoman, and driven back across state lines into Arizona where Slim and her granddaughter were stabbed, slashed, and Doe's skull was crushed. These circumstances meet the requirements for Section 2119.

(2) Because the offense of conviction was of nationwide applicability, it is immaterial whether the Navajo Nation has "opted in" to application of FDPA to an Indian who commits one of the crimes enumerated in 18 U.S.C. 1153 in Indian Country and against an Indian

Defendant, an Indian, next argues he can not be subject to the death penalty because the Navajo Nation never "opted into" the death penalty provision pursuant to 18 U.S.C. § 3598. (OB Argument A at 24.) The district court specifically rejected his argument, concluding that the express language of Section 3598 limited the "opt in" requirement to those offenses where federal jurisdiction was predicated solely on their occurrence in Indian Country. Title 18, U.S.C. § 3598 provides:

> Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is **predicated solely on Indian country** (as defined in section 1151of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction.

(Emphasis added). Had Congress wished, it easily could have precluded the application of the death penalty to any Indian by omitting the phrase "the Federal jurisdiction for which is predicated solely on Indian country." It did not. Instead, it specifically limited the effect of Section 3598 to offenses predicated solely on Indian Country jurisdiction. Armed Carjacking is not such an offense–the place of the

offense is not an element of the offense. The protections afforded under Section 3598 for certain offenses where jurisdiction is predicated solely on Indian Country, therefore, do not apply here.

The specific language of Section 3598 controls. "Where Congress has made its intent clear, 'we must give effect to that intent.'" *Miller v. French*, 530 U.S. 327, 341 (2000)(quoting *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 215 (1962). If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. *United States v. Buckland*, 289 F.3d 558, 564-65 (9th Cir. 2002).

(3) Tribal sovereignty is not violated by subjecting a member of the tribe to the penalties applicable to the violation of a statute with nationwide applicability

Defendant claims that tribal sovereignty is violated by permitting application of the death penalty when his tribe opposes it. (OB Argument A.2 at 30.) This argument is built on the preceding one, and suffers the same fatal flaw. Defendant concedes that, under *United States v. Wheeler*, 435 U.S. 313, 327 (1978), tribal sovereignty is subject to ultimate federal control. (OB at 30.) See also, *United States v. Enas*, 255 F.3d 662, 666 (9th Cir. 2001)(holding tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance").

The exemption provided in Section 3598 derives solely from a Congressional grant and is specifically limited thereby. Congress did not have to provide such an exemption for Major Crimes Act cases, and had it not, there is no aspect of tribal sovereignty that would have constitutionally prohibited the death penalty's routine application to such cases. Indeed, at the hearings on the proposed legislation that ultimately became FDPA, an Assistant Attorney General of the Navajo Department of Justice, speaking on behalf of the tribal president, agreed that "if Congress mandates that the new death penalties will apply to all lands subject to federal jurisdiction, Indian tribes must comply." Testimony of Helen Elaine Avalos before the House Judiciary Committee Hearing on H.R. 3315, 1994WL214209, p. 14 (February 22, 1994). The representative also testified that tribal sovereignty would be diminished if tribes were not given "the right to determine for themselves the severity of punishment for major crimes committed on their reservations." *Id.*

Congress did accord the tribes limited control over offenses where federal jurisdiction was based solely on the situs of the crime. It did not accede, however, to the request to permit tribes to carve out enclaves where all federal criminal laws did not apply.

2. Issues not raised below

a. Standard of Review

Failure to raise an issue below constitutes a waiver and the issue may only be reviewed for plain error, as set forth above in Argument Section A.2(a). *Chea*, 231 F.3d at 535.

b. Discussion

(1) Application of the death penalty to an offense of nationwide applicability does not violate the religious freedom of the person committing the offense.

Defendant asserts, for the first time, that application of the death penalty in a circumstance in which the tribe has not "opted in" violates his First Amendment right of religious freedom and the American Indian Religious Freedom Act. (OB Argument A.3 at 31.) This argument can only be reviewed for clear error. *United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002)

Defendant has cited no "exceptional circumstances" justifying failure to raise the issue below, for there are none. Nor can defendant successfully argue for a change in the law. Boiled down to its essence, defendant, a Native American, claims that Native American religious beliefs in the sanctity of life should protect him from imposition of the death penalty for the brutal stabbing deaths of two innocent Native Americans, even though his conduct violated federal criminal law.

Defendant is entitled to no greater protection of his right to religious freedom than anyone else. To accept his argument would be to exalt Native American religious beliefs over all others, in violation of the equal protection afforded to all by the Constitution. The tribal representative told Congress that the death penalty was "counter to the cultural beliefs and traditions of the Navajo people...." 1994 WL 214209. Congress found this argument unpersuasive, as it gave Native Americans no immunity from federal prosecution for all death penalty eligible crimes, regardless where they occurred. Furthermore, simply because defendant is a Native American does not establish that he has any meaningful or deeply held religious beliefs. He never offered any evidence of such during the mitigation phase. There is no basis in the record to support this claim.

(2) FDPA's aggravating factors do not permit the penalty to be applied in an arbitrary and capricious way

Defendant contends for the first time on appeal that the statutory and non-statutory aggravating factors found by the jury were unconstitutional as applied in this matter. (OB Argument HH at 190.) For the same reasons set forth above in Argument Section A.2.(b)(5), his argument fails.

(3) Non-statutory aggravating factors and victim impact do not permit FDPA to be applied arbitrarily or capriciously

Defendant argues, for the first time, that the use of non-statutory aggravating factors by the government violates the separation of powers as set forth in the Constitution. (OB Argument HH at 197.)

The government only sought and the jury only found one non-statutory aggravating factor: "that defendant has caused injury, harm, and loss to the victim's family." (RT 4199, 4204; ER 944, 954.) Despite defendant's assertion of improper delegation of powers, Congress specifically authorized this non-statutory aggravating factor. Section 3593(a) provides

> [t]he factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.

There was no impermissible delegation as to victim impact. There was no error, plain or otherwise.

(4) The district court did not err by instructing the jury that it could consider kidnaping an aggravating factor

Defendant assigns error to the use of the statutory aggravating factor that the death of Jane Doe occurred during the commission and attempted commission of

kidnaping. According to defendant, because the kidnaping was based on the Major Crimes Act, the tribe had to "opt in" under Section 3598. (OB Argument B at 32.) He raised this general issue below, but his only objection then was that it amounted to double counting to allow the jury to consider kidnaping it as an aggravating factor, as he already had been convicted of that offense. (RT 4001-04; SER 429-32.) The Court may remand only if it finds that the specific issue was properly preserved. 18 U.S.C. § 3595(c)(2). This issue was not properly preserved, and therefore is waived. In any event, there was no plain error in the district court's instruction.

The "opt in" provision of Section 3598 relates to whether defendant is eligible for the death penalty, and nothing more. Section 3598 says nothing about the use of statutory aggravating factors based on Indian Country offenses. Defendant was death-eligible in this case based solely upon his conviction on Count 2 for Armed Carjacking resulting in death, in violation of 18 U.S.C. § 2119.

18 U.S.C. § 3595(c) provides that an appellate court

> shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the government establishes beyond a reasonable doubt that the error was harmless.

Once defendant became death eligible following his conviction for Armed Carjacking, the jury had to consider statutory aggravating factors, as listed in 18

U.S.C. § 3592(c). Section (c)(1) provides: "The death occurred during the commission or the attempted commission, or during the immediate flight from the commission of . . . section 1201 (Kidnapping). . . ." Defendant cites no statutory authority to preclude the consideration of death during the commission of kidnapping as an aggravating factor, even though it occurred in Indian Country. The only prohibition under Section 3598 is that death during a kidnapping cannot be used as the conviction triggering eligibility for the death penalty.

Under Section 3598, the tribe was only given the choice of "opting into" the death penalty for crimes premised on Indian Country jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153. It was not given a choice of which aggravating or mitigating factors might be used to determine whether a death eligible defendant should be sentenced to death. Neither Section 3598, 3592, nor 1153 prohibit using federal crimes that might also fall within the Major Crimes Act as statutory aggravating factors, once the defendant is found death eligible for a covered offense, such as Armed Carjacking or Treason (18 U.S.C. § 2381).

Finally, assuming *arguendo* that use of the kidnapping factor was error, it would be harmless beyond a reasonable doubt. The jury was provided with two separate verdict forms–one each for the death of Alyce Slim and Jane Doe, in order to consider the propriety of the death penalty for defendant. (RT 4196, 4201;

ER 941, 950.) The statutory aggravated factor of death during the commission of a kidnaping applied only to Jane Doe. (RT 4093; ER 953.) The jury found that statutory aggravating factor in her case as well as five other statutory aggravating factors. (RT 4203-04; ER 952.)

The jury found the same aggravating factors existed as to Alyce Slim, other than death during a kidnaping. (RT 4198-99; ER 943.) Any error in including "death during a kidnaping" as an aggravating factor was clearly harmless. The jury determined death was the appropriate sentence in the Alyce Slim verdict based on the same factors as Jane Doe, but without the complained-of "death during a kidnaping" factor. It doubtless would have reached the same conclusion for Jane Doe without the additional aggravating factor. *See Jones*, 527 U.S. at 404.

(5) Defendant is not too youthful to merit the death penalty, so the punishment is not cruel and unusual

Defendant argues for the first time on appeal that the death penalty should not be applied to him because, although he is not a juvenile, he suffers many of the same vulnerabilities as juveniles, to whom the death penalty is inapplicable. (OB Argument FF at 188.) His failure to raise this below waives its consideration, unless to do so would work an injustice or undermine the integrity of the criminal justice system under the plain error standard.

The Supreme Court listed three general differences between those under 18 and adults in finding that the execution of juveniles violated the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551 (2005): first, juveniles tend to be impetuous and engage in ill-considered actions; second, they are more vulnerable to negative influences and peer pressure; and finally, the personality traits of juveniles are more transitory and less fixed. *Id.* 543 U.S. 551, 569 (2005). The Court in *Roper* stated; "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* While noting objections to a categorical rule banning the death penalty for juveniles, the Court held "[t]he age of eighteen is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." *Id.* at 574.

Again, because of defendant's failure to urge this issue below, there is no record that he was "impetuous" or "vulnerable to negative influences and peer pressure," or that his "personality traits were transitory." There is plenty in the record to demonstrate otherwise. The armed carjacking in this case was well thought out as a step in the process of preparing for the robbery of the trading post three days later. Defendant and Orsinger went to New Mexico to steal a car for the robbery.

(RT 2779-80; SER 95-96). While in New Mexico, each obtained a knife. (RT 3118; SER 146). They rode in the pickup with Slim and Doe until they reached the point where they were to be dropped off, where they attacked, repeatedly stabbed, and killed Alyce Slim. (RT 3121; SER 147.) Defendant and Orsinger then drove about 30 miles to another location where defendant slit the throat of Jane Doe before he and Orsinger crushed her skull with 20 pound rocks. (RT 3122-3; SER 148-49.)

Defendant was 20 years of age and had graduated high school when he perpetrated these murders. His co-defendant was only 16 at the time. In *Roper*, the Supreme Court drew a bright line at the age of 18. Because defendant was over the age of 18, society presumes he had the necessary mental capacity and makeup to vote, sit on a jury, marry without permission, enlist in the armed forces, and sign a contract to buy a house or a car. Nothing in the record here warrants a belief otherwise. The record shows he should be held accountable for his own actions, and should be subject to the death penalty because he was two years past the age of 18 at the time of the offense. There is no plain error in the application of the death penalty to this defendant.

(6) Defendant's claim that he is less culpable does not mean applying the death penalty to him violates due process

Defendant claims he was less culpable than his 16 year old co-defendant, Orsinger, and argues that he should not be subject to the death penalty because Orsinger was not. (OB Argument CC at 184.) He offers no authority, however, for the proposition that a defendant who claims to be less culpable than his co-defendant can, as a matter of law, be ineligible for the death penalty. Defendant so argued to the jury in mitigation, and even presented a letter from one of Orsinger's co-defendants that Orsinger, not defendant, was the "bad guy." The jury unanimously found as a mitigating factor that Orsinger could not receive the death penalty. (RT 4199, 4204; ER 945, 955.) However, the jury also concluded those factors were not sufficient to overcome the aggravating factors for which defendant was responsible. (RT 4201, 4205; ER 948, 958.)

Defendant admitted that both he and Orsinger stabbed Alyce Slim. He also said he slit the throat of nine-year-old Jane Doe, and while she was conscious, crushed her head with 20 pound rocks during the course of an armed carjacking. Defendant's heinous conduct, including beheading the bodies and burying the heads and hands of the victims, and using the blood soaked stolen vehicle during a subsequent armed robbery fully justified a death sentence. The jury unanimously

concluded the death penalty was the only appropriate sentence for defendant, even after finding the mitigating fact that Orsinger could not receive the same sentence.

C. Arguments Attacking the Jury Selection and Empanelment

Defendant raised several challenges in the district court regarding the jury selection process, and has added new arguments in his brief. All those arguments are addressed here. They are Argument C at 34-41; Argument D at 41-55; Argument E at 55-66; Argument F at 66-70; and Argument H at 74-76.

1. Standard of review

A district court's ruling on challenges to the composition of a petit jury is reviewed "independently and non-deferentially." *United States v. Cannady,* 54 F.3d 544, 546 (9th Cir. 1995). A trial court's factual findings regarding purposeful discrimination in jury selection are entitled to great deference and will not be set aside unless clearly erroneous. *United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002).

"We review for abuse of discretion a district court's voir dire procedures and for manifest error a court's findings regarding juror impartiality." *United States v. Mendoza,* 157 F.3d 730, 733 (9th Cir. 1998). A court's decision not to strike jurors for cause is reviewed for abuse of discretion. *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2004). Few aspects of a jury trial are more committed to a district

court's discretion than the decision whether to excuse a prospective juror for actual bias. *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997).

2. Discussion

a. There is no evidence that any ethnic group was systematically excluded

Defendant claims that the jury selection process utilized in this cased resulted in an under-representation of Native Americans on his jury. (OB Argument C at 34.) However, a defendant is not entitled to a jury of any particular composition. *Taylor v. Louisiana,* 419 U.S. 522, 538 (1975).

In determining the constitutionality of juror selection under the 5th and 6th amendments, this Court held that to establish a *prima facie* violation of the fair cross-section requirement, the defendant must show: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group *in venires* from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) under-representation is due to systematic exclusion of the group in the jury-selection process. *United States v. Esquivel,* 88 F.3d 722, 725 (9th Cir. 1996)(citing *Duren v. Missouri,* 439 U.S. 357 (1979))(emphasis added).

Defendant cannot show that the representation of Native Americans in the *venire* panel was not fair and reasonable in relation to the number of persons in the community who fit within that "distinctive group." Although he concedes that this Court has never struck down the process used to empanel jurors in Phoenix in other reservation cases, he contends that only in this capital case was there a violation. However, this Court has stated,

> [i]t appears to us that the Supreme Court's use of the plural in setting up the *Duren* test is a clear indication that a violation of the fair cross section requirement **can not be premised upon proof of under representation in a single jury**. While juries must be drawn from a source, fairly represented from the community, the composition of each jury need not mirror that of the community.

United States v. Miller, 771 F.2d 1219, 1228 (9th Circuit 1985); *Esquivel,* 88 F.3d at 726 (requiring proof that the jury pool does not adequately represent the distinctive group in relation to the number of such persons in the population). Defendant does not claim that under- representation occurred generally or in *venires* other that his own; thus his argument fails. *Miller,* at 1228.

Disparity.

Defendant raised this issue prior to trial by motion to dismiss the indictment or stay the proceedings, which the district court denied. (CR 243, 265; ER 151.) The court found the disparity in this case to be within the acceptable limit. (Id.)

This circuit follows the absolute disparity rule in reviewing fair representation. "Absolute disparity" is determined by taking the percentage of the group at issue in the total population and subtracting from it the percentage from that group that is represented on the master jury wheel. *Esquivel*, 88 F.3d at 726. The district court found that the percentage of Native Americans in the Prescott jury wheel was approximately 16.7%. Compared to the census percentage of 18.64% Native Americans, the resulting absolute disparity was 1.94%. Using defendant's proffered figure of 17.23% for the percentage of Native Americans in the initial randomly selected group of 3000 *venire* persons called for this case, the resulting absolute disparity shrinks to only 1.41%. An absolute disparity figure of either 1.9% or 1.41% is well within the acceptable limits. *Esquivel*, 88 F.3d at 727 (no error with absolute disparity of 4.9%); *United States v. Sanchez-Lopez,* 879 F.2d 541, 547 (9th Cir. 1989)(no error with an absolute disparity of 2.05%).

