IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JARVIS J. MASTERS,** Defendant and Appellant.	**CAPITAL CASE** S016883

Marin County Superior Court No. 10467
The Honorable Beverly B. Savitt, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On December 3, 1987, the Marin County District Attorney filed an information charging appellant Jarvis Masters and codefendants Lawrence Woodard and Andre Johnson with the murder of San Quentin Prison Correctional Sergeant Dean Burchfield (Pen. Code, § 187) and with conspiracy to commit murder and assault (Pen. Code, § 182). The information also alleged the special circumstance that Sergeant Burchfield was a peace officer killed in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)), and further alleged that codefendant Johnson personally used a deadly weapon. (Pen. Code, § 12022, subd. (b)). (CT 6-10; see also CT 4519-4523.) All defendants pleaded not guilty. (CT 88; see also CT 4524.)[1/]

On December 12, 1988, the trial court granted codefendant Johnson's motion for a separate trial. (CT 2417-2419, 2457-2459.) On January 17, 1989,

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1. Following severance of Johnson's case, the district attorney filed an amended information against Masters and Woodard broadening the scope of the conspiracy charge to include assault on a prison guard as well as murder and changing certain overt acts alleged in support of the conspiracy; the murder charge was essentially unchanged. (CT 4519-4523.)

the trial court granted the district attorney's motion to hold the trials simultaneously before two different juries, one for Masters and Woodard and one for Johnson. (CT 2694-2697.)

Selection of the Masters and Woodard jury began March 13, 1989. (CT 3279.) Selection of the Johnson jury began July 6, 1989. (2nd Aug. CT 2777-2779.) Both juries were sworn on August 21, 1989. (CT 4540-4541.) Testimony commenced before both juries on August 25, 1989. (CT 4633-4634.) All three defendants were found guilty as charged, with the Johnson jury returning its verdicts on January 3, 1990 (2nd Aug. CT 2904-2907) and the Masters and Woodard jury returning its verdicts on January 8, 1990 (CT 5121-5125).

Appellant Masters's penalty phase trial began on April 2, 1990. (CT 6148.) The jury returned a verdict of death on May 18, 1990. (CT 6559-6560.) On July 30, 1990, the trial court denied appellant's motion to modify the verdict pursuant to Penal Code section 190.4 and sentenced him to death. (RT 6719-6722, 6726.) The court also imposed a consecutive sentence of 25 years to life for conspiracy to commit murder. (CT 6726; RT 23489-23490.) This appeal is automatic. (Pen. Code, § 1239, subd. (b); see also CT 6723.)[2/]

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2. Codefendants Woodard and Johnson had separate penalty trials. Woodard's penalty phase was tried before Masters's. (CT 5301, 6148.) The Woodard jury deadlocked, and the district attorney elected not to retry his penalty phase. (CT 6137.) Johnson's jury returned a verdict of death, but the trial court modified the verdict to life imprisonment without parole pursuant to Penal Code section 190.4. (2nd Aug. CT 3286-3287, 3390.) The trial court sentenced both Woodard and Johnson to life imprisonment without parole for murder and a consecutive term of 25 years to life for conspiracy to commit murder. The Court of Appeal affirmed both judgments on October 20, 1993. (See *People v. Johnson* (1993) 19 Cal.App.4th 778, 780, 794.)

STATEMENT OF FACTS

A. Guilt Phase

This case involves a conspiracy by members of the prison gang known as the Black Guerilla Family (BGF) to assault and kill San Quentin prison staff and ultimately to foment a "war" with other prison gangs. The conspiracy culminated in the murder of Correctional Sergeant Dean Burchfield on June 8, 1985. Testifying under a grant of immunity, BGF member Rufus Willis stated that he, codefendant Woodard, appellant Masters, and several other BGF members agreed on a plan to assault over a period of weeks four prison staff members, beginning with Burchfield, and then to begin attacking other prison gangs. Codefendant Johnson was assigned to carry out the hit, which he did upon receiving a signal from Masters. Willis's account was corroborated by: (1) the observations of the gun walk officer who had been providing cover for Burchfield; (2) notes or "kites" (a written note or letter passed from one inmate to another) in the handwriting of Woodard, Masters, and Johnson in which each implicated himself in the plot and murder; (3) certain physical evidence including the possible murder weapon, which was found beneath Johnson's cell; (4) gang documents, which confirmed the coconspirators membership in the BGF; and (5) the testimony of another BGF member, Bobby Evans. In detail, the evidence was as follows.

1. The Murder

Sergeant Burchfield was working the night shift in the San Quentin cell block known as Carson or C section on June 8, 1985. (CT 11144.) At about 11:00 p.m., Burchfield commented on the unusually loud noise level coming from the tier and told Correctional Officers Edward Hodgkin and Patrick McMahon that he was going onto the tier to check it out. (RT 11147, 11180.) McMahon opened a security gate for Burchfield, who entered the first

tier of cells. (RT 11157, 11247.) After about five minutes, McMahon, who was in the sergeant's office located on the ground floor beneath the second and third cells of the second tier, heard "like a grunt, where someone[] expired their air" come from the area of the cells above. (RT 11252-11253.) Within a few seconds, McMahon and Hodgkin heard the gun walk officer blow his whistle and call for help. (RT 11157-11158, 11256.) The officers immediately called for assistance, then Hodgkin went up to the second tier, where he found Burchfield lying face down in about the middle of the tier. (RT 11165, 11167, 11257, 11259.) Burchfield's shirt was saturated with blood, and he was choking. (RT 11168.) There was a lot of cheering coming from the inmates. (RT 11169.) Burchfield was removed from the tier on a stretcher and taken to the prison hospital, where he was pronounced dead at 11:37 p.m. (RT 11139-11140, 11170.) Burchfield had suffered a wound about one and one-half centimeters long to his right upper chest; the wound had perforated his pulmonary artery and caused him to bleed to death. (RT 11139-11142, 11147, 11149.)

C section consisted of five tiers of cells, with 47 cells and two shower stalls along each tier. (RT 11002-11003.) Across an open space from the tiers, on the outer wall of the cell block, were two narrow walkways known as "gun walks" or "gun rails." These gun walks were patrolled by prison guards. The lower gun walk was situated across from the second and third tiers; the upper gun walk was across from the fourth and fifth tiers. (RT 11005-11006.)

Sergeant Burchfield was being observed at the time of his stabbing by Officer Rick Lipton, an armed officer who was stationed on the lower gun walk. At trial, Lipton testified that Burchfield stopped in front of cell 2-C-2 or 2-C-3 before stumbling back against the tier railing and eventually collapsing in about the middle of the second tier. (RT 11337-11338, 11349.)[3/] This testimony

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3. Cells are designated by tier, section, and number: e.g., cell 2-C-2 refers to tier two, C section, cell number two.

matched statements Lipton made to the officer who relieved him shortly after the stabbing and to his girlfriend the next day. Correctional Officer Gregory McKinney arrived on the gun walk at about 11:40 p.m. (RT 11380, 11388.) He asked Lipton where the stabbing had occurred, and Lipton said around cell 2-C-2 or 2-C-3. (RT 11382-11386.) Lipton talked to his girlfriend, Kathleen Rice, about the murder when he went home. Rice testified that Lipton said he realized something was wrong "between cell 2 and 3." (RT 11909-11913.) However, in statements he made to Officer Hodgkin and McMahon about one to two hours after the stabbing, to investigators on June 9, in his written report of the incident, and in his preliminary hearing testimony Lipton stated Burchfield was hit outside cell 2-C-4. (RT 11193, 11214, 11278-11280, 11341, 11347-11348, 11362.) At trial Lipton explained that the incident happened quickly, that it was very dark, and that he could see Burchfield only from the waist down. (RT 11331, 11336, 11364.) Codefendant Johnson was housed in cell 2-C-2 (RT 11732); an inmate named Ephraim, who was a member of the Crips gang, was housed in cell 2-C-4. (RT 11514-11515, 15763.)

2. Rufus Willis

The day after the murder, inmate Rufus Willis, who was housed in cell 4-C-21 (RT 11727-11728, 12768, 12950), wrote, but did not deliver, a letter to the warden stating that he knew everything about Sergeant Burchfield's death. (RT 11273-12777, 13047.) Willis offered to disclose what he knew in exchange for his release from prison. (RT 12775, 12822-12827.) Willis concealed his identity in the letter by disguising his handwriting and not signing it. (RT 12776-12777, 12820-12821.) As a clue to his identity, he placed his cell number in the letter with four other random cell numbers. (RT 12776-12777, 12826.) Some time later, Willis placed the letter on his cell bars to be picked up with his mail. (RT 12775-12776.) To his surprise, later that night Willis received back the letter by "fishline," a method a prisoner used to retrieve kites

and other objects from other cells by extending or throwing out of his own cell a torn strip of bed sheet or some other "line" to which the kite could be attached and pulled back in. (RT 11395, 12661.) Along with his own letter was a note from codefendant Woodard asking Willis to identify the handwriting in the note. (RT 12778-12779.) Willis was later removed from his cell by a correctional lieutenant and asked about the letter, but he denied any knowledge of it because he distrusted the lieutenant. (RT 12279-12280.)

On June 19, 1985, Willis passed several handwritten notes to Correctional Sergeant Derrick Ollison as Ollison was walking the tier. Willis asked Ollison to deliver the notes to the people handling the Burchfield investigation. (RT 11695-11696, 11722-11729, 12782-12784.) As set forth more fully below, these notes indicated the existence of a conspiracy to murder Burchfield. An expert handwriting analyst later compared these notes with known handwriting samples from appellant Masters and codefendant Woodard and concluded that each had written at least one of the notes. (RT 14382, 14389.)

After turning over these notes, Willis was interviewed by a district attorney's investigator and a correctional officer. The investigator promised Willis he would be released from custody in exchange for his testimony. (RT 12651-12652, 13062-13065, 13166-13167, 13173.) However, the trial prosecutor, Marin County Deputy District Attorney Edward Berberian, refused to go along with the deal and told Willis that only his safety would be guaranteed by confining him out of state for the remainder of his prison term. (RT 12651-12653, 13446-13447.) The prosecutor also promised to advise parole authorities of the extent of Willis's cooperation, but did not agree to make any recommendation regarding parole. (RT 13134-13135.) Willis testified for

the prosecution under a grant of immunity. (RT 12648-12649.)[4/]

Willis testified that the murder of Burchfield was part of a plan by the Black Guerilla Family to assault prison staff. Willis, Woodard and Masters were all part of the BGF's military-style leadership in C section at San Quentin. Woodard was a lieutenant; Masters was the security officer (or Usalama); and Willis was the intelligence officer (or Akili). (RT 12676, 12718-12719, 12729.)[5/]

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4. Willis was serving a life sentence for first degree murder, robbery and kidnaping. (RT 12648, 12950.) He had been confined in protective custody out of state following his grant of immunity. (RT 12651-12652, 13056.) He admitted that while he was confined in California prisons, he had personally stabbed several inmates and ordered "hits" on a number of others. (RT 12958-12962, 12965-12967, 12971-12976.) None of these assaults was fatal. (RT 12959, 12964, 12971-12972.) He also admitted that he had maintained a cache of weapons at San Quentin and had set off a bomb at Folsom prison. (RT 12963, 12978, 13032-13034.) Willis also stated that San Quentin guards had paid him money and given him large quantities of marijuana in exchange for protection, had provided him special privileges, had given him information on other gangs, and access to other inmates central files, and even once supplied him with a knife. (RT 12990-13002, 13007, 13011.)

5. BGF members frequently used Swahili words and names and also used code names. (RT 12671-12672; see also RT 10752.) Willis sometimes used these Swahili names and code names in his testimony. For clarity, we will use the inmate's given name. In alphabetical order, the names, Swahili names, and code names referred to by Willis in his testimony are as follows:

Carruthers, Don:	Tabari (RT 12689)
Carter, Kenny:	Supreme Commander; Fahtis; F-II (RT 12689, 12833-12834)
Daily, Walter:	Wawa (RT 12765)
Johnson, Andre:	Little Askari; Dray; the Younger (RT 12741, 12855-12857)
Masters, Jarvis:	Askari; U-1 (RT 12715)
Redmond, Willie:	Faraji; F-2 (RT 12710, 12714)
Rhinehart, Michael:	Aso; L-9 (RT 12719, 12730)
Richardson, Harold:	Khalid (RT 12689)
Vaughn, Brian:	Swoop (RT 12697-12698)
Wafer, Derek:	DK (RT 12697-12698)

When Willis first transferred into C section, the BGF leader there was an inmate named Redmond. (RT 12710-12712, 12714.) Redmond was the first to raise the subject of assaulting prison staff. (RT 12732.) Masters presented a written paper in a BGF leadership meeting on the exercise yard calling for assaults on rival gang members from the Aryan Brotherhood (AB) and Mexican Mafia (EME). (RT 12734-12735.) Redmond said he did not like it and wanted to "start a war by striking, start it off by striking police," meaning correctional officers. (RT 12735.) Redmond told Masters "to go back and redo up a plan and include in it strategy how to move on police." (RT 12735.)

Redmond led a subsequent meeting on the exercise yard with Woodard, Masters, Willis, and inmate Rhinehart. (RT 12719, 12730, 12737-12738.) Redmond said that Sergeant Burchfield was bringing weapons to an Aryan Brotherhood gang member. (RT 12734-12735, 12739.) Masters produced a piece of paper naming Burchfield and two or three other officers as potential targets. (RT 12740.) Redmond said he wanted Johnson to make the first hit. (RT 12741.) Johnson was in Willis's BGF training class. (RT 12743-12744.) At either the first or second meeting, Redmond said that after the BGF made the first move, the Crips gang would make another assault, followed by a second BGF assault, then a second Crips assault. (RT 12753.) Redmond was transferred out of C section after the second meeting. (RT 12747.)

After Redmond's transfer, Woodard, Masters, Willis, and Rhinehart met on the yard at a third meeting to discuss further the plan to assault prison staff. (RT 12747.) They agreed that Burchfield would be the first target. (RT 12760.) Woodard decided that Johnson would make the hit despite Willis's objection that Johnson was too inexperienced. (RT 12750, 12760.) At this

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Willis, Rufus:	Zulu; A-1 (RT 12673, 12867-12868)
Woodard, Lawrence:	Old Man Askari; M-II (RT 12719, 12848, 12892)

same meeting, Masters said that BGF member Don Carruthers had cut a piece of metal out of his bed frame in cell 2-C-8, and that two other inmates—Richardson and Ingram—had cut the stock into smaller pieces and sent one piece to Masters. (RT 12689, 12763.) Masters said that he would sharpen the piece of metal and send it along to Johnson. (RT 12750, 12764.) Rhinehart said he would make a pole for the weapon. (RT 12760.) The plan called for inmate Daily to retrieve the weapon from Johnson's cell by fishline after the hit and to dispose of it. (RT 12765.) Woodard said that a total of four officers would be stabbed a week apart, after which they would start attacking Aryan Brotherhood and Mexican Mafia gang members. (RT 12754-12755.)

Willis and Woodard discussed the assault plan with two Crips members at two yard meetings, the second of which Masters also attended. (RT 12755-12758.) At first, the Crips wanted to wait for the one year anniversary of the death of inmate Montgomery, a Crips leader who had been killed in San Quentin the previous June. (RT 12757-12758.) The Crips blamed prison staff for Montgomery's death. (RT 11736-11737, 13184, 15154-15155.) At the second meeting, which occurred shortly before the attack on Burchfield, the Crips agreed to the BGF's plan. (RT 12755-12758.)

The BGF had a final yard meeting about the planned attack on June 7, 1985. (RT 13391.) The hit was carried out the following night. (RT 12767, 13391.) Willis heard someone yell "Solid Gold," the signal Masters had said should be given when Burchfield came onto the second tier. (RT 12769, 12815.) When he saw the gun rail officer panic, Willis knew the hit had happened. He learned from an officer later that night that Burchfield had been killed. (RT 12770.)

3. Corroborating Evidence

a. The "Kites"

As mentioned above, Willis gave investigators incriminating notes or kites which were confirmed to be in the handwriting of appellant Masters, Woodard and Johnson. (RT 14363-14364.) One of the kites in Woodard's handwriting (Exhibit 151-B; RT 14382), which Willis obtained by fishline from Woodard shortly before Burchfield's murder, stated in part, "Our Supreme Commander and General was transported to A.C. today and jumped on by the dogs. . . . This total disrespect of our Supreme Commander will be responded to by each and every one of us. . . . There is to be total adherence to discipline and next yard all will be required to get off on K-9s." (Exhibit 151-B, original emphasis; see also RT 12831-12835.)[6/] The kite was signed, "M-II," one of Woodard's code names. (RT 12835.) Willis testified that the "Supreme Commander" referred to BGF leader Kenny Carter, who had been placed in the Adjustment Center (A.C.) (RT 12833-12834); "dogs" and "K-9's" referred to correctional officers. (RT 12834-12835.)

In a second kite in Woodard's handwriting (Exhibit 151-A; RT 14382), written to BGF members in C section after the murder (RT 12838-12839), Woodard wrote, in part:

> I've suggested to you that we not further create any antagonisms with the K-9's at this time even though they are moving us to A.C. I've extended my thoughts as to going to A.C. being to & in our best interests. But, let me go further into it. How the K-9's lost a 8 year veteran of oppression, we've lost no one . . . . The K-9's are in a state

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6. There are minor and insignificant differences, mostly in punctuation, between the actual contents of this and other kites admitted into evidence and the reporter's transcription of these notes as they were read into the record by Willis during direct examination. For accuracy, we quote directly from the documents admitted into evidence (retaining original spelling, punctuation, and grammar), with parallel cites to that part of the reporter's transcript reflecting Willis's recitation of their content.

> of panic because they #1) don't know really, how the move came down; #2) who did the move; #3) they've found no weapons or bloody clothes; #4) no snitch has come forth with any proff and #5) no P.O.W. has helped them. . . . Also the K-9's have no motive which to work with. Indeed the enemy who was the --- recipient of the sgt's friend-ship, -- are quite disturbed and angry and will --- perhap's, --- retaliate at a later date. . . . Now the war is to be addressed on a level of progress and development. This means, it goes from one step to a higher step. As previously discussed, there is still a prime racist tarket in our collective midst which is to be addressed by certain people, as a sign of good faith and of honoring their commitment to us. This must come to be, but it'll only come to pass if we continue to present a well balanced and disciplined collective. If we keep our eye's squarely toward the struggle and our rage burning bright — brighter — brightest. We must not weaken or become emotional. We are an organized, motivated military organization . . . . I take special notice of the consistent excellent conduct of A-1 during this present crisis. We all can learn and become more motivated by him.

(Exhibit 151-A, original emphasis; see also RT 12838-12848.) The kite was again signed, "M-II," Woodard's code name. (RT 12848.) "A-1" referred to Willis (RT 12848), and "P.O.W." stood for prisoner of war. (RT 12840.)

A third kite in Woodard's handwriting (Exhibit 151-C; RT 14382) stated in part, "And we leave one of the enemy DEAD! None of us are even scratched. And its now on the Crips." (Exhibit 151-C, original emphasis; see also RT 12837.) Willis obtained this note from Woodard after Sergeant Burchfield's murder. (RT 12836-12837.)

One of the incriminating kites given by Willis to investigators was in Masters's handwriting. (Exhibit 150-C; RT 14839.) Willis obtained this kite by fishline from Masters after Burchfield's murder. (RT 12849-12851.) This kite stated in part:

> The kisu's is from my knowledge 7½ inches. However, I'm not sure if we have any because . . . brother-n-law was being search by the goon squad yesterday. I threw mines off the tier which was 4 flats easy. I had C-notes looking and found it, but Dray trip to A/C made it impossible to get. The kisu used for the (move) was instructed to be destroyed by Wawa. I'm not sure if he did this. If it's not then it must. I've been fellowing these dogs patern step by step. If we have any

> stock material left all the kisu's will be 7½ to a flat 8 inches. I'm not sure as to what report you are requesting. If it's the begining stages of the stregery to the which the Saturday live jump off give a yes and I drew it for you. Check the razor edge double edge I put on that "black." Could of chop a T-bone stake up ☺ When the Younger saw it, he said God damn ☺ Righteous on the floor safe! . . . [¶] I'm geting at these C-note now pushing them into a corner for them to take off.

(Exhibit 150-C, original emphasis; RT 12852-12859.) The kite was addressed to "Mwenzi L-9," with "mwenzi" meaning comrade and "L-9" being the code name for BGF inmate Rhinehart (RT 12852-12853, 12867-12868), and was signed "U," which stood for Usalama, or security officer, Masters's position in the BGF. (RT 12717-12718, 12859.)[7/] Willis testified that "Dray" and "the Younger" referred to Andre Johnson (RT 12855, 12857); "kisu" referred to a knife or shank (RT 12708); a "flat" referred to metal used to make a knife (RT 12854); "C-notes" referred to the Crips (RT 12854); and "Saturday live jump off" referred to the hit on Burchfield. (RT 12859-12860.) Willis also explained that the statement, "Righteous on the floor safe," was Masters's response to an earlier communication by Willis telling Masters that he had a floor safe in his cell where he could hide the shank used to stab Burchfield. (RT 12857.)

Another incriminating kite (Exhibit 159-C) in Masters's handwriting and containing Master's fingerprint was found by prison authorities in a Bible belonging to Willis. (RT 12022-12023, 14245-14248, 14389.) This kite, which Willis testified was a security report written by Masters at Willis's request after

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7. At the preliminary hearing, Willis testified that he wrote "L-9" on Masters's kite and crossed out "A-1", his own code name. (RT 13126-13128.) At trial, Willis testified he did not make that change. (RT 13125.) Appellant states in his opening brief that, contrary to Willis's testimony, the kite was not signed "U," but "L/2U." Appellant suggests he merely "transcribed" the kite for its true author. (AOB 40.) However, examination of Exhibit 150-C shows that the "U" is preceded by the notation "L/L." The record shows that Masters signed other kites to fellow BGF members with salutations such as "much love" (see Exh. 159-C). This supports a reasonable inference that "L/L" represents an abbreviation for a salutation such as "lots of love."

Willis had already met with investigators, stated, in part:

> The Usalama assignment carried out on 6-8-85 was the result of this pig known activities with these enemy elements. This pig works or at least was working from 11 p.m. to 7 a.m. The pig long being watch and was monitor over months. Information was placing this pig as a key link to the (AB) weaponry. He was continually communicating with the leadership-body of the AB's (Snowman) and indicated to have been supplying them with 22 bullets. This pig soon became a priority target agree to by all commission members and section commander. In addition to this pig another pig was given the same status because of his activities. The C-notes wanted to smash at the EME's but when we heard of this, that they were getting off soon, we propose another type of strategy surrounding our primary targets, who were these two (2) pigs. We stress to remove the enemy source of supply so we can effectively create the hits on their leadership body, and from there on to serious cell-warfare. Committements were made and we committed our forces to a hit on a dog. They at the same time did the same. The C-notes were to be the second wave . . . . CD "Somo" was recommended by A-1 [Willis], and approve by U-1 [Masters], and later approved by M-II [Woodard] and L-9 [Rhinehart]. Though a back up personel was also station with same orders for any reason of "Somo" possibilities of not fullfilling his orders. Both personel was being prepared by U-1, A-1 and L-9 and was brief by said comission members. The end result proved "Somo" effectiveness by scoring a "MS" on this pig. He was not seen and no one knows as to who done this move outside commission members/sector commander and some Usalama personnel. Relative "Somo" is highly commended for representing the party with this "MS". . . . [A]ll Usalama personnel was working on cutting, making, and sharpening weaponry. . . . Also as of this date the C-notes hasn't come through with their commitment, though they will.

(Exhibit 159-C, bracketed material added; see also RT 12886-12899.) Willis testified that "Somo" referred to Johnson (RT 12892), and "MS" meant a master strike--a killing. (RT 12898-12899.)

When Willis first met with the authorities, the district attorney's investigator said he needed corroborating evidence. Willis was thereafter placed on the same Adjustment Center tier as Johnson and sent him several kites in question and answer format asking him to describe what had happened on the

night of the murder. (RT 12906-12907, 12923, 13593-13594.)[8/] Handwriting analyst Moore confirmed that in the question and answer kites, the questions were written by Willis and the answers by Johnson. (RT 14447-14448.) The first kite (Exhibit 128-A) read:

> Greeting's Little Askari.
>
> Where did you hit him at? In the hart all of it went in.
>
> What all did you say to that investigater? I refuse to answer any qestion on the grounds that it may incrimidate me. They got tierd of hearing that, they dont even call me no more.
>
> Did you know he was going to die? When he hit the ground down there by the shower, I new he was dead because when the officers came on the tier they grabed him by his armes and draged him back and forth to git him to breath.

(Exhibit 128-A; see also RT 12908, 12914-12915.)

The second question and answer note (Exhibit 153-A) stated:

> Greeting's Comrade Little Askari. As you know I was intelligence officer in C-setion before we all departed and I know I am going to be expected to write up or explain what lead to the move on the S.G.T. and how was it done and other important information, so I want you to write me a full report in case Im asked what happen. So answer this questions as clear as possible.
>
> 1) Who told you that you was going to make the move on the S.G.T. Saturday, the 8th of June? Aso and the Old Man told him to tell me
>
> 2) Who made the pole that you used? Aso
>
> 3) Who sent the knife to you to put on the pole? Askari II

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8. The Johnson kites were excluded from Johnson's jury since they were elicited after he had invoked his right to silence, but they were admitted at Masters's and Woodard's trial as evidence of a continuing conspiracy. These kites provided the basis for the trial court's decision to order separate juries, with the district attorney conceding that separate trials should be granted if the kites were admitted against Masters and Woodard, but not Johnson. (See CT 2156-2157, 2694-2697; RT [12/12/88] at pp. 43-52.)

4) Was there a kite/note given to the S.G.T. to take to your cell? If so who gave it to him to take to, your cell? Swoop

5) Is that when you speared him, when he was sent to your cell? Yes

6) Did anyone see you spear him? No

7) What did you do with the pole after you speared him? Tore the end off then threw of tier away from cages

8) What did you do with the knife after you used it on the spear to stab the S.G.T.? Wiped it off and threw it off the tier.

9) Who sharpen the knife[?] Askari

. . . .

(Exhibit 153-A, original emphasis; see also RT 12923-12932.) Johnson also set forth a narrative statement on the back of the kite describing how he repeatedly denied involvement in the murder and refused to talk to investigators. (Exhibit 153-A; see also RT 12932-12933.) The letter was signed "A-1" at the bottom (Exhibit 153-A; RT 12933), and "Somo" on the back. (Exhibit 153-A; RT 12939.) Willis explained that "Old Man" referred to Woodard (RT 12925) and "Askari" and "Askari II" referred to Masters. (RT 12926.)[9/] "Swoop" referred to BGF inmate Brian Vaughan (RT 12697-12698) and "Aso" to Rhinehart. (RT 12719.)

Johnson also sent Willis two other kites while both were in the Adjustment Center. (Exhibits 128-B & 128-C; RT 12917-12918.) One stated in its entirety, "It's a waste, to learn something then dont put what you learned to good use." (Exhibit 128-B; see also RT 12917.) The other was another question and answer note, in which Willis commended Johnson for the "excellent move you did on the S.G.T." and asked Johnson to give him a "full

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9. Willis testified that Masters, Woodard, and Johnson all used the name "Askari," meaning soldier. The three were sometimes differentiated by referring to Woodard as "Old Man Askari," to Masters as "Askari II," and to Johnson as "Little Askari" or "Askari I." (RT 12926-12928.)

run down" of the incident. (Exhibit 128-C, original emphasis; see also RT 12918-12919.) Johnson responded in narrative form as follows:

> Greetings loved one, I told you on the yard that I was good with a pole and if I hit him I was going to drop him in witch I did (smile) after the K-9 did a bone Wa-Wa threw the line down twice all off the tier and shit[.] I wiped the nife off and threw it of the tier[.] At this time they dont know hoo did it, the C-note told on me that he saw me do it, I heard the tape the D.A. tryed to scare me, with what he said[.] They dont have no evidence[.] The only witness they had is dead, they realy think the C-note did it and is blameing me, but thats probley one of there weak ass tactics you no, but the C-note said he will go to court against me[.] I heard all that on tape[.]

(Exhibit 128-C; see also RT 12919-12920.)

b. Physical Evidence

In a routine search on June 5, 1985, three days before the murder, Correctional Officer Morris noticed that about 30 inches of angle iron was missing from the bed brace in cell 2-C-8 (BGF member Carruthers's cell). (RT 11089-11090, 12747-12748.) The missing piece of metal had been cut, not broken, from the bed brace. (RT 11105.) Within a short time after Sergeant Burchfield's murder, correctional officers found five pieces of metal that were subsequently determined to have been cut from the missing piece of Carruther's bed brace. (RT 11537-11538, 11953-11959.)

The first piece of metal was discovered by Correctional Officer McMahon within 10 to 15 minutes of the stabbing on the ground floor of C section immediately after the murder in the general area beneath cell 2-C-2. (RT 11261-11262, 11266.) At the time of the murder, McMahon was in the area of the sergeant's office, which was on the first tier directly beneath the second and third cells of the second tier. (RT 11252-11253.) The sergeant's office was within a security area on the ground floor that extended to about the eighth or ninth cell and had a screen on top. (RT 11571, 11573.) After calling for assistance following the stabbing, McMahon was walking from the area of

the sergeant's office towards the front door of the unit to see if help had arrived when he kicked a metal object. (RT 11261.) He looked down, saw a piece of metal sharpened at one end, picked it up, and put it on a bookcase in the sergeant's office. (RT 11262-11263.) Later, McMahon placed the object (Exhibit 118-B) in an envelope, signed the envelope, and gave it to Officer Arzate. (RT 11264, 11266, 11572, 11610-11611.) Arzate asked McMahon to show him where he had found the weapon, and marked the spot on a diagram indicating it was found beneath cells 2-C-1 and 2-C-2. (RT 11522, 11570-11571.) This was the only weapon found in the first six or seven hours after the crime. (RT 11598, 11626-11627.) The coroner testified that this weapon could have inflicted the fatal wound to Sergeant Burchfield. (RT 11433, 11436.)

The other four pieces of angle iron were found within the next two days. On June 9, Correctional Officer Kauanoe found a second piece of metal stock amid debris in the middle of the tier, and a third piece of metal stock within a shoe on top of the security screen covering part of the first tier. (RT 12005, 12007-12011.) On June 10, Officer Kauanoe found the fourth and fifth pieces of metal stock inside an air vent leading to cell 1-C-44. (RT 12014-12015.) FBI metallurgist William Tobin subsequently determined that all five pieces of metal had been "cut from the same source of steel angle iron" (RT 11950, 11956), namely the bed brace in Carruthers's cell. (RT 11953-11959.)[10/]

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10. Tobin's testimony is somewhat difficult to follow given the multiple number of items involved, each with a different court exhibit number and FBI number. Tobin examined seven pieces of metal in total. Two (Exhs. 85-A and 86-A) were known samples cut from the bed in Carruthers's cell, 2-C-8, by Officer Arzate, who took the samples from each side of the 30-inch gap. (RT 11537-11540, 11953-11954.) One piece was the weapon found by Officer McMahon and given to Arzate (Exh. 18-B). (RT 11610-11611, 11953.) The remaining four items were the pieces of metal stock found by Officer Kauanoe (Exhs.43-F, 43-H, 110-G and 110-H). (RT 12007-12011, 11954-11955.) Tobin assigned FBI numbers to each of these pieces, such that Exhibit 118-B was FBI number Q-1, Exhibit 85-A was FBI number K-13, Exhibit 86-A was FBI number K-12, Exhibit 43-F was FBI number K-2, Exhibit 43-H was FBI

Within the first several hours after the assault, Officer Arzate also recovered a spear shaft made of cloth and newspaper from the top of the security screen that covered the first tier of the cell block floor from about cells one to nine. (RT 11528-11532.) The shaft was located below cell 2-C-3, but on a diagonal towards cell 2-C-2. (See Exhibits 52-B, 52-C; RT 11530.) When Arzate climbed on top of the screen to collect the shaft, inmate Ephraim was removed from his cell. As Ephraim was being taken away, codefendant Johnson—who was about 10 feet away from Arzate—warned Arzate, "If anything happens to him, you will be the next one speared." (RT 11573-11575.)[11/]

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number K-4, Exhibit 110-G was FBI number K-7, and Exhibit 110-H was FBI number K-8. (RT 11953-11955.) Tobin was able to reassemble the pieces in their original order. He determined that K-12 and K-13 (Exhs. 85-A and 86-A, the known samples from the ends of the bed brace) formed the outer pieces on each end and that the other five pieces had "been separated from the contiguous piece" of original angle iron. (RT 11958-11959.) Appellant incorrectly states in his opening brief that Tobin testified "a welder had been used" on the suspected murder weapon, suggesting it would have been impossible for an inmates to bring a welder into his cell. (AOB 34-35.) In fact, Tobin testified, "The damage, thermal damage, exhibited by Q-1 [i.e., Exh. 118-B] more likely than not *did not* occur from exposure to having been flame cut or welded." (RT 11967, italics added.) The thermal or heat damage on that exhibit could have been caused by "grinding." (RT 11967, italics added.) The only pieces of metal which Tobin identified as having heat damage from a welding torch were Exhibits 85-A and 86-A, the pieces on either side of the gap in Carruthers's bed brace. (RT 11537-11542, 11967.) These pieces were not removed from the bed brace by an inmate, but were intentionally cut from the brace by Officer Arzate (RT 11530-11540) so that Tobin could compare them with the five pieces of recovered metal. This readily explains why those two pieces -- and only those two pieces – had damage caused by welding.

