S026634

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

PAUL SODOA WATKINS,

Defendant and Appellant.

CAPITAL CASE
~~S020634~~

Automatic Appeal from the Superior Court of the State of California
Los Angeles County Superior Court Case No. KA005658
The Honorable Robert M. Martinez, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

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STATEMENT OF THE CASE

In a second amended information filed by the District Attorney of Los Angeles County, appellant was charged in Count I with murdering Raymond Shield, in violation of Penal Code section 187, subdivision (a).[1/] It was further alleged that appellant murdered Mr. Shield while he and co-defendant Lucien Martin were engaged in the commission of an attempted robbery within the meaning of section 190.2, subdivision (a)(17), and that a principal was armed with a handgun within the meaning of section 12022, subdivision (a)(1).[2/] Count 2 alleged that appellant committed a second-degree attempted robbery of Mr. Shield in violation of sections 664 and 211, and that a principal was armed with a handgun within the meaning of section 12022, subdivision (a)(1). Count 3 alleged that appellant committed a second-degree robbery of Jihad Muhammed in violation of section 211, that a principal was armed with a handgun within the meaning of section 12022, subdivision (a)(1), and that

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1. Unless otherwise noted, all statutory references shall be to the Penal Code.

2. Co-defendant Martin was tried with appellant, convicted on all six counts including the special circumstance allegation, but the jury sentenced him to life in prison without the possibility of parole. Martin is not a party to this appeal.

appellant personally used that firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5. Count 4 alleged that appellant committed a second-degree robbery of Kyung Lee in violation of section 211, and that a principal was armed with a handgun within the meaning of section 12022, subdivision (a)(1). Counts 5 and 6 alleged that appellant committed the second-degree robberies of Anthony Orosco and Juan Gallegos in violation of section 211, that a principal was armed with a handgun within the meaning of section 12022, subdivision (a)(1), and that appellant personally used that firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5. (CT 312-316.)

Additionally, it was alleged that appellant suffered a prior conviction on May 6, 1988, in Riverside Superior Court case number CR28529, for grand theft person in violation of section 487.2, for which he was committed to state prison, and that he committed a subsequent offense resulting in a felony conviction within five years of the prison term within the meaning of section 667.5, subdivision (b). Finally, it was alleged that appellant suffered the following four prior felony convictions: (1) Grand theft person on May 6, 1988, case number CR28529, in violation of section 487.2; (2) Possession of a controlled substance on May 27, 1988, case number CR28991, in violation of Health and Safety Code section 11350; and (3) Grand theft person on June 25, 1987, case number CR27073, in violation of section 487.2. (CR 317.)

Appellant pleaded not guilty and denied the special allegations. (CT 399; RT 116-122.)

Following a jury trial, appellant was found guilty of all six counts, and the jury found the special circumstance allegation true, along with the other special allegations. (CT 762-767; RT 1825-1832.) After a separate penalty-phase trial, the jury fixed the penalty at death. (CT 861; RT 2168.) The trial court denied appellant's new trial motion, and denied appellant's application to modify the

verdict pursuant to section 190.4. (CT 895-898; RT 2189-2197.) The court imposed the death penalty on Count 1, and signed appellant's death warrant.[3/] (CT 898-906; RT 2197-2198.)

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

STATEMENT OF FACTS

INTRODUCTION

Appellant fatally shot Raymond Shield in front of his wife, daughter and two grandchildren following an unsuccessful robbery attempt. That brutal, cold-blooded murder, however, was but the third leg of a robbery spree that began in the early morning hours of July 16, 1990, when appellant and his accomplice, Lucien Martin, robbed Anthony Orosco and Juan Gallegos at gunpoint of the former's pickup truck and the latter's property; drove that pickup truck to a bus station where appellant robbed Jihad Muhammed at gunpoint; drove to a Holiday Inn where appellant armed himself and tried to rob — and then killed — Mr. Shield; and then, feeling that their robbery efforts had not been successful enough, committed another armed robbery, this time at Steve's Market. Appellant emptied the cash register and stole some cigarettes, before the owner, Kyung Lee, fired a shot from his own handgun, causing appellant and Martin to flee. At the penalty phase, the prosecution presented evidence of appellant's four prior felony convictions, along with three additional crimes of violence consisting of appellant's separate brutal assaults on other inmates while awaiting — and during — the underlying trial.

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3. In addition, the court imposed consecutive determinate terms totaling 16 years and 8 months as to the remaining counts, to be stayed pending the death sentence. Appellant also received a total of 853 days credit, consisting of 569 actual days plus 284 days of conduct credit. (CT 898-900; RT 2198-2203.)

THE GUILT PHASE TRIAL

A. Prosecution Case

On July 17, 1990, at about 3:30 a.m., Anthony Orosco and his friend Juan Gallegos were sitting in Mr. Orosco's black pickup truck, which was parked in the lot of a Home Gardens AM-PM market where they had just bought some soda. (RT 1038-1039, 1047-1048, 1072-1073.) As they talked — Mr. Orosco in the driver's seat and his friend in the passenger seat — Mr. Orosco heard someone say, "Get the fuck out of the truck." He turned to see appellant, who struck him on the side of the face with a black Infield nine-millimeter semiautomatic pistol. (RT 1040-1042, 1050-1052, 1078, 1322.) Leaving the keys in the ignition, Mr. Orosco exited the truck while appellant trained his pistol on him and ordered him to "[g]et the hell out of here." Mr. Orosco ran away. (RT 1042, 1044.)

Meanwhile, appellant's accomplice, Lucien Martin,[4/] approached Mr. Gallegos and took the latter's gold chain with an engraved heart (a gift from Mr. Gallegos's girlfriend) and wallet. (RT 1044, 1074, 1077, 1080-1082.)

The two victims watched as Martin got into the driver's seat of the pickup. Appellant jumped into the truck's bed, and Martin drove them toward the 91 Freeway, which was only a block and a half away. (RT 1046, 1061-1064, 1090, 1092.) The pickup was in good running condition and had no mechanical problems; it was eventually returned in that same condition. (RT 1047-1048.)

Shortly before 5:00 a.m., Jihad Muhammed was alone, in front of a Greyhound bus station in Claremont. He was moving back to New York. Appellant and Martin pulled up in the stolen black pickup truck. Martin drove;

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4. Orosco and Gallegos could only identify appellant, but it was later established that co-defendant Martin was appellant's accomplice and getaway driver.

appellant was in the passenger seat. (RT 1095-1096, 1099-1101, 1110.) Appellant asked Mr. Muhammed where he was going. When the latter replied, "Wisconsin," appellant said: "Then you must have some money" and pulled out his nine-millimeter pistol. (RT 1103-1105.)

As Mr. Muhammed began to get his cash, appellant ordered, "Give it up, throw it in the truck." The latter did so and remarked, "I don't know why you all do this to brothers." Appellant replied, "Fuck a brother." Appellant and his comrade then drove toward the Interstate 10 Freeway, which was only about a block away. (RT 1105-1106.) They had taken about $10 or $12 from Mr. Muhammed. (RT 1112.)

Shortly after 5:00 a.m., Raymond Shield drove his wife, daughter, and two grandchildren to the West Covina Holiday Inn, just off the Interstate 10 Freeway. His family was going to take a shuttle bus to Los Angeles International Airport, where they would embark to Hawaii. Mr. Shield planned to join them in a week. (RT 1129-1131.) He parked in front of the hotel, where they began unloading luggage onto the sidewalk. As they did so, appellant and Martin pulled up in the stolen pickup truck, and parked in front of the Shields. (RT 1132-1144, 1147-1148, 1159-1160.) They quickly exited the pickup, walked to the front of the vehicle, and opened the hood. (RT 1144-1147.)

Mr. Shield went over to the pickup truck and stood with appellant and Martin for about a minute, looking into the engine. The lifted hood served to obscure the Shield family's vision of appellant and Martin. (RT 1149-1151.) Mr. Shield then hurried away from the truck, on the passenger side, towards his family. Appellant and Martin put the hood down immediately and went back to the truck, opened the doors, and got in — Martin in the driver's seat; appellant in the passenger seat. The passenger's side door was open. Mr. Shield had taken only about five steps away from the truck, when appellant

fired a fatal gunshot at the grandfather, causing him to fall on the sidewalk. (RT 1154-1156, 1160.) At the time of the gunshot, Mr. Shield had his hands in his pockets and the right side of his body was turned toward the truck's passenger side. (RT 1155.) The bullet had passed through his forearm, entered the front of his abdomen just above his right hip, hit his iliac blood vessel, passed through his urinary bladder, and exited the abdomen above his left hip, causing him to bleed to death. (RT 1307-1309; see also 1173-1175.)

The pickup truck drove off with its tires squealing; there was no indication of any mechanical problem.[5] (RT 1156-1157.)

Kyung Sun Lee, the owner of Steve's Market in Gardena was working behind the cash register at about 8:45 a.m. that same day, when appellant entered the store, approached the counter, and asked for a pack of regular Camel cigarettes. Mr. Lee got the item, placed it on the counter, and told appellant it cost $1.25. Appellant said he only had one dollar, but would get another. (RT 1220-1225, 1238-1239, 1254-1255.) Appellant returned to the pickup truck, which was parked in front of the store. He spoke to Martin, who was in the driver's seat. Martin put a magazine into the pistol, and the two entered the store. Martin stood next to the entrance and pointed the weapon at the cash register. Appellant opened it, and took the money and the cigarette pack. Mr. Lee, who had hidden himself behind the store's deli area, pulled out his own handgun and fired. Appellant and Martin fled in opposite directions. (RT 1225-1232.)

About 15 minutes later, Jeffrey Kamuela Lewis and his father were standing outside their machine shop, located near Steve's Market. He saw appellant and Martin walking down the street, out of breath "as if they had been

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5. The stolen pickup truck's tires matched the acceleration marks — also, the vehicle ran well and had no mechanical problems. (RT 1183-1184, 1344-1345.)

running." (RT 1264-1268.) Appellant approached Lewis's father and asked, "Remember me? I filled out an application last week." Martin stayed outside, acting like a "look-out man." When Lewis's father said he had no such memory, appellant asked to use the restroom. Lewis's father demurred and appellant responded, "What is your problem?" (RT 1269-1271.)

Just after Lewis's father denied having any problem, Detective Gerald Hudgeons of the Gardena Police Department drove by in a marked patrol car. He had received a radio report of a robbery at Steve's Market when he saw someone — Martin — fitting the description of one of the suspects. Lewis's father waived and called out to the detective. When the detective turned towards them, appellant and Martin fled to an alley. (RT 1271-1272, 1374, 1379-1384.)

David Morgan Boone was doing a real estate appraisal of a residence in Gardena on the same street as Steve's Market at about 9:00 a.m. In the alley behind the residence, he found appellant's pistol in a hole in the brick wall. (RT 1301-1303.) Police officers soon arrived on the scene and Mr. Boone handed the weapon over to Officer Rodney Tanaka of the Gardena Police Department; it was missing its magazine. (RT 1304, 1402-1404.)

Officer Blane Schmidt of the Gardena Police Department also responded to the radio call concerning the Steve's Market robbery. In addition to finding the magazine to appellant's handgun in the market, he saw Martin "low crawling" along a brick wall in a nearby alley. Officer Schmidt lost sight of Martin when he jumped the wall into a residential backyard. (RT 1362-1370.)

Gardena Police Officer Dave Golf, who had also responded to the robbery call, motioned Detective Hudgeons over to a "shaking bush" in a residential backyard. Martin was found inside, trying to hide. (RT 1387-1388, 1299-1400.) After an extensive door-to-door search, assisted by a K-9 unit, appellant was found in the bushes of another residential backyard. (RT 1390-1391.) A

booking search revealed that Martin had Mr. Gallegos's gold chain and heart in his pants pocket. (RT 1394-1397, 1081-1082.) Appellant, who identified himself as "Jeffrey Scott," was in possession of a pack of Camel regular cigarettes. (RT 1426-1428.) Fingerprints from all around the stolen pickup truck matched appellant's and Martin's; two palm prints on the bracket under the truck's hood matched appellant's. (RT 1194-1213.) There was $59 in currency strewn about the truck's floor, along with a satchel that had been in the truck before it was stolen. (RT 1423-1424, 1050-1051.) The stolen pickup truck's tires matched the acceleration marks in front of the Holiday Inn — also, the vehicle ran well and had no mechanical problems. (RT 1183-1184, 1344-1345.) All the crime scenes were located very close to freeway on ramps and off ramps, and could have been reached by car within the times of the incidents. (RT 1353-1355.)

The expended bullet found on Mr. Shield's bloody body was matched to appellant's pistol, and so was the bullet's casing, which was found five to seven feet from the victim's head. (RT 1174-76, 1327-1329.) The magazine or "clip" found on the floor of Mr. Lee's store also matched appellant's pistol. (RT 1232, 1363, 1323.) The gun had a 17.25 pound trigger pull, which is considered heavy — indeed, significantly heavier than standard pistols issued by the Sheriff's Department. (RT 1329-1330.)

On the day after his arrest, the police received information that appellant's true name was Paul Watkins. Detectives David Melnyk and Michael Ferrari met with appellant in an interview room. They asked appellant what his true name was. When appellant said, "Jeffrey Scott," they confronted him with his real name, which appellant admitted was correct. When Detective Melnyk told appellant that they were investigating an apparent robbery and murder at the Holiday Inn in West Covina, appellant responded by asking whether any property had been taken. (RT 1452-1453.)

B. The Defense Case

Appellant testified in his own behalf. He and Martin are cousins who had known each other all their lives. On July 16, 1990, they met at appellant's Moreno Valley house at about 11:00 a.m. As Martin's mother's car needed repairs, they went to the Los Angeles dealership in two cars — Martin in his mother's car, appellant and Martin's mother in appellant's mother's car. Martin dropped his mother's car off at the dealership, and then he and appellant took her to Martin's sister's house in Compton. Next, appellant left Martin at a friend's house, while appellant drove to his old neighborhood. (RT 1472-1474.)

When appellant returned for Martin, the latter had a pistol. Appellant had never seen the weapon before. (RT 1475.) When Martin showed appellant the gun, appellant said it was a "proper" gun, meaning very acceptable. Appellant stated, "We could jack some people with this gun." (RT 1521.) Appellant assumed it was loaded. (RT 1523.) He put the pistol in the trunk of his mother's car; they picked Martin's mother up in Compton around midnight, and drove back to appellant's mother's house. That night, appellant and Martin talked "[a]bout robbing some people." Putting those words into action, appellant drove them both to the AM-PM market in appellant's mother's car, and parked alongside the building. They saw "two Mexican guys in a truck." Appellant took out the weapon and approached them. He pulled the gun out and asked one of them "to give me the truck." (1475-1476.)

When the driver did so, appellant hopped into the truck's bed and Martin drove them away, and then back to where they had left appellant's mother's car, which appellant drove back to her house in Ontario. Then, appellant got into the truck's passenger seat with the weapon. They "got on the freeway [in the direction of Los Angeles] and just went like looking for somebody to rob." (RT 1476-1479.)

They drove to the bus station, where they saw a "Black guy standing there alone" and decided to rob him. (RT 1480.) Appellant was in the passenger seat with the weapon. When appellant saw Mr. Muhammed, he said, "let's rob this fool." (RT 1535-1536.) He asked Mr. Muhammed for the money, and Martin drove them away, back onto the freeway toward Los Angles. They eventually "wound up at the Holiday Inn." (RT 1481.) Appellant was still in the passenger seat. They "decided to go in there [the Holiday Inn] and try this place" because it was at the end of a road with various businesses. (RT 1482-1483.)

They saw Mr. Shield's car and the family unloading luggage, but appellant did not intend to rob them because the location was well lit and he was looking for a solitary victim. (RT 11483-1484.) They parked on the other side of the driveway from the victim's car, and decided to get out and lift the hood, so as not to look so suspicious. Appellant noticed that Mr. Shield was looking at them, so appellant waived "hi" to him. (RT 1485-1487.) Mr. Shield approached them, trying to be helpful. Appellant said they did not need any help, and tried to be rude to get him to go away "because there was like 20 people right there" and appellant wanted to find someone alone. Mr. Shield "got kind of offended" and retreated in a hurry — but appellant never asked him for money; never pulled out his weapon which was in his waistband, concealed by his shirt. (RT 1487-1488, 1490.)

Assuming Mr. Shield was going to call the police, appellant told Martin to leave. Appellant slammed the hood down, and Martin got into the driver's seat as appellant went to the passenger side. Appellant opened the door, but was unable to sit down with the gun in his pants, so he pulled it out and — while closing the truck door with the pistol in his hand — the gun went off accidentally. (RT 1489-1493, 1500.) Appellant was surprised because he "didn't pull the trigger." He saw Mr. Shield fall, but did not think he had shot

him.[6] (RT 1493-1494.)

As the car sped away, Martin asked, "What the fuck you doing?" Appellant replied, "I didn't do it on purpose, man." Appellant put the weapon on the car floor and never touched it again. (RT 1495.) Appellant expressed his sorrow for killing Mr. Shield. (RT 1496.) He "never meant to hurt nobody that night" — he just wanted "to scare them and make some money." (RT 1497.)

They decided to go to Gardena to return the weapon. But, upon reconsideration, they felt they were "back where they started from," not having "been successful" in the prior robberies. So they decided to rob Steve's Market. (RT 1497-1498, 1590.) Appellant formulated the plan: He would "case" the place alone first. Then, if it was "all right," they would both rob it together, with Martin as gunman. (RT 1595-1596.) According to the plan, Martin had the pistol; appellant went in first and asked for cigarettes. Both were inside when Mr. Lee shot at appellant. (RT 1497-1498.)

Appellant admitted two prior felonies, both for "grand theft person." (RT 1500.)

C. The Prosecution's Rebuttal

Mr. Shield's daughter, Pamela Joyce Coryell, testified that the pickup truck's passenger side door was open at the time her father fell. The door closed while the truck was pulling away from the scene — after appellant fired the shot. She never saw the gun outside the window as appellant testified. (RT

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6. On cross-examination, appellant gave a detailed and convoluted explanation as to his handling of the pistol: The left-handed appellant had placed the pistol in his belt with his left hand, with the back of the handle extending to the left. But when he got back into the car, appellant executed the awkward maneuver of pulling the gun out with his right hand. Then, before attempting to close the door with his right (gun) hand, appellant repositioned the gun, so he could hold it "properly" — meaning, the manner in which one would shoot it. (RT 1558, 1571-1580.)

1624-1625.)

THE PENALTY- PHASE TRIAL

A. The Prosecution's Case In Aggravation

Mr. Shield's wife of 39 years, Jeneane, had four children and five grandchildren. They had planned a Hawaii vacation, in which she and their daughter Pamela would go first with two grandchildren and Mr. Shield would follow a week later. He took them to the Holiday Inn so they could catch the shuttle to the airport; he had planned to go into work. (RT 1864-1866.)

Mrs. Shield heard the gunshot and saw her husband fall. She ran to him. As he was lying on the ground, she asked, "What's happened?" He said, "I've been shot." She saw only the wound to his arm. (RT 1866.) He said, "I'm dead" — his last words. (RT 1867, 1870.) As Mrs. Shield held her husband, Pamela called the 9-1-1 operator. When the paramedics arrived and took over, she could see that her husband's wounds were more extensive than just to his arm. (RT 1867-1868.)

There was also evidence that appellant committed other acts of violence. On June 2, 1991, at about 10:20 p.m., while appellant was in custody for the underlying offenses, Los Angeles County Sheriff's Deputy Ricky Hampton was called to respond to a "major disturbance" in one of the dorm rooms at the Wayside detention facility. It was a major fight going on between inmates. He saw a fight involving about 40 inmates. With so many inmates involved, the deputy did not directly intervene. He and another deputy ordered the inmates to stop, but they did not comply. Deputy Hampton was able to identify the "major players" — those most responsible — for the fighting. (RT 1877-1880.) Appellant, who was one of the major players, was striking a group of Hispanic inmates with his fists; when he knocked them down, he would kick them. (RT 1881-1882.)