Alternatively, there is no evidence of "systematic" exclusion. In *Duren,* the defendant showed the exclusion of women from the jury pool occurred every week for nearly a year. That exclusion was systematic–that is, inherent in the particular jury selection process used. *Duren,* 439 U.S. at 669. In *United States v. Etsitty*, this Court stated that conducting trials of all cases arising in the Prescott Division in Phoenix over a period of time would constitute systematic exclusion. 130 F.3d 420,

426 (9th Cir. 1997). A one-time anomaly, however, does not qualify as systematic. *United States v. Nakai*, 413 F.3d 1019, 1022 (9th Cir 2005).

Further, there is no evidence that Native Americans were systematically excluded by the death qualification process, as suggested. (OB Argument C at 39.) All potential *venire* persons were provided the same juror questionnaire and all were asked, among a series of other questions, whether they could impose a sentence of death and whether, if they "were personally, morally, religiously or otherwise opposed to the death penalty," they could envision circumstances in which they would be willing to recommend a sentence of death. (SER 494.) There was nothing in those questions, nor does defendant point to any other questions, directed to exclude any ethnic group.

Death qualification of potential jurors is proper. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The exclusion of those that are unable to set aside their strongly held beliefs against the death penalty does not "contravene the basic objectives of the fair-cross-section requirement." *Lockhart v. McCree*, 476 U.S. 162, 176-77 (1986). Those who are *Witherspoon*-excludables are not a distinctive group and therefore there is no Sixth Amendment violation. *Buchanan v. Kentucky*, 483 U.S. 402, 416 (1987).

b. No different jury selection process is required for capital offenses.

Defendant argues, without authority, that jury selection procedures tolerated in non-capital cases cannot be tolerated in capital cases arising from the Navajo Reservation. (OB Argument C.2 at 40.) He appears to suggest that only he did not get a fair trial using the same jury selection process that has been upheld for others.

The Supreme Court has never suggested a two-track jury selection process–one for capital cases and a completely different one for non-capital cases. In fact, it has rejected a similar but inverted argument. In *Buchanan v. Kentucky*, 483 U.S. 402, 416 (1987), a joint trial was held for two co-defendants, one facing the death penalty and one not. The same jury was used for both defendants and, because of the capital offense, was death qualified. The Supreme Court rejected the argument that the non-capital defendant did not get a fair trial because the death qualified jury was more inclined to convict. 483 U.S. at 416. There is no evidence the Court employed faulty procedures in selecting the jury here, and no legal requirement of separate procedures for death eligible defendants who happen to be Native American.

c. The court did not err in refusing to dismiss jurors for bias who either did not sit in judgment of or were not objected to by defendant

1) Standard of Review

A court's decision not to strike jurors for cause is reviewed for abuse of discretion. *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002). Few aspects of a jury trial are more committed to a district court's discretion than the decision whether to excuse a prospective juror for actual bias. *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997). Defendant's failure to object below results in a waiver of the issue and it may only be reviewed for plain error. *United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002).

2) Discussion

Of all the *venire* persons of which defendant complains (OB Argument E at 55), only *venire* person "#36" sat on the jury and deliberated.[7] (RT 2517; SER 31.) Other panelists about whom defendant complains were not selected as trial jurors.

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[7]The district court ordered that the identity of the jury panel be withheld from the public record and that transcripts be filed under seal or redacted to remove jurors' names. (CR 368.) Accordingly, jurors and panel members are referred to by the numbering system designated by Appellant in Volume VI, ER 1054-56, and Appellee in Volume 3, SER 500, where identification of some sort is required. The jury questionnaire for one panel member, juror "#39," has been filed underseal as a separate volume of the SER.

As defendant concedes, he did not seek to remove "#36" for cause, nor did he use a peremptory strike to preclude him from serving. (OB at 64.) The issue is waived and may only be reviewed for plain error.

Defendant quotes "#36's" statement that certain crimes are so horrible the death penalty is the only appropriate penalty. (OB at 64.) However, defendant omits the immediate follow-up question by his counsel: whether there were any crimes that were so serious that "there should be no other possible punishment but death." (RT 2061; ER 352), the *venire*person responded, "[o]h, I see what you're getting at. Well , I don't - - no. I don't know if I - - I don't know how to answer that. Probably no." (RT 2061-62; ER 352-53.) "#36" later said he could vote for a sentence other than death after analyzing all of the evidence. (RT 2063; ER 354.) Defendant did not object to the seating of this juror, and understandably so. (RT 2066; ER 357.)

A trial court's finding of actual juror bias is reviewed under an extremely deferential standard. *United States v. Martinez-Martinez*, 369 F.3d 1076, 1082 (9th Cir. 2004). So long as the jury that sits in judgement of the defendant is fair and impartial there is no constitutional violation, even if the defense uses a peremptory challenge to remove a juror that arguably should have been stricken for cause. *United States v. Martinez-Salazar*, 528 U.S. 304, 317 (2000). The jury that sat in

judgement was fair and impartial and there was no plain error in seating #36 without objection from defendant.

d. The District Court did not abuse its discretion in excusing a prospective juror for cause based on her views of the death penalty

1) Standard of Review

"A prospective juror may be excused because of her views on capital punishment if 'those views would prevent or substantially impair the performance of her duties as a juror.' *Hendricks v. Vasquez,* 974 F.2d 1099, 1103 (9th Cir.1992)." *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996).

2) Discussion

Defendant complains that the district court excused *venire*person "#39" for cause, even though "#39" indicated she would not follow the court's instructions because she so strongly opposed the death penalty. "#39" answered question 57 of her pre-trial questionnaire that she was a person who could "never, under any circumstances, return a verdict which recommend a sentence of death." (SER 491.) To subsequent questions she stated, "[n]o one has the right to take another person's life - regardless of the evils done by that person - it reduces society to the level of the evil doer," and that she would not follow the instructions of the court "[i]f a death sentence would result from following those instructions." (Question #60 SER 492.)

Further, she advised that her views would prevent her from recommending the death penalty as punishment (Question #62 SER 492.); that she would automatically vote to recommend a life without parole sentence (Question #65 SER 493); she could not imagine a set of circumstances under which she recommend a death sentence (Question #68 SER 494.); and that she would not consider all of the evidence before recommending a sentence (Question #69 SER 494.) Finally, she said she would not be able to recommend a sentence of death even if the evidence, beyond a reasonable doubt, established death as the appropriate sentence. (Question #70 SER 494.)

Based on these inflexible positions, the trial judge attempted to explore "#39's" willingness to follow the court's instructions (RT 2401; ER 382; RT 2402-04; ER 383-85), and was not persuaded "#39" would keep an open mind or follow the court's instructions.

In excusing the *venire*person, over defense objection:

> THE COURT: The question is, really, would she remain open to the option of death? I'm very troubled by Ms. "#39's" responses.
>
> ***
>
> It was my firm impression, based on her demeanor here in court, that she would struggle to the point that I don't think she would honestly consider the death penalty in accordance with the instruction and her duty as an oath. And therefore I find that she is not qualified in this case.
>
> [H]er statements in her questionnaire were particularly compelling when she states "No one has the right to take another person's life, regardless of the evils done by that person. It reduces

> society to the level of the evildoer." And, in addition, she states she could not follow the instructions given by the court if a death sentence would result from following those instructions.
>
> ***
>
> I believe her views are so fixed that she would be substantially impaired to follow her oath as a juror in this case and follow the law that the Court gives to her.
>
> And so I find that she is not qualified as a juror in this case.

(RT 2415-16; SER 29-30.)

The court had the benefit of the jury questionnaire, which was filled out at home, giving ample opportunity to reflect; *venire*person "#39's" answers in court; and her body language. There is nothing in the record to establish the district court abused its discretion in excusing "#39" for cause.

e. Native Americans were not excluded from the jury based on their religious beliefs

1) Standard of Review

A district court's actions during *voir dire* ordinarily are reviewed for an abuse of discretion. *United States v. Howell,* 231 F.3d 615, 627 (9th Cir.2000). Given the unique position of a trial court, which must rely largely on immediate perceptions, it is accorded ample discretion in conducting *voir dire,* including whether to propound questions directed at exposing racial biases. *Rosales-Lopez v. United States*, 451 U.S. 182, 189-90 (1981).

A failure to timely object to the district court's *voir dire* on grounds of racial prejudice results in review for plain error. *See United States v. Klinger,* 128 F.3d 705, 710 (9th Cir.1997).

2) Discussion

Defendant argues for the first time that the procedures used to select the jury violated the Religious Freedom Restoration Act and the American Indian Religious Freedom Act. (OB Argument H at 74.) He points to no single *venire*person who was excluded solely because of religious beliefs. All potential *venire*persons were asked the same or similar questions in the questionnaire and in court. Those who were not death-qualified categorically stated that whatever the basis for their objection to the death penalty, they could not set it aside and be fair and impartial. There was no plain error in the disqualification of jurors who were so opposed to the death penalty that their views would prevent or substantially impair the performance of their duties as jurors. *Hendricks v. Vasquez,* 974 F.2d 1099, 1103 (9th Cir.1992).

D. The District Court Did Not Abuse its Discretion in Denying the Motion to Sever.

1. Standard of Review

A district court's denial of a motion for severance under Rule 14, Fed. R. Crim. P., is reviewed for an abuse of discretion. "The test for abuse of discretion by the district court is whether a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." *United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999).

2. Discussion

Defendant argues that the court erred by denying his motion to sever counts 7-11(related to the Trading Post robbery) from the rest of the indictment for trial. (OB Argument J at 87.) His motion to sever those counts initially was granted by the court in conjunction with co-defendant Gregory Nakai's request because Nakai was only charged with the armed robberies. The court concluded "inasmuch as essentially the same evidence and witnesses will be presented against Mitchell and Nakai in connection with the armed robbery counts, Mitchell and Nakai should be jointly tried on those counts. Therefore, Mitchell's motion to sever counts will be granted on that basis . . ." (CR 219; ER 76.) Co-defendant Orsinger's request for

severance from the capital case was denied as he was charged with the same offenses as defendant, even though not death eligible.

Subsequently, defendant asked the court to allow him to introduce evidence of Orsinger's prior armed carjacking conviction, which request was denied. (CR 254, 266; ER 187.) The next day, however, the court *sua sponte* severed Orsinger from the trial because of the possibility that defendant might be permitted to introduce that evidence at a joint trial, thereby creating considerable problems. (RT 0006; ER 166.) In light of that decision, the government requested that the severed counts be rejoined for defendant's trial since there was no legal impediment cited in the court's original order. (CR 267; ER 1030.) The court granted the government's motion. In the subsequent written order, the court found that the armed carjacking and the trading post robbery were connected by a common scheme or plan; that the jury would be able to compartmentalize the counts and follow the court's instructions; and defendant failed to prove convincingly a chilling effect on his decision whether to testify. (CR 283; ER 162-65.)

Defendant argued that the Red Valley Trading Post robbery charges (Counts 8-11) should have been severed from the Car Jacking and Murder charges (Counts 1-7). However, the two were inextricably intertwined. As part of a conspiracy to rob the Trading Post, defendant and Orsinger set out to take a vehicle to use as an

untraceable getaway vehicle. The car jacking took place on or about October 28, 2001; the robbery on October 31, 2001.

Rule 8(a), Fed. R. Crim. P., permits joinder of offenses if they "are based on ... two or more acts or transactions connected together or constituting parts of a common scheme or plan," and the rule is interpreted "broadly in favor of joinder." *United States v. Kinslow*, 860 F.2d 963, 966 (9th Cir.1988), *cert. denied*, 493 U.S. 829 (1989). Accordingly, the word "transaction" has a flexible meaning and may comprehend a series of related occurrences, so long as there is a "logical relationship" between them. *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1208 (9th Cir.1991), *cert. denied*, 508 U.S. 906 (1993). Such a relationship may be shown "by the existence of a common plan, scheme, or conspiracy." *Id.* 1208. "Evidence on the joined counts overlapped at trial and would also have been admissible as proof of motive, intent, plan, and absence of mistake under Fed. R. Evid. 404(b)." *United States v. Evans*, 796 F.2d 264, 265 (9th Cir.1986).

Just as the planning for the trading post robbery is Rule 404(b) evidence of intent, plan or knowledge for the car jacking and murders, the stealing of the truck is similarly admissible in the robbery as evidence of plan, knowledge and intent. Furthermore, there is a logical connection in the indictment between the allegations of the October 28 carjacking and the October 31 armed robbery of the trading post.

The closeness in time between the two events supports a finding that the defendant committed the carjacking of the truck in order to facilitate the armed robbery only three days later. The need for a getaway vehicle is a logical step in the plan for a robbery. Joinder was proper. *United States v. Lane,* 474 U.S. 438, 447 (1986).

Counts that are properly joined will only be severed if the "'joinder was so manifestly prejudicial that it outweighed the dominant concern with judicial economy and compelled exercise of the court's discretion to sever.'" *United States v. Whitworth*, 856 F.2d 1268, 1277 (9th Cir.1988) (internal quotation omitted). The joinder here is not so manifestly prejudicial. The robbery was sufficiently separate and distinct from the murder that the jury was able to compartmentalize and decide each event on its own merits. *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994)(Evidence is susceptible of compartmentalization when the acts constituting the crimes that were allegedly misjoined are discrete. . .).

Defendant argues there was significant prejudice in the joinder of all counts. However, he admitted to the FBI his part in the murder and car jack of Alyce and Jane Doe. He also admitted that he took part in the trading post robbery. Co-defendant Jason Kinlicheenie testified there had been a plan to get a truck to rob a trading post and defendant was in on the planning. Defendant and co-defendant Orsinger left for Gallup, New Mexico and returned with a truck. Defendant admitted

to Kinlicheenie that they had killed an old lady and a small one to get the truck. (RT 2783; ER 441.) Kinlicheenie took part in the robbery and described how defendant carried a gun inside the store, they got money and later split the proceeds.

The jury did not have difficulty compartmentalizing the evidence. The events were separated by several days and involved separate victims. The court did not abuse its discretion by allowing the trading post robbery counts to be tried with the related carjacking, murder and kidnapping counts.

E. The District Court Did Not Abuse its Discretion in Denying the Motion to Continue Trial.

1. Standard of Review

The failure to raise an issue below constitutes waiver and may only be reviewed for plain error. *Chea*, 231 F.3d at 535.

2. Discussion

Defendant contends without any authority that the court, once it severed the co-defendant's case on the day that jury selection began, was obligated to continue the trial even though he requested no such relief. (OB Argument K at 94.)

After reconsidering defendant's request to introduce prior act evidence of co-defendant Orsinger, the court severed Orsinger just prior to jury selection. (RT 0006; ER 166.) In light of the severance, the government asked the court to

revisit its decision severing the trading post robbery counts for trial. Following argument by both counsel, the court rejoined those counts for trial. (RT 0022; ER 162.) Defendant made no request for a continuance, nor did he suggest any impermissible participation by Orsinger in the jury empanelment. (4/1/03 RT 22-27; SER 22-27.) There is no evidence in the record that counsel for Orsinger caused any juror to be struck or disqualified over defendant's objection.

Defendant purely speculates that his tactics must have changed due the severance of Orsinger and the rejoinder of the robbery counts. However, 28 days elapsed between the day jury selection began on April 1, 2003, and the opening statements on April 29, 2003. (CR 267, 293; ER 1030, 1033.) There was more than ample time for the defense, if needed, to modify its trial strategies, or move for additional time to do so. The best evidence that a continuance was not necessary is that over the 28 days it took to select a jury, not once did defendant protest that more time was needed to prepare for trial. The guilt phase of the trial was not lengthy–it last less than five days.

There was no abuse of discretion in the court's failure to grant a trial continuance *sua sponte*. Absent a showing of an abuse of discretion or a plain error and the considerable prejudice required for an exercise of this court's discretion to notice an unpreserved claim, defendant is entitled to no relief.

F. The District Court Did Not Abuse its Discretion in Denying a Mistrial or Dismissal for Alleged Discovery Issues.

1. Standard of Review

The district court's denial of a motion for mistrial is reviewed for abuse of discretion. *United States v. Sarkisian*, 197 F.3d 966, 981 (9th Cir. 1999). Under that standard, "the reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion that it reached upon a weighing of relevant factors." *United States v. Nelson*, 137 F.3d 1094, 1106 (9th Cir. 1998).

Where trial counsel fails to object, the trial court's failure to grant a mistrial *sua sponte* is reviewed for plain error. *United States v. Segura-Gallegos*, 41 F.3d 1266, 1271 (9th Cir. 1994).