11. Officer McKinney, the gun walk officer who relieved Officer Lipton at about 11:40 p.m., heard someone yell, "Let's get another one for Montgomery." (RT 11388, 11390.)

c. BGF Gang Documents

To corroborate Masters's, Woodard's, and Johnson's connection to the BGF, the prosecution introduced various documents in the handwriting of each which Rufus Willis testified were typical BGF writings. (RT 13482-13493, 13495-13498, 13514-13517, 14334-14338, 14413-14422.) These included, for example, a document which had a picture of a dragon (a BGF symbol) on the cover and contained a copy of the BGF constitution, oath, and code of ethics (Exh. 318-A-4); writings using Swahili words; a document containing policies to be carried out by "Usalama" personnel (i.e., persons under the BGF security chief) (Exh. 318-A-1); a security report (Exh. 318-B-1); and another document setting forth BGF doctrine and the instruction received in "cadres" (Exh. 318-B-2), all of which were written by appellant. (RT 13482-13488, 14413-14416.) Appellant signed a number of his writings using the name "Askari." (See Exhs. 318-A-2, 318-B-6, 318-B-6A.) Documents written by Johnson included parts of the BGF constitution and code of ethics and reports about tier officers. (RT 13495-13498, 13516-13517, 14407-14409, 14418-14419.) Other BGF documents introduced by the prosecutor included an anatomy diagram seized from BGF inmate Daily's cell, 2-C-6, on June 8 or 9, 1985 (RT 13525-13526, 14001-14004), and a note seized from inmate Ingram in July 1985 showing the locations and codes of BGF members. (RT 13519, 14008-14012.)

d. Bobby Evans

Bobby Evans, a five-time convicted felon, testified that he was a member of the BGF Central Committee in San Quentin in 1985. (RT 13668-13669, 13673, 13683-13684, 13687.) Evans's BGF name was Joka Damu. (RT 13755.) Evans was in North Block at the time of Burchfield's killing and did not know about the plot. (RT 13717, 13719.) Evans was transferred to the Adjustment Center in July 1985; Woodard was in the

Adjustment Center at that time. At a BGF meeting on the Adjustment Center exercise yard some time in August, Woodard said he had given the order for the hit on Burchfield and had made a deal with the Crips to kill Burchfield in retaliation for the death of the Crips' leader. (RT 13723-13724.) Masters came to the Adjustment Center later in the summer of 1985. (RT 13724-13725.) At a BGF yard meeting in approximately September, Masters said he had been part of the C section commission which voted to kill Burchfield. (RT 13724-13726.)

Evans also met Johnson, whom he did not previously know, in the Adjustment Center. (RT 13752, 13754.) Johnson introduced himself to Evans by his given name and his BGF name, Little Askari. (RT 13755.) In a number of kites Johnson sent to Evans, Johnson bragged about killing Burchfield, stating he had stabbed him in the heart one time through his cell bars. (RT 13757-13764, 13768.) Johnson said he wanted his "stars" and had been promised the rank of lieutenant for the hit. (RT 13764-13765.) Evans testified that a BGF member earned his stars, or rank within the BGF, by drawing blood in an assault upon another. (RT 13765.)

Evans also described the BGF training regimen, which included instruction in Swahili, anatomy, how to stab another in a vital spot, and the manufacture of prison weapons. (RT 13675, 13678, 13680-13681, 13688.) Evans stated that a red star and a dragon were BGF symbols. (RT 13711.) Evans's description of the BGF generally agreed with that given by Rufus Willis. (RT 12657, 12661-12672.) Evans acknowledged authorship of a variety of BGF documents. (RT 13770-13771.)

4. Defense

The defense sought to blame Rufus Willis for Burchfield's murder and otherwise to discredit his testimony. On cross-examination, defense counsel questioned Willis about the numerous violent assaults he had committed or ordered others to commit in prison (RT 12958-12959, 12962-12978), his

in-prison drug dealing, and his manipulation of prison staff. (RT 12979-12980, 12990-13002, 13007, 13011.) Willis acknowledged that he had become disenchanted with the BGF when he was transferred from Folsom to San Quentin in early 1984 (RT 12683, 13207), that he had engaged in a power struggle with BGF inmate Richardson when they were both housed in D section at San Quentin (RT 13145), and that he and several other BGF inmates had discussed plans to take over the BGF in C section. (RT 13181-13183.)

Herbert Gates, a Crips leader at San Quentin, testified that Willis told him he planned to take revenge against the BGF for the death of one of his friends at Folsom. (RT 14756-14760.) Gates said that the BGF and Crips were not compatible. (RT 14755-14756.) Gates also stated that inmates would commonly have someone else write a kite for them for security reasons, and that he knew Willis had others write his kites on several occasions. (RT 14759-14761.)

Inmates Thurston McAfee and Tommy Lee Harris testified that Willis spoke of forming a secret hit squad to assault staff throughout prison. (RT 14896-14898, 15043.) They described Willis as manipulative and untrustworthy. (RT 14903, 15045.) Harris, an admitted Crip leader, said Willis tried to recruit Crips for the BGF. (RT 15040-15041, 15052.) McAfee said Willis had others write notes for him. (RT 14904-14905.) McAfee admitted that prison records listed him as an enemy of Willis, but said that was not true. (RT 15024-15025, 15028.)

Julie Cader, an inmate trustee in Marin County Jail, testified that Willis told her he would do "whatever he had to do to make sure he didn't spend the rest of his life in prison." (RT 15278-15281.) Cader admitted that she had met and corresponded with BGF member Harold Richardson, who told her Willis was a snitch. (RT 15591-15592, 15610-15612.)

Darrell Wright and Johnny Brown, two inmates who met Willis in a Nevada prison in 1988, testified that Willis dealt drugs in prison and associated

with the Crips. (RT 15510-15518, 15545-15551.) Wright said that Willis told him he had a "game plan" to get out of prison. (RT 15520-15521.) Brown said that Willis described killing a prison guard with other San Quentin inmates when the guard walked up on them during a drug transaction. (RT 15553-15554.)

A defense handwriting expert testified that the letters "L-9" in the Masters's kite which Willis turned over to Sergeant Ollison (Exhibit 150-C) were added after the original document was written and may have been written by Willis. (RT 14826, 14828, 14839-14843, 14852-14853, 14875.) The defense expert agreed that the remainder of that kite and Masters's other incriminating kite (Exhibit 159-C) were consistent with Masters's handwriting. (RT 14812-14813, 14838-14839.)

The defense also attempted to discredit Bobby Evans, establishing on cross-examination that he was a violent drug dealer and extortionist. (RT 13811-13813.) He had ordered the murder of another as part of a BGF commission, had carried out stabbings, shootings and robberies on the street as a BGF enforcer, and had been sent to prison on a parole violation for possessing Uzi rifles and hand grenades. (RT 13801, 13834, 13872-13873, 13881, 13908.) He had previously informed on others, including a BGF sympathizer. (RT 13796, 13836.) At the time of his testimony Evans was awaiting sentencing in Alameda County for attempted robbery. (RT 13671.) He had not volunteered any information about the Burchfield case until after he pleaded guilty to the attempted robbery in June 1989. (RT 13866, 13915.) Shortly after he pleaded guilty, he contacted his parole officer and told him what he knew about the case. (RT 13863-13865.) Evans asked for protection after giving the information. (RT 13866, 13915.) Evans's plea agreement in the Alameda County case called for a 16-month prison sentence. (RT 13671.) His sentencing had been postponed until after his testimony in the Burchfield case, but he denied that he expected or might receive a more lenient sentence or probation in exchange for

his testimony. (RT 13808-13809.) He said, however, that he was very concerned about going back to prison because his life had been threatened by the BGF (RT 13863-13865) and that he thought he could put off sentencing in the Alameda case "until the time runs out." (RT 13893.)

The defense called several correctional officers to testify regarding items found in cell 2-C-4, occupied by inmate Ephraim of the Crips. (RT 14886-14887.) Correctional Officer Munoz seized Swahili books and other materials associated with the Crips from Ephraim's cell on June 9, 1985. (RT 14887-14889.) The books were inscribed with the name of inmate McGruder, a Crip whose nickname was "Old Man." (RT 14890-14891.) On June 15, 1985, Officer Arzate made an inventory list of property that he was told was taken from Ephraim's cell. (RT 14976-14978.) Arzate did not personally seize the items, did not have personal knowledge of where the items came from, and could not remember who collected the property. (RT 14978, 14981-14982.) Among the items listed on Arzate's inventory report were three shoes. (RT 14979.)

B. Penalty Phase

1. Prosecution Case

The prosecution presented aggravating evidence showing appellant had committed more than two dozen crimes involving the use or threat to use violence, including robberies, assaults, sexual assaults, and murders, starting when he was 12 years old and continuing through pretrial proceedings in the present case. Thirteen of these criminal acts, all robberies, had resulted in felony convictions.

a. Juvenile Criminal Activity

Appellant was born on February 24, 1962. (RT 19191.) On June 25, 1974, appellant committed a strong arm robbery of another boy, George Brennan. Brennan and two friends were riding their bikes in a park in Torrance when appellant and another boy grabbed their bikes and asked them if they had any money. (RT 19172-19173, 19191.) Brennan and his friends said they had no money, but one of the boys reached into Brennan's pockets and pulled out some loose change. (RT 19173.) The boy gave Brennan back his money when Brennan begged, "Please, don't take my money." (RT 19173-19174.) One boy then said he wanted Brennan's watch, but the other boy talked him out of taking it. (RT 19174-19175.) An off-duty Los Angeles County Sheriff's deputy witnessed the robbery. (RT 19177-19178.) One boy was holding Brennan's shirt while the other went through his pockets as Brennan cried. (RT 19178.) The deputy detained appellant and the other boy and turned them over to a Los Angeles police officer. (RT 19178, 19185-19187.) When the officer interviewed appellant about the incident, appellant claimed that he had asked Brennan to lend him a dime, and gave it back when Brennan said no. (RT 19190-19191.)

On July 3, 1975, Cornelius (Joey) Campbell got into a fist fight with appellant over a damaged bicycle. (RT 19948, 19951-19952.) Eventually, they both pulled knives on each other, and Campbell received a minor cut on his arm. (RT 19953, 19976-19977.) About 15 to 20 minutes later, appellant showed up at Campbell's home and called him outside. (RT 19966.) Campbell told police that appellant pointed a revolver at him and threatened to kill him. (RT 19977, 19979.)[12/] Witness Marjorie Black heard appellant yell, "I'm going to kill

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12. At trial, Campbell, who was serving a prison sentence for a drug offense at the time of his testimony, claimed he did not remember seeing any gun in appellant's hands and denied telling police that appellant pointed a gun at him. (RT 19957, 19960-19961.) Campbell also gave conflicting testimony

you.'" (RT 19971-19974, 19980.) Appellant turned himself in to police later that day. (RT 19995, 20006.) Appellant admitted fighting with Campbell, stating both used knives and beer bottles. (RT 20004.) Appellant said Campbell also chased him and hit him with a baseball bat. (RT 20004.) Appellant said he went to his home after the fight, got a zip gun that used .22 caliber bullets, went to Campbell's house, called him outside, pointed the gun at Campbell, and pulled the trigger twice, but it did not fire. (RT 20004-20005.)

In October 1976, appellant threatened to kill a larger boy who had been hassling him on a school bus. (RT 19266-19268.) Probation officer Frank Mannina saw appellant screaming he was going to kill the other student as they got off the bus at Cooper High School. (RT 19267-19268.) Appellant ran across the campus into the science center and reemerged carrying a hand saw or hack saw he retrieved either from the center or some nearby shrubbery. (RT 19205-19206, 19268.) Appellant ran back towards the other student, screaming he was going to kill him. (RT 19268.) School staff intervened to stop appellant. (RT 19268.)

On October 22, 1976, Cooper High Assistant Principal Charles Healy had appellant in his office when appellant tried to climb out the window. (RT 19204.) When Healy pulled appellant back inside, appellant picked up a large metal three-hole punch and threatened to hit and kill Healy with it. (RT 19205.) Los Angeles police were called. (RT 19205.) Appellant was still holding the three-hole punch when they arrived, but dropped it immediately upon command. (RT 19211-19217.)

On October 28, 1976, Daniel Cobos, who was 13 or 14, was stopped by appellant and another boy while bike riding. (RT 19222-19227.) Appellant, whom Cobos knew, ordered Cobos to give him his watch. (RT 19223-19224.)

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about whether he or appellant first pulled a knife in the earlier fight. (RT 19953-19954.)

Cobos complied. (RT 19225.) Cobos reported to the police that appellant and the other boy were holding sticks, demanded money, and asked for his watch when he said he did not have any money. (RT 19262.) When Cobos started to back up, appellant threatened, "Don't leave or I'll kill you." (RT 19262.) After Cobos gave appellant his watch, appellant poked him in the stomach with the stick. (RT 19262.) When appellant was interviewed by police several weeks later, he said he had asked to look at Cobos's watch and Cobos gave it to him. (RT 19234, 19236, 19249.) Appellant told Cobos the watch was "nothing but a raggedy-assed Timex," showed it to the other boy who was with him, and the companion took it. (RT 19249.)

In April 1978, appellant was confined in a California Youth Authority (CYA) institution. (RT 20053, 20055-20056.) Kenneth Allen, who was 12 or 13 years old, was also a CYA ward at that time. (RT 20053, 20055, 20064-20065, 20074.) On April 24, 1978, Allen reported to CYA authorities that, on the previous day, appellant and two other wards named Barrios and Beck came into his room and sexually assaulted him. (RT 20060-20063.) All three had their penises exposed. (RT 20062.) Barrios forced his penis into Allen's mouth while Beck kicked him and appellant hit him and pinned him to the floor. (RT 20062-20063.) Allen further reported that appellant and Barrios beat him again in his room, apparently later that same day, and then, after dinner, forced him to orally copulate Barrios again in a closet in the day room. (RT 20063.) Allen said appellant helped pin him to the floor in the closet while Barrios tried to put his penis in Allen's mouth. (RT 20063.) At trial, Allen denied that he had been sexually assaulted in CYA. (RT 20059.) He said he had made up the original report because he was mad at appellant and the other two wards. (RT 20064.) However, Allen acknowledged that, in February 1990, he had told the district attorney the original report was true, but that he would not testify against appellant because he did not want to say anything that would harm appellant.

(RT 20064-20065, 20075-20076, 20086-20088.)[13/]

The sexual assaults against Allen were corroborated by Michael Anderson, who was also a CYA ward in 1978. (RT 20096, 20098, 20100.)[14/] Anderson recalled that Kenneth Allen, whom he knew as Tony (RT 20099, 20157), was rumored to be homosexual and was habitually picked on by other wards. (RT 20103.) Anderson remembered an occasion when appellant, Barrios, and two other wards, Becker and Guero, went into Allen's room. (RT 20099-20101.) Anderson heard one of the boys say, "Come on, let's go get some." (RT 20102-20104.) Guero came back out of Allen's room first, laughing. (RT 20104.) Anderson asked him what they were doing, and Guero replied, "He's giving it up." (RT 20104-20105.) After appellant came out of Allen's room, Anderson heard appellant and Guero bragging about having sex with Allen. (RT 20103-20104.) The next day, Anderson was in the day room when appellant, Barrios, and Becker approached Allen; Barrios said he "wanted some head." (RT 20108-20109.) Appellant said, "[G]ive it up, you done it before." (RT 20110.) They told Allen they would "beat his ass" if he did not have sex with them. (RT 20118.) Barrios and Becker had their penises exposed. (RT 20111.) Barrios told Anderson to go to the door of the day room and keep a lookout for the counselor. (RT 20112.) Anderson saw Barrios and appellant slap Allen on the head and saw Barrios put his penis in Allen's mouth. (RT 20112-20113.) Allen said he did not want to do it with people around. (RT

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13. At the time of trial, Allen was serving a 50-year prison sentence in Montana for kidnaping, rape, and theft. (RT 20053-20054, 20085.) He claimed that he told the district attorney the report was true so he could get a trip to California and obtain a "change of scenery," even though he also told the district attorney not to waste his money because he would not testify. (RT 20076.) Allen further testified that his original "lie" against appellant was "the only thing in my life I'm ashamed of." (RT 20082-20083.)

14. By the time of his testimony, Anderson had suffered adult felony convictions for burglary and drunk driving. (RT 20097, 20142.)

20110.) They told him to get in the closet and stuffed him in the back of the weight room corner. (RT 20118-20119.) After watching the incident, Anderson felt sick to his stomach from what he had seen and voluntarily decided to report it. (RT 20112-20113, 20173.)

b. Felony Convictions

On November 9, 1979, William Bentley of Lomita, California, was robbed at rifle point by two assailants while he was at work at a USA gas station. (RT 19339-19341.) Appellant was prosecuted as an adult for this offense after being found unfit for juvenile court treatment; he pleaded guilty, and admitted personal use of a firearm. (Exh. P-86A; see also RT 20507.)

In October and November 1980, appellant pulled a string of robberies in and around Harbor City, California, that ultimately resulted in his conviction by jury of 12 counts of robbery, with findings of personal use of a firearm on seven of the counts. (RT 20506-20507; Exhibit P-86A.) The district attorney presented evidence of the circumstances surrounding most of these convictions. The first three robberies occurred on October 14, 1980, at a Sambo's restaurant. Two men, one Black and one Hispanic, robbed three sisters, Mertie Patterson, Sherry Bryson and Terry King, as they ate at the restaurant. (RT 19356-19358, 19361-19363, 19365-19366.) The Black robber said it was a hold-up and ordered the women to put their purses on the counter. (RT 19357.) When Mertie Patterson hesitated, the Black man cocked and pointed a handgun at her head and repeated the command. (RT 19358, 19364, 19366.) The robbers took the women's wallets or purses. (RT 19363-19364.) A jury convicted appellant of robbing all three women. (RT 20507; Exhibit P-86A.)

At 7:30 a.m. on October 31, 1980, Manager Roberta Coleman and employee Barbara Moorhouse were at work at a Taco Bell in Long Beach when they were robbed by a man with a gun. (RT 19496-19499.) The robber took Taco Bell's receipts from the previous night, told the women to empty the

contents of their purses, and took Coleman's rings. (RT 19501.) When Moorhouse protested as the robber reached for her jacket, he said, "Shut up, bitch," and struck her in the head with his gun. (RT 19503.) The robber locked the two women in an outdoor shed before fleeing, threatening to shoot Coleman in the process. (RT 19504-19505.) The women escaped from the shed after about 40 minutes when Moorhouse managed to kick open the door. (RT 19505.) A jury convicted appellant of the robbery of Coleman with personal use of a firearm. (RT 20506; Exhibit P-86A.)

Appellant robbed the same Taco Bell two more times, on November 6 and November 11, 1980. (RT 19336.) On the night of November 6, appellant approached employee Sheryl Brown McCoy at the walk-up window, brandished a handgun, and told her, "I'll blow your mother fucking brains out." (RT 19300-19303, 19305-19306, 19310.) Brown McCoy gave appellant about $80 from the cash register. (RT 19323.) On November 11, appellant returned to the store, this time with another robber, and again demanded money while brandishing a gun. (RT 19304-19306.) Manager Roberta Coleman gave appellant money from the store (RT 19305), and employee Brown McCoy also had her purse stolen from the back counter. (RT 19304.) A jury convicted appellant of robbing Brown McCoy on November 6 and Coleman on November 11, finding personal use of a gun on both occasions. (RT 20506; Exhibit P-86A.)

Also on the night of November 11, 1980, appellant robbed a 7-Eleven store in Long Beach. (RT 19370-19371, 20507.) The robber approached clerk Demir Demirob (or Demirov), pointed a handgun at him, said "Give me the fucking money," and took the money from the cash register. (RT 19372-19373.) As he was leaving the store, the robber also took the purse of customer Ronda Scrivner, who was with her 11-year-old daughter. (RT 19372, 19375-19378.) A jury convicted appellant of robbing Demirob and Scrivner, finding he personally used a gun against both victims. (RT 20506; Exhibit P-86A.)

On November 18, 1980, three robbers entered a K-Mart store in

Harbor City near closing time and ordered everyone to get down. Clerk Cynthia Nolen saw a robber who appeared Hispanic fire a sawed-off shotgun. (RT 19297-19299.) Clerk Dorothy Siquieros also heard a gunshot after going to the floor. (RT 19343-19345.) The robbers took money from the cash register. (RT 19299.) Siquieros was able to identify appellant at trial in 1980 as one of the robbers. (RT 19345-19346, 19351.) A jury convicted appellant of robbing Nolen and Siquieros. (RT 20507; Exhibit P-86A.)

Appellant was arrested by Long Beach police on November 26, 1980. (RT 19638-19639, 19642.) In an interview after his arrest, appellant confessed to a number of the robberies, including the Sambo's robbery, two Taco Bell robberies, and the K-Mart robbery. (RT 19642, 19652, 19660-19663, 19705-19706.) Appellant said that Sambo's was his "best job," as he made off with about $2,700 from the store and customers. (RT 19662-19663.) He said robbing the Taco Bell, which was about a block away from his residence, was easy. (RT 19649-19650, 19709-19710.) He also said that he had fired a 12-gauge shotgun both inside and outside the K-Mart store, which he robbed with a person named Torres. (RT 19660-19662.) In confessing the robberies, appellant laughed and boasted, "I'm going to get off anyway. I'll just have a psychologist tell them how crazy I am and I'll beat it." (RT 19647, 19648.) He also stated, "I know how the system works. I can beat it. Once I pulled a few robberies, I knew the rest were all free 'cause the courts will only file one, two, or three and the rest are all free. I know I am going to do some time, but it will be . . . only a couple of years." (RT 19728.) Appellant said he had hidden the guns he used in the various robberies, and refused to reveal their location because he said he would need them when he got out. (RT 19664.) Appellant said he would not walk the streets without a gun. (RT 19664.)

c. Unadjudicated Adult Criminal Activity

At about midnight on October 9, 1980, Los Angeles Police Officer

Scott Browning and his partner were dispatched to a robbery in progress at a USA gas station in Harbor City. (RT 19379-19380.) As Browning pulled into the gas station lot, he saw a muzzle flash and heard a gunshot outside the passenger's side of his patrol car. (RT 19381, 19390.) Browning estimated that the muzzle flash was about 150 feet away. (RT 19406.) Browning ducked and heard a second shot. (RT 19381.) Browning got out his driver's door and pulled his partner out behind him. (RT 19401.) His partner said he could hear the bullets going past him. (RT 19401-19402.) After back-up officers arrived, the police commenced a futile search for the shooter in the surrounding neighborhood. (RT 19402-19403.) At one point, one of the searching officers kicked a trash can out of frustration. (RT 19403-19404.) In his police interview following his arrest on November 26,1980, appellant admitted he was the person who shot at the Los Angeles police officers when they interrupted his plan to rob a USA gas station. (RT 19648-19649.) He said he hid under the porch of a nearby residence following the shooting, from where he saw the police searching for him and observed the officer kick the trash can. (RT 19654.)

At about 11:00 p.m. on October 22, 1980, Bob Hamil was murdered in his liquor store on the Pacific Coast Highway in Los Angeles. (RT 19516-19518, 19528-19529.) Michael Balingit, a regular customer of the store, drove by at about that time and saw two men get out of a yellow 1960's model Camaro and go inside the store. (RT 19516-19520.) One of the men had on sunglasses and a beanie, and Balingit could tell that they had left the engine to their car running. (RT 19518, 19520.) Finding these circumstances suspicious, Balingit circled back around the store, by which time he saw the Camaro driving off. (RT 19520.) At about the same time, Shugo San Luis, Jr., was standing outside a bowling alley approximately 100 yards from Hamil's Liquor Store. (RT 19511-19512, 19514.) San Luis heard what sounded like a backfire and saw a man run out of the liquor store and get into a yellow Camaro, approximately 1968 model, which then took off. (RT 19512, 19514-19515.)

Los Angeles police were summoned to the liquor store, where they found Bob Hamil dead behind the counter, having been shot once in the chest at close range with a shot gun. (RT 19525, 19528-19529, 19551.) The cash register was open and there was no money in the till. (RT 19530.) There were two guns, a .38 and a shotgun, under the counter near where Hamil had been standing. (RT 19544, 19546.) Several hours before the murder, a 1967 yellow Camaro had been reported stolen from a residence about six or eight miles away from the liquor store. (RT 19535, 19578.) Police recovered the Camaro the next day a few blocks away from the owner's home; the interior had been burned out. (RT 19537, 19576-19577.)

Appellant was questioned about the liquor store robbery-murder following his arrest on November 26, 1980. Appellant stated, "You got me on all the robberies, but that's no big deal. I'm not stupid. You'll have to prove that one." (RT 19665.) While appellant repeatedly denied responsibility for Hamil's robbery and murder (RT 19721-19722, 197320), he also made a number of incriminating statements about the crime. Appellant told Long Beach police detective Paul Chastain that he knew who had committed the robbery and had talked to the perpetrator. (RT 19720.) When Chastain asked him what went wrong in the robbery, appellant said, "Hey, man, let me put it this way[.] If I go in a store and I tell him not to move and lay on the floor, and he reaches for something, now what I would have done is pistol whipped him. And unless he is big and fat and play a hero, then I'll do him. I wouldn't shoot him in the chest. I'd shoot him in the foot or the leg." (RT 19721.) Chastain had not mentioned that Hamil had been shot in the chest. (RT 19721.) Chastain asked appellant if he had been loaded during the robbery. (RT 19721-19722.) Appellant said, "No, I wasn't loaded," then hesitated and said, "Hey, what do you mean. I told you I didn't rob the liquor store. I didn't kill the clerk." (RT 19721-19722.) Appellant reiterated, "I'm too slick to fuck up a robbery like that. I heard the clerk was a hero man. They went and saw him drinking, tried to rob

him, and he laughed and thought they were playing." (RT 19722.) When Chastain asked again what went wrong, appellant used the word "us" twice, stating, "The dude reached under the counter. It looked like he got a gun and was going to run after us and shoot at us from the back." (RT 19724-19725.) Chastain asked what kind of gun Hamil had, and appellant replied, "I don't know, one of those weird ones. I think a three eight, oh, you know." (RT 19725.) Appellant continued, "If he would have just walked around, but he reached under the counter, and we thought he was going to shoot us when we were running." (RT 19725.) Appellant then smiled after realizing he said "we" and "us," and immediately stated, "So they went back and shot him." (RT 19725, 19745.) Chastain asked how many people had been involved in the robbery, and appellant replied, "Two is normal." (RT 19726.) When asked why he had used a partner in this robbery, appellant stated, "Because the dude really knows the freeways man." (RT 19728.) Appellant said he typically would give someone $30 or $40 dollars from his robbery proceeds to steal a getaway car, and that the person would then return the car after the robbery. (RT 19726-19727.) He mentioned that an orange Camaro had been used in the liquor store robbery, even though Chastain did not mention the color of the car used. (RT 19720.) Appellant said the robbers stole the Camaro by punching out the ignition, stupidly parked it in a red zone right in front of the store, and abandoned it in the middle of the street about a block from the robbery when it stalled. (RT 19723.) Chastain did not record the interview with appellant. (RT 19733.) Chastain tried to write down appellant's words exactly in his police report when he attributed a quotation to him. (RT 19733-19734.)

As mentioned, appellant was arrested on November 26, 1980. (RT 19638.) The police located him at his sister's apartment. (RT 19639-19640.) With their guns drawn, the police knocked on the door of the apartment, announced their presence, and stated they had a warrant for appellant's arrest. (RT 19640-19641.) People yelled from inside the apartment that there were

children present and not to shoot. (RT 19641.) After about 30 seconds, the door opened and about five males came out, including appellant. (RT 19641.) Appellant was holding a small child up in front of him. (RT 19641.) The police ordered appellant to put down the child, and he complied. (RT 19641.)

In July 1981, appellant was confined in the Los Angeles County Jail. (RT 19761.) On July 2, 1981, during a search of the cell appellant shared with other inmates, Deputy Sheriff Mark Machanic saw appellant throw a weapon under his bunk. (RT 19758-1972.) Machanic retrieved from under the bunk a double edge razor affixed to a toothbrush. (RT 19763.) He also found a second weapon, a single edge razor melted into the end of a piece of white tubing, concealed in the wall beneath the same bunk. (RT 19762-19763.) As Machanic was removing appellant from his cell, appellant called out to another inmate, "Hey, man, I just got busted with a shank." (RT 19773.)

On July 30, 1981, appellant initiated a fight with sheriff's deputies at the jail. (RT 19773-19774.) The altercation started when appellant began screaming, swearing, and attempting to rile up other inmates as deputies subdued an inmate who had been fighting with three deputies. (RT 19774-19777.) Deputies St. Amant, Morrison, and Archibald attempted to remove appellant from his cell because he was causing a disturbance. (RT 19778-19779.) When they asked him to step through the gate, appellant pushed Deputy Morrison in the chest causing him to lose his balance. (RT 19779-19780.) Deputies Morrison and Archibald then struck appellant. (RT 19779.) Appellant continued to fight until subdued and handcuffed by five or six deputies. (RT 19779-19780.)

In 1984, appellant was confined in San Quentin. On February 10, 1984, he was on the yard in North Block when inmate David Jackson was stabbed in the neck and killed. (RT 20180, 20194, 20233.) Correctional Officer Clayton Holley was on guard duty on the gun rail above the yard. (RT 20179-20180, 20186.) He saw Jackson boxing with another inmate named Brewer.

(RT 20183.) When they stopped boxing, Brewer walked to a group of five other inmates that included appellant. (RT 20192, 20233.) Jackson also walked towards this group and began unlacing his boxing gloves. (RT 20192.) Officer Holley looked away from the group towards another part of the yard for a few seconds. (RT 20192-20193.) When he looked back towards the group, he saw Jackson backing away from the others with an object protruding from his neck and blood on his shirt. (RT 20194, 20224.) There was no other inmate near this group. (RT 20195.) Holley ordered the group to freeze and fired a warning shot when they started to disperse. (RT 20195.) Eventually, these prisoners, consisting of appellant and inmates Brewer, Womack, Hobbs, Smith, and Woods, were removed from the yard one at a time. (RT 20198.) Jackson collapsed on the yard and was taken to the prison hospital with a three– or four-inch prisoner-made weapon sticking out of his neck. (RT 20221, 20256-20259, 20262-20263.) He still had his boxing gloves on. (RT 20272.) Jackson died a few minutes after being taken to the hospital. (RT 20260.) The autopsy revealed that Jackson had suffered three stab wounds, two to the neck and one to the rib cage. (Exhibit P-85; see also RT 20520.)

Appellant made numerous admissions of stabbing Jackson to fellow BGF member Johnnie Hoze. (RT 20346, 20350, 20409.)[15/] Hoze met appellant

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15. Hoze was serving a life term for multiple felonies, including kidnaping and robbery. (RT 20347-20348.) Hoze dropped out of the BGF in 1986 after he was stabbed by another BGF member named Davis. (RT 20403-20404, 20470.) Hoze admitted that he retaliated against Davis less than two weeks later by stabbing him in the neck with a plastic knife. (RT 20404.) Hoze also admitted that as a BGF member he had overseen a number of stabbings (RT 20388-20389), had threatened officers (RT 20392), had taught other inmates how to make and use prison weapons (RT 20395), had been convicted of possessing weapons in prison (RT 20377), had stolen knives from the prison kitchen with Woodard (RT 20474), and had lied under oath in his trial for possession of those knives. (RT 20468-20469, 20474.) Hoze said the BGF put "the dragon," on him after he dropped out, meaning a death threat, and also had threatened to kill his entire family. (RT 20483-20484.) Hoze was promised that

after appellant was placed in the Adjustment Center in February 1984. (RT 20355, 20358, 20361.) Hoze was the BGF security chief in the Adjustment Center. (RT 20384.) Hoze asked appellant why he had been sent to the Adjustment Center. (RT 20362.) Appellant replied that he had killed inmate Jackson, hitting him in the neck and leaving the weapon in his neck. (RT 20362.) Appellant had called Jackson by another name, but Hoze could not remember what name he had used. (RT 20363.) Appellant said Jackson had been punching on the punching bag and still had on his boxing gloves. (RT 20363.) Over the course of the next year he spent in the Adjustment Center, appellant repeatedly bragged about killing Jackson. (RT 20366-20367, 20409.) In one BGF "hit class" (in which members were taught how to "make a move" on or stab another person), appellant said that "the adrenalin rush was better than having sex" when he stabbed Jackson. (RT 20370.) Everyone laughed at appellant's remark. (RT 20370.) Appellant said Jackson had been stabbed under orders from BGF Captain Welby Johnson because he was buying marijuana from a white person instead of from the BGF. (RT 20471-20472.) Appellant said he had carried out the hit with another inmate name "Tank," who stabbed Jackson in the chest. (RT 20472.)[16/] At a debriefing interview when he dropped out of the BGF, Hoze told San Quentin Correctional Sergeant Spangler that appellant had told him he had hit and killed a guy wearing boxing gloves. (RT 20475-20477.) Over the course of several years, Hoze told the same thing in separate interviews with Correctional Lieutenant Thomas, District Attorney's Investigator Gasser, and the deputy district attorneys who were prosecuting the

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nothing in his testimony would be used against him. (RT 20462.)