Not only was appellant kicking other inmates; he also picked up a 55-cup metal coffee pot and threw it at one of them, striking him in the head. The blow knocked the inmate down and inflicted a gash in his head. (RT 1882-1884.) Appellant was one of the last inmates to stop fighting. None of the inmates attacked appellant; he was the aggressor. (RT 1890-1891.)

On June 30, 1991, Kanoa Philip Biondolillo was in the custody of the Los Angeles County Sheriff at the Wayside facility. At 11:30 p.m., he saw a fight. The victim was Russell Cross, a white male who had sat on the bunk of a Black inmate, despite having been warned not to. That inmate struck Cross on the head and the two began to wrestle. About five "Black guys," including appellant, ran up. When they found out what had occurred, they started hitting Cross. Appellant was one of the five persons who attacked Cross. (RT 1871-1876.)

On the morning of March 16, 1992, Franz Simmons was sleeping in the Pomona Superior Court's main lock-up facility, awaiting trial. He awoke when a fight broke out. Two men were fighting a third, who was on the ground trying to cover himself. (RT 2022-2024.)

Sheriff's Deputy Ted Mossbarger heard a noise from the lock-up facility at about 8:30 a.m. He looked in through the glass window and saw three African-American male inmates kicking and punching a fourth African-American male inmate. Appellant was one of the three assailants. (RT 2029-2033, 2037.) When the victim fell to ground, appellant kicked the unresisting victim in the back and head. (RT 2033-2034.) Deputy Mossbarger and another deputy had ordered the inmates to "break it up," but appellant repeatedly ignored their orders and continued to kick the victim. The deputies opened the cell door and the victim ran out to safety. (RT 2035-2036.)

Deputy Eugene Lindsey, who was also assigned to the lockup area, saw part of the fight. Later, while escorting appellant away, appellant said, "the

reason this happened is that he [the victim] raped my home boy's girlfriend." (RT 2049.)

The parties stipulated that appellant had suffered four prior convictions: (1) Grand theft person on May 6, 1988, case number CR28529, in violation of section 487.2; (2) Possession of a controlled substance on May 27, 1988, case number CR28991, in violation of Health and Safety Code section 11350; (3) Grand theft person on May 6, 1988, case number CR27073, in violation of section 487.2; and (4) Possession of a firearm by a felon on September 5, 1989, in violation of section 12021.1. However, the stipulation contained an error as to the third prior conviction — the parties agreed to an erroneous date of May 6, 1988, instead of the correct date of June 25, 1987. (RT 1899-1900, 2153-2154.)

B. Appellant's Case In Mitigation

Marsha Hightower, a childhood friend of both appellant and Martin, testified that appellant "got along" with his family. He was quiet and shy. She pleaded for his life because appellant was a "good person" with "a lot of good in him."[7/] (RT 1935-1937.)

Appellant's half-sister, Renita Watkins, lived with appellant until he was 13 years old. He was quiet and shy. He was a fearful person. When picked on, he would run away and tell his older brother. Appellant would not fight. She pleaded for his life. The murder must have been an accident because appellant was "too sweet a young man" to do such a thing. He had a "beautiful personality" and had been raised properly. (RT 1940, 1942-1944.)

Appellant's maternal uncle, Edward Miller, testified that he had known appellant since appellant was born. Appellant's parents divorced when

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7. Ms. Hightower was one of co-defendant Martin's witnesses; her testimony regarding appellant was adduced on cross-examination by appellant's counsel.

appellant was about six years old. Appellant had a close family. He was a normal, well-mannered child, who was respectful of his elders. Appellant had no problems with his relations or with other children. (RT 1945-1946.) However, when appellant's parents divorced, appellant moved to a different residence in South Central Los Angeles. It was a nice residential neighborhood, but it changed dramatically for the worse. It became infested with drugs and drug dealers. (RT 1946-1949.)

Appellant's childhood environment was not perfect. Rather, it was "somewhat dysfunctional" — appellant's father regularly beat appellant's mother, who had to get a divorce and move away because of the abuse. Nevertheless, appellant's mother loved appellant a lot. She was a good mother, who showed him a lot of love and affection when he was growing up. (RT 1953.) Mr. Miller pleaded for mercy. He could not believe appellant was "a coldblooded murderer." The crime was "out of his character." Society had a bad influence on appellant. (RT 1950-1951.)

Appellant's mother, Betty Watkins, testified that appellant had a normal birth and suffered from the "normal" childhood diseases. She originally sent him to parochial school because it was better than public school. She worked as an executive secretary and appellant's father worked too. However, when appellant was eight or nine years old, she divorced appellant's father because he had a long-term drug abuse problem and would become physically abusive of her when under the influence. She suffered injuries from his abuse and appellant witnessed the beatings. (RT 1955-1959.)

After the divorce, she had to work two jobs to support her family, but eventually managed to buy a house. The neighborhood, however, decayed. It became filled with gangs and drug dealers — and appellant fell prey to their influence. Nor could she afford to send appellant to parochial school anymore, but had to enroll him in public school. Appellant did not adjust well; he was

frightened by the gangs. (RT 1960-1962.)

In 1981 or 1982, Mrs. Watkins' sister was murdered; the family became closer. (RT 1963-1964.) Appellant had a very close relationship with his grandmother, but she died in late 1984 or early 1985. It became increasingly difficult to counter the neighborhood's bad influence on appellant. (RT 1965-1966.)

Then, appellant's sister Kimberly was killed in a drive-by shooting. Appellant was with her at the time. They were in a group of 10 kids, 5 of whom were killed. Appellant "took it really hard." His "whole personality changed." He became even more shy and began to "play hooky" from school. (RT 1978-1969.) The family went to counseling for victims of violent crimes for about a month, but had to stop when the program ran out of funds. She could not afford private counseling. (RT 1969-1970.) They eventually moved away to Moreno Valley to escape the gangs, but appellant found it hard to make friends, and began to "act out" and get in trouble. (RT 1971-1972.)

Mrs. Watkins cannot explain her son's current offenses. She is "devastated" by them. She tried to "do right for him" in raising him, but she thinks Kimberly's killing was the turning point for appellant. She pleaded for her son's life because he is not a "vile, vicious murderer . . . without a conscience" — and she commiserates with the Shield family. (RT 1972-1974.)

Finally, Queenetta Green, appellant's high school algebra teacher, testified that after appellant transferred to public school from parochial school, he was enthusiastic, studious, obedient, helpful and protective of his sister Kimberly. But after the catastrophic incident that took Kimberly's life, Ms. Green noticed a change in appellant: He became sullen, disobedient, defiant. She also pleaded for appellant's life. (RT 1989-1992.)

ARGUMENT
I.

THERE WAS COMPELLING EVIDENCE THAT APPELLANT ATTEMPTED TO ROB MR. SHIELD, AND THEN SHOT HIM WITH THE PREMEDITATED AND DELIBERATE INTENT OF ELIMINATING A WITNESS

A. Introduction

Only by ignoring the facts leading up to the fatal shooting — not to mention the circumstances of the shooting itself — can appellant hope to convince this Court that evidence of the attempted robbery and the premeditated, deliberate killing of Mr. Shield was deficient. The prosecution demonstrated that appellant robbed Mr. Orozco of his pickup truck (and money) to effectuate a plan to commit armed robberies; that he robbed Mr. Muhammed at gunpoint less than two hours later pursuant to that plan; and that — minutes later — he arrived at the Holiday Inn with the intent of committing further robberies, and set up a ruse to do so. Mr. Shield took the bait and approached the ostensibly disabled pickup truck, where appellant — having armed himself with the same loaded pistol he had just used to rob Mr. Muhammed — was waiting. At that point, appellant had taken a "direct and unequivocal act" toward robbing his victim, and the attempted robbery was complete.

But there was more evidence: Appellant and his accomplice did or said something to cause Mr. Shield to become suspicious. When the victim retreated, appellant and co-defendant Martin fled the scene — but not before appellant, having had time to reflect, squeezed off the well-aimed, fatal round that pierced the victim's stomach. Nothing was mechanically wrong with the pickup trunk; the murder weapon had a heavy trigger-pull of 17.25 pounds. The evidence, thus, permitted a single reasonable inference as to intent and motive — robbery, followed by witness incapacitation and elimination. The prosecution's case concerning the Steve's Market armed robbery hours later

further bolstered the prosecution case as to intent to rob. That is, far from feeling remorse over a supposed accidental shooting, appellant and his accomplice continued their armed robbery spree.

The defense case eliminated all possible doubt as to appellant's intent. Appellant admitted that before setting out for the AM-PM Market in the early morning hours of July 17, 1990, he and Martin had planned to use the pistol to commit robberies. Appellant also admitted that they drove to the Holiday Inn with the intent of committing robbery. Of course, the jury was not obligated to accept appellant's self-serving and dubious assertion that the ruse was not intended as a lure to Mr. Shield. As shown below, the standard of review is not "in for a penny, in for a pound."

B. Standard Of Review

The standard of review is well-established:

> In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)

(*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, parallel citations omitted.)

Moreover, as appellant overlooks, "[t]he standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*Ibid.*) While the jury is obligated to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, the reviewing court is not subject to an analogous limitation. Rather, "[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Ibid.*, citation and internal quotation marks omitted.)

To the extent appellant challenges the trial court's denial of his motion for acquittal under section 1118.1, the applicable standard is whether "there is any substantial evidence, including all reasonable inferences to be drawn from the evidence, of the existence of each element of the offense charged." (*People v. Mendoza* (2000) 24 Cal.4th 130, 175; *People v. Trevino* (1985) 39 Cal.3d 667, 695.) That is, where "there is evidence from which an inference of guilt is justified[,] a case will not be taken from the jury because an inference of innocence might also be drawn therefrom." (*People v. Westcott* (1950) 99 Cal.App.2d 711,714.) "The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on 'isolated bits of evidence.'" (*People v. Cuevas* (1995) 12 Cal.4th 252, 261, citation omitted.) "Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point." (*Trevino, supra*, 39 Cal.3d at p. 695.)

Accordingly, for purposes of addressing each of appellant's sufficiency challenges (attempted robbery's "direct and unequivocal act" and intent elements, and first-degree murder's premeditation and deliberation element) respondent separately summarizes the relevant evidence at the close of the

prosecution's case-in-chief and at the close of evidence.

C. The Prosecution Case

Testimony by victims Orosco and Gallegos demonstrated that a few hours before the Shield incident, appellant and Martin committed their two initial armed robberies. Appellant ordered Orosco and Gallegos out of the truck, and struck the former with the black Infield nine-millimeter semiautomatic pistol he would use to shoot Mr. Shield. (RT 1040-1042, 1050-1052, 1078, 1322, 1327-1329.) Appellant pointed the weapon at Orosco and ordered him to leave. (RT 1042, 1044.) Co-defendant Martin robbed Gallegos of personal property. (RT 1044, 1074, 1077, 1080-1082.) According to the owner, the pickup was in good running condition and had no mechanical problems; it was eventually returned in that same condition. (RT 1047-1048.)

About 90 minutes later, testimony by the third robbery victim, Jihad Muhammed, made it clear that appellant and Martin had embarked on a armed-robbery spree. Appellant and Martin pulled up to a bus station in Orosco's stolen black pickup truck. Mr. Muhammed was waiting alone in front. Appellant, after asking an innocuous question, pulled out the nine-millimeter pistol and demanded Mr. Muhammed's money. (RT 1095-1096, 1099-1101, 1110, 1105-1105.)

Just minutes after committing that robbery and driving away in the direction of a nearby freeway, Mr. Shield's daughter, Pamela Coryell, saw appellant and Martin park the stolen pickup truck in front of the hotel where the Shield family was unloading luggage. The hotel was just off the freeway. (RT 1129-1131, 1132-1144, 1159-60.) She saw the two quickly exit the pickup and open its hood. (RT 1144-1147.)

Mr. Shield went over to the pickup truck and stood with appellant and Martin for about a minute, looking into the engine. (RT 1149-1150.) Mr. Shield then hurried away from the truck toward his family. Appellant and

Martin put the hood down immediately and went back to the truck, opened the door and got in. Mr. Shield had taken only about five steps, when appellant fired a fatal gunshot through the grandfather's stomach, causing him to fall on the sidewalk, where he bled to death. (RT 1154-1156, 1160, 1307-1309, 1173-1175.) Ms. Coryell watched as appellant and Martin sped away in the pickup truck with its tires squealing; there was no indication of any mechanical problem. (RT 1156-1157.)

A few hours later that morning, appellant and Martin committed an armed robbery at Steve's Market in Gardena. As in the previous incidents, it was appellant who made the initial approach to the victims — here, pretending he wanted to buy cigarettes. (RT 1220-1225, 1238-1239, 1254-1255.) While Martin was the gunman, it was appellant who took the money. (RT 1225-1232.)

Additional prosecution evidence showed that after fleeing, appellant gave the police a false name. (RT 1426-1428.) His fingerprints were found on the stolen pickup truck; two palm prints on the bracket under the truck's hood matched appellant's. (RT 1194-1213.) The stolen pickup truck's tires matched the acceleration marks in front of the Holiday Inn — also, the vehicle ran well and had no mechanical problems. (RT 1183-1184, 1344-1345.) All the crime scenes were located very close to freeway on ramps and off ramps, and could have been reached by car within the times of the incidents. (RT 1353-1355.)

The expended bullet found on Mr. Shield's bloody body was matched to appellant's pistol, and so was the bullet's casing, which was found five to seven feet from the victim's head. (RT 1174-76, 1327-1329.) The magazine or "clip" found on the floor of Mr. Lee's store also matched appellant's pistol. (RT 1232, 1363, 1323.) The gun had a 17.25 pound trigger pull, which is considered heavy — indeed, significantly heavier than standard pistols issued by the Sheriff's Department. (RT 1329-1330.)

D. The Defense Case

Appellant's own testimony added significant additional evidence of both specific intent to rob, and premeditation and deliberation. The night before the crime, appellant expressed his approval of what would become the murder weapon. He stated that it would serve well in committing robberies, and he assumed it was loaded. (RT 1475, 1521, 1523.) That night, appellant and Martin talked "[a]bout robbing some people." (RT 1475.)

Appellant admitted that the Muhammed robbery occurred essentially in the way the victim testified. (RT 1535-1536.) After committing that robbery, appellant admitted that he and Martin drove to the Holiday Inn to commit another robbery. (RT 1482-1483.) Although appellant testified that he did not intend to rob the Shields because the area was well lit and he was looking for a solitary victim (RT 1483-1484), he admitted that they parked in front of the Shield's vehicle and lifted the hood, so as not to look so suspicious. He also admitted waving to Mr. Shield. (RT 1485-1487.) Appellant rebuffed Mr. Shield's offer of assistance, and claimed that he neither demanded money nor pulled out his weapon. (RT 1487-1488.)

However, when Mr. Shield retreated, appellant assumed that he was going to call the police — that was why appellant fled. Appellant also offered a convoluted and strained explanation of how his pistol accidentally discharged. (RT 1489-1494, 1500, 1558, 1571-1580.) He further claimed that he "never meant to hurt nobody that night," but admitted that he wanted "to scare them and make some money." (RT 1497.)

Appellant also explained that the reason for committing the Steve's Market robbery was to make up for their past failures that day. (RT 1497-1498, 1590.)

E. Sufficiency Of Evidence As To "direct And Unequivocal Act" And Intent Elements Of Attempted Robbery

1. Legal Standards For Attempted Robbery

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) To constitute an attempt, there must be "'(a) the specific intent to commit a particular crime, and (b) a direct ineffectual act done towards its commission. . . . To amount to an attempt the act or acts must go further than mere *preparation*; they must be such as would ordinarily result in the crime except for the interruption.'" (*People v. Welch* (1972) 8 Cal.3d 106, 118, quoting *In re Smith* (1970) 3 Cal.3d 192, 200, quoting from 1 Witkin, Cal. Crimes (1963), § 93, p. 90.) In *People v. Buffum* (1953) 40 Cal.2d 709, 718,[8] this Court explained that, beyond the mere preparation for committing a crime, "there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature."

In *People v. Dillon* (1983) 34 Cal.3d 441, 454, this Court clarified its statement in *Buffum*:

> We did not mean by this language, however, to depart from the generally accepted definition of attempt. Our reference to an "appreciable fragment of the crime" is simply a restatement of the requirement of an overt act directed towards immediate consummation; it does not establish the novel requirement that an actual element of the offense be proved in every case.

That is, as stated in *People v. Memro* (1985) 38 Cal.3d 658: "'[a]n overt act

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8. Overruled on another ground in *People v. Morant* (1999) 20 Cal.4th 403.

need not be the ultimate step toward the consummation of the design; it is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.'" (*Id.*, at 698, citation omitted.)

Nor had this Court intended to require the prosecution to prove that the crime's commission would have been inevitable:

> Furthermore, properly understood, our reference to interruption by independent circumstances rather than the will of the offender merely clarifies the requirement that the act be unequivocal. It is obviously impossible to be certain that a person will not lose his resolve to commit the crime until he completes the last act necessary for its accomplishment. But the law of attempts would be largely without function if it could not be invoked until the trigger was pulled, the blow struck, or the money seized.

(*Id.*, at 455.) Accordingly, the *Dillon* court crafted a commonsense approach designed to distinguish inchoate crimes from "mere preparation."

> If it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude that a crime will be committed; but when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is under way, and a last-minute change of heart by the perpetrator should not be permitted to exonerate him.

(*Ibid.*)

2. Appellant's Other Robbery Offenses Were Admissible And Decisive In Proving The Attempted Robbery Of Mr. Shield

Appellant contends that the prosecution failed to present credible and solid evidence of both an unequivocal, overt act directed toward committing the robbery of Mr. Shield (AOB 34-45), and the specific intent to commit a robbery

(AOB 45-49). However, when the facts from the prosecution's case-in-chief are considered in the proper light, it becomes clear that any rational person would have believed that when Mr. Shield approached the stolen black pickup truck, he was about to become the fourth victim in appellant's robbery spree. Only his retreat prevented the robbery's consummation — but, it ultimately led to his murder.

Appellant's assertion that his acts leading up to the shooting of Mr. Shield were equivocal with regard to robbery (AOB 35-36, 41-43) is mistaken. Those actions can only be viewed as equivocal if one ignores the standard of appellate review. When viewed in the light most favorable to the prosecution, the prosecution's evidence showed that appellant arrived at the Holiday Inn with the intent of finding another robbery victim. He had already committed the Orosco/Gallegos armed robbery, which not only provided appellant with the vehicle he needed to commit additional robberies, but demonstrated that his overriding goal was to commit robbery. The fact that he brandished the pistol and used it to assault Mr. Orosco showed that appellant was prepared to use violence to commit robbery. The Muhammed robbery showed that appellant was in the midst of a robbery spree when he arrived at the Holiday Inn — a location closely related in time and distance to the Claremont bus stop. Further, the fact that appellant facilitated the Muhammed robbery by approaching his victim in friendly manner, before pulling out his pistol and demanding the victim's money, showed that his actions in making it appear that his truck was disabled were anything but equivocal with regard to appellant's intended purpose.

The prosecution evidence established beyond serious doubt that appellant's action in lifting the hood of the stolen truck was a ruse designed to cause someone in the Shield family to approach appellant for the purpose of committing a robbery. There is no basis for finding that the truck was actually

disabled. Of course, the fact that appellant had armed himself shows that his intent was neither equivocal nor benign. Thus, when appellant, by his ruse, caused Mr. Shield to walk over to appellant and Martin, the preparation stage was over. All that remained was to make the robbery demand.

Further, while it is possible that Mr. Shield retreated for reasons other than appellant's having demanded money, the reasonable inference is otherwise. Of course, appellant's actions following that retreat further bolster that reasonable inference. Not only did appellant flee the scene (demonstrating consciousness of guilt[9]), but he shot Mr. Shield. Again, the reasonable inference is that appellant believed that Mr. Shield had just witnessed an attempted robbery and would report it to the police. Appellant's actions in committing yet another armed robbery eliminates any residual doubt concerning his intentions.