2. Discussion

Defendant complains that the district court abused its discretion in denying his motion for mistrial based upon claims of untimely disclosures by the government. (OB Argument L at 97.) As to some of the specific instances raised in the opening brief there was no objection at trial, and thus the plain error standard applies. As to those other instances where there was a contemporaneous objection, the abuse of discretion standard applies. Defendant also claims that, cumulatively, the net effect

of the delayed disclosures violated his rights to due process, a fair trial, to confront the witnesses against him, and a reliable sentencing determination.

The question for the district court was whether the defendant had adequate time to review, digest, and properly use or respond to the disclosed information. All but one of the disclosures occurred during the guilt phase, and that particular item was used only in the penalty phase, not the guilt phase of the trial. Defendant did not seek a continuance based on the disclosures of any of the information, and did not ask the trial court to fashion any relief other than grant a mistrial. Had trial counsel felt the need for additional time to prepare for or rebut the disclosed information, they could have done so.

Aggregating the claimed irregularities, as defendant does in the opening brief, does not change the analysis required of the district court. The district court had to determine whether the defendant was prejudiced by the disclosure; if so, to what extent; and, what remedy was appropriate to cure the matter, such as striking the evidence, precluding its use, granting a continuance or adequate time to prepare, giving cautionary instructions, or terminating the trial. In making that determination the district court had to look at the entire record to that point, taking into account the strength of the evidence against the accused and the likely impact of the disclosed

material. Defendant has failed to show that the district court abused its discretion in denying the mistrial.

G. The District Court Did Not Abuse its Discretion in Admitting or Excluding Evidence at Trial.

Defendant raised five major arguments in his Opening Brief challenging the admission or exclusion of evidence. Those arguments, answered here, were listed in the as I at 76-87; M at 105-126; N at 125-7; O at 127-30; and P 130-41.

1. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. See *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1062 (9th Cir. 2004). Rulings will be reversed for an abuse of discretion only if such non-constitutional error more likely than not affected the verdict. See *United States v. Edwards*, 235 F.3d 1173, 1178 (9th Cir. 2000).

Questions of the admissibility of evidence that involve factual determinations, rather than questions of law, are reviewed for an abuse of discretion. *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000). When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. If an "essentially factual" inquiry is present, or if the exercise of the district court's discretion is determinative, then deference is given to

the decision of the district court; otherwise, review is *de novo*. See *Mateo-Mendez*, 215 F.3d at 1042.

Failure to raise a timely specific objection constitutes a waiver of that objection under Fed. R. Evid. 103(a)(1). *United States v. Rivera*, 43 F.3d 1291, 1295 (9th Cir. 1995). In the absence of an objection the review is for plain error. *United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990).

2. Discussion

a. There was no plain error in admitting defendant's post-arrest statement.

Defendant did not raise this specific issue at trial; thus review is for plain error. *United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002)

(1) There was no federal-tribal collusion.

Defendant now asserts that he should have been brought before a magistrate on November 5, 2001, because in his view, the investigation into the murders was essentially federal. (OB Argument I at 76.) According to defendant, the delay in his initial appearance was the result of a working agreement between tribal police and the FBI, rendering his statement inadmissible. The burden was on defendant, however, to prove "actual" collaboration between the FBI and Navajo Law Enforcement to deprive him of federal procedural rights. *United States v. Doe,* 155

F.3d 1070, 1078 (9th Cir. 1998). Defendant failed to carry his burden in the district court, and he fails here as well.

"A bare suspicion that there was cooperation ... designed to deny fundamental rights is not sufficient. . ." *Doe*, 155 F.3d at 1078. The mere involvement of federal agents in an investigation does not automatically convert it to a federal case. A state arrest does not trigger federal criminal rules or statutes. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994).

> This is true even if the arresting officers (who, when the arrest is for a violation of state law, almost certainly will be agent of the state or one of its subdivisions) believe or have cause to believe that the individual may also have violated federal law. Such a belief, which may not be uncommon given that many activities are criminalized under both state and federal law, does not alter the underlying basis for the arrest and subsequent custody. As long as a person is arrested and held only on state charges by state or local authorities, the provisions of § 3501(c) are not triggered.

Id. at 358. There is no federal "arrest" without a filing of federal charges. *United States v. Benitez*, 34 F.3d 1489, 1493 (9th Cir. 1994).

In this case, the agents only interviewed defendant as part of an ongoing investigation and in conjunction with routine cooperation between tribal and federal authorities, which is "wholly unobjectionable." *Alvarez-Sanchez*, 511 U.S. at 360. The investigation continued long after defendant was interviewed and confessed.

There is no evidence of an intent to deprive defendant of any federal procedural rights. The admission of defendant's confessions was not plain error.

(2) Defendant was not interrogated about his pants.

Defendant argues, again for the first time, that his statement to FBI Special Agent Hush at the time of his arrest on tribal charges should be suppressed because he was not *Mirandized.* (OB at 82.) The review is for plain error. *United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002).

At the time of his tribal arrest, defendant was sleeping and not wearing pants. Special Agent Hush asked defendant where his pants were and defendant told him they were on the floor. (RT 2960; ER 527.) When the agent picked them up, a knife fell from the pants. (RT 2963; SER 117.) The knife was later seized pursuant to a consent search of the residence. (RT 2964-65; SER 118-18) The knife bore Alyce Slim's blood. (RT 3225; ER 619.)

Although defendant was in custody on the tribal charges, this contact did not amount to interrogation. Interrogation is defined as questions or statements reasonablely designed to elicit incriminatory responses. "[T]he definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis,* 446 U.S. 291 at 301-02 (1980). It cannot be said that an agent

when presented with defendant in his underwear knew that asking defendant where his pants were was likely to produce a murder weapon or incriminating response.

(3) Statements were not improperly induced.

Defendant raises for the first time his contention that his statements were obtained through deception and lies, and therefore must be suppressed. The lie, he contends, was a false representation as part of the *Miranda* warnings that a lawyer would be appointed for him, if requested, when in fact, he was not eligible for appointment of counsel. (OB at 85.) Defendant never requested counsel. He never invoked his rights or asked that the questioning stop until he could speak with a lawyer. There is no valid basis for this claim.

On November 4, 2001, defendant was advised of his rights and signed a written waiver of those rights. (RT 3104-05; SER 139-40.) He was again reminded of those rights on November 5, 2001, and again waived them before confessing his involvement. (RT 3112; SER 143.) Finally, on November 29, 2001 he was again advised of his rights in writing, signed a waiver, and again confessed. (RT 3116; SER 145.) Each of those warnings or admonitions of rights contained the phrase defendant now claims fooled him and tricked him into confessing. He argues now with a straight face that had he known he would not be given a lawyer, he never

would have waived his right to remain silent or stop any questioning until a lawyer could be present.

The law requires that a suspect who is in custody be advised of his *Miranda* warnings and, if he requests the presence of a lawyer, all questioning cease until the lawyer is provided. *Miranda v. Arizona*, 384 U.S. 436, 472-73 (1966). Defendant never asked for a lawyer. All the law requires is a suspect be advised of his rights and make a knowing and voluntary waiver of those right before being questioned. *Id.* 474.

Defendant was advised of his rights and on three separate occasions either signed a written waiver or orally agreed to waive his rights. There was no plain error below, and certainly no showing of sufficient prejudice to warrant considering defendant's claim.

b. There was no error in excluding self-serving, non-inculpatory portions of defendant's statements through cross examination of law enforcement witnesses.

(1) Standard of Review

Defendant complains that the district court erred by precluding him from introducing his self-exculpatory statements through the testimony of law enforcement witnesses. (OB Argument N at 125.) Whether the court correctly construed a hearsay rule is reviewed *de novo*. *United States v. Ortega,* 203 F.3d 675,

682 (9th Cir. 2000). A district court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *United States v. Campbell,* 42 F.3d 1199, 1204 (9th Cir. 1994). Whether limitations on cross-examination are so severe as to violate the Confrontation Clause is reviewed *de novo* and any violation is subject to harmless error analysis. *Ortega,* 203 F.3d at 682.

(2) Discussion

Prior to trial the government filed a Motion in Limine, pursuant to Fed. R. Evid. 801, to preclude defendant from introducing through witnesses other than himself any of his own statements which were arguably exculpatory, as they would constitute hearsay. (CR 122; ER 1010.) The court granted the government's motion. (CR 230; ER 103.)

Notwithstanding the district court's ruling, at trial defense counsel attempted to elicit from one FBI Special Agent that "Mr. Mitchell denied killing anybody, didn't he?" (RT 2736; ER 429.) The government's objection was sustained. (RT 2743; ER 431.) Later, defense counsel tried to establish through another FBI Special Agent that defendant claimed he had been out drinking on the day of the murders. (RT 3154; ER 579.) Both statements were out of court statements offered to prove the truth of the matter asserted. See Fed. R. Evid. 801 (c).

In *United States v. Ortega,* this Court upheld the district court 's preclusion of a defendant from offering his self-serving, exculpatory statements made as part of a confession. 203 F.3d 675 (9th Cir. 2000). Ortega, like defendant here, sought to elicit the statements from a law enforcement officer present when the defendant confessed. He claimed that failure to permit the questioning violated the Confrontation Clause and the evidentiary rule of completeness. 203 F.3d at 682. He also argued the statements should have been admitted under Fed. R. Evid. 807 in the interest of justice.

This Court rejected Ortega's claims and held the district court did not abuse its discretion in excluding the evidence for three reasons. First, defendant's statements were clearly hearsay, even though made as part of an inculpatory statement. The Court stated:

> The self-inculpatory statements, when offered by the government, are admissions by a party-opponent and are therefore not hearsay, *see* Fed. R. Evid. 801(d)(2), but the non-self-inculpatory are inadmissible hearsay. *See Williamson*, 512 U.S. [594] at 599 (finding that "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non self-inculpatory parts [which are hearsay]"). If the district court were to have ruled in his favor, Ortega would have been able to place his exculpatory statements "before the jury without subjecting [himself] to cross-examination, precisely what the hearsay rule forbids." *United States v. Fernandez,* 839 F.2d 639, 640 (9th Cir. 1988).

203 F.3d at 682.

Second, the rule of completeness found in Fed. R. Evid. 106 applies only to written or recorded statements, not oral ones. *Id.* Even if Rule 106 applied, exclusion of the exculpatory statement was proper because it was still hearsay. Rule 106 does not compel the admission of otherwise inadmissible hearsay. *United States v. Collicott,* 92 F.3d 973, 983 (9th Cir. 1996)(reversed on other grounds).

Third, the Court acknowledged that the Confrontation Clause does not preclude a trial judge from imposing reasonable limitations on cross-examination. *Ortega*, 203 F.3d at 682 (citing *United States v. Dees*, 34 F.3d 838, 843 (9th Cir. 1994)). Although Ortega had testified in his own defense and mentioned the statements he sought to elicit through the agent, this Court noted it had previously held that due process did not require the trial judge to allow the presentation of exculpatory hearsay statements. *Ortega*, 203 F. 3d at 683 (citing *United States v. Fernandez*, 839 F.2d 639, 640 (9th Cir. 1988)).

In *United States v. Fernandez*, the government did not introduce defendant's post arrest statement that included his claim that he did not commit the robbery. 839 F.2d 639, 640 (9th Cir. 1988). The defendant attempted to introduce his denial through the agent, but the denial was ruled inadmissible hearsay. This Court stated:

> [F]ernandez was not prevented from introducing his denial – he could have testified to the statement to himself. He chose not to testify. It seems obvious defense counsel wished to place Fernandez statement to

> Bateman before the jury without subjecting Fernandez to cross-examination, precisely what the hearsay rule forbids.

Fernandez, 839 F.2d at 640. In the instant case that is precisely what defendant hoped to accomplish. The district court did not err in excluding defendant's non self-inculpatory statements.[8]

c. There was no *Bruton* violation at trial

(1) Standard of Review

An alleged *Bruton* violation is reviewed *de novo*. See *United States v. Angwin*, 271 F.3d 786, 795 (9th Cir. 2001). The district court's denial of a motion for mistrial is reviewed for an abuse of discretion. See *United States v. Allen*, 341 F.3d 870, 891 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1876 (2004).

(2) Discussion

Defendant contends the court violated the dictates of *Bruton v. United States*, 391 U.S. 123 (1968) by allowing the admission of co-defendant Orsinger's

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[8] Defendant cannot fit the desired testimony into the residual exception to the hearsay rule, Rule 807. In order to meet the requirements of Rule 807, defendant must demonstrate that the testimony was "more probative on the point...than any other evidence which the proponent can procure through reasonable efforts." That he cannot do, given the relative ease with which he could have taken the stand and offered the exculpatory statements himself. Instead, he appears to prefer the "back door" approach.

statements into evidence. (OB Argument O at 127.) There was no error; Orsinger's statements were never introduced.

During its opening statement, the government told the jury that FBI Special Agent Kirk walked over to defendant at the scene where the bodies were recovered and told him Orsinger said that defendant had stabbed Alyce Slim. At that point defendant, who previously had denied involvement in the murders, confessed. (RT 2554; ER 401.) After the opening statement concluded, defendant objected to the reference and asked for a mistrial, which the court denied. The court reminded the jurors of its previous instruction that what the lawyers said was not evidence. (RT 2559-61; ER 405-07.)

During trial, Special Agent Kirk testified that defendant was advised that additional investigation had been conducted and that they had spoken with Orsinger. (RT 2726; SER 91.) Special Agent Kirk related that when asked defendant whether he was involved with the two deaths, defendant told him that he stabbed Alyce Slim, slit Jane Doe's throat, told her to lay down, and then took turns with Orsinger throwing 20 pound rocks on her head. (RT 2727-28; SER 92-93.). There was no defense objection at this point concerning "Orsinger's statement" because no words attributed to Orsinger were offered in evidence. Orsinger's statement was never

introduced in evidence during the trial; thus, there could be no *Bruton* error based on its introduction.

Finally, any references to Orsinger agreeing to show the locations of the bodies and later having difficulty doing so were not statements of Orsinger about what defendant did, and so do not trigger *Bruton*. Even assuming there was some error in the opening statement or the reference to Orsinger at the death scene, they were harmless in light of the direct testimony of Kinlicheenie,[9] Alyce Slim's blood on the knife from defendant's pants, the handprint and the DNA evidence linking defendant to Slim's truck, and defendant's extensive admission of the carjacking, killings, and trading post robbery.

d. Defendant's right to confrontation was not violated

(1) Standard of Review

Failure to object below constitutes a waiver and the issue may only be reviewed for plain error. A court's ruling on evidentiary matters is reviewed for abuse of discretion. *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1360 (9th Cir. 1993).

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[9] At trial, Kinlicheenie testified that defendant told him "that they had took out some people," meaning they killed some people, according to Kinlicheenie. Defendant described the people, saying "one was small and one was an old lady." (RT 2782-3; ER 440-41.)

(2) Discussion

(a) Guilt phase *Crawford* violations

Defendant argues that introduction of certain evidence, to which he did not object, violated his right to confront his accusers under *Crawford v. Washington*, 541 U.S. 36, 68 (2004). (OB Argument P at 130.)

First, defendant complains of evidence presented through tribal police officers concerning the robbery of the trading post, the license plate number of a possible getaway truck, and confirming the possible location of the stolen truck. Under Rule 801(c), this evidence was not offered for its truth, and therefore was not hearsay. (RT 2657-65, 3007; ER 416-24.) The first arriving officer testified that she took the license plate number that was provided to her and radioed it to the dispatcher. (RT 2660; ER 419.) The court overruled defendant's objection to that evidence, finding that it was not hearsay as it was offered to explain the officer's actions. (RT 2661; ER 420.)

The stolen truck later was found by a different officer responding to an abandoned vehicle call. He was not advised that it was wanted in connection with robbery but a registration check revealed it belonged to the missing vicitms. (RT 2669, 2675; SER 77, 80.)

Defendant next complains of evidence related to "information received by law enforcement from an unidentified cooperating person." That information provided the basis for the officer's action in visiting a scene near defendant's grandfather's residence. While he found tire tracks and footprints, none could be linked to any vehicles or individuals. The information was of limited value, and hardly could be said to have prejudiced the defendant or denied his substantive rights.

The evidence at issue explained what the officers did in connection with their limited investigation of the trading post robbery and was not offered for its truth, so it also did not constitute hearsay. *United States v. Andaverde*, 64 F.3d 1305, 1314-15 (9th Cir. 1995); *United States v. Brown*, 923 F.2d 109, 111 (8th Cir. 1991).

Defendant next attacks the case agent's testimony as to the value of the money stolen from the trading post. That testimony was admitted by agreement with defendant. (RT 3166; ER 589.)

Next, defendant complains of statements by the fingerprint examiner who conducted the actual examination. He testified to his findings, and that his findings had been verified. This did not merit a defense objection at the time. (RT 3190; ER 591) The examiner was subject to cross-examination and his findings were not challenged. (RT 3191-93.)

