IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARCHAND ELLIOTT, Defendant and Appellant.	S027094 CAPITAL CASE

Los Angeles County Superior Court No. VA008051
The Honorable Philip H. Hickok, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In a five-count information filed by the Los Angeles County District Attorney, appellant was charged with: (1) murder of Patrick Rooney (Pen. Code, [1] § 187, subd. (a); Count 1), with the special-circumstance allegation that the murder occurred during the commission of a robbery (§ 190.2, subd. (a)(17)); (2) robbery of Rooney and Joseph Swal(§ 211; Counts 2, 3); (3) attempted willful, deliberate, premeditated murder of Pierre Jacobs (§§ 664/187, subd. (a); Count 4); and (4) assault with a firearm of Ardis Irvine (§ 245, subd. (a)(2); Count 5). It was further alleged as to Counts 1 through 3 and 5 that appellant personally used a handgun (§ 12022.5)[2] [3] - (1CT 192-196.)

Appellant was arraigned, pled not guilty, and denied the special-circumstance allegations. (1CT 244; 1RT 4-7.) Appellant's motion to dismiss

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

2. Counts 1 and 2 related to crimes committed at Lucky's Market. Counts 3 through 5 related to crimes committed at Boys Market.

3. This case, which was tried in the Southeast Judicial District (Norwalk) was initially filed in the Central Judicial District (downtown), and, in addition to crimes charged at Lucky's and Boys, included charges related to crimes committed at Hughes Market.

Count 3 was granted. (2CT 452.) Trial was by jury. (3CT 672.) The trial court reduced Count 4 from attempted willful, premeditated murder to assault with a deadly weapon (§ 245, subd. (a)(1)). (3CT 691.)

The jury found appellant guilty of first-degree murder (Count 1), second-degree robbery (Count 2), and assault with a firearm (Count 4, which was originally numbered as Count 5) and found the special-circumstance and personal firearm use allegations to be true. The jury could not reach a verdict on Count 3 (originally numbered Count 4) and the trial court declared a mistrial as to that count. (3CT 865-872; 4CT 969.) At the conclusion of the penalty phase, the jury fixed the penalty at death. (4CT 930.)

Appellant's motion for new trial was denied. The court sentenced appellant to death as to Count 1, in accordance with the jury's verdict. The court imposed a consecutive ten year term for Count 2, five years for robbery and an additional five years for the personal firearm use enhancement. As to Count 4, the trial court imposed a consecutive two year, three month term, (one year for assault with a deadly weapon and one year, three months for the personal firearm use enhancement). (4CT 964-989.)

This appeal is automatic following a judgment of death. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

I. Evidence Presented At The Guilt Phase

A. Prosecution

1. Lucky's Market (Counts 1 and 2)

a. Eyewitnesses

Howard Sands and Patrick Rooney worked for Armored Transport, Incorporated, an armored car company that served banks and supermarkets.

Sands and Rooney had been partners for about six months to one year. On December 15, 1988, at approximately 11:00 a.m., Sands and Rooney drove to Lucky's Market located at 17220 Lakewood Boulevard in Bellflower to make a cash delivery and a cash pickup. Sands and Rooney had made stops at that Lucky's Market every day since the date it opened, which was December 6 or 7, 1988. Sands was driving and Rooney was the passenger. Sands parked the armored truck in front of the market. The truck had clear thick plate glass windows that appeared to be tinted. Rooney carried cash and coins into the market. Sands stayed in the driver's seat. (6RT 1107-1109, 1115-1119, 1126-1127.)

Rooney approached the sliding glass doors of the store, which began to slowly open. A man later identified as appellant rushed behind Rooney and grabbed Rooney's neck. Appellant used his left hand to put Rooney in "some kind of choke hold." Appellant pushed Rooney's head through the glass doors, causing the glass to shatter, and shot Rooney in the head with a silver gun. Appellant held the gun in his right hand. Appellant, using his left hand, grabbed a canvas money bag from Rooney's left hand and a gun from Rooney's right hand. Appellant held a silver gun in his right hand and Rooney's blue steel .38 revolver and the canvas bag in his left hand. (6RT 1117-1114, 1119-1120, 1123-1125; 7RT 1139-1145, 1222.) Sands saw another dark-skinned Black man run out of the store after Rooney was shot. That man was not carrying anything. Sands assumed that man was with appellant. (6RT 1126; 7RT 1219-1220, 1225-1226.)

Sands, a light-skinned Black man, described appellant as male with "my complexion." Appellant wore wire-frame eyeglasses, a white shirt, dark colored pants, and a tan jacket. Sands estimated appellant was about five feet, ten inches tall and weighed 160 pounds. Sands could only see the top portion of appellant's head. Appellant had close-cropped hair. (6RT 1111-1113; 7RT

1145-1146.) Appellant's hair in the back appeared to be short. (7RT 1213-1214.)

Michael Fiamengo was a Lucky's assistant manager. At approximately 10:40 a.m., Fiamengo went to the safe located near the front of the market to meet Rooney. Rooney brought money for the market's payroll checks. Fiamengo gave Rooney $64,184, which was in two plastic bags. Rooney put the money into a white canvas bag and walked out of the store. (5RT 950-954, 956.)

Fiamengo heard a "slam on a glass door up front." Two or three seconds later, Fiamengo saw appellant run past him, carrying the canvas bag and two guns. Appellant ran through the store. Fiamengo tried to calm down the customers at the front end of the store and keep the customers and employees away from Rooney's body. Fiamento "made sure" that the police were called. The police arrived and Fiamengo gave them a statement later that day. (5RT 954-955, 960.) In December 1991, Fiamengo identified appellant from a six-pack photo display. (5RT 979-984.)

Three back gates of Lucky's led to Virginia Street, which was directly behind the market. Virginia Street connected to Palm Avenue. (5RT 958-959, 962.)

On December 15, 1988, at approximately 10:50 a.m., Gerald Roy Lindsey arrived at Lucky's. Lindsey was inside the market, approximately 20 feet from the entrance. Lindsey, who was familiar with firearms, heard a gunshot, which he believed was the sound of a nine-millimeter gun, followed immediately by the sound of crashing glass. Lindsey saw appellant, who was carrying a semi-automatic gun in his left hand and a canvas sack in his left hand, run toward the rear of the store. As appellant ran, he said, "Get the fuck out of my way. Everybody, get the fuck out of my way." Lindsey followed appellant, who ran past the produce and freezer sections, then out of the rear

door to the warehouse area of the market. Lindsey returned to the front of the store and put his windbreaker over Rooney's body, which was laying "half in and half out" of the broken door. Approximately one minute later, deputy sheriffs arrived and took approximately 20 people, including Lindsey, to a back room for questioning. (5RT 851-870, 934-939.)

Cheryl Pitzer, a Lucky's merchandise manager, was walking from the front of the store to the health and beauty care department. Pitzer heard a gunshot and ducked down, and saw appellant run down the center aisle to the back of the market. Appellant turned to look behind him. Pitzer saw appellant's face. Appellant continued to run down the center aisle and said, "Get the fuck out of my way." Appellant was carrying a gun and an armored bank bag. Pitzer ran to the pharmacy. A short time later, the police arrived and Pitzer gave them a description of appellant. (6RT 1018-1026.) Pitzer saw newscasts which showed two photos of possible suspects. Pitzer recognized the person in one of the photographs as appellant. (6RT 1026-1027.)

Albino Martins, a Lucky's employee, heard a gunshot and the sound of glass doors breaking. Martins saw appellant run to the back of the store. Appellant had a large bag on his left shoulder and carried a revolver in his left hand. (6RT 988-997.)

Janet Delaguila started working at Lucky's on December 7, 1988. Delaguila's previous job was at Courtesy Cleaners in Compton, where she worked for about two years. Delaguila knew appellant as a regular customer at Courtesy Cleaners, where Delaguila saw him about two or three times a week. About two days prior to December 15, 1988, Delaguila saw appellant and a woman at Lucky's meat department. Delaguila intended to speak with appellant, but was called away by a co-worker. (6RT 1046-1051.)

On December 15, 1988, Delaguila, who was in the produce department, heard a gunshot, looked to the front of the store and saw appellant running to

the back of the store. Appellant carried two guns, one in each hand, and a bag. Later that day, Delaguila told the police that she knew appellant from working at Courtesy Cleaners. Delaguila told the police that appellant's last name started with "E," but she could not remember his name. On December 16, 1998, the police showed Delaguila some photos, from which she identified appellant. (6RT 1049-1058; 7RT 1397-1400.)

Lawrence Diehl, who was in the back area of the store, saw appellant running toward the back door. Appellant carried a black bag and held a gun in his right hand. Appellant pointed the gun at Diehl as he ran past Diehl. Appellant ran out the roll-up receiving doors. Appellant ran across the street and stopped at the corner of Palm and Virginia. A Black male pulled up in a two tone white and light gray or blue van, picked up appellant, and drove away. Diehl saw part of the license plate and told the police he saw a "2" and an "H." (7RT 1148-1155.) Diehl described appellant as a young Black male with longer hair in back and shorter hair on top. (7RT 1163, 1183-1184.)

Deputy Dennis Flinn was called to go to Lucky's at 10:52 a.m. in response to a report that an armored car driver had been shot. (7RT 1301-1302.)

On March 13, 1990, Lindsey, Fiamengo, Martins, Pitzer, and Delaguila attended a live line-up, from which they each identified appellant. (5RT 947-947, 958, 994-995, 6RT 1044, 1057-1058.) The police did not show Lindsey, Fiamengo, Martins, and Pitzer photographs of appellant during the time after the crime and prior to the line up. (7RT 1408.) Diehl identified someone other than appellant from the line-up. The person Diehl identified at the line-up resembled appellant, but was heavier. In December 1991, Diehl identified appellant from a six-pack photo display. (7RT 1150-1152, 1180-1182, 1400-1402.)

b. Van/Fingerprints/Investigation

At 11:35 a.m. on December 15, 1988, Deputy Sheriff Ronald W. Dietrich saw a gray van with the engine running at an apartment complex parking lot located at 9254 Palm Street. The van matched the description of one that was just used in the Lucky's robbery. Deputy Dietrich "ran" the van's license plates and discovered it was a stolen vehicle. Deputy Dietrich called Detective John Yarbrough. Deputy Dietrich impounded the van. Deputy Dietrich put on plastic gloves, entered the van through the side door and turned off the ignition. The van was towed to the Lakewood Sheriff's Station. (7RT 1187-1195.)

Deputy Ronald George, a fingerprint expert, processed the interior of the van and its contents for fingerprints using fumes from super glue. That fuming method revealed two prints on a Rubbermaid plastic container lid which was inside the van. Deputy George compared those prints with appellant's fingerprint exemplars on a file card and on a card on which Deputy George personally "rolled" appellant's fingerprints. Deputy George concluded that the fingerprints on the Rubbermaid lid belonged to appellant. (7RT 1245-1258.) Deputy George treated a Star magazine which was found inside the van with the ninhydrin process, which revealed six fingerprints. Deputy George determined that three of the prints were appellant's, but could not match the remaining three prints to anyone because those prints were not useable. Deputy George also treated a Los Angeles Times newspaper which was found on the dashboard of the van with ninhydrin, which revealed a fingerprint. Deputy George matched that fingerprint to Steven Young. (7RT 1258-1267, 1291-1293.)

Harry Sera owned the abandoned van. The van was silver and white, with the license plate number 21541H. On December 9, 1988, Sera parked the car at his workplace in Rancho Cucamonga. The car was stolen while Sera was

at work. Sera did not know appellant and had not given anyone permission to take his van. (7RT 1227-1230.) The parties stipulated that appellant was in the vicinity of 9719 Foothill Boulevard in Rancho Cucamonga on December 5, 1998. (7RT 1244.) On December 23, 1998, Sera picked up his van. Sera's gold-colored wire eyeglass frame which had been in the van were missing. There were no lenses inside the frame. (7RT 1230-1238.)

On December 15, 1988, at 11:55 a.m., Detective Yarbrough arrived at Lucky's. It was raining heavily and the Lucky's crime scene had been secured. Detective Yarbrough went to the southwest door of Lucky's and noticed Rooney's corpse under a yellow tarp in the doorway. (5RT 839-841, 847.) Detective Yarbrough recovered a set of keys which was next to Rooney's right foot. Detective Yarbrough later determined the owner of the keys was Sera, whose van had been stolen. Detective Yarbrough asked that Sheriff's Department artists diagram parts of the crime scene and he participated in videotaping the interior of Lucky's. (5RT 845-846.)

The parties stipulated that: (1) Dr. Detraglia was an expert forensic pathologist; (2) the victim was Patrick Rooney, a 35-year-old White male who was five feet, ten inches tall, weighed 188 pounds; (3) Rooney died of a gunshot wound to the head; (4) the bullet entered Rooney's skull through the right temple two inches above the right ear and one inch forward of the right ear; (5) the bullet exited the left side of Rooney's skull, five inches above the left ear; and (6) the area where the bullet entered showed that at the time the gun was fired, the gun was in "loose contact" with the Rooney's temple.[4/] (8RT 1493-1494.)

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4. The parties did not specifically stipulate whether Dr. Detraglia performed the autopsy of Rooney or reviewed the report of another coroner

2. Boy's Market (Counts 3 and 4)

On October 31, 1988, Joseph Swal was working for Federal Armored Express, an armored car company. At approximately 9:45 a.m., Swal and his partner "Ramirez" went to Boys Market located at 950 North La Brea Avenue to deliver currency. "Ramirez," who was driving, parked the armored car and Swal exited. Swal put a shopping cart next to the armored car. "Ramirez" put a box of coins and a canvas bag full of currency into the cart. Swal went inside the store to the courtesy booth, where he gave the store employee currency and cash. Swal picked up receipts, currency, and cash, put them in a canvas bag and put it into the shopping cart. Swal left the courtesy booth. (7RT 1312-1317.)

As Swal walked past the produce department, he heard a mumbling voice, but kept walking. Swal heard the voice again, turned his head to the right, and a gun was placed at his right temple. Swal could not see the person holding the gun. The person said, "Drop it, drop it, drop the bag." Swal dropped the bag. The person said, "Get down, get down on the floor, get down," and pushed the barrel of the gun to Swal's head. Swal lay down on the floor in the second aisle of the store, facing the back of the store. As Swal went to the floor, the person took Swal's revolver out of Swal's holster and ran to the back of the store, carrying a gun in each hand. (7RT 1317-1323, 1337.)

Swal saw the back of the person and noticed he had black hair and wore a black jacket. The person's hair reached the back of his neck or shoulder and was in a "jheri curl." Swal assumed the person was a man based on the person's voice. Swal thought the man was about five feet seven to eight inches tall and was Black. Swal described the man as having a "fairly dark" complexion. (7RT 1319-1320, 1323-1324, 1340.)

Pierre Jacobs was stocking shelves in Aisle 1 of Boys Market with "Luke," a coworker. "Luke" screamed, "The store is being robbed." Jacobs ran down the aisle in a stooping position. Jacobs ran into the left shoulder of

a person at the end of the aisle. Jacobs lay down on the floor. The person said, "Get back." Jacobs heard the sound of someone pulling a trigger of a gun twice, but it did not fire. Jacobs did not see the person's face. The person was wearing a black jacket. The person's voice sounded like that of a man. (7RT 1343-1353.)

Ardis Irvine was working in the rear warehouse area of Boy's. Irvine saw a person later identified as appellant approach double doors leading to the warehouse area. Appellant was carrying a gun in each hand and a money bag under his arm. Appellant approached to two to three feet from Irvine and told Irvine to "open up the damn door" or he would "blow [Irvine's] mother fucking brains out." Appellant put a gun to Irvine's right temple. Irvine pulled the chain down and tried to open the rear door, but it got stuck. Appellant told Irvine to open the door and pushed the gun harder against Irvine's temple and pulled the hammer of the gun back. Irvine opened the door further. Appellant "scooted" under the door when it was partially opened, jumped off the dock and ran around the wall of the building. Irvine did not see appellant enter a vehicle. (8RT 1435-1440.)

Irvine told the police that appellant had a "jheri curl," hair that went to his shoulders, droopy eyes, and was taller than Irvine, who was 5 feet six-and-a-half inches tall. (8RT 1440.) On December 21, 1988, Irvine identified appellant from photographs which were shown him by the police. Irvine was not able to attend a live line-up conducted on March 13, 1990. (8RT 1440-1441.)

Wilson Colon was the manager of Boys Market. There was one moveable surveillance camera that covered the front of the store. There were two fixed cameras, one that pointed down the meat aisle and another that pointed down the produce aisle. Colon, who was on the phone in his upstairs office at the back of the store, glanced over at a monitor from the moveable

camera and saw that there were people lying on the floor. Colon heard the sound of the doors to the back area "slam real loud." (7RT 1355-1359.)

Colon went outside of his office to a balcony and heard someone yell, "Motherfucker, open the door now or I'm going to blow your damn head off." Colon saw a man holding a large gun to Irvine's head. Colon went back into the office and dialed 911. Colon heard the sounds of chains pulling up the store's door. Colon saw the door open up and a salesman standing outside. The gunman said, "Get down or I'll blow your head off." The salesman went to the ground. The gunman jumped down, went up the dock, and entered a blue van which was waiting on Market Street. Colon ran out and wrote down the license plate number of the van. Colon called the police and gave the police a description of the van and the license number. (7RT 1359-1360.)

Colon saw the back of the gunman. The gunman wore jeans, a hat or cap, and had a "jheri curl" which reached his lower neck. Colon estimated that the gunman was about six feet tall. The gunman was a male and had a medium build. The gunman had a gun and a canvas bag. Colon told the police that the gunman was a Black man. (7RT 1360-1362.)

The two fixed cameras were recording, the moveable camera was not. Colon reviewed tapes from those cameras. There was no one shown on the tapes at the time of the crime. Colon gave the tapes to the store's security. (7RT 1364-1366, 1376-1383, 1386-1390.)

At approximately 9:55 a.m., Inglewood Police Officer Randy Goodro received a description of a van, including its license plate number (586TUL) that was involved in a robbery at the Boys Market. Officer Goodro located the van parked in a carport at an apartment complex located at 621 North Market Street. The van was unoccupied and was not running. Officer Goodro "ran" the license plate and discovered it had been reported stolen. (7RT 1306-1311.)

B. Defense

1. Lucky's Market

Sergeant Yarbrough arranged a live line-up which was held on March 13, 1990. Appellant was in position number 4 of the live line-up. The purpose of the line-up was to identify the killer of Rooney. A videotape of the line-up was played for the jury at trial. (8RT 1537-1541; 9RT 1825.)

On December 15, 1988, at approximately 10:42 a.m., Ralph Allen, a magazine sales representative, arrived at Lucky's and spoke with the manager, Fiamengo, at a check-out stand at the front of the store. An armored transport car arrived. Fiamengo excused himself and said he would be right back. An armored car guard entered the store. The guard, accompanied by an female assistant store manager, walked near the store's safe. The assistant manager opened the safe. The guard put money in his bag and walked toward Allen. Allen saw a person whom he identified at trial as appellant standing near a magazine rack. As the guard approached the exit of the store, appellant approached the guard, shot him, took the guard's money bag and gun, turned, and ran toward the rear of the store. Allen did not see the guard's head strike the glass sliding door. Allen was approximately 15 feet away from appellant and the guard. (8RT 1542-1550, 1556-1560, 1571.)

Allen described appellant as a "Negro," approximately five feet, eleven inches to six feet tall, thin build, approximately 165 to 175 pounds, wearing a brown/beige windbreaker type of jacket and eyeglasses, clean-shaven, and having a "college look." Appellant had a loose, medium-length "afro" haircut. Appellant's eyeglasses had a metal frame. Appellant looked like "Roger" from the television show "What's Happening." (8RT 1550-1552; 10RT 1949-1951.)

At the live line-up, Allen identified the person in position number two, who was not appellant, as the person involved in the robbery and murder at Lucky's. Allen was not "100% positive" that the person in position number

two was the shooter. At trial, Allen identified appellant's photograph from a six-pack photograph display as the shooter. Allen was "absolutely positive" the person in that photograph was the shooter. Allen identified appellant at trial as the shooter. (8RT 1553-1555, 1560-1564.)

The parties stipulated that Allen told Detective George Gomez that after the security guard came around the corner, Allen saw a "light" male Negro approach the guard from behind and place a gun behind the guard's ear. The guard appeared to try to escape by stooping forward, and the Negro fired the gun. Allen described the Negro as approximately six feet to six feet one inch tall, slender to medium build, 175 to 185 pounds, wearing black-rimmed eyeglasses, dark pants, and an off-white to light tan jacket, "college prep" in appearance, resembling "Roger" on "What's Happening." (11RT 2068-2069.)

Cynthia Chikahisa, a Lucky's manager, was at the third checkstand in front of the market. Chikahisa saw a man run into an armored car guard and heard a popping noise. Chikahisa saw a silver gun, then ducked down. (8RT 1575-1582.) Chikahisa was told to go to an area in the store to be interviewed. A lot of people were there, and they discussed what they had seen, including the person or persons they had seen. (8RT 1586-1587.) Chikahisa told the police that the person she saw was Black and had light skin and wore a white sweat shirt type jacket with a blue stripe. (8RT 1588-1593.)

Chikahisa identified three different persons, two of whom were not appellant, as the person she saw run into the security guard; Chikahisa identified the person in position number two at the live line-up, appellant's photograph in position "H3" from a photo display she was shown on December 12, 1991, and a photograph of a person in position number four from another photo display that she was shown on December 27, 1991. Chikahisa was not sure about any of those identifications. (8RT 1582-1586, 1594-1595, 1599.)

Debbie Van Sluys, a Lucky's employee, was at the front of the market

when she heard a gunshot. Sluys looked to the office area in front of the store and saw an armored car guard fall and a person near the guard. That person wore a white jacket and had "jheri locks." Sluys saw the left side of the person's face for about two seconds. (8RT 1603-1610, 1617-1620.) Sluys attended the live line-up and identified the person in position number two, who was not appellant, as the shooter. Sluys was not sure about her identification. (8RT 1612-1615, 1620, 1629-1630.) On January 3, 1992, Sluys was shown a six pack photo display. Sluys said that appellant's photograph looked familiar, but she was not positive. At trial, Sluys testified appellant's photograph in that photo display looked like the shooter. (8RT 1615-1617, 1624-1625.)

Bobi Miller, a Lucky's cashier, was working at a checkstand at the front of the market when she heard glass breaking and a gunshot. Miller looked in the direction of the noise and saw a armored car guard fall to the ground "with his head blown." Miller saw appellant straddle over the guard, and take a gun off the guard's side and a bag from the guard. Miller screamed, "Get down." Miller ducked down, then looked up and saw appellant run through the produce department. (8RT 1631-1636, 1644-1645.)

Miller attended the live line-up and identified the person in position number 3, who was not appellant, as the suspect. Miller "froze" when the third person in the line-up appeared and did not look at the additional persons who were in positions four through six. Miller was frightened at the time of the line-up. (8RT 1636–1638, 1646-1649.) Miller was shown several six pack photo displays, but did not identify anyone. (R8T 1638-1641.)

Russell Moss, a produce clerk, heard a gunshot at the front of the store. Moss saw a armored car guard fall to the ground, glass shatter behind the guard, and a man reach down and take the guard's gun and bag. (8RT 1657-1659, 1661-1662.) Moss told the police the suspect was a Black male, five feet eight inches tall, 150 to 160 pounds, with black curly hair and a mustache, and

wearing eyeglasses. (8RT 1660-1661.) Approximately two days after the crime, Moss was shown a photo display, but did not identify anyone. In December 1991, Moss was shown a second photo display, from which he identified appellant. Moss selected appellant's photograph based on photographs he had seen in the news media. (8RT 1663-1665.)

Janice Maier was in line at a ten-items-or-less checkstand. Maier heard a popping sound and glass break. Maier looked up and saw a guard fall down. Maier saw a man she identified at trial as appellant, wearing a white jacket and dark pants, bend over the guard's body and take the guard's gun and bag. Maier gasped, and appellant, who was not wearing eyeglasses, stared at her. Appellant pulled something out of his pocket. Appellant ran down the aisle to the back of the store. (8RT 1669-1667, 1690-1691.) Maier described appellant to a police composite sketch artist as a light-colored Black man with small lips, a long chin, hair in a tight curl, and large eyes which were a little slanted. The sketch artist did not draw the chin as long as Maier wanted it to be and "quit" on her. (8RT 1678, 1688-1689.) Maier attended the live line-up and remembered identifying the persons in position numbers two and four (who was appellant) as looking like the suspect. A form with Maier's handwriting indicated that she identified the person in position number six as the suspect. (8RT 1679-1682, 1685-1686.) In December 1991, Maier selected appellant's photograph from a six pack photo display, but said that she could not be positive about that identification. (8RT 1682, 1695-1696.)

Deputy John Shannon, a police composite sketch artist, spoke with Maier. Deputy Shannon's normal custom and procedure was to complete a drawing after a witness said the drawing resembled the person being described. Deputy Shannon made four drawings of suspects at Lucky's, and did not recall any witness being dissatisfied with his drawings. (9RT 1845-1861.)

Mark Gutcher, a Lucky's meat cutter, was working at the back area of

the store. Gutcher heard a commotion and saw a man running down the aisle with two guns, one in each hand, and a money bag under his arm. The man ran by Gutcher and out the receiving back door. (9RT 1700-1706.) Gutcher was shown several six pack photo displays. From one display, Gutcher circled appellant's photograph (in position "H3") and stated appellant's photograph and the photograph of another person (in position "H4") resembled the person he saw. (9RT 1709-1718.) At trial, Gutcher testified appellant resembled the person he saw. (9RT 1720.)

Gordon Mallett, a Lucky's meat department assistant manager, was in the receiving area. Mallett saw a male with two guns in his hand run through the receiving door, enter a van, and leave. (9RT 1727-1731.) Mallett described the male as between five feet six to eight inches tall, 180 pounds, about 24 to 28 years old, with "ratty" hair in the back. (9RT 1731.) In December 1991, Mallett identified someone other than appellant from a six-pack photo display (People's Ex. 36). (9RT 1732-1733.)

George Nason was inside the market and saw two women walking back and forth in the produce section. Nason heard a pop. One of the women said, "Jesus Christ, he shot him." A man carrying two guns and a bag ran toward Nason. The man told Nason to "get the fuck out of way" and ran to the rear of the store. The two women went to the front of the store. (9RT 1736-1743.) Nason described the man as in his mid to late 20s, no facial hair, with a slight build, and wearing a jacket. Nason saw a composite picture in the newspaper. (9RT 1743-1750.) Nason selected appellant's photograph from a six pack photo display, stating appellant could have been the man he saw at Lucky's. (9RT 1750-1751.) At trial, Nason identified appellant as the man he saw at Lucky's. (9RT 1753-1754.)

Dianna Simien, a Lucky's employee, was near the front desk and saw the armored car arrive. Simien saw someone walk up behind the armored car

guard, put a gun to the guard's head, and shoot him. The man took the guard's gun and satchel, turned around, and ran to the back of the market. (9RT 1757-1765.) Simien was shown a six pack photo display, from which she identified two persons as having similar features to the shooter, but stated that she could not make an identification. Simien described the shooter as five feet eight to ten inches tall, wearing a white jacket, approximately 24 to 28 years old. (9RT 1765-1773.)

Margarita Campos, a Lucky's boxperson, was in the back of the market. A man carrying two guns and a bag walked past Campos. (9RT 1773-1778.) Campos told the police that the man wore a white jacket. (9RT 1778-1781.) In December 1991, Campos identified appellant from a six-pack photo display as the person she saw. Appellant's hairstyle in that photo display was different than the other persons shown in the other photos. (9RT 1781-1787.) Campos identified appellant at trial as the person she saw at Lucky's. (9RT 1787.)

Daniel Regan, a Lucky's boxboy, heard a noise, looked up and saw a Black man running from the front office area to the back of the store. Regan described the Black man as having short hair. Regan selected appellant from the live line up as someone who could be the suspect. Regan picked appellant's photograph from a six-pack photo display and the photograph of another person in another six-pack display as resembling the Black man he saw at Lucky's. (9RT 1815-1826.)

Barbara Wiegandt, a Lucky's employee who was at the "quick" checkstand, heard a sound which she believed was that of a balloon popping. Wiegandt turned around and saw an armed guard fall down and the glass shatter. A man "hovered" over the guard, picked up the guard's bag and gun, came around a checkstand and ran through the middle of the store. (9RT 1861-1865.) Wiegandt told the police that the suspect was about five feet, eight inches tall, light-complected, with a short Afro, in his late twenties to about 35

years old, with a thin build, wearing a light colored shirt or jacket. (9RT 1865-1868.) At the live line-up, Wiegandt was unable to identify anyone. (9RT 1868-1869.) In December 1991, Wiegandt was shown six or 12 photographs, but was unable to identify anyone. (9RT 1869-1870.)

Tammi James, a Lucky's employee, was at the office at the front of Lucky's. James saw a man standing at a checkstand. The man pulled out a gun, walked to the back of an armored car guard, and put a gun to the guard's neck. The guard reached for his gun, and the man shot the guard. The guard fell. The man picked up the guard's bag and gun, turned around, and ran toward James. The man's eye's were large, his mouth was open slightly, and he had an excited look. (9RT 1875-1882.) James described the man as between 27 to 34 years old, about five feet eight to ten inches tall, light-complected, with hair "about a half inch on his head" and a "fu manchu" mustache. The man wore eyeglasses before he shot the guard, then took them off. (9RT 1882-1883.) James attended the live line-up and was unable to identify anyone, though he picked the persons in position number 4 (appellant) or 6 "if [he] had to pick someone." James saw Howard Sands at the live line-up and believed Sands was the suspect. James selected photographs of two persons in a photo display (Def.'s Exh. No. I) that did not include appellant as resembling the suspect. James was "positive" that appellant was not the shooter. (9RT 1884-1897.)

B.T. Austin, a private investigator, measured distances at Lucky's. The checkstand area was 124 feet, six inches. The distance from the meat department to a door that led to the market's warehouse area was 157 feet, nine inches. The distance from an aisle in the center of the store to the pharmacy was 68 feet. The center aisle was 25 feet long; the entry to the aisle was 13 feet, six inches. (10RT 1915-1919.) Austin interviewed Ralph Allen, who said that he made a positive identification at the live line-up. (10RT 1919.)

Denise Ahlrich worked at a Denny's Restaurant which shared a common parking lot with Lucky's market. On December 15, 1988, at approximately 10:50 a.m., Ahlrich saw an armored car and police cars in front of Lucky's and heard sirens. Ahlrich noticed a light-colored Black man who wore wire-frame eyeglasses. The Black man entered the restaurant and went straight to the restroom. The Black man left the bathroom, went out to the parking lot, and sat in a van for about ten to fifteen minutes. Ahlrich wrote down the van's license number and gave it to the police. In December 1991, Ahlrich identified appellant from a six pack photo display as the person who entered Denny's and the van. (9RT 1827-1839.)

Deputy Flinn interviewed Sands at the crime scene. Sands described a Black male, approximately five feet, eleven inches tall and 155 to 160 pounds,wearing a white shirt and dark pants and with short black hair. Sands said this person came out of the front doors of Lucky's, entered a brown Toyota, and drove toward Palm Street. Sands also said that the person who shot Rooney fled in a northerly direction inside the store. Deputy Flinn did not ask Sands whether Sands was talking about two different persons. (10RT 1921-1933.)