Appellant's attempt to prevent consideration of his other robberies on the ground that such evidence fails to satisfy the requirements for admissibility of a "common design or plan" under Evidence Code section 1101, subdivision (b), is wholly unavailing. (See AOB 41-43.) No such objection was raised at trial. As a result, the evidentiary claim was forfeited and the evidence was admissible for all purposes. (E.g., *People v. Champion* (1995) 9 Cal.4th 879, 918 [§ 1101 claim forfeited by failure to make timely, specific objection]; *People v. Anderson* (2001) 25 Cal. 4th 543, 586 ["the rule that a challenge to the admission of evidence is not preserved for appeal unless a specific and timely objection was made below stems from long-standing statutory and common law principles"]; see also, *People v. Saunders* (1993) 5 Cal.4th 580, 590 ["No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."], quoting *United States v. Olano*

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9. The jury was so instructed, pursuant to CALJIC No. 2.52 (CT 693).

(1993) 507 U.S. 725, 731, internal quotation marks omitted.)

In any event, such an evidentiary objection would have been ill-taken. Evidence Code, section 1101, prohibits admission of character evidence in the form of "specific instances of uncharged misconduct" to prove "conduct of that person on a specified occasion." (Evid. Code, § 1101, subd. (a).) However, that provision "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People* v. *Ewoldt* (1994) 7 Cal.4th 380, 393.) As relevant here, the "prior misconduct" was admissible not only to prove that appellant "committed the charged offenses pursuant to the same design or plan [appellant] used to commit the uncharged misconduct" — it was also admissible to prove identity, motive and intent. (Evid. Code, § 1101, subd. (b); *Ewoldt, supra*, 7 Cal.4th at p. 393; *People v. Lewis* (2001) 25 Cal.4th 610, 636 ["Evidence of prior criminal acts is admissible 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . .),' but not to prove the defendant carried out the charged crimes in conformity with a character trait"].)

Evidence Code section 1101 expressly permits the use of prior acts to prove intent. As this Court made clear in *People v. Kipp* (1998) 18 Cal.4th 349, 371, the least degree of similarity between the prior and current acts is required to establish relevance on the issue of intent. "For this purpose, the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant' "probably harbor[ed] the same intent in each instance." [Citations.]"" (*Ibid.*, citing *Ewoldt, supra*, 7 Cal.4th at p. 402.) Moreover, other crimes evidence "is admissible in cases where the proof of defendant's intent is ambiguous, as when he admits the acts and denies the necessary intent because of mistake or accident." (*People v. Kelley* (1967) 66

Cal.2d 232, 242-243.[10]) Of course, that is essentially what appellant did.

Simply stated, "[o]ther crimes evidence is properly admissible when relevant to show intent." (*People v. Wilson* (1991) 227 Cal.App.3d 1210, 1216.) Where intent is at issue, the circumstances of a prior offence "could properly be considered if they tended logically, naturally and by reasonable inference to overcome appellant's defense. (*Ibid.*) The evidence of the Orosco/Gallegos and the Muhammed armed robberies supports the reasonable inferences that (1) appellant lured Mr. Shield to the stolen pickup truck with the intent of robbing him, and (2) appellant lied when he testified that his intent in parking the truck in front of the Shield family's car was merely to "case" the area for other potential victims.

People v. Wilson, supra, 227 Cal.App.3d 1210, is instructive. There, defendant offered the defense that he lacked the intent to commit burglary, claiming that "he knew the victim, that he entered her house knowing she was not home but intending only to wait to talk to her, and that he was intoxicated on alcohol and drugs." (*Id.*, at p. 1217.) As the court explained: "The fact that appellant committed a previous burglary under the same circumstances and with the same excuse tends logically, naturally and by reasonable inference to show that appellant was lying [citation] and that appellant actually entered the house with intent to steal." (*Ibid.*) The two burglaries did not share especially distinctive characteristics — residential break-ins of prior acquaintances who were at work, coupled with intoxication excuse. (*Id.* at p. 1215.) As the *Wilson* court explained, because identity was not the issue, "it does not matter whether the two burglaries shared such distinctive common marks as to warrant an inference that the same person committed both. They were sufficiently similar

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10. The issue as to whether it is proper to admit evidence of sex offenses committed with persons other than the prosecuting witness, which was left unresolved in *Kelley, supra*, 66 Cal.2d at p. 241, was resolved by the Legislature through Evidence Code section 1108.

to warrant a reasonable inference disproving appellant's defense of innocent intent." (*Id.* at p. 1218; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 128 ["The testimony that defendant had recently committed a similar crime against another stranded motorist . . . provided additional circumstantial evidence that his purpose in stopping for Horrell was to steal"].) The same is true in this case.

Indeed, evidence of appellant's other armed robberies also showed a "common design or plan," which was "admissible to establish that the defendant committed the act alleged." (*Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2; *People v. Balcom* (1994) 7 Cal.4th 414, 423.) Such evidence is relevant where the prior misconduct and the charged offense "are sufficiently similar to support the inference that they are manifestations of a common design or plan." (*Ewoldt, supra*, at p. 402.) While "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts . . . the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*Id.* at p. 403.) In short, evidence of a prior or uncharged offense need not possess unusual or distinctive characteristics to be relevant to establish the existence of a common design or plan. (*Balcom, supra*, 7 Cal.4th at pp. 424-425; *Ewoldt, supra*, 7 Cal.4th at p. 403.)

Here, the similarities between the Muhammed and Shield incidents were striking. In both, appellant chose victims in the early morning hours who were easily accessible from the freeway (insuring a quick getaway) and who were likely to be carrying cash. In both cases, appellant used a ruse of false friendliness to get close to his intended victim — indeed, he would use a ruse in committing the Dave's Market armed robbery too.[11/] If that were not enough,

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11. In *Balcom, supra*, 7 Cal.4th 414, this Court found evidence of a similar robbery/rape committed *after* the charged offense was admissible under section 1101, subdivision (b), to prove a common plan. (*Id.* at pp. 423-426.) Again, the common features were not especially distinctive: In each incident,

the fact that appellant and his accomplice stole their getaway vehicle that very morning (using the same weapon they would use throughout the robbery spree), then committed the Muhammed armed robbery, and set up the ruse in front of the Holiday Inn only minutes later, all combine to add a decisive factor that distinguishes appellant's case from all of the cases on which he attempts to rely: In none of those cases was there such a close temporal and spatial relationship between the crimes.

Appellant's reliance on *People v. Harvey* (1984) 163 Cal.App.3d 90 (AOB 47-48), ironically serves to make precisely that point. There, the court found that two garden variety armed robberies lacking any close relation in time or location could not support an inference of intent to rob. (*Id.* at p. 102 ["Tragically the occurrence of the two crimes in the same part of the city within a six-month period borders on the irrelevant. Absent a factual record, it is speculative to assume that the occurrence of the two crimes in the same area of town makes them unique."].) In contrast, this Court in *People v. Lewis* (2001) 25 Cal.4th 610, 635-637, found evidence of a prior robbery admissible to prove intent where the two incidents occurred within several hours of each other. Again, while the two crimes were "not particularly distinctive, they are sufficiently similar to support an inference that defendant harbored the same intent in both instances, that is, to forcibly obtain cash from the victim." (*Id.* at p. 637.)

Appellant's other authorities are just as easily distinguished. This is not a case like *People v. Marshall* (1997) 15 Cal.4th 1 (AOB 46), in which the

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defendant went to an apartment complex in the early morning, sought out a lone woman unknown to him, gained control over her at gunpoint, initially professed only an intention to rob the victim, forcibly removed the victim's clothing and committed a single act of intercourse, stole the victim's automatic teller card, obtained her personal identification number, and escaped in the victim's automobile. (*Id.* at pp. 424.)

prosecution sought to prove intent to rob based solely on a speculative inference from a prior crime. In *Marshall*, the prosecution ascribed a dubious and atypical motive to a prior crime, and argued that the defendant was similarly motivated when he committed the later offense. (*Id.* at pp. 34-35.) Here, appellant's clear criminal intent and motive in the prior robberies was neither speculative nor extraordinary. Similarly, in *People v. Thompson* (1980) 27 Cal.3d 303 (AOB 46-47), the prosecution sought to prove intent to rob as a special circumstance to murder based on an uncharged, prior robbery. However, the "only similarities were that in both instances the actor demanded an automobile and left the scene with a set of his victim's car keys." (*Id.* at p. 320.) The inference of similar intents to rob was rendered untenable because the prior conduct did not support the inference that defendant had the requisite intent — the intent to permanently deprive the victim of the car. (*Id.* at pp. 320-321.) Again, in contrast, appellant's prior robberies decisively supported the necessary intent.

Similarly, when viewed as evidence of a common design or plan, the other offense is admissible to establish that the defendant committed the act alleged. Where the common features indicate "the existence of a plan rather than a series of similar spontaneous acts . . . the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*Ewoldt, supra*, 7 Cal.4th at p. 403.) Obviously, here, when placed in the context of appellant's prior (and subsequent) armed robberies, his actions at the Holiday Inn point strongly to the existence of a plan, rather than similar spontaneous acts.

Appellant's reliance on *People v. Johnson* (1993) 6 Cal.4th 1 (AOB 44), is misplaced. There, the evidence concerning a double murder showed the killings were committed in the course of a burglary; however, the evidence that the defendant attempted to rape both victims was found insufficient. (*Id.* at p.

39 ["But other than the inference that defendant may have raped victim *Castro*, the only evidence of his rape or attempted rape of victim *Holmes* was her partly unclothed body."].) Again, the evidence concerning the prior rape was ambiguous, and there were no prior (or subsequent) rapes to substantiate the inference of a common plan. Accordingly, *Johnson* has no bearing on this appeal.

Nor does *People v. Raley* (1992) 2 Cal.4th 870 (AOB 44-45), support appellant's argument. In that case, there was no evidence that the defendant had committed the charged sexual offense against the other victim. (*Id.* at pp. 889-891 ["there is no evidence of the particular nature of the sexual assault on Jeanine, apart from an inference that because defendant committed a forcible oral copulation against Laurie, he may have attempted to do the same against her companion"].) Again, in the prior and subsequent armed robberies, appellant's criminal intent and conduct were clear; it required no speculation to infer that he attempted to rob Mr. Shields, as he had with regard to his other four victims.

Thus, based on the reasonable inferences from appellant's other armed robberies, the evidence of his actions at the Holiday Inn strongly support findings that he intended to rob Mr. Shield and that he had taken an overt, non-equivocal act towards committing that crime. Appellant's conduct is analogous to a person who rowed out to one side of a lake, dropped his baited hook into the water and caught a fish; rowed to the other side and did the same; and then rowed to the middle of the lake and baited his hook — but suddenly rowed home when a rainstorm hit. When the storm passed, the fisherman went out to a fourth location on the lake, and resumed fishing. If appellant's argument is correct, then the fisherman's conduct at the third location was too equivocal to support a reasonable inference as to his intentions regarding the fish below his boat. Of course, appellant's intent to rob was even clearer, since he had focused

on a particular victim, Mr. Shield, who was in the very act of taking the bait, when he suddenly attempted to flee the would-be robbers.

It is only by appellant's attempted reliance on Evidence Code, section 1101, to improperly prevent consideration of appellant's other offenses, that he can hope to present the underlying facts in such an artificial and attenuated posture that appellant's actions at the Holiday Inn might appear equivocal. Accordingly, his reliance on *People v. Nguyen* (2000) 24 Cal.4th 756, 761 (AOB 36-37), is misplaced. In *Nguyen*, this Court held that for a completed robbery to take place, the robber must take property from the victim — taking property from a business in the mere presence of a visitor did not suffice to prove the victim himself was robbed. (*Id.* at pp. 761-765.) As such, *Nguyen* does not hold — or even intimate — that an attempted robbery cannot occur until personal property is demanded from a victim. The court has rejected that position. (*Memro, supra*, 38 Cal.3d at p. 698 ["'[a]n overt act need not be the ultimate step toward the consummation of the design; it is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.'"], citation omitted.) Moreover, once appellant's actions in connection with the other robbery-spree offenses are factored into the equation, it becomes clear that his ruse was anything but equivocal.[12/]

Thus, in *People v. Birden* (1986) 179 Cal.App.3d 1020, the court rejected the argument that the robbery attempt remained incomplete because the defendant never made any robbery demand of one of his victims, who was in the kitchen when he forced his way past someone else to get into the apartment. The *Birden* court explained that the defendant's confession and surrounding

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12. For the same reasons, appellant's attempted reliance on various lower federal court opinions as to this issue are distinguishable — none involves an attempted robbery in the midst of an ongoing robbery spree. (See AOB 37.) In any event, this Court is not bound by the decisions of the lower federal courts. (E.g., *People v. Cleveland* (2001) 25 Cal.4th 466, 480.)

circumstances showed that defendant had the intent to rob the occupants of the apartment.

> Unlike the case in many attempted crimes, there is no question here as to what the defendant intended to do. That the defendant intended to rob Elizabeth George and all those present at the card game is apparent from his confession. Thus, this is not a case of having to surmise exactly what crime the defendant intended to commit, but rather simply a question of whether the defendant had taken a sufficient step along the path of that crime. We conclude that he had. The defendant's brief but forcible entry into the victim's apartment is an overt and unequivocal act towards the robbery he intended to commit. There is no way the assault on Beebe Brewer could be mistaken for a permissive entry. This act goes beyond merely preparing for the crime, and clearly indicates that the offense was already in progress. The defendant, therefore, is not entitled to the reversal of his attempted robbery conviction.

(*Id.* at p. 1026.)

Similarly, in *People v. Vizcarra* (1980) 110 Cal.App.3d 858, the defendant went to a liquor store at night wearing a poncho and carrying a rifle. He was standing on a walkway in front of the store door when a customer approached the store and saw the butt of the rifle protruding from the poncho. The defendant returned to his car and later drove past the store again. The court stated: "Approaching the liquor store with a rifle and attempting to hide on the pathway immediately adjacent to the liquor store when observed by a customer, is in the opinion of this court a sufficient direct act toward the accomplishment of the robbery." (*Id.* at p. 862.) The facts in appellant's case cannot be meaningfully distinguished from either *Birden* or *Vizcarra*.

3. Summary: Evidence At The Close Of The Prosecution's Case-In-Chief

In addition to the evidence presented concerning the Shield incident at the Holiday Inn, the prosecution's case-in-chief included the evidence concerning the Orosco/Gallegos robberies, the Muhammed robbery, and the Steve's Market attempted robbery. It also included the evidence showing that the pickup truck was in working order and that the murder weapon had nothing like a "hair trigger." As shown above, even without appellant's admission that he was engaged in a planned robbery spree, there was sufficient evidence that he intended to rob Mr. Shield and that he took a direct and unequivocal act towards committing that crime. The other robberies and attempt showed that appellant parked his stolen getaway car near the Shield family with the intent of committing robbery. Appellant's action in arming himself and setting up the disabled car ruse was a direct and unequivocal act towards robbery. In addition, Mr. Shield's attempt to flee supports the inference that appellant had demanded money; appellant's well-aimed, deliberate gunshot supports the reasonable inference that appellant intended to eliminate Mr. Shield as a witness and effectuate his escape. Appellant's flight supports an inference of consciousness of guilt. His later robbery attempt at Steve's Market, where he also employed a ruse, further supports the reasonable inference of a prior intent to rob Mr. Shield.

Accordingly, the trial court did not err in denying appellant's motion for acquittal under section 1118.1. Based on the whole record of evidence presented to the trier of fact in the prosecution's case-in-chief (including the reasonable inferences drawn therefrom), rather than on "isolated bits of evidence," (*Cuevas, supra*, 12 Cal.4th at p. 261), there was strong — if not conclusive — evidence of attempted armed robbery. (See *Mendoza, supra*, 24 Cal.4th at p. 175; *Trevino, supra*, 39 Cal.3d at p. 695.) The mere fact that

appellant can also conjure up a scenario that might justify an inference of innocence does not warrant reversal. (*Westcott, supra*, 99 Cal.App.2d at p. 714; see also *Rodriguez, supra*, 20 Cal.4th at p. 11 ["[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment"], citation and internal quotation marks omitted.)

4. Evidence At The Close Of Trial

Based on the foregoing, it is clear that the evidence was sufficient to support a guilty verdict on the attempted robbery count. However, the prosecution's case was strengthened by appellant's own testimony. As detailed above, appellant testified on his own behalf and admitted that on the night before the robbery spree began, he expressed his approval of the murder weapon as a tool for committing robberies, and that he assumed it was loaded. (RT 1475, 1521, 1523.) He also admitted that the Muhammed robbery occurred essentially in the way the victim testified. (RT 1535-1536.) After committing that robbery, appellant admitted that he and Martin drove to the Holiday Inn to commit another robbery. (RT 1482-1483.) Although appellant testified that he did not intend to rob the Shields because the area was well lit and he was looking for a solitary victim (RT 1483-1484), he admitted that they parked near the Shields' vehicle and lifted the hood, so as not to look so suspicious. He also admitted waving to Mr. Shield, but claimed he rebuffed the latter's offer of assistance. Appellant also claimed that he neither demanded money nor pulled out his weapon. (RT 1485-1488.)

Appellant also admitted that when Mr. Shield retreated, appellant assumed that he was going to call the police — that was why appellant fled. Appellant also offered a convoluted and dubious explanation of how his pistol accidentally discharged. (RT 1489-1494, 1500, 1558, 1571-1580.) In so doing,

he implicitly admitted that he had armed himself before getting out of the truck and waving to Mr. Shield. Appellant further claimed that he "never meant to hurt nobody that night," but admitted that he wanted "to scare them and make some money." (RT 1497.) Finally, appellant admitted that he decided to rob Steve's Market to make up for the past failures that day. (RT 1497-1498, 1590.)

Thus, appellant's testimony adds strong evidence of an intent to rob Mr. Shield. It also supports the reasonable inference that appellant shot his victim in the course of fleeing the scene — that is, the attempted robbery had progressed way past the preparation stage. Appellant, however, argues that the jury was required either to accept or reject all of appellant's testimony. He claims that if the jury credited appellant's admissions about intending to commit the other robberies, it also had to accept appellant's self-serving and dubious disclaimer of any intent to rob Mr. Shield. (AOB 51-52.) The settled law is otherwise. As this Court explained in *People v. Silva* (2001) 25 Cal.4th 345: "The jury was not required to accept this version of events. A rational trier of fact could disbelieve *those portions* of defendant's statements that were obviously self-serving . . . ." (*Id.* at p. 369.) Appellant attempts to distinguish *Silva* on the grounds that appellant's version of the facts was neither implausible nor inconsistent with the prosecution's case. (ABO 52, fn. 24.) The salient point, however, is that appellant's version tracked the prosecution's to the extent eyewitness testimony made contradiction implausible. Appellant's attempt to tack on to that version his own implausible and self-serving subjective state of mind is hardly a mark of meaningful distinction.

In short, it was perfectly reasonable, and consistent with California law, for the jury to reject the implausible aspects of appellant's testimony and accept the plausible ones. As the jurors were instructed, pursuant to CALJIC No. 2.21.2 (CT 688), they had the option of rejecting all of appellant's testimony if they

found it false in one material part. However, they were not required to do so, if all the evidence caused them to believe the probability of truth favored appellant's testimony "in other particulars." (*People v. Reyes* (1987) 195 Cal.App.3d 957, 965 [Jurors who believe a witness wilfully lied in one part of his testimony, "may nevertheless believe the remainder of the witness" testimony if they find the probability of truth favors his testimony in other particulars"].)