Defendant assigns as error the reference to incised neck wounds that *he* introduced in an attempt to impeach the medical examiner with an FBI report concerning a phone conversation. (RT 3267; ER 635.)

Finally, defendant urges *Crawford* error in the admission of the notations on the autopsy diagrams that were physically authored by an examiner other than witness Dr. McLemore. (OB at 134.) However, Dr. McLemore was present during the autopsies, the notes were made contemporaneously in her presence and she was subject to cross-examination. The court did not abuse its discretion in allowing the exhibit over defense objection. (RT 3289; ER 639.)

(b) Penalty phase *Crawford* violations.

Defendant now argues, as he did not below, that the admission of all trial evidence during the penalty phase violated *Crawford*. (OB at 136.) At the start of the penalty proceedings the government announced:

> Just for the purposes of the record, and I know the Court had it in its instruction, but we would just formally adopt the testimony and evidence presented at the trial for the purposes of this hearing.
>
> THE COURT: The testimony of all of the witnesses?
>
> MR. KIRBY: Of all of the witnesses and all of the evidence introduced in the trial.
>
> THE COURT: All right.

(RT 3753; ER 813.) There was no objection by defendant.

Defendant now claims he was denied his right to cross-examine and confront those same witnesses that he had cross-examined during trial. The only witnesses called by the government during the penalty phase were the victims' family members, who talked about the devastating impact they had suffered. Defendant was afforded an opportunity to question these witnesses but elected not to.

Defendant offers *United States v. Jordan*, 357 F.Supp. 2d 889 (E.D. Va. 2005) in support of his theory that he was denied his right of confrontation. However, *Jordan* dealt with a completely different situation. The government there sought to introduce during the penalty phase statements previously made by a then-deceased witness to the grand jury and police officers. The witness had never been subject to cross-examination. The district court, citing *Crawford*, granted Jordan's motion to preclude the evidence during the guilt phase but found that it might be admissible during the penalty phase if the government could demonstrate trustworthiness. *Id.* at 903-04.

In the instant case, all witnesses presented in the penalty phase, either by adoption of the guilt phase evidence or those who testified during the penalty phase, were subject to cross-examination. There was no *Crawford* violation.

(c) Cross-Examination of Kinlicheenie

Defendant argues that the district court impermissibly limited his cross-examination of Jason Kinlicheenie, a co-defendant who testified against him in the guilt phase. (OB at 138.) A court's decision to limit cross-examination is reviewed for abuse of discretion. *United States v. Baker*, 10 F.3d 1374, 1405 (9th Cir. 1993). The test is whether the jury received sufficient information to appraise the biases and motivations of the witness. *United States v. Easter*, 66 F.3d 1018, 1023 (9th Cir. 1995).

During cross-examination of Kinlicheenie defendant attempted to introduce the facts of a separate carjacking and murder case involving Orsinger, Gregory Nakai, and Kinlicheenie. Kinlicheenie was asked if he was aware that there was a separate trial involving Gregory Nakai and Orsinger. (RT 2843; ER 501.) Following a government objection, the court advised defendant that under Rules 403 and 404(b) Fed. R. Evid., he could not pursue evidence of the other case involving Orsinger through Kinlicheenie. (RT 2845; ER 503.) The court then instructed the jury to disregard any reference to Orsinger committing any other murders. (RT 2847; ER 505.)

This attempt was merely an end-run to inform the jury that, in addition to the murders he committed in the instant case, Orsinger–who was not present at

defendant's trial–was also responsible for two others. The court had earlier denied defendant's request to introduce such evidence under Rule 404(b) Fed. R. Evid. (CR 281; ER 1031.) Defendant fails to explain how extracting information about a trial on an unrelated set of murders by Orsinger and Gregory Nakai, to which Kinlicheenie was not a witness, would have provided the jury with additional impeachment evidence of bias or motivation of witness Kinlicheenie, and without running afoul of Rule 608(b) .

The jury heard more than enough about Kinlicheenie's motivations and biases to make an informed decision about his credibility. Defendant pointed out that by testifying under a cooperation agreement, Kinlicheenie was no longer facing a possible sentence of 62 years. (RT 2841; ER 499.) He established that Kinlicheenie had lied to his mother about the robbery (RT 2828; ER 486.), and that he knowingly got into the bloody, stolen truck with guns so he could rob the trading post. (RT 2838; ER 496.) The defense also argued that Kinlicheenie had to testify in a fashion to satisfy the government or his deal would be revoked. (RT 2854-55; ER 512-13.) Defendant was not prevented from cross-examining Kinlicheenie about his plea agreement or his testimony about what defendant said or did.

Defendant was only prevented from probing into areas that were not relevant to the case at hand. Kinlicheenie did not testify during the other case and therefore

there were no prior statements or impeachment to delve into. (RT 2844; ER 502.) Defendant wanted to go into those matters in an attempt to "dirty up" the absent co-defendant Orsinger. This was not relevant, and its exclusion did not restrict defendant's ability to impeach Kinlicheenie. The court merely denied defendant an opportunity to introduce irrelevant evidence; it did not restrict questioning in connection with the case before the jury. It did not abuse its discretion.

(d) Kinlicheenie's prior arrest for theft

Finally, defendant argues that the court improperly denied him the opportunity to impeach Kinlicheenie with a prior arrest for which he was never convicted. (RT 2831; ER 489.) He claims that such evidence is admissible under Rule 608(b) Fed. R. Evid. (OB at 140.) However, he did not raise this specific basis and therefore it is waived. Rule 103(a)(1) Fed. R. Evid.; *United States v. Pino-Noriega*, 189 F.3d 1089, 1097 (9th Cir. 1999); (RT 2831; ER 489.) Furthermore, such evidence is only admissible under Rule 608 if it concerns the witness' character for truthfulness or untruthfulness. Even if relevant, the specific instance may only be inquired about; extrinsic evidence may not be used per Rule 608(b).

In light of the broad range of impeachment of Kinlicheenie, and the irrelevance of what Orsinger may have done in another case, there was no prejudice

and no abuse of discretion in the reasonable limitation placed on the cross-examination of Kinlicheenie.

e. Defendant's general evidentiary objections are not well taken

Defendant asserts error in a laundry list of admitted evidence. (OB Argument M at 105.)

(1) Hearsay - Medical examiner

Defendant argues that the medical examiner, Dr. McLemore, introduced hearsay statements included in notes on the diagrams she used. (OB at 107.) He also complained of the same evidence as a *Crawford* violation, above. (OB at 134.) Dr. McLemore testified that she supervised the autopsy and that notations placed on diagrams to note the injuries and their locations were made by another doctor also present. (RT 3289; ER 639.) Defendant objected only as "hearsay" and failed to articulate a specific basis and therefore it is waived. Dr. McLemore testified she was at the autopsy, that the notations were made during the ordinary course of business and were of a type reasonably relied upon. (RT 3289; ER 639.) Defendant offered no further objection to the court's ruling of admissibility. Failure to specifically object results in a waiver. Dr. McLemore testified as to her own findings and defendant never challenged her findings or her determination of the causes of death.

(2) Gruesome photographs

Defendant next argues that introduction of gruesome photographs, which depicted post-mortem mutilation, was an abuse of discretion. (OB at 110.) Alyce Slim was stabbed 33 times about the core of her body and had 16 more wounds on her hands and arms. Jane Doe's skull was crushed in six places by heavy blows to her head. Defendant admitted stabbing Slim, slitting the little girl's throat, and throwing heavy rocks on her head as she lay on the ground bleeding. Using an ax, both victims were decapitated and their hands severed. The heads and hands were buried in a hole.

Defendant filed a pretrial motion to suppress gruesome photographs. (CR 194; ER 1019.) At a pretrial hearing on the motion the government advised it would offer only 28 of the approximately 150-200 photographs it had. (RT 3/12/03 65, 68; SER 19-20.) After seeing the photographs including the ones the government had decided to use, the court observed the government has selected only those that had probative value, not many of the more graphic photos. (RT 3/12/03 68: SER 20.)

In its order, the court found the evidence of post-mortem mutilation admissible as evidence of consciousness of guilt. (CR 282; ER 206.) Exhibit 149 was a long distance image of the body of Alyce Slim; Exhibit 150 was also a

photograph of Jane Doe at a distance. (RT 3053-54; SER 132-33.) The heads and hands were partially visible as a hole was excavated in exhibit 154. (RT 3058; ER 553.)

He now argues, as he failed to below, that the court should have limited its ruling to the murder charges and excluded the photographs from consideration on the carjacking offense. The images and diagrams clearly would have been admissible during the penalty phase as evidence of defendant's mental state, the victims' family impact, and the especially heinous, cruel and depraved nature of defendant's actions. The court did not abuse its discretion by limiting the number of images that were admissible and ordering that they be cropped to eliminate the evidence of decapitations.

Rule 403 Fed. R. Evid. provides for the exclusion of evidence only "if its probative value is substantially outweighed by the danger of unfair prejudice . . . " It is "'an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise relevant evidence.' Under the rule, the danger of prejudice must not merely outweigh the probative value of the evidence, but substantially outweigh it." *United States v. Mende,* 43 F.3d 1298 (9th Cir. 1995)(internal citations omitted). In *United States v. Goseyun,* the admission of a photograph showing massive injuries to the decedent's head was upheld as relevant to the cause of death

and the willful and premeditated nature of the murder. 789 F.2d 1386, 1387 (9th Cir. 1986). In *United States v. Brady*, photographs showing the battered, bloodied and bruised face of the decedent were admissible to help explain the doctor's conclusions as to the cause of death. 579 F.2d 1121, 1129 (9th Cir. 1978). Finally, in *Rivers v. United States,* the admission of evidence and photographs depicting dismemberment of the victim was upheld as relevant to defendant's state of mind, even though the cause of death was asphyxiation. *Rivers v. United States,* 270 F.2d 435, 437-39 (9th Cir. 1959).

Murder cases cannot be tried in a vacuum. The court properly admitted the photographs to show intent, one of the elements of the offenses . There were no photographs depicting the actual dismemberment except for a cropped one of Jane Doe's neck, which was necessary for the medical examiner to show a sharp force wound consistent with defendant's acknowledgment that he "slit her throat" (RT 3339; SER 221), and evidence of premeditation. The court, just prior to the testimony of the medical examiner, observed that up to that point the trial been very "sanitized." (RT 3260; SER 164.) However, it recognized the need to strike a balance that would permit the government to prove its case while avoiding any undue prejudice to defendant. (RT 3260; SER 164.)

The government introduced only nine photographs of both victims from the 28 it previously identified. Most of Dr. McLemore's testimony was aided through the use of diagrams, not photographs. (RT 3288, 3339-40; SER 170, 221-22.) No further photographs were introduced during the guilt phase. There was no abuse of discretion.

(3) Victim vulnerability - guilt phase

Defendant contends that the court erred by permitting testimony of the vulnerability of Alyce Slim, the victim he described to Kinlicheenie as "an old lady." (RT 2783; ER 441.) However, he concedes that he failed to raise a specific objection (OB at 114), and therefore the issue is waived or reviewed under a plain error standard. Furthermore, the evidence of Alyce's vulnerability was proper to demonstrate that defendant did not have to kill her (or Jane Doe) in order to take the truck. He intended their deaths from the beginning and the killings were therefore evidence of premeditation. The information was relevant; there was no error, and there is no prejudice on this point in light of the overwhelming evidence of guilt, including defendant's own description of the people he "took out" as a "small [one] and an old lady."

(4) Victim impact- guilt phase

Defendant argues that the court wrongly allowed evidence of victim impact during the trial; however, he again concedes the lack of a timely and specific objection. (OB at 115.) He also fails to articulate how the evidence he cites pertained to victim impact, and certainly fails to show how it could have possibly affected the outcome. One portion of the record defendant cites pertained to the juvenile's desire to stay and play with her friends rather that travel with Slim. (RT 2572; ER 408.) Another portion was a volunteered statement of a witness asked if she recognized the person in the photo. (RT 2590; ER 410). A third was to correct the defense characterization of an event at the trading post robbery as being "nudged or touched by the gun" (an event the witness described as a "hit with a gun"). (RT 2629; ER 414.) The next was testimony that the trading post employee went to the hospital because she had been pushed around and her back hurt. (RT 2642; ER 415.) The final reference is not to evidence or testimony, but to the prosecution argument addressing the premeditation aspect of the murder charges. (RT 3497; ER 656.) None of these amount to a plain error or had a prejudicial effect that made the jury verdict unreliable.

(5) Opinion evidence - agent.

Defendant complains that an FBI Special Agent testified as an expert without proper qualification. However, he offered no objection to the testimony and therefore waived the issue. The agent testified as a fact witness with more than 23 years' experience in evidence collection and preservation. His observations as to blood spatter were not challenged and the jury had the opportunity to observe the photographs themselves. Defense even asked questions of the agent dealing with blood spatter. (RT 2954-55; ER 526.) He again fails to demonstrate how this could have affected the outcome in light of an Arizona Department of Public Safety criminalist's testimony that Alyce Slim's blood was all over the truck from which she collected samples. (RT 3203-10; ER 597-604.)

(6) Hearsay from an unidentified source

Defendant next argues that the court should not have permitted Criminal Investigator Louis St.Germaine to testify to his investigation in "Mitchell's" Canyon. (OB at 105.)(Same evidence urged as *Crawford* error, OB at 134.) The officer explained what he did and what led him there. The statement was offered to explain the investigator's action, and explain why he tracked footprints from a set of tire tracks that he discovered there that led in the direction of Gregory Nakai's residence

where defendant was later arrested. (RT 3006-12; ER 539.) Defendant did not object, and therefore waived any error.

(7) "Irrelevant, highly prejudicial evidence"

Defendant argues that a number of items seized from the home where he was arrested, along with others, were improperly admitted. The newspaper article concerning the Red Valley Trading Post was relevant as it was found with the perpetrators of that robbery. Defense initially objected over concern that the jury would read the report of the robbery. (RT 2974-75; ER 531-32.) The court eliminated that concern by only permitting the jury to see the paper and the headline from afar, but not to read the article. The defense agreed. (RT3454; ER 645.) The police scanner and the local police codes were relevant as consciousness of guilt: they were found with the perpetrator of an armed carjacking, double homicide and armed robbery of a trading post who would want to know if the police were on their way to the scene or to arrest him. The frequency number displayed on the scanner at the time of seizure was for the local Navajo Police Department. (RT 3017; SER 129.) The only objection–to relevance–was overruled. Rule 401 Fed. R. Evid. That ruling was not an abuse of discretion.

(8) Height/weight of defendant.

Defendant contends that the court erroneously permitted the introduction of his age, height and weight, and that of co-defendant Orsinger. At the time this evidence was offered, defendant failed to object. (RT 3107, 3139; ER 561, 572.) He did object after the weekend recess, but then argued it opened the door to bring in the evidence that Orsinger had killed in a prior carjacking for which he had been convicted. (RT 3245; ER 630.) The issue is waived, but in any event, the evidence was properly admitted to show the size difference between the defendants and the victims and what type of force or violence was required to steal the truck.

(9) DNA evidence

Defendant argues that certain DNA evidence was improperly admitted and argued, but he never objected at trial. The testimony was that defendant could not be excluded as a DNA contributor of cellular material found on a black handled knife seized in the house where defendant was arrested. There was no objection. This knife contained blood from which Alyce Slim could not be excluded and it was a reasonable inference under all of the circumstances to argue that this knife was used to stab her. (RT 3212; ER 606.) In circumstances where ample independent

physical[10] and testimonial evidence implicates defendant's involvement in a murder, the inability to exclude a suspect is of relevance because it clearly does not exculpate him.

Due to defendant's failure to object, this issue is waived. There was no abuse of discretion, and no plain error.

(9) Cumulative effect error

Defendant contends that the cumulative effects of the errors he alleges is sufficient to warrant a reversal. However, only if actual errors are found can their cumulative effect be considered. *United States v. Gutierrez*, 995 F.2d 169, 173 (9th Cir. 1993). Here, individually or collectively, the evidence objected to on appeal, but not at trial, did not change the course of the proceeding or undercut the integrity of the judicial process. Defendant gains no relief on this issue.

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[10] The analyst testified that the other knife found with defendant's pants at the time of his arrest did contain Alyce Slim's blood. (RT 2962 ER 528; RT 2967 SER 120; RT 3215 ER 609.)

H. Prosecutorial Misconduct in Questions and Statements of Counsel

1. Discussion of Navajo Culture and Parties Was Not Improper.

a. Standard of Review

Failure to raise the issue below constitutes waiver and may only be reviewed for plain error. *United States v. Chea*, 231 F.3d 531, 535 (9th Cir. 2000).

b. Discussion

Defendant contends the government improperly interjected race and religious and cultural heritage into the trial. (OB Argument Q at 141.) He never asserted any error on this ground at trial. This argument is highly disingenuous, as defendant used the issue of his Navajo race and culture throughout his presentation of mitigation evidence. (RT 3788-3830, 3887-3957; SER 304-333, 341-409.)