Deputy Michael Miltimore interviewed Cheryl Pitzer. Pitzer said she had only seen the right side profile of the person who ran down the center aisle of Lucky's and was unsure of whether she could identify him. (10RT 1934-1936.) Deputy Miltimore interviewed Chikahisa, who did not mention anything about the suspect wearing eyeglasses and that he had short black hair. (10RT 1936-1937.) Deputy Miltimore was unable to conduct in-depth interviews or get complete descriptions from Pitzer and Chikahisa because of time restraints. (10RT 1938.)

Deputy Dieter Gerlach, whose responsibility was to control the crime scene until homicide detectives arrived, spoke with Fiamengo, who described

the suspect's hair as "short natural." (10RT 1940-1943.)

Deputy James Smith, whose responsibility was to find witnesses and take down their information so they could be later interviewed in-depth, spoke with Van Sluys. Van Sluys said that the suspect was a Black male wearing a light-colored jacket, and that she hid after she saw the man and saw nothing else. (10RT 1953-1958.)

A .38 caliber "slug" was recovered from the parking lot in front of Lucky's. The "slug" did not have any blood or skin tissue on it. A semi-automatic weapon ejected expended shell casings, a revolver did not. No expended shell casings were recovered from the area in and around Lucky's. There were no blood splatterings inside Lucky's. (11RT 2035-2039, 2047-2048.)

Detective Yarbrough placed a photograph of appellant in a six-pack photo display (Peo.'s Exh. No. 36) that had been published in the news media. (11RT 2036-2037.) Steven Young's photograph was in the number two position of a six-pack photo display that was identified at trial as Defense Exhibit No. O and as the "A" lineup, in another one marked as Defense Exhibit No. J, People's No. 37 and the "I" lineup. (11RT 2042-2045, 2050-2051.) Sera told Detective Yarbrough that he had two pairs of clear non-prescription eyeglasses in his van and intended to replace those lens with prescription glass. (11RT 2045-2046.)

Peggy Patterson, appellant's aunt, knew appellant and saw him on a regular basis before 1988. Appellant never wore eyeglasses when Patterson saw him. (9RT 1725-1726.)

Modesto Ponce De Leon owned Courtesy Cleaners in Compton. In 1987 and 1988, one of Ponce De Leon's employees was Janet Delaguila. In December 1988, the police came to Courtesy Cleaners and asked Ponce De Leon to check his records. Ponce De Leon had sales or claims receipts for the

past five months and gave them to the police. De Leon was not sure which months' records he had kept from 1988. The records were not kept in order, and there was flooding in his store which destroyed some of the records. In the late 1980s, Ponce De Leon began inputting customer's phone numbers and first initial into computers. Ponce De Leon searched his computer records for the name the police gave him, but could not find it. If a customer came in three times a week, Ponce De Leon would not expect that all of that customer's records would have been lost. (9RT 1803-1814.)

2. Eyewitness Identification Expert

Dr. Scott Fraser was a psychology professor with research experience regarding the accuracy of eyewitness memory and identification. (10RT 1958-1961.) Dr. Fraser had a policy that he was willing to provide expert testimony for the prosecution or defense in any case. (10RT 1961.) There were three types of scientific investigations regarding eyewitness memory and identification: (1) laboratory studies; (2) field investigations; and (3) archival studies. Laboratory studies typically involved college students as subjects, field investigations and archival studies involved a cross-section of the population. (10RT 1961-1965.)

The studies showed certain variables affected a person's ability to recall an event. One variable was the duration that a person was exposed to a certain event or face; the greater the duration, the greater the probability of a correct identification. Studies showed that people consistently overestimated the amount of time they actually observed an event or person. (10RT 1966, 1980-1981.) Another variable was cross-racial bias, a phenomenon in which persons were able to identify members of their own race significantly better than individuals of another race. If a group consisting mainly of Whites and Hispanics saw a murder and robbery were identifying a Black person, scientific studies showed that there would be lower rates of accuracy of identification.

(10RT 1966-1968.)

Another variable was the stress to which a person was subjected to when that person witnessed an event. Under very low levels of stress, the rates of accurate recall of events were low. At moderate ranges of stress, the rates of accurate recall were moderate. As persons became more alert and task focused, accuracy improved "higher and higher." At a high level of stress, such as at a crime scene, rates of accurate identifications "drop[ed] off radically" because persons were not storing information, but were focusing on how they were going to survive or get out of the situation. (10RT 1968-1971.) If a group of persons witnessed a traumatic, stressful event, their arousal or stress level would go immediately to the high end where they processed and stored less information. (10RT 1971-1972.)

Another variable was weapons focus; the presence of a weapon reduced the accuracy of correct identifications because the presence of the weapon itself increased stress and was also a distractor which caused persons to focus on the weapon rather the than the face of the person wielding the weapon. If a witness saw another person with two weapons, the accuracy of the information that was stored by the witness would be reduced. (10RT 1972-1974.)

Another variable was memory decay, in which the passage of time caused the amount of information stored in someone's memory to be lost. There was a very rapid loss of memories of details that occurred in four to six hours. Initial crime reports were the most accurate representations of what happened during a crime and of people's appearances. After the initial four to six hours, memory decayed at a slower rate. (R10T 1974-1978.)

Another variable was graphic depictions. If witness was asked to draw a person or asked to describe to an artist a person the witness saw, the probability of making a correct identification later was lower than had the witness not done so. (10RT 1978-1980.)

Another variable was suggestiveness or bias in a live or photographic line-up. The fewer dissimilar alternatives a person had to choose from, the higher the probability of error. (10RT 1981-1983.) Dr. Fraser opined that the six-pack photo display which included appellant (Peo.'s Exh. No. 36) had only two or three candidates with "jheri curls," and when considering the lightness of skin color, became a "1-pack." (10RT 1983-1986.)

Distinctive cues, such as a mole on a person's face, eyeglasses, mustaches and a short afro hairstyle, played a critical role in the accuracy of identifications. Studies showed that witnesses did not omit distinctive features when describing a person or fabricate distinctive features. If one group of persons described a murderer as a Black male with a short Afro, light mustache, wearing eyeglasses, and carrying a silver gun in his right hand and a second group described the person as a Black male, long "jheri curl," carrying two guns and a sack under his arm, those two groups were not describing the same person. (10RT 1986-1992.)

Dr. Fraser could not definitely predict whether a specific identification was correct or not. Dr. Fraser could not testify that any witness in the case who identified appellant was incorrect. (10RT 1991-1995.) Only a small percentage of Dr. Fraser's research upon which he based his opinions was based on "real-life individuals in real-life criminal situations." (10RT 2001.) Dr. Fraser did not speak to a single eyewitness in the case. (10RT 2007-2008.)

A witness who was close enough to see a person carrying two guns and a money bag run through a store after a gunshot, but far enough that the witness did not feel personally threatened, would be at a point where they had a "peak ability" to make an identification. (10RT 2008-2011.) A witness with prior exposure to a person would have higher accuracy in identifying that person than if the witness had no such prior exposure. (10RT 2014.) Any group of persons would not view an individual and describe him in exactly the same manner.

(10RT 2017-2018.)

C. Stipulations

The parties stipulated that: (1) the photographs of appellant marked as defense exhibits "WWW," "YYY," and "VVV" were taken between October 14 and 26, 1988; (2) the photograph marked defense "SSS" was taken on December 23, 1988; (3) the fingerprints on the L.A. Times found in the stolen van used in the Lucky's robbery belonged to Steven Young, whose photograph was included in a six-pack display identified as People's No. 37 and Defense O; (4) useable fingerprints were lifted from a shopping cart at Boys Market and the stolen van used in the Boys Market robbery, and those prints did not belong to appellant or Young or anyone else currently in the California Identification System. (11RT 2069-2070.)

D. Rebuttal

Appellant was in position number four at the live line up. Detective Yarbrough sent registered letters to all persons who had been identified as witnesses by detectives on December 15, 1988, and asked them to attend the live line-up. Some registered letters were returned as undeliverable. (11RT 2071-2074.) Detective Yarbrough showed the six-pack photo display with appellant's photograph in position number three (Peo.'s Exh. No. 36) and the display with Young's photograph in position number four (Peo.'s Exh. No. 37) to all witnesses. Detective Yarbrough never identified the driver of the van which took appellant away from Lucky's. (11RT 2075.)

II. Penalty Phase Evidence

A. The Prosecution's Case In Aggravation

1. Prior Acts of Violence

a. December 29, 1987, Hughes Market Robbery And Shooting

On December 29, 1987, Jesse Benavidez was working at Hughes Market at 11361 National Boulevard in Los Angeles. At approximately 8:00 a.m., Augustus Guardino, the assistant manager, called all employees to come to the front of the store for protection because the safe was going to be opened. Some employees went to one door and some other employees went to another and turned off the power so that the doors could only be opened by hand. Benavidez saw Guardino and the "office girl" open the safe. Guardino grabbed the money bag and walked to the office door. (11RT 2236-2242, 2249.)

A person jumped out from the direction of the meat department aisle, put a gun to Guardino's head, and fired. Guardino fell. The shooter reached for the bag, looked around, and fired two shots towards a door. The shooter ran to the door and out to the parking lot. Benavidez followed the shooter and saw him enter a car, which drove off. Benavidez did not see the shooter's face and did not see whether there was more than one person in the car. (11RT 2242-2244.) Benavidez described the shooter as a Black male, approximately five feet, six inches tall (11RT 2245-2248.)

Guardino identified appellant as the shooter. (11RT 2252.) Guardino was shot in the face below the right eye. The bullet exited his left temple. Both of Guardino's cheek bones, his left eye orbit, the optic nerve to his left eye, his sinuses, and part of his upper jaw were "completely destroyed." Guardino lost his left eye. (11RT 2254-2255.) Guardino identified appellant from a composite Guardino was shown in November 1988. (11RT 2255.) In

November 1989, Guardino identified appellant from a six-pack photo display. (11RT 2257-2259.) Guardino identified appellant from the live line-up held on March 13, 1990. (11RT 2259-2261.) Guardino identified appellant at a preliminary hearing held on May 15, 1990. (11RT 2261.) In January 1992, Guardino identified appellant from a six-pack photo display. (11RT 2261-2262.)

Approximately $43,000 was in the money bag that appellant had taken from Guardino. Appellant dropped $16,000 which was in "pencil bag things." (11RT 2264.)

Guardino described to the police the man who shot him as between five feet eight to ten inches tall, between 160 to 170 pounds, light complected, with a mustache, wearing a dark cap, dark jacket, and dark pants, and appeared to have a mole on the right side of his mustache, and in his late 20's to early 30's. (11RT 2266.) Guardino later told the police that the mole may have been a sight on the gun. (11RT 2291.)

b. June 25, 1988 (Reaching for Gun)

On June 25, 1988, at approximately 10:15 p.m., Deputy John Kuhn went to 208th Street in Lakewood in response to a radio dispatch. Deputy Kuhn parked by a car that was mentioned in the dispatch and noticed it was unoccupied. Four males approached, and Deputy Kuhn told them to put their hands on his patrol car. Three of the males complied. Appellant, the fourth male, did not. (11RT 2298-2301.)

Appellant said that Deputy Kuhn was harassing them. Appellant said that he had some identification to prove that he was a good person and reached for his back left pocket. Deputy Kuhn told appellant to keep his hands in front of him. Appellant talked rapidly and made several additional attempts to reach toward his back left pocket. Deputy Kuhn, who had his gun drawn but hidden behind his back, showed the gun to appellant and told appellant that if he

reached for his pocket one more time, Deputy Kuhn would shoot him. Appellant put his hands on the car. (11RT 2301-2302.)

A back-up officer arrived and covered Deputy Kuhn. Deputy Kuhn went to appellant, checked appellant's left rear pocket, and recovered a fully loaded five-shot revolver. Four of the bullets were hollow-point bullets. Deputy Kuhn found appellant's driver's license in his right rear pocket. Earlier, appellant had not motioned to his right rear pocket; appellant had been using his left hand, reaching for his left rear pocket. (11RT 2302-2304.)

c. December 5, 1988 Robbery And Shooting

On December 5, 1988, at approximately 12:45 p.m., Hojatola Bouroumand went to a Bank of America located at 9719 Foothill Boulevard in Rancho Cucamonga to deposit money from his restaurant. The money was in a plastic bag which he was given by the bank. Bouroumand parked his car and walked to the bank. Bouroumand felt someone tug on the bag. Bouroumand turned around and tried to take the money back. Bouroumand was shot in his hand. Bouroumand lost three fingers. The shooter took the money and entered the passenger side of a white van. (11RT 2305-2315.) Appellant pled guilty to second degree robbery of Bouroumand. (11RT 2315-2316.)

d. March 11, 1989 Attempted Robbery At CJ Market

On March 11, 1989, at approximately 4:27 p.m., Robert Reynolds went to C.J. Market, located at the corner of Riverside and Archibald in Ontario, and bought milk and eggs. Reynolds went to his van and was getting ready to leave. Appellant approached, asked directions, then said, "Get the fuck out of the car." Reynolds responded, "What's your problem?" Appellant pulled out a gun, pointed it at Reynolds, and said, "Get the hell out of the car. Leave the keys there." Reynolds put the keys on the floor, opened the door, and got out of the van. Appellant got into the van and told Reynolds to "get the hell out of

the way." (12RT 2342-2345.)

Appellant put his gun on the driver's seat or on his thigh. Appellant had trouble starting the car. Reynolds punched the side of appellant's head and ran into the market. Appellant grabbed the gun and fired a gunshot at Reynolds. Appellant tried to get the van started, then ran away. Reynolds told other people to call the police and followed appellant at a distance. (12RT 2345-2346.)

Christopher Thomas was at the corner of Riverside and Archibald Avenue. Thomas saw two men across the street struggling inside a van at the parking lot of C.J. Market. Appellant was in the driver's seat of the van and another man, later identified as Reynolds, was in the doorway of the van. Appellant leaned away from the man at the driver's door. Thomas heard a loud pop that sounded like a gunshot. The man at the door ran away from the van. Appellant fumbled around inside the van, then ran north on Archibald Avenue. Appellant was carrying a gun. (12RT 2320-2323, 2342-2343.)

Thomas followed appellant, who ran onto Dune Street. Thomas lost sight of appellant. Thomas asked a group of persons standing on the corner if they had seen someone run that way with a gun. One man from the group pointed to a house on the corner. Thomas ran back to Archibald and saw appellant run northbound on that street. Thomas followed appellant for several streets. When Thomas arrived at Coghill, he saw a man driving a Ford Taurus station wagon and told him to "go get" a police officer who was driving southbound on Archibald. Thomas followed appellant to Wilmington. Thomas yelled to appellant to "give it up." Appellant ran to a cul-de-sac, then into a tract of houses. The police arrived and surrounded the group of houses. During the chase, Thomas noticed that appellant appeared to be limping. (12RT 2320-2329.)

Ontario Police Sergeant Ernesto Dorame, a dog handler, searched the

2600 block of South Dover and found appellant at 2367 South Lexington. Appellant was hiding in some cypress bushes along the fence line of a house. Appellant had a bullet wound to his leg. No weapon was recovered from appellant. (12RT 2347-2349.) Officer Kevin Dempster found a gun in the rear yard of a house at 2916 South Pine Valley Street. (12RT 2350-2352.)

2. Victim Impact Evidence[5/]

The parties stipulated that Rebecca Rooney was Patrick Rooney's wife. (12RT 2353.)

B. Appellant's Case In Mitigation

1. December 29, 1987 Hughes Market Robbery And Shooting

On December 29, 1987, Officer Thomas Villalobos interviewed Guardino at the UCLA medical center regarding the crimes at Hughes Market. Guardino described the person who shot him as a Black male, late twenties to early thirties, wearing a knit or skull cap over his head. (12RT 2369-2371.)

On December 30, 1987, Officer Michael Gannon interviewed Guardino at the hospital. Guardino described the person who shot him as a Black male, five feet nine inches to six feet tall, thirty to forty years old, medium weight, wearing a dark jacket and dark pants. Guardino described a weapon as a handgun of unknown caliber. (12RT 2372-2375.) On January 8, 1988, Officer Gannon conducted another interview with Guardino, who described the person who shot him as a man shorter than five feet, eleven inches tall, with a thin mustache and a dark mole-like coloration above the right side of the mustache. (12RT 2375-2379.)

In November 1988, Detective Peter Waack interviewed Guardino, who

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5. The trial court ruled the prosecution could not call Rooney's widow as a witness, but that the prosecution could nevertheless argue victim impact. (12RT 2340.)

said that he saw a picture of a person who he believed was the shooter in the San Fernando Valley Daily News and on a television broadcast. (12RT 2417-2420.) Jonathan Roberts, a law clerk for co-counsel Stein, looked for Los Angeles Daily News articles regarding armored car robberies from November 21 to November 30, 1988. Roberts contacted Margaret Douglas of the Los Angeles Daily News, who directed him to go the Cal State Northridge. Roberts searched the Cal State Northridge library's microfilm and found three relevant articles, one which had pictures. Roberts' search was limited to the editions of the Los Angeles Daily News held at the Cal State Northridge library; the library did not have copies of both the Los Angeles Daily News's morning or evening editions, and Roberts did not know if that library had all editions for specific geographical areas. (12RT 2429-2433.)

Daniel J. Lopaze witnessed the shooting of Guardino. Lopaze described the shooter to the police as a Black male, approximately five feet, nine inches tall, 145 to 150 pounds, with short hair, a medium to light complexion, possibly 25 to 26 years old. Lopaze did not remember that the shooter wore a "skull cap." (12RT 2386-2392.)

Robert Davis, a Hughes employee, saw the robbery and shooting. Within two hours of the crimes, Davis described the suspect to the police as a man, approximately five feet seven to nine inches tall, wearing a hairpiece, and approximately 20 to 25 years old. Davis met with a police composite artist. Davis described the eyes and nose to the artist. Davis did not tell the artist that the suspect had a beard, but said that the suspect had a mustache. Davis told the artist that the suspect wore a watch cap or knit cap. Davis saw some of the suspect's hair, which was short. (12RT 2420-2427.)

Fernando Ponce, a police composite artist, met with Davis and prepared a composite regarding the suspect involved in the December 29, 1987 crimes at Hughes Market. Ponce believed appellant resembled the person depicted in

the composite drawing. (12RT 2358-2368.)

2. Stipulation

The parties stipulated that Dwight D. Van Horn, a qualified firearms examiner, test-fired the gun recovered after appellant's flight from CJ Market, compared the characteristics of the test-fired bullet to the projectile recovered from the parking lot after the Lucky's crimes, and opined that projectile was not fired from the recovered gun. (12RT 2384-2385.)

3. Character Witnesses

Michael Alverson, who worked for United Airlines for 15 years, was appellant's next-door neighbor for about two years in 1986 and 1987. At the time, Alverson lived near Cherry and Artesia Avenues in Long Beach. Alverson saw appellant on a daily basis. Appellant lifted weights with Alverson and was very respectful. Appellant "seemed to be a very nice young man." Alverson saw appellant help out appellant's mother around the house. Appellant was well-dressed and "carried hi[m]self real nice." Appellant's father did not live with appellant and his mother, but visited appellant once or twice a week. Alverson did not see any evidence that appellant's father mistreated appellant. (12RT 2401-2405, 2410-2411, 2413.)

Appellant was employed in 1987 with United Express Airline and his job was to service aircraft. Alverson spoke to appellant about appellant's job. Appellant seemed very happy and pleased with the job and was at work every day, as far as Alverson knew. (12RT 2402-2403.)

The area where appellant and Alverson lived was "decent' and was not a slum. No one living with appellant took drugs. Appellant had the opportunity to get an education and had the support of his family. Appellant did not appear to have a drug problem. Appellant's mother tried to instill in appellant the morals of a decent law abiding home. Appellant was old enough

to know right from wrong. (12RT 2407-2410.)

Efrem Cater knew appellant since the end of 1983 and was appellant's close friend. Cater and appellant lived in the same apartment complex from the end of 1983 to the beginning of 1988, when Cater moved to Rialto. Cater last saw appellant in June 1988. Appellant had several jobs from 1983 to 1988, including a job at United Express Airlines, Wendy's, and a courier company. From January to June 1988, Cater saw appellant on a regular basis on the weekends. Cater and appellant often went to teenage clubs and the park. Cater did not know appellant to drink or do drugs. Appellant was a great dancer. From January to June 1988, Cater did not notice any change in appellant's lifestyle; appellant did not suddenly buy cars or expensive clothing or have a lot of money. (12RT 2434-2440.)

Cater heard that appellant was arrested on New Year's Day in 1988. Cater did not know "a whole lot" about what appellant was doing since the end of 1987. Cater was not aware that appellant had been arrested for firing a weapon. (12RT 2440-2446.)

Lisa Gaines, appellant's cousin, knew appellant when she was eight to twelve years old; appellant was about five years younger than Gaines. Gaines and her older sister and brother spent weekends at appellant's home. There was not a lot of discipline or structure at appellant's home. Appellant did not have a specific time when he was supposed to be home, and there were no controls over where appellant went or what he did. Appellant's mother worked at night and would leave Gaines's older sister and brother in charge of appellant and appellant's brothers. Appellant's mother left the house for periods of two to four hours. During one summer, when Gaines was 15, all of the grandkids, including Gaines and appellant, spent the summer at their grandparents' home in Texas. As a child, appellant was quiet, shy, and respectful. (12RT 2448-2456.)

Gaines's family lived in Watts and appellant's family lived in Lakewood, which was a nicer neighborhood that was "very good" and "very decent." Appellant's parents showed that they loved him. Appellant's mother was a moral person. Appellant's parents both worked hard to provide for their family and provided appellant with a good home. Appellant's parents tried to teach him how to be a good person. Appellant knew the difference between right and wrong and was intelligent. Gaines knew that appellant had been arrested several times. (12RT 2456-2464.)

Wilbert Harris, appellant's friend, knew appellant since the beginning of 1987, when Harris moved to Riverside County. Harris, Cater, and appellant became good friends. Harris saw appellant a few times, mostly on the weekends. Harris and appellant went to clubs to dance and talk to girls, and to the park. Appellant did not drink or do drugs. Appellant was quiet. Harris did not ever see appellant become violent. From January to June 1988, Harris saw appellant once in a while. Harris stopped seeing appellant in April or May 1988. (12RT 2467-2471.)

Harris did not ever see appellant strike a woman. Harris was aware that appellant had been arrested at the end of 1987 and beginning of 1988. Harris did not know if appellant was violent when appellant was not with Harris. (12RT 2472-2477.)

Rhonda Bailey, appellant's grandmother, was a schoolteacher. Bailey's husband, George, died in 1989. George was a constable for 10 years. Bailey and George moved to Texas in 1965. Appellant was born in 1968. Brenda Elliott, Bailey's daughter, was appellant's mother. Orie Elliott was appellant's father. After appellant was born, Bailey and George visited appellant's home twice a year, during summer and Christmas. Appellant and his two brothers, Kenny and Dwayne, visited Bailey in Texas during the summer and stayed about a month at a time. Appellant was quiet, respectful, clean, and "slow to

anger." Bailey did not know appellant to do drugs. (12RT 2478-2484, 2542, 2549-2550.)

Appellant's parents divorced or separated when appellant was about twelve years old. After the separation, appellant became withdrawn. Brenda worked from three to eleven p.m., and got home around 12 a.m. Appellant and his brothers usually were left alone at home when Brenda worked. Bailey visited appellant's school once after appellant's parents separated and was aware that he had some problems in school. When Bailey visited Brenda during summers, appellant's father did not visit appellant frequently. Appellant did not get into trouble from the time of his parents' divorce to when he reached 18. (12RT 2484-2487, 2526-2527, 2534, 2538-2543.)

Bailey heard that appellant was arrested for shooting a gun when he was 18. Bailey was not aware that appellant had been arrested on June 25, 1988. (12RT 2543, 2547.)

Appellant last visited Bailey in 1988. Appellant was not working in California and was unable to get a job. George said that he could get appellant a job in Texas, but appellant arrived too late and the job was given to someone else. Appellant stayed with Bailey in Austin for two weeks as George tried to get appellant a job. Appellant went to Houston for about three weeks to look for work, but was unable to find a job. Appellant returned to Los Angeles in August 1988, but did not return to his mother's house. (12RT 2528-2531.)

Jacqueline Elliott, appellant's sister-in-law, was married to appellant's older brother, Orie Kenneth Elliott, III. Jacqueline first met appellant when she was 17 and he was 15. Appellant lived with his mother, Kenneth, and another brother in South Gate. Appellant worked for Hughes Express Airline. Jacqueline did not know appellant to use drugs. Appellant was clean and respectable. Appellant lived with Jacqueline for a few months in 1988. Jacqueline did not see appellant with new clothes, gold jewelry or buy new cars

in 1988. Appellant was not a violent person. (12RT 2553-2559.) Jacqueline knew appellant's girlfriend, Rhonda Haley, and knew that he was arrested for beating up Haley. (12RT 2559-2560.)

Paul Burns worked for United Airlines at Los Angeles International Airport as a ramper, or luggage handler. Burns knew appellant through appellant's father, who worked with Burns. When Burns worked for United Express, a commuter airline affiliated with United Airlines, appellant's father asked Burns to get appellant a job. Burns helped appellant get a job. Appellant worked under Burns. Appellant's job was to take luggage off planes. Appellant was promoted to a fueler. Appellant came to work on time, did his job, and got along well with other workers. (12RT 2489-2492.)

Burns worked with appellant for about three to four months. Burns was not aware that appellant had lied on his employment application, and was never told that appellant gave United Express a forged letter saying that appellant had a high school diploma. Burns was not aware that appellant had been fired for lying. (12RT 2492-2494.)

Orie Elliott, appellant's father, testified appellant was born on March 25, 1968. Appellant was a good child. Orie and Brenda Elliott had two other sons, Kenny and Dwayne; appellant was the middle child. Orie and Brenda Elliott, appellant's mother, separated when appellant was five or six years old. Orie did not spend much time with his family during the time appellant was five or six to ten or twelve years old. When appellant was ten to twelve or fourteen years old, Orie saw his family once a week. After Orie and Brenda separated, their family's lifestyle changed because "the money wasn't flowing in the house" and Brenda had to work. (13RT 2607-2613.)

Between the time Orie and Brenda separated and appellant started junior high school, Brenda and her sons moved three times to different areas in Long Beach. They also lived in Sough Gate and Bellflower. Brenda tried moving to

Texas, but Orie drove there and brought the family back. When appellant was about ten or twelve years old, Orie and Brenda attempted to reconcile and live together, but "it just didn't work out." (13RT 2613-2615.)

Orie did not know who watched the children when Brenda went to work during the graveyard shift or when she slept during the day. (13RT 2615-2616.) Orie did not provide regular financial support for Brenda and his sons. Orie tried to give them money when he could. (13RT 2623, 2625-2626.) Orie's son Kenny had problems with the law when he was 15. (13RT 2617.) Orie was unaware how his sons were doing in school. (13RT 2617.)

When appellant was 14 years old, Orie noticed on several occasions that he was not at school. When appellant was 14, he was nice and respectful. Orie did not see appellant much when appellant was 15 to 18 years old. Appellant did not graduate from high school. (13RT 2618-2620.)

A friend of Orie's helped appellant get a job at United Express in 1987, when appellant was 19 or 20 years old. Orie saw appellant every day when appellant worked at United Express. Appellant worked at United Express for about three months. Appellant was proud of his job and told Orie that he liked the job. Appellant went to school to become a fueler. Appellant was dismissed from his job because he lied about having a high school diploma. Orie did not know whether or not appellant would have been hired without a high school diploma. Appellant's morale was low. Orie told appellant to go to night school and get his diploma. Appellant worked for a trucking company and a furniture store after working at United Express. Appellant did not stay at any of the jobs for a long period of time. (13RT 2620-2623, 2630-2632.) Orie did not know who appellant's friends were during the period after he was discharged from United Express and the end of 1988. (13RT 2624.)

4. Prison Conditions

James Park, a prison consultant, testified prisoners were classified from

Level I, minimum custody situations, to Level IV. A Level IV prison was designed to handle prisoners who might be a problem if they did not have strict controls and a structured environment. A Level IV prison was surrounded by a double fence with razor wire and gun towers with armed guards. Within the perimeter, a Level IV prison had 10 housing units, each of which held 100 cells which usually contained two prisoners. Each cell was eight square feet large, with a toilet, wash basin, two bunk beds, and two stools. Each housing unit had a separate exercise yard. Each housing unit could be run as a "separate little mini prison." There are work areas in a prison. Prisoners who passed a screening process could work in prison factories or help maintain the prison. Prisoners with life without parole sentences could be taught a vocational trade. A prisoner could also obtain a high school diploma. There are four Level IV prisons in California. Level IV prisons had security housing units where prisoners stayed in their cell for 23 hours a day. (12RT 2495-2507.)

10 to 12 percent of prisoners were housed at Level IV prisons. Prisoners at Level IV prisons had access to prison libraries, day rooms (which were recreational areas where prisoners could congregate and play dominoes or watch television) and exercise areas where they could lift weights or play basketball. Prisoners at Level IV prisons were allowed family visits, including conjugal visits if they were married. Prisoners sentenced to life without parole could get married after they were sentenced to prison. Prisoners spent eight to ten hours in their cell, including time for sleeping. Prisoners who worked could leave the prison area and go to a work area. (12RT 2507-2514.) The process of living in a prison, by itself, would not make a person feel remorse for committing murder. There were people in society who lived in worse conditions than in prison, but those people had freedom to come and go as they please. (12RT 2514-2518, 2522-2525.)

Prisoners who were sentenced to life without parole were classified as

Level IV prisoners. In rare circumstances, some Level IV prisoners were able to become reclassified as Level III prisoners due to good work and conduct. (12RT 2518-2519.) The Department of Corrections's goal, as to prisoners not subject to a sentence of life without the possibility of parole, was rehabilitation. As to prisoners sentenced to life without parole, the Department's goal was to help them exist in prison without causing a lot of problems and to help them work to upkeep the prison. (12RT 2522-2523.)

5. Employment Expert

Dr. James H. Johnson, a geography professor and director of the study of urban poverty at UCLA, had bachelor's, master's and doctoral degrees in geography. Dr. Johnson researched the availability of employment in urban areas for Black males. Over the past two decades, there was a decline in entry level manufacturing jobs for young Black males, particularly in inner city communities. Black males were adversely affected in communities where there was a surplus of labor. Employer surveys showed that they had negative views of Black males and preferred to hire women and immigrants. Employment was more readily available for Black females. (12RT 2572-2575, 2584.)

In the late 1970s and early 1980s, schools instituted "get tough" educational polices that adversely affected Black and Latino youth. People who went to continuation schools rarely graduated; those that did had difficulty in finding jobs. A young Black male who did not have a high school diploma had incredible difficulty finding a job, even at the entry level. (12RT 2575-2579, 2582-2583.)

Jobless rates for young Black males in inner cites exceeded 50 percent. Due to the way the educational system and labor market treated young Black males, a large segment of the Black male population neither worked nor went to school. Idle young Black males were more likely to turn to the informal economy or illegal activities to survive. Young Black males entered criminal

activity ranging from petty theft to violent crimes. There was a sub-economy of drug dealing or rings that stole car radios. Approximately 25 percent of Black males between the ages of 18 and 35 were connected with the criminal justice system. A person with a criminal record was essentially unemployable. Empirical data showed that as the result of job losses in the inner city, the number of Black males who went to jail or prison increased. (12RT 2579-2582, 2584-2586.)

The inability to find work and provide for oneself caused some people in the inner city to become disconnected from the labor market for two to five years. Such "hard core" disadvantaged people stopped looking for jobs. (12RT 2581-2582.)