16. Appellant said the weapon he used "came off a bed." (RT 20373-20374.) Correctional Officer Arzate believed that the weapon was made from shelving as it was thinner than a bed brace (RT 20286-20287), but Hoze testified weapons could also be made from the metal strap under the bed springs. (RT 20374.)

case. (RT 20486-20487.)[17]

Evidence of two other San Quentin incidents involving weapons was presented in aggravation. On July 27, 1984, Correctional Officer Biederman found a prisoner-made stabbing instrument during a routine search of appellant's Adjustment Center cell, 1-AC-6, which he occupied alone. (RT 19924-19925, 19930, 19933.) The weapon was a piece of sharpened plastic, likely a melted toothbrush, found in a bowl at the foot of appellant's bed. (RT 19927-19928.) On September 5, 1984, Correctional Officer Stacey was escorting an inmate named Roa to his cell in the Adjustment Center when a spear came flying out of appellant's cell and narrowly missed hitting Roa in the shoulder or neck. (RT 19934-19939.) The spear consisted of a long pole made of newspaper with a piece of sharpened metal on the end. (RT 19937-19938.)

The final incident in aggravation concerned an altercation appellant had with correctional officers in a courthouse holding cell during a pretrial proceeding on October 8, 1987. (RT 20009-20010.) Correctional Officer O'Mallen was placing appellant in the holding cell when he heard an altercation in the hallway between codefendant Woodard and other officers. (RT 20010, 20014.) At the sound of the commotion, appellant, whose hands and feet were free though he was wearing a waist chain, bolted for the door. (RT 20011.) Officer O'Mallen tackled appellant from behind. (RT 20013.) As they fell to

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17. Appellant called defense investigator Melody Ermachild in an attempt to impeach Hoze's testimony. (RT 20816.) Ermachild testified that Hoze told her that prison staff had allowed him to go back on the yard and stab the inmate who had stabbed him in exchange for his agreement to tell all he knew about the BGF. (RT 20816-20817.) Ermachild also denied ever telling Hoze that appellant had threatened her. (RT 20818.) This contradicted Hoze's testimony that he had made no such agreement with prison authorities (RT 20403-20404) and that Ermachild told him appellant had threatened to kill her and her family. (RT 20493.) Ermachild further testified that Hoze told her he wanted appellant dead and would kill him himself if he could. (RT 21010, 21027.)

the floor, O'Mallen hit his head hard on a wooden bench, causing him to release his grip. (RT 20013.) Appellant got up and went for the door again. (RT 20013.) O'Mallen grabbed him from behind by his waist chain and attempted to get a hold under his arms. (RT 20013-20015.) Appellant began swinging his elbows wildly, preventing O'Mallen from getting a grip and striking O'Mallen once with his elbows in the neck. (RT 20014-20015, 20030.) O'Mallen struck appellant in the head, which knocked appellant off balance and enabled O'Mallen to pin him to the wall of the holding cell until other officers rushed in to assist. (RT 20015-20016.) Appellant continued to struggle and scream until the officers were able to force him to the floor and handcuff him. (RT 20016.)

2. Defense Case

A total of 33 witnesses, including appellant, testified for appellant during the penalty defense.[18/] The penalty phase defense case began by trying to attack the credibility of prosecution guilt phase witness Bobby Evans. Evans admitted that on three occasions in 1988 he had been paid to shoot others, receiving as much as $15,000 to carry out the hits. (RT 20576-20579.) At least two of the shootings were drug related. (RT 20580, 20582.) In the last shooting, Evans said he tied up the male and female occupants of a dwelling,

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18. The testimony of two additional defense witnesses, prisoner Henry Farve (RT 21151, 21179) and defense legal assistant Kelly Jo Hayden (RT 218892-21893), was struck by the court after the prosecution was unable to conduct cross-examination. Farve, after testifying on direct examination that he was a member of the BGF and that appellant had dropped out in 1987, refused to answer questions about "anything pertaining to the BGF." (RT 21172-21774.) (Defense counsel acknowledged that they put Farve on the stand knowing in advance there was a "risk" he would refuse to answer questions about the BGF. (RT 21177.)) Hayden was proffered as a character witness based on her numerous visits with appellant from 1986 through trial in 1990, but appellant refused to waive the attorney client privilege concerning the contents of their conversations. (RT 21894-21896, 21900.)

stole some cocaine, then shot both occupants. (RT 20580.) None of Evans's shooting victims died. (RT 20582.)

The defense also called several witnesses in an attempt to show that Evans had lied during his guilt phase testimony on October 30 and 31, 1989, when he testified that he did not expect, in exchange for his testimony in the present case, a better deal in his pending Alameda County case than the plea bargain for not more than a 16-month prison sentence. (See RT 13671-13672, 13808.)[19] James Hahn, a special agent with the California Department of Corrections, testified that Evans told him he did not want to go back to prison on his Alameda County case because he believed his life would be in danger for having given information in the Burchfield killing. (RT 20605-20611.) Hahn promised Evans that his safety would be protected, but said he could promise no favors for Evans in connection with his Alameda County case or make any promises in exchange for Evans giving information on the Burchfield case. (RT 20611-20612, 21193-21199.) However, Hahn did tell Evans he would make efforts to have Evans's Alameda County sentencing postponed so he would not be committed to state prison. (RT 21201-21202.) This was not in response to Evans's request for help on his Alameda County case, but to Evans's stated desire not to be returned to state prison, and particularly to the reception center at the California Department of Corrections facility at Vacaville, because Evans had previously informed on a correctional lieutenant at that prison. (RT 21202-21206.) Specifically, Hahn told Evans, "I will take care of it." (RT 21201.) Hahn insisted, however, that "I never promised him a thing." (RT 21208.)

Alameda County Deputy District Attorney Russell Giuntini testified

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19. Evans testified at the guilt phase that he did not want to go back to prison (RT 13863, 13867, 13893), that his Alameda County sentencing had already been postponed three times (RT 13809-13810, 13884, 13959), and that he thought he would be able to "put my sentence off until the time runs out." (RT 13983; see also RT 13959-13960, 13982-13983.)

that he received two or three telephone calls from Hahn, whom he knew, asking if Evans's sentencing could be continued and explaining that there were threats against him. (RT 20618-20622.) Giuntini was familiar with the BGF based on personal experience, and he told William Denny, the deputy district attorney who was handling Evans's case, to continue the sentencing hearing. (RT 20588-20592, 20622-20623.) Denny later had a telephone call with Hahn in which Hahn asked if Evans had enough presentence credits to be released. (RT 20596-29598.) Denny also received a letter from the Marin County District Attorney which stated that no offers of leniency should be made to Evans, and he had communicated this position to the Alameda County judge in Evans's case. (RT 20602-20604.) Evans's sentencing hearing was continued on three occasions, the first because a probation report was not ready (RT 20588) and the second two based on Denny's request at the direction of Giuntini. (RT 20590-20591, 20600-20601.) Evans was eventually sentenced on December 13, 1989. (RT 20604.) To Denny's knowledge, no "deals" were given to Evans in exchange for his testimony in the Burchfield case. (RT 20604.)

The defense also contested the prosecution evidence linking him to the 1980 murder of liquor store owner Bob Hamil and the 1984 murder of San Quentin inmate David Jackson. As to the former incident, Roland Drouin, the Los Angeles police detective in charge of the Hamil investigation, testified that he took no steps to charge appellant. (RT 20583-20586.) As to the latter, Correctional Officer Richard O'Connor testified that he strip-searched appellant when appellant was removed from the yard following the stabbing of Jackson and found no weapons, blood, cuts, or abrasions on him. (RT 20623-20624, 20629.)

Three inmates, Lester Lewis, Ronnie Dubarry, and Howard Williams, who were on the yard on the day of Jackson's murder and who were all still in prison at the time of the present trial, also testified on appellant's behalf. Lewis testified that he was talking with appellant when he saw Jackson staggering

across yard; appellant was not with the group of inmates near the bench where Jackson apparently was stabbed. (RT 20633-20636, 20639-20641.) Lewis said he was not a BGF member, though he associated with them on the yard, and that he had a "bad feeling" about naming BGF members in his testimony. (RT 20655-20658, 20672-20673.) Dubarry also testified that appellant was not with the group of inmates near the back bench. (RT 20682-20684, 20698-20699.) Instead, appellant was talking with another inmate near the speed bag or boxing area. (RT 20689-20690, 20696-20697.) According to Dubarry, Jackson was walking normally across the yard until the moment he collapsed. (RT 20705.) Dubarry said he was an associate, not a member, of the BGF despite incriminating evidence found in his cell including a copy of the BGF constitution. (RT 20707, 20710-20713.) Dubarry said that appellant was not a member of the BGF to his knowledge. (RT 20707.) Williams testified that appellant was not anywhere near Jackson when Jackson fell. (RT 20714-20718, 20721-20722, 20731.) Williams also denied BGF membership, though he had been classified as a BGF member by the Department of Corrections (RT 20745), and denied that appellant was a BGF member. (RT 20751.) All three inmates denied that any warning shot had been fired on the yard the day of Jackson's murder. (RT 20641-20642, 20688, 20730.) However, Correctional Sergeant David Langerman testified that there was a gunshot and that appellant, as one of the persons who had been closest to Jackson, had been one of the first persons ordered off the yard after the stabbing. (RT 20810-20811, 20815.)

Appellant presented testimony from a large number of family members, friends, and acquaintances who described appellant's disadvantaged childhood and troubled background. Appellant's parents, Billy Masters and Cynthia ("Shorty") Campbell married in 1959 and separated in 1963, when appellant was less than two years old. (RT 20821-20822, 21551, 21783.) Appellant's maternal uncle and two maternal aunts (RT 20819-20820, 20858-20859, 20873) described appellant's father, Billy Masters, as a violent man who

repeatedly beat and threatened to kill appellant's mother. (RT 20819-20823, 20827-20832, 20873, 20876-20877.) When appellant was two or three years old, appellant's father was beaten with a pipe and driven off by the uncle and one aunt during a particularly violent altercation with appellant's mother; Billy Masters was never heard from by the family again. (RT 20834-20836, 20877-20878, 20880.) Appellant's mother had eight children by five different men; appellant was the fourth of the eight. (RT 20824-20825.) Appellant's mother was an addict, alcoholic, and prostitute. (RT 20837, 20850, 20879-20880.) After appellant's father left, his mother hooked up with a man named Otis Harris, with whom she had a mutually violent relationship. (RT 20838, 20879, 21457-21458.)

Appellant testified that he could not remember his natural father from childhood and did not remember anything about his parents' relationship. (RT 21550, 21552-21553.)[20/] He recalled living with his mother, Otis Harris and four of his siblings from about the age of two until he was six. (RT 21550.)[21/] Harris would slap appellant and whip him with an electric cord. (RT 21575.) Harris and appellant's mother used and dealt drugs from their residence. (RT 21563-21564.) Appellant saw them packaging dope in balloons and shooting up. (RT 21563-21565.) Once, appellant took some of the balloons and hid

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20. Appellant's testimony consumes more than 300 pages of reporter's transcript. (See RT 21550-21890.) To maintain a chronological narrative, we do not present an unbroken summary of appellant's testimony. Instead, we integrate the testimony of other witnesses regarding particular events or time periods. Where a given paragraph states that appellant or a witness testified to the described events, it may be assumed that the entire paragraph is derived from that person's testimony unless specified to the contrary within the paragraph.

21. According to the testimony of appellant's older brother Thomas, appellant lived with Harris and their mother through the age of eight or nine. (RT 21452-21453.) However, probation records established that appellant was placed in foster care in October 1968, when he was six. (RT 21783.)

them. (RT 21573.) Harris beat appellant and his mother until appellant told him where the balloons were. (RT 21573.) Appellant recalled getting so angry at Harris when he was four of five years old that held a butcher knife over Harris while Harris was sleeping and considered stabbing him. (RT 21574-21575.)

Appellant testified that his mother was usually drunk or high; he liked her better that way because she was angry when she was sober. (RT 21564-21565, 21570.) Appellant watched his mother have sex with other men through the keyhole of her bedroom. (RT 21571-21572.) Once, when appellant was about four, his mother hid all of the children under the bed and told them not to come out no matter what happened. (RT 21566-21567.) Appellant then heard the sounds of a prolonged violent fight and someone pounding on his mother's body. (RT 21567-21568.) Appellant could hear his mother crying and could see a man's shoes. (RT 21568.) Appellant was so scared he wet himself. (RT 21568.) Eventually, he saw his naked mother crawling towards him. (RT 21569.) She grabbed appellant's arm then passed out. (RT 21569.) Appellant helped to clean his mother up with the assistance of a neighbor. (RT 21569.) Appellant's mother occasionally used other prostitutes as babysitters. (RT 21579-21580.) They would shoot dope and give appellant coke spiked with alcohol. (RT 21579-21580.)

Appellant testified that his mother would leave the children alone for days at a time to fend for themselves. (RT 21557-21558; see also RT 20878 [testimony of appellant's uncle that appellant's mother left her children alone].) On occasion they ran out of food, and other times they had only mustard, catsup or mayonnaise sandwiches on moldy bread to eat and sugar and water to drink. (RT 21559, 21883.) Appellant would resort to stealing food from a nearby Chinese restaurant; sometimes a neighbor would feed them. (RT 21559-21560.) The children were not kept clean and often went to school with soiled and urine-stained clothing. (RT 21495-21496.) Eventually, their school started bathing them and washing their clothes for them. (RT 21495-21496, 21581.)

Appellant and his older sister Charlene testified about taking care of their infant twin siblings, Carl and Carlette. (RT 21562.) Appellant was responsible for Carl, and Charlene for Carlette. (RT 21485-21486, 21488, 21491-21492, 21562.) Carl died as an infant, apparently while in his crib. (RT 21498-21499.) Appellant blamed himself for Carl's death. (RT 21577-21578.) Appellant's mother told him it was not his fault and that she would get him another baby. (RT 21499, 21578.) Two of appellant's sisters and one of his brothers generally corroborated appellant's description of their horrific early childhood. (RT 21432-21436, 21452-21460, 21485-21499.)

When appellant was about six, appellant and his sisters were taken from their mother's custody and placed in separate foster homes. (RT 20847, 21499-21502, 21550, 21584-21585.)[22/] Appellant said he screamed when he was told that he would be separated from his sisters. (RT 21586.) Appellant testified that he did not know what his real name was until taught by a social worker after being removed from his mother. (RT 21587-21588, 21604.) Up until then, he had always been called "Cassius Clay." (RT 21587-21588.) Appellant also remembered being frustrated as a child that he could not wash "the black off me." (RT 21597.)

In October 1968, appellant was placed with an older, childless Black couple named Prock, with whom he lived until 1971. (RT 21448, 21588-21589, 21783.) Appellant testified that the Procks' home was the "complete opposite" of his mother's home and that he did not want to go back to his mother's. (RT 21588-21590, 21594.) The Procks loved appellant, gave him a bike and his own room, and enrolled him in school. (RT 21589.) After about two years appellant was able to have regular visits with his sisters. (RT 21503-21504, 21593.) In

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22. The record is unclear whether appellant and his siblings were taken from their mother due to Carl's death, their mother being arrested, the children being left alone, or some combination of these circumstances. (See RT 20847, 21501, 21584-21585.)

June 1971, when appellant was nine, he was moved to the foster home of a family named Chargois. (RT 21141, 21595, 21784.)[23/] The new foster home included both the Chargoises' two natural children and four other foster children. (RT 21140-21142.) Appellant testified that he felt the Chargoises showed favoritism to their natural children and treated the foster children as "mainly the chorekeepers." (RT 21598.) He recalled that he was not allowed to attend Mrs. Prock's funeral when she died. (RT 21603.)

Mrs. Chargois testified that appellant was a pleasant child, but said he was confused about why he had been removed from Mr. Prock, whom he referred to as his father. (RT 21143-21146.) Appellant frequently ran back to Mr. Prock's home, which was about five miles away. (RT 21143, 21146.) Appellant lived with the Chargoises for about a year until Mrs. Chargois asked that he be placed in a different home because he kept running away. (RT 21141, 21149, 21784.)

For the next two years, appellant shuffled between a variety of out-of-home placements, including other foster homes, McLaren Hall, Boys Town of the Desert, and the California Military Academy in Beaumont. (RT 21603-21617, 21784, 21803-21804.) Appellant testified that he habitually ran away from these facilities except for McClaren Hall, which was a fenced facility and which appellant enjoyed because of the rules, activities, and opportunities for friendship with other wards. (RT 21604-21607, 21610-21613.)[24/] Appellant

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23. A probation report stated that the Procks retired from providing foster care. (RT 21802.) Other evidence showed that they had become too aged and infirm to care for appellant, with Mrs. Prock dying not long after appellant was placed in the new home. (RT 21144, 21964.)

24. Robert Leslie, a McLaren Hall counselor, testified that the facility housed about 135 abused, abandoned, or neglected children. (RT 20933-20935.) Typically, wards housed at McLaren were troubled children who could not be managed in a foster care home. (RT 20952.) Leslie testified that most children removed from their parent's home eventually matured and conformed their behavior to societal norms. (RT 20960-20961.)

recalled the California Military Academy as a "real rough place" where fighting was encouraged by staff. (RT 21614-21616.) While at this academy, appellant started being allowed to visit his aunts, first for a weekend and then for longer periods. (RT 21618.)

In May 1974, appellant moved in with his Aunt Nadine, her husband, and their four children, where he lived for three or four years. (RT 21619, 21784-21785.) Nadine and her family lived in Harbor City, a violent area with widespread drug dealing. (RT 20915, 21119, 21631-21632.) Appellant was also reunited with his mother at about this time. (RT 21619.) She was still living with Otis Harris, engaging in prostitution, and using drugs. (RT 21618-21621.)

Appellant and his older brother Thomas testified that when appellant was about 13 or 14, Harris and their mother began using appellant as a drug courier, concealing the drugs in the seat of his bicycle. (RT 21459, 21622-21623.) Appellant began smoking marijuana with his mother. (RT 21618.) Appellant joined a gang called the "Chicos" through the influence of his brother Thomas. (RT 21627-21628.) This gang engaged in theft, graffiti, and vandalism at schools. (RT 21628-21629.) Appellant considered the gang to be like another family. (RT 21629.) Appellant's brother Thomas, who had been convicted of multiple felonies and was in prison at the time of his testimony,[25/] testified that the Chicos were the little brothers of the members of his own gang, the "Harbor City Locos." (RT 21452-21453, 21461-21462, 21470-21471.) Appellant testified that during this time, his brother gave him a lot of alcohol and he helped with his brother's drug business. (RT 21631.) Thomas testified that appellant joined the Chicos when he was still in elementary school and that he gave appellant a knife and told him to use it if anyone messed with him at

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25. At least three of appellant's siblings had served time in prison. (RT 20826.)

school. (RT 21460-21463.)[26]

Appellant admitted the robbery of George Brennan on June 25, 1974, though he could not remember whether he or his companion took Brennan's money or whether they kept it. (RT 21630, 21785.) He admitted having a knife fight and pointing a gun at Joey Campbell (in July 1975). (RT 21632-21634.) He testified that Campbell started the incident by hitting him with a bat and that the gun he pointed at Campbell was a cap gun with a sealed barrel. (RT 21632-21634.) Appellant's cousin Ricky recalled appellant running into the house and complaining that Joey Campbell had hit him with a stick. (RT 20908-20909, 20911-20912.) Ricky testified that appellant took a cap gun and ran to Joey's house. (RT 20912.) Ricky said he followed appellant, but did not see him do anything with the gun. (RT 20913, 20924.) Ricky admitted that his father kept a .22 in the house. (RT 20929-20930.) When he heard the police were looking for him regarding the Campbell incident, appellant went to John Northmore, the director of a neighborhood youth center, and said he wanted to surrender. (RT 21136, 21634.)

Appellant testified that after the gun-pointing incident involving Joey Campbell, he was sent to several juvenile camps where he spent about a year. (RT 21637-21638.) The wards at the camps routinely engaged in fighting and glue sniffing. (RT 21640.) Following his release from camp, appellant returned to his Aunt Nadine's home and became heavily involved in his gang. (RT 21640.) At some point during this period, appellant said he spent two months in Compton Foundation Hospital under placement by a social worker. (RT 21642-21643.) He did not know why he had been placed in the hospital, where

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26. Thomas also testified that, when appellant was eight or nine years old, he gave him marijuana to smoke and had appellant package marijuana for him. (RT 21463-21464.) This testimony conflicts with the evidence showing appellant was in foster care, until May 1974, when he was 12. (See RT 21141, 21148-21149, 21784-21785.)

he was forced to take Melaril and other drugs when he acted out. (RT 21643, 21850-21851.)[27/]

Appellant admitted the incidents at Cooper School (in October 1976), which he attended between the 6th and 11th grades, involving chasing another boy with a saw and brandishing the three-hole punch at the assistant principal. (RT 21664-21666.)[28/] Appellant testified he was the youngest student at the school. (RT 21664, 21666.) The incident with the saw was precipitated when he was chased by a gang of bigger boys. (RT 21666-21668.) The incident with the three-hole punch was precipitated when the assistant principal tried to force him to go back to a classroom full of the bigger boys and slammed appellant back into a chair when appellant tried to flee his office. (RT 21669-21670.) Appellant could not remember whether he had uttered threats on either occasion. (RT 21668-21670.) Appellant had no recollection of stealing Daniel Cobos's watch (in October 1976), but said the incident could have happened. (RT 21635-21636.)

Appellant admitted that in 1977, he fired a pellet or B-B-gun into the house of a person named Angel Rodriguez after Rodriguez had beaten him. (RT 21790-21791.) Appellant ran away from juvenile hall while awaiting trial on that charge. (RT 21791-21792.) The case was dismissed when Rodriguez failed to appear to testify. (RT 21792.) Appellant acknowledged that he or his friends may have threatened Rodriguez to dissuade him from testifying. (RT 21792-21793.)

Appellant testified that in 1977, he was sent to the Fred C. Nelles CYA facility in Whittier, where he remained for six to 10 months. (RT 21670-21671.) The wards called it a "gladiator school," and appellant and other wards

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27. Appellant later asked to be given Melaril when he was in CYA. (RT 21851.)

28. A witness described Cooper School as a continuation school where most students were involved in gangs. (RT 21129.)

frequently got into fights and were physically assaulted by staff. (RT 21671, 21673-21674.) Appellant was put in isolation (or "the hole") three or four times for up to 10 days at a time. (RT 21675-21676.) He was forcibly medicated and strapped down for up to ten hours. (RT 21677.) He drew on the wall using his own blood while confined in the hole. (RT 21679.) While at this facility, appellant met wards Barrios and Allen. (RT 21679-21681.) Barrios was a bully, but appellant looked up to him and was part of his gang. (RT 21679-21680.) Appellant did not like Allen and picked on him. (RT 21680-21681.) Appellant knew that Allen traded sex with Barrios for small favors, and said he may have acted as a lookout when Barrios and Allen were having sex. (RT 21680-21683.) Appellant's account of the violent conditions at Fred C. Nelles was corroborated by Michael Anderson, who had previously testified in the prosecution's case. (RT 20764, 20767-20768, 20771-20773, 20777, 20783-20787.) Anderson described other forcible sexual assaults he saw at Nelles. (RT 20769-20770.)

In August 1978, appellant was transferred to the O.H. Close CYA facility in Stockton, where there was less gang influence. (RT 20968-20969, 20986, 20993, 21685-21686.) Appellant characterized his time at O.H. Close as a "fresh start." (RT 21686.) Appellant testified that he developed strong bonds with several counselors, whom he considered father figures, and felt he could improve himself there. (RT 21688-21690.) Appellant and several counselors testified that he achieved his high school diploma, made the honor roll, was awarded a private room as one of the top 12 wards in his dormitory, had above normal behavior, was head of the K-P crew, and received two commendations. (RT 20971-20972, 20975, 20991-20993, 21688.) Three of appellant's counselors at O.H. Close testified to his positive behavior at that facility. Jack Mayfield testified that appellant was the "top ward in the dorm." (RT 20965, 20977.) Mayfield believed that appellant was not impaired in any way in his ability to function. (RT 20975.) According to Mayfield, a therapist

at O.H. Close determined that appellant was able to control his behavior and had no organic brain damage. (RT 20980.) George Jacques testified that appellant had no serious behavioral violations while at O.H. Close. (RT 20982-20984, 20990.) Hershey Johnson testified that appellant arrived at O.H. Close with "a lot of pain," but was a "very good" person at the facility. (RT 21030, 21032.) Johnson interacted with appellant at the time of trial in the same pleasant way he had when appellant was at O.H. Close. (RT 21034.)

In July 1979, appellant was paroled to a group home in Stockton, where he got a job and enrolled in a welding program. (RT 20998, 21690-21691.) However, appellant testified that he missed the supervision provided at O.H. Close and soon became frustrated in trying to take public transportation to the welding program. (RT 21992-21993.) After about one month, he arranged to have his parole transferred to Southern California when his brother told him that his family had reunited. (RT 21994.) Appellant moved back in with his aunt. (RT 21697.) Appellant had no job or supervision and felt pressure to get back into gangs. (RT 21698-21699.) Dope was being sold from his aunt's house without her knowledge. (RT 21699-21700.) He sold his high school diploma for $20. (RT 21702.) During this period, appellant's mother, who was still heavily into drugs, was shot five times but survived. (RT 21696, 21703.)[29/]

Appellant testified that, within a short time, he began pulling robberies. While still 17, he robbed a USA gas station with a person named "Mad Dog." (RT 21700-21703.) He was caught and put into juvenile hall, but was charged as an adult and transferred to county jail. (RT 21703-21704.) He was jumped and beaten by sheriff's deputies when he turned 18 in jail on February 24, 1980, suffering a chipped tooth. (RT 21704-21705.) He pleaded guilty to the USA

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29. Appellant's cousin Ricky felt appellant had been an "average kid" before he went to CYA, but that he was "wilder" and "seemed like he was more disturbed about something" after he returned. (RT 20914.)

robbery and was sent to another CYA facility, but escaped and returned to his home town. (RT 21705-21709.) He stayed at several places and started committing more robberies, feeling he had nothing to lose. (RT 21709-21710.) Appellant characterized himself as out of control and angry at the system. (RT 21711.)[30] He said he did not see his victims as human beings. (RT 21712.) Appellant admitted robbing Taco Bell, K-Mart, 7-Eleven and Sambo's during this period, but denied that he ever hit or shot anyone during a robbery. (RT 21710-21711, 21713.) He said he never tried to hide his identity because he knew he was going to be caught. (RT 21712.) Appellant specifically denied robbing Taco Bell on the occasion when Barbara Moorehouse was struck in the head and denied shooting at the police officers at the USA gas station. (RT 21713-21714.) Regarding the latter incident, appellant said he had been drinking with a group of gang members and fired a shot in the air, not at the police. (RT 21713-21714.) However, he acknowledged that the police arrived just as he was going to rob the gas station. (RT 21828-21829.) He heard the police broadcast for help after he fired the shot because "there was a scanner out there." (RT 21830-21831.) Appellant also denied committing the liquor store robbery-murder of Bob Hamil. (RT 21722.) He testified that he could not remember where he had been on October 22, 1980, the night of that murder. (RT 21727.)

Appellant testified that he was at his sister's home when he was arrested for the robberies shortly before Thanksgiving, 1980. (RT 21714-21715.) His little nephew Dante tried to run outside when the police announced their presence. (RT 21716.) He grabbed the boy because he did not want any sudden movements to trigger gunfire, then put him down after showing him to the police. (RT 21716.) Appellant said he told the police, "I'm glad you got

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30. Youth center director John Northmore testified that he had a big concern about the level of violence appellant exhibited after he turned 18 and how it would affect the younger boys in the community. (RT 21139.)

me." (RT 21717.) The police shoved him against a wall and threatened him. (RT 21717-21718.) He was taken to the police department and interrogated by a group of white officers for five or six hours late into the night. (RT 21719-21720.) Appellant was intimidated by the number of officers and their threats. (RT 21720-21721.) He was tired, but they would not let him sleep. (RT 21721-21722.) He decided to tell them what they wanted to hear and even to boast about crimes he never committed. (RT 21722.) He made up what he said about the Hamil murder based on information he picked up from what the police told him and showed him from their file. (RT 21834, 21842-21843.) He had not heard about the robbery-murder on the streets and did not know who did it. (RT 21843-21844.) He denied telling the police that Hamil had reached under the counter for a gun. (RT 21835.)

Appellant testified that he spent a year in county jail awaiting trial on the robberies. (RT 21728.) He was placed in the hole for acting out and confined with older men who had already been to prison. (RT 21728-21729.) These men taught him revolutionary Black nationalism; he gained a sense of pride and began reading authors such as Malcolm X and Frederick Douglass. (RT 21729-21731.) He admitted the altercation with Deputy Morris, but blamed the deputy for starting it. (RT 21732-21733.) He admitted possessing a weapon in jail, but said everybody had weapons. (RT 21733-21734.) After being convicted for the robberies, appellant was sentenced to 20 years in state prison. (RT 21734)

Appellant was first sent to the reception center at Chino. (RT 21856-21857.) While there, he wrote the following on a prison form: ". . . I know how to live with a gun in my hand and kill if I have to" (RT 21856-21857); "I robbed because I loved getting money and spending it" (RT 21857), "I give respect and do what I feel is right. But when somebody don't respect me, I will kill them. And I don't feel shit for them. I don't care about the time either." (RT 21857.) Appellant also referred to himself as "Askari" on this form. (RT 21889-21890.)

Appellant testified that he arrived at San Quentin in the autumn of 1981, where he was placed in administrative segregation and locked down for six to eight months, only getting out of his cell twice a week to shower. (RT 21739, 21743.) Appellant testified that he was scared, the prison smelled bad and was filled with vermin, there were rats in his cell, and he heard gunshots every day. (RT 21735-21740.) Finally, he was moved to the North Block and allowed to go to the yard. (RT 21745.) He was introduced to and joined the BGF in North Block, being attracted to their rhetoric, study habits, ideology, and the help they provided to Black inmates. (RT 21747-21748.)

Appellant's description of the conditions in San Quentin was generally corroborated by Robert Slater, the former chief psychiatrist at the prison (RT 21042, 21044), psychology professor Craig Haney. (RT 21901, 21997-21998; see also RT 21290-21291), and sociology professor John Irwin. (RT 21263-21264.)[31/] Dr. Slater testified that inmates lived with a pervasive sense of terror from 1982 to 1984, that there was "open warfare" among prisoners, that nearly all inmates possessed or had access to weapons, that the cell blocks were unbearably noisy which led to sleep deprivation, and that the guards were abusive, all of which led to psychiatric treatment for about 20 to 25 percent of the inmate population and had a "chilling effect on anybody wishing to reform . . . ." (RT 21058, 21061-21064, 21069-21072, 21083.) Inmates distrusted staff, believed guards conspired with rival gangs, and constantly plotted against staff. (RT 21076, 21080-21082.) Dr. Slater conceded that he could not testify that the prison conditions in San Quentin caused Sergeant Burchfield's murder. (RT 21091-21092.) Professor Haney testified that the "terrifying" prison environment during this time contributed to the development of prison gangs because gangs provided structure and support for the inmates who otherwise

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31. Professor Haney said he had testified for the defense about 10 times in capital cases. (RT 21922.) Professor Irwin characterized himself as a "very strong" opponent of the death penalty. (RT 21378.)

were provided no educational programs or vocational training. (RT 21998, 22010, 22014.) Haney testified that many of the prisoners who functioned best were gang members. (RT 22014.) Professor Irwin, a former inmate, testified that prison gangs were at their greatest influence between 1980 and 1985. (RT 21263-21264, 21270, 21327.) Irwin further testified that prison gang members would make false claims of having perpetrated acts of violence "in order to develop an image," a practice which he termed "posturing" and "shucking and jiving." (RT 21348-21349.)

Appellant testified that his natural father had visited him a few times in prison, but that he did not care to see his father anymore. (RT 21752-21753.) Appellant first met his father in about 1975, and saw him only rarely after that. (RT 21551-21552.) Appellant's mother died in 1988. (RT 21752-21753.) Her death made him realize that life was precious. (RT 21757.) He never blamed his mother for his troubled life, and wrote a letter which was read aloud at her funeral. (RT 21756-21757.)

Appellant denied that he killed inmate Jackson, and also denied that his tattoos of boxing gloves and a gun tower related to Jackson's murder. (RT 21818, 21850.) He said he got the tattoo of boxing gloves when he was in CYA. (RT 21883.) Regarding the 1987 incident in the courthouse holding cell, appellant said this was precipitated when a correctional officer got into a shouting match with and pushed codefendant Woodard when they were in the elevator on the way to the holding cell. (RT 21766-21767.) As appellant was being placed in his holding cell, he heard a banging and rumbling and wanted to see what it was out of concern for Woodard. (RT 21768-21769.) When he leaned towards the window, Officer O'Mallen grabbed him and shoved him to the floor. (RT 21769-21770.) Appellant wrestled to get up and swung his elbows to try to get O'Mallen to release him, but he did not intend to hit O'Mallen. (RT 21770.)

Appellant testified that in 1986, he started having questions about the

BGF for "no particular reason." (RT 21749.) He began gradually withdrawing from the BGF in 1987 and 1988, telling BGF members on the yard he was "gone" and staying in his cell and reading more. (RT 21751.) He told the BGF they could "have my back," meaning they could stab him if they wanted to do so. (RT 21750.) By the time of trial, appellant testified he was no longer in the BGF. (RT 21751-21752.) Appellant testified that he had changed his attitude about crime and now believed it was senseless. (RT 21558.) He was now interested in books on personal growth, rather than violence and upheaval, and was considering marriage. (RT 21775-21777.)[32/] Appellant said that in January 1990 (just a few months before his testimony), he helped to defuse another confrontation between Woodard and a correctional officer, telling Woodard, "[I]t ain't worth it. I'm not going to get involved. Let it go." (RT 21771-21772.)[33/] Appellant also said he recently had helped resolve a dispute between Blacks and Mexicans on the prison yard regarding the use of showers. (RT 21772-21773.)