During the guilt phase the government had to prove that defendant was an Indian and that the offenses occurred in Indian Country within the confines of the Navajo Indian Reservation for all charges except Count 2, the carjacking count. 18 U.S.C. § 1153. The government introduced evidence of these facts and the jury found each element beyond a reasonable doubt.

Charlotte Yazzie, one of the victims of the Red Valley Trading Post robbery, admitted that she was a Navajo and that the Trading Post was on the Navajo Reservation, in Arizona. (RT 2599-2600; ER 413-14.) There was no objection.

Likewise, when Jason Kinlicheenie identified himself as a Navajo who lived on the Reservation, there was again no objection. (RT 2776; ER 434.)

During the penalty phase it was extremely important for the jury, in order to understand the impact of these crimes on the victims' family, to understand that the Navajo culture is matriarchal. That culture is significantly different than non- Indian cultures and the jury needed to know that so it could properly assess the loss. A jury must consider the victims of any offense as they find them. *United States v. Bernard*, 299 F.3d 467, 479 (5th Cir. 2002). Evidence of religious beliefs of the victim and the victims' family is properly admissible as contextual evidence relating to the harm suffered by the family. *Id.* "Because religion played a vital role in [the victims'] lives it would be impossible to describe their 'uniqueness as individual human beings' without reference to their faith." *Id.*

Another of Slim's daughters explained the impact on her daughters on having lost the one person the culture recognizes and expects to pass on traditions. (RT 3771; ER 817.) Finally, Jane Doe's mother explained the double loss she suffered by losing the matriarch of the clan as well as the one girl she had to pass on the culture. (RT 3776; ER 821.)

Defendant, who now cries foul about this cultural issue, repeatedly introduced evidence concerning the Navajo culture throughout his mitigation. He called Dr.

Roessel to testify about living on the Navajo Reservation, being married to a Navajo (Ruth Roessel), and educating Navajo children. (RT 3788-3829; SER 304-345.) He established that Ruth Roessel was clan-related to defendant. (RT 3822, 3825-26; SER 338, 341-42.) Ruth Roessel also testified to the importance of the maternal side of the family and clan relations. (RT 3826; SER 342.) She explained how "forgiveness" was part of the Navajo way. (RT 3828; SER 344.) Defendant's uncle, Ausca Kee Charles Mitchell Sr., testified that he was a believer in the Navajo way. (RT 3896.) Defendant's former high school principal described the programs dealing with the Navajo culture at defendant's school. (RT 3911.)

The government's statement to the jury that defendant had turned his back on his religious and cultural heritage was in direct response to defendant's argument that traditional Navajo beliefs should spare his life. He read a letter from the Navajo Nation asking that the prosecution not seek the death penalty. In part it stated:

> As part of Navajo cultural and religious value, we do not support the concept of capital punishment. The Navajo holds life sacred. Our culture and religion teaches us to value life and instruct against the taking of human life for vengeance.

RT 4163-64; SER 464-65.)

The government pointed out that defendant, by his own horrible actions, had rejected what this letter told the jury the Navajo people valued. There was nothing

improper or racist about the introduction the government's evidence or argument. No suggestion was made that the jury impose the death penalty based on race. The jurors, following their oath and in accordance with 18 U.S.C. § 3593(f), signed a document which stated that race played no part in their decision. (RT 4206; ER 949, 959.)

The government's conduct in this case does not compare to *Withers v. United States*, where the prosecutor improperly remarked that "not one white witness has been produced in this case that contradicts (the victim's) position." 602 F.2d 124 (6th Cir. 1979). Nor does it share any common ground with *Fontanello v. United States*, where the prosecutor stated that the defendants were Italian and "it was a matter of everyday knowledge" that the majority of people in the county who were running stills were Italian. *Fontanello v. United States*, 19 F.2d 921, 921 (9th Cir. 1927).

In contrast, the government introduced Navajo cultural information to the jury in this case so they might better understand the victim impact; it therefore was proper. Defendant introduced the same information for his own reasons and spent more time in closing directing the jury's attention toward cultural issues than did the prosecution. There was no plain error.

2. Opening and closing statements by the government were not improper

a. Standard of Review

"Prosecutorial comments to which defendant objects are reviewed for 'harmless error', while the standard of review for comments which defendant failed to interpose an objection is 'plain error'." *United States v. de Cruz*, 82 F.3d 856, 861 (9th Cir. 1996)(internal citations omitted).

b. Discussion

(1) Guilt phase -opening statement

Defendant submits a laundry list of alleged government misconduct committed during opening and closing statements. (OB Argument S at 145.) He failed to object to all but one of the statements at trial. When a prosecutor's remarks are nonprejudicial, or constitute reasonable inferences from the evidence, no prosecutorial misconduct can be demonstrated. The critical inquiry is whether, in the circumstances of the trial as a whole, the remarks were so prejudicial that they likely influenced the jury adversely to defendant and deprived him of a fair trial. *United States v. Patel*, 762 F.2d 784, 795 (9th Cir. 1985).

(A) Defendant objected to the government's opening statement explaining the anticipated testimony of an FBI Special Agent about a comment he made to defendant. The prosecutor said:

> At the scene where Alyce and Tiffany are found Special Agent Trace Kirk contacts the defendant and says that it appears that Alyce has been stabbed numerous times. "We have talked to Johnny Orsinger. He says you stabbed Grandma." The defendant says, "I did. I stabbed Grandma a few times."
> Agent Kirk says to him, "Well, what about -- what about the little girl?" And he pauses and says, essentially, "Well, I guess the evidence is going to show or witnesses are going to say I slit her throat twice. And I did."

(RT 2554-55; ER 401-02.)

At the conclusion of the government's opening statement, defendant objected and moved for a mistrial. (RT 2559; ER 405.) The government explained that the reference to an alleged Orsinger statement was offered solely for the effect it had on the defendant, prompting him to make admissions when previously he had not. *United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir. 1991). (RT 2559-60; ER 405-06.) The court denied the motion for a mistrial, and that denial is reviewed under an abuse of discretion standard. *United States v. Marsh*, 894 F.2d 1035, 1040 (9th Cir. 1990)[11] (RT 2560; ER 406)

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[11]The court later directed the agent not to testify that he told defendant that (continued...)

The jury immediately was instructed for a second time that the lawyers comments were not evidence. (RT 2561; ER 407.) Cautionary instructions ordinarily are sufficient to cure the effects of improper conduct. *United States v. Enriquez-Estrada,* 999 F.2d 1355, 1361 (9th Cir. 1993). Juries are presumed to follow the cautionary instruction given, and a trial court should declare a mistrial only when the instruction was unlikely to cure the prejudice. *Id.*

Moreover, a prosecutor's statements must be considered in the context of the entire proceeding to determine whether the improper conduct affected the fairness of the trial. *United States v. Young*, 470 U.S. 1, 11-12 (1985). A reversal is warranted only when those statements have " so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright* 477 U.S. 168, 181 (1986). If there is substantial independent evidence of the defendant's guilt which overwhelms the prejudicial impact of the impropriety, this Court will not reverse a defendant's conviction based on prosecutorial misconduct. *Enriquez-Estrada,* 999 F.2d at 1361.

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[11](...continued)
Orsinger told him defendant had stabbed the victim. (RT 2690; SER 82.) The agent followed that admonition. (RT 2726; SER 9.)

It can hardly be said that the government's isolated mention of Orsinger so infected the trial with unfairness as to deny defendant his due process. This sole reference in a nearly five day trial was overwhelmed by the defendant's own admissions to law enforcement and co-defendant Kinlicheenie that he killed "a small one and an old lady" to get the truck, by the forensic evidence linking him to the victim's truck, by her blood on a knife found in his pants, and by items found in the truck.

(B) Defendant also argues that the government erred in opening when it stated that defendant, in connection with the murder of Jane Doe, yelled, "bitch won't die. Lay down and die bitch." (OB at 147.) During a prior hearing, the government advised defendant and the court that defendant had made this statement. (RT 8/2/02 11; SER 2.) The testimony at trial was not as graphic. Special Agent Kirk testified defendant said, "after he slashed the young girl's throat, he told her, in essence, to lay down on the ground and die." (RT 2727; SER 92.) The use of the term "bitch" in the opening statement was not so inflammatory or prejudicial to put in doubt the integrity of the jury's verdict, especially in light of the overwhelming evidence of guilt.

(C) Defendant also complains, for the first time, that the government said in opening statement that DNA evidence linked all defendants to

the masks. (OB at 147.) A DPS criminalist testified that she analyzed a Halloween mask also described as the "old man mask," Exhibit 93, and found DNA from which defendant could not be excluded as a contributor. (RT 3217; ER 611.) Jason Kinlicheenie testified that defendant wore that mask during the robbery. (RT 2791-92; ER 449-50.) Defendant admitted his participation in the robbery to FBI Special Agent Duncan. (RT 3109; ER 562.) There was no error on these facts.

(2) Guilt phase- closing argument

Defendant next argues that the government engaged in prodigious and constant misconduct during closing argument for the guilt phase. (OB at 150.) He has compiled a 3-page litany of alleged instances of government misbehavior, each no more than a sentence or two long, utterly conclusory in nature and none citing any legal authority in support. The government submits this Court should deem such generalized, incomplete and undeveloped issues waived, as it is nearly impossible to divine any legal basis for such arguments, and where it is possible, the government would exceed its word limitation properly answering these issues alone. If this Court deems to review the laundry list of charged errors, defendant concedes he made no objection at trial (OB 150), so review is for plain error. *United States v.*

Romero, 282 F.3d 683, 689 (9th Cir. 2002). The government here attempts to economically address the discernable issues in defendant's list.

---Defendant contends–without any support–it was error to argue that the reason the victims of the trading post robbery were not killed was because they could not identify him due to his mask. This was a reasonable inference since there was no evidence that he was masked when he killed Alyce and her granddaughter. The jury was instructed, prior to closing argument, as it had been twice during the opening statements, that the arguments and statements by the lawyers were not evidence. (RT 3458-9; SER 253-54.) A prosecutor may argue reasonable inferences drawn from the evidence. *United States v. Necoechea*, 986 F.2d 1273, 1279 (9th Cir. 1993).

---Defendant states in conclusory fashion that the government committed misconduct by repeatedly arguing "we know" what happened in the case. Government references to "we know" were based solely on the evidence and never to suggest information outside of the record. (RT 3487-3505; ER 651-660.)

---Defendant incorrectly states that the government changed its theory of the duration of the carjacking offense at trial. The government never argued, as defendant claims, that the carjacking was complete after Ms. Slim was murdered, nor could it. The carjacking was not over until Jane Doe was murdered. *See United*

States v. Hicks, 103 F.3d 837, 843, n.5 (9th Cir. 1996)(carjacking continues until last victim is permanently separated from the car).

---Defendant complains the government improperly appealed to the jurors' passions when it argued that Jane Doe did not want to accompany Alyce Slim to New Mexico in the first place. The victim's mother testified simply that "[Doe] didn't want to go." Her testimony was admitted without objection and the government's argument in closing was a singular and proper comment on the evidence. (RT 2572; ER 408,).

---The government's isolated reference to "heinous murders" was not error, where there was no objection, and where defense counsel acknowledged in his own argument: "There's no question that this is a horrible crime. What you've heard from the prosecutors here is disturbing, shocking, awful. There's no other way to describe it." (RT 2561; ER 407.)

---The government's references to DNA, made without objection, were supported by the testimony that defendant could not be excluded as a contributor to the DNA found on the "old man" mask and Alyce's cell phone. (RT 3216-17; ER 610-11.)

---Defendant claims the government tried to infer that there was evidence that it did not have concerning whether Jason Kinlicheenie lied during his testimony.

Defendant did not object. Kinlicheenie pled guilty to armed robbery and told court he was carrying a knife. (RT 2851, 2863; ER 509, 521.) The defense argued with Kinlicheenie that he did not tell the court at the time of the plea that he also had a gun and therefore committed perjury by not including that fact in the factual basis of his plea agreement. (RT 2851-52; ER 509-10.) On redirect, Kinlicheenie was asked whether he was required to state all of the facts that he knew at the time of the plea and whether his factual statement was true. (RT 2862-63; ER 520-21.). There was no suggestion in the closing that there was evidence of which the jury was not aware.

---The government said "with this knife, I stabbed Alyce Slim" during rebuttal arguments, as it displayed to the jury the knife with Alyce's blood, found in defendant's pocket, and discussed the reasonable inferences from the evidence of premeditation. (RT 3554; ER 665.)

---The reference to the vulnerability of the victims, made without objection, was a reasonable inference that defendant viewed these victims as no threat to him. He wanted to take their truck because they were clearly vulnerable. He did not attempt to carjack on a truck full of men.

---Regarding argument about where the initial events took place, there was more than sufficient evidence that events began and ended in Arizona, even though

there may have been travel through New Mexico. (RT 3098, 3123; SER 136, 149.). The government advised the jury–as did the court–that they had to find beyond a reasonable doubt that the charged offenses, except for carjacking, occurred in Indian Country. It argued the reasonable inferences from the statements of witnesses, including defendant, that the crimes began and ended in Arizona. Additionally, many of the offenses were of a continuing nature. There was no objection to the argument.

---The argument that the government asked the jury to consider their own child in a situation is miscast. The thrust of the argument was explaining that Jane Doe had or might assert a right to the truck, that she might tell defendant and Orsinger not to take the truck. She had every right, as would a juror's child, to deny defendant permission to take the truck. (RT 3559; ER 668.)

---The government did not argue any statement by co-defendant Orsinger. Jason Kinlicheenie testified that defendant told him that " That they had took out some people, meaning they killed some people. . . He said one was small and one was an old lady." (RT 2783; ER 441.) The reference was proper.

---The government's reference to defendant's admissions becoming increasingly incriminating was an accurate statement of the evidence. Initially, defendant claimed that he was "hanging out" on the reservation at the time of the

offenses. (RT 3107; ER 561.) Later, he admitted his involvement in the trading post robbery, but only that he was present when things happened to the victims. (RT 3109; ER 562.) After the bodies were located, Special Agent Kirk told defendant he had spoken to Orsinger. At this point, defendant admitted he stabbed Alyce Slim, slit the little girl's throat, and crushed her head with rocks. (RT 2726-27; SER 91-2.) The closing statement was a proper statement of the evidence.

In its closing, the defense questioned whether defendant actually confessed because his admissions had not been recorded. (RT 3522.) In rebuttal, the government merely acknowledged the admissions were not taped and stated the jury would have to decide the credibility of the agents who had testified. (RT 3560; ER 669.) Defendant could have challenged the agents about the inculpatory statements, but he did not. There was no attempt to discredit or contradict the agents' testimony of defendant's admissions that he stabbed Alyce Slim and crushed Jane Doe's skull. Defendant argues that these statements so infected the trial that it deprived him of his right to a fair proceeding. However, his three defense counsel who were present for the arguments did not object to the portions defendant now finds so objectionable. The evidence against defendant was overwhelming, including his admissions to three separate FBI agents, his admission to co-defendant

Kinlicheenie, his handprint on the victim's truck, and his possession of a knife with the blood of one of the victims.

Defendant here does little more than cobble together isolated statements that did not change the tone or substance of the argument, and had no impact on the outcome. In so doing, he fails to demonstrate any prejudice to his case. The evidence was so overwhelming, he cannot show that any of these alleged errors so infected his trial as to deprive him of his rights.

(3) Penalty phase - opening statement

Defendant argues that the government committed error during its opening statement to the penalty phase. However, he offered not a single objection. (OB at 154.) Plain error is the proper review. *United States v. Williams*, 990 F.2d 507, 510 (9th Cir. 1993).

First, he objects that the government argued during its opening rather than outlining anticipated evidence. He acknowledges he did not object. (OB at 154.) The penalty phase is an unusual proceeding. It is the only time the parties address a jury that has already heard most, if not all, of the evidence surrounding the case and has already determined guilt. There is no purpose at that point of taking the jury once again through evidence of the penalty phase. The government's opening focused on the aggravating factors, such as defendant's intent.

In this case, prior to openings, the jury was instructed on the law that it had to follow during the death penalty determination. (RT 3728-43; SER 281-296.) The government then adopted all the evidence presented during the trial and told the jury it would hear the impact of the crime on the family. (RT 3744; SER 297.) The jury was then provided with a quick synopsis of the government's position on the states of mind and aggravating factors it could find based on the evidence. (RT 3745-48; SER 298-301.)