Thus, in *People v. Koontz* (2002) 27 Cal.4th 1041, the defendant admitted committing the fatal shooting, but testified to a scenario that excluded robbery as a motive. (*Id.* at p. 1060.) This Court squarely rejected the argument that the jury was required to accept the defendant's version in its entirety. Rather, the jury could reject key aspects of that version, based on the testimony of a prosecution witness:

> [I]n the present case, McLean Currie testified [for the prosecution] that defendant demanded Martinez's car keys at gunpoint, Martinez refused, and defendant then shot him, after which he again demanded the keys and proceeded to search for them. Defendant asserts the shooting grew out of a dispute between the two men concerning the heat in their apartment and that any theft was incidental to the shooting, *but the jury was not required to credit defendant's version of the event.* From the evidence presented, the jury reasonably could have inferred that the dispute between defendant and Martinez concerned defendant's insistence that Martinez surrender his car, and that defendant shot Martinez in order to compel him to accede to his demands. In other words, the evidence supports an inference that defendant entertained the intent to steal before he committed an act of force. That defendant did not actually succeed in finding the keys until after the shooting does not dictate a contrary result. The jury's

verdicts on the robbery and murder charges and its true finding on the robbery-murder special-circumstance allegation find ample support in the evidence.

(*Id.* at p. 1080, italics added.)

Also instructive is *People v. Yeoman, supra*, 31 Cal.4th 93. There, the defendant unsuccessfully challenged the sufficiency of evidence supporting the robbery-murder special circumstance finding. In *Yeoman*, this Court rejected the argument that the trier of fact was required to accept defense testimony as to a exculpatory mental state in the face of evidence that supported reasonable contrary inferences:

> Here, defendant took valuable property from the victim and had no other apparent reason for killing her. The defense attempted to supply another reason with Dr. Rosenthal's opinion testimony that the killing was an irrational act caused by defendant's use of methamphetamine. But the jury was not required to accept the witness's opinion. In any event, the defense theory that defendant killed irrationally and only later decided to steal was contradicted by the evidence that he intentionally selected a vulnerable, well-dressed victim, took valuable property and immediately afterwards destroyed evidence linking himself to the crime. The testimony that defendant had recently committed a similar crime against another stranded motorist (Ford) provided additional circumstantial evidence that his purpose in stopping for Horrell was to steal.

(*Id.* at pp. 127-128; see also *People v. Arias* (1996) 13 Cal.4th 92, 141 ["I]n light of the contrast between eyewitness accounts which suggested a deliberate action, and defendant's claim of mere reflex, a jury could reasonably infer that the statements were self-serving falsehoods intended to cast his conduct in the least culpable light. [Citation.] That defendant also expressed remorse . . . does

not negate such an inference, since the jury could conclude that such expressions were also self-serving and insincere."].)

Appellant's argument fails because the constitutional standard is premised on what a *rational* trier of fact would find after viewing the entire record in the light most favorable to the prosecution. (*Jackson, supra*, 443 U.S. at pp. 317-320; *Rodriguez, supra*, 20 Cal.4th at p. 11.) Therefore, the question of the extent to which the trier of fact must accept a witness' testimony depends on whether there are reasonable grounds for accepting some portions, while rejecting others. As this Court made clear in *Silva* and *Koontz*, a reasonable inference that a defendant fashioned portions of his testimony in a self-serving and dubious manner provides a rational basis for disregarding those portions. Such is the case here.

Of course, "[t]he standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*Rodriguez, supra*, 20 Cal.4th at p. 11.) However, appellant essentially argues that because the circumstantial evidence of attempted robbery is susceptible of two interpretations, one of which suggests guilt and the other innocence, this Court must find the evidence insufficient. The jury's verdict foreclosed that argument. On appeal, the rule is otherwise: "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Ibid.*, citation and internal quotation marks omitted.) Here, the circumstances justified a finding of attempted robbery. The fact that those circumstances were arguably consistent with appellant's farfetched and self-serving testimony does not warrant reversal.

5. There Was Strong Evidence Of Premeditation And Deliberation

Appellant asserts there was insufficient evidence to support a first degree murder conviction based on premeditation and deliberation. He also asserts that the prosecution tacitly conceded the lack of evidence to support anything other than felony murder. (AOB 59-63.) Both assertions are wrong. Not only did the prosecution repeatedly argue that the evidence supported a guilty verdict on both theories (RT 1656-1657, 1675, 1686), but the evidence supported a reasonable inference of premeditation and deliberation: Appellant armed himself to enforce his robbery demand and effectuate his escape. Then, believing that Mr. Shield was about to call the police, appellant aimed and fired at his victim to prevent him from doing so.

The legal standards are well-established:

> "A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill." [Citation.] "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly....'[Citations.]" [Citation.]

(*Koontz, supra*, 27 Cal.4th at p. 1080.) In *People v. Anderson* (1968) 70 Cal.2d 15, this Court created "a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations." (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) However, "[i]t did not refashion the elements of first degree murder or alter the substantive law of murder in any way." (*Ibid.*;

Koontz, supra, at p. 1081 ["[T]he *Anderson* guidelines are descriptive, not normative."].)

The *Anderson* court identified three factors commonly present in cases of premeditated murder:

> "(1) [F]acts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing — what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." [Citation.] Defendant argues the *Anderson* factors are lacking in the present case.

(*Koontz, supra*, 27 Cal.4th at p. 1081, quoting *Anderson, supra,* 70 Cal.2d at pp. 26-27, italics in original.)

Again, "[t]he *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*Koontz, supra*, at p. 1081, citation omitted.) Of course, in determining the sufficiency of the evidence proving premeditation and deliberation, this Court reviews "the entire record in the light most favorable to

the People to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Marks* (2003) 31 Cal.4th 197, 230.)

The record supports a finding of *Anderson*'s first criterion — planning activity. On the night before the robbery spree began, appellant admitted that he considered the murder weapon to be a "proper" gun for robbing people. (RT 1521.) Appellant assumed it was loaded. (RT 1523.) Also, in committing the Orosco/Gallegos robberies, appellant struck Mr. Orosco on the side of the face with the weapon. (RT 1040-1041.) Those facts, combined with the fact that appellant concealed the loaded handgun on his person before he set up the ruse and confronted Mr. Shield, supports the reasonable inference "that he planned a violent encounter" with his victim. (See, e.g., *Marks, supra*, 31 Cal.4th at p. 230; *People v. Steele* (2002) 27 Cal.4th 1230, 1250 ["As to planning, the jury could infer that defendant carried the fatal knife into the victim's home in his pocket, which makes it 'reasonable to infer that he considered the possibility of homicide from the outset.'"], citation omitted; *People v. Adcox* (1988) 47 Cal.3d 207, 240 [bringing loaded gun to victims location and using it to kill unarmed victim reasonably suggests that defendant considered possibility of murder in advance]; *People v. Miranda* (1987) 44 Cal.3d 57, 87 [same]; *People v. Wright* (1985) 39 Cal.3d 576, 593, fn. 5 [obtaining loaded weapon in advance of a killing supports inference of planning activity]; *People v. Alcala* (1984) 36 Cal.4th 604, 626 [reasonable inference that homicide was contemplated from outset where defendant brought along deadly weapon which was employed]; *People v. Williams* (1995) 40 Cal.App.4th 446, 455.)

As this Court explained in *People v. Morris* (1988) 46 Cal.3d 1, 22-23:

> As to prior planning activity, the evidence — viewed in the light most favorable to the judgment — showed that defendant brought a

> .38-caliber revolver to a public bathhouse during the early morning hours, parked his car near by, and shot the victim twice from close range inside an enclosed restroom with no witnesses present. After the shooting, defendant ran a short distance to his car and made a successful escape. "In view of the fact that a killing in fact ensued, the foregoing evidence is sufficient to support a reasonable inference that defendant went to the bathhouse with either a preconceived design to kill, or fully prepared to do so. Defendant's possession of a weapon in advance of the killing, and his rapid escape to a waiting car moments afterwards, amply support an inference of planning activity." [Citation.]

(*Id.* at pp. 2-23, overruled on other points in *In re Sassounian* (1995) 9 Cal.4th 535, 543-545, fns. 5 & 6.)

That is, for *Anderson* purposes, planning activity is not limited to a preconceived design to kill, but includes the defendant's being fully prepared to do so. Appellant demonstrated his intent to use the "proper" and loaded handgun to enforce his robbery demands. The only difference between this case and *Morris* is that, instead of shooting his victim in a room where there were no witnesses, appellant shot his victim to eliminate the primary witness and to effect his escape — distinctions that make the case for premeditation and deliberation better.

Evidence of *Anderson*'s second criterion — motive — is even stronger. The evidence all but compelled the inference that appellant's motive was to effect his escape by preventing Mr. Shield from calling the police and identifying his assailants. Not only does the timing of appellant's gunshot — just after the victim hastily retreated from the robbery attempt and just before appellant fled the scene — support that inference, but appellant even admitted that he thought at the time that Mr. Shield was on his way to calling the police.

(RT 1489.) *People v. Thomas, supra,* 2 Cal.4th at p. 489, is instructive. There, this Court held that a "defendant's need to eliminate a witness to his crimes" provided the jury with a "'plausible motive'" for murder.[13] (*Id.* at pp. 518-519, citing *People v. Lucero* (1988) 44 Cal.3d 1006, 1019, and *Alcala, supra*, 36 Cal.3d at p. 627; see also *People v. Bloom* (1989) 48 Cal.3d 1194, 1210; *People v. Brito* (1991) 323 Cal.App.3d 316, 323 ["there is evidence Brito was motivated to kill the victim because he was fleeing from and refusing to comply with his demands for money and gold"].)

The manner of Mr. Shield's killing — the third *Anderson* criterion — also supports an inference of premeditation and deliberation. Immediately after Mr. Shield retreated from his assailants, appellant and Martin put the hood down and went back to the truck, opened the doors and got in. Appellant was in the passenger's seat with the door open. Mr. Shield had taken only about five steps away from the truck, when appellant fired a fatal gunshot at the grandfather.[14] (RT 1154-1156, 1160.) At the time of the gunshot, Mr. Shield had his hands in his pockets and the right side of his body was turned toward the truck's passenger side. (RT 1155.) The bullet had passed through his forearm and stomach, causing him to bleed to death. (RT 1307-1309; see also 1173-1175.) The getaway vehicle sped off with its tires squealing. (RT 1156-1157.)

Again, appellant testified that at the time his victim hurried away, appellant formed the thought that Mr. Shield was going to call the police. (RT 1489.) If appellant could form that thought, he obviously had time to "reflect" for

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13. The fact that the prosecution did not specify witness-elimination as a motive, but referred more generally to an intentional slaying motivated by Mr. Shield's refusal to part with any money (RT 1686), did not preclude the jury from making that reasonable inference. (*Thomas, supra*, 2 Cal.4th at pp. 518-519.)

14. Appellant estimated that Mr. Shield was 15 feet away at the time. (RT 1581.)

purposes of deliberation. (See, e.g., *People v. Perez* (1992) 2 Cal.4th 1117, 1127 ["We have previously observed that premeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'"], citation omitted.)

Thus, the evidence leads to the strong inference that appellant shot his unarmed, retreating victim pursuant to a plan to shoot noncompliant victims. (*Brito, supra*, 323 Cal.App.3d at p. 323 ["the manner of the shooting can support an inference of preconceived design since Brito shot his unarmed victim in the back as he was fleeing, which could suggest he had decided ahead of time he would shoot if the victim did not comply with his demands."].) Appellant's argument that evidence of premeditation is lacking because he did not shoot Mr. Shield in the head or chest, but rather in the arm (AOB 65), does not bear scrutiny. Far from showing a rash or spontaneous reaction, the more reasonable inference, based on the facts that Mr. Shield's hand was in his pocket and his right side was turned toward appellant, and the handgun had a very heavy trigger pull, was that the gunshot was well-aimed and meant to kill. Appellant's testimony as to an accidental discharge verged on the ludicrous. In sum, the finding of first degree, premeditated murder was well-supported by the evidence.

II.

THE PROSECUTOR COMMITTED NO MISCONDUCT IN EITHER OF THE TWO CHALLENGED INSTANCES; IN ANY EVENT, THE SECOND WAS FORFEITED BY APPELLANT'S FAILURE TO OBJECT, AND NO PREJUDICE RESULTED FROM THE FIRST; AS THE COURT SUSTAINED A DEFENSE OBJECTION AND GAVE AN EFFECTIVE ADMONISHMENT, THERE WAS NO PREJUDICE

Appellant contends the prosecutor committed misconduct on two occasions during his cross-examination of appellant. He argues that the prosecutor violated state standards and that appellant suffered various constitutional rights violations as a result. (AOB 69-82.) In fact, there was no misconduct, as the trial court expressly ruled in rejecting appellant's new trial motion. (RT 2189-2190.) Moreover, as to the first challenged question, the court sustained a defense objection (on Evid. Code, § 352 grounds), struck the question and admonished the jury to disregard it. There is no basis for contending the admonition failed to cure any potential prejudice. In addition, appellant forfeited his challenge to the second question by failing to object and request an admonition. In any event, the prosecutor's comment was innocuous by any standard.

A. The Proceedings Below

During direct examination, appellant testified that he "felt very bad about" killing Mr. Shield. He also tendered his sympathy to his victim's daughter, Pamela Coryell, and said he was "very sorry about it." (RT 1496.) On cross-examination, the prosecutor attempted to impeach appellant's testimony as to remorse, asking why appellant was "laughing and carrying on" when they were outside the jury's presence. (RT 1502.) Appellant objected and the court immediately sustained the objection. (*Ibid.*)

Then, at sidebar, appellant moved for a mistrial for "misconduct." The prosecutor explained that he and others had witnessed appellant and co-defendant Martin "laughing and carrying on" outside the jury's presence — a fact the prosecutor believed tended to show appellant's professed remorse was feigned. The court noted that, generally, evidence of a defendant's non-testifying demeanor during trial was not admissible. However, in this case, appellant had put his current mental state as to remorse directly at issue. The court wondered aloud how the prosecution could challenge or refute such testimony, if such cross-examination were impermissible. Defense counsel asserted that any laughter was merely to relieve tension, and argued that the probative value on that score was outweighed by potential prejudice. The prosecutor replied that appellant's conduct went far beyond the release of tension, but that if the court felt otherwise, an admonition would suffice for Evidence Code 352 purposes. (RT 1503-1506.)

The court ruled that it would strike the prosecutor's question and any answer, and admonish the jury to disregard them. In addition, the court noted for the record that "in terms of what may have precipitated the question, aside from what has happened outside the presence of the jury, on numerous occasions during the jury selection process both defendants were laughing and unsuccessfully controlling their humor." (RT 1507.) As the court explained, the prosecutor had factual support for his proposed line of impeachment. Not only did such "moments of laughter" occur outside the jury's presence, but "even in the presence of the jury there were moments of inappropriate laughter by the defendants." (*Ibid.*) Neither defense counsel offered any reason why an admonition would be ineffectual. The court instructed the jury: "[Y]ou are to disregard the question and answer. You are not to consider the question and answer nor permit it to let it enter into you deliberation in any fashion." (RT 1508.)

Additionally, on direct examination, appellant had testified that he and Martin initially intended to return the gun after the Holiday Inn incident, but changed their minds because they felt they had not accomplished enough with it. (RT 1497.) Towards the end of cross-examination, the prosecutor questioned appellant about the decision to attempt another armed robbery — specifically, what did appellant say to Martin after deciding to venture another robbery? Appellant replied:

> I said . . . let's get this gun back. But we weren't too successful. Like I said before. So we decided to probably rob this place, get one more shot, then just —

(RT 1594.) The prosecutor interrupted, "No pun intended?" When the prosecutor repeated his remark, appellant's counsel stated: "Your honor, I think that counsel has made his point." The court ordered: "Next question, counsel." (*Ibid.*)

Appellant raised this misconduct allegation in his new trial motion. (CT 865-868.) In rejecting the argument, the court found that the prosecutor's questioning was permissible impeachment as to the genuineness of appellant's professed remorse. Moreover, it was non-prejudicial in light of the court's evidentiary ruling and admonition. Finally, based on the court's own contemporaneous observations of appellant's "actions and expressions of attitude," it emphasized that the prosecutor had a "good faith basis" for engaging in the challenged line of questioning. (RT 2189-2191.)

B. The Governing Law

Improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Earp* (1999) 20 Cal.4th 826, 858, citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642; cf. *People v. Hill* (1998) 17 Cal.4th 800, 819.) Conduct by a prosecutor that does not render a

criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Earp, supra*, 20 Cal.4th at p. 858, citing *People v. Espinoza* (1992) 3 Cal.4th 806, 820; *People v. Price* (1991) 1 Cal.4th 324, 447.) "'To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.'" (*Ibid.*, citation omitted.) Generally, an objection alone is insufficient to preserve a misconduct claim; an admonition must also be requested. (E.g., *People v. Montiel* (1993) 5 Cal.4th 877, 914.)

C. The Questioning As To Demeanor Was Permissible Impeachment

As the trial court found in denying appellant's new trial motion, the prosecutor's questioning as to demeanor during the trial was permissible impeachment concerning appellant's testimony as to contemporary feelings of remorse. This was not a case in which the sole issue was remorse at the time of the crime — on direct examination, appellant testified as to his contemporaneous feelings of remorse. (RT 1496.) Nor was this is a case in which the challenged line of questioning implicated appellant's constitutional right to remain silent — appellant testified and placed his current mental state at issue. Nor can appellant claim that the prosecutor acted in bad faith — the trial court made specific findings based on its own observations of appellant's behaving callously and inappropriately outside the jury's presence. (RT 1507-1508, 2190.) Accordingly, none of appellant's authorities are remotely on point.

While this Court has ruled that a nontestifying defendant's courtroom demeanor is generally inadmissible (*People v. Heishman* (1988) 45 Cal.3d 147, 197), it has not addressed the situation in which a defendant's own testimony makes his demeanor relevant. The *Heishman* court identified three rationales

in support of its holding, none of which applies in appellant's situation:

> "In criminal trials of guilt, prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character."

(*People v. Boyette* (2003) 29 Cal.4th 381, 434, quoting *Heishman, supra*, at p. 197; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 ["Comment on a defendant's demeanor as a witness is clearly proper and comment on courtroom demeanor may be proper under some circumstances."].) Here, the evidence was offered for the legitimate purpose of impeaching appellant's credibility; appellant did testify and put his current mental state at issue;[15] and the questioning was not designed to support an inference of guilt from bad character.

Nor is *People v. Wagner* (1975) 13 Cal.3d 612 (AOB 74-75), availing to appellant. In *Wagner*, this Court made it clear that "[w]hen a defendant testifies in his own behalf, his character *as a witness* may be impeached in the same manner as any other witness." (*Id.* at p. 618, italics in original.) Of course, that is precisely what the prosecutor attempted to do in appellant's case. The vice in *Wagner* was that the prosecutor exceeded the scope of permissible impeachment as to the defendant's prior criminal acts — "although he could ask simple questions designed to elicit the name and nature of the crime and the

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15. In *Boyette, supra*, 29 Cal.4th at p. 434, this Court found non-prejudicial misconduct based on the prosecutor's reference to the defendant's pleasant courtroom demeanor; however, in that case, the defendant did not offer testimony as to his remorsefulness.

place and date of conviction, he could not inquire into its details." (*Ibid.*) Nothing of the sort occurred in appellant's trial.

It would be hard to imagine a more distinguishable case than *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978 (AOB 75-76). In that case, there was no evidence that the defendant's laughing ever occurred (*Schuler, supra*, at p. 980-981); here, the prosecutor made an offer of proof as to the inappropriate conduct, and the trial court's own observations confirmed its truth. (RT 1503-1506, 2189-2191) There, the defendant neither objected nor requested a curative instruction (*Schuler, supra*, at p. 980); here, the trial court granted the objection, struck the testimony and gave a curative admonishment. (RT 1502, 1508.) Moreover, as this Court explained in distinguishing *Schuler*: "That decision was expressly premised on the reasoning that prosecutorial comment impinges on the defendant's Fifth Amendment right not to testify [citation] and thus it can have no application to a case such as this where the defendant has testified and put his credibility in issue." (*Edelbacher, supra*, 47 Cal.3d at p. 1031.)

Thus, as the prosecutor's questioning was in good faith, both legally and factually, no misconduct occurred. (See, e.g., *Hill, supra*, 17 Cal.4th at p. 819 [misconduct is premised on the use of deceptive or reprehensible means to persuade].) Certainly, it cannot be said that the prosecution infected the trial with such unfairness as to make the resulting conviction a denial of due process. (See, e.g., *Earp, supra*, 20 Cal.4th at p. 858; *Donnelly, supra*, 416 U.S. at p. 642.)