Many community-based organizations that encouraged children to pursue mainstream social and economic mobility and discouraged dysfunctional or antisocial behavior were eliminated in the 1980s. Programs that allowed people to enter into entry level positions with subsidies were eliminated. The reduction in those programs caused the number of unemployed Black males to increase. (12RT 2586-2588.)

A young Black male who was out of work and unable to find a job would not automatically turn to a life of crime. (12RT 2590-2593, 2596, 2603-2604.)

6. Forensic Psychologist's Testimony

Dr. Robert White, a forensic psychologist, served as a consultant in criminal cases, but did not always testify for the defense. Dr. White interviewed appellant and appellant's brothers, parents, cousin Lisa Gaines, sister-in-law Roshonda Elliott, aunt Peggy Patterson and grandmother to gain an understanding of the factors in appellant's developmental history. Based on those interviews and investigation, Dr. White opined that there was a gross lack of discipline and structure in appellant's home environment. As a result, values

were not transmitted to appellant. (13 RT 2634-2640.)

Dr. White also opined that the gross lack of discipline and structure suddenly ended when appellant reached his late teens and early adulthood when appellant became influenced by people involved in "heavy-duty criminal activity." Appellant was a "very suggestible or influenceable" person. (13RT 2640-2641.) Appellant's firing from the United Express job caused distress and frustration. (13RT 2641.)

Appellant grew up in a dysfunctional family. There was a significant absence of parental figures. Appellant's mother related to her sons more as a sibling than a mother. Being raised in a dysfunctional family often resulted in children having a deficit in personality development, independent thinking, and maturity. Such a child could be influenced by others. (13RT 2643-2645.) A child that grew up in a dysfunctional family would be exposed to more criminal influences in an inner-city area than a rural area. (13RT 2657-2658.)

If a child grew up in a family with two parents and adequate supervision, and there was a breakup in the family and a change in lifestyle, that child could have excessive dependency, "acting-out" behavior, rebelliousness, submissiveness, or a sense of hopelessness or depression, or poor performance at school. Where there was inadequate development of a child, that child would be more susceptible to having problems as an adult, including problems with the law, spouses or girlfriends, substance abuse, and problems holding onto a job. A six-month period of increasing frustration could cause a person to give up and become more susceptible to the influences around him. A young adult at 18 to 20 years old was particularly susceptible or impressionable. (13RT 2645-2650.)

Based on his research and studies and information regarding appellant, Dr. White opined that: (1) appellant was over-indulged to an extreme degree by his mother and had developed fantasies about fancy cars and nice jewelry;

(2) that overindulgence suddenly stopped when appellant was kicked out of the house in April 1987; (3) appellant's needs became more adult- like and he became frustrated when he realized that his efforts were not going to work out; and (4) appellant became very susceptible to external influences. (13RT 2651-2652.)

Most children who grew up in divorced families who were spoiled did not "turn to a life of crime." (13RT 2659-2660.) Appellant was not physically or sexually abused as a child. Appellant's physical needs were met. Appellant's family seemed to care a great deal for him. (13RT 2660-2661.)

7. Miscellaneous Defense Evidence And Stipulations

On January 1, 1988, Long Beach Police Officer Larry Brown arrested appellant, who was at an apartment. Officer Brown searched appellant and recovered no money from him. Officer Brown also searched the apartment for weapons and recovered a weapon which was lying on a bed in a bedroom. (12RT 2563-2566.)

Detective Yarbrough was unaware whether any pictures of appellant were published in any news media from November 20 to 28, 1988. Detective Yarbrough was unaware that a composite drawing had appeared in the Daily News. To Detective Yarbrough's knowledge, the first picture of appellant was published at a news conference conducted in December 1988. (12RT 2567-2569.)

The parties stipulated that: (1) Steven Young had a birthdate of September 17, 1959, was five feet seven inches tall, and weighed 140 pounds; (2) appellant was incarcerated at the Los Angeles County Jail from August 22, 1988 to October 12, 1988; and (3) the person depicted in defense exhibits E and F was Jeffrey Young. (12RT 2676-2677, 2757-2758.)

ARGUMENT

I.

APPELLANT HAS NOT BEEN DEPRIVED OF HIS RIGHT TO AN ADEQUATE APPELLATE RECORD

Appellant contends the Superior Court's failure to provide him with Reporter's Transcripts of proceedings and other elements of the record deprived him of his right to an adequate appellate record in violation of his federal constitutional rights, warranting reversal. (AOB 51-83.) Appellant's claim lacks merit.

> "An incomplete record is a violation of section 190.9, which requires that all proceedings in a capital case be conducted on the record with a reporter present and transcriptions prepared. (See also Cal. Rules of Court, [former] rule 39.51(a)(2) [see now rule 8.610].) Although section 190.9 is mandatory, a violation of its provisions does not require reversal of a conviction unless the defendant can show that 'the appellate record is not adequate to permit meaningful appellate review.' [Citation.]" [Citations.]

(*People v. Zambrano* (2007) 41 Cal.4th 1082, 1192.) Where the record on appeal allows a reviewing court to address contentions raised on appeal, a defendant is not prejudiced by an incomplete record, and the defendant's federal constitutional right to meaningful appellate review is not violated. (*People v. Seaton* (2001) 26 Cal.4th 598, 699; *People v. Frye* (1998) 18 Cal.4th 894, 941.)

1. Transcript Of Jury Instruction Conferences

Appellant contends the appellate record lacks transcripts of hearings regarding jury instructions at both the guilt and penalty phases, limiting his ability to bring a proper appeal. (AOB 54-57.) The contention is meritless

The failure to report conferences regarding jury instructions is not prejudicial where a trial court summarizes those proceedings on the record, permitting counsel to mention objections made during those conferences. (*People v. Seaton, supra,* 26 Cal.4th at p. 699; *People v. Freeman* (1994) 8 Cal.4th 450, 510.) Missing transcripts of a hearing regarding jury instructions do not preclude adequate appellate review of instructional error claims where an appellate court gives the defendant the benefit of the doubt as to the substance of the missing transcripts. (*People v. Wilson* (2005) 36 Cal.4th 309, 326; *People v. Seaton, supra,* 26 Cal.4th at p. 699 [no prejudice from failure to report jury instruction conferences where reviewing court does not reject any instructional error claim on the ground of failure to object to or request instructions].)

Here, during the guilt phase, the trial court requested the parties submit proposed jury instructions. (8RT 1490, 1498.) Defense co-counsel[6] Andrew M. Stein stated that he had given jury instructions to the court and to the prosecutor. (10RT 1905.) Subsequently, the trial court asked defense counsel Javier B. Ramirez whether he had a question about the jury instructions. Counsel Ramirez noted there was an instruction on intent to kill that stated that in order for the jurors to find appellant guilty, they would have to find that he aided and abetted an intentional killing. Counsel Ramirez noted there was no instruction on premeditated first degree murder, and the prosecutor only requested a felony murder instruction. Counsel Ramirez asked if "we need to give them [the jurors] a definition of first degree premeditated murder." (11RT 2077.) The trial court ruled that no such instruction was necessary. (11RT 2078.)[7]

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6. Stein was appointed as co-counsel. (1CT 244.)

7. The trial court reasoned as follows:

If it were in fact a person other than the defendant who

Based on the foregoing record, where the trial court gave the parties, specifically the defense, an opportunity to voice any objections or issues with regard to the jury instructions and appellant's attorneys only specifically mentioned the possible need for a premeditated first degree murder instruction, this Court may properly infer that there were no other objections or issues the defense wished to raise.

In any event, appellant has not demonstrated how any unreported conference regarding jury instructions prevented him from raising any claims on appeal. The record includes the written instructions given to the jurors during the penalty phase, including indications as to which instructions were requested by the prosecution and defense and which instructions were modified. (3CT 787-847.) The record also includes the defense's proposed instructions which were refused by the trial court. Many of those instructions include handwritten notations which appear to be those of the trial court (based on a comparison of that handwriting with handwritten initials of the judge that appear on each instruction). (3CT 849-864.) Several of those handwritten notations indicate reasons for refusing the particular instruction, including that the instruction was redundant, or was based on an overruled case. (3CT 849-852, 859-861, 863.)

> did the actual killing and the defendant was merely an aider and abettor, then in order for him to be guilty of felony murder, he would have had to have shared an intent to kill. That would have had to have been the conspiracy or the plan.
>
> So it isn't -- it doesn't require a definition of premeditated first degree murder because it would simply be either -- he would either be one or the other. He would either be the actor or he would be the aider and abettor to the actor.
>
> And if he were an aider and abettor, then he would have had to have shared in that intent under the 8.80 definition. So I don't think it requires any intent to kill instruction. I think it's good the way it is.

(11RT 2078.)

The record also includes the written instructions given at the penalty phase, including instructions requested by the defense, the prosecution, and given on the trial court's own motion. (4CT 912-929.)

Thus, any transcripts of discussions regarding jury instructions was not necessary for appellate review, and this Court could review instructional error claims in this case based on the appellate record and the evidence presented at trial.

Appellant specifically complains that the lack of a transcript of discussions regarding jury instructions prevented appellate counsel from determining how the prosecutor's proposed instruction on flight, based on evidence which had been precluded at trial, was accepted and given to the jurors. (AOB 56.) Appellate review of the merits of that claim does not depend upon any transcript of discussions regarding jury instructions, but rather portions of the trial which are part of the record on appeal, including the discussion and ruling on the admissibility of the evidence, and settled case law regarding the flight instruction. (See Arg. XVI, *post.*)

Appellant also contends that there may have been other instructions requested by the defense that were improperly denied, specifically noting that the defense had requested an instruction for the jury to disregard the relative costs of the death penalty and life imprisonment. (AOB 56-57.) However, meaningful appellate review of that claim does not depend upon any missing transcript. That written instruction includes handwritten notations by the trial court indicating that the instruction had been "overruled" and "specifically disapproved." (3CT 863.) Thus, adequate review of that claim can be accomplished using the handwritten notations and case law and statements made by the prosecutor and trial court which are part of the appellate record, without any transcript of discussions regarding jury instructions. (See Arg. XVII, *post.*)

2. *Faretta* Hearing Transcript and Psychological Evaluation

Appellant next complains that the appellate record regarding his initial motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806, 834-835 [45 L.Ed.2d 562, 95 S.Ct. 2525] ("*Faretta*") is incomplete because it does not include a report of his psychological evaluation or a record of a hearing on that motion. Appellant contends the absence of those documents hinders appellate review of his claim that the trial court improperly granted his second *Faretta* motion, made after the jury reached its death verdict, by erroneously relying on the prior ruling to determine his competency and failing to advise appellant of the disadvantages of forgoing counsel. (AOB 57-59, see AOB 380-391.) The contention is meritless.

The appellate record is adequate to permit meaningful review of appellant's claim that the trial court failed to determine his competency and failed to give appellant required advisements before granting appellant's second, post-death verdict, *Faretta* motion, independent of the mental evaluation report and reporter's transcript from the first *Faretta* motion. (See Arg. XX, *post* [addressing appellant's *Faretta* claim].) Specifically, the record includes sufficient documentation to show appellant was given the required advisements during his initial *Faretta* motion. (18SCT 4616-4619.)

The record also shows appellant was competent to represent himself when he made his second *Faretta* motion for the reasons set forth in Argument XV, *post*, which answers appellant's claim that the trial court erred in failing to initiate proceedings under Penal Code section 1368 to determine appellant's competence based on his mid-trial behavior. the appellate record prior to the court's ruling on appellant's second *Faretta* motion is sufficient to allow adequate review of that ruling. (See Arg. XV, *post*; 18RT 2766-2771.)

3. Petit Jury Challenge

Appellant next contends that the record does not include a transcript of a hearing regarding a defense motion challenging the manner in which jurors were selected in Los Angeles County. (AOB 59-61.) Appellant previously raised this claim in his June 16, 2006, Motion for Remand to the Superior Court to Augment and Settle the Record ("Remand Motion"). (Remand Motion at 21.) The claim is still meritless.

Appellant has not demonstrated that any such motion was actually filed with the trial court. Specifically, counsel Ramirez stated, "We were *considering* filing a challenge to the petit panel." The court stated a hearing on the motion could be held the next court date. (2RT 361-362.) There is no indication that such a motion was filed or orally made. (3CT 669; 3RT 363-570). Despite Respondent's previous response noting that appellant failed to present any evidence to show that such a motion was filed or lodged in the trial court (see Opposition to Remand Motion at 5-6), appellant still has not obtained a declaration from counsel or any other evidence to show that such a motion was filed.

Appellant does cite the trial court's statement, made in response to a defense motion that all prospective Black jurors had been removed by the prosecution's use of peremptory challenges, that it could not "bring in a panel of Black jurors for you. So I can't control that. And that part, as far as challenge to the panel, is behind us." (4RT 802-803.) That statement does not show that a motion challenging the petit jury was ever filed. Rather, the most reasonable interpretation of that comment is that the time for filing such a motion had already passed.

Finally, even if such a motion had been made, an appellate claim that the jury venire in Norwalk was not representative would not have warranted relief. The claim that any underrepresentation of Blacks in the Norwalk courthouse

jury venire was due to systemic exclusion has been rejected by this Court and at least one lower appellate court. (*People v. Horton* (1995) 11 Cal.4th 1068, 1087-1091; *People v. Mattson* (1990) 50 Cal.3d 826, 843-844; *People v. Harman* (1989) 215 Cal.App.3d 552, 558-566.)

4. Attorney Angela Wallace's Request For Appointment

Appellant next contends that the record is missing a letter from attorney Angela Wallace requesting that the court appoint her as appellant's trial counsel. (AOB 61-62) Appellant raised a similar contention in his previously filed Remand Motion. (Remand Motion at 23-24.) The claim is meritless.

Appellant has not demonstrated the absence of Wallace's letter prevents meaningful appellate review of any claim that the trial court improperly failed to appoint Wallace. The trial court noted it had read the letter, and its reasons for refusing to appoint Wallace are clearly stated in the Reporter's Transcript, primarily that she was not qualified to handle a capital case. (1RT 1-3, 33-37.) The trial court's reported ruling provides an adequate basis for reviewing that ruling, since it can be considered in conjunction with Wallace's earlier participation in this case, which is reflected in the existing record. (See *People v. Horton, supra*, 11 Cal.4th 1098 [decision to appoint counsel for an indigent defendant rests within sound discretion of trial court].)

5. Disorganization Of Record

Appellant finally complains that the record on appeal is disorganized, noting it is not in chronological order, includes improperly disclosed section 987.1 materials, contains duplicative and incomplete documents, includes juror questionnaires from another case, and includes documents from appellant's non-capital cases. Appellant contends that the record hampered appellate counsel's ability to prepare his appeal. (AOB 62-69.) Similar contentions were raised in the Remand Motion. (Remand Mot. at 32-33.) The arguments are

meritless.

Appellant has not demonstrated that the disorganization of the record precludes meaningful appellate review. At best, appellant has shown the state of the appellate record made it difficult to prepare his appeal. However, that the state of the record did not preclude meaningful appellate review is shown by the fact that appellate counsel has filed the Opening Brief.

Further, appellant's request that the "36 volumes" of the Clerk's Transcript (appellant appears to be referring to both the Clerk's Transcript and Supplemental Clerk's Transcript) be rearranged (AOB 69) should be rejected. As previously noted, the Superior Court rejected appellant's request to rearrange the Supplemental Clerk's Transcript, noting in part that it would lead to delay and that adding additional volumes might add to confusion. (Opposition to Remand Motion at 14; 4/4/03 RT at 7-9.)

Finally, this Court should reject appellant's claim that the appellate record omits "substantial" portions previously discussed, requiring per se reversal. (AOB 80-83.) As demonstrated above, none of the missing materials prevents adequate appellate review of any of appellant's claims. Further, California law does not provide for, and this Court has never required, per se reversal based upon an incomplete appellate record. (See *People v. Zambrano, supra*, 41 Cal.4th at p. 1192; *People v. Seaton, supra,* 26 Cal.4th at p. 699; *People v. Frye, supra,* 18 Cal.4th at p. 941.)

II.

THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES WAS CONSTITUTIONAL

Appellant contends the prosecutor excluded Black and Hispanic prospective jurors, violating his federal and state constitutional rights under *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 [106 S.Ct. 1712, 1716-1719, 90 L.Ed.2d 69] and *People v. Wheeler* (1978) 22 Cal.3d 258. (AOB 84-152.) Appellant's claim lacks merit.[8/]

A. Relevant Factual Background

1. Jury Selection Procedures, Peremptories, and Composition of Jury

The jury selection procedure in this case began with the removal of prospective jurors who established an excusable hardship. The remaining "time-qualified" jurors were given questionnaires to fill out; one of the questions required that the jurors indicate their "race and ethnic origin." The jurors then were qualified for cause, based on their questionnaire responses and answers during voir dire. As to the remaining pool of qualified jurors, the parties were allowed to exercise 20 peremptory challenges during the selection of the 12-member jury, and four peremptories during the selection of the four

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8. Respondent raises several forfeiture arguments regarding appellant's *Wheeler/Batson* claim. (See fns. 7, 13.) Imposition of state procedural bars advances important institutional goals in the state criminal justice system (see *In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 1) and precludes subsequent federal habeas review of the claim, except under a narrow class of exceptions (*Coleman v. Thompson* (1991) 501 U.S. 722, 750 [111 S.Ct. 2546, 115 L.Ed.2d 640]) As such, respondent requests this Court explicitly rule on these forfeiture arguments, and other forfeiture arguments raised in the Respondent's Brief, even if this Court decides, alternatively, that the contentions fail on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10 [109 S.Ct. 1038, 103 L.Ed.2d 308].)

alternate jurors. (1RT 22-25 [trial court's description of procedure]; 2RT 225-362 [time-qualification of jurors]; 3RT 363-4RT 786 [removal of jurors for cause]; 4RT 788-810 [peremptories as to jurors]; 810-816 [peremptories as to alternates]; see 1SCT 63-90 [juror questionnaire].)

The trial court noted that during the peremptory challenge portion of jury selection, the jurors would be called into the jury box in the order in which their names appeared on a randomly-selected, computer-generated list. The trial court explained this procedure would permit the attorneys to arrange their questionnaires in the order indicated on the list, help them to plan which jurors to challenge, and "speed things along." (1RT 23-24, 360-362.)[9/]

The prosecutor exercised 17 peremptory strikes in the following order: (1) **Vincent R.**,[10/] a "Mexican" (5SCT 1184); (2) **Elaine G.**, a "Mexican-American" (8SCT 1967); (3) **Guadalupe O.**, a "Mexican-American" (7SCT 1855); (4) Fern R., a "Caucasian" (6SCT 1659); (5) Karen T., who was

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9. Appellant did not object to this procedure of placing jurors into the "box" according to a randomly-selected, computer-generated list when the trial court first mentioned it at the opening of trial, and when the trial court later mentioned it prior to the "cause-qualification" portion of jury selection. (1RT 23-24, 360-362.) Appellant first complained about this procedure when he made his first *Batson* motion contending the prosecution improperly excused Patricia J. Appellant specifically stated the procedure allowed the prosecution to "engineer" its peremptories to exclude certain jurors. The trial court ruled appellant's challenge was untimely, and further noted appellant had, that morning, asked the list be re-generated to include a particular juror the defense liked, and that the list had been "re-scrambled." (4RT 794-795.) Appellant does not raise any claim on appeal challenging this procedure. Because appellant did not challenge this procedure at trial or on appeal, that claim has been forfeited. (*People* v. *Neal* (1993) 19 Cal.App.4th 1114, 1118; *People v. Hill* (1992) 3 Cal.App.4th 16, 33, fn. 5 [issue is waived if not briefed].)

10. In these paragraphs listing the prospective jurors and alternate jurors whom the prosecutor peremptorily challenged and who ultimately served on the jury, Respondent identifies Black and Hispanic jurors by bold-facing their names.

"White, Finnish" (11SCT 2835); (6) **Kelly E.**, a "Mexican-American" (5SCT 1323); (7) Roberta P., a "Caucasian" (6SCT 1491); (8) Marcus W., who was "Anglo/Caucasian" (9SCT 2247); (9) Angela F., who was "Caucasian-Croatian" (10SCT 2695); (10) **Patricia J.**, who was "Black" (7SCT 1743); (11) Barbara G., a "European" (3SCT 624); (12) Gladys W., who was "White, German" (7SCT 1827); (13) Estelle B., who was "White-Italian" (3SCT 680); (14) **Mary G.**, a "Hispanic"[11] (15) **Myron G.**, a "Negro" (9SCT 2415); (16) **Inez A.**, a "Hispanic" (5SCT 1128); and (17) **Laurie H.**, a "Caucasian/Hispanic" (5SCT 1267). (4RT 788-808.)

The prosecutor also exercised four peremptory strikes as to the following prospective alternate jurors: (1) Thomas C., a "Caucasian" (3SCT 763); (2) **Angelita O.**, an "American of Mexican descent" (6SCT 1435); (3) Scott D., a "Caucasian" (2SCT 456); and (4) **Angela F.**, a "Hispanic" (3SCT 567). The alternate jurors who were selected to serve were: (1) Larry R., who was "White" (7SCT 1883); (2)Toni R, who was "White" (6SCT 1547); (3) **Irene M.**, who was "Mexican" (7SCT 1799); and (4) **Christina G.**, who was "Hispanic" (2SCT 316). (4RT 810-815.)

The jurors who ultimately decided the guilt phase were:
(1) **Sandra S.**, a "Hispanic" (14SCT 3728); (2) **Rebecca L.**, a "Hispanic" (10SCT 2335; 12 CT 3461-3488); (3) **Irene M.**;[12] (4) Brenda M., who was "White" (2SCT 540); (5) Gay C., who was "White" (11SCT 2918; 13CT 3601-3628); (6) Erline N., who was "White" (3SCT 792); (7) Gary S., the foreman, who was "Mexican" (6SCT 1603); (8) Luis A., a "Pacific Islander" (4SCT

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11. Mary G.'s juror questionnaire is missing from the appellate record, but was she was referred to as "Hispanic." (4RT 798.)

12. Prior to the presentation of the defense case, alternate juror Irene M. replaced juror Joy B., who was "White" (2SCT 288; 13CT 3769-3796). (8RT 1429-34)

1072, 12CT 3377-3404); (9) **Sandra G.**, a "Mexican" (4SCT 988; 13CT 3517-3544); (10) Peter D., who was "White" (2SCT 400, 9CT 2301); (11) Martha M., who was "White" (4SCT 875; 10CT 2621-2648); and (12) Larry R.[13] (11RT 2202-2203.)

2. The *Batson/Wheeler* Motions

Appellant made four *Batson/Wheeler* motions, contending the prosecutor improperly used peremptory challenges as to prospective jurors Patricia J., a black woman, Mary G., a Hispanic woman, Myron G., a Black male, and prospective alternate juror Angelita O., a Hispanic woman.[14]

a. Patricia J.

After the prosecutor exercised her tenth peremptory challenge against Patricia J., trial counsel, citing *Batson,* made a motion contending that prosecutor had removed the only Black female juror from the jury pool. (4RT 794.) Co-counsel Stein stated asked for "an explanation as to why the only Black juror who has been called has been excluded." (4RT 795.) The trial court responded, "Under *Wheeler*, it's hardly a systemic exclusion, but what's the basis of your exclusion?" (4RT 795.) The prosecutor replied as follows:

> May I see her questionnaire, and I'll tell you exactly why.
>
> I remember her. Because I felt that she was weak on death when I first read her. And I'm kicking off everybody that I feel -- that I perceive as being weak on death from the questionnaire.

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13. Alternate juror Larry R. replaced juror Linda M., who was "White" (4SCT 904). (8RT 1516-18, 1533.)

14. In the interest of juror privacy and safety concerns, respondent refers to the prospective and actual jurors only by their first names and the initials of their last names. (See Code Civ. Proc., §§ 237, 206; *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087.)

And since we didn't -- I realize I didn't get a chance to really talk to her because we were running at the end of the day. She appeared at the end of the day when we were talking to her. The defense never talked to her about death.

So from -- all we have as to her feelings on death is what she wrote in this questionnaire. And it's apparent from this questionnaire that she's weak on death.

(4RT 795.)

The court found that the prosecutor's explanation was race-neutral, and that the challenge was based on Patricia J.'s responses on the questionnaire. The court stated, however, that it was "a little alarmed" that the prosecutor exercised her first several peremptories against Hispanics, which might establish a pattern requiring her to explain her challenges, but noted that the defense had not raised the issue. (4RT 795-796.)

b. Mary G.

When the prosecutor used her fourteenth peremptory challenge against Mary G., counsel Ramirez stated he was raising a *Wheeler* motion based on a pattern of strikes as to Hispanic women. Co-counsel Stein stated the prosecutor had challenged five Hispanic women. The trial court, without finding that appellant had established a prima facie case of discrimination, asked the prosecutor to explain her reason for excusing Mary G. (4RT 798.) The prosecutor responded:

Your Honor, Miss [G.], as I recall, from when she was on the stand yesterday, came very close to being a challenge for cause.

She was sitting here -- in fact, I tried to challenge her for cause. She was sitting next to [Fern R.], as I recall. And she -- I thought I had her originally down for my questionnaire as a challenge for cause. If she had stuck to the answers when she was talked to, it would have gotten

her kicked. But she changed her tune as soon as [Fern R.] changed hers.

So unless I got my people mixed up –

(4RT 798-799.)

Counsel Ramirez stated an explanation was required of "all the previous challenges." The trial court disagreed, stating:

> Because I sounded a note of caution before and said that I had noticed a pattern, that there were systemic Hispanic names, although a couple of them I noticed appeared to be Hispanic by marriage rather than Hispanic because they were not Hispanic coloring.
>
> But nevertheless -- so I think that counsel at this time has a very logical explanation. I remember the colloquy very well with Miss [G.] She was -- waffled back and forth. And we had to go into great detail with her. And she finally qualified -- I mean she passed cause by changing her position back again.
>
> And I'm sure you remember the same thing. We had to go back and forth with her. And I finally had to get into it. So I can't fault her [the prosecutor] for having -- since she said that she is exercising her challenges for people that she perceives to be weak on death, certainly this is a person that would be a loose cannon in the jury room as far as the prosecution is concerned.

(4RT 799.)

Counsel Ramirez objected to the court's "classification of these women as being possibly Hispanic by marriage." The trial court agreed, stating that without knowing the women's maiden names, its conclusion that the women were Hispanic by marriage was unwarranted. The trial court found that the prosecutor's explanation for challenging Mary G. was "on solid ground." The trial court stated that if there were further challenges to Hispanic jurors, especially Hispanic women, that the prosecutor would have to explain all of its

challenges to Hispanic women. (4RT 799-800.)

c. Myron G.

The prosecutor exercised her fifteenth peremptory challenge against Myron G. Counsel Ramirez, citing *Wheeler*, contended the prosecutor excluded Blacks from the jury. (4RT 802.) The trial court asked the prosecutor to explain her challenge against Myron G. The prosecutor noted Myron G.'s appearance, stating he came to court each day wearing t-shirts and jeans, and his hair was "an Afro, cut into a bun in the back" and his haircut included "little rows that went around his head." The prosecutor also stated Myron G. would not make eye contact with her, or anybody else, and was not paying attention. (4RT 803.)

Co-counsel Stein disagreed, stating that he paid close attention to Myron G. and did not notice Myron G. not paying attention. (4RT 803-804.) Co-counsel Stein also stated the prosecutor was "basically saying if someone is poor and can't afford a suit and tie . . ." The trial court interrupted counsel, stating:

> No, no. That's not it at all. His general appearance and demeanor had nothing to do with money. He could be the wealthiest person in the world. [¶] And that is, his style of hair, and so on, as far as the mainstream is concerned, is bizarre.

(4RT 804.)

The prosecutor, referring to the questionnaire, also stated an additional reason she challenged Myron G. was:

> [Myron G.'s] feeling as to the worst problem in the criminal justice system is, "Sometimes people are being tried with lack of evidence; innocent people being convicted. Guilty, known fact, getting away easy."

(4RT 804.) The prosecutor stated that, "People with attitudes like that are not

going to be open-minded." (4RT 804.)

Co-counsel Stein argued that Myron G.'s appearance was neat and clean, and counsel Ramirez argued that Myron G.'s haircut was not unusual in the Black population. (4RT 804-805.) The trial court disagreed, noting that Myron G.'s appearance was "bizarre enough" that prior to any challenge, courtroom personnel had commented on Myron G.'s "odd appearance." (4RT 805.) Co-counsel Stein argued that Myron G.'s appearance would not be odd in "central Los Angeles."

The trial court found the prosecutor's explanation for challenging Myron G. was justified, specifically noting Myron G.'s appearance and answers on the questionnaire were sufficient race-neutral reasons for the challenge. (4RT 806.)

d. Angelita O.

The prosecutor used the second of her four peremptory challenges allotted for selection of the alternate jurors to remove Angelita O. Counsel Ramirez made a *Batson/Wheeler* motion, contending that there was a pattern of excluding Hispanic females from the jury. The trial court replied that Angelita O. answered on her questionnaire that she did not believe in the death penalty. (4RT 813.) Counsel Ramirez stated that Angelita O. had explained her answer during voir dire, and stated "it's submitted with the Court. The Court can make the call."(4RT 813-814.)

The trial court responded that counsel's challenge was justified based upon Angelita O.'s answer in the questionnaire, and her changing of her position on the death penalty during voir dire. The trial court also noted that it had cautioned the prosecutor about excusing Hispanic women, and "I can't attribute that kind of bad faith to [the prosecutor], that she is doing this on a racial basis or ethnic basis." (4RT 814.)

Counsel Ramirez noted that the court previously stated that if the prosecutor excused another Hispanic female, that the court would ask for an

explanation from the prosecutor. Counsel Ramirez stated that "the pattern has been developed at this point that the Court would certainly be justified in doing that." The trial court denied the motion, based upon Angelita O.'s "representations and showing in the questionnaire." (4RT 814.) The prosecutor did not state her reasons for challenging Angelita O.

B. General Principles

The use of peremptory challenges to remove prospective jurors solely on the basis of their membership in a racial or other cognizable group is prohibited by the state and federal Constitutions. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1104; *Wheeler, supra*, 22 Cal.3d at pp. 276-277; *Batson, supra,* 476 U.S. at pp. 84-89.) Under *Batson*, the following three-step procedure governs review of a prosecutor's use of peremptories:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]

(*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129], fn. omitted; *People v. Zambrano, supra*, 41 Cal.4th at p 1104.)

"[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834]; see *People v. Stevens* (2007) 41 Cal.4th 182, 192.) It is presumed that a prosecutor who uses a peremptory challenge does so for a purpose other than to discriminate.

(*People v. Griffin* (2004) 33 Cal.4th 536, 554; *People v. Wheeler, supra*, 22 Cal.3d at p. 278.)

C. Appellant Failed to Show A Prima Facie Case of Discrimination As To Patricia J. and Hispanics Other Than Mary G.

A defendant establishes a prima facie case of discrimination by making a showing that "the totality of the relevant facts gives rise to an inference of discriminatory purpose. [Citations.]" (*Johnson v. California, supra*, 545 U.S. at p. 168, quotation marks omitted; *People v. Howard* (2008) 42 Cal.4th 1000, 1016.) If a trial court denies a *Batson/Wheeler* motion without finding a prima facie case of discrimination, this Court reviews the record of voir dire for evidence to support the trial court's ruling, and will affirm that ruling where the record suggests non-discriminatory grounds which the prosecutor might reasonably have relied upon in challenging the stricken jurors. (*People v. Hoyos* (2007) 41 Cal.4th 872, 900.)