Defendant now objects to the government's request that the jury consider all of the evidence admitted during the guilt phase. (OB at 154.) There was no objection to this request at trial, nor was there any objection when the government formally adopted the trial evidence into the penalty phase. 18 U.S.C. § 3593(c) specifically provides "[i]nformation presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion."

The government never mentioned defendant's race or religion in opening but defendant freely reminded the jury during his opening that the jury would hear from witnesses who knew defendant and the Navajo people. (RT 3750; SER 302.) Further, he advised the jury it would hear about the views of the Navajo Nation on capital punishment. (RT3751; SER 303.)

The requirement of the gateway intent factors makes it imperative the focus be on defendant's intent as evidenced either by his own actions, or those he expressly adopted, and that was the thrust of the government's argument. Any reference to the activities of Orsinger was to suggest the jury infer defendant's intent from joining in and adopting those actions, demonstrating his intent. (RT 3745; SER 298.) The government never hinted that defendant should be sentenced to death based solely on the actions of the Orsinger.

Finally, defendant argues that the government improperly asked the jurors to consider how the case affected themselves in determining the proper sentence. A review of the transcript clearly shows that this argument is misleading-there was a slip of the tongue and everyone knew it:

> The nonstatutory factor you are going to hear about, to the best of their ability to describe to you what they went through and how this has affected you (sic) is a factor once you get beyond the statutory factors that allows you to focus a little more on does this defendant deserve a sentence of death.

(RT 3748; SER 301.) There was no objection. It is clear that the reference was to the non-statutory factor of victim impact, and the word "you" was merely a misstatement of the intended "them."

(4) Penalty phase - closing argument

Defendant argues that government statements during closing argument were improper and warrant reversal. (OB at 156.) Once again he did not object at the time, and therefore plain error is the proper review. *United States v. Williams*, 990 F.2d 507, 510 (9th Cir. 1993).

Defendant argues it was improper to suggest that he sentenced himself to death. (OB at 156.) However, it is the conduct of defendant that brought him before the jury and he was to be judged for what he had done. The heinous actions by this defendant, mitigation aside, cried out for a sentence of death and he is the one who decided to commit the acts. These are reasonable inference from the facts, and fair argument.

Defendant errantly claims the government misled the jury to conclude that the responsibility for the death sentence rests elsewhere, and the government's argument that defendant judged himself was constitutionally impermissible under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The Court held in *Caldwell* that it was impermissible for a prosecutor to tell the jury that they needn't worry about making the wrong decision because it was "reviewable." *Id.* 325. The government's statement in the instant case made no such suggestion of "reviewability." (RT 4142, 4162, 4167; SER 456, 463, 466.)

The government referred in closing to the acts committed by Orsinger to show that defendant saw what Orsinger had done, and instead of walking away, he took his knife and joined in. The death penalty is not available for an individual who commits an armed carjacking where no one dies. It is reserved for those defendants who deliberately cause death during the offense, either in a heinous manner or for pecuniary gain. There was no error in using the word murder. The defense used that term as well. (RT 4144; SER 458.)

The government did not commit error by referring to mitigation as "excuses for murder." That was a fair comment on the evidence and the jury was reminded that they still had the duty to weigh the mitigating and the aggravating factors.

It was fair to argue that defendant was manipulating witnesses who testified as to defendant's good and kind nature in light of the fact that the jury had convicted him of a cruel and heinous double murder. There was no shifting of the burden to defendant by rhetorically asking what he had done to earn a sentence of life, any more than arguing that he had done everything he could to earn a death sentence. The government still had to establish that the aggravating factors substantially outweighed the mitigating ones.

There was nothing improper in asking the jury to affirm the sentence that defendant had imposed on himself, because the government never suggested that the

jury disregard its duty in finding the requisite mental state and statutory aggravating factors. The reference was the government's way of saying that defendant's conduct should be punished with death. Again, there was no objection.

The government never argued that defendant deserved the death penalty because he associated with Orsinger. The comment he complains about was a response to defendant's argument that since Orsinger was not eligible for the death penalty, neither should he be. The prosecution told the jury to focus was on this case and this defendant. (RT 4173; SER 467.) In regard to the decision not to seek a death sentence against Gregory Nakai, the jury was told that the decision was based on information that they were not presented with, which was a true statement. (RT 4173; SER 460.). Defendant presented some evidence of the Nakai case but not all of it and therefore the jury did not have all of the facts. Defendant told the jury that Nakai escaped the death penalty for "reasons that are not clear to us." (RT 4154; SER 460.) Noteworthy is the fact that the jury found unanimously as a mitigating factor that "another person equally culpable will not be sentenced to death." (RT 4204; SER 471.)

The comment that defendant said "die old lady and get out of my truck," was a fair comment on his actions in repeatedly stabbing Alyce Slim so he could steal her

truck. He wanted her truck and was going to kill her to get it. The jury was not told he actually said those words. (RT 4174; SER 468.)

There was no plain error in telling the jury that defendant challenged them by committing nightmarish acts and then asking that he life be spared. It was a fair rebuttal argument and defendant fails to suggest how his rights were violated. Finally, there was no error by arguing that defendant did nothing to earn a life sentence in prison where he could earn a degree or chat with someone through the Internet. It was rebuttal to defendant's argument that his life be spared in order that he could help others. (RT 4160-61; SER 461-62.)

Defendant failed to object to any of the issues that he now raises except for the motion for mistrial he made following the government's opening statement to the guilt phase. There was no plain error at the time, and there has been no prejudice shown given the overwhelming evidence of guilt and the appropriateness of the death penalty. Defendant failed to demonstrate that the prosecutor's statements have " so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright* 477 U.S. 168, 181 (1986).

(5) Cumulative effect

Finally defendant argues that if none of the statements alone warrant reversal, then taken altogether they do. (OB at 159.) However, statements not found to

constitute error or misconduct can not be considered in a cumulative effect argument. *United States v. Berry*, 627 F.2d 193, 201 (9th Cir. 1980).

I. The District Court Did Not Abuse its Discretion in the Formulation of the Jury Instructions

On appeal defendant asserts two challenges to instructions given by the district court. (OB Argument R at 144-5; and Argument Y 170-6.) The first argument attacks for the first time the sufficiency of an aiding and abetting instruction given during the guilt phase of the trial. The second argument contests certain instructions given during the penalty phase of the case. Those arguments are addressed here in the order raised.

1. Standard of Review

Jury instructions which are alleged to be confusing or inadequate are reviewed in the context of the entire trial to determine "whether they were misleading or inadequate to guide the jury's deliberations." *United States v. Morfin*, 151 F.3d 1149, 1151 (9th Cir. 1998); "Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing that they prejudiced the defendant." *United States v. Frega*, 179 F.3d 793, 807 (9th Cir. 1999). Normally "[a] district

court's formulation of jury instructions is reviewed for an abuse of discretion." *United States v. Barajas-Montiel*, 185 F.3d 947, 950 (9th Cir. 1999).

Failure to specifically object to a jury instruction constitutes a waiver of defects. An instruction given without objection can only be reviewed for plain error. *United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002).

2. Discussion

a. The district court did not commit plain error in the formulation of the aiding and abetting instruction given during the guilt phase of the trial

Defendant concedes that he failed to object to the aiding and abetting instruction of which he now complains. (OB at 144.) (RT 3392-3407; SER 233-247.) In fact, defendant requested the court give the very instruction he now contends is flawed. (RT 222; SER 1024.) He now asserts that the instruction must state the *mens rea* for the substantive offense. (OB at 145.) However, an instruction for aiding and abetting is sufficient "if it includes the statutory language and states that someone must have committed the crime." *United States v. Armstrong*, 909 F.2d 1238, 1244 (9th Cir. 1990.) The instruction given here did just that.

The instruction the district gave court followed the Ninth Circuit Model Criminal Jury Instruction 5.1 Aiding and Abetting, and stated:

A defendant may be found guilty of an offense, even if the defendant personally did not commit the act or acts constituting a crime but aided and abetted in the commission of the crime.

To prove a defendant guilty of aiding and abetting the commission of a crime, the government must prove beyond a reasonable doubt:

First a crime was committed;

Second, the defendant knowingly and intentionally aided, counseled commanded, induced, or procured another person to commit that crime; and,

Third, the defendant acted before the crime was completed.

It is not enough that a defendant merely associated with the person or persons who committed the crime, or unknowingly or unintentionally did things that were helpful to that person or persons, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping another person or persons to commit the crime.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

(RT 3463-64.)(emphasis added.) This instruction defines the requisite *mens rea* for an aider and abettor.

Additionally, there was overwhelming evidence that defendant actually committed the crimes of which he was convicted. Defendant was part of the planning to steal a truck to use in a robbery of a trading post. He traveled to Gallup,

New Mexico in order to steal a truck. He and his co-defendant stabbed Alyce Slim over 30 times and then tossed her bleeding body into the rear compartment with her nine-year old granddaughter. Defendant drove the Slim truck to a remote site in the mountains. He alone walked off with the nine year old and slit her throat. When that failed he told her to lay down and he picked up a twenty pound rock and crushed her head. He drove off, secreted the truck and later returned to behead the victims and bury their heads and hands in a hole. Finally, several days later, using the blood soaked, stolen truck, he entered the Red Valley Trading Post wearing a mask and carrying a gun to commit an armed robbery. He later split the proceeds with his accomplices.

There was ample evidence of defendant's intent as a primary actor with the intent to commit murder, an armed carjacking, a kidnap, and a robbery of a trading post. He was neither merely present nor an unwitting participant. There was no plain error in using the given instruction as requested by defendant, and he has failed to demonstrate how he could have been prejudiced.

b. No error permitting jury to consider evidence from trial.

Defendant argues that instructing the jury it could consider all evidence from the trial proceedings amounted to a circumvention of the "opt in" provision of 18 U.S.C. § 3598. (OB Argument Y at 170.) Defendant was convicted of the death-

eligible offense of Armed Carjacking in violation of 18 U.S.C. § 2119 which occurred on the Navajo Indian Reservation. 18 U.S.C. § 3593(c) specifically provides: "Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial court's discretion." The jury thus can consider the evidence adduced at trial. There was no objection.

All of the evidence surrounding defendant's horrific crimes would have been admissible against defendant even if carjacking were the only charge at a trial or during the penalty phase. The planning of the armed robbery, the need for a getaway vehicle, his traveling to Gallup, his murder of Alyce and the manner in which he slit Jane Doe's throat and crushed her skull all were relevant to that offense.

Defendant's argument that any reference to his Native American heritage could not have been admitted is disingenuous. He introduced a letter from the Navajo Nation, as well as mitigation witnesses to talk about defendant and the Navajo culture, and their opposition to the death penalty on cultural grounds. (RT 4162, 3788-3829, 3887-3956; SER 463, 304-45, 354-421.)

c. No error in instructing jury to consider gateway intent factors as they regarded homicides

Defendant next argues what he did not below, that the jury was improperly instructed that it could consider defendant's intent regarding the killings of Slim and Doe in reaching its death eligibility decision. (OB at 171.) Failure to object waives the issue unless there is plain error.

The jury was instructed:

> The second step in determining eligibility requires that you consider the gateway intent factors alleged by the government concerning the personal intent of the defendant in regard to the homicides for which he has been convicted.

(RT 4080; ER 870.) Defendant urges the instruction should have substituted the word "cajacking" for "homicides."

The jury had to decide defendant's intent when he killed the victims, not his intent in taking the truck. This is a correct statement of the law. The jury was not misled. They had been told during jury selection that only the offense of Armed Carjacking was death eligible. The jurors had to receive two separate verdict forms since defendant murdered two separate people during his spree. The jury might well have found some factors present for one victim's case and not the other. There was no error, plain or otherwise.

d. No error where jury instructions did not require government to prove beyond a reasonable doubt that aggravating factors outweighed mitigating ones

Defendant claims, for the first time and without any legal authority, that the jury should have been instructed that the government had to prove beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors in order to justify a sentence of death. (OB at 172.) During the formulation of the instructions, he agreed with the government and the court that the jury did not have to find beyond a reasonable doubt that the aggravating factors outweighed the mitigation. (RT 4034; SER 447.)

FDPA requires that a jury find a least one gateway intent factor and one statutory aggravating factor beyond a reasonable doubt. If the jury makes those findings, then Section 3593(e) requires a determination whether the aggravating factors sufficiently outweigh any mitigating factors to justify a sentence of death. *Jones v. United States*, 527 U.S. 373, 377 (1999). That is all.

Significantly, this provision tracks essentially verbatim the death sentencing provision of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(k). The federal appellate decisions interpreting Section 848(k) prior to and since the September 13, 1994, effective date of the FDPA have uniformly held that "sufficiently outweighs," rather than "beyond a reasonable doubt," is the standard that sentencing juries are to

apply in the final determination of sentence. *United States v. Flores*, 63 F.3d 1342, 1376 (5th Cir. 1995), *cert. denied*, 519 U.S. 825 (1996); *United States v. Chandler*, 996 F.2d 1073, 1091-92. Most recently, in *Jones*, the Supreme Court did not resolve any claim concerning the weighing standard per se, but in reviewing generally the provisions of FDPA the Court noted the conspicuous requirements that aggravating factors be proven beyond a reasonable doubt and that mitigating factors be proven by a preponderance of the evidence, whereas the final sentence determination turned on whether the aggravating factors "outweighed" the mitigating factors. 527 U.S. at 377.

Construing FDPA to employ a "sufficiently outweighs" standard, consistently with its express terms, is entirely constitutional. In *Walton v. Arizona*, 497 U.S. 639, 651 (1990), Walton claimed that because the Arizona death penalty statute "provides that the court 'shall' impose the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficiently substantial to call for leniency, the statute creates an unconstitutional presumption that death is the proper sentence." The Court rejected that claim, emphasizing in part that "the States are free to structure and shape the consideration of mitigating evidence" and that the presumption emphasized by the defense did not preclude

consideration of constitutionally relevant mitigation. *Id.* at 651-52 (plurality opinion), 674 (Scalia, J., concurring).[12]

This Court has since relied on *Walton* in support of the proposition that death penalty statutes may constitutionally require the defendant to persuade the sentencer that mitigating factors outweigh aggravating factors in order to avoid a death sentence. *See Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994), *cert. denied*, 514 U.S. 1071 (1995). Thus, if a death penalty statute constitutionally allows imposition of the death penalty where the mitigating factors do not outweigh aggravating factors, then the federal provision allowing the death penalty only where aggravating factors "sufficiently outweigh" mitigating factors is certainly proper. The "sufficiently" standard itself is not unconstitutionally vague. *Ortiz v. Stewart*, 149 F.3d 923, 944 (9th Cir. 1998) (rejecting vagueness challenge a final weighing standard of whether the mitigating factors are "sufficiently substantial to call for leniency"), *cert. denied*, 526 U.S. 1123 (1999). The district court's final instructions on the weighing standard were thus proper, and do not remotely constitute plain error.

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[12] Because the plurality's opinion in Walton is based on a narrower ground than Justice Scalia's concurrence, the plurality's opinion is controlling. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).

e. No error in permitting jury to consider guilt phase findings in penalty phase

Defendant argues that the jury should have not been instructed that they could rely on their findings in the guilt phase in determining intent. (OB at 175.)No such instruction was given. The jury was instructed, without objection:

> And with regard to your findings, you may not rely solely upon your first stage verdict of guilt or your factual determinations then therein. Instead, you must now decide this issue for yourselves again.

(RT 4084; ER 872.)

Thus the jury was clearly told they could not simply reuse their trial findings, but had to essentially start over. They were further advised:

> Before you may consider the imposition of the death penalty, you must consider the question of the defendant's intent to commit the killings of which he has been convicted. Although you addressed this issue in the first phase of the trial, in this separate proceeding your focus must be on the *individual intent of Mr. Mitchell*, not on the collective intentions of both participants in the offense. Accordingly, before a death penalty may be considered, you must unanimously find, beyond a reasonable doubt, the existence of at least one of the following four gateway intent factors.

(RT 4083; SER 452.)(emphasis added).