Finally, even if the prosecutor's questioning might somehow be deemed improper, appellant offers no convincing reason why the court's admonition would be inadequate. (AOB 79-82.) This Court has repeatedly rejected similar arguments, whether phrased in terms of letting cats out of bags or unringing bells:

> We do not agree that it is not possible, through instructions, to "unring the bell" heard earlier. Rather, we assume the jury was capable of following the court's instruction here to disregard evidence of any uncharged crime that the People fail to prove beyond a reasonable doubt.

(*People v. Coddington* (2000) 23 Cal.4th 529, 631, overruled on a different point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn. 13.)

> As this Court held in materially indistinguishable circumstances:
>
> By sustaining defense counsel's objection, the court immediately signaled that the prosecutor's remarks were improper. The incident occurred at the outset of trial proceedings, long before deliberations began. Just before the jury retired, it received instructions, among others, to disregard "evidence" that had been "stricken," and to avoid speculation about gaps caused by successful objections.[16] For these reasons, any omission by counsel does not undermine confidence in the penalty judgment. [Citations.] Hence, there is no basis for reversal."].)

(*Montiel, supra*, 5 Cal.4th at p. 915.)

D. Appellant Forfeited Any Claim As To The Prosecution's Innocuous "No Pun Intended" Remark

As shown above, appellant's second misconduct allegation was waived by his failure to object and request a curative admonition. (E.g., *People v. Valdez* (2004) 32 Cal.4th 73, 123; *People v. Cunningham* (2001) 25 Cal.4th 926, 1001.) Moreover, in context, the remark can only be considered fleeting and innocuous — and, therefore, non-prejudicial. Finally, respondent strongly disputes appellant's characterization of the prosecutor as engaging in "cheap

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16. Appellant's jury was so instructed, pursuant to CALJIC No. 1.02 (CT 673).

tricks." (AOB 78.) The trial court found that appellant "received one of the most fair trials from any prosecutor in this country that I have ever seen." (RT 2155). A fair reading of the record fully supports that finding.

III.

THE COURT PROPERLY INSTRUCTED THE JURY ON CONSCIOUSNESS OF GUILT

Appellant raises a welter of claims arising out of the trial court's decision to instruct the jury pursuant to CALJIC Nos. 2.03, 2.06, and 2.53, which permitted the jurors to infer consciousness of guilt on appellant's behalf based on his making false statements concerning the crime, concealing evidence, and fleeing the crime scenes. More specifically, appellant claims: (1) there was insufficient evidence to support the giving of CALJIC No. 2.06 and that the instruction violated various constitutional rights, including due process and equal protection, by removing an important factual issue from the jury; (2) the three challenged instructions were duplicative and, therefore, somehow violative of appellant's due process and equal protection rights; (3) the challenged instructions amounted to unfairly "argumentative," pinpoint instructions that violated his rights to due process and a fair trial; and (4) the challenged instructions permitted the jury to draw "irrational inferences" against appellant in violation of his rights to due process and to a fair trial. (AOB 83-104.)

In fact, the instructions were constitutional and fully supported by the record. Following his arrest, appellant gave a false name to the police. (RT 1452-1453.) Accordingly, CALJIC No. 2.03 was justified.[17/] Not only did

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17. As given by the court, the instruction provided:

> If you find that before this trial a defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as

appellant refuse to take part in a lineup (RT 1276-1278), but there was also evidence that appellant and/or Martin hid the murder weapon in an alley during their attempted escape from the police following the Steve's Market incident. Therefore, CALJIC No. 2.06 was doubly justified.[18/] Appellant fled from the scenes of each of the underlying crimes — the Orosco/Gallegos armed robbery (RT 1046, 1063-1064, 1068, 1071, 1090, 1092), the Muhammed armed robbery (RT 1105-1106), the Shield attempted robbery (RT 1152-1156, 1183-1184, 1345), and the Steve's Market attempted robbery (RT 1230-1232, 1266-1267, 1272, 1380-1382, 1391), thereby justifying CALJIC No. 2.52.[19/] This Court has consistently and repeatedly rejected appellant's related constitutional challenges

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> a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(CT 679; RT 1772.)

18. As given by the court, the instruction provided:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by concealing evidence or refusing to stand in a lineup, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for your determination.

(CT 680; RT 1772-1773.)

19. As given by the court, the instruction provided:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(CT 693; RT 1779.)

to these instructions. Moreover, appellant failed to object on constitutional grounds to any of the three challenged instructions. He merely interposed an unspecified objection to the giving of CALJIC No. 2.06. Accordingly, he forfeited his instructional claims, save the claim that there was insufficient evidence to support CALJIC No. 2.06.

A. The Relevant Facts And Proceedings Below

The testimony concerning appellant's flights from each of the underlying incidents was clear and uncontroverted. Immediately after the Orosco/Gallegos robberies, Martin started up the stolen pickup truck and appellant jumped into the truck's bed, as Martin drove it toward the nearby freeway. (RT 1046, 1063-1064, 1068, 1071, 1090, 1092.) Immediately after the Muhammed robbery, Martin drove the pickup to the nearby freeway. (RT 1105-1106.) The circumstances of the Shield attempted robbery have been discussed in detail, but the evidence of a hurried flight was overwhelming and included eyewitness and forensic testimony. (RT 1152-1156, 1183-1184, 1345.) Finally, immediately after attempting to rob Steve's Market, appellant and Martin fled the scene and ran away from the police. (RT 1230-1232, 1266-1267, 1272, 1380-1382, 1391.)

With regard to appellant's suppression of evidence by refusing to stand in a lineup, the evidence was also clear. The court held a hearing outside the jury's presence to determine whether, or to what extent, it would permit Los Angeles County Sheriff's Deputy William Hartwell to testify about appellant's (and Martin's) refusal. Appellant had objected on Sixth Amendment grounds because Deputy Hartwell neither asked if appellant was represented, nor offered to provide him with counsel. When the court overruled that objection, appellant waived it so that evidence of appellant's professed reasons for refusal could be admitted. (RT 1274-1289.)

Before the jury, Deputy Hartwell testified that on July 26, 1990, while appellant and Martin were in local custody following their arrests, he made preparations for separate lineups for appellant and Martin. Both refused to participate. (RT 1290, 1292.) The deputy had told them that they were charged with murder and gave them lineup refusal forms, which he also read to them. (RT 1292-1293.) Appellant signed the form and wrote down his reason for refusal. (RT 1295-1296.) On cross-examination, Deputy Hartwell related that reason: Appellant was aware that he had been photographed by the police, and he was afraid that those photographs had been shown to the persons who would witness the lineups. (RT 1299.)

Finally, as to appellant's false statement, Detective David Melnyk of the West Covina Police Department testified that appellant had been booked under the name "Jeffrey Scott,"[20/] but the detective had received information that appellant's true name was Paul Watkins. Detective Melnyk and another detective interviewed appellant a few days after the crimes. Appellant told them his name was Jeffrey Scott. However, upon being confronted with the name of Paul Watkins, appellant admitted that the latter was his true name. (RT 1452-1453.) There was also evidence of concealing evidence: At the time appellant and Martin attempted to evade the police, following the Steve's Market incident, real estate appraiser David Morgan Boone found appellant's pistol in a hole in the brick wall that was on the route of appellant's and Martin's attempted flight. (RT 1301-1304, 1368, 1384, 1402.)

Of the three instructions challenged here, appellant only objected to CALJIC No. 2.06, but specified no legal basis therefor. The court overruled the objection. (RT 1633-1636.)

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20. Upon arrest, appellant identified himself as "Jeffrey Scott." (RT 1426-1428.)

B. Forfeiture

Appellant interposed a non-specific contemporaneous objection solely to the giving of CALJIC No. 2.06 regarding the suppression of evidence. (RT 1634.) Therefore, apart from his claim that the suppression of evidence instruction was unsupported, appellant forfeited his claims of instructional error, including his claims of constitutional error. (See *Valdez, supra*, 32 Cal.4th at p. 137 ["As a threshold matter, we find that defendant forfeited this claim [of error in giving CALJIC No. 2.06] because he did not object at trial. [Citations.]. Defense counsel did not object to the court's ruling at the time it was made, or later when the court asked whether defense counsel had any requests or objections to the proposed instructions on behalf of defendant."].) "No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (*People v. Saunders*, *supra,* 5 Cal.4th at p. 580, quoting *United States v. Olano*, *supra,* 507 U.S. at p. 731, internal quotation marks omitted.) As will be shown below, the forfeiture exception for instructional claims affecting a defendant's "substantial rights" (see §§ 1259 and 1469) does not apply because the instructions were adequately supported by evidence and the constitutional claims upon which any "substantial rights" might be affected have been rejected by this Court.

C. CALJIC No. 2.06 Was Amply Supported By The Record; It Did Not Remove Any Factual Determination From The Jury

Appellant contends there was insufficient evidence to support the giving of CALJIC No. 2.06 because appellant offered a reason for his refusal to take part in the lineup — that he thought the police had shown a photograph of him to the persons who would view the lineup. First, however, he erroneously asserts that the trial court violated the rule of *People v. Hannon* (1977) 19

Cal.3d 588, because it overruled his objection to the instruction without giving an explanation or making express findings. (AOB 85-86.) However, the *Hannon* court addressed a completely different issue. There, the trial court failed to make the initial *legal determination* that the factual record of suppression or attempted suppression of evidence supported an inference of the defendant's consciousness of guilt. Instead, the court instructed the jurors that *they* could make that preliminary legal determination. (*Id.* at pp. 597-598 ["[T]he court committed error because such a procedure forced or at the very least permitted the jury to resolve a question of law"].)

Nothing similar occurred here. Indeed, this Court squarely rejected appellant's contention in *People v. Johnson* (1992) 3 Cal.4th 1183. There, as here, the trial court overruled the defendant's objection and gave the standard pattern instruction, thereby implicitly finding that there was evidence of suppression sufficient to support the inference of consciousness of guilt. (*Id.* at p. 1236 ["[I]n this case the trial court, in giving the instruction, implicitly determined as a matter of law that the evidence of defendant's refusal to stand in the lineup, if credited by the jury, could warrant an inference of consciousness of guilt if the jury found that the refusal was intended to suppress evidence"]; see RT 1633-1636.)

As shown above, it was undisputed that appellant refused to stand in the lineup. (RT 1290, 1292-1296.) The mere fact that appellant had voiced a reason for his refusal did not require the court to make a specific finding that appellant's excuse was credible. Nor was the court obliged to find that appellant's professed reason for non-participation eliminated a reasonable inference of consciousness of guilt. (RT 1299.) A defendant's refusal to participate in a lineup is admissible and supports the inference of a consciousness of guilt. (*Johnson, supra*, 3 Cal.4th at p. 1235.) Certainly, none of appellant's authorities (see AOB 86-87) remotely supports the proposition

that the trial court was somehow obligated to find appellant's excuse credible, much less find it sufficient to make an inference of consciousness of guilt unreasonable. As this Court recently explained, the facts giving rise to an inference of consciousness of guilt need not be conclusively established before CALJIC No. 2.06 may be given. Rather, "there need only be some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference." (*People v. Coffman* (2004) 34 Cal.4th 1, 103.)

Moreover, while appellant focuses solely on his refusal to stand in a lineup as the basis for the suppression of evidence instruction (AOB 85-88), there was an alternative basis — appellant's and/or Martin's attempt to conceal the pistol used in each of the underlying offenses. (*People v. Visciotti* (1992) 2 Cal.4th 1, 61 ["Nor are we persuaded that the instruction on concealment of evidence (CALJIC No. 2.06) was improper simply because it was Hefner who had concealed the gun. The evidence permitted an inference that Hefner had acted on behalf of defendant as well as in concealing the weapon and that he did so with defendant's encouragement"].) As shown above, during appellant and Martin's attempt to escape and elude the police following the Steve's Market incident, one or both of them attempted to conceal the pistol in an alley wall. (RT 1301-1304, 1368, 1384, 1402.)

Next, appellant erroneously contends that the giving of CALJIC No. 2.06 violated his rights to due process and a fair trial because the instruction required the jury to find that appellant's refusal to stand in the lineup was an attempt to suppress evidence, thereby intruding into the factfinder's province. (AOB 87-88.) A plain reading of the instruction shows that the jury was merely given the permissive *options* of (1) finding appellant attempted to suppress evidence, and (2) finding that suppression, if it occurred, tended to show a consciousness of guilt. Indeed, the jury was further cautioned that such a finding was "not sufficient by itself to prove guilt, and its weight and significance, if any, are for

your determination." (CT 680; RT 1772-1773.) As this Court has observed in rejecting a similar challenge, "[t]he cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224; see also *ibid.* ["The inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction]"].) In short, as this Court has repeatedly held in rejecting analogous constitutional claims, neither CALJIC No. 2.03 nor CALJIC No. 2.06 directs or compels the drawing of impermissible inferences. (*Jackson, supra*, at p. 1224.)

D. The Consciousness Of Guilt Instructions Were Neither Duplicative Nor Argumentative

In an apparent attempt to dress up an oft-rejected constitutional claim in new garb, appellant argues that CALJIC Nos. 2.03, 2.06, and 2.52 unnecessarily duplicated the court's general instructions on how to evaluate circumstantial evidence. As such, he asserts that the challenged instructions served to emphasize facts that tended to weigh against the defense case, thereby giving an "unfair advantage" to the prosecution. (AOB 88-89.) That contention neither improves upon nor differs from his subsequent argument concerning "argumentative" instructions in any meaningful way.

As this Court has explained, the consciousness of guilt instructions are not only narrower than the general instructions concerning circumstantial evidence, but they are crafted so as to avoid the vice appellant attempts to identify:

> In the present case, each of the four instructions made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt,

> and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.] We therefore conclude that these consciousness-of-guilt instructions did not improperly endorse the prosecution's theory or lessen its burden of proof.

(*Jackson, supra*, 13 Cal.4th 1224.)

Appellant urges this Court to reconsider its unbroken line of authority that the California's consciousness of guilt instructions are not unconstitutionally "argumentative." (AOB 91-94; see e.g., *People v. Crew* (2003) 31 Cal.4th 822, 848-849; *Jackson, supra*, 13 Cal.4th 1224.) While the fact that courts in other states have disapproved of such instructions may be interesting in a political or academic sense, it is neither determinative nor especially indicative of constitutional error. This Court has considered the same arguments and reasonably rejected them. Moreover, the prosecution and trial court relied on California precedent in connection with the instructions in this case. It would be unfair to create a new rule and then apply it retroactively to appellant's trial.

E. The Consciousness Of Guilt Instructions Were Based On The Reasonable Common Sense Inferences That The Appellant Lied, Attempted To Suppress Evidence, And Fled Because He Knew He Had Committed A Variety Of Crimes, Including The Murder And Attempted Robbery Of Mr. Shield

Appellant argues that this Court should repudiate its longstanding, consistent precedent that properly given instructions on consciousness of guilt pursuant to CALJIC Nos. 2.03, 2.06, and 2.52, may support (but not compel) an inference of the intent element of a crime, including intent to kill. (AOB 95-103.) Appellant's justifications are far from compelling. As supporting authority, appellant can point to little other than the Ninth Circuit's opinion in

United States v. Warren (9th Cir. 1994) 25 F.3d 890, 899. Leaving aside the fact that this Court is not bound by the decisions of the lower federal courts (e.g., *Cleveland, supra*, 25 Cal.4th 466 at p. 480), neither the majority's opinion in *Warren* nor Judge Rymer's concurring opinion support appellant's constitutional claim. In *Warren*, the court found the trial court's permissive inference malice instruction neither violated the Constitution nor was otherwise improper. (*Warren, supra*, 25 F.3d at p. 898-899.)

Moreover, the *Warren* court's test for assessing constitutional error is consistent with that of the United States Supreme Court: So long as the inference was one that reason and common sense justified in light of the proven facts, the instruction did not violate due process. (*Id.* at p. 898; *Francis v. Franklin* (1985) 471 U.S. 307, 314-315 ["A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury."]; *People v. Mendoza*, supra, 24 Cal.4th at p. 180, [applying same standard and rejecting same constitutional challenges to the flight instruction].) As to non-constitutional error, the Ninth Circuit found the trial court's cautionary instructions, which were analogous to the ones given in appellant's trial, adequately served to avoid any danger of unfairness. (*Id.* at pp. 898-899.) Judge Rymer did not argue otherwise. Rather, she advised against giving permissive inference instructions on prudential grounds. (*Id.* at pp. 899-900, conc. opn. Rymer, J.)

Appellant contends it would have been irrational for the jury to infer from appellant's consciousness of guilt based on false statements, suppression of evidence, and flight that appellant had the requisite mental states for first degree murder and attempted robbery. (AOB 96-102.) This Court has repeatedly rejected materially indistinguishable arguments. (See e.g., *Jackson, supra*, 13 Cal.4th at p. 1224 ["The inference of consciousness of guilt from willful

falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction]"].) Here, the flight after the Shield murder logically tended to show — contrary to appellant's testimony — that the shooting was no accident. The subsequent attempts to conceal both the weapon and appellant's identity also tended to disprove his accident defense. As this Court explained in *People v. Arias, supra*, 13 Cal.4th 92, such an inference was permissible where the instruction was based on the defendant's statements that the killing was accidental — if the jury believed those statements to be lies, it "would logically suggest that defendant did intend to kill, and that he harbored a consciousness of that fact." (*Id.* at p. 142.) Moreover, "the instruction told the jury only that pretrial lies may bear on 'consciousness of *guilt*' (italics added); a reasonable jury would understand this phrase to mean only 'consciousness of some wrongdoing,' not consciousness of each and every element of the charged offense." (*Ibid.*, citing *People v. Crandell* (1988) 46 Cal.3d 833, 871.)

Appellant asserts that the facts supporting an inference of his consciousness of guilt have no tendency in reason to prove that appellant "*also* committed an attempted robbery in connection with the homicide" of Mr. Shield. (AOB 102.) That assertion is anything but obvious. To the contrary, if appellant's meeting with Mr. Shield had been entirely licit, as he testified, why did appellant flee from the scene? Why did he shoot the witness? Why did he or Martin attempt to hide the weapon? Why did he try to conceal his name and identity? Consciousness of guilt as to the killing and the attempted robbery are both reasonable inferences.

IV.

THE JURY WAS PROPERLY INSTRUCTED AS TO MOTIVE, PURSUANT TO CALJIC NO. 2.51; THERE WAS NO CONSTITUTIONAL ERROR

Appellant contends that his constitutional rights to a fair trial, due process and a reliable verdict in a capital case were violated because the jury was instructed, pursuant to CALJIC No. 2.51 that:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt; absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(CT 692; RT 1778-1779.) More specifically he advances three arguments in support of his constitutional claims: (1) The instruction implied that evidence of motive was sufficient alone to prove guilt because it did not specifically say that evidence of motive alone was insufficient (AOB 105-107); (2) the instruction lessened the prosecution's burden of proof (AOB 107-110); and (3) the instruction shifted the burden of proof to appellant to prove innocence (AOB 110). As this Court recently held in *People v. Cleveland* (2004) 32 Cal.4th 704, 750, all those claims are meritless, and the first claim is not cognizable due to appellant's failure to request clarification of the instruction at trial.