Professor Haney, who met with appellant about 11 times between 1986 and 1990, believed appellant was sincere in stating he had left the BGF. (RT 21919, 22016.)[34/] Haney said he had observed tremendous differences in appellant since first visiting him in 1986. (RT 22023.) Haney believed

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32. Loretta Lunsford, who had begun corresponding with appellant in 1987 when she was serving a prison sentence for forgery, testified that she loved appellant and intended to marry him, though she had not yet been granted permission to visit him. (RT 21423-21430.)

33. A correctional officer confirmed that appellant had helped to defuse an incident involving Woodard and a transportation officer in 1990. (RT 21413-21417.)

34. A correctional sergeant searched appellant's cell on April 30, 1990, a day when appellant testified (RT 21660, 21664), and found no materials relating to the BGF, though she did not search several boxes and stacks of legal material. (RT 21877, 22007-22008.)

appellant had become more open, vulnerable, and caring of others; he had matured with age; the present case had had a "tremendously sobering effect on him"; his mother's death had triggered insight into self-understanding; and he was engaged in the process of rehabilitation. (RT 22025-22026, 22028, 22032-22033, 22124.) Appellant had received only three relatively minor disciplinary infractions since 1986. (RT 22098.)[35/] Professor Irwin similarly testified that it was common for inmates to phase out of gang activity as they grew older and that life prisoners often changed dramatically after they turned 30 and wanted to "pay back for what they've done." (RT 21351, 21366-21367.) Irwin believed that the BGF was on the decline. (RT 21372.) He had previously testified that the best way of dealing with prison gangs was to ignore them. (RT 21379-21380.)

Professor Haney thought appellant would be confined at Pelican Bay if he received a sentence of life without parole and believed he would adapt well to that prison. (RT 22034-22035, 22113-22114.) A correctional officer testified that Pelican Bay was safer than San Quentin and that it was easier to control

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35. Professor Haney avoided talking with appellant about the BGF, the Burchfield case or any other San Quentin crimes because appellant was very worried about getting a "snitch jacket" which would endanger his life. (RT 22127-22128, 22151, 22168.) Appellant did volunteer that he did not kill inmate Jackson. (RT 22128.) In addition to testifying about his observations of appellant and his living conditions at San Quentin, Professor Haney recounted at length appellant's life leading up to his confinement in San Quentin. (RT 21927-21993.) He concluded that appellant's early childhood left him feeling "not worthy of people's love and attention" (RT 21937), that he had low self-esteem (RT 21945), that he grew up in an "awful environment" with no role models (RT 21976), and that he "became institutionalized" by his succession of placements in juvenile camps and the CYA. (RT 21970-21971.) Professor Haney is not a licensed psychologist, and he did not believe psychological testing would have been useful to confirm his conclusions. (RT 21905, 21920, 22141-22142.) He relied heavily on what appellant told him and believed appellant was truthful. (RT 22236, 22239-22140.) He observed no evidence of psychosis in appellant. (RT 22142-22143.)

gangs there. (RT 21226, 21255, 21259-21262.) Professor Haney believed there was "every probability" appellant would "avoid violence" at Pelican Bay. (RT 22144-22145.) However, Dr. Slater and Professor Irwin admitted that it is difficult or impossible to predict a person's future dangerousness. (RT 21095, 21111, 21385-21386.)

Appellant repeatedly refused to answer any questions about the Burchfield murder or the BGF. (RT 21781, 21801, 21819-21820, 21823, 21852-21854, 21859-21860.)[36] The trial court decided to strike appellant's statement that he would not talk about the BGF because it would endanger his life (see RT 21779), but otherwise allowed appellant's testimony to remain in full. (RT 21880-21881.) The court instructed the jury it could consider appellant's refusal to answer in assessing his credibility. (RT 21880-21881.)

3. Prosecution Rebuttal

In rebuttal, the prosecution presented evidence on several specific points, including, most significantly, whether appellant was still active in the BGF.

Retired Correctional Lieutenant Lawrence Thomas, who had been the San Quentin gang coordinator, testified that he did not believe a BGF member would testify on behalf of an inmate who had dropped out of the gang, but would instead assault or stab such an inmate. (RT 22268-22273.) San Quentin Correctional Officer Gerald Williams, who had guarded the Adjustment Center

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36. Appellant did recite the BGF oath from memory: "If I should ever break my stride, falter at my comrades' side, this oath will kill me[.] If ever my words should prove untrue, shall betray this chosen few, the oath will kill me. Shall I submit to greed or lust, shall I misuse the people's trust, this oath shall kill me. Shall I be slow to take a stand, show fear of any man, this oath will kill me. Shall I grow lax in discipline, in time of strife refuse my hand, this oath would kill me." (RT 21811; see also RT 20351 [Johnnie Hoze's recitation of oath].)

yard from 1988 to 1990, testified that during that period appellant participated in BGF exercises performed in military-style formation with a leader calling a cadence or chant. (RT 22239-22243, 22246-22247.) Appellant's attendance at these exercises diminished as his need to attend court proceedings increased, but Officer Williams had still seen him lead the exercises on occasion. (RT 22246-22248.) Usually, the exercises were led by Woodard. (RT 22248.) Officer Williams testified that he had also seen appellant conversing with Woodard and had recently seen appellant leading what appeared to be structured group discussions with other inmates. (RT 22249.) Retired Lieutenant Thomas testified that BGF members would not exercise or have discussions with a BGF drop-out, but would instead try to stab him and keep him from coming to the yard. (RT 2274.)[37/]

Prison inmate Richard Little rebutted defense witness Howard Williams's testimony that he was not a member of the BGF, testifying that Williams had tried to recruit him into the BGF at Folsom prison between 1987 and 1989. (RT 22190-22193.) When Little refused to join, his jaw was broken by another inmate. (RT 22194-22195, 22198.) A correctional officer rebutted defense witness Ronnie Dubarry's testimony that he was not a member of the BGF with testimony that he seized a document from Dubarry in 1985 that contained the BGF's history and code of conduct. (RT 22200-22205.) Adjustment Center Officer Williams testified that he had seen inmate Howard Williams participate in BGF yard activities (RT 22250-22251) and that inmate Dubarry was a recent arrival in the Adjustment Center. (RT 22250.)

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37. Officer Williams also testified that in 1990 he saw appellant wear black and red clothing, colors generally associated with the BGF. (RT 22241, 22262.) Retired Lieutenant Thomas, who left San Quentin in 1986, was not aware of any particular colors associated with the BGF. (RT 22278, 22292.) Thomas also testified that merely reciting the BGF oath would not have adverse repercussions with the gang because the contents of the oath were common knowledge. (RT 22277.)

Correctional Lieutenant Stuart Ryan, who had worked under Sergeant Burchfield's supervision in C section, testified that many inmates of all races had told him Burchfield was "a hard individual to be around" because "he wouldn't give them the time of day." (RT 22304-22305, 22311-22314.) He strictly enforced prison rules, such as providing the exact issue of towels but no extras. (RT 22316.) Put more bluntly, inmates of all races had told Ryan that Burchfield was "a total asshole." (RT 22318-22319.) Ryan heard a rumor immediately after Burchfield's murder that some inmates suspected Burchfield of smuggling in bullets or contraband, but several other inmates had told Ryan that they did not believe it. (RT 22321-22322.)[38/]

Taco Bell robbery victim Sheryl McCoy testified that appellant's sister Carlette started working at the Taco Bell not long after the robberies. (RT 22327-22329.) Carlette told McCoy that she wondered why appellant had been bringing home Taco Bell bags full of money. (RT 22330.) Carlette also said she was a little afraid of appellant because he had shot another person over a car. (RT 22230.)[39/]

Long Beach Police Officer Robert Vandemeer, who participated in appellant's arrest in November 1980, testified that when appellant came out of the residence he was holding a child directly in front of him "as though using the child as a shield." (RT 22324-22325.) Appellant carried the child for 12 or 15 feet in that manner until ordered to put him down. (RT 22326.)

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38. Dr. Slater, the former San Quentin psychiatrist, had testified that it would have been "rational" for BGF members to conclude that an officer seen spending an unusual amount of time with the Aryan Brotherhood was conspiring against the BGF and that it "would not be illogical" for the BGF to decide to take preemptive action against the officer as a means of self defense. (RT 21080-21082.)

39. Carlette had testified she could not remember telling McCoy that she wondered why appellant had Taco Bell bags filled with money. (RT 21448.)

APPELLANT'S CONTENTIONS

1. "The denial of a lineup and crucial cross-examination of Willis was prejudicial." (AOB 49.)

2. "The exclusion of compelling evidence of misidentification and innocence was error." (AOB 80.)

3. "The court's failure to sever Masters' trial from Woodard's further prevented Masters from presenting his defense." (AOB 122.)

4. "Denying Masters every opportunity to present his principal defense resulted in prejudicial error." (AOB 130.)

5. "The state's failure to disclose evidence of Evan's bias and the trial court's ruling preventing Masters from presenting this evidence require reversal." (AOB 165.)

6. "The denial of judicial use immunity, coupled with restrictions on examination of the prosecutor's motives, was constitutional and prejudicial error." (AOB 196.)

7. "Other evidentiary rulings prevented Masters from presenting his defense." (AOB 215.)

8. "Admitting irrelevant and inflammatory evidence about the revolutionary political beliefs of the BGF violated appellant's right to free speech and due process." (AOB 249.)

9. "The jury's 18-day separation during deliberations was prejudicial constitutional error." (AOB 275.)

10. "Cumulative error requires reversal of the verdict of guilt." (AOB 292.)

11. "The admission of uncharged crimes as aggravating factors violated due process and the Eighth Amendment right to a reliable death penalty determination." (AOB 330.)

12. "The court erred in denying Masters' motion to voir dire the jury at the completion of the Woodard penalty phase." (AOB 363.)

13. "Limiting the penalty phase closing argument to one and one-half hours was reversible error." (AOB 383.)

14. "It was an abuse of discretion to admit gruesome photographs of the victim of an uncharged crime in the penalty phase." (AOB 392.)

15. "California's capital sentencing scheme, as interpreted by this Court and applied at appellant's trial, violates the federal constitution." (AOB 398.)

16. "The delay inherent in the state capital appellate system, violated appellant's right to due process and equal protection of the laws, and his Eighth Amendment rights." (AOB 477.)

17. "The California death penalty violates the norms of a civilized society and thus the Eighth and Fourteenth Amendments." (AOB 482.)

18. "Appellant's death sentence should be reversed because it is unconstitutional, and because no constitutional death sentence can be substituted in its place." (AOB 499.)

19. "Cumulative error requires reversal of Masters' death sentence." (AOB 512.)

RESPONDENT'S ARGUMENT

1. Having failed to establish trial prejudice from the magistrate's denial of a lineup at the preliminary hearing, appellant may not obtain review of this claim. In any event, the magistrate's ruling was not an abuse of discretion.

2. The trial court did not err in excluding hearsay statements by inmates Richardson and Drume.

3. The trial court did not abuse its discretion by denying appellant's motion to sever his guilt trial from Woodard's.

4. Appellant was not denied the opportunity to present a defense and did not suffer cumulative prejudice from the magistrate's and trial court's rulings.

5. There was no failure to disclose material evidence of any inducements made to Bobby Evans, and the court did not abuse its discretion by failing to allow appellant to present additional evidence on this point after the jury had begun deliberations.

6. The trial court had no duty or power to grant testimonial use immunity to a prisoner called by appellant.

7. The trial court did not restrict appellant's right to present a defense by its rulings preventing introduction of certain items of evidence.

8. The trial court did not erroneously admit gang-related evidence against appellant.

9. Appellant waived any claim of error regarding the break in jury deliberations by failing to object at trial.

10. There was no cumulative error requiring reversal at the guilt verdicts.

11. The admission of unadjudicated crimes of violence at the penalty phase was not error.

12. The trial court did not abuse its discretion by failing to grant separate penalty juries or by declining to permit appellant to voir dire the jury after codefendant Woodard's penalty trial.

13. Appellant failed to make an adequate objection to the trial court's time limitation on closing argument.

14. The trial court did not abuse its discretion by admitting photographs of murder victim David Jackson at the penalty phase.

15. California's capital sentencing scheme is constitutional.

16. Appellate delay does not render the death penalty unconstitutional.

17. Delay between judgment and execution does not render the death penalty unconstitutional.

18. The method of execution is irrelevant to the constitutionality of

appellant's death judgment.

19. There was no cumulative error requiring reversal of the penalty verdict.

ARGUMENT

I.

HAVING FAILED TO ESTABLISH TRIAL PREJUDICE FROM THE MAGISTRATE'S DENIAL OF A LINEUP AT THE PRELIMINARY HEARING, APPELLANT MAY NOT OBTAIN REVIEW OF THIS CLAIM. IN ANY EVENT, THE MAGISTRATE'S RULING WAS NOT AN ABUSE OF DISCRETION

Appellant first contends the magistrate erroneously denied his request for a lineup made during the preliminary hearing. (AOB 49-79.) Having failed to demonstrate any trial prejudice as a result of this ruling, appellant may not obtain review of this claim. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530.) In any event, the magistrate did not abuse his discretion.

A. The Record

A felony complaint charging appellant and his codefendants with conspiracy to commit murder and murder was filed on December 2, 1985. (CT 2.) The preliminary hearing began on June 22, 1987, and continued for 52 days, with a holding order issuing on November 30, 1987. (CT 1, 6880-6882.) On July 13, 1987 (the eighth day of the preliminary hearing (CT 6880)), the prosecution called Rufus Willis as a witness. (CT 8329.) As soon as he was called, counsel for appellant and the codefendants asked if the defendants could be removed from the courtroom. (CT 8329-8330.) Appellant's counsel stated, "I'm making the representation to the Court, at least for Mr. Masters, that identity of – of my client as being involved in a conspiracy in any particular way is an issue and is going to become an issue in the preliminary hearing, it may even be an issue if we ever get to the superior court." (CT 8329.) Willis did not actually take the stand until July 14; no witnesses ended up testifying on July 13. (See CT 8331-8349, 8362.)

The defendants were not in court when Willis entered and was sworn to testify. (CT 8362.) Willis testified on direct examination that he knew each of the defendants, specifically stating he had met and known appellant during the months he was housed in C section after January 17, 1985. (CT 8364-8366.) Under cross-examination by appellant's counsel, Willis testified that he was confined in cell 4-C-21 and appellant was in cell 4-C-2. (CT 8377-8378.)[40/] Willis saw appellant twice a week on the exercise yard and also when appellant would walk by his cell on the way to the shower. (CT 8379-8380.) The last time Willis saw appellant on the exercise yard was June 7, 1985. (CT 8381.)

Appellant's counsel asked Willis a series of leading questions about appellant's description. Asked if appellant was "maybe five seven in height, right?," Willis responded, "Somewhere – yes, maybe." (CT 8383.) Asked if appellant weighed "maybe 195, 200 pounds," Willis replied, "I don't think he's that heavy." (CT 8383.) Counsel immediately followed up, "140, what?," and Willis replied, "Somewhere up in there." Willis later estimated that appellant weighed "maybe 175, 180." (CT 8387.) He disagreed when counsel asked him whether appellant was "rather stocky, rather heavy," replying, "Slim." (CT 8386.) Willis also described appellant as "[k]ind of husky" or "chubby," with "a little stomach on him," and not "toned" or having "definition in his muscular . . . ." (CT 8387.) He said appellant was "[d]ark skinned" (CT 8384), and had a "[s]queaky voice." (CT 8386.) When asked if appellant had a small afro, Willis replied, "Yes, he kept his hair just about as short as mine." (RT 8389.) Later, Willis testified that appellant kept all of his hair "shaved off." (CT 8386.) Asked repeatedly about appellant's age, Willis testified, "I don't know, it just looked like maybe he was in his 30s. Maybe early 30s –" "-- or late 20s." (CT 8385.) Willis testified he did not remember whether appellant had any facial

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40. Testimony at trial from a correctional officer confirmed that appellant was confined in cell 4-C-2. (RT 11210.)

hair or facial tattoos. (CT 8384.) Masters never used his given name when speaking to Willis, instead referring to himself as Askari. (CT 8387-8388.) Willis heard correctional officers call appellant by his given name when he was on the yard. (CT 8387.) Willis testified that he "had paperwork on everybody in the section . . . so I knew who was who according to their names and their Swahili names." (CT 8387.)[41/]

After all three defense counsel finished cross-examining Willis about his description of their clients, appellant's counsel for the first time asked for a pretrial lineup. (CT 8404.) Counsel, referring to the varying estimates provided by Willis of appellant's weight, height, and age, alleged that Willis had given "different descriptions of the person he thought was Masters." (CT 8404-8405.) Counsel attempted to justify his belated request "made long after the event in June of 1985" by arguing that the defense had not been given access to Willis and "he did not wish to talk with any of us" prior to his testimony. (CT 8404.) Counsel stated that Willis's testimony was "the first time the – the identification problem has arisen, has become fully appreciated." (CT 8406.) But he also stated, "Frankly, I thought it was going to be an issue and that's why I raised it so that we could have this separate hearing go forward." (CT 8406.) The district attorney responded that the motion was made more than 18 months after charges were filed and that appellant would have a full opportunity to explore Willis's identification through cross-examination. (CT 8406-8407.) The magistrate denied appellant's motion "[b]ased on this showing I've heard, and the testimony as to the number of times that he's met him on the yard . . . ." (CT 8408.)

The defendants then were brought back into the courtroom, but were not seated next to their respective attorneys. (CT 8409.) Willis proceeded to

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41. Willis also testified that appellant wore glasses (CT 8384), but at trial said he may have gotten appellant mixed up with Woodard on this point. (RT 13102.)

identify each defendant, with appellant being the last identified. (CT 8409-8410.) Much later during the preliminary hearing, Willis's ability to identify appellant arose again in connection with newly-provided discovery of a memorandum by prison officials concerning an August 1986 interview with inmate Harold Richardson.[42/] In this interview, which was disclosed to the defense and prosecution during the preliminary hearing on November 12, 1987, Richardson admitted involvement in the conspiracy to murder Burchfield, and named Woodard, Johnson, Willis, and others as coconspirators, but made no reference to appellant. (See CT 1908-1910, 14686-14692.)[43/] After disclosure of this memorandum, appellant's counsel asked for permission to recall Willis "to have [him] look at Mr. Richardson here in court and ask him questions . . . ." (CT 14811.) Counsel argued that Richard "fit[] the description [given by Willis] a little bit better than Mr. Masters does." Citing Evidence Code section

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42. This memorandum has no relevance to the question whether denial of the lineup motion was an abuse of discretion, since the magistrate was not aware of the memorandum at the time he ruled on the motion. Nevertheless, we will discuss it in some detail given the emphasis appellant places on it in his brief.

43. The contents of this memorandum will be discussed in detail below in connection with appellant's next contention that the memo was admissible at trial. Appellant implies that the prosecution intentionally withheld this memo from the defense. (See AOB 51.) In fact, the record shows that the district attorney did not know of the memorandum's existence. (CT 14686-14688.) Instead, the Department of Corrections had claimed an informant privilege as to the memorandum under Evidence Code section 1042 in response to a subpoena duces tecum served by the defense. (CT 14686-14689.) The magistrate had reviewed the memorandum in camera and ordered it disclosed (CT 14686), but Richardson had challenged the disclosure order by filing a writ in the superior court. (CT 14686, 14689.) The superior court denied the writ on the afternoon of November 9, and the magistrate disclosed the memorandum in open court on November 10. (CT 14686, 14689.) We fail to see how either the prosecutor or the Department of Corrections can be accused of withholding this memorandum when in fact it was revealed to the magistrate in camera and ultimately disclosed in accordance with the orderly processes of the court.

352, the magistrate conditionally denied appellant's request "unless the memorandum comes in or Mr. Richardson testifies concerning those meetings, and then I mean I can understand that." (CT 14843.) Thereafter, Richardson was called as a witness but invoked his Fifth Amendment privilege. The magistrate declined appellant's request to grant Richardson immunity. (CT 7633-7649, 7701.) The memorandum itself was not admitted into evidence, but the magistrate did permit one of the prison officials who had interviewed Richardson to describe the contents of that interview. (CT 14888, 14892-14897.) The magistrate sustained the prosecutor's objection when appellant's counsel asked whether Richardson named appellant "as being involved in any of the activities, BGF activities." (CT 14895-14897.) Appellant was permitted to ask about the role Richardson ascribed to himself and other inmates in the conspiracy. (CT 14893-14895.) Appellant never renewed his request to recall Willis after this testimony.

Appellant was held to answer on November 30, 1987. (CT 14907.) He subsequently filed a motion to dismiss the information under Penal Code section 995 in which he argued, inter alia, that the magistrate erred in failing to grant a lineup and in declining his request to recall Willis. (CT 547-552.) In opposition the prosecution argued that the lineup motion was untimely, that the magistrate had only conditionally denied the request to recall Willis, and that the magistrate did not abuse his discretion in ruling on either motion. (CT 845-855.) The superior court denied the motion to dismiss on September 27, 1988. (CT 1406-1418.)

B. Reviewability

Ordinarily, alleged errors at the preliminary hearing may not be raised on appeal following conviction absent a showing that the defendant was deprived of a fair trial or otherwise suffered prejudice at trial as a result of the preliminary hearing error. (*People v. Pompa-Ortiz, supra*, 27 Cal.3d at pp. 529-

530.) We have found no case suggesting that a magistrate's ruling denying a lineup falls outside this rule. Appellant acknowledges *Pompa-Ortiz* (AOB 76), but fails to identify any trial prejudice he may have suffered as a result of the magistrate's rulings. Instead, he simply asserts that the alleged errors were "undeniable, prejudicial, and constitutionally reversible." (AOB 79.)

Apparently, appellant believes that once Willis was allowed to make an in-court identification of appellant at the preliminary hearing, there was no way to ameliorate its impact in the future at trial. The law is to the contrary: "it has long been recognized that '[i]n the case of in-court identifications not preceded by a lineup . . ., the weaknesses, if any, are directly apparent at the trial itself and can be argued to the court and jury . . . .'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1155, citations omitted.) Here, appellant had at his disposal a wide array of options by which he could challenge Willis's trial identification. He could and did ask him to provide a description. He could and did ask him about any inconsistencies between his trial description and his description at the preliminary hearing. (RT 13083-13086, 13097-13108.) He could have put Richardson's description before the jury and argued that Willis's testimony fit Richardson better than appellant (an argument, we think, would have been frivolous). He could have shown a photograph of Richardson to Willis and asked if Richardson was the person to whom Willis was referring when he described conduct performed by Askari or the Usalama officer. He could have shown that Willis made no identification at a lineup. In short, appellant had every opportunity at trial to test and attack Willis's identification of appellant as one of his coconspirators. The magistrate's ruling did not deprive appellant of a fair trial or otherwise prejudice him.

Accordingly, appellant may not obtain review of the ruling denying the lineup. (*People v. Pompa-Ortiz, supra*, 27 Cal.3d at pp. 529-530.) The alleged error in denial of a lineup is no different in kind than other alleged constitutional violations at the preliminary hearing which this Court has declined to review

following trial. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 951 [denial of discovery and ability to develop defense at preliminary hearing]; *People v. Millwee* (1998) 18 Cal.4th 96, 122 [ineffective assistance of counsel at preliminary hearing]; see also *Coleman v. Alabama* (1970) 399 U.S. 1, 11 [denial of counsel at preliminary hearing].) This conclusion applies equally to the magistrate's decision not to permit appellant to recall Willis. Anything appellant might have wished to ask Willis at the preliminary hearing after disclosure of the Richardson memorandum he could have asked Willis at trial. (See *People v. Aston* (1985) 39 Cal.3d 481, 494-495 [unavailability of witness at preliminary hearing cured by availability at trial].) Appellant's first contention should therefore be rejected pursuant to *Pompa-Ortiz*.

C. Merits

Assuming that appellant may obtain review of the magistrate's ruling, he fails to demonstrate error.[44/] In *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, the Court stated that

> due process requires in an appropriate case that an accused, on a timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only where eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve. The questions whether eyewitness identification is a material issue and whether fundamental fairness requires a lineup in a particular case are inquiries which rest for determination within the broad discretion of the magistrate or trial judge. (See *United States v. MacDonald* (9th Cir. 1971) 441 F.2d 259, cert den., 404 U.S. 840; *United States v. Ravich* (2d Cir. 1970) 421 F.2d 1196, 1202-1203.) We do not hold,

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44. We do not respond further on appellant's argument that the magistrate erred by refusing to permit him to recall Willis, for his ability to examine Willis at trial was sufficient to cure any error in the magistrate's ruling. In any event, we submit that the magistrate's conditional denial of appellant's motion was not an abuse of discretion.

> accordingly, that in every case where there has not been a pretrial lineup the accused may, on demand, compel the People to arrange for one.

(Footnote omitted.) The Court further explained,

> The broad discretion vested in a trial judge or magistrate includes the right and responsibility on fairness considerations to deny a motion for a lineup when that motion is not made timely. Such motions should normally be made as soon after arrest or arraignment as practicable.

(11 Cal.3d at p. 626.)

Here, appellant's motion was not made until more than 18 months after criminal charges were filed and over two years after the murder. Appellant did not attempt to make any showing as to whether and how his appearance had changed between June 1985 and July 1987. He did not even make his motion at the start of the preliminary hearing, but waited until a number of witnesses had already testified, increasing the inconvenience that would have been caused by the motion. Matters of convenience aside, a lineup would have been of limited utility given the considerable passage of time from the crime and filing of charges. These circumstances amply justified the magistrate's ruling.

Appellant goes to great lengths to show that the motion for a lineup was made "as soon . . . as practicable" by cataloguing a host of alleged discovery violations which he now maintains prevented him from realizing the likelihood of misidentification at an earlier stage. (See AOB 60-72.) This argument is wholly unconvincing given the statement by appellant's counsel prior to Willis's testimony at the preliminary hearing that "identity of . . . my client . . . is an issue and is going to become an issue at the preliminary hearing . . . ." (CT 8329.) Counsel thus intended to challenge Willis's identification even before the preliminary hearing. There is no suggestion in the record that counsel seized upon identification as an issue only on account of some belated revelation in discovery.

Appellant also asserts he could not have made the motion earlier because the preliminary hearing marked the first occasion he was given access

to Willis. (AOB 54.) His conclusion does not follow from his premise. The law presumes that a defendant does not have the ability to conduct a lineup absent court order. (*Evans v. Superior Court, supra*, 11 Cal.3d at pp. 625-626.) That is why a defendant is permitted to bring a motion. Yet appellant, knowing that he intended to raise identity as an issue and knowing that he did not have independent access to Willis, nevertheless failed to ask the court for a lineup until more than 18 months after arraignment and after the preliminary hearing had already commenced. Under these circumstances, the motion was untimely.

A lineup was also unnecessary because there was no "reasonable likelihood of a mistaken identification which a lineup" could have resolved. (*Evans, supra*, at p. 625.) The evidence was undisputed that Willis and appellant were confined in the same cell block on the same tier for nearly six months, from January to June 1985. Willis saw appellant on the yard twice a week during this time and saw him passing on the tier on other occasions. Given this record, it is far-fetched to argue that Willis did not really know who appellant was and had confused him with Richardson. It is especially significant that Willis testified the coconspirator he referred to as Askari (whom he heard correctional officers identify by name) was confined in cell 4-C-2. This was in fact appellant's cell. (RT 13102.)[45/] The magistrate, therefore, did not abuse his discretion by finding that appellant had not shown a reasonable likelihood that Willis's identification was mistaken.

Appellant's detailed comparison of Richardson's and his own descriptions in an effort to show that Willis confused the two is not persuasive. First, appellant ignores the context in which Willis was asked to describe appellant, largely disregarding the leading nature of the questions and the

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45. The likelihood that Willis might have misidentified appellant as Richardson was further rendered negligible by the fact that he knew Richardson and referred to him by the code name of Khalid, a fact to which Willis testified at trial. (RT 12689.)

various qualifiers used by Willis in his description. The magistrate was in the best position to observe the questions and Willis's answers and to decide whether he in fact accurately described appellant. Second, appellant was free to develop any and all inconsistencies in Willis's identification of appellant at trial and to argue that his description actually matched Richardson instead of appellant. The failure to grant a lineup at the preliminary hearing did not preclude appellant from fully presenting this theory at trial. (See *People v. Rodgrigues, supra*, 8 Cal.4th at p. 1155.) Third, appellant did not argue at the time he sought the lineup that Willis was actually describing Richardson. The magistrate could not have abused his discretion in denying a lineup for reasons not presented to him. In short, whether or not Willis's description fit Richardson (and we do not concede that it did) was irrelevant to whether the magistrate abused his discretion on the showing made to him.

Finally, even assuming appellant had shown a reasonable likelihood of misidentification at the time of the motion, under any standard the magistrate's failure to grant a lineup was not prejudicial in view of the trial evidence. Not only did Willis correctly identify appellant's cell – thus establishing that the person whom he described was indeed appellant – but he also testified that he knew Harold Richardson, whom he identified by his given name and the name Khalid. The notion that Willis had somehow mistakenly identified appellant instead of Richardson as the "Askari" who was part of the murder conspiracy was entirely fanciful. Moreover, appellant convicted himself through his own handwriting, admitting he had sharpened the murder weapon (Exh. 150-C ["check the razor edge double edge I put on that 'black.' Could of chop a T-bone stake up"]) and had approved Johnson to make the hit. (Exh. 159-C.) In addition, appellant's writings provided corroboration of Willis's identification in other important respects by showing that he was the Uslama or BGF security officer in C section. (See Exh. 318-A-1.) Given the trial evidence, any error by the magistrate was harmless beyond a reasonable doubt

(*Chapman v. California* (1967) 386 U.S. 18, 24) and did not result in a miscarriage of justice. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II.

THE TRIAL COURT DID NOT ERR IN EXCLUDING HEARSAY STATEMENTS BY INMATES RICHARDSON AND DRUME

Appellant contends the trial court erred in excluding hearsay statements by inmates Harold Richardson and Charles Drume. (AOB 80-121.) He argues that the statements were declarations against interest. The trial court properly excluded the statements as hearsay not subject to any exception.

A. Richardson's Statements

The record shows that Richardson met with San Quentin administrator Jeanne Ballatore two or three times in August 1986 during which meetings he indicated he wanted to drop out of the BGF. Ballatore explained that the debriefing process would require him to provide information about the BGF. (CT 2519.) At one of these meetings Richardson indicated he had information about the Burchfield case. (CT 2519.) Ballatore and Correctional Lieutenant James Spangler met with Richardson on August 21, 1986, and interviewed him about the murder. (CT 2519.) The prison officials told Richardson that they did not intend to use any of his statements against him, that they would "do everything possible to keep the information confidential," and that they would "keep him in as safe a housing as possible." (CT 14889.) They did not give Richardson any *Miranda* warnings. (CT 14889.) Ballatore took notes during the interview and prepared a memorandum the next day. (CT 2521-2523, 14888.) Ballatore's memo contained the following information:

> RICHARDSON stated that he knows all the details about the Birchfield [*sic* throughout] murder but he would not testify. According to RICHARDSON, Birchfield was killed because he was bringing hacksaw blades and bullets in to the AB's. It was RICHARDSON's job to monitor Birchfield's activities. REDMOND B55567 ordered the hit on Birchfield. He does not know if CARTER B52119 had knowledge of the hit prior to Birchfield's death. The hit

took about two weeks to plan. The hit was planned by WILLIS C71184, JOHNSON C71184, WOODARD C21690, and himself on the Carson Section yard. The initial plan was for RICHARDSON to spear Birchfield and for JOHNSON C71184 to use a zip gun. JOHNSON C71184 was afraid of the zip gun and asked to use the spear. RICHARDSON was then to use the zip gun. RICHARDSON did not use the zip gun because the BGF lost their gun powder during a search. CARRUTHER's C20634, cut the bed frame and sent it down to RICHARDSON to sharpen. RICHARDSON sent the metal to INGRAM B95647 to cut. One piece was sent to Cisco GOMEZ C20891, on the third tier of Carson Section. The other piece was sent to JOHNSON C71184 on the second tier of Carson Section. If JOHNSON C71184 was unable to make the hit on the second tier, GOMEZ C20891 was to do the hit on the third tier. VAUGHN C30853 sent JOHNSON C71184 a note through Sergeant Birchfield to lure Birchfield to Johnson's cell. They knew they could keep Birchfield on the tier because in the past, he had stayed on the tier talking to the AB's. JOHNSON C71184 speared Birchfield according to RICHARDSON. RICHARDSON does not know what he did with the weapon as he was in 2C44 and could not see.

(CT 1909.)