> "In deciding whether a prima facie case was stated, we consider the entire record before the trial court [citation], but certain types of evidence may be especially relevant: '[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic-their membership in the group-and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition

his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.' [Citation.]"

(*People v. Bonilla* (2007) 41 Cal.4th 313.)

If it is not clear whether a trial court used the proper "reasonable inference" standard rather than the disapproved "strong likelihood" standard, this Court reviews the record independently to determine whether the record supports an inference that the prosecutor's use of peremptories was improperly discriminatory. (*People v. Kelly* (2007) 42 Cal.4th 763, 779; *People v. Bonilla* (2007) 41 Cal.4th 313, 341-342.) If a trial court expressly states that it does not believe that a prima facie case has been made, then invites the prosecution to justify its challenges for the record on appeal, the issue of whether a prima facie case has been made is not rendered moot, and there is no implied finding of a prima facie case. (*People v. Howard, supra*, 42 Cal.4th at p. 1018; *People v. Welch* (1999) 20 Cal.4th 746.) This Court has also held that where a prosecutor proffers reasons for excusing a juror, the issue of whether a prima facie case existed has been rendered moot. (*People v. Lewis*, 43 Cal.4th at p. 471.)

1. Patricia J.

Appellant suggests the trial court found that the defense had established a prima facie case that the prosecutor's peremptory challenge of Patricia J. was unconstitutional. (AOB 109.) The contention is not supported by the record. Appellant argued at trial that a prima facie case had been established as to Patricia J. because she was the lone Black juror who had been seated. (4RT 794.) The trial court responded that "it's hardly a systemic exclusion." (4RT 795.) The trial court's statement indicated that it found that appellant had *failed* to establish a prima facie case as to Patricia J. based on systemic exclusion.

Appellant nevertheless asserts on appeal that several factors showed a

prima facie case of discrimination as to Patricia J., including that he and Patricia J. were Black, that the strike removed half of the Black jurors, that Patricia J. was "heterogenous as the community as a whole" and the prosecutor failed to ask Patricia J. any questions during voir dire. (AOB 107-109.) The contention is meritless.

At trial, the defense cited no other reason for inferring discriminatory intent, other than Patricia J. was the sole Black female juror who had been peremptorily challenged by the prosecutor. In any event, an independent review of the record supports the inference that the prosecutor's use of peremptories was not discriminatory.

First, appellant makes the conclusory assertion that Patricia J. was "heterogenous as the community as a whole" (AOB 108-109) without providing any facts to support that argument. Moreover, "[t]he challenge of one or two jurors, standing alone, can rarely suggest a pattern of impermissible exclusion. [Citation.]" (*People v. Howard, supra*, 42 Cal.4th at p. 1018, fn. 10; see *People v. Bell* (2007) 40 Cal.4th 582, 598 [that two of three African-American women were excused was insufficient to show a prima facie case because "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible."]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1201 [defendant's claim that prosecutor exercised three of six challenges to excuse Hispanic jurors was deemed insufficient to establish a prima facie case of discrimination].)

2. Hispanics Other Than Mary G.

Appellant asserts the trial court erred by failing to find a prima facie case as to five Hispanics (specifically, four women and one man) who had been removed from the venire before the prosecutor challenged Mary G., and two additional Hispanic jurors who were removed after Mary G. Appellant specifically argues that the trial court applied the incorrect "strong likelihood"

standard, ignored evidence of statistical disparity, failed to ask prospective juror Kelly E. any questions, and that the court's "Hispanic by marriage" reasoning was flawed. (AOB 143-150.) The claim should be rejected.

First, even if the trial court applied the disapproved "strong likelihood" standard, that alone does not demonstrate a prima facie case of discrimination. This Court must independently review the record to determine whether there was a prima facie case of discrimination. (*People v. Kelly, supra,* 42 Cal.4th at p. 779; *People v. Bonilla, supra,* 41 Cal.4th at pp. 341-342.) As explained below, there was insufficient evidence suggesting such a prima facie case.

Second, appellant's statistical disparity arguments do not appear to be entirely factually correct. Appellant's asserts that, prior to the challenge of Mary G., there were five Hispanics who were removed, plus Roberta P., who was a Caucasian juror with a Hispanic surname. (AOB 146.) However, prior to challenging Mary G., the prosecutor removed *four* Hispanic jurors: Vincent R., Elaine G., Guadalupe O., and Kelly E. (4RT 788-798.) Also, that the prosecutor apparently did not question Kelly E.[15/] (3RT 597-613) also does not, in of itself, demonstrate a prima facie case of discrimination. (See *People v. Lewis, supra*, 43 Cal.4th at p. 476 [in third stage, prosecutor's failure to question juror on voir dire insufficient to show pretext].)

Further, though the trial court initially stated that some of the challenged jurors may not have been Hispanic, and may have been "Hispanic by marriage," the court later acknowledged that statement was incorrect and found the prosecutor's stated reason for excusing Mary G. (her "weakness" on the death penalty) was proper. (4RT 799.)

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15. Appellant incorrectly refers to Kelly E. as a male. (AOB 148.) During voir dire, counsel Ramirez referred to Kelly E. as "Miss [E.]" (3RT 584.) Appellant also identifies Kelly E. as a female. (AOB, Appendix 3.)

Most importantly, appellant's arguments fail to show that the totality of the facts and relevant circumstances gave rise to an inference of discrimination. At trial, appellant relied solely upon the number of Hispanic jurors who were challenged by the prosecutor to show a prima facie case. However, such a showing alone is insufficient to raise an inference of discrimination. The record shows the prosecutor repeatedly accepted the jury panel when there were Hispanic women on it. Rebecca L., a Hispanic female (10SCT 2335), was initially in position number two, was never challenged by the prosecution or defense. (11 RT 2202; see 4RT 788-810.) When the prosecution first accepted the jury panel, Rebecca L. and, Gary S., a Hispanic male (6SCT 1603), were on the panel. (4RT 793.) When the prosecutor accepted the panel the second, third, fourth, fifth, and sixth times, Rebecca L., Gary S., and Sandra G., another Hispanic woman (4SCT 988), were on the panel. (4RT 793-794, 801-802.) Specifically, when the prosecutor challenged Mary G. (4RT 798), Rebecca L., Sandra S. and Gary S. were part of the panel. Also, after Sandra S., another Hispanic female (14 SCT 3728) was seated in position number one; the prosecutor did not excuse her, though she had three peremptory challenges remaining. (4RT 809.)

Moreover, in selecting the alternate jurors, the prosecutor did not excuse Christina G., a Hispanic female (2SCT 316). (4RT 810-816.) When the prosecutor excused Angelita O., Christina G. was on the panel of four alternate jurors.

Additionally, the jury that was initially seated to decide appellant's case included three Hispanic women (Sandra S. [no. 1], Rebecca L. [no. 2], and Sandra G. [no. 9]) and one Hispanic male (Gary S. [no. 7]). A fourth Hispanic female, Irene M. (7SCT 1799) was added to the jury when she replaced Joy B. in position number 3 prior to the presentation of the defense case. (11RT 2202-2203.)

These facts strongly show that there was no prima facie case of discrimination against Hispanics, and specifically Hispanic women. (See *People v. Hoyos*, *supra,* 41 Cal.4th at p. 901 [no prima face case where prosecution did not excuse all Hispanic jurors and defendant was a Hispanic man, not a Hispanic woman].) Indeed, that a prosecutor did not peremptorily challenge all jurors of a certain race or gender is an indication that "strongly suggests that race [or gender] was not a motive behind the challenge" and also shows there is no prima facie case. (*People v. Kelly, supra*, 42 Cal.4th at p. 779; *see People v. Snow* (1987) 44 Cal.3d 216, 225.) Further, that the jury ultimately empanelled included Hispanic women, and that the prosecutor accepted the jury several times with multiple Hispanic women, are indications of the prosecutor's good faith in exercising peremptories. (*People v. Turner* (1994) 8 Cal.4th 137, 168, overruled on other grounds in *People v. Griffin, supra,* 33 Cal.4th at p. 555, fn. 5.)

D. The Prosecution's Stated Reasons Were Race-Neutral

Even assuming there was a prima facie case of discrimination as to Patricia J. (see *People v. Zambrano, supra,* 41 Cal.4th at p. 1106 [assuming without deciding that defendant established a prima facie case, and proceeding directly to second and third steps of *Wheeler/Batson* analysis]), there was no *Batson/Wheeler* violation as to her. Similarly, the prosecution's peremptory challenges as to Myron G., Mary G., and Angelita O.[16/] were proper because there were race and gender neutral justifications for those challenges.

"[T]he critical question in determining whether [a party] has proved

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16. Respondent discusses only the prospective jurors identified in the *Wheeler* proceedings below (Patricia J., Mary G., Myron G. and Angelita O.). Respondent is not addressing other Hispanic jurors who were removed, as appellant presents no argument as to those jurors beyond a first-stage prima facie case argument.

purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339, 123 S.Ct. 1029, 154 L.Ed.2d 931.) The credibility of a prosecutor's stated reasons for exercising a peremptory challenge "can be measured by, among other factors ... how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Id.* at p. 339, 123 S.Ct. 1029.)

(*People v. Lewis* (2008) 43 Cal.4th 415, 469.)

A trial court's ruling that a prosecutor's proffered justifications for use of his or her peremptories are non-discriminatory is entitled to review under the deferential substantial evidence standard if the court made a sincere and reasoned effort to evaluate those justifications. (*People v. Lewis, supra*, 43 Cal.4th at p. 470; *People v. Zambrano, supra*, 41 Cal.4th at p. 1104.)

1. Views on Death Penalty: Patricia J., Mary G., Angelita O.

A prospective juror's feelings about the death penalty are reasonably related to trial strategy (see *Miller-el v. Cockrell, supra*, 537 U.S. at p. 339, 123 S.Ct. 1029) and are a legitimate race-neutral reason for exercising a peremptory challenge (*People v. Ledesma* (2006) 39 Cal.4th 641, 678, 47 Cal.Rptr.3d 326, 140 P.3d 657; *People v. Montiel* (1993) 5 Cal.4th 877, 910, fn. 9, 21 Cal.Rptr.2d 705, 855 P.2d 1277). (*People v. Lewis, supra*, 43 Cal.4th at p. 472.) Specifically, a juror's uncertainty, reservations, or skepticism about the death penalty is a race-neutral justification for a peremptory challenge. (*People v. Watson* (2008) 43 Cal.4th 652, 681; *People v. Ward* (2005) 36 Cal.4th 186, 201; *People v. Catlin* (2001) 26 Cal.4th 81, 118 [juror's serious reservations about death penalty is race neutral].) Indeed, a juror who with views on the death penalty that would prevent or substantially impair the performance of his or her duties may be dismissed for cause. (*People v. Wilson* (2008) 43 Cal.4th

1, 14; *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].)

a. Patricia J.

As to Patricia J., the prosecutor stated that she was challenging every juror that she perceived as being "weak on death from the questionnaire" and noted it was apparent from Patricia J.'s questionnaire that Patricia J. was "weak on death." (4RT 795.) The prosecutor also noted that she did not have the opportunity to question Patricia J. during voir dire at length because Patricia J. "appeared at the end of the day." (*Ibid.*) The prosecutor's reasons are supported by the record.

Patricia J.'s questionnaire included the following responses showing antipathy toward the death penalty: (1) "I feel a little uneasy with the death penalty, never really gave it a days thought" (7SCT 1763); (2) her opinion regarding life in prison without the possibility of parole ("LWOP") was that she was "a little more comfortable with that . . . as it is not taking a life" (7SCT 1764); (3) that the saying "an eye for an eye" was "not always true in all cases" (7SCT 1765); (4) that LWOP is a worse punishment than death, explaining, "With death its over - Life in prison is like a living death" (7SCT 1766); (5) that a sentence of death by the gas chamber was "too quick and easy" (7SCT 1766); and (6) that she felt that LWOP was a severe punishment because "they would be locked up forever with the thought of what they did" (7SCT 1766).

Additionally, the record shows that Patricia J., who was in the second group of fourteen prospective jurors who were examined for cause (see 3RT 465-466), was not asked questions during voir dire by either the prosecutor or defense. (3RT 465-510.)

b. Mary G.

The record also shows Mary G. had an antipathy toward the death

penalty. During voir dire of Mary G.'s group of prospective jurors, counsel Ramirez asked whether any of the prospective jurors "would never vote for death." (4RT 636.) The record shows, and appellant acknowledges on appeal (AOB 138-139), that Mary G. was one of three prospective jurors who raised their hands.

Counsel Ramirez noted that juror Sarah C. had raised her hand and asked her whether she could vote for the death penalty. She responded that she could vote for LWOP, but not death. Counsel asked Sarah C. whether she could vote for death for the "worst criminal you could ever think about, a Nazi war criminal . . ." Sarah C. responded that she could not do it. (4RT 637.)

Counsel then asked Mary G. the same question. Mary G. responded, "I would say no, but it would be according to what the case is." (4RT 637.) Counsel also asked Mary G. whether she could think of an instance or situation where she could vote for the death penalty. She responded, "Yes." Counsel then asked Mary G. if she was selected as the foreman, and the jury decided that death was the appropriate punishment, whether Mary G. could "sign [her] name to the verdict." She responded, "Yes." (4RT 638.) Counsel then noted that juror Erlinda L. had raised her hand, indicating that she would never vote for the death penalty, and questioned her. (4RT 638.)

Subsequently, the prosecutor noted that when Erlinda L. and Sarah C. raised their hands, indicating they would never vote for the death penalty, that Mary G. also raised her hand. The prosecutor asked Mary G. to explain her position on the death penalty. Mary G. responded, "I am for it. Of course. Depending on the case and the circumstances." (4RT 686-687.)

The prosecutor asked how Mary G. would feel about having to judge somebody. She responded, "I would be judgmental." She also responded that there was nothing about judging someone that would give her pause or hesitation. (4RT 687.)

The prosecutor noted that Mary G. did not respond on the questionnaire[17] to a question regarding what her feelings were on the death penalty, but that in response to a question about life without parole, that life without parole was the most severe punishment "due to the fact that no one knows how long you will live." The prosecutor asked Mary G. if she still believed if life without parole was the most severe punishment. She responded, "I would say it would depend on each individual." (4RT 687.)

The prosecutor stated that if Mary G. had to determine appellant's sentence, she would have to hear about factors and personally determine what weight to give to those factors, and that if those factors weighed more in aggravation than mitigation, then the appropriate sentence would be death. The prosecutor asked whether Mary G. understood that the law "views death as a more severe sort of thing. It's not a case-by case thing. It's a weighing process." Mary G. responded that she did. The prosecutor asked how Mary G. felt about being told to weigh factors. Mary G. responded, "I would say death." (4RT 687-688.)

The record thus shows that Mary G. initially expressed her clear antipathy toward the death penalty. She was one of three jurors who raised their hands, indicating they would never vote for the death penalty, and, in her questionnaire response, indicated that life without parole was the most severe punishment. Though Mary G. backed off those statements during voir dire, the prosecutor's concern that Mary G. was weak on the death penalty was clearly supported by the record.

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17. It appears Mary G.'s questionnaire is missing from the appellate record. Respondent has made attempts to locate that questionnaire, including contacting the prosecutor, who has stated that the questionnaire is not in her trial file, but has not been able to locate it. Though that questionnaire is missing, meaningful appellate review is still possible, especially in light of the record of Mary G.'s voir dire responses, which are part of the record. (See *People v. Heard* (2003) 31 Cal.4th 946, 969.)

Appellant nevertheless contends the prosecutor failed to state a race neutral reason for challenging Mary G. and that the trial court erred in crediting the prosecutor's explanation because that the prosecutor "falsely represented" to the trial court that Mary G. was a different juror (either jurors Erlinda L. or Sandra S.) and the trial court failed to notice that misidentification. (AOB 137-143.) The contention should be rejected.

Appellant did not raise such a claim at trial. Appellant did not contend at the time of the *Wheeler* motion that the prosecutor had misidentified Mary G. or that the prosecutor's reasons for Mary G. were not genuine because she had confused Mary G. with another juror. (4RT 798-800.) Due to appellant's failure to raise any claim regarding misidentification of Mary G., this Court should conclude the issue is not preserved for appeal. (See *People v. Lewis, supra*, 43 Cal.4th at p. 481 [deeming *Wheeler* issue waived, noting failure to press for ruling deprived court of opportunity to correct potential error in the first instance].)

The record shows the prosecutor misspoke when she said that Mary G. had been sitting next to juror Fern R. Mary G. was part of what appears to be the fifth set of prospective jurors who were called for voir dire. (4RT 633-634.) Fern R. was voir dired with a different group of prospective jurors. (4RT 762.) Regardless of any confusion or misstatement by the prosecutor regarding who sat next to Mary G., the record clearly supports the conclusion that the prosecutor was discussing the voir dire of Mary G.. The prosecutor first noted that Mary G.'s questionnaire responses were unfavorable regarding the death penalty. (4RT 798-799.) The prosecutor's statement is supported by the record. As set forth above, the prosecutor noted while questioning Mary G. that she did not respond on the questionnaire regarding what her feelings were on the death penalty, and wrote in response to another question that life without parole was the most severe punishment "due to the fact that no one knows how

long you will live." (4RT 687.)

The prosecutor also stated that Mary G. had "changed her tune," and the trial court stated Mary G. had "waffled back and forth." (4RT 799.) Mary G. changed her answers regarding the death penalty. Mary G. initially stated on the questionnaire that life without parole was the most severe punishment, then responded during voir dire that "it would depend on each individual." (4RT 687.) More importantly, during voir dire, Mary Mary G. initially raised her hand, indicating she would never vote for the death penalty, then changed that response and said she could vote for it depending upon the case and circumstances. The record thus supports the reasons the prosecutor stated for striking Mary G.

Further, where a juror's questionnaire responses reflect hesitation about the death penalty, a prosecutor reasonably could believe those responses reflected the juror's true feelings and undermined the juror's assurances during voir dire that the juror would not automatically vote for life without parole. (*People v. Lewis, supra*, 43 Cal.4th at p. 474.) Here, the prosecutor reasonably could believe Mary G.'s questionnaire responses indicated her true feelings, especially in light of the fact that during voir dire, she also raised her hand, indicating she did not believe in the death penalty.

c. Angelita O.

As to Angelita O., the trial court, without asking or requiring a response from the prosecutor, found her dismissal to be race-neutral, noting Angelita O. indicated on her questionnaire that she did not believe in the death penalty and changed that position in voir dire. (4RT 813-814.) The record supports the trial court's finding.

During voir dire, the prosecutor asked Angelita O. if she had stated on her questionnaire that she did not believe in the death penalty. Angelita O. responded, "Yes." The prosecutor asked her to explain her beliefs about the

death penalty. Angelita O. responded that she understood a bit more after hearing the other prospective jurors answers during voir dire, and that "I believe in the death penalty depending on the situation, you know, depending on if it's a heinous crime or premeditated." She also indicated that she could see herself personally voting for the death penalty. (3RT 503-504.)

Angelita O. indicated in her questionnaire that she did not "believe in [the] death penalty." (6SCT 1455.) She also indicated that life without parole was a more severe punishment because "a person has so much time to think." (6SCT 1458.) She further indicated that death was not a severe punishment for a defendant "because his life is over. He doesn't have a chance to think about it." (6SCT 1458-1459.) She also indicated that she had heard of someone being executed by lethal injection, and stated, "I thought if he couldn't have been punished differently" (6SCT 1459), indicating she believed execution was not an appropriate penalty.

Thus, despite Angelita O.'s response during voir dire that she could impose the death penalty, her questionnaire included several statements indicating antipathy toward the death penalty which undermined her assurance on voir dire that she could vote for that penalty. (*People v. Lewis, supra*, 43 Cal.4th at p. 474.)

d. Myron G.

A juror's appearance is a race-neutral reason justifying the exercise of a peremptory challenge. (*People v. Reynoso* (2003) 31 Cal.4th 903, 916; *People v. Wheeler, supra*, 22 Cal.3d at p. 275 [clothes or hair length that suggest an unconventional lifestyle are race-neutral]; *Purkett v. Elem* (1995) 514 U.S. 765, 767 [115 S.Ct. 1769, 131 L.Ed.2d 834].) Here, the prosecutor explained that she excused Myron G. because of his clothing (wearing t-shirts and jeans) and unusual hairstyle. The prosecutor also stated Myron G. would not make eye contact with her, or anybody else, and was not paying attention.

(4RT 803.) The trial court found the prosecutor's explanation based on Myron G.'s appearance was race-neutral, stating that the court staff had commented on his unusual appearance. (4RT 805-806.) A trial court's finding that a prosecutor's stated reasons were sincere and genuine is entitled to great deference where those reasons are based on appearance and demeanor. (*People v. Ward, supra*, 36 Cal.4th at p. 202.)

Also, the prosecutor stated another reason she challenged Myron G. was that his questionnaire indicated distrust of the legal system. She specifically noted Myron G. stated on the questionnaire that the worst problem in the legal system was the innocent being convicted and guilty "getting away easy." (4RT 804.) The trial court found this reason to be race-neutral. (4RT 806.) The record supports the trial court's ruling.

Myron G. wrote in his questionnaire that a problem with the criminal justice system was that "[s]ometimes people are tried w/ lack of evidence. Innocent people being convicted. Guilty (known fact) people getting away easy." (9SCT 2432.) Myron G. also made several other statements indicating distrust of the legal system and sympathy for defendants, including: (1) "I feel that it is difficult to judge one's conduct if it was'nt [sic] witness first hand." (9SCT 2424); and (2) that the cause of crimes was "Individuals struggling in life, or wanting more, but have no other resources in obtaining goals." (9SCT 2431.) Myron G. also indicated antipathy toward the death penalty, stating "if there is no way the person can be helped and if they were justly convicted then I somewhat believe in it." (9SCT 2435.) Myron G. also wrote that he was "more in favor of this [life without parole] because the person lives and thinks about what he/she has done." (9SCT 2436.) Myron G. further wrote that the phrase "an eye for an eye" was wrong. (9SCT 2437.)

During voir dire by counsel Ramirez, Myron G. stated that if he was selected as a juror, he could express and hold onto his own opinion, and could

discuss his views. (3RT 591.) The prosecutor asked Myron G. to explain his questionnaire response that he somewhat believed in the death penalty, but felt that if somebody got a life without parole sentence, that would give the family less grief, and he did not want to punish the family. Myron G. responded that he meant that the family of the person being executed would grieve. Myron G. also said that after listening to voir dire, he thought differently, and would have an open mind. Myron G. further stated that if given a life without parole sentence, a defendant would have time to sit and think about what he had done. Myron G. said that he could weigh aggravating and mitigating factors and would wait until he heard all the evidence before deciding on a sentence. (3RT 599-600.)

Despite Myron G.'s responses during voir dire, his questionnaire responses clearly gave the prosecutor adequate reason to believe he would not be a favorable prosecution juror, especially since his questionnaire reflected sympathy for a defendant's family, antipathy toward the death penalty, and distrust of the criminal justice system. (*People v. Lewis, supra*, 43 Cal.4th at p. 474.)

2. Prosecutor's Acceptance Of Panel With Hispanic Female Jurors

As noted above, the prosecutor repeatedly accepted the jury panel when it included several Hispanic females (and a Hispanic male), the prosecutor did not challenge a Hispanic female alternate juror, and the jury that was initially seated (and the jury that ultimately decided appellant's case) included several Hispanic women and one Hispanic male. These circumstances may be considered in the third prong of the *Wheeler/Batson* test, and strongly support the inference that the prosecutor acted in good faith and without discriminatory purpose in exercising her peremptory challenges, and show appellant did not establish purposeful discrimination against Hispanics. (*People v. Watson,*

supra, 43 Cal.4th at p. 673; *People v. Lewis, supra,* 43 Cal.4th at p. 480.)

E. Comparative Juror Analysis

This Court has recently decided that comparative juror analysis is appropriate for the first time on appeal at the third step of the *Batson/Wheeler* test, if an appellant relies upon such an analysis on appeal and "the record is adequate to permit the urged comparisons." (*People v. Lenix* (2008) ___ Cal.4th ___, ___ [80 Cal.Rptr.3d 98, 115].) In conducting such an analysis, the issue is not whether the challenged prospective jurors are similarly situated to jurors who were accepted, but whether the record shows the party exercising the peremptory challenges honestly believed the jurors were not similarly situated in legitimate respects. (*People v. Lewis, supra*, 43 Cal.4th at p. 472; *People v. Huggins* (2006) 38 Cal.4th 175, 233.)

Here, appellant raises comparative juror analysis arguments only as to Patricia J. and Myron G. Appellant's arguments are meritless.

1. Myron G.

As to Myron G., appellant on appeal and at trial identified no other juror who had an unusual hairstyle or who wore t-shirts and jeans. It is highly unlikely any other prospective juror shared these characteristics, as the record shows the court staff commented *only* on Myron G.'s unusual appearance. (4RT 805.) For this reason alone, appellant's comparative juror analysis argument should be rejected.

Appellant also contends that Myron G.'s answers on the questionnaire to Question No. 77, regarding problems with the criminal justice system, were similar to two White jurors (Joy B. and Brenda M.) and two White prospective jurors (Frank P., and Laura C.) who were not challenged by the prosecutor. (AOB 129-130; see AOB 125-128.) That claim lacks merit.

Myron G.'s response to Question 77 was that "Sometimes people are

tried w/ lack of evidence. Innocent people being convicted. Guilty (known fact) people getting away easy." (9SCT 2432.)

Joy B., who served during part of the trial as juror no. 3, responded to Question 77 by stating: "Too many people waiting to be tried. Criminals set free." (2SCT 305.) Brenda M., juror no. 4, responded, "Convicted criminals get out before their sentence is over." (2SCT 557.) Frank P. responded, "Overcrowded courts; system allows too much leniency for technical violations resulting in reversals; unequal access to legal representation." (4CT 1092.) Laura C. responded, "Lack of jail space; sentencing rules." (3SCT 753.)

Joy B. and Brenda M.'s responses noted problems with the criminal justice system that *benefitted* a defendant (criminals set free, criminals being released early), indicating views that favored the prosecution. In contrast, the problems that Myron G. noted were problems that were *detrimental* to a defendant (innocent being convicted, people being tried with a lack of evidence), indicating views that favored a defendant. As for the comment by Frank P. that there may be unequal access to legal representation (apparently meaning that wealthy defendants have access to better legal help), this was not indicative of the system failing by convicting innocent people and thus was qualitatively different than, as Myron G. stated, defendants being tried with a lack of evidence and the innocent being convicted. Frank P. also noted a problem that benefitted a defendant, that the system was too lenient in allowing reversals based on "technical violations."

Laura C.'s "general concerns" about "sentencing rules" also are not similar to Myron G.'s response. Indeed, Laura C.'s statement that "sentencing rules" was a problem is entirely ambiguous, and it is essentially impossible to determine whether that statement was favorable to the defense or prosecution. In light of the responses, the prosecutor could have reasonably believed that unchallenged jurors' responses were not similar to that of Myron G., and the

prosecutor's failure to challenge them does not undermine the credibility of her stated reason for exercising a peremptory challenge against Myron G.

Moreover, as set forth above, Myron G. made several other responses on the questionnaire indicating he was not a good prosecution witness, such as that it was difficult for people who were not "first-hand" witnesses to judge someone else's conduct, that the cause of crimes was due to people having "no other resources in obtaining goals," that he "somewhat" believed in the death penalty, and that the phrase "an eye for eye" was wrong. (9SCT 2424, 2431, 2435, 2437.) Appellant presents no comparative juror analysis as to these responses.

2. Patricia J.

Appellant contends that Patricia J.'s questionnaire responses regarding the death penalty were "substantively indistinguishable" from responses provided by non-Black individuals who the prosecution did not challenge. (AOB 110-121.) The claim is meritless.

Appellant first notes that Patricia J.'s responses to ten "yes/no" questions regarding prospective jurors' ability to administer the death penalty were "identical" to that of several non-Black jurors and alternates who were not challenged. (AOB 111; see Appendix 1.) That comparison does nothing to show purposeful discrimination because every White juror the prosecutor peremptorily challenged had identical responses as Patricia J. to those same "yes/no" questions. (Fern R. [6SCT 1658, 1680-1683]; Karen T. [11SCT 2835,2856-2859]; Marcus W. [9SCT 2246, 2268-2271]; Angela F. [10SCT 2694, 2716-2719]; Barbara G. [3SCT 623, 645-648]; Gladys W. [7SCT 1827, 1848-51]; Estelle B. [3SCT 679, 1571-1574].)

Appellant asserts Patricia J.'s response to Question 99 ("What is your opinion regarding the death penalty?") was the same as those of Sandra S., Sandra G., Christine G., and Rebecca L.

Patricia J.'s response indicated ambivalence about the death penalty: "I feel a little uneasy with the death penalty, never really gave it a days thought." (7SCT 1763.) Sandra S. responded, "I don't know if I could sentence someone to the death penalty" (14SCT 3748.) Sandra G. responded, "I don't think it serves its purpose." (4SCT 1008.) Christine G. responded, "I am not sure[,] never had to really think about it[,] depends on case." (2SCT 336.) Rebecca L. responded, "Unsure." (10SCT 2575.)

Sandra S., Sandra G., Christine G., and Rebecca L.'s responses, essentially "I don't know" or "I'm unsure," are qualitatively different from Patricia J.'s response that she was "a little uneasy" with the death penalty. Patricia J.'s response indicated a greater degree of discomfort with the death penalty. Even if responses are similar, where a challenged juror expresses a greater degree of opposition to the death penalty, a comparative juror analysis does not show that a prosecutor's reasons for peremptorily challenging a juror are not race-neutral. (*People v. Watson, supra*, 76 Cal.Rptr.3d at p. 231; see *People v. Zambrano, supra*, 41 Cal.4th at p. 1118 ["no seated juror expressed view *so starkly similar* to those of the excused prospective jurors," emphasis added].)

Appellant also asserts Patricia J.'s response to Question No. 105 ("What do you think of the Biblical saying, 'an eye for an eye?'") was similar to that of Peter D., Linda M., Gay C., and Gary S. Appellant additionally contends that Patricia J.'s response to Question 110 (whether death or life imprisonment was a worse punishment for the defendant) was the same as Gary S., Linda M., Sandra G., and Joy B., who each responded that life without the possibility of parole was worse. (AOB 112-113.) It appears the responses to these questions were similar.[18/] However, that these responses were similar (and, even if the

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18. As to Question 105, Patricia J. responded the Biblical saying was "not always true in all cases." (7SCT 1765.) Peter D. responded, "I don't

responses to Question 99 can be considered similar) does not demonstrate the prosecutor's stated reason for peremptorily challenging Patricia J. was a pretext.

Here, other responses by the jurors identified by appellant indicated they would be more willing than Patricia J. to impose the death penalty. (See *People v. Lewis, supra*, 43 Cal.4th at p. 475 [that 14 non-Black jurors and prospective jurors who were not challenged and the challenged juror each wrote that they were not strong supporters of the death penalty, prosecutor could reasonably conclude that eight of the 14 panelists would be more willing than challenged juror to impose death penalty based on their views about its social value, and six remaining panelists' "overall responses reflected more pro-death penalty views" than the challenged juror].)