As in *Cleveland*, appellant argues that "because the motive instruction, unlike the court's instruction on attempts to suppress evidence, did not specifically say that evidence of motive alone is insufficient to prove guilt, it implied that such evidence alone may be sufficient." (*Cleveland, supra*, at p. 750; AOB 105-107.) Although appellant attempts to dress his argument in constitutional garb, "[t]his argument merely goes to the clarity of the

instruction." (*Ibid.*) As such, due to appellant's failure to request clarification at trial, the claim is not cognizable on appeal. (*Ibid.*)

Of course, there was no "omission" from the instruction, as appellant mistakenly asserts. The entire pattern instruction was accurately given. Moreover, read in the context of the instructions as a whole, it would have been irrational for the jurors to think that they could disregard the elements of the charged offenses, and find appellant guilty based solely on motive, pursuant to an instruction that cautioned that *motive is not an element of the crime charged and need not be shown*. The only reasonable reading is that, regardless of the presence of any motive, the jury must find the elements of the offense true beyond a reasonable doubt. As in *Cleveland*, there was no error and no prejudice:

> The court fully instructed the jury on the reasonable doubt standard. We find no reasonable likelihood the jury would infer from the motive instruction that motive alone could establish guilt. Moreover, given the strong evidence of guilt aside from motive, the jury certainly did not base its verdicts solely on motive.

(*Cleveland, supra*, 32 Cal.4th at p. 750.)

Appellant also claims the motive instruction lessened the prosecution's burden of proof. Appellant asserts that a finding that he had the motive to rob Mr. Shields was tantamount to a finding of specific intent as to the attempted robbery for purposes of first degree felony murder. He proceeds to argue that because CALJIC No. 2.51 instructed that motive was not an element, the jury would have understood that it was not required to find beyond a reasonable doubt the specific intent element of attempted robbery. (AOB 107-108.) A more strained and hyper-technical interpretation would be hard to imagine.

Thus, it is no surprise that this argument has been repeatedly rejected. (*Cleveland, supra*, 32 Cal.4th at p. 750, citing among others, *People v. Estep*

(1996) 42 Cal.App.4th 733, 738-739.) In *Estep*, the Court of Appeal explained, CALJIC No. 2.51 "did not tell the jurors their duty was to decide if defendant was guilty or innocent." (*Estep, supra*, 42 Cal.App.4th at p. 738.) Rather, the jurors' duty in that respect was explained by CALJIC No. 2.90.

> CALJIC No. 2.51 did not concern the standard of proof in this case, but merely one circumstance in the proof puzzle — motive. Defendant cannot quarrel with the concept that presence of motive is a circumstance that may tend to establish guilt. The flip side of this indisputable concept is that absence of motive is a circumstance that may tend to establish innocence. Since CALJIC No. 2.51 does not instruct jurors on the standard of proof they are to apply, it would be awkward (and confusing in context) to say that on the one hand "presence of motive may tend to establish guilt" while on the other hand "absence of motive may tend to establish that guilt has not been shown beyond a reasonable doubt." In this way, then, the word "innocence" in CALJIC No. 2.51 plays to a defendant's advantage.

(*Estep, supra*, at p. 738.)

Further, as the *Estep* court explained, this Court rejected an analogous argument in *People v. Wilson* (1992) 3 Cal.4th 926, 943:

> In *Wilson*, the defendant argued that the CALJIC instructions on the weight to be given circumstantial evidence negated the presumption of innocence and the standard of proof of beyond a reasonable doubt. [Citation.] In rejecting this argument, the *Wilson* court said: "[A] reasonable juror would understand that, taken in context, the relevant language of [the circumstantial evidence instructions] must be considered in conjunction with the 'reasonable doubt' standard [given the jury in CALJIC No. 2.90]." [Citation.]

(*Estep, supra*, at p. 738.) In sum, the pattern instruction did not lessen the

prosecution's burden.

Finally, appellant contends CALJIC No. 2.51 shifted the burden of proof to appellant to prove his innocence. (AOB 110.) Once again, this Court has repeatedly rejected this stock claim. (*Cleveland, supra*, 32 Cal.4th at p. 750 ["[T]he instruction did not shift the burden of proof. It merely told the jury it may consider the presence or absence of motive"].) In sum, as to all claims predicated on CALJIC No. 2.51, there was no constitutional error; any assertion of prejudice would be wholly speculative.

V.

NONE OF THE STANDARD CIRCUMSTANTIAL EVIDENCE INSTRUCTIONS (OR THE NUMEROUS OTHER STANDARD INSTRUCTIONS APPELLANT IDENTIFIED), ALONE OR TOGETHER, UNDERMINED THE CONSTITUTIONAL PROOF-BEYOND-A-REASONABLE-DOUBT REQUIREMENT

In addition to raising stock claims this Court has repeatedly rejected to the effect that the standard circumstantial evidence instructions (CALJIC Nos. 2.01, 2.02, 8.83, 8.31.1) served to undermine the constitutional proof-beyond-a-reasonable-doubt requirement (AOB 112-120), appellant also contends a variety of other standard instructions (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.51, 2.52) "vitiated" the reasonable doubt standard (AOB 120-126). Although appellant acknowledges that this Court has repeatedly rejected such challenges to "many" of the instructions he identified, he urges reconsideration of those holdings. (AOB 126-130.) This Court should decline that invitation, as those holdings were legally sound and established a well-reasoned line of unbroken authority on which litigants have a right to rely. Indeed, if appellant's arguments are correct, then it would follow that one of the most fundamental aspects of the CALJIC system is constitutionally flawed.

In rejecting appellant's argument as to the circumstantial evidence

instructions, this Court stated:

> As defendant acknowledges, we have previously held that "these instructions properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other 'reasonable' interpretation can be drawn. Particularly when viewed in conjunction with other instructions correctly stating the prosecution's burden to prove defendant's guilt beyond a reasonable doubt, these circumstantial evidence instructions do not reduce or weaken the prosecution's constitutionally mandated burden of proof or amount to an improper mandatory presumption of guilt. [Citations.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 375, 75 Cal.Rptr.2d 716, 956 P.2d 1169.) Defendant asks us to revisit this conclusion, but he advances no persuasive reason to do so.

(*Koontz, supra*, 27 Cal.4th at p. 1084-1085) The same is true here.

As to appellant's arguments based on the other instructions, as this Court recently explained, none has any merit:

> Cleveland reiterates other arguments we have already rejected. Instructions on circumstantial evidence and evidence of mental state, including use of the word "appears," did not undermine the reasonable doubt standard or create an impermissible mandatory presumption of guilt. [Citations.] Instructions that contain the word "innocence" or "innocent" do not suggest that defendant has the burden of establishing innocence. [Citation.] The instruction on willfully false witnesses (CALJIC No. 2.21.2) does not reduce the prosecution's burden of proof. [Citation.] Cleveland argues that the standard instruction on weighing conflicting testimony (CALJIC No. 2.22) also undermines the reasonable doubt standard. We said long ago that this instruction must be given sua sponte in every criminal

> case in which conflicting testimony has been presented. [Citation.] We have apparently not yet confronted an argument that this instruction somehow undermines the reasonable doubt instruction, but it does not do so any more than the other instructions that have already been challenged on this basis. "The instructions as a whole correctly instructed the jury on the prosecution's burden of proof." [Citation.]

(*Cleveland, supra*, 32 Cal.4th at p. 750.)

VI.

AS THIS COURT HAS REPEATEDLY HELD, THE PROSECUTION'S CHARGING INSTRUMENT NEED NOT SPECIFICALLY ALLEGE FIRST DEGREE MURDER

In another stale, off-the-shelf contention, appellant argues it was improper to instruct the jury on first degree murder because the prosecution's charging instrument alleged murder in violation of section 187, subdivision (a), rather than specifying first degree murder pursuant to section 189. Appellant contends the prosecution was legally and constitutionally limited to proving second degree murder. (AOB 131-138.) To accept that contention, this Court would have to reverse this state's longstanding precedent — precedent that it has recently endorsed. (E.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370.) Appellant also erroneously asserts that by instructing the jury on the supposedly "uncharged crime" of first degree murder, the trial court violated his constitutional rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Beck v. Alabama* (1980) 447 U.S. 625 [100 S. Ct. 2382, 65 L. Ed. 2d 392]. (AOB 137-138.)

In *People v. Hughes*, this Court emphatically rejected each of appellant's arguments in support of this claim. (*Hughes, supra*, 27 Cal.4th at p. 369 [rejecting argument that felony murder and malice murder are separate offenses;

reaffirming that an accusatory pleading charging murder need not specify the theory of murder upon which the prosecution intends to rely; and recognizing that this Court's precedent has implicitly rejected the argument that felony murder and malice murder are separate crimes requiring separate pleading].) As in *Hughes, supra*, 27 Cal.4th at 369-370, and *People v. Diaz* (1992) 3 Cal.4th 495, 557, and numerous other decisions of this Court, it is clear that appellant received adequate notice that the prosecution was attempting to prove first degree murder and its theory of the case for doing so.

At the time of the preliminary hearing, appellant knew that this was a special circumstance case, based on the attempted robbery of Mr. Shield. (CT 275-282.) The second amended information alleged as a death penalty special circumstance pursuant to section 190.2 that the murder was committed in the course of the attempted armed robbery of Mr. Shield (CT 313) — that Penal Code section gave appellant notice that the prosecution was seeking to prove murder in the first degree. Appellant even moved to dismiss that special circumstance allegation. (CT 323-338; RT 606-607.) In addition, well before the trial, the prosecution announced its intention to seek the death penalty — something that was legally predicated on a first degree murder conviction. (RT 33, 74.) Obviously, appellant was well aware of the capital nature of his trial at the time of jury voir dire. Of course, as shown in detail in connection with appellant's sufficiency of the evidence claims, the evidence at trial eliminated any theoretical doubt on those points.

As this Court explained in *Hughes*:

> In summary, we reject, as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses. Accordingly, we also reject defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the

jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed.

(*Hughes, supra*, 27 Cal.4th at p. 370.)

Nor do appellant's invocations of *Apprendi, supra,* 530 U.S. 466, and *Beck, supra*, 447 U.S. 625 (AOB 137-138), add anything of substance to his claim. In *Apprendi,* the court held that "the Fourteenth Amendment's due process clause requires the state to submit to a jury, and prove beyond a reasonable doubt to the jury's unanimous satisfaction, every fact, other than a prior conviction, that increases the punishment for a crime beyond the maximum otherwise prescribed under state law." (*People v. Griffin* (2004) 33 Cal.4th 536, 594-595.) There can be no serious question as to whether that occurred in this case:

> Under the law of this state, all of the facts that increase the punishment for murder of the first degree — beyond the otherwise prescribed maximum of life imprisonment with possibility of parole to *either* life imprisonment without possibility of parole *or* death — already have been submitted to a jury (and proved beyond a reasonable doubt to the jury's unanimous satisfaction) in connection with at least one special circumstance, prior to the commencement of the penalty phase.

(*Ibid.*) Further, as shown above, appellant had adequate notice (not to mention actual and timely knowledge) of the specific facts upon which he was subject to conviction for first degree murder, based on both a felony murder theory and on a premeditation and deliberation theory.

Similarly, the *Beck* rule has no application to California's death penalty law. Under *Beck* and *Schad v. Arizona* (1991) 501 U.S. 624, it is constitutionally impermissible to present the jury with an "all-or-nothing" choice between capital murder and innocence. Obviously, appellant's jury did

not face the *Beck/Schad* dilemma. Not only was appellant's jury given the option of choosing lesser included offenses, but a guilt-phase jury in California will never have to choose between the death penalty and freedom. Rather, it will still have to make findings on the special circumstance allegations — giving a reluctant juror the opportunity to prevent a penalty phase without having to worry about setting the defendant free. Still more fundamentally, even if that hypothetical reluctant juror somehow felt compelled to find the special circumstance allegations true, the result would be a penalty-phase trial at which the choice would be death or life without the possibility of parole ["LWOP"] — not exactly the draconian dilemma that informs the *Beck/Schad* rule.

Accordingly, appellant's claim must fail.

VII.

AS THIS COURT HAS REPEATEDLY HELD, THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE JURY UNANIMOUSLY AGREE ON A PARTICULAR THEORY OF FIRST DEGREE MURDER

Appellant urges this Court to reconsider its longstanding precedent rejecting his argument that by failing to instruct the jury to unanimously agree on a particular theory of first degree murder — premeditation and deliberation or felony murder — the trial court violated appellant's state and federal constitutional guarantees that (1) all elements of a crime be proved beyond a reasonable doubt, (2) the jury's verdict be unanimous, and (3) the capital offense determination be fair and reliable. (AOB 139-147.) Once again, this Court has repeatedly rejected this argument.

> [T]he jury was not required to decide which of the two proposed "theories" (premeditation versus rape-murder) governed the killings in this case. Each juror need only have found defendant guilty

> beyond a reasonable doubt of the single, statutory offense of first degree murder. [Citations.] Whatever the basis for this long-standing rule [citation], it follows that the same jury need not have unanimously agreed on the precise factual details of how a killing under one or the other theory occurred in order to convict defendant of first degree murder.

(*People v. Pride* (1992) 3 Cal.4th 195, 249-250; *People v. Nakahara* (2003) 30 Cal.4th 705, 712-13.) Indeed, the United States Supreme Court has reached the same conclusion. (*Schad v. Arizona, supra,* 500 U.S. at pp. 630-631, plurality opn.)

As with the previous claim, appellant's attempted reliance on *Apprendi* (and *Ring v. Arizona* (2002) 536 U.S. 584) adds nothing of substance to his claim (AOB 147-148), as this Court held in *Nakahara, supra*: We see nothing in *Apprendi* that would require a unanimous jury verdict as to the particular theory justifying a finding of first degree murder." (*Nakahara, supra*, 30 Cal.4th at p. 713.)

VIII.

JUROR ALMEYDA WAS PROPERLY EXCLUDED FOR CAUSE, BASED ON THE TRIAL COURT'S FINDING THAT SHE WAS UNABLE TO CONSCIENTIOUSLY CONSIDER ALL SENTENCING ALTERNATIVES

Appellant erroneously contends that the exclusion for cause of Juror Almeyda violated appellant's constitutional rights to an impartial jury, a fair capital sentencing hearing, and due process. (AOB 149-172.) Indeed, appellant ignores the proper standard of review — whereby the trial court's determination as to the prospective juror's true state of mind is binding on this Court when the prospective juror's statements are conflicting or ambiguous — and asserts that this Court must accept his own tendentious interpretations of the juror's

statements. As shown below, the trial court's contemporaneous credibility assessment was fully supported: Juror Almeyda testified that she was not merely afraid to impose a death sentence, but that she was conscientiously predisposed against voting to impose such a sentence.

The standard of review is well-settled, based on decisions of the United States Supreme Court and this Court: A prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Stewart* (2004) 33 Cal.4th 425, 440-441, citing *People v. Cunningham* (2001) 25 Cal.4th 926; *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Crittenden* (1994) 9 Cal.4th 83, 121.) That is, the relevant question is whether a prospective juror's "views on capital punishment . . . would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Witt, supra*, 469 U.S. at p. 424; *People v. Mincey* (1992) 2 Cal.4th 408, 456 [A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate].)

Moreover, as appellant overlooks, the exclusion of prospective capital sentencing jurors because of their opposition to capital punishment depends on the trial court's fact-based credibility determinations, which are subject to deference on appeal. (*Wainwright, supra*, 469 U.S. at pp. 428-429.) Accordingly, "[o]n appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*Stewart, supra*, 33 Cal.4th at p. 441 [internal quotation marks omitted], citing *Cunningham, supra*, 25 Cal.4th at p. 975, and *People v. Heard* (2003) 31 Cal.4th 946, 958.)

A fair and objective summary of the relevant voir dire shows that Juror Almeyda initially made conflicting and ambiguous statements concerning her views on capital punishment, and whether they would prevent her from following the court's instructions. However, upon additional questioning by the prosecutor, the prospective juror admitted that her conscience prevented her from voting to impose the death penalty. The court began its examination of Ms. Almeyda by asking some background questions concerning her attitude towards the death penalty and the LWOP alternative. She denied having an opinion as to whether LWOP might be an appropriate penalty, and denied discussing the death penalty with anyone. (RT 866.) However, when asked for her reaction to hearing that she was a prospective juror in a death penalty case, she admitted not only feeling "scared," but feeling that imposing the death penalty was — to her — tantamount to committing a crime: "Well, I just feel like I am the one who is going to be prosecuted, no one else." (*Ibid.*) Following up, the court asked directly whether she could vote for the death penalty if the evidence supported that verdict. Juror Almeyda replied that she was "not sure," but denied having moral or religious beliefs as to the issue. (RT 867.) When asked to disclose the reason for her reservations, she offered the cryptic explanation: "It's just me. I am a very negative person." (*Ibid.*)

Upon further examination by the court, the prospective juror explained that she felt that she was "not the one to judge anybody." (RT 868.) On that score, her objections extended to imposing both guilt and capital verdicts. (*Ibid.*) Next, the court asked why she responded with question marks to the questions in her jury questionnaire addressing the death penalty. Juror Almeyda explained that she did not understand most of them. (RT 868.) Additional questioning tended to confirm that she had difficulty understanding the court's questions. (RT 868-869.) Nevertheless, Juror Almeyda asserted that she "could" vote for the death penalty. (RT 869.)

At sidebar, the court asked counsel if they wanted to follow up on the voir dire of any of the prospective jurors. Among the jurors identified by the prosecutor was Juror Almeyda. (RT 880.) At the start of his questioning, the prosecutor explained to the venire that the court was seeking to determine not whether the prospective jurors supported or opposed the death penalty as a general matter, but whether they could vote to impose it in a given case. (RT 884-885.) After conducting further inquiry along those lines with other prospective jurors (RT 886-886), the prosecutor asked Juror Almeyda whether she could follow the court's instructions and vote for the death penalty if the facts supported that verdict. (RT 889.) The prospective juror replied, "It would be hard for me." (RT 890.)

The prosecutor explained that he was trying to find out the nature and degree of that difficulty, and asked whether she was trying to say that she felt it was outside a human being's authority to impose the death penalty. Juror Almeyda replied, "I would feel guilt that person would die because I said yes. I would carry a guilt." (RT 890.) Seeking additional clarification as to whether she could overcome those scruples in this case, the prosecutor explained that she might be called upon to render such a decision as a juror in appellant's trial. (*Ibid.*) He then asked, "what you are expressing to me is your feelings are such that you probably really couldn't with a clear conscious [sic] make that decision, could you?" Juror Almeyda responded, "No." (RT 890-891.) Appellant's counsel declined the court's invitation to ask any questions of her. (RT 891-893.)

The prosecutor challenged Juror Almeyda for cause. Appellant's counsel asserted that she could be a fair juror, arguing that she merely represented that it would be difficult to render a death verdict, but that "given the right set of circumstances," she could do so. (RT 893-894.) The court accepted the prosecution's challenge, finding that in response to the prosecutor's

questioning, Juror Almeyda "indicated that she would feel guilty if she were to impose a death sentence. And that based on that guilt she couldn't." (RT 894.)

As shown above, Juror Almeyda's answers to the court's questions were ambiguous and conflicting with regard to whether she could vote for the death penalty if the evidence supported that verdict, notwithstanding her personal beliefs and reservations. When asked how she felt about the possibility of imposing a death verdict, she volunteered that she was afraid because, by her lights, such as decision would be criminal. (RT 866.) However, when the court asked directly whether she could set aside her personal concerns and vote for the death penalty if the evidence supported that verdict, she said she was "not sure" — although she denied having moral or religious beliefs that bore on the issue. (RT 867.) Further complicating matters was the fact that her understanding of the issues involved appeared limited. (RT 868-869.) Thus, when she asserted that she "could" vote for the death penalty (RT 869), it is impossible to know whether she understood the distinction the court was making or whether she merely acknowledged that she could do something she believed was morally wrong.

The prosecutor sought to resolve those ambiguities and inconsistencies by asking whether she believed the decision to condemn a person to death was beyond the authority of a human being to render. In response, Juror Almeyda recurred to her initial statements to the court. She would feel guilty — not merely sad or conflicted — if she voted to impose the death penalty. (RT 890.) When asked whether she could do so with a clear conscience, she said, "no." (RT 890-891.) Thus, the court's resolution of the conflicting testimony as to Juror Almeyda's subjective beliefs was entirely supported by the record. Based on the totality of her responses, it was reasonable to conclude that Juror Almeyda could not vote to impose the death penalty without violating the dictates of her conscience. (RT 894.) Contrary to appellant's argument, the

Constitution does not require a juror to betray her conscience.