On or about August 8, 1987, Richardson wrote Ballatore that he had reviewed her memo written the previous year and that his recollection of their conversation was different in certain reports. (CT 2531.) This letter focused on the hit itself. Specifically, Richardson wrote that he recalled telling Ballatore that the original plan called for Richardson to hit Burchfield with a spear and then Johnson would hit an Officer Morris with a zip gun, but that Richardson and Johnson decided to reverse roles because of Johnson's worries about using a zip gun. Richardson said his plan to hit Morris with the zip gun the day after the Burchfield murder was prevented because "[t]he gunpowder was taken" after Burchfield's murder. (CT 2531-2532.) The August 8 letter contained no other information about the preparation for the murder, such as who participated in the yard discussions during which the plot was formulated or who prepared the

murder weapon. (See CT 2531-2533.)[46/]

B. Drume's Statements

On December 9, 1987, Charles Drume mailed a letter to the Marin County Clerk stating that he had information about "the murder of a sergeant here at San Quentin." (CT 5051-5052.) As a result, District Attorney's Investigator Gasser and two correctional officers, Lieutenant Watkins and Captain Everly, jointly interviewed Drume on December 23, 1987. Each produced a report of the interview. According to Gasser, when asked what he knew about the Burchfield murder, Drume said, "I made the knife." (CT 5053.) Asked to explain his statement, Drume said, "I cut the knife out of my bed brace, sharpened it on the floor, and sent it down" to an inmate named

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46. As stated in our previous argument (see *ante*, p. 67, fn. 43), the defense obtained Ballatore's memo of the August 21, 1986, interview as a result of a subpoena duces tecum served on the Department of Corrections after privileges asserted by the department and Richardson were overruled. (See CT 14686-14689.) Ballatore, Spangler, and Richardson all testified at an in camera hearing on the claim of privilege held before the preliminary hearing magistrate on August 7, 1987. (See CT 2516-1528; 2531.) Ballatore and Spangler also testified in open court later during the preliminary hearing. (CT 14884-14902.) Ballatore's and Spangler's testimony at the in camera hearing was later disclosed to the defense by order of the trial court on May 5, 1988. (CT 602, 604.) Richardson's testimony was kept sealed since it contained no "relevant testimony . . . ." (CT 604.) A portion of the Ballatore memo was not disclosed. (See CT 1908-1910.) The trial court found the undisclosed portion was "not relevant or exculpatory" or "useful to defense counsel." (RT [Jan. 9, 1988] at p. 10; see also CT 605.) Richardson's letter to Ballatore dated August 8, 1987, was prompted by his appearance at the in camera hearing on August 7. He reminded Ballatore that she and Spangler had told him that the information he provided would not be disclosed or used against him. (CT 2531.) He went on to state that the magistrate told him "I was misinformed [and] that the info could be used [and] that I could actually be charged as a coconspirator in that case." (CT 2531.)

"Drake."[47] Drume said he was confined on the third tier and was in charge of security for the BGF. He recited the BGF oath from memory. (CT 5053.) Drume said he knew other BGF members called Zulu, Old Man Askari, and Left Hand Askari, identifying the latter two as Woodard and "Thomas" respectively.[48]

Lieutenant Watkins reported that Drume said he manufactured the weapon used to kill Burchfield on the night of the murder and sent it to an inmate on the second tier named Anthony Wallace. The weapon was then forwarded to "Drake," whom Drume identified as "the one you got now. The short one of the three." (CT 5054-5055.) Drume said he met with three other inmates on the yard to plan the assault, but when asked by Watkins who these three were, Drume was unable to provide further information. (CT 5054-5055.) Drume also mentioned another BGF member called "Ferrajery." (CT 5054.) Correctional Captain Everly added that "Drume stated he was fully involved in the planning of the assault to kill Sergeant Burchfield . . . ." (CT 5056.)

According to a defense pleading, Drume subsequently met with a defense investigator on February 23, 1988, in which he confirmed his earlier statement. (CT 5046.) Drume said he had just been stabbed a few days earlier by the BGF because he had provided information about the case. (CT 5046.) He also said "Woodie" or "Old Man Askari" had ordered him to make a knife at a yard meeting involving four prisoners. Drume could not recall who was at this meeting besides "Woodie" and himself, but "did not believe that Thomas" was present. (CT 5046.)

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47. Appellant assumes this was a reference to codefendant Johnson. (See AOB 87.) While the record indicates that Johnson was known as "Dray" (RT 12855), there is no indication that he was ever referred to as "Drake."

48. Appellant asserts that "Thomas" was one of his nicknames. (AOB 87, fn. 33.) We can find no indication in the record suggesting that appellant was referred to as "Thomas" within the BGF. Appellant's older brother is named Thomas. (RT 21452-21453.)

C. The Trial Court's Rulings

The admissibility of Richardson's statements to Ballatore first came up in connection with appellant's motion to sever, which he grounded on the assumption that Richardson's and Drume's statements were admissible in his own defense as declarations against interest but inadmissible against Woodard and Johnson. (CT 1860-1861.) The trial court denied the motion for severance after expressing doubts about the reliability of both the Richardson and Drume statements given that they had been made long after the crime and well after appellant and his codefendants had been charged. (RT [Dec. 13, 1988] at pp. 7-10, 40.)

Later, appellant formally sought admission of Richardson's statement of August 21, 1986, Richardson's letter of August 8, 1987, (CT 4949-4964), Drume's statement of December 23, 1987, and Drume's statement of February 23, 1988. (CT 5044-5050.) After extensive argument (RT 14710-14719), the court ruled that the Richardson statements were not admissible, finding the first statement to Ballatore was not against his penal interest (RT 14717) and characterizing his letter to Ballatore as a "non-statement" because it "doesn't say anything about Masters" or "say that Masters wasn't there." (RT 14717-14718.) The court also excluded the statements under Evidence Code section 352. (RT 14719.)[49/] The court also heard lengthy argument on the Drume statements (RT

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49. In his written pleading to admit Richardson's statements appellant alleged that in August 1988 Richardson had told another inmate, whom appellant did not identify, "I cleaned up my tracks and they got some other motherfuckers for it," purportedly in reference to the Burchfield murder. (CT 4963.) At the hearing on the admissibility of Richardson's statements, appellant's counsel said he was not talking about the 1988 statement when he argued for admissibility of Richardson's other statements. (RT 14710-14712.) After appellant had rested, he identified the source of this alleged statement for the first time as an inmate named Broderick Adams. (RT 15643, 15773-15774.) Appellant never made any attempt to show Adams was actually willing to

15331-15345), at the conclusion of which the court excluded the statements "both because of the time lapse between the admission and the actual crime and, two, under [Evidence Code section] 352." (RT 15345.) During the course of the argument the court several times pointed out that Drume's statements were unreliable given the passage of time between the crime and the statement, the amount of information and gossip that had been disseminated to prisoners during that time, and the demonstrably false information in Drume's statements. (See RT 15336-15342.)[50/]

D. Analysis

Evidence Code section 1230 provides:

Evidence of a statement by a declarant having sufficient knowledge of

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testify. It is highly unlikely appellant could have made such a showing given that Adams had been accused by prison authorities of stabbing Charles Drume in February 1988. (CT 2540-2546.) Nor did appellant ever obtain any sort of ruling on his proffer to admit Richardson's statement to Adams. To the extent that appellant asserts that Richardson's purported statement to inmate Adams should have been admitted as a declaration against interest (see AOB 97), this claim is waived because appellant never asked for a ruling on his proffer of this statement. (RT 14710-14712, 15773-15774; see Evid. Code, § 354; *People v. Brewer* (2000) 81 Cal.App.4th 442, 459.)

50. Appellant complains that both the court and the prosecutor shifted theories before the court ultimately excluded the statements (see AOB 94-96), claiming that the district attorney's purportedly changing position "raises serious due process and judicial estoppel concerns." (AOB 95-96, fn. 35.) While we do not discern the dramatic shifts appellant protests, it is irrelevant whether either the district attorney or the court relied on different theories prior to the court's ultimate ruling. It is the correctness of the trial court's ruling, not its reasoning, that this Court must review. (*People v. Mickey* (1991) 54 Cal.3d 612, 655.) The cases cited in footnote 35 of appellant's brief contain no suggestion that a prosecutor is limited to articulating a single theory for the admission or exclusion of evidence, for there is no such rule. These cases concern the entirely different scenario where the prosecutor presents inconsistent theories of guilt against two codefendants in their separate trials. (See, e.g., *Standefer v. United States* (1980) 447 U.S. 10, 25-26.)

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

A party seeking admission of an out-of-court statement under this hearsay exception must also show "that the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Frierson* (1991) 53 Cal.3d 730, 745.)" (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) "To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.'" (*Ibid.*, citing *People v. Frierson* (1991) 53 Cal.3d 730, 745.) "Thus, even when a hearsay statement runs generally against the declarant's penal interest . . ., the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. (See *People v. Shipe* [(1975)] 49 Cal.App.3d [343,] 354 [to satisfy the requirements of § 1230, a declaration must be distinctly against the declarant's penal interest 'and must be clothed with indicia of reliability']; see generally 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, §§ 150, 151, pp. 861-864 [same].)" (*People v. Duarte* (2000) 24 Cal.4th 603, 614.)

On appeal, a trial court's decision to exclude the proffered statement as untrustworthy is reviewed for an abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153; *People v. Cudjo, supra*, 6 Cal.4th at p. 607; *People v. Frierson, supra*, 53 Cal.3d at p. 745.)[51] Even a third party's purported

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51. Appellant suggests that the circumstances under which the statement is made are irrelevant to the determination of trustworthiness. (AOB 102-103.) This Court's decisions to the contrary compel rejection of this argument. (See,

confession to the crime charged against the defendant may be excluded if its entire context does not demonstrate reliability. (*People v. Lawley, supra*, 27 Cal.4th at p. 153.) "A court may not, applying this hearsay exception, find a declarant's statement sufficiently reliable for admission '"*solely because* it incorporates an admission of criminal liability."'" (*Ibid.*, quoting *People v. Duarte, supra*, 24 Cal.4th at p. 611 and *People v. Campa* (1984) 36 Cal.3d 870, 883, original italics in *Campa*.) Thus, in *Lawley*, the Court found no abuse of discretion in the trial court's exclusion of a statement made by a third party who claimed to have killed the victim as part of an Aryan Brotherhood plot as insufficiently reliable and trustworthy. (27 Cal.4th at pp. 151-154.)

Taking the proffered statements in order, Richardson's statement to Ballatore in August 1986 clearly was not against his penal interest because when it was made he was assured that it would not be used against him in a criminal proceeding. (See, e.g., *People v. Traylor* (1972) 23 Cal.App.3d 323, 331.) Appellant argues that even if the statement was not against Richardson's penal interest, it was against his social interest because the statement subjected him to the hatred and reprisals of the BGF. (AOB 97-101.) However, Ballatore told Richardson she would do "everything possible to keep the information confidential . . . ." (CT 14889.) The statement was therefore not against Richardson's social interest because he had no reason to fear the BGF would learn of its existence. Indeed, Richardson lived under this assumption until he was told otherwise by the magistrate at the in camera hearing, prompting his letter of August 8, 1987, to Ballatore reminding her of her earlier promise. (CT 2531.)

As to the August 8 letter, appellant argues that Richardson had reason to believe that letter would subject him to criminal liability given the

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e.g., *People v. Lawley, supra*, 27 Cal.4th at p. 153; *People v. Cudjo, supra*, 6 Cal.4th at p. 607.)

magistrate's earlier warnings to him at the in camera hearing. (AOB 96-97.) It is not at all clear from the circumstances and context of the letter that Richardson reasonably believed the letter could subject him to penal liability or social reprisal from the BGF. Whether or not Richardson had such a belief, however, the letter contained nothing exculpatory of appellant. It did not refer to any of the planning meetings on the yard or the preparatory activities such as fashioning the weapon. It therefore contained no relevant information as to appellant, just as the court found. Appellant attempts to bootstrap the earlier statement by arguing it was "adopted" by the letter. (AOB 97.) However, the letter was written for the express purpose of reiterating that the original statement was made only after assurances were given that it would not be used or disclosed. The only thing "adopted" by the letter were the assurances of secrecy and non-use given in the first statement that rendered the original statement not against penal or social interest. The August 8 letter could not have transformed the inadmissible hearsay from the previous meeting into a declaration against interest when the purpose of the letter was to remind Ballatore of the very conditions that made the prior statement not against Richardson's interests

As to Drume's statements, these were not made until two and one-half years after the murder, a factor that the court properly noted rendered them highly suspect. The court observed that the time lapse "tends to make [Drume's statements] unreliable because there had been, as the district attorney pointed out, three years worth of gossip around the prison. Every prisoner who testified has said they heard about the crime within hours or days of the crime itself and it went around the prison like wildfire which one would expect to happen." (RT 15340.) That the staleness of information affects its reliability is commonly recognized in various contexts. (See, e.g., *Alexander v. Superior Court* (1973) 9 Cal. 3d 387, 393; *People v. Gibson* (2001) 90 Cal.App.4th 371, 380.) Here, the information was not only stale, it was demonstrably false. Drume claimed

to have sent the sharpened knife to an inmate named Wallace on the second tier. (CT 5054.) Drume claimed that Wallace was still confined in San Quentin at the time he made his statement. (CT 5054.) However, prison records showed that there was no Wallace confined at San Quentin when Drume made his original report (CT 2536), nor was there any inmate named Wallace confined on the second tier of C-section the day of the murder. (CT 2547.) The only Wallace in C-section on that date was on the third tier in cell 3-C-41, just two doors away from Drume and far removed from Johnson in cell 2-C-4. (CT 2548.) There were multiple other indications of unreliability in Drume's statements, including his use of the name "Drake" to refer to Johnson, "Woodie" for Woodford, and "Thomas" for appellant. No other witnesses referred to the defendants by these names. In addition, Drume's claim that he cut out and sharpened the murder weapon from the iron in his bed brace on the night of the attack was not only highly improbable, it was inconsistent with the physical evidence showing that the murder weapon likely came from the angle iron in Carruther's cell, 2-C-8. Drume could not identify "Zulu" or "Ferrajerry." (CT 5054.) He would not even definitively exclude "Thomas" from the yard meeting at which Burchfield's murder was planned. (CT 5046.) In light of these circumstances, the trial court did not abuse its discretion in concluding that Drume's statements lacked adequate indicia of reliability to qualify for admission as declarations against interest. The fact that Drume's statements contained some bits of information that happened to coincide with the trial evidence concerning Burchfield's murder does not support a different conclusion. (See, e.g., *People v. Lawley, supra,* 27 Cal.4th at p. 153 ["'One of the most effective ways to lie is to mix falsehood with truth . . . .'"], quoting *Williamson v. United States* (1994) 512 U.S. 594, 599-600.)

Even if Richardson's or Drume's statements, or both, should have been admitted, appellant has failed to demonstrate a reasonable probability that exclusion of the statements prejudiced him at trial. (See *People v. Gordon*

(1990) 50 Cal.3d 1223, 1254 [erroneous rulings under Evidence Code section 1230 are reviewed pursuant to the standard of *People v. Watson, supra*, 46 Cal.2d at p. 836, not the "harmless beyond a reasonable doubt" standard for federal constitutional error, unless the evidence in question is an erroneously admitted and "powerfully incriminating" statement of a non-testifying codefendant].) Here, the lack of prejudice is demonstrated by the absence of any truly exculpatory information in either the Richardson or Drume statements. Richardson was never asked whether appellant was a member of the conspiracy. Appellant asked the trial court to infer his absence from the conspiracy from the fact Richardson did not mention him in his statements. However, the omission could have been attributable to lack of recall or an intentional omission designed to protect appellant. It is sheer speculation to infer otherwise. (See, e.g., *People v. Davis* (1995) 10 Cal.4th 463, 504 ["the trial court's ruling, even if erroneous, could not have prejudiced defendant because any favorable inference he sought to draw from the [excluded evidence] was purely speculative."])[52/] Drume's statements – in addition to their patent unreliability – in no way necessarily excluded appellant as a participant.[53/] Appellant stresses that the Richardson and Drume statements were particularly significant because both admitted "sharpening the knife," a role ascribed to appellant by Willis. (AOB 116-118.) In fact, even if the statements were true, they were completely consistent with

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52. Richardson's alleged statement to inmate Adams likewise supported only a speculative inference inasmuch as nothing in that statement excluded appellant as a participant in the Burchfield murder.

53. The speculative inference appellant sought to draw from the Richardson and Drume statements also justified the trial court's reliance on Evidence Code section 352 to exclude the statements as not sufficiently probative. (*People v. DeLaPlane* (1979) 88 Cal.App.3d 223, 244.) Moreover, appellant identifies "at least 10 witnesses he could have called" had the statements been admitted. (AOB 159-160.) This undue consumption of time for statements of speculative relevance further justified the court's exclusion under section 352.

appellant's own admission in a kite sent to Willis shortly after the murder that "all Usalama personnel was working on cutting, making and sharpening weaponry." (Exh. 159-C.) Given the contemporaneous and detailed admissions appellant made in his own handwriting, before the authorities had any idea who the perpetrators were, there is no reasonable probability that exclusion of the later statements by Richardson and Drume – none of which specifically exculpated appellant – prejudiced appellant at trial. Even if the *Chapman* standard applied, exclusion of these statements was harmless beyond a reasonable doubt.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION TO SEVER HIS GUILT TRIAL FROM WOODARD'S

Appellant contends that the trial court erred in denying his motion to sever his guilt trial from codefendant Woodard's. (AOB 122-129; see CT 1842, 2430; RT [Dec. 13, 1988] at pp. 4, 14.) This contention is predicated on his previous claim that the hearsay statements of Richardson and Drume were admissible at his trial: "Because . . . the court's evidentiary rulings excluding the Richardson and Drume statements were error, so, too was the court's denial of the motion to sever." (AOB 124.)

Since we have demonstrated that the court did not abuse its discretion in excluding the Richardson and Drume statements, it follows that the court did not abuse its discretion in denying a severance, the asserted need for which rested on a contrary assumption. (*People v. Hardy* (1992) 2 Cal.4th 86, 167; *People v. Turner* (1984) 37 Cal.3d 302, 312.) Raising the severance issue separately adds nothing. Moreover, for the same reasons that failure to admit the statements was harmless, failure to grant severance occasioned no prejudice in any event. (See *People v. Hardy, supra*, 2 Cal. 4th at pp. 169-171.)

IV.

APPELLANT WAS NOT DENIED THE OPPORTUNITY TO PRESENT A DEFENSE AND DID NOT SUFFER CUMULATIVE PREJUDICE FROM THE MAGISTRATE'S AND TRIAL COURT'S RULINGS

Appellant next contends that the denial of "every opportunity to present his principal defense resulted in prejudicial error." (AOB 130.) The gist of this argument is that the cumulative effect of the magistrate's rulings denying his motions for a lineup and to recall Rufus Willis and the trial court's rulings excluding the hearsay statements of Harold Richardson and Charles Drume violated his federal constitutional right to present a defense and prejudiced him under both state and federal standards. (AOB 130-164; see particularly AOB 130, 154-164.)

Appellant spends a good deal of time rehashing the merits of the various rulings previously addressed. (See AOB 151, 157-164.) Having already demonstrated that (1) appellant may not complain of the magistrate's rulings, (2) the magistrate did not err in any event, and (3) the trial court did not abuse its discretion in excluding Richardson's and Drume's statements or denying severance, we will not repeat those arguments here. Since there was no error, "there is no cumulative error to assess." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150.)

Were this Court to reach the question of prejudice, we have already discussed the lack of prejudice as to each of the alleged errors in our arguments above. That analysis is fully applicable whether the alleged errors are considered singularly or cumulatively. Appellant argues at length that the asserted errors constituted a "massive denial" of his "right to a fair trial and his right to present a defense," citing *Crane v. Kentucky* (1986) 476 U.S. 683, 690, and related cases. (AOB 130-131.) He also complains that this Court has misconstrued federal law concerning the right to present a defense in *People v.*

Cudjo, supra, 6 Cal.4th at p. 611. Specifically, he argues that the Court erred by stating that "the mere erroneous exercise of discretion under such 'normal' rules [of evidence] does not implicate the federal Constitution. Even in capital cases, we have consistently assumed that when a trial court misapplies Evidence Code section 352 to exclude defense evidence, including third-party-culpability evidence, the applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* [, *supra*,] 46 Cal.2d 818, 836 (error harmless if it does not appear reasonably probable verdict was affected). [Citations.]" However, *Cudjo* itself considered and rejected the same points raised by appellant, observing that the United States Supreme Court "has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible," and citing numerous high court cases in support of this statement. (*Cudjo, supra*, 6 Cal.4th at p. 611; see also *People v. Lawley, supra*, 27 Cal.4th at pp. 154-155 [following *Cudjo*].) Appellant further argues that the Court has "silently overruled" (AOB 149) *Cudjo* through its subsequent decisions in *People v. Cunningham* (2001) 25 Cal.4th 926, 999 and *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103, which both state that the federal constitutional right to present a defense is not implicated by the erroneous exclusion of defense evidence unless the ruling amounts to "complete exclusion of evidence intended to establish an accused's defense . . . ." (*Cunningham, supra*, at p. 999; see also *Fudge, supra*, at p. 1103 ["completely excluding evidence of an accused's defense theoretically could rise to this level" of a federal constitutional violation].) We see no inconsistency between *Cudjo*, *Fudge* and *Cunningham*.

But even assuming error in some or all of the respects argued by appellant, there was no "complete exclusion" of the defense. The defense had ample opportunity to impeach Willis and to attack his ability to describe and identify appellant at trial. The failure to grant appellant a pretrial lineup did not prevent him from attempting to make such a showing at trial. (*People v.*

Rodrigues, supra, 8 Cal.4th at p. 1155.) The exclusion of the Richardson and Drume hearsay statements did not prevent appellant from attempting to show that Willis had wrongly accused appellant by attacking Willis's credibility, by showing his motive to lie against appellant and the BGF, and by arguing that he had altered documents written by appellant. Perhaps the strongest challenge to Willis was the evidence that gun rail Officer Lipton, who was providing cover for Sergeant Burchfield, first identified the cell where Burchfield was standing when he was hit as one occupied by a Crip, not the cell occupied by BGF codefendant Johnson. Of course, the fundamental problem with any defense was that appellant and his codefendants all admitted their roles shortly after the murder, in their own hand, before they had any reason to believe they were under suspicion, and while they were still plotting the next step in their conspiracy.

In short, even if this Court were to find error in any of the respects urged by appellant, there was no "complete exclusion" of defense evidence or of any theory of defense. Accordingly, any errors should be analyzed under the state standard of *People v. Watson*. For the reasons set forth above in our previous arguments, the claimed errors, considered singularly or cumulatively, did not create a reasonable probability of a less favorable verdict to appellant. Even if analyzed under the federal standard, the claimed errors were harmless beyond a reasonable doubt whether considered singularly or cumulatively.

V.

THERE WAS NO FAILURE TO DISCLOSE MATERIAL EVIDENCE OF ANY INDUCEMENTS MADE TO BOBBY EVANS, AND THE COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO ALLOW APPELLANT TO PRESENT ADDITIONAL EVIDENCE ON THIS POINT AFTER THE JURY HAD BEGUN DELIBERATIONS

Appellant contends that the state failed to disclose promises of leniency made to prosecution witness Bobby Evans on the case he had pending in Alameda County at the time of his guilt phase testimony. He further argues that, once these alleged promises came to light after the jury had begun deliberations, the trial court should have permitted him to reopen the defense case and present additional evidence on this subject. (AOB 165-195.) The trial court held a full evidentiary hearing on this matter while the jury was deliberating appellant's guilt (RT 16878-17092) and ultimately denied appellant's motion to reopen the case for further evidence. (RT 17092.) It did not err in doing so.

A. The Record

Evans testified in the guilt phase on October 30, 1989. (RT 13639-13661.) During his testimony, Evans admitted that he was awaiting sentencing in Alameda County after pleading guilty to attempted robbery in exchange for a promise of "no more than 16 months state prison time." He said he did not anticipate receiving a different sentence than what was discussed in the plea bargain. (RT 13671-13672.) On cross-examination, Evans testified that in June 1989, after pleading guilty to the pending charges, he contacted a Department of Corrections agent named James Hahn and divulged information about the Burchfield murder. (RT 13863, 13866, 13915.) Evans had previously informed on others to Hahn and believed the BGF was a threat to his life. (RT 13796,

13802, 13865.) Evans testified that he told Hahn he was concerned about going back to prison and facing the BGF and asked Hahn for protection in exchange for information on the Burchfield case. (RT 13863-13866.) Evans repeatedly acknowledged that he did not want to go back to prison (RT 13863, 13867, 13983), but testified that the 16-month term was a "solid figure." (RT 13808.) Evans also disclosed that his sentencing date had been postponed two times from the original July 1989 date to a date in November 1989, which was after the completion of his testimony. (RT 13809-13810, 13884.) Evans denied that Hahn or another state agent went into chambers and spoke with the sentencing judge at either of the two postponements. (RT 13809-13810.) He also denied that he hoped Hahn would help him get his violation time reduced on a pending parole revocation. (RT 13982-13983.) Evans testified that he wanted to spend all of his time in local custody if possible: "*I'm gonna put my sentence off until the time runs out.*" (RT 13983 [italics added]; see also RT 13959-13960, 13982-13983.)

On January 4, 1990, after Johnson's jury had returned a verdict and while appellant's and Woodard's jury was still deliberating, the defense learned that Evans had been granted probation in his Alameda County case on December 13, 1989. (RT 16878-16879.) The trial court held an evidentiary hearing to determine whether Evans had lied during his testimony about promises made to him. (See RT 16921-16925.)

Three witnesses testified at the hearing: Alameda County Deputy District Attorney William Denny, Alameda County Deputy Public Defender John Costain (Evans's attorney), and agent Hahn. Denny was responsible for handling Evans's case at sentencing. (RT 16932, 16935.) Denny first appeared at a sentencing scheduled for July 27, 1989. At that time there was a discussion between the attorneys and the sentencing judge, Judge Golde, about a letter Marin County Deputy District Attorney Edward Berberian had written in which Berberian stated that no promises would be extended to Evans on the Alameda

County case in exchange for his testimony in the Burchfield case. (Judge Golde called Berberian's letter "snotty.") (RT 16394, 16952, 16975-16976; see Exh. 212.) At some point Denny contacted Berberian to ask about Evans. Berberian said he would call back if he ever desired consideration for Evans's testimony; he never called. (RT 16952.) Evans's attorney later repeatedly asked Denny to call the Marin County District Attorney again to seek consideration for Evans's testimony, but Denny never did in light of the letter and his earlier conversation. (RT 16951-16952.)

The July 17 sentencing was continued until September 12 because a probation report had not been prepared. (RT 16962-16964.) On or about September 12, another Alameda County Deputy District Attorney, Russell Giuntini, asked Denny to continue Evans's sentencing hearing for five weeks because Evans was testifying in a Marin County Case. (RT 16935-16936, 16971.) Agent Hahn had contacted Guintini and asked that Evans's sentencing be postponed after Evans had expressed concern for his safety. (RT 16957-16958, 17014-17015, 17019.) Sentencing was continued to November 9, and again to December 13 – the latter continuance at the request of defense counsel. (RT 16935, 16958.) Guintini also asked Denny to continue the November hearing because Evans had not testified yet in Marin County. (RT 16973.)

In October, Denny spoke with agent Hahn, who asked whether Evans had earned enough pretrial credits to be released on November 9. Denny said he had not. (RT 16942, 16956-16957.) Denny asked Guintini if the December date should be continued. Guintini told Denny to have Evans sentenced to credit for time served because he was "close to release anyway on a 16-month state prison sentence" taking conduct credits into consideration. (RT 16940, 16947-16948, 16958.) At the sentencing, Evans received credit for 203 days actual custody and was placed on probation for three years. (RT 16945.) Denny never made any promises or representations to Evans about his Marin County testimony, nor did Judge Golde so far as Denny knew. (RT 16976.)

Attorney Costain testified that he had an ex parte conversation with Judge Golde on July 27 in which he expressed concern for Evans's safety in state prison. (RT 17033-17034.) Costain believed "there was a good chance that Mr. Evans . . . could serve out his time in the county jail awaiting sentence so that he would get . . . credit for time served. . . ." (RT 17039.) Judge Golde made no promises to Costain, "none at all" (RT 17042), nor did Costain tell Evans that any promise had been made. (RT 17044.) In additional testimony given in camera, Costain testified that Evans told him he was not worried about serving his *Morrissey* time for a pending parole violation.[54/] Evans "felt that his *Morrissey* time was going to be taken care of by the Department of Corrections." (Sealed RT [Jan.5, 1990] pp. 2-4.)[55/] Costain also testified, "I got from him the understanding that should Judge Golde sentence him to sixteen months state prison that he felt that would get taken care of, too." (*Ibid.*)

Agent Hahn testified that he spoke with Evans eight or nine times between June 14 and September 25, 1989. (RT 17012-17013.) Evans said he was concerned about returning to prison, and Hahn said he would speak to Alameda County authorities about postponing his sentence. (RT 17014-17015.) Hahn told Evans he would take care of his safety, but he never told him he would "cut his parole date." (RT 17016, 17021-17022.) Hahn made no promises to Evans, but said he would do what he could to keep him out of state prison, such as transferring him to another state. (RT 17018, 17021.) Hahn was under defense subpoena during the trial, but was released without testifying.

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54. See *Morrissey v. Brewer* (1972) 408 U.S. 471.

55. Appellant argues that Costain's in camera testimony proves Evans lied at trial when he said he expected nothing in exchange for his testimony. (AOB 174-175.) It does not. In context, Costain's testimony reveals only that Evans "felt" his parole revocation period and possibly his sentence would be "taken care of," but suggests nothing as to the basis for his hope – i.e., whether or not he had been given a *promise* to that effect. According to Agent Hahn, there was no such promise. (RT 17021-17022.)

Prior to releasing Hahn from subpoena, defense counsel asked Hahn if he had made any promises to Evans, and Hahn said he had not. (RT 17028, 17030.) In a memorandum dated June 14, 1989, provided to the defense before trial, Hahn stated that no guarantees or promises were made to Evans, but that the Department of Corrections would take care of his safety. (RT 17012, 17030, 17051, 17090; see Exh. 1230.)

Thus, the "fishing expedition"[56] to find out whether Evans was secretly promised a "deal" on his Alameda County case turned up absolutely no evidence of such a deal. The defense argued that the testimony showed Hahn had *promised* to get Evans's sentence postponed despite telling the defense no promises had been made. (RT 17051.) The court ultimately ruled that the defense had failed to show any promises were made to Evans that had not been effectively disclosed to the defense or revealed by Evans himself in his trial testimony. (RT 17089-17091.) The court therefore denied appellant's request to reopen the defense case. (RT 17092.)

B. Analysis

The prosecution has a duty to "disclose to the defense and the jury any *inducements* made to a prosecution witness *to testify* and must also correct any false or misleading testimony by the witness relating to any inducements." (*People v. Phillips* (1985) 41 Cal.3d 29, 46 [italics added], citing *Giglio v. United States* (1972) 405 U.S. 150, 154-155; see also *Brady v. Maryland* (1963) 373 U.S. 83, 87 [due process requires disclosure of material, evidence favorable to the defense irrespective of bad faith of prosecutor];*United States v. Bagley* (1985) 473 U.S. 667, 678, 682 [evidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result

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56. As characterized by the trial judge, who also called the hearing "a waste of time." (RT 16974, 16992-16993, 17049.)

. . . would have been different"; a reasonable probability is one sufficient to "undermine[] confidence in the outcome"].) This duty to disclose includes favorable evidence known to others acting on the government's behalf. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-438; *In re Brown* (1998) 17 Cal.4th 873, 879.)

The record demonstrates that no undisclosed promises or inducements were made to Evans by *anyone* in regards to his *testimony* in this case. Appellant argues that agent Hahn "promised" to postpone Evans's sentencing and do what he could to keep him from going to state prison and that there was at least an "implied understanding" between the two. (AOB 180-181.) Hahn, of course, testified that he made no *promises.* Assuming that his statements that he would try to help Evans could reasonably be viewed as an implied promise, appellant made absolutely no showing that Hahn's statements served as an inducement to Evans's testimony in this case. To the contrary, the entire context of Hahn's testimony was that he would attempt to help Evans out of concern for his general safety, and not for the purpose of encouraging or inducing his testimony in the present case. This point was repeatedly made by the trial court. (RT 17063, 17068, 17072.) The defense was informed through Hahn's memorandum and Evans's trial testimony that Hahn had said he would take care of Evans's safety. In short, nothing in the special hearing revealed evidence of an undisclosed inducement to testify which Evans denied or lied about on the witness stand. Indeed, far from revealing any undisclosed promises, the hearing did not even reveal any genuine inconsistencies in Evans's trial testimony. For these same reasons, since there was no undisclosed promise which served as an inducement for Evans's testimony, the trial court did not abuse its discretion in declining appellant's request to reopen the defense case so that he might attempt to attack Evans's trial testimony. (See *People v. Berryman* (1936) 6 Cal.2d 331, 338-339.)

But assuming that there were some lack of candor by either Evans or

Hahn regarding the nature of their communications and that the defense should have received fuller disclosure, any breach of the duty to disclose did not deprive appellant of "material evidence," that is, evidence that probably would have resulted in a more favorable verdict or that undermined confidence in the guilt verdict. Evans freely admitted that he planned to "put off my sentence until the time runs out." (RT 13983.) It would not have undermined his credibility had the jury also learned that agent Hahn said he would *try* to help Evans, particularly in the absence of any evidence that this induced Evans to testify. And, in any event, the jury received a complete picture of Evans's disreputable character and suspect motivations. (See RT 13794-13834, 13865, 13883, 13908.) (See, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210, 1273-1274 [failure to fully disclose arrangements with prosecution witness and to correct false impressions in witness's testimony did not undermine reliability of the verdict where defense amply impeached character and credibility of witness]; *People v. Morris* (1988) 46 Cal.3d 1, 33-35 [prosecution's failure to clarify testimony about witness's incentive and inducements "could not have affected the result" "[g]iven the considerable amount of impeachment evidence presented . . . as well as the independent corroboration of [the witness's] testimony"].) Indeed, it is telling that after appellant was allowed to present at the penalty phase all of the testimony about Evans's alleged inducements he believed he should have been allowed to present by reopening the guilt phase, the jurors still returned a verdict of death. They did so even after being told they could consider any lingering doubt or uncertainty as to appellant's guilt. (RT 22526.) It is hard to imagine more conclusive evidence that non-disclosure of any implicit agreement between Evans and Hahn was immaterial to the jury's assessment of appellant's guilt. Confidence in the outcome of appellant's trial is assured.

VI.