Here, Gary S. and Sandra S. each responded on the questionnaire that the benefit of the death penalty was that the criminal would no longer be able to commit any other crimes. (6SCT 1626; 14SCT 3750-3751.) Sandra S. also stated that, though she was not a believer in the saying "an eye for an eye," that "if someone committed a crime, they should be punished for the same crime." (14SCT 3750.) Patricia J. made no statements regarding the benefits of the death penalty.

The other jurors identified by appellant also made responses that were

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believe in it and feel it is an unproductive policy. There seems to be no other good coming from this than that of satisfying our pangs of vengeance." (2SCT 422.) Linda M. responded, "I think it was true in Biblical times, but not always for today" (4SCT 926.) Gay C. responded, "I don't agree with it" (11SCT 2941.) Gary S. responded, "Does not apply to everything" (6SCT 1625.)

As to Question 110, Patricia J. responded, "With death its over - Life in prison is like a living death." (7SCT 1766.) Gary S. responded, "Nobody likes being lock[ed] up until you die. Freedom gone." (6SCT 1626.) Linda M. responded, "knowing you have lost all - never to regain a full life." (4SCT 927.) Sandra G. responded, "A person would hurt more by knowing he-she would never be set free." (4SCT 1011.) Joy B. responded, "Having to live forever with our crime." (2SCT 311.)

more pro-death penalty than Patricia J. Joy B. stated that sometimes death in gas chamber is a "just punishment" and the death penalty is imposed too seldom. (2SCT 311-312.) Linda M. stated that the death penalty is imposed too seldom, and that from what she knew from media sources regarding the death penalty was that there were constant appeals and stays by government, and that it frustrated her. (4SCT 928.) Gay C. stated that the death penalty was appropriate in some cases. (11SCT 2939.) Peter D. stated that he supported the death penalty for heinous crimes, and that the death penalty had a benefit in "extreme cases" where a defendant was a danger to others. (2SCT 420, 423.) Christine G. stated that her opinion of the death penalty was that it led to "less crime." (2SCT 364.) Sandra G. responded that she did not believe in eye for an eye, but believed that "what you do to others will some day be done to you." (4SCT 1010.)

Further, in addition to Patricia J.'s responses to Questions 99, 105, and 110, Patricia J.'s other responses on the questionnaire that reflected antipathy towards the death penalty included that she was "a little more comfortable" with life imprisonment without the possibility of parole because "it is not taking a life" (7SCT 1764), that death by the gas chamber was "too quick and easy" (7SCT 1766), and that she believed a life without parole sentence was a severe punishment because "they would be locked up forever with the thought of what they did" (7SCT 1766). Appellant simply has not shown a single unchallenged juror who made as many questionnaire responses indicating opposition to the death penalty as did Patricia J.

Also, on voir dire, other jurors identified by appellant made statements favorable to the prosecution, or that showed their questionnaire responses did not really indicate antipathy toward the death penalty. Rebecca L. explained that when she responded on the questionnaire that she was unsure about the death penalty, she meant she would have to hear all the facts before she could

vote for the death penalty, not that she was unsure whether she believed in the death penalty. Rebecca L. stated she could vote for or against the death penalty, depending upon the facts. She also said she did not prefer the death penalty or life without parole. Rebecca L. also said that she could reach a verdict of death. (4RT 670-672, 680-681.) On voir dire, Sandra G. explained her statement that death and life imprisonment were severe punishments, stating that "life imprisonment, if you are a young person, you will suffer more because you do have a longer term of life to spend in jail. [¶] If you are an older person, and it's death, there really is no suffering."

Additionally, the prosecutor had additional facts from the questionnaire indicating the jurors identified by appellant on appeal would be favorable prosecution witnesses. Sandra G.'s spouse was a detective with the Los Angeles Police Department (4SCT 992), she had served on a previous criminal case involving murder and rape where the jury reached a verdict, and she described that jury service as a good experience. (4SCT 992, 995-996.) Rebecca L. served on two previous juries in criminal cases, and described that as "a great experience." (10SCT 2562-2563.) She also had friend or relative victim of child molestation and rape, and she testified about it in court. (10SCT 2564-2565.) Gary S. considered working for law enforcement. (6SCT 1617.) Sandra S.'s husband had applied for work with law enforcement, but was disqualified for medical reasons. She served on a criminal jury that reached a verdict, and described that experience as "comfortable." (14SCT 3735, 3742.) Joy B. served as a juror on a criminal murder trial, where a verdict was reached and described that experience as "good." She felt a police officer's testimony would be more truthful or accurate than a civilian, and she had worked for FBI. (2SCT 291, 295, 302, 303) Linda M.'s father was retired police officer and she was a juror in two prior criminal cases where verdicts were reached. (4SCT 908, 911.) Gay C. served on a criminal trial that did not reach a verdict, and she

was disappointed they did not reach a result. (11SCT 2927.) Peter D. stated schools and parks needed protection against gangs and drug dealers. (2SCT 416.) Christine G.'s brother was a police officer. (2SCT 330.)

In contrast to the above-listed jurors, Patricia J.'s spouse and parents did not work for law enforcement and none of her relatives or friends considered working for law enforcement (7SCT 1747, 1757-1758), neither she nor any of her friends or relatives had been victims of any violent crime (7SCT 1752-1753), she had not previously served on a jury (7SCT 1750), and she said that she did not feel that a police officer's testimony would be more truthful or accurate than that of a civilian because officers "are human and can both be wrong or inaccurate" (7SCT 1757).

3. The Prosecutor's Objection To The Defense's Reliance On A White Juror's Questionnaire Responses In Support Of A Challenge For Cause Does Not Show Her Reason For Peremptorily Challenging Patricia J. Was Pretextual

Appellant notes the prosecutor objected to the defense's attempt to remove for cause prospective juror Terrance K. on the basis of his questionnaire answers, and asserts this shows the prosecutor's reliance upon Patricia J.'s questionnaire responses in support of her peremptory challenge was a pretext for racial discrimination. (AOB 115-117; see 3RT 617-628.) The contention is meritless.

Here, the defense attempted to dismiss Terrance K. for cause. In contrast, as to Patricia J., the prosecutor dismissed her based on a peremptory challenge. The purpose of a challenge for cause is to remove jurors for specific reasons, including lack of general qualifications such as the ability to understand English, implied bias, and actual bias. (*Wheeler, supra*, 22 Cal.3d at p. 274; Code of Civ. Proc., §§ 225, 228, 229.) In contrast, a peremptory challenge may be made for a "broad spectrum of evidence suggestive of juror partiality . . . rang[ing] from the obviously serious to the apparently trivial, from

the virtually certain to the highly speculative." (*Wheeler, supra*, 22 Cal.3d at p. 275; see *People v. Williams* (1997)16 Cal.4th 664 [peremptory challenge may be based upon a hunch about a prospective juror].) Further, the number of challenges for cause is unlimited, but the number of peremptory challenges is restricted. (Code of Civ. Proc., § 231.) In light of the differences between peremptory challenges and challenges for cause, the prosecutor's differing views on the "value" of the juror questionnaires in the for cause challenge as to Terrance K. and the peremptory challenge of Patricia J. does not demonstrate any discrimination on the basis of race or gender.

As such, for the reasons set forth above, the prosecutor's use of peremptory challenges did not violate *Wheeler* or *Batson*.

III.

APPELLANT HAS FAILED TO DEMONSTRATE THE TRIAL COURT HAD A RACIAL BIAS, OR THAT THE ALLEGED BIAS CAUSED THE COURT TO FAIL TO ADDRESS JURY SELECTION ISSUES INVOLVING RACE

Appellant contends the trial court had a racial bias, preventing the court from remedying race-based errors in jury selection process. (AOB 152-159.) The claim is meritless.

As a preliminary matter, appellant has forfeited any claim regarding judicial bias by failing to raise the issue below. (*People v. Samuels* (2005) 36 Cal.4th 96, 114 [failure to object to judicial bias forfeits claims of statutory and constitutional error]; see *People v. Williams,* 16 Cal.4th at p. 250 [failure to raise federal constitutional claim in the trial court precludes appellant from raising it for the first time on appeal].) In any event, the claim is meritless.

A trial court has the duty to be impartial to the prosecution and a defendant; a serious violation of this duty may constitute reversible error. (*People v. Burnett* (1993) 12 Cal.App.4th 469, 475; *People* v. *Harmon* (1992) 7 Cal.App.4th 845, 852.) In evaluating a claim of judicial misconduct, appellate courts examine the propriety of a trial judge's comments on a case-by-case basis, considering the content of a particular comment and the circumstances in which it is made. (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532.)

Appellant first contends the trial court's statements regarding the defense's proposed juror questionnaire questions showed the court "apparently believed that racism is confined to the South and the 1950s" and that "this view limited the court's ability to respond to matters arising in its own courtroom." (AOB 154-155.) The contention should be rejected.

Here, in discussing the defense's proposed questions regarding racial bias on the juror questionnaire, the trial court stated as follows:

> But the way you phrased the question just seems to me that -- I don't now. Perhaps I have some biases of my own. I just had occasion to see the Martin Luther King Museum in Memphis, Tennessee, a very moving and powerful experience; and I have very strong feelings about the progress of Afro-Americans in the country based on the exhibits there and what happened in the Deep South, contrasted, I think, with California to a certain extent.

(1RT 167-168.)

There is no indication of any racial bias against African-Americans in the above-quoted passage. Indeed, the trial court made positive statements regarding African-Americans, including that the trial court's visit to the Martin Luther King Museum was a "very moving and powerful experience" and that trial court felt strongly about the progress of African-Americans. Further, the above-quoted passage does not show that the trial court believed that racism was confined to the South and in the 1950s. Rather, the trial court was simply stating that racism was worse in the "Deep South" than in California, not that racism was limited to the Deep South and in the 1950s. Also, appellant has not demonstrated that the court's alleged limited view affected the court's rulings on race-related issues.

Appellant also contends that the trial court, in redacting some of the defense's proposed questions regarding race from the questionnaire, "failed to recognize that the race of the victim in this case (white) in relationship to the race of Mr. Elliott (black) required probing into juror biases in great detail without the crime being classified as a hate crime." (AOB 154.) The claim lacks merit.

The questionnaire given to the prospective jurors included several questions regarding race, including the progress of African-Americans in society, whether African-Americans were more likely to commit crimes than other racial groups, whether African-Americans were treated fairly by the courts, whether jurors could think of any reasons they might be biased or prejudiced for or against African-Americans, and whether the fact that the case involved an African-American male accused of crimes against a Caucasian male would affect their ability to be fair and impartial. (1RT 170-173; see 1SCT 75-76.) That the trial court permitted these extensive questions regarding race shows the court recognized the importance of uncovering juror racial bias.

Also, the trial court was not required to allow every question on racial bias requested by the defense. (See *People v. Robinson* (2005) 37 Cal.4th 592, 619-621 [trial court's failure to ask additional questions designed to elicit whether prospective jurors actually held a racial bias held harmless]; *People v. Roldan* (2005) 35 Cal.4th 646, 695-696 [where defendant did not explain how juror questionnaire was inadequate to reveal racial bias, trial court did not abuse its discretion by relying on questionnaire].)

Appellant next contends that the trial court's own racial attitudes caused it to fail to remove prospective juror Terrance K.[19] for cause. Appellant specifically complains that the trial court stated that statistical studies supported Terrance K.'s questionnaire response in which Terrance K. agreed with the statement that African Americans were more likely to commit crimes than other racial groups. (AOB 155-157, citing 10CT 2886; 3RT 616-618.) The contention should be rejected.

The trial court's statement did not indicate any bias on the part of the court against African-Americans, but rather was a an assertion of a factual

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19. The defense used its twentieth peremptory to remove juror Terrance K. (4RT 809.)

matter that statistical studies showed African-Americans were more likely to commit crimes. Even assuming the trial court's comments reflected racial bias, appellant has failed to demonstrate that the trial court's own attitudes cause it to not remove Terrance K. for cause.

Further, the record discloses ample reasons, apart from any alleged bias of the trial court, that show the challenge for cause as to Terrance K. was properly rejected. Terrance K. stated on the questionnaire that he had could not think of any reason he might be biased for or against African-Americans, and that his ability to be fair and impartial would not be affected in a case involving an African American male defendant and a Caucasian male victim. (5SCT 1364.) Terrance K. also stated he believed all people had biases of some sort, that he was not raised in an atmosphere free of biases, that he had been exposed to persons who exhibited racial and/or ethnic prejudice, and that he had biases against Vietnamese and gang members. (5SCT 1363.) In response to questioning during voir dire, Terrance K. explained that he had heard that African-Americans were more likely to commit crimes than other racial groups. (3RT 620-628.) None of Terrance K.'s responses indicated the trial court abused its discretion in denying the defense's for-cause challenge against him. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1199-1200 [no abuse of discretion in denying for-cause challenge to juror who stated he had been raised with racial prejudice but had grown out of it, had heard from the media that Blacks committed more crimes, but stated he could address each case individually].) Further, since the trial court's comments were made during a discussion held at the bench (3RT 613), there was no effect on the jurors.

Appellant also contends that the trial court's bias caused it to "gloss over" allegations that the prosecutor had removed prospective Black jurors (Patricia J. and Myron G.) based on race. Appellant specifically complains that the trial court allowed the prosecutor to remove Patricia J. based on "vague

allegations" that she was "weak on death" and that the trial court stated, as to Myron G., that the prosecutor could remove him based on a hunch. (AOB 157-158.) Neither action constituted error.

First, as set forth more fully above in Argument II, Patricia J. was not removed based upon "vague allegations," but rather based on her questionnaire responses indicating she did not support the death penalty. Second, the trial court's statement that the prosecutor was entitled to exercise her peremptory challenge to remove Myron G. based on a hunch was an accurate statement of the law. (See *People v. Williams, supra,* 16 Cal.4th at p. 664.)

Appellant further complains the trial court's actions and statements regarding the *Batson/Wheeler* motion as to prospective Juror Mary G. reflected bias. Appellant contends that when the prosecutor stated Juror Mary G. had changed her answers after hearing responses from Fern R., the trial court "rushed to the prosecutor's defense" by inaccurately recalling which juror had made problematic statements justifying a for-cause challenge. (AOB 158.) Appellant has presented no evidence to show that the trial court's action was due to any racial bias, as opposed to simply inaccurate memory.

Appellant additionally complains the trial court, in declining to require the prosecutor to explain her use of peremptory challenges of Hispanic female jurors prior to prospective juror Mary G., exhibited bias by stating that some of the challenged jurors appeared to be Hispanic by name through marriage because they did not have Hispanic coloring. (AOB 158.) The contention lacks merit.

The trial court's observation was correct and did not reflect racial bias. Prospective Juror Roberta P., who had a Hispanic surname and who was one the Hispanic females peremptorily challenged by the prosecutor prior to Mary G., identified her race as Caucasian on the juror questionnaire. (6SCT 1491; 8CT 2160-2161; 4RT 790.) Prospective Juror Roberta P. was a clear example

of someone who was "Hispanic by marriage," as noted by the trial court. In any event, after the defense objected to the court's statement that some of the jurors in question could have been Hispanic by marriage, the court stated it was merely making an observation, and that observation was unwarranted without knowing what the jurors's maiden names were. (4RT 800.) Finally, even before the defense made any challenge based on the exclusion of Hispanic females, the trial court noticed the prosecutor had challenged several Hispanic jurors. (4RT 796.) That the trial court first noticed and mentioned the prosecutor's exclusion of Hispanic jurors strongly suggests it did not have a bias against Hispanics. Thus, appellant has failed to demonstrate the trial court had a racial bias, and has further failed to show that any alleged bias actually affected any of the court's decisions.

IV.

THERE WAS NO PROSECUTORIAL MISCONDUCT; APPELLANT'S RELATED CLAIMS THAT THE ADMISSION OF EVIDENCE VIOLATED STATE RULES AND HIS FEDERAL CONSTITUTIONAL RIGHTS ARE FORFEITED AND IN ANY EVENT ARE ARE MERITLESS

Appellant contends the prosecutor committed misconduct by asking prosecution witness Janet Delaguila questions about her personal safety and, during voir dire of prospective juror Ines A., insinuating that the jurors may be in danger. (AOB 160-182.) The contentions should be rejected.

Appellant has forfeited his prosecutorial misconduct claims by failing to preserve the issue at the trial court level by making a timely objection *and* requesting an admonition to cure any harm. (*People v. Williams, supra,* 16 Cal.4th 153, at p. 255; *People v. Hardy* (1992) 2 Cal.4th 86, 171.) Appellant did not request any curative admonition as to Delaguila's testimony or the voir dire of Ines A. (4RT 682-6833; 6RT 1046-1105.)

A. General Principles

Under the federal Constitution, a prosecutor commits misconduct only when his or her behavior "comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Under state law, a prosecutor commits misconduct by using deceptive or reprehensible methods to persuade either the court or the jury, even if such actions did not render the trial fundamentally unfair. (*People v. Frye, supra,* 18 Cal.4th at p. 969; *People v. Hill, supra,* 17 Cal.4th at p. 819.) When the claim focuses on comments made before the jury, the question is whether there is a reasonable likelihood the jury construed or applied he comments in an objectionable manner. (*People v. Prieto* (2003) 30 Cal.4th 226, 260.) Whether a prosecutor has committed

misconduct must be determined in light of the particular facts of each case. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 182.) In any event, appellant's claims are meritless.

B. Delaguila

Janet Delaguila testified during the prosecution's case-in-chief that she worked at the Lucky's where appellant killed Patrick Rooney. About two days before the crimes, Delaguila saw appellant and a woman at the Lucky's meat department. Delaguila recognized appellant, who was a regular customer at Courtesy Cleaners, where Delaguila previously worked. (6RT 1046-1051.) On the day of the crimes, Delaguila heard a gunshot and saw appellant run to the back of the store. Delaguila told the police she recognized appellant, and thereafter identified him from a group of photos and at a subsequent live line-up. (6RT 1046-1058.)

On cross-examination, the defense asked Delaquila whether she was receiving any benefits from Lucky's or anybody else "with regards to this incident." Delaguila responded, "No." Defense counsel then asked whether Lucky's was giving her a free car. Delaguila responded that Lucky's was leasing the car, but that she paid for it and "it's not free." (6RT 1081-1082.) After Delaguila was subjected to redirect and re-cross examination (6RT 1092-1103), the prosecutor requested that she be allowed to reopen on redirect to address a brief matter. The following colloquy took place:

Q [Prosecutor] Miss Delaguila, you told Mr. Ramirez [defense counsel] that Lucky['s] market leased a car for you, is that right?

A Yes.

Q And why did they lease a car for you?

A Because I needed transportation.

Q And was this because your place of employment had to be relocated after this incident?

A Yes.

Q And did you do this for your personal safety?

A Yes.

MR. RAMIREZ: Objection, Your Honor. It's irrelevant.

THE COURT: I'm sorry. You brought it up, Mr. Ramirez, and I think counsel is entitled to clear up the matter.

Q BY MS. NAJERA: And in terms of your employment, were you moved from the Lucky store in Bellflower after you positively identified the defendant in this matter?

MR. STEIN: Objection to the phrasing of the question.

THE COURT: The objection is well taken as far as the phrasing of the question. The word "After you made the identification," leave out the adverbs and adjectives.

Q BY MS. NAJERA: Miss Delaguila, were you moved from the Lucky store after you identified the defendant as the person who was running from the store?

A Yes.

Q And were you moved to another Lucky's -- another place of work within the Lucky's Corporation?

A Yes.

Q Was this a substantial distance from the Lucky's in Bellflower that you were working at?

A Yes, it was.

Q And was this done for your safety?

A Yes, it was.

Q And is that why they allowed you to lease a car from them?

A Yes.

(6RT 1104-1105.)

Appellant contends the prosecutor committed misconduct by eliciting Delaguila's testimony because that testimony was inadmissible and insinuated that appellant had threatened her. (AOB 164-182.) The contention lacks merit.

A prosecutor commits misconduct by intentionally eliciting inadmissible testimony. (*People v. Smithey* (1999) 20 Cal.4th 936, 959; *People v. Pinholster* (1992) 1 Cal.4th 865, 943.) As demonstrated below, appellant's prosecutorial misconduct claim lacks merit because he has failed to show that Delaguila's testimony was inadmissible.

Appellant first contends that the trial court improperly concluded the defense had opened the door to Delaguila's testimony regarding her personal safety because the defense had questioned her about a different subject, that is, benefits Delaguila received for her testimony. (AOB 164-165.) The claim is meritless because all of the questions pertained generally to the relevant issue of Delaguila's credibility and specifically to the weight that should be given to the fact that Lucky's leased a car for her.

Appellant's argument that a witness's testimony regarding personal safety is distinct from benefits received for testimony has been rejected by this Court. "Personal safety may logically comprise one such inducement [for a witness to testify]." (*People v. Williams, supra,* 16 Cal.4th at p. 210.) Generally, evidence regarding a witness's credibility is relevant and admissible at trial. (*People v. Harris* (2005)37 Cal.4th 310, 336-337; Evid. Code § 351.) Specifically, a factor jurors may consider in assessing a witness's credibility is whether the witness expects to receive, or has received, something in exchange for testimony. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1142; *People v. Price* (1991) 1 Cal.4th 324, 422; Evid. Code § 780, subd. (f) [jurors may consider "existence or nonexistence of a bias, interest, or other motive" for giving testimony].)

Here, appellant brought up the issue of whether Delaguila had an interest

in testifying against him by asking whether she received benefits from Lucky's, specifically a "free car." (6RT 1081-1082.) The prosecution was entitled to introduce evidence to explain that the reason Lucky's leased the car for Delaguila was because she had been relocated to another store due to concerns for her personal safety, and not as a financial reward or benefit for testifying against appellant.

Appellant also contends Delaguila's testimony regarding her personal safety was inadmissible because it did not meet California's standard for the admission of evidence of a threats to a witness. (AOB 165-167.) The claim should be rejected because that evidence was not presented or admitted for the purpose of showing Delaguila's testimony was influenced by threats, but rather was introduced on the issue of her bias or interest, specifically the circumstances surrounding the lease of her car and the question of whether she received or expected to receive benefits for testifying against appellant, and the nature of the benefit. Indeed, Delaguila did not testify that anyone had specifically threatened her, just that the lease was provided for her personal safety after she witnessed the crime. Thus, there was no need for her testimony to satisfy requirements for the admission of evidence of threats to a witness because that testimony was not offered for that purpose.

Appellant next contends Delaguila's testimony was unduly prejudicial because it "insinuated" that appellant was the person who threatened her. (AOB 166-168.) The contention is meritless.

Unduly prejudicial evidence which tends to evoke an emotional bias against a defendant and which has minimal impact on material issues should be excluded under Evidence Code section 352. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121; *People* v. *Zapien* (1993) 4 Cal.4th 929, 958.) Here, Delaguila's testimony was not unduly prejudicial. Her testimony that she had relocated to a different store and that Lucky's leased a car for her due to concerns for her

personal safety was brief and did not necessarily suggest to the jury that appellant, or anyone else, had threatened her. (See *People v. Padilla* (1995) 11 Cal.4th 891, 944 [witness's testimony that he or she is afraid to testify is "far from accusing defendant or his associates of threatening [the witness] if he testified."].) In this regard, there was no specific testimony that any threat had been made against Delaguila or that any such threat came from appellant. In similar circumstances, this Court has found that testimony regarding a witness's fears did not necessarily suggest that the defendant was guilty of witness intimidation. (*People v. Williams, supra,* 16 Cal.4th at p. 210.) And, this Court has observed that a witness's fear is relevant and admissible on the issue of the witness's credibility, even without any link to the defendant. (See *People v. Burgener* (2003) 29 Cal.4th 833, 869-870.)

Appellant also contends that the admission of Delaguila's testimony violated his right to due process and a fundamentally fair trial. (AOB 167-177.) As a preliminary matter, appellant has forfeited this claim of constitutional error by failing to raise it below. (*People v. Burgener, supra,* 29 Cal.4th at p. 869; *People v. Rodrigues* (1994) 8 Cal.4th at p. 1060.) In any event, the claim is meritless.

The admission of evidence violates due process only if the error makes the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385]; The admission of relevant evidence does not violate a petitioner's right to due process. (*Estelle v. McGuire,* 502 U.S. at 70; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1385 [erroneous admission of evidence does not violate due process unless there are no permissible inferences that a jury may draw from the evidence].)

Here, there was no due process violation because the evidence was, as set forth above, relevant on the issue of Delaguila's credibility. Even if that evidence was irrelevant, the admission of that testimony did not render the trial

fundamentally unfair. The defense could have dispelled any perceived insinuation that he had threatened Delaguila by asking her whether she had been threatened, or by asking that the jury be admonished to disregard any objectionable portions of her testimony. (*People v. Williams, supra,* 16 Cal.4th at p. 212.) Further, the jurors were instructed to decide the case based on the evidence received at trial, to not decide the case based on conjecture, passion or prejudice, and that they were not to assume to be true any insinuation suggested by a question asked of a witness. (11RT 2147-2149; 3CT 788-789, 791.) It is presumed that jurors follow a court's instructions. (*People v. Smith* (2007) 40 Cal.4th 517-518; *People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Danielson* (1992) 3 Cal.4th 691, 722.) Thus, it is presumed the jurors did not decide the case based on the alleged insinuation that appellant had threatened Delaguila.

Appellant finally contends, as to Delaguila's testimony, that the admission of her testimony was erroneous because evidence presented in capital cases must have greater reliability that in non-capital cases. (AOB 171-173.) The argument should be rejected. The cases relied upon by appellant in support of this argument do not discuss the admission of *evidence* as to the *guilt* determination of a capital case; rather those cases discuss reliability in terms of the penalty decision. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [109 S.Ct. 2934, 106 L.Ed.2d 256; *Zant v. Stephens* (1983) 462 US. 862, 885 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Beck v. Alabama* (1980) 447 U.S. 635, 637-638 [100 S.Ct. 2382, 65 L.Ed.2d 392].)

C. Ines A.

During voir dire, prospective juror Ines A. stated that he had reported a crime, but dropped the charges after "preliminaries" because he lived close to the defendants in that case, and felt that he was a target. (4RT 682.) The prosecutor asked Ines A. the following:

Let me ask you something hypothetically, and I think you will see what my point is. Once again, this has absolutely -- I cannot stress enough. This has nothing to do with this case.

Let's say you sat on a jury, and you perceived - - as you were sitting on the jury listening to evidence and everything, you perceived some danger to yourself in coming back with a verdict one way or the other.

Would that affect your decision?

(4RT 682-683.)

The defense objected on ground the question was "highly objectionable." The trial court agreed, stating as follows:

Yes. I think that's inappropriate.

That situation is not going to exist. There is no reason to feel it would exist. Therefore, it is not an appropriate inquiry in the context of this case, the fear that someone may have of a result because of -- in a neighborhood of being terrorized is completely divorced from what the situation is in this courtroom. There isn't a person on this jury who has the slightest reason to fear any consequence as a result of their jury service.

(4RT 683.)

Appellant contends the prosecutor committed misconduct by insinuating the prospective jurors may be in danger. (AOB 179-181.) The claim lacks merit since the prosecutor specifically prefaced the hypothetical by saying it had "nothing to do with this case."

Moreover, the trial court's admonition was more than sufficient to cure any harm from the prosecutor's question. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1337 [trial court's instruction to disregard inadmissible evidence cured any harm caused by the admission of such evidence]; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1020 [even assuming prosecutorial

misconduct in seeking to introduce inadmissible evidence, timely objection and ruling excluding such evidence would have cured any harm].) Further, the jurors were also instructed that the statements of the attorneys were not evidence, and that if an objection was sustained as to a question, that they were not to guess as to what the answer may have been. (11RT 2148-2149; 3CT 788-789, 791.)

V.

TRIAL COURT AND PROSECUTOR DID NOT DIMINISH THE JURORS' RESPONSIBILITY IN DELIBERATING ON GUILT AND PENALTY

Appellant contends the trial court and the prosecutor repeatedly diminished the jurors' responsibility in deliberating upon both guilt and penalty, specifically complaining about comments the court and prosecutor made during voir dire of prospective jurors Karen T. and Erlinda L., when jurors who ultimately served at the guilt and penalty trials were present. (AOB 183-191.) The argument should be rejected.

A. Relevant Facts

1. Karen T.

During voir dire, the prosecutor asked prospective juror Karen T. about her written response on the juror questionnaire that, in regard to the death penalty, she did not like circumstantial evidence, and would not want to base her decision on it. The prosecutor stated that the judge would tell the jurors that circumstantial evidence was "just as good" as direct evidence. Prospective juror Karen T. explained that about 12 to 14 years earlier, when she was in college, she conducted research and found numerous cases where persons who had been put to death based on circumstantial evidence had subsequently been found to be innocent. (4RT 773-774.)

The prosecutor asked whether her research showed innocent persons had been put to death in California. Prospective juror Karen T. responded, "That was all over." The prosecutor asked whether the executions of innocent persons had occurred in the last 50 years, or the last 10 years. Prospective juror Karen T. responded, "[I]t could have been the last 20 years that that had happened." She also stated, "[I]t colored the way I think. [¶] You know, it's a frightening thought to put someone to death and then, whoops." (4RT 774.)

The prosecutor responded as follows:

Let me tell you here, because you're addressing a concern that the judge is going to tell you now we have laws set up, and we have all these safeguards and procedures in place.

We have this kind of a system, things that have developed and evolved over the last 20, 30, 40 years that weren't in place possibly when you did these studies and did all of that.

And these are all things - - this is why we're going through all of this, and this is why the People have a certain burden. This is why the burden is on the People, and all these things. And in the State of California you'll find that the laws are different than in other states, where maybe they don't have as many safeguards as they do here.

(4RT 774-776.)

Defense counsel Stein objected, stating, "This is sort of preinstructing and making a personal statement." The court responded:

Well, I think the whole problem is a misunderstanding about circumstantial evidence.

Because sometimes people say, well, it's only circumstantial evidence, and they don't - - They don't realize how much circumstantial evidence is used and relied on all the time.

To give you a very homey example, if you look at your gas gauge and it says you have a quarter tank of gas, that's circumstantial evidence. You haven't smelled the gasoline or stuck a stick in it to see what you really have in the tank. You just accept the gauge. The gauge may or may not be right.

We have all these cautionary things about circumstantial evidence. We say if the evidence is equally susceptible to two interpretations, one of which points to innocence and the other to guilt, you have to adopt

that interpretation which points to innocence and reject the one that points to guilt; but if the interpretation of circumstantial evidence is unreasonable, then you reject the unreasonable and accept the reasonable.

We do have many safeguards in place; and as far as the evidence that's concerned, that's what my job is, to screen the evidence so that all you hear in a trial is what is competent and what is acceptable evidence from both sides. Regardless who presents it, the same rules obtain.

I don't want you to be fooled that in making determinations in this case that you have to be concerned about some remote possibility, because this was mentioned earlier. Even in our definition of beyond a reasonable doubt, we have to set some sort of limits. We have to say the law does not require the People to prove a case beyond all possible doubt because that degree of proof is rarely possible.

But what is required is evidence that is so convincing that it leaves your mind in that condition that you can say you feel an abiding conviction to a moral certainty of the truth of the charge. That's a reasonable doubt. And if the proof doesn't come up to that point, then you find the defendant not guilty or you find the point to be proved not true.

So I really don't think that is a concern that you have to be worried about in this courtroom.

(4RT 776-777.)

The prosecutor asked whether prospective juror Karen T. felt she could decide the case based on what she heard in the courtroom and follow the court's instructions. She responded, "Sure." (4RT 777.)