While appellant spends pages and pages criticizing the trial court and prosecutor for their efforts at questioning Juror Almeyda, a fair reading of the transcript shows that they were conscientious in trying to assess the juror's relevant state of mind. As this Court has recognized:

> [D]eath-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented.

(*People v. Cash* (2002) 28 Cal.4th 703, 721-722.) In stark contrast, appellant made no real effort in that regard.

The trial court's decision is perfectly consistent with this Court's precedent. Indeed, it is materially indistinguishable from *People v. Wader* (1993) 5 Cal.4th 610. There, the prospective juror gave various conflicting responses as to whether he could vote to impose the death penalty, despite his religiously-informed conscientious opposition thereto. As here, the prospective juror stated that he could conceive of opting for a death verdict under some circumstances, but felt he would be violating his beliefs. This Court upheld the juror's dismissal, based on the juror's statement that his conscience opposed imposition of the death penalty. (*Id.* at 652-653; see also *People v. Box* (2000) 23 Cal.4th 1153, 1181 [affirming dismissal of juror who had personal moral objection to imposing the death penalty and said that she would have to live with a sense of guilt if she voted for it, but who also represented that she would try to follow the law]; *People v. Samayoa* (1997) 15 Cal.4th 795, 823-824 [affirming dismissal of one prospective juror who agonized over the issue, and

another who stated that "in most places I think I would not vote [for the] death penalty," but when asked whether there could be a case that was so overwhelming against a defendant that he would be able to vote for death, he stated that it was possible, but that "I don't think that I — I would say no"]; *People v. Garceau* (1993) 6 Cal.4th 83, 175 ["[Prospective juror] Wilken's responses indicated she was troubled by the prospect of sitting on a penalty phase jury and was uncertain whether she could set aside her bias against the death penalty in favor of weighing the evidence and following the trial court's instructions. Under these circumstances, the trial court properly could find that her views would 'substantially impair the performance' of her duties at the penalty phase. Accordingly, no error appears."], overruled on other grounds in *People v. Yeoma, supra,* 31 Cal.4th at pp. 117-118.)

As shown above, appellant's assertion (AOB 155) that Juror Almeyda "demonstrated that she was impartial with regard to capital punishment" can be considered true only by ignoring the deferential standard of review and resolving all ambiguities in her testimony *against* the reasonable findings of the trial court. (See, e.g., *Stewart, supra*, 33 Cal.4th at p. 441; *Cunningham, supra*, 25 Cal.4th at p. 975.) The fact that her conscientious objections to judging other persons in general, and to imposing the death penalty in particular, were not grounded in a particular religion or ideology is constitutionally immaterial. Neither *Witherspoon* nor *Witt* nor any of this Court's precedent have imposed a religious test in connection with this issue. Finally, appellant's attempt to parse the prosecutor's final question — "And what you are expressing to me is your feelings are such that you probably really couldn't with a clear conscience make that decision, could you?" (RT 890-891) — so that Juror Almeyda's negative response really meant that she *could* impose the death penalty with a clear conscience deserves scant response. (See AOB 157.) The juror's actual meaning is clear from the context. Moreover, appellant's counsel made no

effort to resolve the supposed ambiguity at the time, and it is improper for appellant to attempt to do so on appeal.

The balance of appellant's argument (AOB 157-172) reduces to the erroneous assertion that Juror Almeyda had merely admitted to a reluctance, rather than a full-blown and implacable moral opposition, to the imposition of the death penalty. Again, however, that argument depends on acceptance of appellant's partisan interpretation of the prospective juror's ambiguous statements. As those statements also support the reasonable inference that her conscience prohibited her from imposing the death penalty, the trial court's findings to that effect are binding on appeal. (E.g., *Stewart, supra*, 33 Cal.4th at p. 441; *Cunningham, supra*, 25 Cal.4th at p. 975.)

This case is wholly distinguishable from *People v. Heard, supra*, 31 Cal.4th at p. 964, in which the stricken juror had "made it quite clear that he would not vote 'automatically' — in other words, 'no matter what the evidence showed' — either for life imprisonment without the possibility of parole or for death, and also that he would not be reluctant to find the defendant guilty of first degree murder or to find the special circumstances true 'so as to avoid having to face the issue of the death penalty.'" Moreover, in *Heard*, the prospective juror repeatedly insisted that he would follow the law in assessing mitigating/aggravating factors. Accordingly, this Court found nothing in those responses to support a finding that his views would prevent or substantially impair the performance of his duties as a juror. (*Id.* at pp. 964-965.) Here, at a minimum, Juror Almeyda undeniably expressed an extreme reluctance to follow the law and her oath. Moreover, as the trial court reasonably found, her conscience dictated that she should not impose the death penalty.

Appellant's reliance *Adams v. Texas* (1980) 448 U.S. 38 and *Witherspoon v. Illinois* (1968) 391 U.S. 510, is misplaced. The former decision held that certain veniremen had been improperly excluded because they acknowledged

that their views of the death penalty might "affect" their deliberations, but only to the extent that they would view their task with greater gravity. The latter held it improper to exclude veniremen simply because they voiced general objections to the death penalty or expressed conscientious or religious objections to its imposition. In contrast, the record reflects that the Juror Almeyda had more than mere qualms or a general moral objection to the death penalty. Rather, she had an a strong unwillingness, if not inability, to follow the law or obey her oath.

IX.

THERE IS NO CONSTITUTIONAL REQUIREMENT FOR INDIVIDUAL, SEQUESTERED VOIR DIRE; THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN OVERRULING APPELLANT'S MOTION THEREFORE; IN ANY EVENT, APPELLANT FAILED TO PRESERVE ANY CLAIM REGARDING THE PRESENCE OF SUPPOSEDLY BIASED JURORS, AND CANNOT SHOW PREJUDICE

Appellant argues that (1) the California and federal Constitutions mandate individual sequestration of all prospective jurors during the death qualification process, despite this Court's contrary holdings; (2) his constitutional rights to due process and an impartial jury, and proper application of Code of Civil Procedure section 223, required sequestration in his particular case;[21] and (3) the failure to order sequestration amounted to a "miscarriage of justice" and prejudice in the constitutional sense under *Chapman v. California* (1967) 386

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21. Appellant also attempts to frame this issue as the violation of his supposed federal due process and equal protection "liberty interest" in the favorable application of Code of Civil Procedure section 223, which provides that voir dire of prospective jurors in all criminal cases, including capital ones, "shall, where practicable, occur in the presence of the other jurors . . . ." As discussed below, this Court has consistently rejected such liberty interest claims in analogous contexts.

U.S. 18, 24. (AOB 173-184.) Each argument is meritless. This Court has repeatedly rejected the first, and correctly found that the same United States Supreme Court precedent on which appellant relies does not support his argument. As to the second, appellant cannot show that the trial court abused its discretion in finding that group voir dire was practicable in this case. Finally, as appellant can only speculate that group voir dire might have caused sitting jurors to be biased, he cannot show any basis for reversal — indeed, as appellant did not even move to strike the supposedly tainted jurors for cause, much less exercise available peremptory challenges to strike them — he cannot show prejudice by any standard, much less satisfy the required showing of a miscarriage of justice.

The relevant procedural history shows that appellant's counsel sought to have death qualification voir dire conducted by sequestration. However, the court informed the parties that it had determined that the voir dire would be "in open court." Appellant's counsel objected, but identified no particular reasons for sequestration, but merely requested that the jurors "not have to answer those questions in front of the rest of the jury." (RT 667-668.) The court overruled the objection without further comment. (RT 668.) In addition, the court made it clear that counsel would have the opportunity to request sequestration as to particular jurors, if the need arose. (RT 792.)

Contrary to appellant's assertion, there is no constitutional right to sequestered voir dire, as this Court held in *People v. Box* (2000) 23 Cal.4th 1153, 1178-1182, and *People v. Waidla* (2000) 22 Cal.4th 690, 713-714. Appellant's repeated citations to *Morgan v. Illinois* (1992) 504 U.S. 719, do not support his constitutional claims. As this Court explained in *Box*, the *Morgan* court imposed no specific guidelines for the conduct of death-qualification voir dire: "'The Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.'" (*Box, supra*, 23 Cal.4th at p.

1179, quoting *Morgan, supra*, 504 U.S. at p. 729.) The assertion that sequestration is necessary to insure an impartial jury finds no support in any of the federal Supreme Court cases on which appellant relies; those authorities do not even address the question.

Nor has this Court ever held that sequestration was constitutionally required. In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, this Court "'declare[d], pursuant to [our] supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with' his views on the death penalty 'should be done individually and in sequestration' [citation; footnote]." (*Waidla, supra*, 22 Cal.4th at p. 713, citations to *Hovey* omitted.) *Hovey*'s non-constitutional, supervisory rule was abrogated with the passage of Proposition 115 and the amendment to Section 223 of the Code of Civil Procedure. (*Ibid.*) That provision provides, among other things, that "[i]n a criminal case," the trial court has "discretion in the manner in which" it conducts the voir dire of prospective jurors. (Code Civ. Proc., § 223; *Waidla, supra*, 22 Cal.4th at p. 713.) Section 223 also provides that in all criminal cases, *including* capital ones, the trial court must conduct the voir dire of any prospective jurors, "where practicable," in the presence of the other prospective jurors. (Code Civ. Proc., § 223; *Waidla, supra*, 22 Cal.4th at p. 713.)

Simply put, acceptance of appellant's argument would require this Court to reverse itself and retroactively impose an unprecedented rule of constitutional criminal procedure, based on arguments and authorities this Court has already rejected.

Nor does appellant's claim fare any better when he resorts to the "liberty interest" doctrine under *Hicks v. Oklahoma* (1980) 477 U.S. 343, in an attempt to dress up as a federal due process or equal protection claim the statutory claim that the trial court abused its discretion under Code of Civil Procedure section

223 by refusing to order sequestered voir dire. (AOB 177-178.) In *People v. Boyette, supra,* 29 Cal.4th at p. 381, this Court found that the trial court's erroneous denial of defendant's challenge for cause did not violate his constitutional right to an impartial jury. In the course of reaching that finding, this Court noted:

> Defendant additionally claims the trial court's "failure to adhere to a consistent standard for the qualification of jurors" arbitrarily deprived him of a right created by state law in violation of his right to federal due process. [Citation.] We disagree. In *Hicks*, the United States Supreme Court explained that a state law guaranteeing a criminal defendant certain procedural rights at a sentencing hearing, even if not constitutionally required, may give rise to a liberty interest protected against arbitrary deprivation by the due process clause. [Citation.] Defendant does not explain how the necessity of having our trial courts determine a juror's credibility and willingness to abide by the law is the equivalent of a guarantee of a procedural right based in state law. [Citation.] A contrary holding would convert all incorrect rulings by our trial courts into constitutional error. We thus reject his reading of *Hicks*.

(*Boyette, supra*, 29 Cal.4th at p. 419, fn. 6.) As appellant's "liberty interest" claim differs in no meaningful respect, it must also be rejected.

Appellant's assertion that the trial court violated Code of Civil Procedure 223 is meritless. "An appellate court applies the abuse of discretion standard of review to a trial court's granting or denial of a motion on the conduct of the voir dire of prospective jurors." (*Waidla, supra*, 22 Cal.4th at pp. 713-714.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."'" (*Id.* at p. 714, citations omitted.) Appellant argues that the trial court cannot be said to have exercised discretion because it overruled

appellant's objection without explanation. (AOB 178-179.) That argument is contrary to the most basic principles of appellate review, whereby a trial court's discretionary ruling will be affirmed so long as the record shows that it was reasonable, regardless of whether the court explained its ruling. (E.g., *People v. Jones* (2003) 29 Cal.4th 1229, 1245 [affirming denial of *Marsden* motion where trial court merely explained to defendant that "[i]t doesn't work that way"]; *People v. Alvarez* (1996) 14 Cal.4th 155, 204, [affirming trial court's unexplained evidentiary ruling based on trial court's implicit findings].)

In appellant's authorities, the court solely articulated a reason that was inconsistent with the exercise of discretion. Most significantly, in *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1183, it was evident from the trial court's statement that it believed Proposition 115 overruled *Hovey* that the court saw no need to consider whether group voir dire was impractical, as required by Code of Civil Procedure section 223. Here, in contrast, there is nothing in the record — save the lack of a expressed finding — to indicate that the trial court believed it had no discretion to order sequestered voir dire, much less that it refused to consider the practicalities involved. Moreover, given that appellant failed to identify any such impracticalities below — and the record fails to disclose any — there is no basis for a finding that the trial court's ruling fell outside the bounds of reason. (See *Waidla, supra*, 22 Cal.4th at pp. 714.)

Appellant argues that sequestered voir dire was required because during questioning three prospective jurors appeared to moderate their views concerning capital punishment. Appellant's assertions are purely speculative and legally deficient. The most appellant can show is that prospective jurors Harrison, Mehta, and Bingham indicated their strong support for the death penalty in answers on their questionnaires. During voir dire, after being informed that service as a juror would require them to keep an open mind and follow the law, irrespective of their personal beliefs, they stated that they could

do so. When challenges for cause to those prospective jurors were overruled, appellant used peremptory challenges to strike them. (AOB 179-181.)

Appellant's assertion that the prospective jurors were "educated" to give answers that allowed them to survive a "for cause" challenge is pure speculation. (See *ibid.*) Of course, had the court refused to permit individual voir dire, and ruled on challenges based solely on the written responses, appellant would certainly be claiming error. (See *Stewart, supra*, 33 Cal.4th 425, 440-441 [trial court erroneously excused prospective jurors for cause, based solely upon their written answers to a jury questionnaire concerning their views relating to the death penalty, and without any opportunity for follow-up questioning during which the court and counsel might have been able to clarify the responses and determine whether, in fact, the prospective jurors were disqualified from service].) A primary reason for such individual voir dire was to test and probe the written responses. Appellant can only speculate that listening to other prospective jurors' answers caused Harrison, Mehta, and Bingham to change (or conceal) their opinions. It is just as likely that the written responses were ill-conceived or badly written reflections of the true beliefs that surfaced on voir dire. In any event, the bottom line for constitutional purposes is whether the prospective jurors satisfied the *Witherspoon/Witt* standard — and appellant cannot pretend to have shown otherwise. Moreover, given that none of the three prospective jurors sat on the jury appellant cannot show any prejudice. "Defendant has not established that any juror who eventually served was biased against him, and thus has not established prejudice arising from the [voir dire] procedure." (*Cunningham, supra*, 25 Cal.4th at p. 975.)

Appellant also argues that three sitting jurors (Twaddell, Yarbrough, and Cummings) were tainted by the failure to order sequestered voir dire because they were "exposed to" the strong pro-death penalty opinions of various

prospective jurors. (AOB 181.) No published decision of this Court or the United States Supreme Court has ever recognized such exposure as amounting to constitutional injury. Moreover, given that appellant neither challenged any of the three jurors for cause, nor attempted to exercise a peremptory challenge when such challenges were available (RT 981), he failed to preserve his claim. (See, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 132 [To preserve a claim of trial court error in failing to remove a juror for bias in favor of the death penalty, a defendant must either exhaust all peremptory challenges and express dissatisfaction with the jury ultimately selected or justify the failure to do so].)

For the reasons set forth above, appellant cannot show that the absence of sequestered voir dire resulted in a miscarriage of justice, as required for reversal for an erroneous ruling under Code of Civil Procedure section 223. Indeed, appellant cannot show prejudice under any standard. (*Cunningham, supra*, 25 Cal.4th at p. 975 [appellant must show a biased juror served]; see also *People v. Williams* (1997) 16 Cal.4th 153, 229 [claim concerning trial court's failure to reopen voir dire cannot be supported by mere speculation as to prejudice].) Appellant's reliance on *Cash, supra*, 28 Cal.4th at pp. 722-723, is misplaced. Unlike the situation in *Cash*, appellant's trial court did not prevent all voir dire on a crucial issue, thereby preventing the defendant from curing any prejudice. To the contrary, the trial court did not place any significant restrictions on voir dire. Accordingly, his sequestration claim must fail.

X.

APPELLANT FORFEITED HIS PENALTY-PHASE PROSECUTORIAL MISCONDUCT CLAIM BY FAILING TO INTERPOSE A TIMELY OBJECTION AND REQUEST A CURATIVE ADMONITION; IN ANY EVENT, THERE WAS NO MISCONDUCT - THE PROSECUTOR'S QUESTIONING ON RACIAL MATTERS WAS NEITHER GRATUITOUS NOR IMPROPER

Appellant's claim that the prosecutor injected irrelevant and inflammatory evidence of racial violence into the penalty phase — and thereby violated appellant's constitutional rights to a fair trial, equal protection and due process — is wholly meritless. (See AOB 185-201.) Indeed, respondent takes strong exception to appellant's baseless attempts to demonize the prosecutor's conduct, which was entirely proper. As shown below, the prosecutor merely adduced unobjectionable eyewitness testimony that when appellant took active part in two post-arrest violent attacks on jail inmates, those attacks appeared to be racially motivated. That testimony was relevant to explain the circumstances of the attacks and appellant's motive for the assaults. Contrary to appellant's assertions, at no point did the prosecutor suggest or even imply that appellant's underlying charged offenses were racially motivated. A fair reading of the record shows that appellant's allegation that the prosecutor's questioning amounted to a "disingenuous device to insert racial animosity into the penalty trial" (AOB 199) is itself disingenuous: It was appellant who "injected" race into the proceedings by choosing to participate in two violent, race-based attacks. In any event, appellant forfeited his misconduct claim by failing to interpose a contemporaneous objection and request a curative admonition. Finally, there was no potential for prejudice. The prosecutor never appealed to race and no reasonable juror could have construed the challenged questioning as implying such an appeal.

"[T]he presence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" is a statutory aggravating factor for purposes of determining whether to impose California's death penalty. (§ 190.3, subd. (b).) As part of its case in aggravation, the prosecution presented evidence that appellant had actively engaged in three violent attacks on fellow inmates while in custody for the underlying offenses: (1) The June 2, 1991, incident in which appellant and other African-American inmates attacked a group of Hispanic inmates; appellant was one of the aggressors; he struck another inmate with a 55-cup metal coffee pot;[22/] (2) The June 30, 1991, incident in which appellant joined a group of African-American inmates who attacked white inmate, Russell Cross, because Cross sat on an African-American inmate's bunk, despite having been warned not to;[23/] and (3) The March 16, 1992, incident in which appellant and two other Black inmates attacked a fourth Black inmate.[24/]

Appellant contends that the prosecutor impermissibly injected race into his examinations of the witnesses to the two incidents in June of 1991— the attack on inmate Cross and the African-American/Hispanic melee. (AOB 185-189.) However, at no time during the prosecution's examination of Kanoa Phillip Biondolillo, the sole witness to the Cross incident, were any objections interposed as to the questions concerning the racial identities of the parties involved. Nor was Biondolillo seriously impeached. Nor did appellant object to the prosecutor's questions to sole witness Deputy Ricky Hampton concerning the racial identities of the participants in the other June incident. Thereafter, the prosecution presented evidence of the third violent incident, and completed its

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22. RT 1877-1882, 1890-1891.

23. RT 1871-1876.

24. RT 2022-2024, 2029-2037.

case in aggravation as to all three incidents in the morning session of March 16, 1992. Appellant interposed no objections to the testimony of Biondolillo or Deputy Hampton during a sidebar discussion before the noon-time break. (RT 1899-1893.) Upon commencement of the afternoon session, out of the presence of the jury, appellant moved for a mistrial on the ground that the prosecutor attempted to prejudice the jury by adducing unnecessary evidence of race during his examination of Biondolillo and Deputy Hampton. The court summarily denied the motion. (RT 1912-1913.)

Appellant's belated motion for a mistrial was not a timely objection; at no time did appellant request a curative admonition. Accordingly, appellant's misconduct allegation was waived by his failure to make a timely objection and request a curative admonition. (E.g., *Valdez, supra*, 32 Cal.4th at p. 123; *Cunningham, supra*, 25 Cal.4th at p. 1001; *People v. Mayfield* (1997) 14 Cal.4th 668, 783 ["Defendant contends there were improper racial references in the prosecutor's guilt phase argument to the jury. Because defense counsel did not object to these statements or request that the jury be admonished, the contention is not reviewable on appeal"].)