THE TRIAL COURT HAD NO DUTY OR POWER TO GRANT TESTIMONIAL USE IMMUNITY TO A PRISONER CALLED BY APPELLANT

Appellant contends the trial court erred in failing to grant testimonial use immunity for Harold Richardson and Charles Drume. Appellant never requested immunity for Drume. (See RT 15308-15347; CT 5044-5050.)[57] Because any immunity claim as to Drume is waived (*People v. Lucas* (1995) 12 Cal.4th 415, 460; *People v. Cudjo, supra*, 6 Cal.4th at p. 619), we will focus on his claim that inmate Richardson should have been granted immunity. It is not even clear that appellant has preserved this claim, as the request for immunity was made not in the trial court, but before the magistrate at the preliminary hearing. After permitting appellant's counsel to call the prosecutor as a witness and inquire into his reasons for not granting Richardson immunity, the magistrate ultimately denied appellant's request to grant Richardson use immunity. (CT 14883.) That ruling was upheld by the trial court on review under Penal Code section 995 (CT 1411), and the trial court later indicated – in response to an inquiry by the prosecutor, not appellant – that it did not intend to grant immunity to Richardson at trial. (RT 14709.)

The record shows that appellant called Richardson as a witness at the preliminary hearing, but Richardson invoked the Fifth Amendment and refused to answer any questions about the case. (CT 14815-14830.) After the magistrate sustained the privilege, appellant asked that Richardson be given "immunity under Section 1324 of the Penal Code" or, failing that, "judicial use immunity . . . ." (CT 14831-14832.) After Deputy District Attorney Berberian

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57. Drume was called as a witness outside the jury's presence and invoked his Fifth Amendment Privilege. Thereafter, appellant sought admission of Drume's out-of-court statement but never asked for immunity for Drume. (RT 15308-15347.)

stated that he did not intend to seek immunity for Richardson (CT 14838), the magistrate permitted appellant to call Berberian as a witness to ask him "why he hasn't given Mr. Richardson immunity." (CT 14851, 14583.)

Berberian testified that he had not offered Richardson immunity (CT 14854) nor even considered whether to offer him immunity because Richardson was unwilling to give a tape-recorded statement that would be turned over to the defense in discovery. (CT 14856-14857.) Berberian said he would not grant immunity to Richardson or any witness simply because the witness claimed to have information about the case "[b]ecause I have no way of corroborating what he has to say and I may be inviting an individual who is then completely free of worry about prosecution from getting up and lying on the witness stand." (CT 14859-14860.) Berberian did not interpret Richardson's statement to San Quentin employee Ballatore as favorable to appellant because he did not know how that interview had been conducted or why Ballatore's note of the interview did not list appellant as one of the coconspirators. (CT 14860-14862.) Berberian explained why, in contrast, he granted immunity to Willis, pointing out that he had been able to corroborate Willis's account though the kites and letters which independently implicated the defendants. (CT 14864, 14866.) Berberian explained:

> if I believed that Mr. Richardson established, through corroborated evidence, that Mr. Masters was not a part of this conspiracy, I wouldn't merely grant Mr. Richardson immunity, I would dismiss the case against Mr. Masters.

(CT 14865.) Berberian also contrasted Richardson with inmate Carruthers. Berberian had been willing to seek immunity for Carruthers early in 1986 after Carruthers gave a tape-recorded statement that was furnished to the defense. (CT 14867-14868.) Carruthers's statement was independently corroborated by the same evidence that supported Willis's statement. (CT 14868-14869.) At the time of the preliminary hearing, Berberian had not offered immunity to any witness besides Willis or Carruthers. (CT 14869.) Ultimately, the magistrate

terminated Berberian's examination and struck all of Berberian's testimony on his own motion when appellant's counsel persisted in asking questions "beyond the scope of the hearing." (CT 14878.)[58] After further argument, the magistrate denied appellant's motion to immunize Richardson. (CT 14883.)

After appellant was held to answer and an information was filed, he filed a motion pursuant to Penal Code section 995 seeking dismissal on account of the magistrate's failure to grant immunity to Richardson, among other grounds. (CT 501, 535-546.) The trial court denied this motion on September 27, 1988. (CT 1406-1417.)

The issue appeared for the last time when the district attorney filed a motion during trial on November 9, 1989, seeking to preclude appellant from calling Richardson as a witness in front of the jury and asking that the court not grant Richardson immunity or permit the introduction of his hearsay statements. (CT 4868-4876.) The district attorney stated in his motion that he "anticipate[d] that the defense will seek a grant of judicial use immunity for Harold Richardson." (CT 4869.) In his opposition to this motion, appellant argued only that Richardson's statements were admissible as declarations against interest; he did not request immunity for Richardson. (CT 4949-4964.) At a hearing on November 13, 1989, Richardson was called outside the jury's presence and again invoked his Fifth Amendment privilege. The trial court sustained the

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58. The magistrate additionally refused to permit appellant to ask whether Berberian had disclosed the names of all persons who had offered to give information about the case (CT 14870-14871), whether Berberian had given "any thought" to prosecuting Richardson (CT 14873), what "burden would be imposed on the government" if Richardson were granted immunity (CT 14873), whether there were any memoranda in Berberian's file which discussed offers of immunity or which "contradict[ed] or support[ed] the policy reasons that you've cited here for extending immunity" (CT 14876-14877), and whether there were other prosecutors who participated in the decision to grant Willis immunity. (CT 14877-14878.) At the conclusion of the examination, the magistrate commented that appellant's counsel had "turned the proceeding into a farce. . . ." (CT 14880.)

privilege. (RT 14696-14708.) Immediately thereafter, the district attorney stated, "we briefed on the judicial immunity as well but the court has already indicated a ruling on that." (RT 14709.) The court replied, "I don't intend to grant any judicial immunity to Mr. Richardson." (RT 14709.)[59/]

On this record, we submit that appellant failed to adequately preserve the issue regarding immunity for Richardson. In general, a criminal defendant must take steps to raise and preserve an issue in the trial court in order to preserve it for appeal. (See, e.g., *People v. Saddler* (1979) 24 Cal.3d 671, 684; see also *People v. Pompa-Ortiz, supra*, 27 Cal.3d at pp. 529-530 [errors at preliminary hearing generally cannot be raised on appeal].) Here, appellant fully litigated the Richardson immunity issue at the preliminary hearing, but never renewed his request for immunity for Richardson in the trial court. We recognize that occasionally reviewing courts have forgiven the absence of a trial motion or objection where such a motion would have been futile. (See, e.g., *People v. Rivas* (1985) 170 Cal.App.3d 312, 319, fn.4 [given superior court's denial of Penal Code section 995 motion raising discovery violations, it would have been futile to require defendant to make further efforts to seek discovery in the superior court].) The trial court's ruling on appellant's section 995 motion did not necessarily render further attempts to obtain immunity for Richardson futile, for the court simply concluded that denial of immunity at the preliminary hearing did not result in denial of "a substantial right requiring dismissal." (CT 1411.) It did not rule that appellant could never make a sufficient showing to justify immunity. The trial court's subsequent statement during trial that it did not "intend" to grant immunity to Richardson (RT 14709) admittedly presents a closer question as to futility. The court's statement did not unequivocally

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59. It is unclear what the district attorney was referring to when he stated the trial court had already indicated a ruling on the immunity issue. The only pertinent references we have found in the record are the court's Penal Code section 995 ruling and the comment quoted above.

foreclose a grant of immunity. More importantly, this comment was made in response to the prosecutor's inquiry, not appellant's. Nowhere in appellant's responsive papers to the prosecutor's motion (see CT 4949-4965) did appellant indicate that he intended to seek immunity for Richardson, nor did his counsel hint at any such intention during the hearing on the prosecutor's motion. (See RT 14693-14720.) Accordingly, we submit the issue has been waived.

Assuming that the Court reaches the merits of the claim, we urge the Court to resolve the question it has repeatedly left open since *People v. Hunter* (1989) 49 Cal.3d 957, namely, whether a judge has the power to grant immunity to a witness upon a defendant's request. In *Hunter*, the Court observed that "the Courts of Appeal of this state have uniformly rejected the notion that a trial court has the inherent power . . . to confer use immunity upon a witness called by the defense" and, that "[w]ith few exceptions, federal and state judicial authority is to the same effect." (49 Cal.3d at p. 973, citations omitted.) Nevertheless, the Court declined to decide whether "judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial" in a hypothetical case. (*Id.* at p. 974.) Since *Hunter*, at least three additional cases in this Court have presented the same issue, and each time the Court has followed the approach in *Hunter* and declined to decide whether a court has the power to grant use immunity to a defense witness. (See *People v. Lucas, supra*, 12 Cal.4th at p. 460; *In re Williams* (1994) 7 Cal.4th 572, 610; *People v. Cudjo, supra*, 6 Cal.4th at p. 619.) While the Court has stated that the proposition a trial court has inherent authority to grant immunity is "doubtful" (*People v. Lucas, supra*, at p. 460), that the "vast majority" of cases reject the notion (*In re Williams, supra*, at p. 610), and that there is "no authority in this state" for such a proposition (*People v. Cudjo, supra*, at p. 619), it has nevertheless failed to squarely decide the question. The result is that the issue is being raised with greater frequency in the trial courts while at the same time those courts lack authoritative guidance from

this Court on how to resolve a request for immunity. Unwilling to risk error, particularly in a capital case, by simply rejecting such requests as unauthorized, the trial courts feel compelled to accept extensive briefing and conduct time consuming hearings. In this case, the magistrate went so far as to require the prosecutor to testify under oath to explain his charging and immunity decisions, a procedure which, on its face, raises serious separation of powers concerns. (See *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 262-263 [the "function of determining which persons are to be charged with what criminal offenses" lies with the executive branch].) Given the frequency with which the issue has recurred since *Hunter* and the lengths to which the issue is being litigated in the trial courts, this Court should definitively resolve whether a court has the inherent power to grant a witness immunity upon defense request. For the reasons explained below, we submit that no such power exists.

It is clear that California courts have no *statutory* power to grant immunity absent a prosecutorial request. (Pen. Code, § 1324; *People v. Hunter, supra*, 49 Cal.3d at p. 973; *People v. Cooke* (1993) 16 Cal.App.4th 1361, 1367.) The question, then, is whether courts have *inherent* authority to grant immunity to a defense witness upon defense request in the absence of statutory authority to do so. Strong and compelling policy reasons militate against creating such a power in the trial courts. As the courts of this state have recognized, whether to seek immunity for a witness "is strictly an executive function, 'since the decision to seek immunity is an integral part of the *charging* process, and it is the prosecuting attorneys who are to decide what, if any, crime is to be charged.'" (*People v. Cooke, supra*, 16 Cal.App.4th at p. 1367, quoting *In re Weber* (1974) 11 Cal.3d 703, 720, italics in *Weber*.) Any decision by the judicial branch to grant immunity to a defense witness impermissibly intrudes

into the prosecutorial function of the executive branch.[60/]

Appellant maintains that there was no risk of invading the charging prerogative here because the prosecutor did not intend to charge Richardson with any crime. However, this argument is short-sighted. In the absence of the type of corroboration it had obtained for appellant, Woodard, and Johnson – contemporaneous admissions of guilt in their own handwriting – the prosecution plainly did not intend to charge Richardson. However, given the absence of a statute of limitations for murder and the possibility that adequate corroboration might be discovered in the future, granting immunity to Richardson would have interfered with the prosecution's function. This is particularly true in light of the "heavy burden" the prosecution would face at any subsequent prosecution to prove that its evidence was not obtained or derived from immunized testimony. (See *Kastigar v. United States* (1972) 406 U.S. 441, 461.)

Accepting that any likelihood of prosecuting Richardson is, at best, remote, granting him immunity nevertheless would have invaded the prosecutorial function. The intrusive interrogation into the prosecution's motives, reasoning, and discretion concerning who to charge and who not to charge was itself improper and never could have never occurred had the magistrate not entertained the notion that he had the inherent power to grant use immunity. In addition, recognition of a judicial power to grant immunity could

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60. This is not the case when a court grants limited use immunity to a defendant who has already been charged, such as when the court precludes later use at trial of a defendant's testimony at his probation hearing, his statements to a psychiatric evaluator, or his statements to a probation officer. (See *People v. Coleman* (1975) 13 Cal.3d 867, 889 [testimony at probation revocation hearing]; *Bryan v. Superior Court* (1972) 7 Cal.3d 575, 587 [statements to juvenile probation officer]; *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 470.) In these cases, the risk of interfering with or jeopardizing the prosecutorial function is much lower than when the defense seeks immunity for a witness because the state has already made its decision to prosecute. (See *People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 263.)

distort the prosecutor's exercise of discretion, since it would give him an incentive to sweep all potential suspects into a prosecution in order to avoid the possibility of defense witnesses being immunized over his objection. As even appellant recognizes, the courts have rejected any notion that one defendant may obtain immunity for a codefendant. (See *People v. Sutter* (1982) 134 Cal.App.3d 806, 817; see also *United States v. Turkish* (2d Cir. 1980) 623 F.2d 769, 778 ["we think trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution"].) Thus, authorizing judges to grant immunity could lead to distortion of the charging process by encouraging prosecutors to expand the reach of their prosecution.

Even apart from the inevitable interference with the prosecutorial function, conferring a judicial power of immunity leads to a waste of time and resources. This case is an apt example. The immunity issue occasioned the taking of evidence at the preliminary hearing and extensive and repetitive briefing and argument in the trial court. All of this was essentially directed at a question that courts are ill-suited to decide, namely, whether the prosecutor acted with the proper motives in deciding to seek immunity for some witnesses but not others. As explained in *United States v. Thevis* (5th Cir. 1982) 665 F.2d 616, 640:

> An immunity decision moreover, would require a trial judge, in order to properly assess the possible harm to public interests of an immunity grant, to examine pre-trial all the facts and circumstances surrounding the government's investigation of the case. Such collateral inquiries would necessitate a significant expenditure of judicial energy, possibly to the detriment of the judicial process overall, and would risk jeopardizing the impartiality and objectivity of the judge at trial.

In view of these considerations, this Court should put an end to the type of improper and wasteful intrusions upon the prosecutorial function as occurred below by simply declaring that the courts in this state do not have the inherent power to immunize a defense witness. (See Annot., Right of Defendant in

Criminal Proceeding to Have Immunity from Prosecution Granted to Defense Witness (2002) 4 A.L.R. 617)

We acknowledge that some jurisdictions have suggested that a court may grant immunity as a remedy for prosecutorial misconduct. Specifically, these courts have stated that a court may immunize a defense witness if necessary to secure the defendant's due process right to a fair trial if (1) the prosecution has engaged in discriminatory use of its immunity powers or improperly intimidated witnesses from testifying in order to gain a tactical advantage and deliberately distort the factfinding process, (2) the witness's testimony is material, exculpatory and not cumulative, and (3) the evidence cannot be obtained from any other source. (See *United States v. Dolah* (2d Cir. 2001) 245 F.3d 98, 105; see also *Williams v. Woodford* (9th Cir. 2002) 306 F.3d 665, 697-698.) We question, however, whether a trial court is in an adequate position to assess pre-trial or mid-trial whether a prosecutor's given decision not to grant a defense witness immunity so infects the *entire trial* with unfairness as to violate due process. (See *Donnelley v. DeChristoforo* (1974) 416 U.S. 637, 643 [setting forth basic test for when prosecutorial misconduct rises to due process violation].) We see no reason why a properly preserved allegation of misconduct in the exercise of immunity powers cannot be reviewed on appeal like any other allegation of misconduct. The reviewing court would protect and vindicate the defendants' due process rights by determining whether the prosecutor, in refusing to grant immunity to a defense witness, had acted in such a way as to deprive the defendant of a fair trial. In this way, there would be no interference in the exclusive prosecutorial prerogative to seek immunity, but there would likewise be full protection of the defendant's right to a fair trial, just as currently exists against all other manner of alleged prosecutorial misconduct. Review would take place where it belongs, in the appellate court where the entire record can be reviewed. All of the pitfalls of giving trial courts immunity power – including interference with the prosecutorial function, time consuming

proceedings, distortion of the fact-finding process, and the risk of jeopardizing judicial impartiality – would be avoided. We can find no justification in any of the reported cases why the extraordinary remedy of judicially-conferred immunity is necessary, or why traditional appellate review is ineffective, to remedy any misconduct in the prosecutor's withholding of immunity that results in the denial of a fair trial.

One case has gone well beyond recognizing a limited right to judicial use immunity to remedy cases of prosecutorial misconduct. In *Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 694, the court stated that judicial use immunity could be conferred even in the absence of prosecutorial misconduct that distorts the factfinding process when the proffered testimony is "clearly exculpatory," "essential," and there are no "strong governmental interests" which countervail against a grant of immunity. (*Id.*, at p. 972.) This test invites even greater intrusion into the prosecutorial function, with less justification, than the misconduct test set forth above. We submit that there are always "strong governmental interests" that counsel against any inherent judicial power of immunity. Such a power necessarily intrudes into the prosecutorial function, whether as an interference with the prosecutor's crime-charging power, an influence which tends to distort the exercise of that power, or an inquiry into the prosecutor's motives in using that power. Moreover, while even a limited judicial power to confer immunity upon defense request to remedy prosecutorial abuse will still strain judicial resources and imperil the trial court's impartiality, the broad sweep of the *Smith* test would exacerbate these problems. The fact that, in the dozens of cases to consider the issue of judicial use immunity, the *Smith* case stands virtually alone in authorizing such immunity even in the absence of prosecutorial abuse demonstrates the unsoundness of *Smith*'s approach. (See Annot., Right of Defendant in Criminal Proceeding to Have Immunity from Prosecution Granted to Defense Witness, *supra*, 4 A.L.R. 617.)

We have urged this Court to put an end to the routine recurrence of this

issue by declaring that trial courts have no inherent authority to grant a defense request to immunize a witness. Alternatively, should the Court disagree with our view, we urge the Court to reject the test of *Government of Virgin Islands v. Smith* and instead adopt a test similar to that used by the Second and Ninth Circuits of the United States Court of Appeals. Under that approach, a trial court could grant immunity only if it first finds that (1) the prosecutor had engaged in intentional discriminatory use of his immunity powers with the deliberate intention of distorting the fact-finding process, (2) the proffered defense witness has testimony which is material, clearly exculpatory, and essential, and (3) that evidence cannot be obtained by any other means than a grant of immunity. In the event the Court does adopt this test, it should further clarify the procedure to be followed by trial courts so that prosecutors are not needlessly and improperly subjected to cross-examination of their motives. First, if the defense witness is an actual or potential target of prosecution, a defense request for immunity should be summarily rejected with no further statement required of the prosecutor. (See *United States v. Turkish, supra*, 623 F.2d at p. 778.) Second, if the defense witness is not an actual or potential defendant, the defendant should be required to make a preliminary showing of *facts* establishing *some evidence* of each of the above elements. (See 1 Witkin, Cal. Criminal Law (3d ed. 2000) §§ 237-238, pp. 607-611 [discussing preliminary showing required to support defense discriminatory prosecution motion].) The mere fact that the prosecutor exercised discretion in the use of his immunity power should be insufficient to require him to explain his reasons, as should the defendant's mere desire to know what those reasons are. In other words, merely because the prosecutor granted immunity to one witness but not another would never justify a judicial inquiry into the prosecutor's reasons. Only if the defense possesses facts – as opposed to speculation – suggesting the prosecutor has intentionally and deliberately distorted the factfinding process through the use of his immunity power should the prosecutor be required to

explain how he used that power.[61/] The trial courts need guidance to enable them to resolve these claims efficiently and without unnecessarily trampling upon the executive function. The guidelines set forth above can provide that measure of guidance, which was so lacking in this case.

Finally, if the Court elects to follow its prior course and assess whether the trial court should have granted immunity without deciding whether the court had the power to do so, appellant's contention would still fail. Applying the test employed by the Second and Ninth Circuits, we find that the record reveals no deliberate prosecutorial distortion of the factfinding process. As the prosecutor explained, he declined even to consider granting Richardson immunity because Richardson was unwilling to give a tape-recorded statement that would be turned over to the defense. Willis, on the other hand, agreed to this process. Willis's statement, moreover, was corroborated by the documents in the handwriting of appellant and his codefendants. Far from distorting the factfinding process, the prosecutor's decisionmaking with respect to who to grant immunity preserved the integrity of the proceedings below by ensuring that an immunized witness's statement would be verifiable on tape, fully disclosed to the defense, and corroborated by physical and documentary evidence. Appellant failed to show any prosecutorial overreaching.

We further submit that appellant failed to make an adequate showing for immunity even under the *Smith* test. Appellant asserts that Richardson's testimony would have established that appellant was not involved in planning Burchfield's murder or in sharpening the knife. (See AOB 202.) However,

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61. Appellant argues that the magistrate erred in not permitting an unlimited examination into the prosecutor's charging and immunity decisions. (See AOB 211-214.) Putting aside the fact that appellant may not now obtain review of the magistrate's ruling (*People v. Pompa-Ortiz, supra*, 27 Cal.3d at pp. 529-530), in our view appellant made an inadequate showing to require any response from the prosecution, let alone the unlimited inquiry which he believes he was entitled to undertake.

Richardson's prior statements merely *omitted* mention of appellant and his role; they did not necessarily *exclude* him from the plot. (See CT 1908-1909, 2531-2532.) There is no evidence anyone ever asked Richardson specifically about appellant's participation. Assuming that everything Richardson said was true, it is entirely possible that Richardson, if asked, would have testified that he simply forgot to mention appellant in his prior statements, and that appellant was indeed involved in the planning and weapon preparation. Moreover, Richardson's statement was not inconsistent with appellant's own admission that "all Usalama personnel was working on cutting, making, and sharpening weaponry." (Exh. 159-C.) Accordingly, appellant cannot show that Richardson's testimony was either "clearly exculpatory" or "necessary" as those terms are used in *Smith*. At all events, then, appellant's immunity claim fails.

VII.

THE TRIAL COURT DID NOT RESTRICT APPELLANT'S RIGHT TO PRESENT A DEFENSE BY ITS RULINGS PREVENTING INTRODUCTION OF CERTAIN ITEMS OF EVIDENCE

Appellant contests three additional evidentiary rulings by the trial court. He contends the court should have admitted (1) expert testimony on prison informants (AOB 215-225), (2) evidence concerning the prior prison murder of Crip leader Montgomery (AOB 228-232), and (3) evidence of an anonymous, unidentifiable note claiming responsibility for Burchfield's murder. (AOB 232-238.) The rulings below were correct.

A. Irwin Testimony

At the guilt phase, appellant sought to introduce expert testimony from sociologist John Irwin. Counsel for appellant attempted to establish the relevance of Irwin's proposed testimony in an offer of proof. He stated that Irwin would "describe what the prison environment is like," "the impact of the . . . environment on . . . inmates," how "individual inmates tend to create . . . elaborate schemes for themselves," and how "gang members tend to brag and embellish their involvement in crimes . . . ." (RT 15059.) He furthered offered Irwin to testify that "snitching . . . has become the norm rather than the exception, . . . and that it is used on a frequent basis to gain the most minimal amount of benefit." (RT 15067.) The court ruled Irwin's testimony irrelevant absent a foundation relating the testimony to the facts of the case. (RT 15058-15074, see especially RT 15063 ["I don't see how it comes in unless he [Irwin] knows for a fact that it was Mr. Masters who lied when he wrote that [incriminating kite] . . . . You have to lay that kind of foundation and then perhaps you can have a sociologist explain why inmates might lie about committing a crime."]; RT 15065-15066 ["I think you can't do it unless you

show me that in fact, your client had a tendency to lie about his crimes in order to make much of himself. You can't do it for the group because there are people in prison . . . who probably never lie about how tough they are. . . . It has to go specifically to these defendants. We're not having a sociological study in this courtroom about what happens in prisons."]; RT 15073 ["[Y]our offer of proof is to prove things in general and not specific to these defendants."].)[62/]

Appellant's codefendants challenged the exclusion of Irwin's testimony in their appeal. In the published portion of its decision, the court of appeal upheld the trial court. After correctly stating that a trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion (*People v. Johnson, supra*, 19 Cal.App.4th at p. 790, citing *People v. Alcala* (1992) 4 Cal.4th 742, 787-789), the court concluded:

> There was no such abuse of discretion in this case. The trial judge properly observed the proposed testimony by the two witnesses in issue would not assist the trier of fact, because it was irrelevant and of dubious scientific or testimonial value in considering the questions before the jury.
>
> First, there was no need for a sociological lecture on the nature of the prison environment—the jury learned plenty about that subject from the other evidence, including the two jury visits to San Quentin. To the extent this sociological lore was intended to become relevant to contest the credibility of statements or testimony by inmates, it was rather wide of the mark. There was no showing the proposed sociologist witness had researched the particular inmates in question,

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62. Appellant also sought to introduce testimony from a jail informant named Leslie White. Appellant's counsel said White would testify about how he had fabricated testimony in exchange for benefits from the government. (RT 15079.) The trial court also excluded this testimony. (RT 15083.) In the published portion of its opinion on the direct appeal of appellant's codefendants, the court of appeal concluded, "The proposed testimony from a self-appointed expert who was a former inmate and self-confessed liar, as to the lies he had told in the past in other jails and prisons, was . . . properly barred by the trial court." (*People v. Johnson, supra*, 19 Cal.App.4th at p. 791.) Appellant does not renew the claim that White should have been permitted to testify.

> or had made any scientific study of their credibility; and the inherent problems with such expert testimony as to the credibility of other witnesses, and the prospective abandonment of common sense by lay jurors for reliance on paid "expert" testimony covering a subject well within a jury's ken, amply justified the trial court's decision to exclude it. (See *People v. Alcala, supra*, 4 Cal.4th at pp. 781-782, 788-789.)

(*Johnson, supra*, at pp. 790-791.) This reasoning is persuasive, and we urge the Court to adopt it.

Appellant relies primarily on *People v. McDonald* (1984) 37 Cal.3d 351. In *McDonald*, an eyewitness identification case, the Court held that in an appropriate case a trial court should admit "qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known or understood by the jury . . . ."

McDonald did not change the basic rules of admissibility of expert testimony or eliminate trial court discretion to exclude such testimony when it is attenuated from the case at hand. An expert's testimony still must be sufficiently beyond common experience that his opinion will assist the trier of fact, and the testimony must be relevant to the issues raised. (*People v. McDonald, supra*, 37 Cal.3d at pp. 366-367; Evid. Code, § 801.) Furthermore, *McDonald* affirmed that trial courts retain discretion to exclude expert testimony: "the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion; . . . 'we do not intend to "open the gates" to a flood of expert evidence on the subject.'" (*McDonald, supra*, at p. 377 [citation omitted].) "Clearly, the admissibility of expert testimony in a given subject must turn both on the nature of the particular evidence and its relation to a question actually at issue in the case." (*People v. Bledsoe* (1984) 36 Cal.3d 236, 246.)

It was appellant's failure to relate the proposed testimony to a question actually at issue in the case that rendered his offer of proof fundamentally

inadequate. Appellant proposed to have Irwin testify that prisoners commonly brag about crimes they do not commit as part of the prison culture. But there was absolutely no evidence either appellant or his codefendants falsely admitted their crimes. Nor did the defense offer of proof include any suggestion that Irwin had reviewed the facts of this case and concluded that it contained factors typical of false admissions of crime. In fact, far from presenting evidence that they falsely bragged about Burchfield's killing in their kites, appellants suggested they simply transcribed those notes at Willis's request. Defense witness Herbert Gates, an admitted Crips leader, testified that prison gang members including Willis would have others write their kites for them. (RT 14760-14761.) In short, appellants did not propose to relate their expert testimony to any specific facts in evidence.

Comparison to *McDonald* further demonstrates the correctness of the trial court's ruling. There the expert had reviewed the details of the various eyewitness identifications and intended "to point out various psychological factors that could have affected" the identifications. (*People v. McDonald, supra*, 37 Cal.3d at p. 362.) Similarly, other types of expert testimony, to be admissible, "must be targeted" to the evidence in the case. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393-394 [child sexual abuse accommodation syndrome].) Appellant failed this prerequisite. He did not offer to point out or target any particular factors in his case which might have supported a *reasonable* inference that appellant and his codefendants falsely bragged about Burchfield's murder. The trial court did not abuse its discretion in precluding Irwin's testimony in the absence of any evidence that the witness could or would relate his general testimony about prison culture to the specific circumstances of this case. (See *People v. Alcala, supra*, 4 Cal.4th at pp. 787-788 [trial court did not err in excluding "highly speculative" expert testimony that eyewitness had confabulated identification of defendant through police brainwashing]; *People v. Page* (1991) 2 Cal.App.4th 161, 187-188; *People v. Bowker, supra,*

203 Cal.App.3d at pp. 393-394.)

B. Inmate Montgomery

Appellant contends slain inmate Montgomery's status as a Crip leader was kept from the jury. He argues that this minimized evidence suggesting the Crips had a motive for Burchfield's murder. The record shows, however, that the jury learned of Montgomery's status.

On cross-examination, Correctional Officer McKinney said he was aware of inmate Montgomery's death about a year before Burchfield's. The defense then asked whether Montgomery was a Crip leader. The court sustained the prosecutor's objection for "lack of foundation." (RT 11391.) Attempting to lay the foundation, the defense asked whether McKinney had heard that Montgomery was "a major Crip leader." McKinney replied that he did not know this at the time of Burchfield's death, but learned so later. McKinney nodded affirmatively when defense counsel sought to reiterate that he knew about Montgomery's reputed status at the time of his testimony. The trial court sustained the prosecutor's relevancy objection to the question, "Do you know it now?" However, the prosecutor did not ask the court to instruct the jury to disregard any of McKinney's answers. (RT 11392.)

As the record makes clear, although the court sustained two objections to appellant's line of questioning, it did not preclude McKinney from answering that he had heard Montgomery was a Crips leader and it did not strike any of McKinney's answers. Nothing in the court's rulings could have led the jury to disregard McKinney's answer that he had heard Montgomery was a Crip leader. (RT 11392.) The defense gained the information they sought. Furthermore, Montgomery's status as a Crip leader was also established by defense witness Tommy Harris, who testified that Montgomery was known as "Slow Drag" and was the supreme commander of the Crips. (RT 15148-15149.) In addition, Rufus Willis and Correctional Sergeant Ollison testified to the Crips' desire to

avenge Montgomery's killing on the anniversary of his death. (RT 11736-11737, 13184.) The jury was thus fully apprised both of Montgomery's status within the Crips and of the Crips' motive for wanting to see Burchfield dead.

C. Anonymous Note

Appellant also contends the trial court erred in precluding Correctional Lieutenant Kimmel from testifying about a note which had apparently been written by an unknown inmate. In a hearing outside the jury's presence, the lieutenant testified that about 10 days after the murder, a correctional officer (whose name the lieutenant did not remember) showed him a kite that said something to the effect of "We killed the dog." Apparently, the other officer found the note in a common area of East Block. The note used the term "cuz" throughout, which the lieutenant testified was common among Crips. The note was one of hundreds seized by prison staff in the days following the murder. (RT 15254-15261.)[63/] The defense sought to elicit the lieutenant's testimony about the note and its contents primarily to show that "inmates in San Quentin around this time will admit responsibility to the Burchfield killing." (RT 15262.) The defense also suggested this evidence was admissible as a declaration against interest and showed negligence on the part of San Quentin staff for failing to preserve the note. (RT 15262-15265.) The trial court refused to permit the testimony, finding it irrelevant. (RT 15265-15266.)

Citing *People v. Sassounian* (1986) 182 Cal.App.3d 361, appellant asserts that the lieutenant's testimony was admissible for the non-hearsay purposes of showing that "people in prison often write notes for crimes they did not commit" and that "numerous such notes" were found then lost during the

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63. Appellant mistakenly asserts that San Quentin staff found "potentially hundreds of notes claiming responsibility for Sergeant Burchfield's murder." (AOB 238.) In fact, while Kimmel testified that hundreds of notes were seized, he described the contents of only this one note. (RT 15247-15265.)

Burchfield investigation. (AOB 234.) *Sassonnian* is inapposite. There, the defense was able to present evidence of the existence and content of a lost jail *record*. (*Id.*, at p. 394.) Here, the note in question was not a jail record which would have been otherwise admissible as an official record. (See Evid. Code, § 1280.) It was an anonymous note found in an unknown location by an unknown person. As such, it was inadmissible as hearsay. It also did not have a reasonable tendency to support the non-hearsay inferences set forth by appellant.

To be admissible for the non-hearsay purpose of showing that many San Quentin inmates routinely claimed responsibility for the Burchfield murder (which appellant and his codefendants hoped would weaken the probative force of their own admissions), it was still necessary at a minimum for the defense to show that the lieutenant had personal knowledge of the circumstances surrounding the making and discovery of the kite. (Evid. Code, § 701.) He had no first-hand knowledge of where it was found, who wrote it, or for that matter, even whether it was written by an inmate. The lieutenant therefore lacked personal knowledge to testify that the note was written by a Crip confined in East Block. (See 2 Witkin, Cal. Evidence (3d ed. 1986) §§ 1055-1056, pp. 1001-1003.)

Absent such rudimentary foundational prerequisites, the note had no reasonable tendency to prove that many inmates falsely claimed responsibility for Burchfield's killing. Even if these foundational elements had been met, the note still was not reasonably probative as a false claim of responsibility. The note did not claim personal knowledge of or participation in the killing. It could not have been written by anyone in a genuine position to claim responsibility for the murder, since it was found in a different cell block. And it was wholly general in nature. It was so dissimilar from both the contents and the circumstances surrounding the discovery of appellant's and his codefendants' kites as to support no reasonable inference that appellant, Woodard and Johnson

had falsely claimed responsibility for Burchfield's murder. It would be no more reasonable to infer that the author of the note was falsely claiming responsibility for Burchfield's murder than it would be to infer that a resident of Tampa, Florida, who stated, "We won the Super Bowl," was claiming to have been a personal participant in the contest. The inference appellant sought to draw was entirely speculative. The trial court properly excluded the lieutenant's testimony as irrelevant.