It was not difficult for the jury to determine, based on the trial evidence, that defendant possessed at least one of the gateway mental states. Defendant confessed that after he saw Orsinger stab Alyce Slim, he took his knife and stabbed her as well. He also slit Jane Doe's throat and crushed her skull with a 20 pound rock. There was

more than ample evidence to support the jury's determination that defendant possessed all four requisite gateway intent factors as to each victim. (RT 4197-98, 4201-02; ER 942, 951.) There was no error, but if there were, it is certainly not plain.

f. No error in serious physical abuse instruction

Finally, defendant argues that the jury should not have been instructed that serious physical abuse did not require that a victim be conscious at the time it was inflicted. (OB at 176.) Defendant raised the issue during a hearing on the admissibility of photographs when he argued that the dismemberment images were not admissible because they show activity after death. He argued that the victim had to be alive. (CR 240; ER 207.) The district court overruled the objection, relying on *United States v. Chanthadara*, 230 F.3d 1237, 1261 (10th Cir. 2000), which held that a similar instruction was proper.[13] It also considered a Fifth Circuit opinion in *United States v. Hall*, 152 F.3d 381, 415 (5th Cir. 1998), *abrogated on other grounds, United States v. Martinez-Salazar*, 528 U.S. 304 (2000), which approved a similar definition. Finally, the court cited *United States v. Quintero*, in which this Court held that a sentencing guideline departure for acts in a manner that were unusually

[13]The court was ruling on pre-trial admissibility of murder scene and autopsy photographs.

heinous, cruel, brutal or degrading to the victim focused on the *"defendant's conduct*, not the characteristics of the victim and therefore post mortem mutilation was a proper basis for an upward departure. *United States v. Quintero*, 21 F.3d 885, 893-94 (9th Cir. 1994). (CR 283; ER 219.)

Defendant later objected during discussions of jury instructions. (RT 4009; SER 446.) The court overruled the objection relying on its original ruling on April 16, 2003. (RT 4066-67; SER 450.)

Defendant also contends there was insufficient evidence to permit the jury to find this factor. The evidence is viewed in the light most favorable to the government. *Moormann v. Schiro*, 426 F.3d 1044, 1053 (9th Cir 2005); *United States v. Bernard*, 299 F.3d 467, 482 (5th Cir. 2002), and as set forth below, that standard is easily met.

The jury was fully instructed on the definition of an especially heinous, cruel or depraved manner, and the definition of serious physical abuse:

> The second statutory aggravating factor alleged by the government is that the defendant committed the killing in an especially heinous, cruel, or depraved manner and that it involved torture or serious physical abuse to Alyce Slim and/or [Jane Doe].
>
> "Heinous" means shockingly atrocious. For the killing to be heinous, it must involve such additional acts of torture or serious physical abuse of the victim as to set apart from other killings.

"Cruel" means that the defendant intended to inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

"Depraved" means that the defendant relished the killing or showed indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

"Torture" includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted, and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

"Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, or organ, or mental faculty. Serious physical abuse, unlike torture, may be inflicted either before or after death and does not require that the victim be conscious of the abuse at the time it was inflicted. However, the defendant must have specifically intended the abuse apart from the killing.

Pertinent factors in determining whether a killing was especially heinous, cruel, or depraved include: Infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing; needless mutilation of the victim's body; and helplessness of the victim.

(RT 4088-89; ER 874-75.)

Without question, the jury could and did find that the dismemberment of the victims, including burying the heads and hands in a hole, was gratuitous and needless mutilation of the remains of Alyce Slim and Jane Doe,.

Defendant's actions clearly show a depraved mind of an individual who was indifferent to the suffering of the victims. He participated in stabbing Alyce Slim

approximately 33 times and cutting her hands approximately 16 times as she tried to defend herself. She was tossed over the seat into the rear as she continued to bleed profusely in the presence of her granddaughter. The little girl endured a nightmare drive into the mountains, fully aware of what happened to her grandmother, whose bloody body lay right next her. Once there, defendant twice slit her throat. When that did not kill her, he told her to "lay down and die." As she lay down, her neck already sliced and bleeding, she waited as defendant and his cohort each wrested 20 pound rocks from the ground and threw them on her head, knowing she was alive until the rocks crushed her skull.

Defendant stripped both victims to their underwear and left them at a remote sheep camp in the mountains. At some point, defendant and cohort decided to chop off the hands and heads of the 65 year old woman and nine-year old little girl. Defendant told agents that if it had been his idea, he would have also cut off their feet. Defendant dug a hole and buried the heads and the hands along with a latex glove worn by defendant. They dragged the headless and barely clad bodies 150 yards from one another, for the animals to finish the job. The murderers burned the victims' clothing and identifying paperwork ,and then drove away with stolen truck.

Though the truck contained massive amounts of Alyce's blood, several days later, defendant used it to commit armed robbery of a trading post.

There was ample evidence to support the jury's determination that defendant engaged in gratuitous violence, needlessly mutilated the victims. The helplessness of the victims was without question. These killings clearly were set a part from the run-of-the-mill murder.

J. The District Court Did Not Improperly Shift the Burden to Defendant or Lessen the Government's Burden.

1. Standard of Review

Issues not raised below are reviewed for plain error. *United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002). The government sets out plain error analysis above in Argument Section A(2)(a).

2. Discussion

Defendant complains that the court, by informing potential jurors during jury selection that he was an Indian and that the events took place on the Navajo Indian Reservation, relieved the government of its burden of proving those elements beyond a reasonable doubt. (OB at 71-2.) However, he failed to raise the issue below. Those elements were not contested at trial. It was not plain error and was not applicable to the Armed Carjacking offense in Count 2, which was not a Major Crimes Act offense.

In any event, the government introduced ample evidence to meet its burden. The government introduced, without objection, a notarized copy of defendant's Navajo Nation Certificate of Indian blood. (RT 3106; SER 141.) The testimony of the case agent established, without objection, that the events occurred within the confines of the Navajo Nation. (RT 3099, 3123; SER 137, 149.)

At the conclusion of the trial the court instructed the jury as to all the counts, except Counts 2, 9 and 11, that the government had to prove beyond a reasonable doubt that defendant was as Indian and that the offenses occurred in Indian Country.[14] (RT 3456-81; SER 251-268.) Defendant never argued lack of proof that he was an Indian nor that the offenses occurred in Indian Country. (RT 3513-3551.)

Defendant also complains, as he did not below, that the court's reference to the offenses committed as "murder" relieved the government of its burden of proving the offenses beyond a reasonable doubt. (OB at 73.) Any court reference to the murder was not plain error and did not relieve the government of its burden.

The only reference by the court to "murder" was during questioning of potential jurors: "During this trial, if you are selected as a juror, there could be

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[14]The Court initially left out the element that the government had to prove beyond a reasonable doubt that defendant was an Indian but later advised the jury. (RT 3481.) Defendant had offered to stipulate to the fact. (RT 3479.)

testimony of a graphic nature regarding the murders in this case and also possibly graphic photos, pictures of stab wounds and dead bodies. Would that kind of evidence affect your ability to be fair and impartial in this case?" (RT 1494, 2250; ER 310, 367.) There was no objection to the line of questioning.

The jury was instructed as to each of the elements of First Degree murder and the lesser included offense of Second Degree murder, as well as felony murder , and advised that the proof of each had to be beyond reasonable doubt. (RT 3464-66, 3470-72; SER 271-73, 275-77.) Finally, there was no question that the victims had been murdered. The real issue was whether defendant committed the murder and whether he premeditated. There was no plain error.

K. The District Court Did Not Abuse its Discretion in Determining That Defendant Had Knowingly and Voluntarily Waived His Right to Be Present During Trial

Defendant raises three major arguments regarding his presence at trial: Argument T at 159; Argument U at 160; and Argument V at 162. Those arguments are answered here.

1. Standard of Review

Failure to object to defendant's absence at *in camera* proceeding constitutes a waiver of Rule 43 Fed. R. Crim. P.. *United States v. Gagnon*, 470 U.S. 522, 528-29 (1985). Trial court's determination of competency is reviewed for clear error. *United States v. Timbana*, 222 F.3d 688, 700 (9th Cir. 2000).

2. Discussion

a. Court discussion with U.S. Marshal

Defendant argues now that he was improperly excluded from two meetings the court had with representatives of the U.S. Marshal Service. (OB Argument T at 159.) Defendant had filed a motion to reconsider the court's original order transferring trial from the Prescott Courthouse to the Phoenix Courthouse based on the Marshal's security concerns. However, he did not object when the court advised the parties that rather than conduct a public hearing with Deputy Marshals, it would meet the Deputies in chambers to discuss their security concerns. (RT 3/11/03 113-121; SER 8-16.)

Defendant's other reference to a discussion with the Marshal is unclear. It appears that the court was made aware by the U.S. Marshal that defendant had stated he would fight the deputies to avoid be brought into the courtroom. (RT 3673,

3850.) There was no objection to that discussion either. The right must be asserted at the time is arises or it is lost. *Gagnon*, 470 U.S. at 529.

In *Gagnon*, the Supreme Court held that a defendant's absence from an *in camera* meeting between the judge and a juror during trial did not violate Rule 43 Fed. R.Crim. P. and did not deprive him of any constitutional right. 470 U.S. at 526. In neither situation could defendant have added anything to what essentially was a procedural matter. *Id.* at 527.

b. The district court's assessment that defendant was competent to waive his physical presence was not clearly erroneous

Defendant argues that the court *sua sponte* should have ordered a competency evaluation after he asked to waive his presence during the penalty phase proceeding. (OB Argument U at 160.) Throughout the long history of the case the defense never requested a formal determination of competency and there is no evidence in the record to suggest that defendant was not competent.

The court addressed defendant on several separate occasions about the waiver and also discussed it with defense counsel. Defendant was repeatedly asked to reconsider his decision during the several days prior to the penalty hearing. Defense counsel met with defendant regularly and never suggested defendant did not understand his rights or counsel's advice.

Contrary to defendant's assertion, the trial court pointedly explored defendant's competency on May 14, 2003. (RT 3841-50; ER 823-33.) Defendant was asked whether he was under a doctor's care. He replied that he was not and was not taking any medication. (RT 3843; ER 825.) He also reported that he graduated high school, had been employed and that he had been able to follow all of the criminal proceedings up to that point. (RT 3844; ER 825.) He also was able to explain to the court that he knew the government would present evidence of aggravating factors to justify a death sentence and that his lawyers would present mitigation in support of life sentence. (RT 3845; ER 827.) After additional questioning of defendant and advising him of the tremendous benefit of being present in the courtroom the court found defendant alert and in good health. Further, the trial judge specifically found that "neither you nor lawyers have suggested any reason or presented any evidence to suggest that you are not competent to waive your right to be present at the sentencing hearing." (RT 3850; ER 832.) Defendant stated several times he did not wish to be present because he was convinced that the jury had already decided to impose the death penalty.

The court, in the absence of any evidence to the contrary, did not clearly err in finding defendant competent to waive his physical presence in the courtroom; nor was there plain error.

c. The court did not err by accepting defendant's waiver of his physical presence during the penalty phase under rule 43 Fed. R. Crim. P.

Defendant argues for the first time that it was error, pursuant to Rule 43 Fed. R.Crim.P., to allow him to waive his own physical presence in the courtroom during the aggravation/mitigation phase of the death penalty proceedings. (OB Argument V at 162.) Though not in the courtroom, defendant was provided with a closed circuit broadcast of the hearing in the jail cell immediately adjacent to the courtroom and arrangements were made to allow him immediate contact with his counsel. (RT 3854; ER 836.)

Just after the jury convicted defendant on May 8, 2003, counsel advised the court that defendant did not wish to attend the penalty phase proceedings. (RT 3589; ER 736.) The court immediately conducted an *ex parte* hearing at which defendant said that he wished to waive his appearance for the rest of the proceedings. (RT 3598; ER 743.) The court told him to think about it, and scheduled another hearing for the next day. (RT 3599; SER 279.)

On May 9, 2003, after questioning by the court, defendant stated that he did not wish to be present because he believed that the jury had "already made their decision." (RT 3609; ER 749.) The court denied the request and directed defendant

to appear for sentencing. (RT 3610; ER 750.) Defense counsel expressed concern that defendant might be sitting in court in shackles and they believed he could waive his presence. (RT 3612-13; ER 752-53.)

On May 13, 2003, during another *ex parte* proceeding, counsel advised that defendant did not wish to dress in street clothes for the penalty phase. (RT 3663; ER 763.) Counsel again advised the court of their belief that defendant could waive his presence. (RT 3663; ER 763.) The court reiterated its position to defendant that it was a major mistake not to attend. (RT 3664; ER 764.) Defendant was also told that if he waived his presence the court did not think it was going to make a difference on appeal. (RT 3668; ER 768.) The court told to him think about it overnight, and informed counsel that it was going to set up a closed circuit television to allow defendant to hear and see the proceedings. (RT 3668-70; ER 768-70.)

On May 14, 2003, defendant refused to dress in civilian clothes because he wanted to waive his presence. (RT 3841; ER 823.) The court conducted a lengthy discussion with defendant and found him competent to waive his presence, and that his decision was made knowingly and voluntarily. (RT 3849-50; ER 831-32.) Counsel informed the court that they believed it was too prejudicial for defendant to be brought to the courtroom in jail clothes and shackled, especially in light of his statement to the court that he did not intend to testify. (RT 3847, 3849; ER 829,

831.) Defendant was informed that he could change his mind at any time and he would immediately be brought into the proceedings. (RT 3850; ER 832.) The court also stated its concern with disruption in the courtroom based, in part, on defendant telling the Marshal that he would fight being present for the sentencing phase. (RT 3850; ER 832.)

On May 15, 2003, just prior to the mitigation presentation, defendant was brought into the courtroom outside the presence of the jury and affirmed his decision not to be present. (RT 3885.) Again, on May 16, 2003, just prior to closing argument in the penalty phase, defendant, in jail clothes and handcuffs, was brought into the courtroom outside the presence of the jury and affirmed his decision and waived his right to make a statement. (RT 4055; SER 449.) During a later recess he reaffirmed his waiver to his counsel. (RT 4135; SER 453.) Defendant was present in the courtroom , however, to hear the jury's decision to recommend two death sentences. (RT 4196; SER 470.)

Defendant now contends that Rule 43 Fed. R. Crim P. does not permit him to waive his presence in a capital case. Rule 43 provides that defendants have a right to be present at critical stages of the proceedings, but that a defendants waives that right if he is voluntarily absent once the trial begins. Fed R. Crim P. 43 (c).

In this case, defendant was present from when trial started until the jury announced its guilty verdict. At that point he decided to voluntarily absent himself from the penalty phase proceedings. He knowingly waived his right to be physically present in the courtroom over the course of a three-day penalty phase. However, he was in a jail cell immediately adjacent to the courtroom and was able to see and listen to the witnesses and confer with his counsel if he chose. He was in the courtroom for the return of the jury's verdict of death and was in the courtroom when he was formally sentenced on September 15, 2003. (RT 9/15/03 3; SER 473.)

The only other alternative was to order defendant shackled and forcibly brought to the courtroom in jail clothes. Counsel made it clear, as a tactical decision, that they did not want defendant in the courtroom in jail clothes and shackles due to the highly prejudicial impact on the jury. (RT 3663, 3849; ER 763, 831.) Their decision was fully justified in a subsequent Supreme Court decision that detailed the adverse impact on a jury of routine shackling and handcuffing of a defendant during the penalty phase of a trial and found it violated the Constitution, except where necessary for physical security or courtroom decorum. *Deck v. Missouri*, 125 S. Ct. 2007, 2014-15 (2005).

L. There Was No Improper Influence on any juror

1. Standard of Review

Failure to raise the issue below constitutes a waiver and may only be viewed for plain error. *United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002).

2. Discussion

Defendant now argues, for the first time, that his conviction should be reversed because family members wore buttons in the courtroom depicting the victims. (OB Argument BB at 182.) After the government rested, it inquired of the court whether witnesses who had been excluded from the courtroom would be permitted to attend closing argument. (RT 3407; SER 247.) In response, defendant advised the court that "[t]here were some members of the victim's family apparently that were here last week and we looked around and they are wearing buttons." (RT 3410; SER 248.) There was no objection, motion for mistrial, or other relief sought at that time. Nor was any record made regarding the size of the buttons or the photographs, the number of persons wearing the buttons, where the persons wearing the buttons were seated in the courtroom, and whether any of the buttons or photographs could be seen by the jury.

Counsel apparently had observed the buttons earlier in the proceedings but only raised the issue in connection with the attendance of family members/witnesses

during closing arguments. Defense counsel was concerned with emotional disruption from the family members who had been witnesses and therefore argued that witnesses should continue to be excluded. (RT 3410; SER 248.) However, the court permitted the witnesses to attend the closing arguments. (RT3411; SER 249.)

Defense counsel conceded the government interceded with the spectators when he raised the issue of the buttons with the government, and the buttons were not seen again. (RT 3410; SER 248.)

Three cases establish that, unlike the case here, prolonged wearing of buttons, or a strong showing of courtroom support could be sufficient to warrant reversal. This Court held in *Musladin v. LaMarque* that in a homicide prosecution, the wearing of buttons with the victim's photograph, throughout the 14 day trial, by at least 3 family members of the victim called for a reversal. 403 F.3d 1072, 1079 (9th Cir. 2005). In *Musladin,* defendant asked the court prior to opening statements to instruct the family members to refrain from wearing the buttons; the court denied the request. *Id.* at 1073. This Court noted that reversal is warranted if a defendant can prove either actual or inherent prejudice. *Id.* at 1078 fn. 2.