2. Erlinda L.

During voir dire, prospective juror Erlinda L. repeatedly responded that

she could not vote for the death penalty. (4RT 638- 640.) The trial court noted that in her response on the juror questionnaire, prospective juror Erlinda L. stated that in an appropriate case, she could vote for the death penalty, and asked if she had changed that position. Erlinda L. responded, "I think it is not my position to do that decision. I think is your -- is the judge you know. That's what I think about it." (4RT 641.)

The trial court stated:

> Let me clarify that, as well. Nobody is going to have to impose the death penalty, but the jury has to make the decision. Nobody is going to tell you what to do. Nobody is ever going to tell you you have to impose the death penalty or you have to impose life without the possibility of parole, or decide on the death penalty or decide on life without the possibility of parole.
>
> If the jury comes back with a sentence of death, then at a later time it would be my responsibility to actually impose a death sentence, to actually say the words, just as it would be my responsibility to say the words "life without the possibility of parole." But in order to prompt the words that I say, it's your decision.

(4RT 641-642.)

B. There Was No *Caldwell* Error

In *Caldwell v. Mississippi* (1985) 472 U.S. 320, 325-326, 105 S.Ct. 2633, 86 L.Ed.2d 231, the prosecutor argued to the jury that they did not have the final decision as to whether the defendant would receive life imprisonment or the death penalty, because the case would be reviewed by the state supreme court. The *Caldwell* Court reversed the death sentence, holding

> it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's

death rests elsewhere.

(*Id.* at pp. 328-329.)

In determining whether there is *Caldwell* error, this Court does not focus on a single statement by the prosecutor, but rather considers the trial court's instructions, the arguments of the parties, and the prosecutor's statements within the overall context of closing argument. (*People v. Hinton* (2006) 37 Cal.4th 839, 905; *People v. Young* (2005) 34 Cal.4th 1221.) This Court evaluates comments which allegedly violate *Caldwell* under the standard of whether it is reasonably likely the jury understood the comments as diminishing its responsibility in making the sentencing determination. (*People v. Marlow* (2005) 34 Cal.4th 131, 153; *People v. Fauber* (1992) 2 Cal.4th 792, 847; *People v. Clair* (1992) 2 Cal.4th 429.)

As a preliminary matter, appellant's argument that comments made by the prosecutor and trial court diminished the jurors's sense of responsibility in determining his *guilt* should be rejected. *Caldwell* does not apply to jurors' determination of guilt. "*Caldwell* simply requires that the jury not be misled into believing that the responsibility for the *sentencing decision* lies elsewhere. [Citation]" (*People v. Ledesma, supra,* 39 Cal.4th at p. 733, emphasis added; *People v. Schmeck* (2005) 37 Cal.4th 240, 264-265 ["*Caldwell* error is based upon the Eighth Amendment, and focuses on the reliability of the death penalty verdict"].)

Appellant's argument that the comments by the prosecutor and trial court diminished the jurors' responsibility regarding the penalty determination is meritless. Here, as to the comments made by the prosecutor and trial court during voir dire of prospective juror Karen T., those comments were made in the context of addressing her concern that innocent persons had been put to death based on her circumstantial evidence. In other words, the comments addressed the jury's role in determining guilt, not in determining the appropriate

sentence. In particular, the trial court noted "the whole problem is a misunderstanding about circumstantial evidence," discussed its role in ensuring only appropriate evidence was presented to the jury, and noted the beyond a reasonable doubt standard was required to prove appellant's guilt. Thus, since the comments were made in response to a concern about a determination about guilt, there was no reasonable likelihood that the jurors understood the remarks of the prosecutor and trial court as diminishing their responsibility for making the sentencing determination as to life imprisonment or death. (See, e.g., *People v. Montiel, supra,* 5 Cal.4th at p. 912 ["Nor are we persuaded that a penalty jury's sense of *sentencing* responsibility is necessarily diminished by the knowledge that another jury has already rendered a conclusive judgment of *guilt."].*)

As to the trial court's comments during voir dire of Erlinda L., there was no reasonable likelihood the jurors understood those comments to mean the ultimate responsibility for the penalty determination lay elsewhere. The trial court told the jurors that in the event they returned a death verdict, then the court had the responsibility of actually imposing the death sentence. The trial court emphasized that "in order to prompt the words I say, it's your decision." (4RT 641-642.) The trial court correctly informed the jurors that the trial court had the responsibility of formally pronouncing the death sentence, but emphasized that the jurors would make the decision that would lead to the trial court's pronouncement of sentence. Similar comments have been held to not violate *Caldwell.* (See, e.g., *People v. Leonard* (2007) 40 Cal.4th 1370, 1416-1417 [prosecutor's comments that the jury would not kill the defendant, but would bear the responsibility for determining his fate, were held proper].)

Additionally, the trial court's instructions correctly informed the jurors that they bore the responsibility for determining appellant's sentence. During the penalty phase, the trial court instructed the jurors that the penalties appellant

faced were death or a state prison term of life without the possibility of parole, and that "you must now determine which of said penalties shall be imposed on the defendant." (4CT 913 [CALJIC No. 8.84]; 13RT 2736.) The trial court also instructed the jurors with CALJIC No. 8.88 that:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

(4CT 927; 21RT 2744.)

The jurors were also instructed that:

> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(4CT 928 [CALJIC No. 8.88]; 13RT 2745.)

Additionally, the questionnaire distributed to the prospective jurors informed them that they bore the responsibility of determining appellant's sentence. Specifically, that questionnaire included the following question:

> Do you understand that if there is a penalty trial, the only two sentences you will be choosing between will be the death penalty and life in prison without the possibility of parole?

(See 4CT 1011 [Questionnaire, p. 21].)

Additionally, in closing argument, defense counsel Ramirez repeatedly argued to the jury that they had the responsibility of choosing death or life.

> [P]retty soon this case is going to pass onto your hands. And there is a lot of polite euphemisms, death penalty, and you are going to be called

upon to decide the death penalty; but pretty soon, when this case goes into your hands, the decision that's going to be placed before you is to kill or not to kill. When it comes right down to it, we can't hide behind words when something as serious as this has to be decided. So what you are going to be deciding is to kill or not to kill.

(13RT 2708; see also 21RT 2710

["You can't pass the buck. When you decide to kill Marchand Elliott, if you decide to kill Marchand Elliott, you have spoken, that is your word"]; 13RT 2716 ["But is that the type of killing that you should go back there and say, we are going to kill Marchand Elliott because he did that?"]; 13RT 2725 ["And I submit to you that there are many reasons why you should not kill Marchand Elliott"]; 13RT 2728 ["Is killing Mr. Elliott going to bring Mr. Rooney back? The question -- the answer is no. Is it going to make it any better? No. Is that our only answer? No. You are provided with alternatives"]; 13RT 2729 ["The state is asking you to go back in there and willfully decide to kill a person"]; 13RT 2729 ["But the ultimate decision you're going to make is to kill another human being. That the state justifies it doesn't make it any better. That's the kind of moral decision you're going to be called upon to make"].)

Finally, the prosecutor told the jurors that they would have to decide appellant's sentence, stating they would have to discuss the case and "come to the appropriate conclusion" and that "the only appropriate sentence for you to reach is that of the death penalty." (13RT 2707.)

In light of the trial court's penalty phase instructions, the juror questionnaire, and the arguments of counsel during the penalty phase, there is no reasonable likelihood the jurors would have understood the comments by the prosecutor and trial court during voir dire as diminishing their responsibility for

the sentencing determination. (*People v. Moon* (2005) 37 Cal 4th 1, 18; *People v. Fauber,* 2 Cal.4th at p. 847.)

C. There Was No Prosecutorial Misconduct

Appellant also contends his right to due process was violated, asserting the prosecutor committed misconduct by stating, during voir dire of prospective juror Karen T., that California had safeguards against wrongful convictions. (AOB 187-188.) The claim should be deemed forfeited. Though defense counsel objected to the prosecutor's statements (4RT 776), defense counsel did not state as the basis for the objection any federal constitutional grounds, and did not request a curative admonition. Thus, appellant has failed to preserve the claim. This Court has repeatedly held that an objection and request for a curative admonishment be made to preserve a claim of prosecutorial misconduct. (*People v. Jones* (1997) 15 Cal.4th 119, 181; *People v. Sanders, supra,* 11 Cal.4th at p. 549.)

In any event, the claim is meritless. Prosecutorial comments violate the federal constitution where those comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144][quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431]; *Davis v. Woodford* (9th Cir. 2004) 384 F.3d 628, 643.) The *Darden* Court noted several factors in holding there was no due process violation, including that the prosecutor's argument did not misstate or manipulate the evidence, implicate specific rights of the petitioner, and was responsive to or invited by defense argument; that instructions were given to the jury that the arguments of the attorneys were not evidence and they were to decide the case based on the evidence alone, and that the weight of evidence of the petitioner's guilt was "heavy." *Darden v. Wainwright,* 477 U.S. at 182; see *Tan v. Runnels* (9th Cir. 2005)) 413 F.3d 1101, 1115.)

Here, the prosecutor's comment did not so infect the trial with unfairness so as to make appellant's convictions a denial of due process. The prosecutor noted that California had safeguards that may not have been present in the cases prospective juror Karen T. had researched where innocent persons had been put to death. The prosecutor specifically stated the safeguards *"possibly"* may not have been in place in the cases in which innocent person had been executed, and that *"maybe"* other states did not have as many safeguards as California. (4RT 774-775.) The prosecutor then specifically noted the prosecution had a certain burden. (4RT 774-776.) The trial court explained one of the safeguards was that the court had the role of determining what evidence could be presented to the jury, and also explained the prosecution had the burden of proving guilt beyond a reasonable doubt. (4RT 776-777.)

The prosecutor's comments were not improper, especially in light of the conditional language the prosecutor used. In other words, the prosecutor did not affirmatively state as a factual matter that California had more safeguards against the conviction of innocent persons than other states, or had safeguards that did not previously exist. Also, the prosecutor's comments were made in response to prospective juror Karen T.'s statement that she had researched cases in which innocent persons had been executed. Further, the prosecutor did not misstate or manipulate the evidence. Additionally, that the defense did not seek any additional clarification or curative instruction is a factor showing the prosecutor's comments were not violative of due process. Moreover, the jurors were instructed that the statements of the attorneys were not evidence and they were to decide the case based on the evidence alone. (11RT 2148-2149.) During the penalty phase, the trial court again instructed the jurors that the statements of the attorneys were not evidence. (11RT 2234.)

VI.

SUBSTANTIAL EVIDENCE SUPPORTED APPELLANT'S CONVICTIONS; APPELLANT HAS FORFEITED HIS ARGUMENT THAT THE EYEWITNESS IDENTIFICATIONS WERE UNRELIABLE, AND IN ANY EVENT, THOSE CLAIMS ARE MERITLESS

Appellant raises several contentions that there was insufficient evidence of his identity as the person who committed the Lucky's and Boys crimes. (AOB 192-224.) The contentions are meritless.

A. There Was Substantial Evidence Of Appellant's Identity As The Person Who Committed The Charged Crimes

In determining whether a conviction is supported by substantial evidence - evidence which is reasonable, credible and of solid value - from which a reasonable trier of fact could find a defendant guilty beyond a reasonable doubt, appellate courts review the entire record in the light most favorable to the judgment below. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Akins* (1997) 56 Cal.App.4th 331, 336-337 [a defendant bears a "massive burden" in claiming insufficient evidence sustained his convictions because role of reviewing court is limited].) This standard also applies where the People rely primarily on circumstantial evidence, and circumstantial evidence may be sufficient to support a conviction. (*People v. Bradford, supra,* 15 Cal.4th at p. 1329.) Where the trier of fact's findings are reasonably justified by circumstantial evidence, an appellate court may not reverse a judgment even though it believes the circumstantial evidence might reasonably be reconciled with the defendant's innocence. (*People v. Bradford, supra,* 15 Cal.4th at p. 1329; *People v. Austin* (1994) 23 Cal.App.4th 1596, 1603.)

Appellant contends that the eyewitness identification evidence was

inconsistent and unreliable because the eyewitnesses gave differing descriptions of his physical characteristics. (AOB 195-209.) The contention should be rejected.

That eyewitnesses gave conflicting descriptions of an assailant does not show that their identifications were unreliable or constituted insufficient evidence to support a conviction. (*People v. Young, supra,* 34 Cal.4th at p. 1181.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts." (*People v. Young, supra*, 34 Cal.4th at p. 1181.) The testimony of a single eyewitness, absent physical impossibility or inherent improbability, is sufficient to support a criminal conviction. (*People v. Young, supra*, 34 Cal.4th at p. 1181; *People v. Allen* (1985) 165 Cal.App.3d 616, 623.)

Here, the following six eyewitnesses identified appellant in court as the person who shot and killed Rooney at Lucky's: Michael Fiamengo (5RT 954), Gerald Lindsey (5RT 853-854, 866), Cheryl Pitzer (6RT 1021), Albino Martins (6RT 990-991), Janet Delaguila (6RT 1049-1051), and Lawrence Diehl (7RT 1150-1151). Howard Sands did not identify appellant in court, but gave a description of appellant. (6RT 1111-1113; 7RT 1145-1146, 1213-1214.) As to the Boys Market crimes, Ardis Irvine identified appellant at trial. Irvine saw appellant's face as appellant approached, stopped two to three feet away, pointed a gun to Irvine's head, and demanded that Irvine open the rear door. (8RT 1437-1439.) Joseph Swal (7RT 1319-1324, 1340), Wilson Colon (7RT 1360-1362), and Pierre Jacobs (7RT 1343-1353) could not identify appellant, but gave descriptions of the assailant. Despite any inconsistencies in the eyewitnesses's descriptions of appellant from the Lucky's and Boys crimes, appellant has neither alleged nor demonstrated that their identifications were physically impossible or inherently improbable.

Further, as to each crime scene, the testimony of a single witness would

have been sufficient to support appellant's convictions. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) Also, each of the above-listed witnesses were cross-examined at length about their identifications and/or descriptions of appellant. (5RT 866-889, 934-946 [Lindsey], 961-985 [Fiamengo]; 6RT 996-1014 [Martins], 1028-1043 [Pizter], 1059-1092, 1101-1104 [Delaguila], 1115-1129 [Sands]; 7RT 1139-1146 [Sands], 1148-1155 [Diehl], 1324-1340 [Swal], 1353-1354 [Jacobs], 1362-1384 [Colon]; 8RT 1448-1470 [Irvine].) "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*In re Gustavo M., supra,* 214 Cal.App.3d at p. 1497.)

Also, the jury was presented with extensive testimony of defense witness Dr. Fraser regarding factors affecting eyewitness identifications. (10RT 1961-2018.) The jury had the benefit of a fully litigated identification issue, and concluded appellant was guilty.

Moreover, there were several out-of-court identifications of appellant. As to the Lucky's crimes, hours after the crime, Delaguila told the police she recognized appellant as a regular customer at her previous workplace, before the police conducted any identification procedure with her. (6RT 1046-1058.) Also, five the six eyewitnesses who identified appellant at trial also identified him at a live lineup which was held on March 13, 1990. (5RT 958; 6RT 994-995, 1044, 1057-1058; 7RT 946-947.)[20/] Two of those eyewitnesses also identified appellant from groups of photos shown to them. (6RT 1058; 7RT 1151.) As to the Boy's crimes, Irvine identified appellant from a group of photos and identified appellant at the preliminary hearing. (8RT 1440-1442;

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20. Diehl acknowledged he identified someone other than appellant at the live line-up, but testified the person he identified resembled appellant. (7RT 1151-1152.)

1CT 137.) These out-of-court identifications could, by themselves, be sufficient evidence of appellant's guilt. (*People v. Boyer* (2006) 38 Cal.4th 412, 480; see also *People v. Cuevas* (1995) 12 Cal.4th 252, 271-272.)

Appellant also contends that there was insufficient evidence of identity because the witness's identifications were tainted by the publishing of his photo or composite drawing in the newspapers and on television, and the inclusion of a photo that was published in the media in a six-pack lineup. (AOB 203-205.) The contention is meritless. As set forth more fully below, appellant has not demonstrated the identification procedures were unreliable, and there was at least one identification of appellant (by Delaguila as to the Lucky's crimes) that was untainted by any showing of appellant's photo. (See *People v. Prince* (2007) 40 Cal. 4th 1179, 1256 [rejecting insufficiency of evidence claim that witness's identification was tainted by viewing of photo shown on news because witness was confident of her identification and witness's identification was supported by other witnesses].)

Appellant further contends there was insufficient evidence of his identity because none of the fingerprints lifted from the van recovered shortly after the Lucky's crime belonged to him, and evidence that he left his fingerprints on a Rubbermaid lid and newspaper in the getaway van used in the Lucky's crimes was unreliable. (AOB 213-216.) The claims are meritless. Since the testimony of a single eyewitness is sufficient to support a criminal conviction (*People v. Young, supra*, 34 Cal.4th at p. 1181), the lack of fingerprint evidence or alleged unreliability of such evidence does not demonstrate that evidence of identification is insufficient. Moreover, appellant's argument that fingerprint evidence is unreliable must be rejected in light of this Court's well-settled precedent providing that fingerprints are the strongest evidence of identity and under proper circumstances is alone sufficient to establish identity. (*People v. Andrews* (1989) 49 Cal.3d 200, 211; *People v. Johnson* (1988) 47 Cal.3d 576,

601.)

Appellant additionally notes Dr. Fraser's testimony regarding factors negatively affecting the accuracy of eyewitness identification (AOB 201-203) and also argues the evidence showed he was left-handed, whereas the prosecution witnesses as to both the Lucky's and Boys' crimes testified the perpetrator used his right hand (AOB 217-218). These points, and appellant's view regarding the fingerprint evidence, at most support an argument consistent with innocence, but do not show the identification evidence in this case was insufficient to establish his guilt.

That the evidence could possibly support an inference that appellant was not the person who committed the crimes does not demonstrate that the evidence was insufficient to support the jury's reasonable and factually supported conclusion that appellant was guilty. (*People v. Earp* (1999) 20 Cal.4th 826, 887-888; *In re Gustavo M., supra,* 214 Cal.App.3d at p. 1497 [if substantial evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed].) Appellant essentially requests this court to reweigh the evidence, which this court may not do. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-333; *People v. Bozigian* (1969) 270 Cal.App.2d 373, 376-377 [defendant's argument that the identification evidence was insufficient to support his conviction included an implied request that the court reweigh and reinterpret the evidence in a manner consistent with his innocence, which appellate court could not do].)

B. The In-Court Identifications Were Reliable And Proper

Appellant contends that the eyewitnesses' in-court identifications were based upon impermissibly suggestive out-of-court identification procedures and violated his due process rights. (AOB 203-206, 218-224.) The claim is meritless.

Preliminarily, appellant has forfeited this claim. Appellant does not

contend, and the record does not show, that he made any pre-trial motions or any objections at trial claiming any of the out-of-court identification procedures were unduly suggestive. Appellant's failure to make a motion or objection challenging the identification procedures constitutes forfeiture. (*People v. Medina* (1995) 11 Cal.4th 694, 783 [defendant's failure to object at trial to identification procedures forfeited the claim on appeal].) In any event, appellant's claim is meritless.

The admission of tainted identification evidence may result in a violation of a defendant's right to due process of law. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 107 [97 S.Ct. 2243, 53 L.Ed.2d 140]; People v. *Cunningham, supra*, 25 Cal.4th at p. 989.) To determine whether there is such a due process violation, courts first consider whether a pretrial identification procedure was unduly suggestive and unnecessary. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942; *People v. Kennedy* (2005) 36 Cal.4th 595, 608; *People v. Gordon* (1990) 50 Cal.3d 1223, 1242.) A defendant bears the burden of demonstrating that an identification procedure was unduly suggestive. (*People v. Gonzalez, supra*, 38 Cal.4th at p. 942; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) If a procedure is found to be unduly suggestive, courts then examine whether the procedure was nevertheless reliable under the totality of the circumstances. (*People v. Gonzalez, supra*, 38 Cal.4th at p. 942.)

Here, appellant has failed to bear his burden of demonstrating that the identification procedures in this case were unduly suggestive. In determining whether an identification procedure is unduly suggestive, the question is whether anything in the procedure caused the defendant to stand out from other persons in a way that would suggest the witness should select him. (*People v. Carpenter* (1997) 15 Cal.4th 312, 367; *People v. Johnson* (1992) 3 Cal.4th 1183, 1217.) In general, a pretrial identification procedure will only be deemed unfair if it suggests in advance the identity of the person suspected by the

police. (*People v. Hunt* (1977) 19 Cal.3d 888, 894; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.)

Appellant, relying upon the testimony of his eyewitness identification expert, first contends that a six-pack photo lineup (People's No. 36) shown to the witnesses to the Lucky's crimes was unduly suggestive because only two of the other individuals had appellant's "jheri curl" hairstyle, and none had his light skin tone. (AOB 220-221; see 10 RT 1983-1986 [expert's testimony].)[21/] The contention is meritless.

> Because human beings do not look exactly alike, differences are inevitable. The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.

(*People v. Carpenter, supra*, 15 Cal.4th at p. 367.) There is no requirement that a lineup include individuals who are nearly identical in appearance. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1051-1052; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.) Thus, there was no requirement that the six-pack photo display show every individual in "jheri curls," and that each individual be light-skinned.

Appellant also contends that the six-pack (People's No. 36) was unreliable because it included a photograph of appellant that had been released to the media. (AOB 206.) Appellant raises a similar contention that both the six-pack and live lineups as to the Lucky's crimes were unreliable because witnesses had seen photographs or composite sketches of him that were shown in newspapers or on television broadcasts prior to those identification procedures, and that the Lucky's store had a "wanted poster" of appellant

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21. The six-pack identified as prosecution Exhibit Number 36 also was identified at trial as Defense Exhibit H. (9RT 1713-1714, 1785.) Appellant was in position number three of that photo display. (9RT 1823.)

displayed in the employee area. (AOB 203, 206, 222-223.) The contentions are also meritless.[22/]

Detective Yarbrough himself did not engage in any suggestive conduct. Detective Yarbrough prepared People's Exhibit Number 36, and included a photo of appellant that had been shown on television and in newspapers. (11RT 2036-2037.) However, Detective Yarbrough did not tell any witness that any photo in the six-pack had been previously published in the news media, or that any person's photo should be selected for any reason. Detective Yarbrough also did not tell any witness was told that any photo of any of the persons included in the live lineup had been published in the news media, or that any person should be selected for any reason. Appellant has not demonstrated that the showing of his photograph in the news media, or the inclusion of that same photograph in People's Number 36, rendered that six-pack or the live line-up impermissibly suggestive. (See *United States v. Dearinger* (9th Cir. 1972) 468 F.2d 1032, 1035-1036 [publication of defendant's photograph in newspaper identifying him as a robbery suspect did not taint witness's later live lineup identifications where no indication was given to witnesses that the men in that lineup were those whose photos appeared in the paper].) Further, this Court has rejected the argument that viewing a composite drawing of a suspect prior to an identification procedure necessarily renders that procedure impermissibly suggestive. (*People v. Cook* (2007) 40 Cal.4th 1334, 1354-1355.)

Moreover, two witnesses were not "tainted" by viewing any photograph or composite of appellant that had been published. Specifically, Martins did not see any photographs or composites of appellant prior to his identifications

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22. Appellant presents no argument that any identification procedure as to any of the witnesses to the Boys Market crimes was unduly suggestive. (See AOB 207-209, 220-223.)

of appellant. (5RT 977-978; 6RT 995.) Also, Delaguila identified appellant before any photo or composite of appellant had been shown in the media. Hours after the Lucky's crimes were committed, Delaguila told the police she recognized appellant (6RT 1046-1058.) Indeed, Delaguila helped a police sketch artist produce the composite of appellant that was subsequently published in the Press Telegram. (6RT 1078-1079.) As to these witnesses, appellant has failed to show that any publication of any photo or composite of him in the media affected their identifications of him.

Even if the procedures here were unduly suggestive, the eyewitnesses' identifications of appellant were nonetheless reliable under the totality of the circumstances. (*People v. Gonzalez, supra*, 38 Cal.4th at p. 942.) Where an eyewitness has been subjected to an unduly suggestive identification procedure, a jury must nevertheless be permitted to hear and evaluate the witness's identification testimony unless the totality of the circumstances suggests a very substantial likelihood of irreparable misidentification. (*Neil v. Biggers* (1972) 409 U.S. 188, 199 [93 S.Ct. 375, 34 L.Ed.2d 401]; *People v. Arias* (1996) 13 Cal.4th 92, 168.) Such circumstances to be considered include:

> the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.

(*People v. Cunningham, supra*, 25 Cal.4th at p. 989; see also *Manson v. Brathwaite, supra*, 432 U.S. at pp. 104-107; *Neil v. Biggers, supra*, 409 U.S. at pp. 199-200; *People v. Ottombrino* (1982) 127 Cal.App.3d 574, 579-581, disapproved on other grounds in *People v. Belmontes* (1983) 34 Cal.3d 335, 345 [viewing of television broadcast showing defendant's picture, even if impermissibly suggestive, does not render an identification procedure

inadmissible where eyewitnesses had an independent basis for the identification].)

Here, as set forth below, the totality of the circumstances showed the witnesses' identifications of appellant were reliable. Each of the witnesses had the opportunity to view appellant at the time of the Lucky's crimes, and several had a high degree of attention and expressed certainty of their identifications. Each of them identified appellant at trial with no hesitation. In these circumstances, the identification evidence bore sufficient indicia of reliability to be admissible. (See, e.g., *People v. Huggins, supra,* 38 Cal.4th at p. 243; *People v. Cunningham, supra*, 25 Cal.4th 990.)

First, Delaguila saw appellant run to the back of the store. Delaguila recognized appellant as a regular customer at Courtesy Cleaners, where she previously worked and had seen him about three times a week for a period of about two years. Delaguila also saw appellant about two days prior to the crimes. Delaguila told the police she recognized appellant. Delaguila identified appellant at the live lineup. Delaguila helped a police sketch artist prepare a composite of appellant. (6RT 1047-1052, 1057-1058, 1078-1079.)

Lindsey positively identified appellant at the March 13, 1990 live lineup. (5RT 867, 946.) Lindsey followed appellant through the store to get a good look at appellant because he believed appellant had committed an armed robbery, and was not afraid. (5RT 887.) Based on these circumstances, Lindsey had the opportunity to see appellant, and Lindsey's degree of attention was high.

Fiamengo heard a loud sound and, two or three seconds later, appellant ran right past him. At the time of the crimes, Fiamengo was certain that he could identify appellant. Fiamengo identified appellant at the live lineup. In December 1991, Fiamengo identified appellant from a six-pack photo display (identified as Defense K); he was positive about that identification. (5RT 954,

958, 973-975, 984.)

Martins heard a loud bang and saw appellant's left profile from about 34 feet away. Martins identified appellant at the live lineup. (6RT 988-995.)

Pitzer heard a gunshot and saw appellant run down the center aisle, in her clear view. Appellant turned to look behind him, and Pitzer "saw a shot of his full face." Appellant was no more than 25 feet away from Pitzer when she saw his face. Pitzer identified appellant at the March 13, 1990 live lineup, and at trial, testified appellant was the same person. (6RT 1020, 1044.)

Appellant ran past Diehl. Diehl saw appellant run across the street and into a van. Although Diehl identified someone other than appellant from the live lineup, Diehl identified appellant at trial and from a six pack photo lineup (identified as Defense K). (7RT 1150- 1152, 1180-1184.)

Appellant claims several factors show the witnesses identifications are unreliable, specifically contending they only saw appellant for a short period of time, that many saw appellant from distances from 20 to 34 feet, that there were discrepancies in their descriptions, and that the live lineup and showing of the six-pack identifications occurred at least 15 months after the crimes. (AOB 221-223.) The contention should be rejected.

Appellant has not demonstrated that these factors applied to each witness. For example, Fiamengo testified appellant ran directly by him (5RT 954), and thus distance was not an issue as to his identification of appellant. As another example, any lapse in time between the crimes and the identification procedures did not in any way lessen the reliability of Delaguila's identification of appellant, as she was able to identify him the day of the crimes based on her past contact with him. Further, a strong factor indicating the identifications by the Lucky's eyewitnesses were reliable was that each of them identified appellant, and their identifications corroborated each others' identification. Additionally, these identifications were corroborated by appellant's fingerprints

found in the van used to commit the Lucky's crimes. In light of the totality of the circumstances, the identifications were reliable.

Furthermore, there is no due process violation.

> "'It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness - an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart - the "integrity" - of the adversary process.
>
> "'Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification - including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.'" (*Manson v. Brathwaite, supra*, 432 U.S. at pp. 113-114, fn. 14 [53 L.Ed.2d at pp. 153], quoting, without footnote, *Clemons v. United States* (D.C. Cir. 1968) 408 F.2d 1230, 1251 [133 App. D.C. 27] (conc. opn. of Leventhal, J.).)

(*People v. Gordon, supra*, 50 Cal.3d at p. 1243.)

Here, the jury was made fully aware of the circumstances of the eyewitnesses' identifications of appellant through the direct and cross-examination of the witnesses. In addition, appellant presented expert testimony from Dr. Fraser regarding factors affecting the reliability of an identification, and specific testimony that, in his opinion, the six pack photo display was unreliable. (10RT 1958-2032.) Moreover, the jury was also instructed with CALJIC No. 2.92 about the factors which bore upon the accuracy of eyewitnesses' identifications. (11RT 2162-2163; 3CT 814-815.) In these circumstances, there was no due process violation. (See, e.g., *People v. Gonzalez, supra,* 38 Cal.4th at p. 944; *People v. Gordon, supra,* 50 Cal.3d at

p. 1244; *People v. Contreras* (1993) 17 Cal.App.4th 813, 823-824.) Accordingly, the trial court properly admitted the identifications.

VII.

THE TRIAL COURT PROPERLY LIMITED CROSS-EXAMINATION OF THE PROSECUTION'S FINGERPRINT EXPERT

Appellant contends the trial court erroneously cut off the defense's cross-examination of Deputy Ronald George, the prosecution's fingerprint expert, regarding the variability and accuracy of fingerprint examination techniques. Appellant also contends the trial court prevented him from presenting a defense. (AOB 225-241.) The claims lack merit.

A. Factual Background

Deputy George discovered several fingerprints on items inside the van which had been used in the Lucky's crimes. Deputy George compared two fingerprints found on a Rubbermaid plastic container lid with two sets of appellant's fingerprint exemplars and concluded the prints on the lid were appellant's. Deputy George compared six fingerprints found on a Star magazine with appellant's exemplars and determined that three of the prints were appellant's, but could not match the remaining three prints to anyone because they were unuseable. Deputy George matched a fingerprint found on a Los Angeles Times newspaper to Steven Young. (7RT 1245-1267, 1291-1293.)

Deputy George testified about the method he used to form his opinion that the fingerprints belonged to appellant as follows:

> I compared the minutiae such as the ending ridges, the bifurcations, their relative position to one another, and the latent print and the inked print.
>
> And after making that comparison, there [were] enough characteristics for me to form an opinion that they were made by the same person. And there were no discrepancies.

(7RT 1257.)

The Court asked how many points of comparison Deputy George counted. Deputy George replied that he did not count characteristics in making a comparison, but "none of the fingerprints that I compared had less than 10." (7RT 1257.)