D. Prejudice

Having demonstrated the trial court committed no error in the various challenged rulings, we find it unnecessary to discuss the question of prejudice at length. We do observe that all of the issues raised present only questions of state evidentiary law, notwithstanding appellant's attempt to cast everything in terms of federal constitutional error. Even if proved, state evidentiary errors ordinarily present no issue of a federal constitutional dimension. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67-68.) Appellant maintains that the state court's rulings denied him "a meaningful opportunity to present a complete defense." (See *Crane v. Kentucky, supra*, 476 U.S. at p. 690.) Appellant had a *meaningful* opportunity to challenge every aspect of the state's case, including the veracity of Rufus Willis and the truthfulness of his own notes.

The courts of this state have routinely reviewed the types of claims raised by appellant under the state constitutional standard. (See *People v. McDonald, supra*, 37 Cal.3d at p. 376 [expert testimony]; *People v. Allen* (1978) 77 Cal.App.3d 924, 938-939 [impeachment].) Under that standard, there is no reasonable probability that the excluded evidence, taken singly or together, would have produced a more favorable outcome for appellants. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Each of the excluded items of evidence essentially was offered to attempt to discredit Willis, including the expert testimony. Willis was so thoroughly challenged that any additional

impeachment or discrediting evidence would have been of marginal value at best. Willis was believed because appellant's own admissions and those of his codefendants corroborated him and not because appellant was denied the opportunity to expose his shortcomings as a witness. Indeed, the challenged rulings were not prejudicial under any standard, federal or state.

VIII.

THE TRIAL COURT DID NOT ERRONEOUSLY ADMIT GANG-RELATED EVIDENCE AGAINST APPELLANT

Appellant contends that the trial court admitted irrelevant and unduly prejudicial documentary evidence relating to the practices and beliefs of the BGF. He also contends that admission of this evidence violated his First Amendment rights and rendered his trial unfair within the meaning of the Fourteenth Amendment. (AOB 249-274.) The trial court did not err in admitting the gang-related documents.

This topic was the subject of extensive pretrial briefing and argument. (CT 2629-2632, 2679-2681, 2806-2837, 3000-3013, 3116-3131, 3173-3177, 4749-4758, 4762-5770; see also RT 12163-12168, 13239-13390.) The prosecution sought to introduce BGF-related documents to

> (1) prove the existence of the Black Guerilla Family (BGF) as a prison gang at San Quentin State prison; (2) identify the members of that organization, principally in 1985; (3) document the societal association of Andre Johnson, Jarvis Masters and Lawrence Woodard, as well as the non-indicted coconspirators such as Michael Rhinehart, Willie Redmond, Donald Carruthers, Brian Vaughn, Brian Ingram, Nelson Gomez, Walter Daily, Harold Richardson and Rufus Willis; (4) establish the structure and regulations of the BGF which demands from its membership adherence to stringent rules [such] as those that detail . . . how to attack another, how to construct and use weapons, and the use of special methods and/or mechanisms for communications. [¶] The evidence is central in the presentation of why, and how the killing of Sergeant Burchfield could occur, and to show the nature and structure of the BGF as it relates to the nature and scope of the conspiracy. Further, this evidence provides corroboration for the testimony of Rufus Willis. . . . The gang-related evidence also provides circumstantial evidence of . . . premeditation, malice aforethough[t], motive, and intent. The gang-related materials additionally are circumstantial evidence of many of the alleged Overt Acts.

(CT 3118-3119.) The prosecutor also argued that the murder of Sergeant Burchfield "further[ed] the revolutionary cause" demonstrated in the gang-

related documents. (CT 4763.)[64/] Appellant offered to stipulate that he was affiliated with the BGF and known as "Askari" (CT 3120), but not to the position he held within the BGF. (RT 12164-12165.)

The trial court preliminarily ruled that a limited amount of the prosecution's gang-related material would be admitted to "show the customs and practices of the BGF if those customs and practices relate to the facts and evidence in this case" (RT 12163-12164) and as "corroborative evidence of the testimony of co-conspirators." (RT 12169.) Thereafter, the court conducted a painstaking review of each document for foundation and probative value before ultimately deciding to admit 22 of the more than 130 documents or groups of documents originally offered by the prosecution. (See RT 12174-12353, 13278-13390.) Even then, the court required that some of the documents be edited.[65/]

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64. Appellant complains that the prosecution's theory of relevance broadened over time from its initial desire to show the existence of the BGF and the defendants membership in it. (See AOB 254.) The prosecution was entitled to raise any and as many arguable theories of admissibility as it desired prior to the trial court's ruling.

65. The 22 documents admitted by the court are: Exhibits in Masters's Handwriting or Found in His Possession: 1. Exhibit 318-A-1 (RT 12204-12207, 14632); 2. Exhibit 318-A-4 (RT 12223, 14633); 3. Exhibit 318-B-1 (RT 13331, 14635); 4. Exhibit 318-B-2 (RT 13331, 14634); 5. Exhibit 318-B-6 (edited) (RT 13332-13335, 14636); 6. Exhibit 318-B-7 (RT 13335, 14637); 7. Exhibit 381-B-9 (RT 13335, 14637).

Exhibits in Johnson's Handwriting or Possession. 8. Exhibit 383-A-1 (RT 12286, 14648); 9. Exhibit 383-A-2 (RT 12290, 14648); 10. Exhibits 383-A-3 (A, B & C) (edited) (RT 12291, 14648-14650); 11. Exhibit 383-A-6 (RT 12295, 14652); Exhibit 383-A-8 (RT 12297-12298, 14653).

Exhibits in Woodard's Handwriting or Possession. 12. Exhibit 390-B-1 (RT 12317-12318, 14655); 13. Exhibit 390-C-1 (RT 12318-12319, 14655); 14. Exhibit 390-E-1 (RT 12321, 14657); 15. Exhibit 390-E-1 & 2 (RT 12337, 14658).

Other Exhibits. 16. Exhibit 340-A-1 (edited), from inmate Ingram (RT 12247-12250, 14641; see CT 2817); 17. Exhibit 353-A (RT 13375, 14643-14644); 18 Exhibit 353-B (RT 13375, 14643-14644); 19. Exhibit 376-A-1 (RT 13373, 14645); 20. Exhibit 376-A (RT 12282-12283, 14646-14647) [items 17-

The careful and time consuming manner in which the trial court approached its task demonstrates a reasoned exercise of discretion lacking any hint of abuse. (See *People v. Dominguez* (1981) 121 Cal.App.3d 481, 499.)

Appellant argues generally that all of the documents were irrelevant and unduly prejudicial, but specifically mentions the contents, or portions of the contents, of only six of the exhibits. (See AOB 255-256.) As a threshold matter, we submit appellant has waived any challenge to the remainder of the documents. At page 256, footnote 68 of his opening brief, appellant asserts that all of the gang-related documents we have listed above were inadmissible,[66/] but he describes the contents of only Exhibits 318-B-2, 318-B-6(a), 383-A-3(C), 385, 390-C-1 and 390-E-1. Appellant is mistaken, however, as to the admission of two of these exhibits, namely, Exhibits 381-B-6(a) and 385. Exhibit 318-B-6(a) (the exhibit he quotes most extensively and complains about most vehemently for its references to the 1970 Marin County courthouse shootout and the 1971 San Quentin Prison shootout involving George Jackson) was admitted only in a highly redacted form that blocked out all of its contents and revealed only that appellant had signed the document "Askari" in his own handwriting.

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20 apparently came from inmate Redmond (see CT 2818-2831)]; 21. Exhibit 481-A, from inmate Evans (RT 12349, 13780, 14660); 22. Exhibit 419-B, from inmate Evans (RT 12349, 13770, 14660).

These documents are described in the district attorney's pleading at CT 2806-2836 and in the reporter's transcript at RT 12174-12353.

66. Appellant includes several other exhibits that are not properly part of this argument. These are Exhibit 417-B, which he himself moved into evidence (RT 12348, 13038), and Exhibits 336 and 336-A, a greeting card inside of which is a photograph of appellant. This was admitted not as a gang-related document, but as corroboration of Willis's identification of appellant. (RT 13494, 14638-14639.) In addition, appellant counts Exhibits 383-A-3(A, B, C) as three separate exhibits. We have counted them as a single exhibit because the court admitted them as a single "group of documents that are typical of the B.G. F. training." (RT 12291.) The district attorney did break them into three component parts when he introduced the group. (RT 14648-14650.)

(RT 14635-14636.) The trial court expressly excluded the contents of the document under Evidence Code section 352. (RT 13352-13335.) Exhibit 318-B-6(a)(1) is the redacted form of this exhibit received by the jury. Exhibit 385 was excluded in its entirety. (RT 12308-12309.)

As to those documents not specifically discussed by appellant, appellant's failure to explain why admission of any particular document was error should be treated as a waiver. This court "need not consider on appeal mere contentions of error unaccompanied by legal argument." (*People v. Earp* (1999) 20 Cal.4th 826, 844; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793.) It is not this Court's or respondent's role to search through the record for the specified documents, examine the contents of those documents, and construct the theories for and against admissibility of those documents.

Assuming that appellant's argument is sufficient to preserve the issue for review as to all gang-related documents, the record reveals no error. A trial court has broad discretion to determine the relevance of gang evidence. (*People v. Champion* (1995) 9 Cal.4th 879, 922.) Like any other evidence, gang-related evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" such as identity, intent, or motive. (Evid. Code, § 210; *People v. Champion, supra*, at p. 922.) In discussing the general admissibility of gang-related evidence, the court in *People v. Frausto* (1982) 135 Cal.App.3d 129, 140-141, stated, "[I]t has repeatedly been held that it is proper to introduce evidence which is unpleasant or negative pertaining to an organization in issue which is relevant on the issue of motive or the subject matter at trial." Accordingly, courts have found gang evidence admissible for a variety of purposes depending on the circumstances of the case. (See, e.g., *People v. Champion, supra*, 9 Cal.4th at p. 922 [gang membership relevant to show identity]; *People v. Sandoval* (1992) 4 Cal.4th 155, 175 [gang membership relevant to show motive]; *People v. Dominguez, supra*, 121 Cal.App.3d at pp. 498-499 [Nuestra Familia's tenets relevant to

issues of intent and motive]; *People v. Remiro* (1979) 89 Cal.App.3d 809, 841-844 [criminal acts and revolutionary beliefs of Symbionese Liberation Army relevant to show nature of conspiracy]; *People v. Manson* (1976) 61 Cal.App.3d 102, 131, 155-156 [structure, religion and criminal activities of Manson Family relevant to show motive and nature of conspiracy]; *People v. Beyea* (1974) 38 Cal.App.3d 176, 194 [Hell's Angels membership relevant to show motive].) Only if gang-related evidence is unconnected to the charged offense should it be excluded as irrelevant. (*People v. Pinholster* (1992) 1 Cal.4th 865, 942.)

Here, the various documents admitted by the court were plainly relevant to show each defendant's connection to and membership in the BGF, and therefore to corroborate Rufus Willis's testimony that Burchfield's murder was part of a BGF conspiracy. More than merely connecting the defendants to the BGF, the documents tended to corroborate particular details of Willis's account of each conspirator's role in that organization and thus in the conspiracy. For example, one of the documents in Masters's handwriting contained an internal description of "Usalama" or Security Chief. (See Exh. 318-B-2; RT 12705-12706, 12718-12719, 13330-13331, 14415-14416.) The various documents also corroborated Willis's description of the conspirators' code names, various BGF symbols and credos, and such BGF practices as teaching anatomy, using Swahili, keeping "floor mats" or rosters of other inmates, and compiling daily reports. (See RT 13453-13455, 13482-13493, 13495-13498, 13514-13521, 13525-13526.) In a case where the prosecution was required to provide corroboration for coconspirator Willis, these documents helped show that Willis's account of the BGF and its conspiracy was genuine. The documents also supported Bobby Evans's description of the BGF and of his own role in the organization. (See RT 13770, 13780.)

In addition, at least some of the documents showed that BGF members were required to carry out orders under penalty of death. For example the copy of the BGF constitution and code of ethics in Johnson's handwriting requires a

"sentence of death" for members who "break[] stride . . . in battle." (Exhibit 383-A-3; see also RT 13497-13498, 14409) This also confirmed Willis's testimony (RT 13129-13130) and showed why appellant and Johnson obeyed Woodard's command. (See *People v. Dominguez, supra*, 121 Cal.App.3d at pp. 498-499 [evidence that Nuestra Familia members obligated to commit criminal acts].)

As to those documents which he does quote, appellant complains that they improperly put the revolutionary political beliefs of the BGF before the jury. (AOB 256.) Attempting to redefine the scope of the conspiracy shown at trial, appellant argues that the "'radical revolutionary philosophy of the BGF' was *not* directly connected to the murder of Sergeant Burchfield.'" (AOB 263, original italics.) Instead, he maintains, "[t]he conspiracy was grounded not in 'revolutionary' politics but in a battle for prison turf." (AOB 263.) This argument cannot be squared with the trial evidence. According to Willis's testimony, this was not a mere turf battle between the BGF and rival prison groups, but the first step in a plan to foment a prison-wide war. (RT 12732-12735.) In fact, when appellant initially presented a plan calling only for assaults on rival gang members, it was rejected by coconspirators for failure to "include in it strategy how to move on police." (RT 12735.) Thereafter, appellant produced a plan naming Sergeant Burchfield and two or three other officers as potential targets. (RT 12740.) Eventually, the plot called for a total of four officer attacks before moving to generalized attacks on rival gang members. (RT 12754-12755.) Why would a group of prisoners concoct such a far-reaching plan? The larger purposes and principles of the BGF provide the motive. As indicated in the very documents quoted by appellant, it was the BGF's purpose to "destroy" white institutions (Exh. 390-C-1), "to liberate all members from prison camps" (Exh. 383-A-3(C)), and to "struggle" "under the banner of our party." (Exh. 318-B-2.) (See AOB 256.) Moreover, the brief excerpts set forth by appellant – while insufficient to demonstrate any trial error

– fail to reveal the full context and admissible purpose of the four quoted documents.[67] Thus, Exhibit 318-B-2, from appellant, discussed the structure and security procedures of the BGF (RT 13331); Exhibit 383-A-3, from Johnson, was "typical of the B.G.F. training" (RT 12291); Exhibit 390-C-1, from Woodard, was typical of "BGF educational discipline" (RT 12318-12319); and Exhibit 390-E-1, showed a connection between Woodard and Willis since the handwriting of both appeared on the document. (RT 14656-14657.)

These documents, by showing each defendant's connection to the BGF and the BGF's larger purpose to foment rebellion, had at least some tendency in reason to connect appellant and his codefendants to the conspiracy and to substantiate that the scope of that conspiracy included multiple attacks on guards and, eventually, a general prison war. The district attorney was entitled to show that this was the BGF's purpose – its underlying motivation for the charged conspiracy and the murder of Sergeant Burchfield – in order to corroborate Rufus Willis's testimony concerning the elaborate plot. Indeed, the kites in appellant's own handwriting demonstrated the broader goals and purposes of the BGF beyond an isolated assault on a prison guard or a turf battle with a rival gang. For example, appellant wrote that Johnson was to be "highly commended for *representing the party* with this 'ms,'" meaning a master strike or killing. (Exh. 159-C, italics added; RT 12892, 12898-12899.) In short, whether the Court considers the admissibility of the gang documents as a whole or focuses only on those documents specifically discussed in appellant's brief, all of the admitted documents had at least some tendency in reason to support the prosecution's case by establishing a motive for the conspiracy and murder and by connecting appellant and his codefendants to that conspiracy.

Appellant's offer to stipulate to the existence of the BGF and his

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67. As stated above, the contents of Exhibit 318-B-6(a) were not admitted and Exhibit 385 was not admitted at all.

membership in it did not render the gang evidence irrelevant. The scope of appellant's stipulation was far narrower than the relevance of the documents. As the trial court pointed out, appellant's offer to stipulate did not encompass his position in the BGF, the structure of the BGF, or the control the BGF imposed upon its members. (RT 12165-12166.) Nor did appellant offer to stipulate that the BGF had a motive to assault prison staff. The documents admitted by the court showed that structure and showed each defendant's connection to the BGF (including that appellant was the "Usalama," or security chief, just as Willis testified (see Exh. 318-B-2)). And appellant certainly never offered to stipulate that Willis's testimony regarding the BGF was corroborated by various documents written by each defendant and other BGF members. The proffered stipulation was, therefore, inadequate. (See, e.g., *People v. McClellan* (1969) 71 Cal.2d 793, 802 [prosecutor is not required "to accept stipulations that soften the impact of the evidence in its entirety']; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.)

Appellant also contends that the gang documents, even if relevant, should have been excluded under Evidence Code section 352. (AOB 264-269.) As demonstrated above, the trial court *did* make a reasoned exercise of discretion under Evidence Code section 352 in deciding which documents should be admitted, which should be admitted only in an edited form, and which should be excluded. In a review of the documents that covered hundreds of pages of reporter's transcripts, the court frequently excluded or limited items it concluded would be unduly inflammatory or cumulative. (See, e.g., RT 12273, 12293-12294, 12295-12298, 12308-12309, 13352-13353.) The trial court "carefully scrutinized" all of the gang-related evidence and, as to the admitted documents, "reasonably concluded that the probative value of the evidence . . . was not substantially outweighed by its prejudicial effect." (*People v. Champion, supra*, 9 Cal.4th at pp. 922-923.) As we explained above, the gang-related documents were highly probative of the underlying motive for the

assault, the structure of the BGF, the control it exercised over its members, and each defendant's particular role within that structure. In all of these ways, the documents tended to connect appellant to the murder and conspiracy, especially by providing essential corroboration for Rufus Willis's testimony. The trial court, therefore, did not abuse its discretion under Evidence Code section 352 by admitting the documents. (See *People v. Champion, supra*, 9 Cal.4th at p. 923.)

Appellant further argues that admission of the gang-related documents violated his First Amendment rights to free speech and association, citing *Dawson v. Delaware* (1992) 503 U.S. 159. (AOB 268-271.) However, *Dawson* only prohibited reference to a defendant's membership in a racist prison gang where that evidence had no relevance to the trial. (*Id.* at p. 166.) The court was careful to note that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations . . . simply because those beliefs and associations are protected by the First Amendment." (*Id.* at p. 164; see also *People v. Quartermain* (1997) 16 Cal.4th 600, 629.) Since the gang-related documents were relevant to the issues being tried, their use did not violate the First Amendment. (*People v. Quartermain, supra*, at p. 629.)

Because the trial court committed no error in admitting the gang-related documents, we will not dwell on the question of prejudice. We do, however, feel constrained to observe that appellant considerably overestimates the significance of this evidence. Appellant was convicted not by evidence connecting him to the BGF, but by evidence in his own handwriting in which he admitted his role in the murder and conspiracy. The gang-related documents merely established some of the explanatory details to the case, and the prosecution did not rely on them for anything more than that. Under any standard, admission of these documents was not prejudicial.

IX.

APPELLANT WAIVED ANY CLAIM OF ERROR REGARDING THE BREAK IN JURY DELIBERATIONS BY FAILING TO OBJECT AT TRIAL

Appellant contends that the trial court violated his right to due process by recessing for two weeks during the end of year holidays – a break which had been planned since the beginning of trial and which was expressly agreed to by all counsel. The break, which came during jury deliberations, was for 17 calendar days but only nine court days (excluding weekends, Christmas and New Year's Day). (AOB 279-291.)[68] Appellant waived this claim of error by failing to object at trial. (*People v. Bolden* (2002) 29 Cal.4th 515, 561.) In any event, there was no error.

The trial court raised the issue of the holiday recess on August 20, 1989, before the start of the evidentiary portion of trial and before the juries were sworn. "[F]or the Christmas holiday," the court observed, "I think it would be cruel and unusual punishment to keep the jury in the week before the holiday, or the week of the holiday." The court thus inquired whether any counsel had objection to recessing from December 15 to January 2. Counsel for each defendant expressly replied, "No objection." (RT 10623.) The court thereupon announced the schedule to the juries the following day. (RT 10633-10634.) In reliance on this schedule, six jurors made unchangeable plans for the week commencing December 18. (RT 15284.) Counsel never withdrew their agreement even as it became apparent that both sides would rest before the break. On one occasion, appellant's counsel said he was "a little bit concerned"

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68. Appellant refers to the break as an 18-day recess. Appellant's jury deliberated on Friday, December 15, 1989, and again on Tuesday, January 2, 1990, leaving 17 days when it was not in session. (CT 5105-5106.) Appellant neglects to mention that eight of these days were weekends or holidays: December 16, 17, 23, 24, 25, 30 and 31, 1989, and January 1, 1990.

about the possibility of arguing before the break with instructions afterwards, but this concern did not come to pass as both argument and instruction came before the recess. (RT 15306.)

This Court has expressly held that the failure to object to a suspension or break in jury deliberations waives the claim on appeal. (*People v. Bolden, supra*, 29 Cal.4th at p. 561; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 440.) Appellant's codefendants made this same claim in their direct appeal. In the published portion of its opinion, the court of appeal found the claim was waived by the lack of a trial objection. (*People v. Johnson, supra*, 19 Cal.App.4th at pp. 791-794.) This Court has repeatedly cited *Johnson* with approval in support of the waiver rule. (See *People v. Bolden, supra*, 29 Cal.4th at p. 562; *People v. Ochoa, supra*, 26 Cal.4th at p. 490.)

Appellant claims that the break was too long to be waived by a failure to object. (AOB 289-291.) However, no reason appears for recognizing such an arbitrary exception to the rule requiring a trial objection. Apart from the obvious practical difficulty of deciding how long is too long to excuse the need for an objection, appellant's proposed exception ignores the fact that the significance of any given delay depends on the facts and circumstances of each trial. As the court of appeal observed in *Johnson*, there was nothing "necessarily aberrant" about the delay in this case given that it came during the traditional holiday period. (*People v. Johnson, supra*, 19 Cal.App.4th at p. 792.) Furthermore, "there would be no reason why a defendant would necessarily want to force the jury to continue to deliberate without ceasing, against a Christmas holiday deadline; this could lead to a very quick and unfavorable verdict. . . ." (*Ibid*; see also *People v. Bolden, supra*, 29 Cal.4th at pp. 561-562 [waiver rule applied to 13-day break in deliberations over Christmas holidays].)

Not only did appellant waive the claim by failing to object, the trial court did not abuse its discretion – let alone violate due process – by permitting the break. In *Bolden*, this Court concluded that the trial court did not abuse its

discretion by granting a 13-day break in deliberations "during the holiday season for the jurors' convenience." (29 Cal.4th at p. 562.) Likewise, the court of appeal found no abuse of discretion under the circumstances of this case when it considered the claim in the codefendants' appeal. (*People v. Johnson, supra*, 19 Cal.App.4th at p. 792; see also Pen. Code, § 1121 [trial court has discretion to permit separation of jurors]; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1159 [no denial of due process where trial court interrupted jury deliberations for 18 calendar days during December holidays].)

Appellant relies on *People v. Santamaria* (1991) 229 Cal.App.3d 269, but that case is readily distinguishable. As explained in *Johnson*, in *Santamaria* the trial judge suspended deliberations for 11 days to accommodate his own out-of-town travel. (19 Cal.App.4th at p. 793.) The parties did not consent to the adjournment, but rather sought to have another judge preside during deliberations. (*Ibid.*) "The trial court irrationally denied this request for no good reason, thus abusing its discretion." (*Ibid.*, citing *People v. Santamaria, supra*, 229 Cal.App.3d at pp. 276-279 & fn. 7.) As both this Court and the court of appeal have stated, *Santamaria* "did not purport to abrogate the duty to object generally." (*People v. Ochoa, supra*, 26 Cal.4th at p. 440; see also *People v. Johnson, supra*, 19 Cal.App.4th at pp. 792-793.)

Unlike the plain abuse of discretion in *Santamaria*, no error occurred here. Far from being irrational, the trial court's decision to grant a holiday recess was a reasoned exercise of discretion agreed to by all parties. Appellant's contention to the contrary is meritless.

X.

THERE WAS NO CUMULATIVE ERROR REQUIRING REVERSAL AT THE GUILT VERDICTS

Appellant contends that his guilt verdicts must be reversed due to "cumulative error" during the guilt phase. (AOB 292-294.) As we have shown, no error occurred at the guilt phase. Even should this Court find error in one or more of the respects urged by appellant, the prejudicial effect of that error, whether considered singularly or cumulatively, did not deprive appellant of a fair guilt trial. (See, e.g., *People v. McDermott* (2002) 28 Cal.4th 946, 1000; *People v. Samayoa* (1997) 15 Cal.4th 795, 849.)

XI.

THE ADMISSION OF UNADJUDICATED CRIMES OF VIOLENCE AT THE PENALTY PHASE WAS NOT ERROR

Appellant contends that the admission of unadjudicated prior criminal acts of violence at his penalty phase violated his federal constitutional right to due process as well as his rights under the Fifth and Sixth Amendments. (AOB 330-362.) He acknowledges that this claim has been repeatedly rejected in other cases, but sets forth a lengthy argument "to encourage this Court to revisit the issue and to set the stage for federal appellate and *habeas* consideration of these issues." (AOB 331, original italics.) Appellant presents no persuasive showing that this Court's earlier cases were wrongly decided. (See *People v. Avena* (1996) 13 Cal.4th 394, 428-429; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1252 ["We see no reason to consider our contrary conclusion" that admission of unadjudicated criminal activity is constitutional.])

In *People v. Balderas* (1985) 41 Cal.3d 144, 204-205, the Court explained that due process does not preclude the same jury which convicted a defendant from considering evidence of unadjudicated crimes at the defendant's penalty phase. This is because a separate penalty jury would still hear all the circumstances underlying the crimes of conviction as well the circumstances of the unadjudicated aggravating crimes. Given this fact, "the strong legislative preference for a unitary jury outweighs any 'supposed disadvantage' to defendant in the single-jury process." (*Ibid.*) In *People v. Miranda* (1987) 44 Cal.3d 57, 99, the Court explained that jurors need not unanimously agree on the prior unadjudicated crimes because other violent criminal activity is but one factor which a juror may consider in deciding whether to vote for death or life. What the Constitution requires is unanimity on "the *final determination as to penalty*," but not the underlying or foundational facts which cause a particular juror to support that ultimate decision. (*Ibid*, original italics; see also *People v. Ghent*

(1987) 43 Cal.3d 739, 773-774 ["[a]ny such requirement would immerse the jurors in lengthy and complicated discussions of matters wholly collateral to the penalty determination"].) In *People v. Cox* (1991) 53 Cal.3d 618, 688-690, the Court explained that admission of violent activity committed while the defendant was a juvenile is permissible because section 190.3, factor (b), permits any criminal activity involving force or violence "irrespective of the offender's age." (*Id.* at p. 688.) Admission of such evidence does not offend the Constitution because the penalty verdict is attributable to the defendant's current murder, not to his past criminal activity. (*Id.* at pp. 689-690.) In *People v. Rodriguez, supra,* 8 Cal.4th at p. 1161, the Court explained that remoteness of a prior unadjudicated violent crime "affects the weight, not admissibility, of the offense." So long as procedural safeguards are provided such as proper notice of the offense, an opportunity to confront and cross-examine the witnesses who testify, and the requirement that prior crimes be proved beyond a reasonable doubt – all safeguards afforded to appellant (see CT 1429-1430, 3014-3037, 3100-3102; RT 22524) – the Constitution does not forbid the admission of prior violent activity merely due to remoteness. (See *People v. Rodriguez, supra*, at p. 1161.) And in *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243, the Court explained that admission of unadjudicated criminal activity at capital sentencing proceedings does not violate equal protection in comparison to the sentencing proceedings of non-capital defendants because capital defendants are "situated differently from [non-capital] defendants subject to sentence enhancements . . . ."

Turning to the more specific arguments appellant makes, appellant repeatedly characterizes the evidence of the Hamil murder as "barely sufficient" (AOB 341), "marginal at best" (AOB 349), and "either insufficient as a matter of law or so close to it" that its admission violated due process. (AOB 340.) The evidence was either legally sufficient or not. There is no higher degree of "sufficient evidence" that must be satisfied to permit the introduction of violent

criminal activity at the penalty phase. (See, e.g., *People v. Fauber* (1992) 2 Cal.4th 792, 849 [unadjudicated violent crimes may be admitted at a penalty phase if there is "'substantial evidence to prove each element of the other criminal activity"'].) Here, the evidence of the Hamil murder was legally sufficient such that a rational juror could have found beyond a reasonable doubt appellant committed that murder. The only issue was the identity of the robber or robbers who perpetrated the killing. The prosecution presented evidence of appellant's admissions to participating in the robbery. Most significant were his statements to Detective Chastain that it looked like the victim "got a gun and was going to run after us and shoot us from the back" (RT 19724-19725) and "we thought he was going to shoot us when we were running." (RT 197725.) While appellant also denied the Hamil robbery-murder in both his police statement and his trial testimony, these conflicts were for the jurors to resolve and do not support a conclusion that the evidence of the murder was legally insufficient. (See, e.g., *People v. Jennings* (1991) 53 Cal.3d 334, 368-369 [sufficient evidence shown by facts establishing corpus delicti of offense plus defendant's incriminatory admissions to cellmate establishing his identity as the perpetrator]; see also *People v. Lewis* (2001) 26 Cal.4th 334, 361 [it is jury's province to resolve conflicts in testimony and to decide believability of witnesses].)

Appellant also contends that it was "impossible as a practical matter" for him to defend against the Hamil murder given its remoteness in time and distance from his Marin County penalty trial. (AOB 334.) However, appellant was able to produce dozens of penalty phase witnesses, including many from Southern California and many who testified to events far mor remote in time than the Hamil murder. One of his witnesses – the Los Angeles police detective in charge of the Hamil murder – left no doubt that he did not believe the evidence against appellant warranted charges against him. (See RT 20583-20586.) There is no evidence appellant was unable to defend against the Hamil

murder on account of either remoteness in time or distance from his penalty trial.

Appellant similarly complains about the Jackson prison murder, claiming that evidence of this murder was "suspect" and that he was unable to investigate its occurrence in the prison setting. (AOB 351-352.) However, as with the Hamil murder, the undisputed corpus delicti of the murder coupled with appellant's admissions to inmate Hoze easily established sufficient evidence for this crime. (See, e.g., *People v. Jennings, supra*, 53 Cal.3d at pp. 368-369.) To the extent inmate Hoze may have been biased against appellant, appellant's counsel were able to fully explore this on cross-examination.[69/] In addition, the court instructed the jury that evidence of an oral admission or confession should be viewed with caution. (RT 22512-22513.) Moreover, there is no evidence appellant's investigation of the Jackson murder was impeded by its prison setting, as he was able not only to cross-examine the state's witnesses, but also produced numerous witnesses of his own who testified that appellant was not the killer and otherwise presented favorable evidence. (See testimony of Correctional Officer O'Connor and inmates Lewis, DuBarry and Williams summarized *ante* at p. 38.) In sum, admission of the unadjudicated criminal activity at the penalty phase did not violate the Constitution in any of the respects alleged by appellant.

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69. We are aware that Hoze has more recently recanted his trial testimony, and we have provided relevant discovery to appellant. Hoze's recantation is irrelevant to the issues on direct appeal.

XII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO GRANT SEPARATE PENALTY JURIES OR BY DECLINING TO PERMIT APPELLANT TO VOIR DIRE THE JURY AFTER CODEFENDANT WOODARD'S PENALTY TRIAL

Appellant contends the trial court abused its discretion by failing to empanel a new jury for his penalty phase. (AOB 363-377.) Alternatively, he contends the court should have permitted him to voir dire the penalty jurors after codefendant Woodard's penalty trial and before his own. (AOB 377-382.) Neither ruling was an abuse of discretion.

Appellant first moved for severance in a written motion filed November 29, 1988 (CT 1849-1897), in which he argued, inter alia, that a joint penalty trial would prevent individualized consideration of each defendant's culpability. (CT 1864-1866.) He also argued that a joint penalty trial would enable his codefendants to exploit appellant's own mitigation evidence – which they otherwise would not be able to do in separate trials – and present appellant in a "comparatively worse light . . . ." (CT 1863-1864; see also CT 1873-1896.) The court heard this motion on December 12, 1988. In the course of argument on the motion, counsel pointed out that potential mitigating evidence as to one defendant that had been secured by the district attorney in the course of his investigation had been mistakenly disseminated to all defendants. (RT [Dec. 12, 1988] at p. 18.) Later during the course of this hearing the court broached the possibility of trying the penalty cases serially rather than jointly "so that neither defendant can cross-examine the documents of the other." (*Id.* at p. 38.) Appellant's counsel responded:

> Well, I was just going to say your honor, we had thought of that possibility too, and would be making a motion along those lines if we do get to that point and we would support that personally. . . .

(*Ibid.*) The court further observed, "I think there is no reason I could possibly think of that would make such a serial . . . penalty phase not proper, and that

seems to me to be the logical way to go. (*Id.*, at pp. 38-39.) At that point, counsel for both appellant and codefendant Woodard expressed concern should their client be tried at the second penalty trial. (*Id.* at p. 39.) The court replied that it did not believe either defendant would necessarily be prejudiced by going second at the penalty phase (*id.*, at p. 39) and ultimately denied appellant's motion for separate juries. (*Id.*, at p. 40.)