In *Norris v. Risley*, this Court found reversal was warranted after the trial judge in a rape case refused a defense request to order removal of buttons saying "Women Against Rape." 918 F.2d 828, 833 (9th Cir. 1990). This Court found that

"where the duel of credibility was all-important, the buttons created the 'unacceptable risk that the jury's determination of [the complaining witness's] credibility was influenced by the courtroom showing of support by the Rape Task Force.' " *Id.* This Court went on to say that it was troubled by the fact that the trial court could have easily alleviated problem by honoring the request of counsel. *Id.* at 834.

In *Woods v. Dugger*, the Eleventh Circuit reversed a conviction and death sentence for the murder of a corrections officer based on the attendance of significant number of corrections officers in uniform throughout the course of the trial. *Woods v. Dugger*, 923 F.2d 1454, 1461 (11th Cir. 1991). The trial occurred in a rural community with four separate corrections facilities nearby and extensive pretrial publicity over the danger of working in the prison. The Eleventh Circuit found that the continuing presence of uniformed corrections officers was intended to send a message to the jury. *Id.* at 1459-60.

This case stands in stark contrast to *Musladin*, *Norris* and *Woods*. There was no allegation here that any buttons were used to influence the jury. The court was not requested to order them removed. Finally, the government's intercession early in the proceedings to stop any button wearing eliminated any concern about unfair impact. There was no plain error.

M. It Was Not Error to Deny Counsel's Motion to Withdraw on the Eve of the Penalty Phase Due to an Alleged Breakdown in Communications with Defendant

1. Standard of Review

The denial of a motion to withdraw as counsel and an appointment of new counsel is reviewed for abuse of discretion. *Bland v. California Department of Corrections*, 20 F.3d 1469, 1475 (9th Cir. 1994). The court of appeals should consider (1) the timeliness of the motion; (2) the adequacy of the court's inquiry into defendant's complaint; and (3) whether any alleged attorney-client conflict was so great that it resulted in an inadequate defense. *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1380 (9th Cir. 1991); *United States v. Whaley*, 788 F.2d 581, 583 (9th Cir. 1986).

2. Discussion

Defendant argues that his counsel's motion to withdraw just prior to the penalty phase should have been granted even though he did not ask for the change. (OB at 164.) However, the claim of breakdown in communication only came after the jury convicted defendant of several murder counts and the death-eligible offense of Armed Carjacking. (RT 3589; ER 736.) At that point, defendant decided he did not wish to attend the penalty phase because he believed the jury had already decided to impose death. (RT 3609; ER 749.) Defendant never asked for new counsel.

The record is clear that up to the point of the actual conviction, defendant had cooperated fully with and assisted his counsel over the preceding year and a half. (RT 3613; ER 753.) The court conducted three separate sealed proceedings on May 8, 13 and 14, 2003, dealing with this issue. (RT 3598, 3663, 3841; ER 743, 763, 777.) On May 8, 2003, defendant directly told the court that he did not have issues with his counsel. (RT 3610; ER 750.) He also stated he had no problem with his lawyers doing everything on his behalf for the sentencing phase. (RT 3617-18; ER 757-58.)

It was counsel who raised the issue of continuing to represent defendant. (RT 3611; ER 751.) The court observed that "it's clear that it doesn't matter who is representing him with respect to that communication" and that it would be irresponsible to allow counsel to withdraw at that point. (RT 3614-15; ER 754-55.) Defendant again confirmed that he did not have any particular issues with the three lawyers representing him. (RT 3614; ER 754.) The court found that were no irreconcilable differences between defendant and counsel and denied the request to withdraw. (RT 3618; ER 758.)

Subsequently, on May 13, 2003, counsel advised the court that defendant was not cooperating with them. (RT3670; ER 770.) The court again observed that the

situation would be the same regardless of who represented defendant at that point. (RT 3670; ER 770.)

On May 14, 2003 counsel renewed their motion to withdraw. (RT 3851; ER 883.) Defendant, when asked, again told the court that he did not have any issues with his lawyers and his desire not to be present would not change even if another lawyer was appointed. (RT 3852-53; ER 834-35.) The renewed motion was denied as the court found that any new lawyer would be at an extreme disadvantage and that the current lawyers were in a far better position to represent defendant. (RT 3853; ER 835.) The court also noted that it appeared that defendant had contributed in a significant manner in assisting his counsel in preparing for the penalty phase based on the number of records and witnesses that were prepared for the penalty phase. (RT 3853; ER 835.)

Defendant does not now complain that his refusal to communicate with counsel after the guilty verdict materially affected the outcome of the penalty phase. As the court pointed out, the vast amount of the work for the penalty phase had been completed before he decided to isolate himself from counsel. The court took the additional steps of furnishing closed circuit television to defendant and ready access to counsel who were right outside the holding cell. There is no reason to believe a

substitution of counsel, that defendant did not seek, on the eve of the penalty phase would have altered the outcome.

This case is unlike the more common situation where the breakdown occurs prior to trial as in *United States v. Nguyen*, 262 F.3d 998 (9th Cir. 2001). Defendant was cooperative in the instant case and apparently helped prepare his defense and the mitigation information to be presented during the penalty phase. There is very little defendant could have contributed over and above what he already had. The government only presented victim impact witnesses during the aggravation portion and the witnesses who testified for the defense were providing their own knowledge and observations of defendant. The situation is unlike a trial, where defendant could have provided insight as to circumstances of his confession or background of a cooperating witness. Moreover, new counsel would not have been able to extract information from defendant that prior counsel had and would have been at a severe disadvantage.

The court was faced with a sitting jury that had heard all of the evidence and found defendant guilty of a death eligible offense. New counsel would not have been prepared to go forward with the penalty phase until he reviewed the case file, motions, evidentiary hearings, the trial transcript, reinterviewed witnesses and still been saddled with an uncooperative client. The sworn jury would be out of the eye

of the court for months and the possibility for a mistrial would have increased dramatically. If the court contemplated dismissing the jury and empaneling another jury only to consider the sentence, a whole new lengthy jury selection process would have ensued. The government likely would have had to re-present most if not all of its case-in-chief. The court balanced all of these concerns and with defendant saying his decision to waive his presence would not change even if new counsel were appointed; it correctly denied the motion to withdraw of counsel. Defendant does not point to concrete facts to persuade this Court that refusal to appoint new counsel on the eve of the penalty phase proceeding resulted in an adequate defense.

Given the very late timing of he request, defendant's prior cooperation with counsel right up to the point of conviction, the fact that defendant had no problems with his counsel and the court's well-founded opinion that nothing would change with appointment of new counsel, the court did not abuse its discretion by denying counsel's motion to withdraw on the eve of the penalty phase.

N. The District Court Did Not Abuse its Discretion in Admitting or Excluding Evidence During the Penalty Phase of the Case

1. Standard of Review

Decisions on admissibility of evidence are reviewed for abuse of discretion. *United States v. Gil*, 58 F.3d 1414, 1419 (9th Cir. 1995.)

2. Discussion

Defendant first argues that the court improperly prevented testimony on the "appropriateness" of a life sentence and evidence that Gregory Nakai had been convicted in a separate carjacking case for which the government did not seek death. (OB Argument Z at 177.)

First, the court only precluded defendant from eliciting from his mitigation witnesses their *opinion* as the appropriate sentence. (RT 3725; ER 805.) However, each witness was permitted and did testify that they believed defendant's life was worth saving. (RT3725; ER 805). This was consistent with defendant's proposal after the court ruled that the victims' family could not offer their opinion on the appropriate sentence. (RT 3725; ER 805.) There was no objection to the court's directive and therefore this issue is waived.

Second, whether or not a defendant is subject to the death penalty in another unrelated case is irrelevant to the instant case. 18 U.S.C. § 3593 (c) provides that any

information that is relevant to a mitigating factor may be admissible, but can be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.

The decision process to seek the death penalty covers many aspects above and beyond the facts of the case. Regardless, defendant was permitted to introduce a letter from the government to Gregory Nakai's lawyer that advised that the Attorney General had decided against seeking the death penalty against Nakai. (RT 4142; SER 456.) Defendant called the FBI case agent, over government objection, during the mitigation hearing for the sole purpose of introducing evidence of the actions of Nakai and Orsinger in the other carjacking/murder case. (RT 3964-74; SER 429-39.) He argued it to the jury. (RT 4140-43; SER 454-57.) The jury found unanimously that another equally culpable individual would not be punished by death, and even if that was referred to Orsinger, the jury had the ability to find that fact that Nakai was not sentenced to death and declined.[15] (RT 4098, 4199; ER 946, 956.)

[15]Several of the jurors, on their own, found that the letter from the Navajo Nation was a mitigating factor even though it was not formally listed. (RT 4201; ER 946, 956.)

a. Evidence introduced by government.

Defendant next cites a list of information that he says the government was wrongly permitted to introduce, including the religious and cultural impact of the victims' brutal murders (without objection at trial); a daughter testifying about her loss knowing of the torture that the victim suffered (without objection), and the statements about the death penalty certification by the Department of Justice that he alleges were improperly introduced were made by the government in a proffer to the court. The agent testified, during cross-examination, that he knew that information was sent to the Department of Justice and the decisions were made at a high level. (RT 3994-95; SER 440-41.) This was in response to defendant's question that out of all the defendants in the separate carjacking/murder cases, he was the only one facing a death sentence. (RT 3968-69; SER 433-34.) The court did not abuse its discretion and where defendant failed to object there was no plain error.

b. Navajo Nation Letter

Finally, defendant argues that the court erred by not specifically including as a specific mitigating factor a letter from the Attorney General of the Navajo Nation, asking that the government not seek the death penalty against defendant. He never asked for its inclusion, but he did argue it and seven members of the jury found it, on their own, as a mitigating factor. (RT 4142, 4201: ER 946, 956.) Clearly, the

jury recognized the issue, discussed it and some but not all found it in mitigation. There was no error.

O. This Court Need Not Remand the Non-Capital Counts for Resentencing as All but the Robbery Counts were Mandated by Statute, and Defendant's Rights Were Not Substantially Affected by Error, if Any, in the Guideline Robbery Sentences he Received

1. Standard of Review

This Court reviews sentencing decisions for "unreasonableness." *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 767 (2005). An unpreserved claim of a *Booker* error is reviewed for plain error. *United States v. Cantrell*, 433 F.3d 1269, 1278 (9th Cir. 2006).

2. Discussion

Defendant urges this Court to remand his10 non-capital counts of conviction for resentencing in accordance with *Booker*. However, *Booker* does not apply to the four Murder counts, the Kidnapping count or the two Firearm counts, as each of those seven convictions carries by statute mandatory life sentence; thus, guideline considerations did not come into play. Limited remand is not appropriate for defendant's remaining three robbery counts, because the record makes clear the court

would not have sentenced defendant any differently for those robberies under an advisory guideline scheme.

a. Defendant's Murder, Kidnaping and Firearm Convictions

18 U.S.C. § 1111, under which defendant was convicted in Counts 1, 3, 5 and 6, provides that premeditated murder and felony murder in the commission of a robbery or kidnap constitutes First Degree Murder, and a defendant convicted of First Degree Murder will be sentenced to life in prison or death. The jury found the necessary elements to convict defendant of First Degree Murder on all four counts. Thus the district court sentenced defendant according to the statutory mandate of Section 1111, and neither Guideline sentencing nor *Booker* were implicated.

Similarly, 18 U.S.C. § 1201(a), under which defendant was convicted in Count 7, provides that where the death of any person results from a kidnap, a defendant convicted of that kidnap shall be sentenced to life imprisonment. The jury found defendant guilty in Count 7, and returned a finding that a death resulted from that kidnapping. Thus, the court gave defendant the minimum sentence allowed under statute–life. Again, *Booker* is not implicated in this sentence.

The jury convicted defendant in Counts 9 and 11 of possessing a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The jury further returned special findings on each count that defendant brandished the firearm in each

case. Section 924(c)(1)(A)(2) mandates a minimum sentence of seven years on the first conviction in such circumstances. The court sentenced defendant to 7 years on Count 9. Section 924(c)(1)(C)(1) provides that for a second or subsequent conviction under section, a 25 year minimum sentence is mandated. The court sentenced defendant to 25 years on Count 11. Here again, *Booker* is not implicated in the sentences for these counts.

b. Defendant's robbery convictions

Booker considerations do apply to defendant's convictions on Counts 4, 8 and 10 for robbery–the only counts that did not carry with them a statutory minimum sentence that took them out of the guidelines' reach. Upon review, however, this Court will conclude that the sentences in Counts 4, 8 and 10 did not violate *Booker* and a limited remand is not required on the facts of this case.

18 U.S.C. § 2111 provides that a defendant convicted of robbery shall serve a maximum sentence of 15 years. The statute provides no minimum sentence. The court sentenced defendant to 15 years on each count. It did so after finding defendant's guideline offense level was 43 and his criminal history level was I, yielding a guideline range of life imprisonment. Thus, the court issued a sentence on the robbery counts that was already far below the calculated guideline range.

Any district court that applied the Guidelines as mandatory at sentencing committed plain error. *United States v. Ameline*, 409 F.3d at 1073, 1078 (9th Cir. 2005). Further, if the district court would have imposed a materially different sentence under an advisory scheme, then that plain error was prejudicial and the failure to notice that error would seriously affect the integrity, fairness and public reputation of the proceedings. *Id.* at 1085. However, in cases where the record demonstrates that the district court would have imposed the same sentence under an advisory scheme, *Ameline* directs that entreaties for limited remand should be denied. *Ameline*, 409 F.3d at 1083. The record in this case shows the district court would have imposed the same sentence on defendant had it known the guidelines were advisory.

First, the sentences imposed on the robbery counts–180 months each–already were well outside the guideline range as the court calculated it–life imprisonment. The sentencing judge understood that the statutory maximum penalty for robbery of 180 months rendered the guideline range for this defendant inapplicable, and so she disregarded it.

Second, when the court was freed from the guidelines, and was bound only by the robbery statute, it court chose to sentence defendant to the maximum time allowable under that statute. The sentence speaks for itself. The court's comments

at sentencing also reinforce the conclusion that it would not have sentenced defendant differently under an advisory guideline scheme:

> Mr. Mitchell, the court's sentence is fashioned to achieve a just punishment in light of the seriousness of the offense, the totally unprovoked nature of the attack, the age and vulnerability of the victims, the severity and nature of the wounds inflicted on the victims, and the senselessness of the murders in light of the defendant's goal of obtaining the victim's truck to use in the armed robbery of the trading post.

RT 9/15/06 16; SER 477.)

Given that the sentences for defendant's eight non-robbery convictions were pre-determined by statute, the only sentences the court was involved in "fashioning" were for the robbery counts. Its comments and justifications must be deemed to apply to its consideration of the robberies. In light of these strong comments, which consider factors beyond the guidelines, it is clear the court deliberately selected the harshest penalty allowed by the statute for the robbery counts. This sentence was unrelated to the guidelines.

Because the record clearly shows that there is no chance defendant would receive a lighter sentence on remand, any error was harmless. This ground for appeal should be denied.

P. The Defendant's Conditions of Confinement Following Conviction Are Not Properly Before this Court

1. Standard of Review

As a general rule, an appeals court will not consider an issue raised for the first time on appeal. *United States v. Nyemaster*, 116 F.3d 827, 829 (9th Cir. 1997).

2. Discussion

Defendant argues, although he has not presented the issue to any court, that he is prohibited from participating in a sweat lodge ceremony at his place of confinement. (OB Argument JJ at 201.) Since the issue was not previously raised there is no evidentiary record to review. Ordinarily the appellate court will not render a decision on a direct appeal if there is an incomplete or non-existent record. *United States v. Bauer*, 84 F.3d 1549, 1563 (9th Cir.1996)(evidentiary hearing is required to develop facts outside of the official record).

This issue is not ripe for review.

VIII. CONCLUSION

For the foregoing reasons, the judgment of conviction and sentence should be affirmed.

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IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)© AND CIRCUIT RULE 32-1 FOR CASE NO. 03-99010

I certify that: (check appropriate option(s))

√ 1. Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 36,833 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

___ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ pages or _____ words or _____ lines of text.

8/31/06
Date

Signature of Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 31ST day of August, 2006, I caused the Brief of Appellee and Supplemental Excerpts of Record to be served by causing two copies of the replacement brief and one copy of the replacement supplemental excerpts to be mailed, postage prepaid, to Celia Rumann, 850 W. Adams Street, Suite 201, Phoenix, Arizona 85007 and Michael O'Connor, 2617 South Palm Drive, Tempe, Arizona, 85282, counsel for defendant-appellant.

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