In any event, appellant's claim fails miserably on its merits. This court rejected a materially indistinguishable claim in *People v. Scott* (1997) 15 Cal.4th 1188:

> Violet H. testified that defendant had impregnated her 14-year-old daughter. About two hours before defendant assaulted her, she told him she wanted him to end his relationship with her daughter. He told her "that I will make sure she'll never, ever want to be near or around a black man again." Defendant argues that by eliciting this testimony, the prosecutor "improperly injected the irrelevant issue of race into the proceedings. . . ." On the contrary, defendant himself injected race into his criminal behavior. This evidence was relevant

> to show the circumstances, including motivation, of the other violent criminal activity. "The prosecutor was entitled to elicit the facts surrounding defendant's assault on [Violet H.]; the racial [comment] came from defendant's own mouth."

(*Id.* at p. 1219, citation omitted.) As in *Scott*, evidence of the parties' racial identities was relevant to explain the circumstances and motivations in the two challenged incidents — neither incident would make sense without that information.

As appellant cannot argue that the challenged acts of violence failed to qualify as permissible evidence in aggravation, pursuant to section 190.3, subdivision (b), his argument amounts to the meritless assertion that the prosecution was proscribed from adducing evidence concerning the violent incidents beyond the bare fact of the violence. In essence, appellant contends that the prosecution was required to present a bowdlerized version of the incidents. This Court has repeatedly and emphatically rejected that argument:

> We have observed that the issue of other violent criminal activity encompasses not only the existence of such activity but also all the pertinent circumstances of that activity. [Citations.] The prosecution, in presenting the above described evidence of prior violent activity, was not obliged to omit evidence pertaining to particular acts committed during the course of the incidents that in themselves were not violent. In each incident, an explanation of defendant's conduct preceding or following a particular forceful or violent act clearly assisted the jury's understanding of the inception of and continuation of the express and implied threats to the victims. The trial court did not err in admitting this evidence.

(*People v. Bradford* (1997) 15 Cal.4th 1229, 1377-1378; *People v. Montiel supra,* 5 Cal.4th at p. 916 ["[I]t is well settled that an 'actual' violent crime

admissible under factor (b) may be shown in full context."].)

None of appellant's authorities supports his claim. In all of the cases on which he relies, the prosecutor made irrelevant or gratuitous racial comments, or adduced irrelevant or gratuitous evidence of race, for the purpose of inciting racial prejudice against the defendant. As one representative example, appellant relies on *Moore v. Morton* (3d Cir. 2001) 255 F.3d 95, to support his claim that the prosecutor appealed to racial prejudice. (AOB 193.) In *Moore*, however, the prosecutor not only mischaracterized witness testimony but made various arguments that "asked the jury to decide the case on bias and emotion rather than on the evidence presented." (*Id.* at p. 118.) Among those arguments was one that "asked the jury to infer from Mrs. Moore's race, and not from the credibility or reliability of her alibi testimony, that her husband was guilty." (*Ibid.*) Nothing remotely similar happened in appellant's trial. Rather, the evidence of race was relevant and admissible; the prosecutor never argued for any inferences based on race. Moreover, the challenged evidence had no tendency to stir up racial prejudice against appellant. If anything, it merely showed that appellant's violent acts were sometimes racially motivated. That is quite different from arguing that a person should be judged differently because of his race — racial bigotry and belonging to an identifiable racial group are two different and independent things.

Moreover, the admission of the challenged evidence was harmless and non-prejudicial by any standard. Evidence of the third violent incident adduced by the prosecution showed that appellant's penchant for attacking fellow inmates was not solely motivated by race — he also engaged in a cowardly and vicious attack on an African-American inmate.[25] (*People v. Howard* (1988) 44 Cal.3d 375, 427 [finding admission of evidence of defendant's alleged child abuse, in penalty phase of capital murder prosecution, even if error, was

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25. RT 2022-2024, 2029-2037.

"harmless under any standard," in light of other evidence of injuries inflicted by defendant on children as well as adults].) Moreover, there was no attempt to attribute a racial motive to appellant's murder of Mr. Shield.[26] Indeed, any such attempt would have been ludicrous. In committing the underlying armed-robbery spree, appellant displayed a complete indifference to his victims' races — Hispanic, African-American, White, and Asian-American. Indeed, when Mr. Muhammed remarked that he did not "know why you all do this to brothers," appellant replied: "Fuck a brother." (RT 1105-1106.)

In short, appellant's reliance on a welter of wholly distinguishable, non-binding authorities from the lower federal courts and other states to assert that the prosecutor in appellant's trial "deliberately inserted 'hate-engendering' racial factors into the calculus of whether [appellant] should live or die" (AOB 197) is baseless.[27]

Appellant's additional claim that the same challenged conduct violated international law deserves scant comment. (See AOB 201-206.) Not only is it dependant on acceptance of the same fallacious assertions on which appellant attempted to support his constitutional claim of misconduct, but this Court has repeatedly rejected analogous arguments. (*People v. Brown* (2004) 33 Cal.4th 382, 403-404 ["'International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]' Since we find no other defect in imposing the death penalty against defendant, we decline to find the law defective based on any provision of international law."].)

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26. In fact, the prosecutor was emphatic that racial considerations must play no part in the resolution of appellant's trial. (RT 953.)

27. Appellant's improper, extra-record speculation that the jury was especially susceptible to the prosecutor's supposed decision to play the "race card," based on the Rodney King trial (AOB 201), should be disregarded.

XI.

IT IS CONSTITUTIONALLY PERMISSIBLE TO IMPOSE THE DEATH PENALTY FOR FELONY MURDER WHEN, AS HERE, THE DEFENDANT WAS THE ACTUAL KILLER; INTERNATIONAL LAW IS IRRELEVANT TO HIS CLAIM

Repeating an argument this Court has consistently rejected, appellant argues that the Eighth Amendment and international law require a factual finding that appellant killed his victim with some culpable state of mind, such as intent to kill or recklessness in order to impose the death penalty. (AOB 211-225.) Here, the jury found appellant guilty of the first degree murder of Mr. Shield, and specifically found true the special circumstance allegation that appellant killed his victim while engaged in the commission of an attempted robbery. The jury also found true the allegation that appellant did so while armed with a handgun. (CT 762; RT 1825-1826.) As appellant concedes, the prosecutor argued that the special circumstance finding must be predicated on a finding that appellant was the actual killer. (AOB 214-215.) Appellant was the actual killer beyond any doubt.

Appellant argues that the possibility that he killed Mr. Shield accidentally renders his punishment constitutionally disproportionate. His claim fails as a matter of law because the imposition of the death penalty for felony murder in circumstances where the defendant is the actual killer is well-recognized as being constitutional. As this Court has repeatedly explained:

> Contrary to defendant's assertion, the federal Constitution's Eighth Amendment imposes no requirement that a jury make an express finding that a capital defendant acted with "reckless disregard for human life." As the United States Supreme Court said in *Tison v. Arizona, supra,* 481 U.S. at pages 157-158, such mental state is "implicit" in the knowing participation in criminal activities carrying

> a grave risk of death. Moreover, defendant is wrong when he asserts that this court has never addressed whether, consistent with the federal Constitution's Eighth Amendment, the death penalty can be an appropriate punishment for someone who kills *accidentally* during such activity. The purpose of our felony murder law "is to deter felons from killing negligently or accidentally [in the course of a felony] by holding them strictly responsible [for such killings]." [Citations.] Thus, we necessarily resolved this issue in *People v. Anderson, supra,* 43 Cal.3d at pages 1146-1147, when we concluded that the Eighth Amendment posed no impediment to subjecting the actual killer in a felony murder to the death penalty.

(*People v. Earp*, *supra,* 20 Cal. 4th at p. 905, parallel citations omitted; *People v. Smithey* (1999) 20 Cal.4th 936, 1016 ["Evidence that the defendant is the actual killer and guilty of felony murder, however, establishes 'a degree of culpability sufficient under the Eighth Amendment to permit defendant's execution.'"]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1151 ["Although he presented evidence he lacked the intent to kill, defendant does not dispute he personally killed the victim; nor does he contend the penalty jury failed to consider his individual circumstances. We thus find the trial court properly applied the law under *People v. Anderson, supra*, 43 Cal.3d 1104."]; *Woratzeck v. Stewart*, 97 F.3d 329, 335 (9th Cir. 1996).

As this Court's rulings are fully consistent with federal Supreme Court authority, appellant's citations to various state and lower federal court decisions for the proposition that a mens rea finding is constitutionally required — above and beyond a finding that the defendant was the actually killer and guilty of felony murder (AOB 218-220) — are neither binding nor instructive. Appellant's attempt to rely on *Hopkins v. Reeves* (1998) 524 U.S. 88, 90 (AOB 217-218), is wholly misguided. There, the Supreme Court held unconstitutional

a state statute that prohibited lesser included offense instructions in capital cases, when lesser included offenses to the charged crime existed under state law and such instructions were generally given in noncapital cases. (*Id.* at p. 90.) Obviously, that has nothing to do with this case or this issue. Appellant's advertence to statutory limitations other state legislatures have enacted and "international opinion" (AOB 219-224) is wholly beside the point when this Court has determined that California law is consistent with the United States Supreme Court's constitutional law precedent.

In any event, because the jury necessarily found appellant was the actual killer, any error was harmless beyond a reasonable doubt. (*People v. Jones* (2003) 30 Cal.4th 1084, 1120-1121 ["We conclude that the jury found defendant to be the actual killer and hence that any instructional error was harmless beyond a reasonable doubt."].)

XII.

AS THIS COURT HAS REPEATEDLY HELD, THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE DEFINITION OF "LIFE WITHOUT THE POSSIBILITY OF PAROLE"

Appellant contends this Court should reverse its longstanding precedent and hold that the trial court's instructions on the LWOP alternative sentence were inadequate to inform the jury that such a sentence would render appellant ineligible for release on parole from prison. (AOB 226-232.) However, appellant offers no new arguments for doing so, and can point to nothing in the record to support his idle speculation as to prejudice. Accordingly, his claim should be rejected. (E.g., *People v. Prieto* (2003) 30 Cal.4th 226, 269-271; *People v. Smithey* (1999) 20 Cal.4th 936, 1008-1009.)

XIII.

NEITHER THE CONSTITUTIONAL EIGHTH AMENDMENT NOR ITS EQUAL PROTECTION CLAUSE REQUIRES "INTERCASE PROPORTIONALITY" REVIEW

Raising another consistently rejected claim, appellant argues that the federal Constitution's Eighth Amendment and the equal protection clause require "intercase proportionality" review of capital sentences. (AOB 233-241.) As this Court has repeatedly held, the settled law is otherwise: "The federal Constitution does not require intercase proportionality review . . . ." (*People v. Marks, supra,* 31 Cal.4th at p. 237, citing *Pulley v. Harris* (1984) 465 U.S. 37, 50-51; *People v. Griffin* (2004) 33 Cal.4th 536, 596 [rejecting all federal constitutional permutations of this argument].)

XIV.

AS THIS COURT HAS REPEATEDLY HELD WITH REGARD TO THE JURY'S SENTENCING DECISION, THE CONSTITUTION DOES NOT REQUIRE (1) THE ASSIGNMENT OF A BURDEN OF PROOF, (2) A PROOF BEYOND A REASONABLE DOUBT STANDARD, OR (3) UNANIMITY AS TO AGGRAVATING CIRCUMSTANCES

Appellant makes three related and consistently rejected contentions as to the jury's sentencing determination — particularly, its assessment of whether aggravating factors justify imposition of the death penalty. (AOB 242-257.) As this Court's precedent makes clear, however:

> The death penalty law is not unconstitutional for failing to impose a burden of proof — whether beyond a reasonable doubt or by a preponderance of the evidence — as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence.

> [Citation.] Unlike the statutory schemes in other states cited by defendant, in California "'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." [Citations.] [¶] The jury is not constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.] Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, have not altered our conclusions regarding burden of proof or jury unanimity. [Citation.]

(*People v. Brown, supra,* 33 Cal.4th at pp. 403-404, parallel citations omitted.) Accordingly, appellant's contentions must fail.

XV.

CALIFORNIA'S STANDARD INSTRUCTION, CALJIC NO. 8.88, CONCERNING THE JURY'S OBLIGATIONS IN MAKING THE PENALTY-PHASE DETERMINATION IS CONSTITUTIONAL

Appellant asserts various related constitutional challenges to CALJIC No. 8.88, as given by the court: (1) that the terms "so substantial" and "warrant," as used in the instruction, rendered it vague and misleading (AOB 258-264); (2) that the instruction failed to inform the jury that if the aggravating circumstances did not outweigh those in mitigation, a sentence of life without the possibility of parole was mandatory (AOB 265-269); and (3) that it failed to inform the jury that neither party bore the burden of persuasion (AOB 269-270). This Court has repeatedly rejected those contentions, and appellant offers no legitimate reason for reversing its precedent. (E.g., *People v. Coffman, supra,* 34 Cal.4th at p. 124; *People v. Crew, supra,* 31 Cal.4th at p. 858.) Moreover, as the court gave appellant's requested special defense instruction to the effect that compassion or sympathy alone was sufficient to reject the death penalty, and that there was no legal requirement that the jury find a

mitigating factor before choosing LWOP. (CT 859; RT 2151-2152.) Accordingly, any error would have been harmless beyond a reasonable doubt.

XVI.

CALIFORNIA'S STANDARD INSTRUCTIONS, CALJIC NOS 8.85 AND 8.88, REGARDING THE FACTORS TO BE CONSIDERED IN DETERMINING WHICH PENALTY ALTERNATIVE TO CHOOSE, ARE CONSTITUTIONAL

Appellant raises a welter of boilerplate constitutional challenges to CALJIC Nos. 8.85 and 8.88, all of which this Court has rejected. As appellant presents no legitimate reason for reversing this Court's well-considered precedent, his arguments should be rejected. First, appellant contends that the "circumstances of the crime" factor in section 190.3, subdivision (a), is so unconstitutionally vague and ambiguous in practice that it fails to adequately narrow the bases for imposing the death penalty, and therefore renders its application arbitrary and capricious.[28/] (AOB 272-279.) This Court has rejected that argument's premise and other related arguments. (E.g., *People v. Hughes*, *supra,* (2002) 27 Cal.4th at pp. 403-405; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137 ["The use of section 190.3, factor (a), which permits the jury to consider in aggravation '[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true,' is not unconstitutionally vague or imprecise, nor does it improperly weight the scales in favor of death"].) It should do so again here.

Second, appellant asserts that the jury was constitutionally misinstructed with regard to the "forceful or violent activity" factor under section 190.3, subdivision (b), because: (1) the jury was not instructed that they had to

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28. Appellant does not contend that any of the facts urged by the prosecution in connection with this factor were improper. (See AOB 278.)

unanimously agree that appellant committed each alleged act of violence before any act could be considered; (2) the consideration of "unadjudicated" criminal acts violated appellant's due process and equal protection rights; (3) appellant's right to a jury trial required a unanimity instruction; and (4) the Eighth Amendment requires a unanimity instruction in death penalty cases. (AOB 279-287.)

Each of those contentions is meritless. As this Court recently held, "factor (b), which permits the jury to consider in aggravation '[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence,' does not violate state or federal constitutional requirements of due process, equal protection, or reliability in death sentencing [citations], and the standard jury instructions given here provided adequate guidance on the use of this factor [citations]." (*Kipp, supra*, 26 Cal.4th at p. 1138; *People v. Brown, supra,* 33 Cal.4th at p. 402 ["The jury may properly consider evidence of unadjudicated criminal activity involving force or violence under factor (b) of section 190.3 and need not make a unanimous finding on factor (b) evidence. [Citations.] Contrary to defendant's implication, 'the court must instruct, on its own motion, that no juror may consider any alleged other violent crime in aggravation of penalty unless satisfied beyond a reasonable doubt that the defendant committed it [citations].'"].)

Third, appellant urges this Court to reconsider a claim it has consistently rejected — that the trial court must delete inapplicable statutory factors. (AOB 287-289; e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 421.) As appellant presents no new basis therefor, his claim should be rejected. The same is true for his claims that:

(1) The trial court must instruct the jury as to which factors were mitigating and which were aggravating (AOB 289-290). (E.g.,

People v. Raley (1992) 2 Cal.4th 870, 919.)

(2) The use of "restrictive adjectives" such as "extreme" and "substantial" violated various constitutional rights (AOB 290). (*People v. Yeoman, supra,* 31 Cal.4th at p. 165.)

(3) Written findings were constitutionally required as to aggravating factors (AOB 291-293). (E.g., *People v. Davis* (1995) 10 Cal.4th 463, 549.)

Appellant's final argument is inherently flawed. Appellant asserts that the lack of the above procedural safeguards, which this Court has found were not constitutionally required, coupled with the failure to require intercase proportionality review, which this Court has also found was not constitutionally required, somehow combined to result in a constitutional deprivation. (AOB 293-295.) One cannot add a group of negative numbers and obtain a positive sum.

XVII.

INTERNATIONAL LAW DOES NOT PROHIBIT A SENTENCE OF DEATH, SUCH AS APPELLANT'S, WHICH WAS RENDERED IN ACCORDANCE WITH STATE AND FEDERAL CONSTITUTIONAL AND STATUTORY REQUIREMENTS

Appellant assert's that international law and the Eighth Amendment proscribe the imposition of California's death penalty. (AOB 296-301.) This Court has consistently rejected that argument:

> Defendant further argues that California's death penalty statute is unconstitutional because the use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency. In a related vein, he contends that the statute violates international law as set forth in the International Covenant on Civil and Political Rights (ICCPR) and that use of the death penalty violates

international standards because only a small minority of countries consider death an appropriate form of punishment. [¶] Setting aside whether defendant has standing to invoke the terms of an international treaty in this circumstance [citation], we question whether defendant's argument regarding the ICCPR fails at its premise. Although the United States is a signatory, it signed the treaty on the express condition "[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." [Citations.] Given states' sovereignty in such matters within constitutional limitations, our federal system of government effectively compelled such a reservation.

In any event, we have previously considered and rejected the various permutations of defendant's arguments. [Citations.] As succinctly stated in *People v. Hillhouse* [(2002) 27 Cal.4th 469], at page 511: "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]" Since we find no other defect in imposing the death penalty against defendant, we decline to find the law defective based on any provision of international law.

(*People v. Brown, supra,* 33 Cal.4th at pp. 403-404, parallel citations omitted.)

XVIII.

THERE WERE NO ERRORS TO ACCUMULATE

Appellant's "cumulative error" argument fails because, as shown above, there were no errors to accumulate. (See, e.g., *People v. Griffin, supra,* 33 Cal.4th at pp. 599-600.)

CONCLUSION

For the above-stated reasons, appellant's convictions and judgment of death should be affirmed.

Dated: September 29, 2004

Respectfully submitted,

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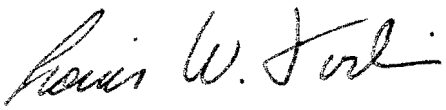

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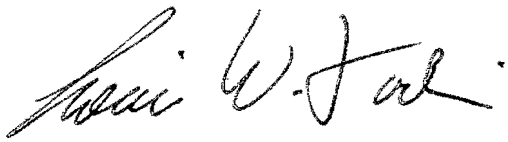
CERTIFICATE OF COMPLIANCE
(CALIFORNIA RULES OF COURT, RULE 14(c))

I certify that the attached brief uses 13-point, Times Roman font and contains 31,169 words.

Dated: September 30, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE

Case Name: PEOPLE v. PAUL SODOA WATKINS Case No.: S020634

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 1, 2004, I placed two (2) copies of the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

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For DELIVERY TO: Hon. Robert M. Martinez, Judge

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on September 1, 2004, at Los Angeles, California.

JENNIE VILLEGAS

Signature

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