When the jury returned its guilt verdict on January 5, 1990, the court informed the jurors, "You will hear the penalty phases serially . . . . as to one defendant first and then as to the other." (RT 17104.) After excusing the jury, the court suggested the Woodard penalty case should go first because that case would likely be shorter. (RT 17106.) On January 25, 1990, the court formally set the dates for the penalty trials, with Woodard's going first and appellant's second. (RT 17115-17120.)

On March 26, 1990, after the Woodard penalty trial and before his own, appellant filed a motion for "a new jury for the penalty phase of his trial; or, in the alternative for an order reopening voir dire to determine the ability of the jury to impartially consider his penalty." (CT 5895; see CT 5889-5920.) In this motion, appellant speculated as to a variety of ways the jury might have been "tainted" by first hearing the penalty case against Woodard, but offered no evidence that any such taint had occurred. (See CT 5898-5907.) The trial court denied appellant's motion for a new penalty trial or to reopen jury voir dire on March 28, 1990, and the same jury which decided his guilt proceeded to hear the penalty case against him. (CT 6131.)

At appellant's penalty trial, the court instructed the jury at both the beginning and end of trial, "Do not consider against defendant any of the evidence which you heard at the penalty trial of Mr. Woodard." (RT 19153,

22523.)[70] In addition, during closing argument, appellant's counsel reminded the jury that, apart from assessing appellant's relative culpability for Sergeant Burchfield's murder, it had to reach an individual penalty determination for appellant. (RT 22491 ["It wouldn't be right for you to compare them. They've had different life experiences. Look at Jarvis Masters as individual, but compare his culpability for the crime to Lawrence Woodard's"].)

Appellant contends the court erred by failing to grant him a new penalty jury. He argues that he was "severely prejudiced by having the same jury hear Woodard's penalty phase evidence before his own" (AOB 371), that the court's admonitions were ineffective (AOB 371), that "the failure of the jurors to agree on the death sentence for Woodard clearly made it easier for them to agree on death for Masters" (AOB 374), and that "the jurors would invariably make comparisons . . . between the codefendants . . . and that it was likely that Masters would come out looking comparatively worse . . . ." (AOB 374.) These assertions, like those appellant made below, are entirely speculative. Indeed, appellant admits that "[t]here is no way, of course, that appellant can now say that any of the [grounds raised below and on appeal] *did* have a prejudicial effect . . . ." (AOB 380, original italics.)

This Court has considered the need for severance or separate penalty juries for multiple defendants in *People v. Taylor* (2001) 26 Cal.4th 1155, 1174 and *People v. Ervin* (2000) 22 Cal.4th 48, 69. As stated in *Ervin*, "in light of the statutory preference for joint trials (§ 1098), severance remains largely with the trial court's discretion." (*People v. Ervin, supra*, 22 Cal.4th at p.69; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1070 ["The Legislature has clearly articulated its preference for a single jury to decide both guilt and penalty"].)

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70. At the conclusion of the Woodard penalty trial, the court told the jury, "You'll be asked to put everything that you heard in the Woodard penalty trial out of your mind" for the Masters penalty trial. (1st Aug. RT, Vol. K, p. 19127.)

The failure to grant separate penalty juries may result in reversal on appeal only where consolidation has resulted in gross unfairness and "deprived the defendant of a fair trial." (*People v. Ervin, supra*, 22 Cal.4th at p. 69.) To establish such unfairness, the record must show that the jurors"were unable or unwilling to assess independently the respective culpability of each codefendant or were confused by the limiting instruction." In the absence of such a showing, this Court may assume that the court's instructions to not consider the penalty evidence from the Woodard trial were adequate to ensure individual consideration of penalty as to appellant. (*People v. Taylor, supra*, 26 Cal.4th at p. 1174.) Appellant's speculation that the jury may have disregarded such instructions and unfavorably compared him with his codefendant is insufficient to show error. (See *People v. Ervin, supra*, 22 Cal.4th at p. 95.)

Pursuant to these decisions, appellant's contention must be rejected. As in *Ervin* and *Taylor*, nothing but speculation supports his argument that the jury may have disregarded the court's instructions and improperly compared his mitigation case with Woodard's. As stated in *Taylor*, "nothing in the record indicat[es] defendant's jurors failed to assess independently the appropriateness of the death penalty for defendant . . . or engaged in improper comparative evaluations." (*People v. Taylor, supra*, 26 Cal.4th at p. 1174.)[71/]

Appellant further argues that he should have been granted a new penalty jury for the additional reason that his own jury, having already convicted him of participating in a prison killing, could not fairly evaluate the aggravating evidence relating to the killing of inmate David Jackson. (AOB 375-377; see also CT 5911-5914.) However, the Court has repeatedly held that a trial court

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71. While the court was clearly not required to do so, the fact that it granted serial penalty trials makes appellant's argument even weaker. The serial trials prevented any potential exploitation or diminution of one defendant's mitigating evidence through cross-examination by the other defendant at a joint trial.

does not abuse its discretion "in declining to impanel a new jury based upon the assertion that the jury at the penalty phase might be prejudiced by having heard the evidence of the capital crimes." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1354; see also *People v. Kraft, supra*, 23 Cal.4th at p. 1069; *People v. Pride* (1992) 3 Cal.4th 195, 252.) This variant on his claim that he should have been given a new penalty jury is also based on a purely speculative allegation of prejudice. (See *People v. Pride, supra*, at p. 253.) Furthermore, we fail to see how granting a separate jury for this reason would be of any particular benefit to a defendant. A new penalty jury would still be entitled to hear all of the incriminating evidence of the charged murder and be told that the guilt phase jury had convicted the defendant of that crime beyond a reasonable doubt. Thus, the new jury would be in essentially the same position as the guilt phase jury. Unlike the guilt phase jury which debated the strengths and weaknesses of the prosecution's case before coming to a verdict, one could reasonably expect a new penalty jury to uncritically accept the prior conviction without much debate. In addition, we dispute appellant's suggestion that a new jury was required in this particular case because of the similarity in the Jackson killing and the charged Burchfield murder. Apart from the fact that both killings occurred within the walls of San Quentin, they were not at all similar. Among other differences, one murder was of a guard, the other of an inmate; one was part of a broader conspiracy to foment prison violence, the other had no such broad purpose. In short, nothing about the penalty phase evidence showing appellant murdered inmate Jackson required the trial court to grant a new penalty jury. (See, e.g., *People v. Kraft, supra*, 23 Cal.4th at pp. 1069-1070 [observing that a second jury would have learned of the circumstances of the offense of which the defendant was convicted as well as uncharged murders].)

Appellant alternatively argues that, having failed to grant a new penalty jury, the court should have permitted him to voir dire the jury before the start of his own penalty trial. (AOB 377-381.) The Court has repeatedly

rejected similar arguments. (See *People v. Bradford, supra*, 15 Cal.4th at p. 1354-1355, and cases cited therein.) "The trial court is not obliged to reopen voir dire based upon mere speculation that good cause to discharge the jury thereby may be discovered." (*Id.*, at p. 1355, citing *People v. Gates* (1987) 43 Cal.3d 1168, 1199, see also *People v. Fauber, supra*, 2 Cal.4th at p. 846.) "Good cause is established only by facts which '"appear in the record as demonstrable reality"' . . ." (*People v. Williams* (1997) 16 Cal.4th 153, 229, quoting *People v. Gates, supra*, 43 Cal.3d at p. 1199.)

To support his argument that the trial court should have reopened voir dire, appellant offers the same speculative reasons he offered to support a second jury. For example, he suggests the jury might have considered the testimony of an inmate witness who testified at the Woodard penalty trial to the effect that his own sentence of life without parole had been reduced to conclude that such a sentence was not effective (AOB 378), that the jury might have considered Woodard's own penalty testimony describing how the defendants had been shackled when brought to court to conclude that appellant was a dangerous man (AOB 379), that the jury might have read media accounts about the case between penalty trials (AOB 380), and that the jury might have felt added psychological pressure to return a verdict of death for appellant having failed to do so for Woodard. (AOB 380.) None of these assertions establish good cause. A contrary conclusion is equally if not more probable for each of the predicates underlying appellant's assertions. If the jurors were not swayed to use the inmate's testimony regarding a sentence of life without parole or Woodard's testimony regarding shackling to return a death verdict against Woodard, it is difficult to believe that they used *that* evidence to return a death verdict against appellant. This is all the more so given the court's explicit admonitions to disregard the Woodard penalty evidence. Nor is there any evidence in the record to indicate that the jury ignored the court's strong and repeated admonitions to avoid media coverage of the case (see, e.g., RT 16858-

16859), including an admonition at the conclusion of the Woodard penalty trial. (1st Aug. RT, vol. K, p. 19127 ["remember the admonition. This case isn't over, so don't talk about it. All right. Folks, don't read about it or any other penalty case."].) And appellant's "psychological pressure" argument is not only speculative but illogical. Having seen the court accept the split decision at the Woodard penalty trial, any juror who truly believed that appellant was not deserving death would have had no reason to abandon his or her conscience and vote for death. In any event, so long as the penalty procedure chosen by the court satisfied basic principles of fairness, the court was not required "to select the process psychologically designed to render jurors most favorably disposed toward" appellant. (*People v. Kraft, supra*, 28 Cal.4th at p. 1070.) Just as the court did not abuse its discretion by denying a new penalty jury, so it did not abuse its discretion by declining to permit appellant to voir dire the jurors prior to his penalty trial.

XIII.

APPELLANT FAILED TO MAKE AN ADEQUATE OBJECTION TO THE TRIAL COURT'S TIME LIMITATION ON CLOSING ARGUMENT

Appellant contends that the trial court abused its discretion and deprived him of due process by limiting the time for his attorneys' closing argument to approximately one hour and 40 minutes. (AOB 383-391.) The issue is not preserved, and the court's ruling was neither an abuse of discretion nor prejudicial.

Prior to argument, the court announced that it would give the parties "three and a half hours to divide between you" for closing arguments. (RT 22358.) The prosecutor immediately asked the court to consider granting "a little more time"; defense counsel said nothing. (RT 22358.) After some discussion about the order of arguments, the court then reminded counsel that the jurors were "sophisticated," had already been through the Woodard trial, and would not want the attorneys to rehash "every fact and every clue and every drop of evidence referred to to be able to draw it together." (RT 22367.) The court admonished counsel that it was more important "to be effective rather than extremely thorough," and stated that it would "give each side an hour and a half" for closing arguments. (RT 22367.) The prosecutor immediately objected and asked for two hours; appellant's counsel again said nothing. (RT 22367-22368.) The trial court maintained its limitation of one and one-half hours per side. (RT 22368.)

Thereafter, on May 4, 1990, the prosecutor commenced her opening argument at 10:13 a.m. and concluded it at 10:57 a.m., covering 24 pages of reporter's transcript. (CT 6547; RT 22400-22424.) After a recess, appellant's first counsel argued from 11:14 a.m. to 11:50, also covering 24 pages of reporter's transcript. (CT 6548; RT 22425-22448.) After the court excused the jury for the noon recess, appellant's second counsel asked how much time he

had left, indicting, ". . . I would like an hour. At least an hour. We object to the time limitation to begin with." (RT 22454.) The court replied that first counsel had used ten minutes of second counsel's time. (RT 22454-22455.) The prosecutor suggested second counsel be given an additional 10 minutes. The court replied, "All right." (RT 22455.)

Following the noon recess, the prosecutor gave rebuttal argument from 1:34 p.m. to 2:05 p.m., covering 20 pages of reporter's transcript. (CT 6548; RT 22456-22475.) After another recess, appellant's second counsel presented the final argument from approximately 2:10 p.m. to 3:18 p.m.,[72/] covering a total of 30 pages of reporter's transcript. (CT 6548; RT 22476-22505.) All told, defense counsel's arguments consumed approximately one hour and 44 minutes covering 54 pages of reporter's transcript.

As this Court stated in *People v. Rodrigues, supra*, 8 Cal.4th at p. 1184:

> It is firmly established that a criminal defendant has a constitutional right to have counsel present closing argument to the trier of fact. (*Herring v. New York* (1975) 422 U.S. 853, 856-862; *People v. Bonin* (1988) 46 Cal.3d 659, 694 (*Bonin*); *People v. Cory* (1984) 157 Cal.App.3d 1094, 1105.) Nonetheless, it is equally settled that a judge in a criminal case "must be and is given great latitude in controlling the duration and limiting the scope of closing summations." (*Herring v. New York, supra*, 422 U.S. at p. 862; see *People v. Cory, supra*, 157 Cal.App.3d at p. 1105.) The trial judge has broad discretion to limit counsel to a reasonable time and to terminate argument when continuation would be repetitive or redundant. (*Herring v. New York, supra*, 422 U.S. at p. 862.)

Moreover, as with any claim of trial error, even an alleged constitutional violation, a defendant must make an adequate trial objection to preserve the

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72. The clerk's transcript does not indicate the starting time for second counsel's argument. However, it does show that the prosecutor's rebuttal argument ended at 2:05 p.m., after which the court announced a "brief, five-minute recess," which was immediately followed by counsel's final argument when court resumed. (CT 6548; RT 22475-22476.)

point for appellate review. (See, e.g., *People v. Hawkins* (1995) 10 Cal.4th 920, 970; *People v. Benson* (1990) 52 Cal.3d 754, 788.) In the specific context of a complaint on time limitations on closing argument, we submit that counsel must not only object at the time the limitation is announced, but also "appl[y] for an extension of" argument when the allotted time expires in order to preserve the issue for review. (See *People v. Keenan* (1859) 13 Cal. 581, 584.) Otherwise, a defendant would be permitted to raise a frivolous due process claim on appeal even where the record contains no indication that counsel was unable to present to the jury all of his desired argument within the allotted time.

Appellant made no adequate objection to the trial court's time limits on closing argument. He made no objection whatsoever when the trial court initially announced the time allotments. He argues that an objection would have been futile because the court overruled the prosecutor's objection. (AOB 388, fn. 90.) However, it is impossible to conclude that an objection would have been futile. Had the court faced objections from both sides, rather than just the prosecutor, the court might well have acquiesced to longer arguments. Moreover, the court readily granted additional time to appellant's second counsel when he stated that he needed at least an hour. (RT 22454-22455.) Appellant also suggests that the belated statement of second counsel that "[w]e object to the time limitation to begin with" (RT 22454) adequately preserved the issue. (See AOB 384.) However, this objection was too late. The prosecution had already given her opening argument operating under the court's constraints. It would have been unfair to grant appellant unlimited time at that point. In any event, when the court *did* grant appellant 10 minutes of additional time at the prosecutor's suggestion, appellant's counsel voiced no further objection that the time allotted was insufficient. Perhaps most significant, neither of appellant's counsel made any request to extend their argument. There is thus no evidence in the record that the court's time limitations precluded counsel from raising any particular point in their arguments. Under these circumstances, we submit the

issue has been waived.

Furthermore, the contention is plainly meritless. Granting counsel one hour and 40 minutes (or slightly more) was a reasonable limitation on argument. Appellant's jury had already completed codefendant Woodard's penalty trial and thus had no need for the type of extended discussion of penalty phase procedure and statutory aggravating and mitigating factors that is typically given by the attorneys in a penalty phase argument. Though there were numerous incidents of other criminal activity presented at the penalty trial, both sides were able to discuss these incidents at length. Given this jury's familiarity with penalty phase proceedings and the substantial time allowed for argument, any attempt by appellant to compare his case with those where stricter time limitations were disapproved is unavailing. (See, e.g., *People v. Keenan* 13 Cal.3d at pp. 582, 584 [court limited combined guilt and penalty argument to 90 minutes per side and denied requested extension]; *Collier v. State* (1985) 101 Nev. 473, 482-483 [705 P.2d 1126, 1131-1132] [one hour per side in capital case]; *Willie v. State* (Miss. 1991) 585 So.2d 660, 676 [court should have granted counsel's request for 25 minutes of penalty phase argument, rather than limiting argument to 15 minutes per side].)

Finally, the record contains no indication that the court's time limitation in any way deprived appellant of a fair trial or prejudiced him. Appellant points to the fact that his first counsel was admonished to slow down twice as evidence of prejudice. (AOB 390.) That a given attorney may on occasion speak too quickly for a given court reporter is utterly irrelevant to the question whether appellant was in any way prejudiced by the court's time limits on penalty phase argument. (See RT 14701 [court admonished attorney to speak more slowly during proceedings out of jury's presence].) What is relevant is the lack of any evidence that counsel were forced to omit any portion of their argument on account of the court's ruling. (See, e.g., *Willie v. State, supra*, 585 So.2d at p. 676 [counsel offered to read into record portions of argument that

he did not have time to deliver].) The trial court gave adequate time for argument, and appellant suggests nothing that his counsel were forced to omit. (See *Weaver v. Chandler* (1972) 31 Ohio App.2d 243, 248 [287 N.E.2d 917, 920-921] ["had counsel for defendant utilized the 15 minutes allotted and, at that point, been interrupted by the trial court and not allowed to finish his argument, an issue would arise as to whether there had been an abuse of discretion."].) Accordingly, even if appellant had preserved the claim, it would be meritless.

XIV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING PHOTOGRAPHS OF MURDER VICTIM DAVID JACKSON AT THE PENALTY PHASE

Appellant contends that the trial court abused its discretion by admitting two photographs of David Jackson, the victim of an uncharged murder proved at the penalty phase. (AOB 392-397.) No abuse of discretion is demonstrated.

The prosecution offered four photographs of victim Jackson to show "the wounds of the [victim] at the time he was killed." (RT 19887-19888.) Appellant proposed "to stipulate to the identity of Mr. Jackson, the description of the wounds, how he was killed" (RT 19888-19889), but objected to the photos under Evidence Code section 352 as "inflammatory and grotesque . . . ." (RT 19890.) Noting that the photographs of Jackson showed "far more gruesome looking wounds" than those of the other penalty phase murder victim, Bob Hamil, which showed blood but no wounds, the court excluded two of the offered photographs and admitted two. (RT 19889-19890.) The court excluded one photograph showing "a full body view of Mr. Jackson" and one showing "his face with all sorts of last minute medical equipment trying to save him." (RT 19890.) The two permitted photographs showed the two wounds to Jackson's neck. (RT 19888.) The two photographs were subsequently admitted into evidence as exhibits P-74(1)(A) and (B). (RT 20518-20519.)

Photographs of a victim of an uncharged murder used as aggravating evidence at a penalty phase are evaluated under the "same standard" as victim photographs admitted at the guilt phase. (*People v. Hart* (1999) 20 Cal.4th 546, 643-644; see also *People v. Medina* (1995) 11 Cal.4th 694, 775.)

> "The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value

of the photographs clearly is outweighed by their prejudicial effect. [Citations.]" [Citation.]

People v. Hart, supra, 20 Cal.4th at p. 644, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 133-134 and *People v. Scheid* (1997) 16 Cal.4th 1, 18.) Moreover, a defendant's offer to stipulate to the facts and manner of a murder does not negate the relevance of victim photographs. (*People v. Scheid, supra*, 16 Cal.4th 1.) The prosecution is not obliged to accept "antiseptic stipulations in lieu of photographic evidence" (*People v. Crittenden, supra*, 9 Cal.4th at p. 133), but instead is entitled to show the physical details of a victim's body and tell its story with the descriptive richness and forcefulness that photographs can provide. (*People v. Scheid, supra*, 16 Cal.4th at pp.16-17; see also *Old Chief v. United States* (1997) 519 U.S. 172, 187.)

Here, the nature and location of victim Jackson's wounds were relevant to the prosecution's penalty phase case under factor (b) of section 190.3 as evidence of other criminal activity by the defendant that involved the use of force and violence. (*People v. Wader* (1993) 5 Cal.4th 610, 655.) The fact that Jackson was stabbed twice in a vulnerable part of his body was relevant to show the "extreme violence" appellant used to kill Jackson. (See *ibid.*) Appellant was not entitled to deprive the prosecution of the forcefulness of the photographic evidence through his proffered antiseptic stipulation. (See *People v. Scheid, supra*, 16 Cal.4th at pp. 16-17; *People v. Crittenden, supra*, 9 Cal.4th at p. 133.) In addition, the trial court properly exercised its discretion under Evidence Code section 352 by excluding the two more inflammatory photographs and admitting only those two which focused upon the wounds to Jackson's neck. No error is shown. Even if the photos should have been excluded, there is no reasonable probability that these two photographs resulted in the jury's death verdict given the wealth of evidence of violent and assaultive behavior committed by appellant both inside and outside prison combined with the circumstances of Sergeant Burchfield's murder. (See *People v. Weaver* (2001) 26 Cal.4th 876,

934; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

XV.

CALIFORNIA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL

Appellant raises a number of stock challenges to the California death penalty law, arguing that the "capital sentencing scheme, as interpreted by this Court and applied at appellant's trial, violates the federal constitution." (AOB 398.) For the most part, these challenges have repeatedly been rejected by this Court. Accordingly, we will not engage in a lengthy analysis of these issues.

Specifically, appellant claims his death sentence is unconstitutional because:

A. The jury was prevented from giving full consideration to mental disturbance as a mitigating factor because the jury instruction stated that mental or emotional disturbance must be "extreme." (AOB 399-406; see CALJIC No. 8.85, factor (d); § 190.3, factor (d); CT 6863; RT 22524.) This argument was rejected in *People v. Weaver, supra*, 26 Cal.4th at p. 992, and cases cited therein. (See also *People v. Kipp* (2001) 26 Cal.4th 1100, 1138 [use of "extreme" does not render statute vague].) As in those cases, here the jury was told it could consider "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (CT 6864; RT 22525; see *People v. Ghent, supra*, 43 Cal.3d at p. 776.) Moreover, the trial court also told the jury that it had to "disregard any instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle." (CT 6864; RT 22525.)

B. The death penalty statutes fails to sufficiently narrow the class of death-eligible defendants. (AOB 406-428.) This argument has been rejected in *People v. Michaels* (2002) 28 Cal.4th 486, 541, *People v. Frye* (1998) 18 Cal.4th 894, 1028-1029, *People v. Ray* (1996) 13 Cal.4th 313, 356, and other cases cited in those decisions.

C. The death penalty law fails to require written findings on the aggravating factors relied on by the jury. (AOB 428-433.) This argument has been rejected in *People v. Weaver, supra*, 26 Cal.4th at p. 992, and the cases cited therein.

D. The death penalty law fails to provide for appropriate "burden of proof" instructions, including (1) instructions that aggravating factors be proved beyond a reasonable doubt, that aggravation outweigh mitigation beyond a reasonable doubt, and that death be appropriate beyond a reasonable doubt (AOB 433-439), all arguments that have been rejected in *People v. Kipp, supra*, 26 Cal.4th at p. 1137, *People v. Weaver, supra*, 26 Cal.4th at p. 992, and cases cited in those decisions; (2) instructions placing a heightened burden of proof or persuasion on the prosecution to obtain a death verdict (AOB 440-443), an argument that has been rejected in *People v. Weaver, supra*, 26 Cal.4th at p. 992, *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418, *People v. Hayes* (1990) 52 Cal.3d 577, 643, and cases cited in those decisions; and (3) assuming that the prior two claims lack merit, an instruction telling the jurors that there is no burden of proof at penalty. (AOB 443-444.) While we have not found this precise variation on the burden of proof arguments addressed directly in this Court's death penalty jurisprudence, the Court has stated that a trial court should not instruct "at all on the burden of proving mitigating or aggravating circumstances" given the "'inherently moral and normative, not factual'" decision at the sentencing phase. (*People v. Carpenter, supra*, 15 Cal.4th at pp. 418-419.) This rule subsumes appellant's alternative contention that the jury should be told there is no burden of proof and compels rejection of his claim.

E. The death penalty law fails to require jury agreement or unanimity on aggravating factors. (AOB 445-451.) This argument has been rejected in *People v. Weaver, supra*, 26 Cal.4th at p. 992, *People v. Kipp, supra*, 18 Cal.4th at p. 381, and cases cited in those decisions.

F. The death penalty law permits penalty phase reliance on

unadjudicated criminal activity. (AOB 452-454.) This argument has been rejected in *People v. Carpenter* (1999) 21 Cal.4th 1016, 1061, *People v. Cain* (1995) 10 Cal.4th 1, 69-70, and cases cited in those decisions.

G. The death penalty law gives prosecutors "unbounded" discretion in deciding when to charge a murder as a capital case. (AOB 454-457.) This argument has been rejected in *People v. Weaver, supra*, 26 Cal.4th at p. 992, and cases cited therein.

H. The death penalty violates international law. (AOB 456-459.) Variations of this argument have been rejected in *People v. Hillhouse* (2002) 27 Cal.4th 469, 511, and *People v. Jenkins, supra*, 22 Cal..4th at p. 1055. In a somewhat different variation of the claim, appellant argues that the Eighth Amendment itself incorporates prevailing international norms as part of the "evolving standards of decency" that inform Eighth Amendment jurisprudence. (AOB 458.) Thus, he maintains, "[t]he Eighth Amendment . . . prohibits the use of forms of punishment not recognized by the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own 'standards of decency' are supposed to be antithetical to our own." (AOB 459.) The United States Supreme Court has explicitly rejected the notion that international practices are relevant to inform "evolving standards of decency" under the Eighth Amendment: "We emphasize that it is American conceptions of decency that are dispositive, rejecting the contentions of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant." *Stanford v. Kentucky* (1989) 492 U.S. 361, 369, fn. 1. The practices of other countries "cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people." (*Ibid.*) Recently, in *Atkins v. Virginia* (2002) 536 U.S. 304 [153 L.Ed.2d 335, 122 S.Ct. 2242], the United States Supreme Court did make passing reference to the views of the "word community" in the course of its decision finding that execution of the mentally retarded is cruel and unusual punishment. (*Id.* at p.

__, fn. 21, [153 L.Ed.2d at p. 347, fn. 21, 122 S.Ct. at p. 2249, fn. 21].) However, this reference came only after the Court had already concluded that a "national consensus had developed" against execution of the mentally retarded. (*Id.*, at p. — [153 L.Ed.2d at p. 347, 122 S.Ct. at p. 2249].) The reference to the views of the world community was simply one bit of "additional evidence" of the broad consensus on the question. (*Id.*, at p. ___, fn. 21 [153 L.Ed.2d at p. 347, fn. 21, 122 S.Ct. at p. 2249, fn. 21].) Nothing in *Atkins* remotely suggests that international law may be imported wholesale into Eighth Amendment analysis to render unconstitutional a particular punishment where there is no national consensus against that punishment or, indeed, where the national consensus favors that punishment. Accordingly, appellant's variation on the international law argument must be rejected.

I. The terms "aggravating" and "mitigating" circumstances are vague and ambiguous. (AOB 460-461.) This appears to be a novel claim. It is without merit. The terms "aggravating" and "mitigating" are commonly understood and take on no arcane meaning when applied in the context of penalty phase deliberations. (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 699.) In any event, appellant's jury was instructed with a version of CALJIC No. 8.88, defining an aggravating factor as "any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself," and a mitigating circumstance as "any fact, condition or event about the circumstances of the particular offense or about the defendant which does not constitute a justification or excuse for the crime in question, but may call for a penalty less than death." (CT 6875; RT 22529-22530.) In light of this amplifying instruction – to which appellant suggested no additional language (see *People v. Estrada* (1995) 11 Cal.4th 568, 574 [counsel must request clarifying or amplifying instructions]) – appellant's claim is not tenable.

J. The jury was not instructed that life without prole "means exactly

that." (AOB 461; see also AOB 461-463.) This argument has been rejected in *People v. Earp, supra*, 20 Cal.4th at p. 903, and cases cited therein.

K. The jury was not instructed "as to the presumption of life, the penalty phase correlate of the presumption of innocence." (AOB 464; see also AOB 463-465.) This argument has been rejected in *People v. Arias* (1996) 13 Cal.4th 92, 190.

L. There is no intercase proportionality review. (AOB 465-474.) This argument has been rejected in *People v. Weaver, supra*, 26 Cal.4th at p. 992, and cases cited therein. (See also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51.)

M. Post-conviction review can never "balance considerations essential in imposition of [the] death penalty." (AOB 474.) This argument rests on Justice Blackmum's opinion dissenting from the denial of certiorari in *Callins v. Collins* (1994) 510 U.S. 1141, 1145 (". . . I no longer shall tinker with the machinery of death"). This Court has found Justice Blackmum's dissent unconvincing. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.)

N. Federal and state habeas corpus relief is blocked by too many procedural barriers. (AOB 474-475.) This novel claim is meritless. The United States Supreme Court has never suggested that federal habeas review of state court convictions is a free-standing constitutional right. Rather, such review is a statutory creation (28 U.S.C. § 2254) limited to claims that a state conviction was obtained in violation of the federal constitution. (See *Herrera v. Collins* (1993) 506 U.S. 390, 400-401.) Congress and the United States Supreme Court are free to prescribe conditions and limitations on the scope and availability of federal habeas review. Any such limitations have nothing whatsoever to do with the constitutionality of California's death penalty. Nor is there any federal constitutional requirement that a state furnish any form of post-conviction collateral review, although California has elected to do so. (See, e.g., *Hopkinson v. Shillinger* (10th Cir. 1989) 866 F.2d 1185, 1219-1220 ["The presence of a procedural deficiency in a state's scheme for postconviction relief . . . does no

violence to federal constitutional rights"], affd. 888 F.2d 1286 (en banc), en banc decision overruled on another ground in *Sawyer v. Smith* (1990) 497 U.S. 227, 233; see also *Franzen v. Brinkman* (9th Cir.1989) 877 F.2d 26.) Accordingly, neither state nor federal procedural limitations on the availability of collateral review on habeas corpus have any bearing on the constitutionality of California's death penalty.

O. The death penalty is arbitrary. (AOB 476.) This argument is based on a dissenting opinion by Circuit Judge Noonan in *Jeffers v. Lewis* (9th Cir. 1994) 38 F.3d 411, 425-427 (en banc). Raising the issue sua sponte, Judge Noonan argued that Arizona's death penalty was "irrationally applied" in violation of the Eighth Amendment because only one out of the 164 persons sentenced to death in that state between 1977 and 1994 had been executed. Judge Noonan's dissent has been rejected in *Woratzeck v. Stewart* (9th Cir. 1997) 118 F.3d 648, 652, which concluded that the infrequent scheduling of executions does not establish an independent Eighth Amendment violation. This Court has repeatedly rejected the analogous claim that the delay in carrying out the death penalty violates the Eighth Amendment. (See, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1096; *People v. Ochoa, supra*, 26 Cal.4th at pp. 462-463.) Appellant's variation on this theme is meritless.

XVI.

APPELLATE DELAY DOES NOT RENDER THE DEATH PENALTY UNCONSTITUTIONAL

Appellant's next two contentions argue that the death penalty is unconstitutional on account of delay. He first contends that "delay inherent in the state capital appellate system" makes the death penalty unconstitutional. (AOB 477-481.) This Court rejected an identical argument in *People v. Hill* (1992) 3 Cal.4th 959, 1016-1018, holding that "the 'inherent delay' of which [appellant] complains is not a basis for finding that the death penalty itself or the process leading to it is cruel and unusual."

XVII.

DELAY BETWEEN JUDGMENT AND EXECUTION DOES NOT RENDER THE DEATH PENALTY UNCONSTITUTIONAL

Appellant's second delay argument contends the death penalty is unconstitutional on account of delay between judgment and execution. (AOB 482-498.) This Court has repeatedly rejected arguments relying on the same national and international sources cited by appellant. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1269; *People v. Ochoa, supra*, 26 Cal.4th at pp. 462-464; *People v. Massie* (1998) 19 Cal.4th 550, 574; *People v. Frye, supra*, 18 Cal.4th at pp. 1030-1032.)

XVIII.

THE METHOD OF EXECUTION IS IRRELEVANT TO THE CONSTITUTIONALITY OF APPELLANT'S DEATH JUDGMENT

Appellant contends that his death sentence must be reversed because neither method of execution permitted by Penal Code section 3604 (lethal gas and lethal injection) is constitutional. (AOB 499-511.) As this Court has previously stated, """the claim must be rejected out of hand as a ground for reversal of the judgment of death. It bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself."""" (*People v. Samayoa, supra*, 15 Cal.4th at p. 864, and cases there cited.) Moreover, neither this Court nor the United States Supreme Court has held that either lethal gas or lethal injection is a cruel and unusual method of execution. (*Ibid*; *Gomez v. Fierro* (1996) 519 U.S. 918 [vacating and remanding Ninth Circuit decision finding lethal gas and cruel and unusual]; see also *People v. Ochoa, supra*, 26 Cal.4th at p. 464.) Accordingly, appellant's contention fails.

XIX.

THERE WAS NO CUMULATIVE ERROR REQUIRING REVERSAL OF THE PENALTY VERDICT

Appellant's final contention is that the penalty verdict must be reversed on account of "cumulative error." (AOB 512-513.) As we have shown, no error occurred at the penalty phase. Nor did any asserted guilt phase error infect the penalty verdict. Even should this Court find error in one or more respects as urged by appellant, the prejudicial effect of any errors, whether considered singularly or cumulatively, did not deprive appellant of a fair penalty trial. (See, e.g., *People v. Koontz, supra*, 27 Cal.4th at p. 1094.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 3, 2003

Respectfully submitted,

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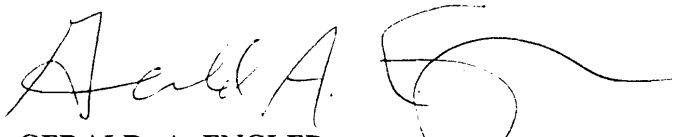

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DECLARATION OF SERVICE BY MAIL

Case Name: ***People* v. *Jarvis J. Masters***
Case No. **S016883**

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RESPONDENT'S BRIEF

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on March 3, 2003, at San Francisco, California.

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