On cross-examination, defense co-counsel Stein elicited Deputy George's testimony that he considered fingerprinting a science, and that there was a scientific community of experts in the field of fingerprints. Deputy George also testified regarding the definition of a characteristic:

> A characteristic -- if you look at a fingerprint under magnification, you will notice that the ridges are flowing through a fingerprint, they stop, they will start again, they will bifurcate, which is intersect together. There will be dots. Sometimes two prints will form what we call an island in that they will separate and come back together a short distance away.
>
> These characteristics and their relationship to each other is what we use in the form of making an identification, and the fact we will find one characteristic at a certain spot in the inked impression and latent print, and we will go from that point to another point, and that characteristic will also have to be there on the other print. And we continue following those characteristics around a point until we form an opinion that the prints were made by the same person or they are not.

(7RT 1268-1269.)

The defense also elicited Deputy George's testimony that the scientific community had no accepted number of minimum characteristics required to make a definite identification, and that the Sheriff's Department did not have a policy as to any required minimum number of characteristics. Further, there was no general consensus in the scientific community that a minimum of 10

characteristics was required to make an identification. The minimum number of characteristics Deputy George would rely upon would vary depending on each individual print. (7RT 1270-1271.)

Deputy George did not make notes as to how many characteristics were found on each print. (7RT 1271.)

Subsequently, the defense asked Deputy George whether he would agree that one of the fingerprints found on the Rubbermaid lid had a maximum of eight characteristics. Deputy George responded that he did not count the exact number of characteristics and that one of the prints "did not have a whole lot of characteristics," but had enough to conclude it was appellant's. Defense counsel asked Deputy George whether any of the prints found on the Rubbermaid lid had less than 10 characteristics. Deputy George responded that he would have to count the exact number. Counsel then asked whether the print left on the flat side of the lid had more characteristics than one on another portion of the lid. Deputy George responded, "That's correct." (7RT 1284-1286.)

The trial court directed the parties to approach the bench, and stated that it was going to stop the cross-examination as a waste of time under Evidence Code section 352, unless the defense could make an offer of proof that they would call an expert to testify the prints did not belong to appellant. Defense counsel responded that they had experts they could call that would testify that there was a minimum number of characteristics which was accepted within the relevant scientific community, and that experts counted characteristics. (7RT 1286-1287.)

The trial court responded that the defense must call an expert that would testify that the prints did not belong to appellant. Counsel responded that his expert could testify that one of the prints had eight characteristics, which might possibly, but not definitely, belong to appellant.[23/] The trial court asked about the other prints found in the car. Counsel responded that his expert could not testify that the other prints did not belong to appellant. Trial counsel argued he was entitled to elicit evidence that Deputy George's testimony was "totally different" than people in the relevant scientific community, because "everyone knows there is an accepted minimum in the scientific community." Counsel stated he was going to set Deputy George up for impeachment. (7RT 1287-1289.) The trial court responded that one technique of fingerprint comparison involved counting characteristics, but that was not the only method, and that "if you're a real fingerprint expert, you can use any technique you want to." The trial court barred the defense from asking any additional questions regarding the number of characteristics found on the prints in the van under Evidence Code section 352 as a waste of time. (7RT 1291.)

B. Analysis

As a preliminary matter, appellant's claims of federal constitutional error regarding the trial court's ruling limiting his cross-examination of Deputy George should be deemed forfeited because appellant did not assert such grounds below. (*In re Josue S.* (1999) 72 Cal.App.4th 168, 170; *People* v. *Neal, supra,* 19 Cal.App.4th at p. 1118.) In any event, appellant's claims are meritless.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront a prosecution witness and the opportunity for

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23. The defense did not provide discovery of any defense fingerprint report to the prosecution. (7RT 1287.)

cross-examination. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [106 S.Ct. 1431, 1435, 89 L.Ed.2d 674].) The right to confrontation and cross-examination is not unlimited. (*People v. Sully* (1991) 53 Cal.3d 1195, 1219-1220; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1747.) A trial judge has broad discretion to control the scope of cross-examination, and may restrict cross-examination that is repetitive, prejudicial, confusing, or of marginal relevance. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 680; *People v. Cornwell* (2005) 37 Cal.4th 50, 95; *People v. Frye* (1998) 18 Cal.4th 894, 946.)

Under the confrontation clause, a defendant is guaranteed "'an opportunity for effective cross-examination, not cross-examination in whatever way, and to whatever extent, the defense might wish.'" (People v. Clair, supra, 2 Cal.4th at p. 656, fn.3, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 20 [88 L.Ed.2d 15, 19, 106 S.Ct. 292].) "There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced a significantly different impression of [the witness's] credibility. [Citations]." (*People v. Cooper* (1991) 53 Cal.3d 771, 817, internal quotation marks omitted; *People v. Frye*, *supra*, 18 Cal.4th at p. 946.)

Here, the defense asked Deputy George several questions regarding the number of characteristics he found on the prints on the Rubbermaid lid recovered from the van. (7RT 1284-1286.) The trial court properly stopped this line of questioning because it was of marginal relevance and confusing.

At trial, the defense stated additional questioning regarding the number of characteristics was necessary in order to "set up" impeachment, through a defense expert, of Deputy George's testimony that there was no consensus regarding the minimum number of characteristics, and that none of the prints had less than eight characteristics. (7RT 1286-1289.) Any additional questioning for these purposes was of little, if any, relevance.

Any impeachment regarding the minimum number of characteristics required to make a positive identification had little relevance because Deputy George's testimony that there was no minimum number of required characteristics was plainly correct. There is no consensus in the scientific community regarding the minimum number of characteristics. (Epstein, Robert, *Fingerprints Meet Daubert: The Myth of Fingerprint "Science" Is Revealed* (2002) 75 S. Cal. L. Rev. 605, 610-611, 636-638.)

Moreover, though the proposed defense expert would have testified that one of the prints on the Rubbermaid had only eight characteristics, that expert, according to the defense, could not definitively testify that the print did not belong to appellant, and could not testify that appellant was not the person who left the other fingerprints on items recovered from the van. (7RT 1287-1289.) Thus, the barred cross-examination would not have left the jury with a different impression of Deputy George's credibility.

Appellant nevertheless contends the trial court's limitation of cross-examination was erroneous because it prevented the defense from introducing evidence questioning the methodology and reliability of fingerprint evidence. (AOB 231-236.) The argument is meritless.

The trial court did not bar the defense from presenting evidence challenging the reliability and methodology of fingerprint evidence, but rather stopped additional questioning regarding the number of characteristics Deputy George found on the prints found in the van. Indeed, the trial court permitted Deputy George to testify regarding fingerprint comparison techniques and his use of those methods in this case. On direct, Deputy George explained that he compared characteristics in the latent prints and fingerprint exemplars and that he did not count the exact number of characteristics as to each set of prints, but that there were enough common characteristics for him to conclude that the prints were appellant's, and that no set of prints had less than 10 characteristics.

(7RT 1257.) On cross, Deputy George explained fingerprint characteristics to the jury, and testified that there was no consensus in the scientific community as to the minimum number of characteristics which were necessary to make an identification. (7RT 1268-1271.)

Even if the trial court's ruling could be construed as barring the proposed defense fingerprint expert testimony, there was no violation of appellant's right to present a defense.

> Application of the ordinary rules of evidence, such as Evidence Code section 352, generally do not deprive the defendant of the opportunity to present a defense [citation]; certainly the marginal probative value of this evidence does not take it outside the general rule.

(*People v. Snow* (2003) 30 Cal.4th 43, 90.) Here, the proffered evidence was ruled inadmissible under the ordinary rules of evidence, specifically, Evidence Code section 352, because it was of marginal relevance and taking of the testimony would be a waste of time. Accordingly, appellant was not deprived of the opportunity to present a defense. (See *People v. Reeder* (1978) 82 Cal.App.3d 543, 553 [defendant has no constitutional right to present all conceivably relevant evidence in his favor without regard to its probative value and potential for misleading the jury].)

Appellant also contends the trial court improperly required him to provide exculpatory evidence (specifically, a defense expert who would testify that the fingerprints did not belong to appellant) as a prerequisite for cross-examination of Deputy George. (AOB 239-241.) Respondent disagrees.

The trial court's statement barring additional questioning regarding fingerprint characteristics unless the defense made an offer of proof that they intended to call an expert to testify the prints did not belong to appellant (7Rt 1286-1291) was not improper. The trial court asked for an offer of proof in order to determine the relevance of the additional questioning. (3 Witkin, Cal.

Evidence (4th ed. 2000) Presentation At Trial, § 401, p. 490 [offer of proof made to show what counsel intends to prove by a line of questioning].) In doing so, the trial court was not requiring the defense to provide exculpatory evidence as a prerequisite for further cross-examination, but rather was properly determining the relevance of the defense questions.

In any event, any error in limiting cross-examination or precluding the proposed defense expert testimony was harmless beyond a reasonable doubt. (See *People v. Cornwell, supra*, 37 Cal.4th at p. 95 [applying harmless beyond a reasonable doubt standard to limitation of cross-examination].) Here, the prohibited cross-examination would have, at most, shown that one of the fingerprints had less than 10 characteristics in common with appellant's exemplars and shown differing standards regarding the minimum number of characteristics required to make an identification. However, this prohibited cross-examination did nothing to show the that appellant was misidentified or that the prints Deputy George identified as appellant's did not belong to him. The defense fingerprint expert could not testify that one fingerprint which he found had only eight characteristics did not belong to appellant, and indeed would testify the print was possibly, but not definitely, appellant's. Also, that defense expert could not testify that none of the fingerprints lifted from items recovered from the van did not belong to appellant. (7RT 1287-1289.) To the extent appellant was attempting to impeach Deputy George's conclusion by challenging his methodology, the cross-examination actually conducted sufficiently accomplished that purpose.

Also, any limitation on evidence questioning the reliability of fingerprint comparison was meritless. The visual comparison of fingerprints is a "long-established technique." (*People v. Farnam, supra,* 28 Cal.4th at p. 160; see Houck et al., *Locard Exchange: The Science of Forensic Hair Comparisons and the Admissibility of Hair Comparison Evidence: Frye and Daubert*

Considered (Mar. 2, 2004) Modern Microscopy Journal, p. 9 [fingerprint comparison is a forensic technique that "has been well-established in the forensic laboratories of the world"]; Annot., Evidence-Finger, Palm, or Footprint (1953) 28 A.L.R.2d 1115, 1119 [identification by fingerprint comparison "has become widely recognized as a relatively accurate system of establishing identity and has become a fixed part of our system of jurisprudence"].) Indeed, this Court has noted the reliability of fingerprint evidence, stating it is the "strongest evidence of identity" and "is ordinarily sufficient alone to identify the defendant." (*People v. Gardner* (1969) 71 Cal.2d 843, 849; *People v. Andrews, supra*, 49 Cal.3d at p. 211; *People v. Johnson, supra*, 47 Cal.3d at p. 601; *People v. Adamson* (1946) 27 Cal.2d 478, 495.)

Additionally, the jury was presented with the photographs of the fingerprints left on the Rubbermaid lid and Star magazine recovered from the van, as well as appellant's fingerprint exemplars. (7RT 1253-1257, 1260-1263; 8RT 1495.) This was demonstrative evidence involving a visual comparison between the latent prints and appellant's prints, which was based on principles and procedures which were explained to the jury. Thus, the jury could see for itself whether there was a match, and did not need to rely completely on Deputy George's expert testimony. (See *People v. Farnam, supra,* 28 Cal.4th at p. 160.)

Finally, in addition to the fingerprint evidence, numerous eyewitnesses identified appellant as the perpetrator of the Lucky's crimes. (See Arg. VI, *ante*.) In light of the foregoing, any prohibited cross-examination and exclusion of defense evidence was harmless beyond a reasonable doubt.

VIII.

THE TRIAL COURT PROPERLY LIMITED THIRD PARTY CULPABILITY EVIDENCE

Appellant contends the trial court erroneously excluded evidence of third party culpability. Appellant specifically contends the trial court improperly excluded evidence: (1) that appellant and Steven Young resembled each other and knew each other; and (2) of Young's convictions for armed robberies. (AOB 242-258.) The claim is meritless because the trial court permitted appellant to present extensive evidence of Young's culpability, allowed the defense to argue Young's culpability, and properly excluded evidence that did not directly link Young to the charged crimes.

A. Factual Background

On March 10, 1992, the prosecutor noted that the defense was seeking to introduce evidence that Young was involved in twelve unsolved armored car robberies and had "four convictions" to prove by inference he committed the crimes charged against appellant. The trial court barred the defense from introducing evidence of any unsolved armored car robberies, but held the defense could introduce evidence of Young's crimes which had been "adjudicated" to prove Young's "signature crime-type of activity." The trial court specifically stated that if the defense could prove Young's other crimes had a "special signature," they could introduce evidence of those crimes to show the charged crimes were Young's "signature crime." The trial court noted it failed to see anything unique "about somebody trying to rob an armored car guard and killing the guard in the process of the robbery." The court deferred ruling until the next hearing. (8RT 1504-1513.)

On March 11, 1992, appellant filed a motion requesting the admission of evidence of similar crimes committed by Young to establish third party culpability. Appellant submitted police reports regarding four armored car

guard robberies alleging Young was involved in them. Appellant asserted evidence of those robberies was relevant to prove Young's identity and use of a common plan or scheme pursuant to Evidence Code section 1101, subdivision (b), and was admissible under the standard for third party culpability set forth in *People v. Hall* (1986) 41 Cal.3d 826. Appellant argued that he expected to produce evidence connecting Young to the charged crimes, including that Young's fingerprint was found in the Lucky's get-away vehicle, three witnesses identified Young, and Young fit the description of the killer given by numerous witnesses. (3CT 700-762.)

At the hearing on that motion, the trial court stated that no witness had testified that Young fit the description of "the killer." The trial court also stated that the only evidence that connected Young to the charged crimes was that Young's fingerprint was found on a newspaper recovered from the Lucky's Market get-away van.[24/] The trial court stated:

> That fingerprint could have been placed on that newspaper a week before, two weeks before, anything else. So as far establishing the criteria of *People v. Hall*, the defense is so far short that the case is inapplicable.

(8RT 1519-1520.)

The defense noted that, based on discovery provided by the prosecution and on defense interviews, three persons had identified Young's photograph ("picture I4") from a six-pack photographic line-up noted as "I." The trial court ruled that defense could present that evidence at trial. However, the trial court ruled that Young's other crimes were not admissible because the similarities between those crimes and the charged crimes were not sufficient to establish a signature modus operandi. (8RT 1521.)

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24. The trial court had already allowed evidence of Young's fingerprint into evidence. (7RT 1265.)

The defense argued that *Hall* established a "more liberal standard" that provided that third party culpability evidence was admissible so long as it rose to the level that it would create reasonable doubt in the mind of a juror. The trial court responded that the only evidence linking Young to the charged crimes was his fingerprint found in the van. (8RT 1521-1524.) The trial court stated:

> I agree the *Hall* standard is the appropriate standard. And what I'm saying is there's no way that I'm going to preclude you from calling all the witnesses that you can to establish that some other person did it.
>
> What I'm not going to do is I'm not going to try these other offenses of Mr. Young in this Court, and I'm not going to allow you to present before this jury evidence of those other crimes.

(8RT 1528-1529.)

The trial court explained that Young's other crimes was inadmissible because those crimes did not involve a "signature," specifically stating the commonalities involved in those crimes (waiting until the victim had money, running, then fleeing in a stolen car) were not unique. (8RT 1529.) The trial court ruled the jury could hear evidence of any witness who identified Young as the person who committed the charged crimes. (8RT 1530.)

The defense also requested permission present evidence of descriptions and pictures of Young. The trial court denied that request, stating that there were other people who looked similar to appellant who were included in photographic line-ups. (8RT 1524.) The defense also noted there was evidence of a "connection" between Young and appellant that was discovered through surveillance. The trial court stated that it understood that Young and appellant knew each other, but that fact did not "rise up to a *Hall* situation." (8RT 1525-1526.)

Subsequently, the prosecutor informed the court that the defense's

updated witness list included Berton Wyngaarden. Two days prior to the Lucky's crimes, Wyngaarden saw a Black male and female outside of Lucky's, drawing a picture of the store. The defense explained that the couple were pacing the parking lot and areas in the store, indicating planning, and noted Wyngaarden's description of the couple, including that the Black male was dark-complected. The trial court stated that the evidence was inadmissible unless there was "some nexus" to the Lucky's crimes. The defense argued that Wyngaarden's description fit Young; the trial court responded that the description "fits [appellant] to a 'T.'" The defense noted that Young was dark-complected and that appellant was light-complected. The prosecutor noted there was a report indicating Wyngaarden was shown pictures of Young and appellant, and could not identify either of them as the Black male who "cased" Lucky's. Counsel Ramirez stated the defense did not have that report; co-counsel Stein stated that the defense did. The trial court barred Wyngaarden's testimony under Evidence code section 352. The trial court stated that it was not restricting the defense from introducing witnesses who identified Young as the perpetrator of the charged crimes, but was barring Wyngaarden's testimony because that regarded "totally unrelated conduct." (9RT 1797-1802.)

B. Analysis

In order to be admissible, evidence of third-party culpability must be "capable of raising a reasonable doubt of the defendant's guilt." (*People v. Hall, supra,* 41 Cal.3d at p. 833; *People v. Panah* (2005) 35 Cal.4th 395, 481.)

> [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

(*People v. Hall, supra,* 41 Cal.3d at p. 833; see *People v. Lewis* (2001) 26 Cal.4th 334, 372; *People v. Sandoval* (1992) 4 Cal.4th 155, 176.)

Even if a defendant's third-party culpability evidence raises a reasonable doubt about the defendant's guilt, a trial court may nevertheless properly exclude such evidence under Evidence Code section 352 if the probative value of the evidence is substantially outweighed by the risk of undue delay, prejudice, or confusion. (*People v. Lewis, supra*, 26 Cal.4th at p. 372; *People v. Hall, supra*, 41 Cal.3d at p. 833; *People v. Adams* (2004) 115 Cal.App.4th 243, 252.) Third party culpability evidence "should be treated like any other evidence." (*People v. Valdez* (2004) 32 Cal.4th 73, 109, fn. 10; *People v. Hall, supra*, 41 Cal.3d at p. 834.) A trial court's ruling regarding the admissibility of third-party culpability evidence is reviewed for abuse of discretion. (*People v. Lewis, supra*, 26 Cal.4th at p. 372; *People v. Adams, supra*, 115 Cal.App.4th at pp. 252-253.)

Here, as set forth above, the trial court permitted appellant to present evidence that Young had committed the crimes, including that eyewitnesses had identified Young as the perpetrator and that Young's fingerprint had been found in the getaway van along with appellant's fingerprints. (8RT 1528, 1530; 9RT 1802.) Two defense witnesses, Lucky's employees Cynthia Chikahisa and Mark Gutcher, each testified that he or she had identified the person in position number 4 of the photo display marked as defense exhibit "I" as the person most resembling the perpetrator. (8RT 1585-1586; 9RT 1711; see 8RT 1521.)[25/] Also, the trial court, at the time of appellant's motion, had already admitted

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25. In his motion requesting admission of evidence of third party culpability the defense did not provide names of any witnesses who identified Young as the perpetrator of the charged crimes. (3CT 700-762.) In the hearing on that motion, defense counsel Ramirez indicated that there were three witnesses who identified Young from position number four of a photo display marked at trial as Defense Exhibit "I," but did not name those witnesses. (8RT 1521.) The six-pack photo display marked as defense exhibit "I" also was marked as prosecution exhibit number 37. (9RT 1713-1714, 1785.) Counsel for respondent has reviewed the record, but only found two such witnesses who testified, Chikahisa and Gutcher.

evidence that Young's fingerprint was on a newspaper in the Lucky's Market getaway van. (7RT 1256.)

Appellant's contention that the additional evidence of third party culpability which the trial court ruled was inadmissible is meritless. None of the evidence excluded by the trial court (Young's other armored car guard robberies, the alleged resemblance between Young and appellant, that Young and appellant knew each other, and that Wyngaarden's testimony that a dark complected Black male and female "cased" Lucky's two days prior to the crimes) linked Young to the Lucky's crimes.

The trial court acted within its discretion in excluding evidence of Young's prior crimes, since it found the similarities between Young's other crimes and Lucky's crimes were insufficient to establish Young's identity as the perpetrator of the Lucky's crimes, or Young's use of a common plan or scheme. (8RT 1529.) (See Evid. Code, §1101, subd. (a); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Evidence offered merely to show that a third party was a likely perpetrator of a crime because he or she had a criminal disposition does not constitute admissible third party culpability evidence because it does not link the third person to the actual commission of a charged crime. (*People v. Davis* (1995) 10 Cal.4th 463, 501; *People v. Farmer* (1989) 47 Cal.3d 888, 921 [third party culpability evidence must be treated like any other evidence and was properly barred under Evidence Code section 1101].)

Further, evidence that appellant and Young may have resembled each other and that Young and appellant knew each other failed to link Young to the perpetration of the Lucky's crimes. (See *People v. Panah, supra*, 35 Cal.4th at p. 483 [offer of proof that two potential witnesses would testify they saw individuals outside of defendant's apartment, which would corroborate defendant's statements about other persons being involved in crimes held "grossly inadequate" to support admission as third party culpability evidence].)

Also, appellant's argument on appeal that the trial court barred evidence that Young bore a "striking resemblence" to him (AOB 242) contradicts the assertions of his trial attorneys, who argued Young was dark-skinned and Elliott was light-skinned. (9RT 1801-1802.) Moreover, Wyngaarden's testimony that he saw a Black male and female "casing" Lucky's a few days prior to the charged crimes did not link Young to those crimes. In this regard, the record shows Wyngaarden could not identify Young or appellant as the Black male he saw. (9RT 1801.)

In any event, the evidence was properly excluded under Evidence Code section 352. The introduction of Young's other crimes evidence would have caused undue consumption of time. The other crimes evidence would have required the jury to consider and resolve issues not directly related to the instant case (i.e., the identity of the robber in the other cases), creating a likelihood of confusing or misleading the jurors. Further, presentation of that evidence would have caused undue consumption of time, as that would require witnesses testifying as to events involved in Young's other crimes. Moreover, the probative value of Young's other crimes to show he was the person who committed the Lucky's crimes, or used a common plan or scheme in those crimes, was low in light of the lack of similarities between the other crimes and charged crimes.

Evidence that Young and appellant resembled each other and that they knew each other, and that Wyngaarden saw a Black male "casing" Lucky's also had little probative value. That Young may have resembled appellant and that appellant and Young knew each other had little, if any, tendency in reason to show Young committed the Lucky's crimes. Further, Wyngaarden's testimony had little probative value, since he did not identify Young or appellant, and, as noted by the trial court, many other Black males fit Wyngaarden's description. (9RT 1802.)

Moreover, the exclusion of the evidence was harmless. The *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) standard of harmless error review applies to the erroneous exclusion of third party culpability evidence. (*People v. Geier* (2007) 41 Cal.4th 583-584; *People v. Hall, supra*, 41 Cal.3d at p. 836.) Here, it is not reasonably probable that had the third party culpability evidence been admitted, the result of the proceeding would have been different. First, the trial court permitted evidence directly linking Young to the Lucky's crimes to be admitted, specifically that witnesses identified Young as the perpetrator of those crimes. (8RT 1528, 1530; 9RT 1802.) Two witnesses provided such testimony at trial. (8RT 1585; 9RT 1711.) The trial court also admitted into evidence testimony from the prosecution's fingerprint expert that one of the fingerprints left on a newspaper found in the van belonged to Young. (7RT 1265.)

Further, as to the excluded evidence that Young and appellant resembled each other, Deputy Yarbrough informed the jury that Young's photograph was included on two photographic lineups (in position number two of photo display "A," also marked as defense exhibit "O" and in position number four of "line-up I"), and those lineups were admitted into evidence. (11RT 2044-2045, 2061.) Thus, the jury had Young's photograph available, and could compare it to appellant's appearance in court and photographs of appellant.

As for appellant's claim that appellant and Young being acquainted with each other, the jurors were also reminded that Young's fingerprint was found on a newspaper inside a van. (11RT 2044.) This established a connection between appellant and Young and the getaway van, independent of any proffered defense evidence such as police surveillance showing Young and appellant knew each other.

Moreover, as set forth above, several eyewitnesses identified appellant as the perpetrator of the Lucky's crimes. (See Arg. VI, *ante*.) Further, if

additional evidence of Young's culpability had been introduced, it would only have established that both men were involved in the Lucky's crimes, but would not have undermined the eyewitness evidence that appellant was the shooter. In light of the strong evidence of appellant's guilt and the fact that third party culpability evidence directly linking Young to the Lucky's crimes was admitted at trial, the trial court's exclusion of evidence which did not directly link Young to the crimes was harmless.

Appellant also contends the trial court used the wrong standard of requiring a substantial probability of third party guilt to admit such evidence. (AOB 251-257.) The contention should be rejected.

Though the trial court stated the *Hall* standard *could* be distinguished (8RT 1527), the trial court stated that it was applying the *Hall* standard (8RT 1528). Further, as set forth above, the trial court's ruling excluding the evidence was proper under *Hall* and Evidence Code section 352. Despite appellant's claim that the trial court's reasoning was incorrect, its ruling was still correct, as Respondent has demonstrated. "It is settled that the trial court's ruling must be upheld if there is any basis in the record to sustain it. [Citation.]" (*People* v. *Marquez* (1992) 1 Cal.4th 553, 578.)

Finally, appellant contends that the exclusion of the third party culpability evidence violated several of his federal constitutional rights. (AOB 242, 257-258.) Appellant's failure to raise those claims in the trial courts constitutes forfeiture, and, in any event, since there was no error, the court's rulings "do not implicate any of the cited federal constitutional provisions." (*People v. Davis, supra*, 10 Cal.4th at p. 501, fn. 1.)

IX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING A PHOTOGRAPH OF APPELLANT WEARING ROLLERS IN HIS HAIR

Appellant contends the trial court erred by admitting a photograph of him that was unrelated to the crimes for which he was accused. (AOB 259-264.) The claim should be rejected.

A. Relevant Background

1. Ruling On Admissibility

In a hearing held out of the presence of the jury, the parties noted there was an issue regarding the admissibility of a black and white photograph of appellant, taken in 1987, and showing appellant's hair in rollers. The defense argued there was "no foundation" for the photograph because no one had identified appellant as having his hair in rollers, and because appellant's appearance in 1987 was not an issue. (7RT 1197-1198.) The prosecutor responded that prosecution witness Delaguila's identification of appellant had been "called into question" by the defense during trial. The prosecutor argued the photograph was relevant because it was consistent with Delaguila's testimony that she knew appellant a few years prior to the December 1988 Lucky's crimes, and knew appellant to have long hair. The prosecutor argued the photograph was "very probative" of Delaguila's memory of appellant, because the photograph showed appellant's hair was long enough to be put into rollers. (7RT 1198.)

The trial court stated the prejudicial effect of the photograph was "very minimal." The trial court also stated the photograph was "a very poor likeness, very poor photo" which was "obviously . . . a reproduction from some other type of I.D. photo." The trial court stated there was no harm in admitting the

photograph into evidence, so long as it was made clear which year the photo was taken. (7RT 1198.)

The defense argued that the "objection is as to the rollers and hairstyle," stating there was no foundation for the photograph because Delaguila never testified to seeing appellant with his hair in rollers. The trial court asked the defense to explain any prejudice. The defense replied that during jury selection, the trial court had found the prosecution's justification for exercising a peremptory challenge against a juror who had an unusual hairstyle. (7RT 1199.)

The trial court responded:

> I said that the People objected to that, and you vigorously took the other side and said there was no basis at all for people being excluded because they chose to wear their hair in a particular style.
>
> And he [appellant] apparently posed for a picture with his hair in that particular style. So what's the prejudice? This isn't a candid camera shot. This is some kind of photo I.D. So, apparently, at the time that was his general appearance, that's the way he appeared, and it's within the critical time.

(7RT 1199-1200.)

The defense again stated that the objection was lack of foundation, specifically that there was no testimony that appellant wore his hair in rollers when he knew Delaguila. The defense also stated that the photo may have been taken before Delaguila knew appellant from working at a cleaner. The defense stated that it believed Delaguila started working at the cleaner in November 1987.[26/] The trial court stated, "That's right." The prosecutor said the photograph had been taken in August 1987. The defense again argued that the

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26. The defense was incorrect, Delaguila had testified she worked at the cleaner in November 1986. (6RT 1067-1068.)

photo had been taken long before Delaguila worked at the cleaner.[27] (7RT 1200.)

The trial court stated that the defense objection was "overruled." The trial court ruled that the photograph would be admitted with a date marked under the photo. The defense stated that an exact date was not necessary and "just the year is fine." (7RT 1201.)

2. Related Facts

During voir dire, the defense raised a *Wheeler* motion, contending the prosecution's use of a peremptory challenge to remove prospective juror Myron G. from the jury panel was racially motivated. The prosecution noted as one reason for challenging Myron G. his unusual appearance, including his hairstyle. The defense argued Myron G.'s haircut was not unusual in the Black population. The trial court disagreed, stating Myron G.'s hairstyle was bizarre enough that courtroom personnel had commented on it. (4RT 804-805.)

Delaguila testified that the first time she saw appellant was sometime from November 1986 to the middle of 1987, when she worked at a cleaner and appellant was a customer. At the time, appellant had his hair in a "jheri curl" that reached his shoulders. (6RT 1067-1068.) Delaguila testified that when she saw appellant in December 1988, at the time of the Lucky's crimes, appellant had the same hair style as when she saw him at the cleaners, specifically stating he had his hair in long curls, down to his shoulders. (6RT 1085-1087, 1095.)

B. Analysis

All relevant evidence is admissible (Evid. Code § 351), but is subject to exclusion by a trial court if it determines the probative value of the evidence is

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27. Appellant does not argue on appeal that there was no foundation for the photo because it was taken before Delaguila knew him from working at the cleaners. (AOB 263.)

substantially outweighed by the probability that its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice, confusing the issues, or misleading the jury (Evid. Code § 352).

A trial court's decision to admit or exclude evidence pursuant to Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; see also *People v. Davis, supra,* 10 Cal.4th at p. 530.) The abuse of discretion standard applies to a trial court's determination regarding the relevance of evidence and whether the evidence's probative value is substantially outweighed by its prejudicial effect. (*People v. Cain* (1995) 10 Cal.4th 1, 33; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) A trial court abuses its discretion regarding the admissibility of evidence "only where there is a clear showing the trial court exceeded the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 32.)

> "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' [Citation.]"

(*People* v. *Karis* (1988) 46 Cal.3d 612, 638; see also *People v. Zapien, supra,* 4 Cal.4th at p. 958 [statutes uses the word "prejudice" in its etymological sense of prejudging a person or cause on the basis of extraneous factors].)

Here, the trial court did not abuse its discretion by admitting the photograph of appellant with rollers in his hair into evidence. That photograph had probative value as it was relevant to show that Delaguila correctly identified appellant during the December 1988 Lucky's crimes. Specifically, Delaguila testified she saw appellant beginning in November 1986 to the middle of 1987, and that at that time he had his hair in shoulder-length "jheri

curls." The photograph of appellant, taken in 1987, had a tendency in reason to show Delaguila's description of appellant's hair style was correct, as it showed appellant had hair long enough to use rollers and was using rollers to produce curls in his hair.

Further, the probative value of the evidence was not substantially outweighed by its prejudicial impact. Appellant's argument that the photo "painted [him] as a strange, eccentric person, and was likely to alienate the jury from [appellant] and to dehumanize him" (AOB 263) involves several layers of speculation. Appellant offers nothing but speculation to show that the jurors would have concluded appellant was strange or eccentric based upon the photo of appellant with his hair in rollers. Even if the jury did so, appellant has made no showing that the jurors would then conclude that because appellant was strange or eccentric, he would commit the charged crimes.

Appellant also argues that trial court had taken the position that having a ponytail was sufficiently bizarre to justify excluding a Black juror, but refused to entertain the suggestion that a picture of appellant with his hair in rollers could be prejudicial. (AOB 261-264.) This argument fails to demonstrate any prejudice. In this regard, appellant conflates two different standards, one regarding the admissibility of evidence and the other involving assessment of whether a prosecutor's exercise of a peremptory challenge is race-neutral. The trial court's statement regarding Myron G.'s bizarre hairstyle was appropriate, because under the *Wheeler/Batson* standard, a prospective juror's odd appearance is an appropriate reason for challenging that juror. (*People v. Reynoso, supra*, 31 Cal.4th at p. 916.) Further, under *Wheeler/Batson*, the issue is not whether a juror's odd appearance is prejudicial, but whether that juror's odd appearance is a race-neutral reason justifying a prosecutor's peremptory challenge. In contrast, the admissibility of the photo of appellant wearing rollers in his hair was not prejudicial within the meaning of the Evidence Code

as that photo did not uniquely tend to evoke an emotional bias against appellant as an individual.

In any event, the admission of the photograph was harmless under the *Watson* (*People v. Watson, supra,* 46 Cal.2d at p. 836) standard of review because it is not reasonably probable appellant would have received a more favorable result in the absence of the alleged error. (*People v. Earp, supra,* 20 Cal.4th at p. 877; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1125.) In this regard, as set forth above, the evidence of appellant's guilt of the charged crimes was overwhelming, including that appellant was identified by multiple witnesses as to the Lucky's crimes and that his fingerprints were located in the Lucky's getaway van. (See Arg. VI, *ante*.) Further, the jurors were instructed to base their decision on the facts and law, and to not be influenced by prejudice against a defendant, and were not be to influenced by conjecture, passion, prejudice, public opinion, or public feeling. (CALJIC No. 1.00; 3CT 788; 11RT 2147-2148.) In light of the evidence and instruction, any alleged error was harmless. Appellant's claim of federal constitutional error must be rejected since the trial court's ruling was correct and appellant was not denied due process or a fair trial.

X.

THE TRIAL COURT PROPERLY ADMITTED PENALTY PHASE AGGRAVATING EVIDENCE THAT APPELLANT HAD ROBBED AND SHOT AUGUSTUS GUARDINO (HUGHES MARKET ROBBERY)

Appellant contends the trial court erred by admitting evidence of an uncharged robbery and shooting at the penalty phase. Appellant specifically contends that Augustus Guardino, the assistant manager of a Hughes market who was shot in the head and robbed, was the sole person who identified appellant and that his identification was unreliable. (AOB 265-271.) The contention should be rejected.

A. Relevant Factual Background

During the penalty phase, the prosecution introduced as aggravating evidence the testimony of Guardino and Jesse Benavidez regarding appellant's robbery of Hughes Market in December 1987. Benavidez did not identify appellant, but described the shooter as a Black male, about five feet, six inches tall. (11RT 2242-2244.) Guardino identified appellant as the shooter. (11RT 2252.) The jury was informed appellant had not been convicted of any crime relating to the Hughes robbery. (11RT 2231.) After the jury reached its death verdict in the instant case, the Hughes charges were dismissed. (18SCT 4743; see 3CT 895.)

Guardino testified that as he turned down an aisle, he saw appellant "standing there pointing a gun." Guardino saw appellant for about two seconds. (11RT 2251, 2270.) Guardino identified appellant at trial. (11RT 2251-2252.)

Around Thanksgiving 1988, Guardino saw a composite drawing in a newspaper and recognized it as appellant, the man who robbed him. (11RT 2255, 2267, 2274.) Guardino told Detective Peter Waack that he saw a picture

of a person whom he believed was the assailant in the San Fernando Valley Daily News and on a television broadcast. Detective Waack's report did not indicate that Guardino said he saw the picture on television. (12RT 2417-2420.) Approximately a month later, Guardino's brother-in-law showed Guardino another composite drawing. (11RT 2275.)

On November 13, 1989, Detective Waack showed Guardino a six-pack photo display, from which Guardino identified appellant. Guardino wrote on that display, "This is the person who shot me. I remember the eyes. There is no doubt in my mind." (11RT 2256.)

On March 13, 1990, Guardino went to a live lineup, from which he identified appellant. (11RT 2259.) On May 15, 1990, Guardino identified appellant at the preliminary hearing. (11RT 2261.)

B. Analysis

At the penalty phase, evidence of a defendant's criminal activity that involves the use or attempted use of force or violence is admissible under Penal Code section 190.3, subdivision (b), regardless of whether that activity led to criminal charges or convictions, or when that activity occurred, with the exception that acts for which a defendant was acquitted are not admissible. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1051; *People v. Stitely* (2005) 35 Cal.4th 514, 562; § 190.3, factor (b).) A trial court has no discretion to exclude such evidence of unadjudicated criminal activity under Evidence Code section 352. (*People v. Sanders, supra,* 11 Cal.4th at pp. 542-543; *People v. Freeman, supra,* 8 Cal.4th at p. 512.)

An individual juror may consider unadjudicated criminal activity in aggravation only if he or she is convinced beyond a reasonable doubt that a defendant committed that activity. (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1051; *People v. Anderson* (2001) 25 Cal.4th 543.) There is no requirement that the jurors unanimously find the other crimes true beyond a

reasonable doubt before an individual juror may consider them. (*People v. Anderson, supra,* 25 Cal.4th at p. 590.)

Preliminarily, appellant did not object to the admission of evidence regarding the Hughes robbery. Though appellant filed a motion to strike evidence in aggravation, that motion was limited to another incident involving carrying a loaded firearm and another bank robbery, not the Hughes robbery. (3CT 888-893 11RT 2208-2213.) A defendant's failure to object on any ground to the admission of unadjudicated criminal activity at trial results in forfeiture of any such claims on appeal. (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1052.) In any event, appellant's claim is meritless.

Here, on appeal, appellant raises the following arguments that Guardino's identification was unreliable: (1) his photo display identification was unreliable because it was predicated on a composite and television viewing; (2) the initial identification occurred about two years after viewing the assailant for two seconds; and (3) Guardino's description of appellant having a mole was inaccurate. (AOB 270-271.) The claims lack merit.

In evaluating whether the admission of identification evidence violates due process, courts first examine whether the identification was the result of an unduly suggestive identification procedure, and, in the event there is an unduly suggestive procedure, then evaluates whether the identification was nevertheless reliable under the totality of the circumstances. (*People v. Gonzalez, supra*, 38 Cal.4th at p. 942.) Appellant has not demonstrated that Guardino's identifications were the result of any unduly suggestive identification procedure. As noted above (see Arg. V, *ante*), the viewing of a composite drawing of a suspect prior to an identification procedure does not necessarily render that procedure impermissibly suggestive. (*People v. Cook, supra,* 40 Cal.4th at pp. 1354-1355; see also *United States v. Dearinger, supra*, 468 F.2d at pp. 1035-1036.) Further, appellant has not shown that Detective

Waack or any other police officer explicitly or implicitly expressed to Guardino that he should select any photograph in any display, or any person in any lineup for any reason. Also, there is no indication from the record that the viewing of the composites contributed to Guardino's subsequent identifications of appellant. (See *People v. Rodrigues, supra*, 8 Cal.4th at pp. 1162-1163, 1165-1166 [no due process violation from loss of photo lineups where record did not indicate that witness's identifications from those lineups contributed to subsequent identifications].)

In any event, appellant's arguments that Guardino's identifications were unreliable should be rejected. Guardino was certain of his identifications. Notably, when Guardino first identified appellant from the six-pack display shown to him on November 13, 1989, Guardino wrote on that display, "This is the person who shot me. I remember the eyes. There is no doubt in my mind." (11RT 2256.) Further, appellant's argument that Guardino's description of the shooter was not consistent with that of appellant because appellant did not have a mole should be rejected in light of Guardino's testimony that he told the police that the mole may have been a sight on the gun. (11RT 2291.) In addition, Guardino's description of the shooter as between five feet eight to ten inches tall, between 160 to 170 pounds, light complected, with a mustache, wearing a dark cap, dark jacket, and dark pants, and in his late 20's to early 30's (11RT 2266) was consistent with that of other witnesses. For example, Hughes Market Robert Davis described the shooter as about five feet seven to nine inches tall, wearing a hairpiece, approximately 20 to 25 years old, with a mustache, and wearing a watch cap or knit cap. (12RT 2420-2427.) This description was consistent with Guardino's description of appellant.

Also, any error was harmless. This Court evaluates penalty phase errors under the reasonable possibility standard (whether there is a reasonable possibility the error affected the verdict), which effectively the same standard

for reviewing federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. (*People v. Wilson, supra,* 43 Cal.4th at p. 28; *People v. Gonzalez, supra,* 38 Cal.4th at pp. 960-961; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.)

In *People v. Barnett* (1998) 17 Cal.4th 1044, 1172, the prosecution failed to present evidence that the defendant was the person identified by a victim as her rapist in a prior crime. This Court found reversal of the death judgment was not warranted, reasoning:

> Significantly, the jury was expressly instructed that it could not consider such evidence unless the offense was proved beyond a reasonable doubt. In light of such instruction, it is not reasonably possible that a rational jury would have permitted inconclusive evidence connecting defendant with the alleged rape to cause it to impose the death penalty, when the evidence failed to show his identity as the rapist. [Citations.]

(*Id.* at pp. 1172-1173.)

The *Barnett* opinion additionally reasoned that in light of other evidence of the defendant's substantial criminal history that was properly admitted, and the circumstances of the charged offenses, it was not reasonably probable the jury would have reached a different verdict had it not heard evidence of the rape for which there was insufficient evidence of the defendant's identification.

For the same reasons set forth in *Barnett*, any error in the admission of the Hughes robbery does not warrant reversal of the death verdict in this case because it is not reasonably probable the jury would have reached a different verdict had it not heard evidence concerning that robbery.

The trial court instructed that before a juror could consider evidence of any of appellant's prior criminal acts as an aggravating circumstance, that the juror must first be convinced beyond a reasonable doubt that appellant committed those acts. (13RT 2743; 4CT 925.) In light of this instruction, even

if Guardino's identification of appellant was insufficient to establish appellant committed the Hughes crimes, it is not reasonably possible that a rational jury would have permitted such evidence to cause it to impose the death penalty.

Further, there was substantial and significant other penalty phase aggravating evidence. The prosecution presented other evidence of appellant's violent criminal activity, including his possession of a loaded firearm, the circumstances of which showed he repeatedly made movements toward the gun when stopped by a deputy sheriff (11RT 2298-2305), his robbery of Hojatola Bouroumand, in which appellant shot off three of Bouroumand's fingers and in which appellant pled guilty to second degree robbery (11RT 2305-2315), and appellant's arrest for the robbery of C.J. Market almost immediately following that crime (12RT 2320-2329, 2342-2352). Additionally, the circumstances of the murder of Rooney showed callousness on appellant's part. Finally, there was evidence of how the murder of Rooney impacted Rooney's widow.

In light of the instructions, given the other evidence of appellant's criminal activity, and the circumstances of the murder of Rooney, there is no reasonable possibility appellant would have received a more favorable result had evidence of the Hughes Market crimes been excluded. For the reasons state above, appellant's claim of federal constitutional error is baseless and must be rejected.

XI.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING THE CIRCUMSTANCES OF APPELLANT'S PRIOR CONVICTION FOR MISDEMEANOR POSSESSION OF A LOADED FIREARM UNDER SECTION

Appellant contends his conviction for misdemeanor possession of a loaded firearm in a public place did not amount to criminal activity involving force or violence or the threat of force of violence, and thus evidence regarding the facts surrounding that conviction was not permissible under section 190.3, subdivision (b). (AOB 272-279.) The contention is meritless.

A. Relevant Background

Appellant had a June 25, 1988, misdemeanor conviction of carrying a loaded firearm in a public place. (4CT 980; see 3CT 981, 983.) Appellant made a motion to strike that evidence in aggravation, specifically arguing that the June 25, 1988 incident of "carrying a loaded firearm in a public place" was inadmissible. (3CT 888-889.) At the hearing on the motion, the prosecutor argued this incident "shows violent activity or violent conduct" and was admissible under section 190.3, subdivision (b). Defense counsel Ramirez argued "there was no violence exhibited" by appellant in that incident. (11RT 2208-2210.)

The trial court responded, "If that officer hadn't told [appellant] to keep his hands in front of him, there's every reason to believe that would be a dead officer." (11RT 2210.) The trial court stated that if the evidence showed only that a weapon was recovered from appellant during a pat-down search following a detention, the incident would be inadmissible. The trial court noted, however, that according to the police report, following a detention of appellant and several other men, appellant told the officer, "We're not doing anything," offered to show his identification, and reached for his back left

pocket, which contained the loaded gun. The trial court ruled such conduct would be admissible. (11RT 2210-2211.)

Defense counsel Ramirez argued that appellant was left-handed and was merely reaching for his identification. (11RT 2210-2212.) The trial court responded:

> What [appellant] knew, and the officer did not know at the time, [appellant] knew that the pocket he was reaching for contained a weapon. And the officer would have the drop on him. [¶] [Appellant], if he succeeded in reaching back there and getting that weapon, would have had the drop on the officer. And I think that the jury is entitled to evaluate that. And you can argue everything you're saying now to the jury.

(11RT 2212.) The trial court ruled appellant's conduct was admissible. (11RT 2212.)

During the penalty phase, Deputy John Kuhn testified that on June 25, 1988, he responded 208th Street in Lakewood and noticed an unoccupied car mentioned in a dispatch. Four males, including appellant, approached. Deputy Kuhn told them to put their hands on his patrol car. Appellant did not comply, said Deputy Kuhn was harassing them, said he had identification, and reached for his left back pocket several times. Deputy Kuhn displayed a gun to appellant and told appellant he would shoot appellant if appellant reached for his pocket again. Appellant put his hands on the patrol car, and after a back-up officer arrived, Deputy Kuhn searched appellant and recovered a loaded revolver from appellant's left rear pants pocket and appellant's driver's license from his right rear pants pocket. (11RT 2298-2305.) Evidence that appellant had a misdemeanor conviction for this conduct was not presented at trial.

B. Analysis

Section 190.3, subidivision (b) permits the admission of evidence of

"[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."

Appellant first contends that there was insufficient evidence to prove that he had any intent of using the loaded handgun. (AOB 275-276.) The argument is meritless. Here, the evidence showed that appellant offered to show Deputy Kuhn his identification, and repeatedly reached for his left back pocket, where appellant was carrying a loaded revolver, but that appellant's identification was in his right back pocket. (11RT 2298-2304.) Such evidence was more than sufficient to show appellant had the intent to use the handgun.

Appellant next contends that his conviction for possession of a loaded firearm does not involve force or violence or the threat of violence. (AOB 276.) That argument is also meritless.

This Court has held "the criminal character of defendant's possession of knives and firearms, and the evidence of defendant's use of those or similar weapons to commit crimes, is sufficient to permit a jury to view his possession as an implied threat of violence." (*People v. Michaels* (2002) 28 Cal.4th 486, 536; see also *People v. Quartermain* (1997) 16 Cal.4th 600, 631 [possession of sawed-off firearms and silencer materials carries an implied threat of violence because their obvious purpose is to harm human beings].) The factual circumstances of a defendant's possession of a weapon may be considered in determining whether the possession involved an implied threat of force or violence. (*People v. Jackson, supra,* 13 Cal.4th at p. 1235.)

In *Michaels,* this Court noted a line of cases in which it held that possession of a weapon in a custodial setting where any possession is illegal involves an implied threat of violence, even if there was no evidence the defendant used or displayed the weapon. (*People v. Michaels, supra,* 28 Cal.4th at p. 535; see *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589; *People v.*

Harris (1981) 28 Cal.3d 935, 962-963.)

The *Michaels* opinion also noted several cases discussing possession of weapons in a noncustodial setting as implied threats under section 190.3, factor (b). *Michaels* noted that in *People v. Belmontes* (1998) 45 Cal.3d 744, 809, this Court found error in the admission of evidence that the defendant had a handgun in his waistband. *Michaels* distinguished *Belmontes*, stating "*Belmontes* turned on the fact that the conduct there was not criminal" and the defendant's possession of a handgun was not directed at a particular victim. *Michaels* noted that in that case, "[b]y contrast, here in each instance defendant's possession was illegal." (*People v Michaels, supra,* 28 Cal.4th at p. 536.)

Here, the trial court properly admitted evidence of appellant's criminal possession of a loaded firearm. First, evidence of that incident did not show appellant's mere possession, but, as set forth above, the circumstances showed a clear intent on appellant's part to use that firearm against Deputy Kuhn. Second, appellant relies upon *Belmontes* in support of his contention that mere possession of a firearm of a gun in a non-custodial setting is not admissible under section 190.3, subdivision (b) (AOB 276-277), but that case is clearly distinguishable. Unlike *Belmontes*, appellant's possession of the firearm and his repeated attempts to reach for it in this case were directed at a particular victim, Deputy Kuhn. Further, appellant's possession of the firearm was clearly illegal.

In any event, any error in admitting evidence of appellant's misdemeanor firearm possession was harmless. Extensive evidence was presented at the penalty phase regarding appellant's use of firearms to commit crimes, including his robbery of Hotajola Bouroumand in which appellant shot him (11RT 2305-2315), appellant's robbery of a Hughes Market in which he shot store Guardino in the head (11RT 2254-2255), and appellant's attempted robbery of

Reynolds's van at the C.J. Market, in which appellant shot at Reynolds (12RT 2342-2345.) Further, appellant was free to present evidence to the jury that his possession of the firearm during his detention by Deputy Kuhn was not for criminal violence. (See *People v. Michaels, supra*, 28 Cal.4th at p. 536.) In these circumstances, there was no reasonable possibility that, absent admission of the facts regarding appellant's misdemeanor firearm possession, there would have been a different verdict. (*People v. Wilson, supra.* 43 Cal.4th. at p. 28; *People v. Gonzalez, supra,* 38 Cal.4th at pp. 960-961.)

Finally, appellant's claims of federal constitutional error (AOB 278) should be rejected. First, the record does not reflect that appellant raised any federal constitutional objections to the admission of the possession of a firearm incident involving Deputy Kuhn. (11RT 2208-2210; 2298; 3CT 892-893.) As such, appellant has forfeited any such claims by failing to raise them at trial. (*People v. Jackson, supra*, 13 Cal.4th at 1236, fn. 18.) In any event, since the claim involves only state law, under which there was no error, any claim of federal constitutional error is meritless. (*Ibid.*)

XII.

THE PROSECUTOR DID NOT ASK THE JURY TO DRAW INFERENCES OF LACK OF REMORSE FROM APPELLANT'S FAILURE TO TESTIFY; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant contends the prosecutor violated his right to due process by asking the jury to draw inferences of lack of remorse from appellant's failure to testify. (AOB 279-282.) The claim should be rejected.

In closing argument, the prosecutor stated the following:

> But the bottom line is a lot of victims came up and testified. And these were people, some of them, there was no question but that the defendant had shot them, had done things to them. And he sat there the whole time as he sits there now, and he doesn't care. He isn't remorseful in the slightest.

(13RT 2705.)

Defense counsel Ramirez objected. The trial court stated, "I think that's very much on the border. I would avoid that if I were you." (13RT 2705.)

A prosecutor is entitled to argue the lack of any evidence of remorse, but may not argue that a defendant's failure to take the stand at the penalty phase demonstrates lack of remorse. (*People v. Lewis* (2001) 2 Cal.4th 610, 673-674; see also *People v. Monterosso* (2004) 34 Cal.4th 743, 768; *People v. Melton* (1988) 44 Cal.3d 713, 757-758.) Here, the prosecutor did not tell the jurors that appellant's failure to testify showed his lack of remorse. (Compare *People v. Coleman* (1969) 71 Cal.2d 1159, 1168.) The prosecutor argued appellant "doesn't care" based on how appellant "sat there" and "sits there now." (13RT 2705.) Considered in context, the most reasonable interpretation of the prosecutor's statements was that she was commenting on appellant's demeanor in the courtroom when the victims of his crimes testified on the witness stand, not on appellant's failure to testify. (See *People v. Valencia* (2008) 43 Cal.4th

268, 307-308 [prosecutor may properly comment on a defendant's demeanor in court].)

In any event, any error was harmless. A prosecutor's "brief and solitary" suggestion that a defendant should have testified and expressed remorse at the penalty phase may be found to be harmless. (*People v. Boyette* (2002) 29 Cal.4th 381, 455-456; see *People v. Bradford, supra,* 15 Cal.4th at p. 1340.) Here, the prosecutor's comments were brief. Appellant even states the prosecutor's comments were "singular." (AOB 280.) Further, the jurors were instructed to not consider appellant's failure to testify at the penalty phase. Specifically, the jurors were instructed with CALJIC Nos. 2.60 and 2.61 as follows:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.
>
> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the allegations brought against him in this phase of the trial. No lack of testimony on the defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such evidence.

(13RT 2738; 4CT 918-919.) The jurors were also instructed at the guilt phase that the statements of the attorneys was not evidence. (11RT 2148; 3CT 791.)

In light of the indirect, brief, and mild nature of the prosecutor's statements which were unlikely to have been construed as referring to appellant's failure to testify, and in light of the instructions set forth above, there was no reasonable possibility that the prosecutor's statement affected the jury's death verdict. (*People v. Wilson, supra,* 43 Cal.4th at p. 28; *People v.*

Gonzalez, supra, 38 Cal.4th at pp. 960-961.) A prosecutor's brief comment that improperly touches on a defendant's right to not testify at the penalty phase does not deprive a defendant of his federal constitutional rights to a fundamentally fair trial and a reliable penalty determination. (*People v. Boyette, supra*, 29 Cal.4th at p. 456, fn. 16.)

XIII.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SEVER THE BOYS COUNTS FROM THE LUCKY'S COUNTS

Appellant contends the trial court violated state and federal law by using the wrong standard in denying appellant's motion to sever two charges. (AOB 283-294.) The claim lacks merit.

A. Relevant Background

Appellant filed a pre-trial motion to sever two counts related to the Boys Market robbery from the counts relating to the Lucky's Market crimes. Appellant argued that severance was proper because the evidence as to both sets of crimes was not cross-admissible, and there was the danger of "spill-over," in that the jury might consider evidence from both sets of crimes and convict appellant based on his predisposition to commit grocery market robberies. (2CT 479-502.)

On February 18, 1992, the court held a hearing on appellant's severance motion. The trial court noted it had read the parties's moving papers. The trial court heard argument from the parties, including the defense's arguments that the evidence was not cross-admissible, that a weak case (the Boys case) was joined with a strong case, that the Lucky's crimes were inflammatory, and that the non-capital Boys case was being joined with the capital Lucky's crimes. The court denied the motion to sever. (2RT 202-223.)

B. The Trial Court Did Not Abuse Its Discretion

Section 954 provides a trial court may consolidate two or more offenses of the same class for trial and the law prefers consolidation of charges. (*People v. Manriquez* (2005) 37 Cal.4th 547, 574.) Here, all of the offenses charged as to the Lucky's and Boys crimes (murder, attempted murder, robbery, assault)

belonged to the same class of crimes because each offense involved a common element of assault on the victim. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243; see also *People v. Balderas* (1985) 41 Cal.3d 144, 170.) Where, as in the instant case, the statutory requirements for joinder are satisfied, a defendant must make a clear showing of prejudice to establish the trial court abused its discretion in denying his motion for severance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160-161.)

An appellate court reviews the denial of a motion for severance under the abuse of discretion standard, assessing the trial court's use of discretion in light of the facts known and showings made at the time of the motion. (*People v. Musselwhite, supra,* 17 Cal.4th at p. 1244; *People v. Arias, supra,* 13 Cal.4th at p. 127.) The party seeking severance bears the burden of demonstrating an abuse of discretion. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.)

Courts have relied upon the following factors in determining whether denial of severance constitutes an abuse of discretion: (1) whether evidence of the offenses would be cross-admissible in separate trials; (2) whether some charges are unusually likely to inflame the jury; (3) whether a weak case has been joined with a strong case or another weak case, so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) whether any one of the charges carries the death penalty or joinder of the charges converts the case into a capital proceeding. (*People v. Bradford, supra,* 15 Cal. 4th at p. 1315; *People v. Marshall* (1997) 15 Cal.4th 1, 27-28.)

1. The Trial Court Applied The Correct Standard

Appellant first contends the trial court used the wrong standard in denying his motion to sever, arguing the trial court failed to apply the correct factors and instead used standards applicable to dismissal of charges for insufficiency of the evidence. (AOB 287-288.) The contention is meritless.

The record clearly shows the trial court considered the appropriate factors regarding severance. In this regard, the trial court specifically noted it had read appellant's severance motion, which included the applicable factors. (2RT 202; see 2CT 479-502.) Additionally, at the hearing on the severance motion, counsel Ramirez stated the trial court needed to consider a "four-prong test" and discussed each of the applicable factors (cross-admissibility, joining a weak case with a strong case, whether some charges were inflammatory, and whether one of the cases involved the death penalty). (2RT 203-204, 210-211.) Indeed, the issue of a possible motion to dismiss charges based on insufficiency of the evidence or the prosecution's destruction of evidence was raised by the defense. (2RT 204-205.) Also, the trial court noted that a possible motion to dismiss was an issue "that's not before me." (2RT 222.) In light of the foregoing, appellant's argument that the trial court used the wrong standard in denying his motion to sever should be rejected.

2. Cross-Admissibility

Appellant contends evidence of the Boys and Lucky's crimes were not cross-admissible. (AOB 288-291.) However, jointly charged offenses need not be cross-admissible in order to be joined for trial. (Section 945.1; *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1284.) In light of section 945.1,

> "the sole question upon review of the denial of a motion for severance is whether the prejudice to the defendant from joinder of the cases outweighed the benefits. [Citation.]"

(*People v. Hill* (1995) 34 Cal.App.4th 727, 734-735.)

Further, the absence of cross-admissibility does not by itself demonstrate prejudice; rather, the additional three factors used in determining whether a trial court abused its discretion in denying a motion to sever must be examined. (*People v. Mendoza, supra*, 24 Cal.4th at p. 161.) When those other three factors are examined, it becomes clear that the trial court was well within its

discretion in denying appellant's severance motion.

3. Inflammatory Charges

Appellant next asserts joinder of the charges inflamed the jury because it permitted the prosecutor to argue that appellant had the ability to procure numerous guns, and speculate that appellant was a "dangerous, sophisticated criminal." (AOB 289-290.) This claim should be rejected.

Appellant must demonstrate the evidence pertaining to one of the offenses was "significantly more inflammatory" than evidence in the other offenses (*People v. Jenkins* (2000) 22 Cal.4th 900, 949) or an "extreme disparity" existed between inflammatory and noninflammatory offenses (*Belton v. Superior Court, supra,* 19 Cal.App.4th at p. 1284). Appellant fails to make this showing. Indeed, appellant presents no argument that one set of crimes was more inflammatory than the other. (AOB 289-290.) Further, because all of the offenses involved assaultive behavior and were of a similar class, "[i]f one [offense] was inflammatory, all were." (*People v. Memro, supra*, 11 Cal.4th at p. 851.)

Moreover, appellant improperly relies upon the prosecutor's arguments to the jury in arguing the trial court abused its discretion in denying his motion to sever. This Court reviews a trial court's denial of a motion to sever based on the record when the motion was heard. (*People v. Cook* (2006) 39 Cal.4th 566, 581.) Here, appellant's motion to sever was made pre-trial, before any arguments were made to the jury. Moreover, the comments appellant complains of were made during the penalty phase (AOB 290, citing 13RT 2691-2696), and thus those comments had no role in inflaming the jury in its consideration of appellant's guilt of the charges.

4. Joining of Weak Cases

Appellant further argues the joinder of the charges prejudiced him

because it permitted the linking of two weak cases, specifically arguing the identification evidence as to both cases was weak. (AOB 25-27.) This contention is meritless.

As a preliminary matter, the argument appellant makes on appeal differs from the argument than that he presented to the trial court. Appellant argued below that "[the Boys case] is a weak case joined with a strong case [Lucky's] in that that's an uncorroborated, one-witness identification case wherein it's bringing it in with a - death penalty case, which presents a stronger case because that case has some corroboration." (2RT 204; see 2RT 210 [same].) Appellant's current argument should be rejected, as that was not the claim presented to the trial court. (See *People v. Cook, supra*, 39 Cal.4th at p. 581 [denial of severance motion is based on record at time the motion was heard].)

Moreover, evidence known to the trial court when it ruled[28] showed appellant's guilt on all the charged offenses was strong. At the preliminary hearing, Detective Yarbrough testified Delaguila identified appellant from a phot display, that she identified him at a previous court hearing, and that she knew him from working at Courtesy Cleaners. (1CT 33-38, 48-51, 62-64.) Also, at the preliminary hearing, Inglewood Police Sergeant Percy Roberts testified Irvine identified appellant at a prior court hearing. (1CT 56-58.) The evidence as to the Boys crimes was not "weak" simply because Irvine was the only eyewitness. (See, e.g., *People v. Mendoza, supra,* 24 Cal.4th at p. 161

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28. In addition, the evidence at trial showed that, as to the Lucky's crimes, appellant was identified by six eyewitnesses. (5RT 954 [Fiamengo]; 853-854, 866 [Lindsey]; 6RT 1021 [Pitzer], 990-991 [Martins], 1049-1051 [Delaguila]; 7RT 1150-1151 [Diehl].) In particular, Delaguila recognized appellant because she had seen him regularly at her previous job. (6RT 1046-1051.) Moreover, appellant's fingerprints were in the getaway vehicle used in the Lucky's crimes. (7RT 1187-1195, 1245-1258.) As to the Boys crimes, the evidence at trial showed Irvine identified appellant at trial, at the preliminary hearing, and from a photo lineup. (8RT 1438-1443.)

["strong evidence" included, as to one case, the victim's identifications of defendant from a photo lineup, live lineup, and at the preliminary hearing, and, as to another case, two victims' identification of defendant].) Since the evidence as to both the Lucky's and Boys Market crimes was strong, there was little danger that a stronger case would be used to bolster the weaker case. (*People v. Jenkins* (2000) 22 Cal.4th 900, 949; *People v. Bradford, supra*, 15 Cal.4th at p. 1318.)

5. Capital Case Considerations

Joinder of the separate incidents did not result in making the matter a capital case. Here, the capital charges were not the result of joinder of the various incidents, but were the result of the offenses charged as to the Lucky's market crimes (robbery-murder). Moreover, "joinder of a death penalty case with noncapital charges does not by itself establish prejudice. [Citation.]" (*People v. Marshall, supra*, 15 Cal.4th at p. 28.) Joinder is proper in such cases where the evidence is so strong as to each charge that consolidation is unlikely to affect the verdict. (*People v. Manriquez, supra*, 37 Cal.4th at pp. 574-575.) As previously noted, the evidence as to both the Boys and Lucky's charges was strong.

In sum, appellant has not demonstrated that the potential for substantial prejudice from joinder of the charges outweighed the benefits of joinder to the state, nor has he shown the trial court's denial of his motion to sever was unreasonable. Accordingly, the trial court's denial of appellant's motion to sever was not an abuse of discretion.

6. Due Process

Finally, appellant contends joinder resulted in a denial of his right to due process under the state and federal constitutions. (AOB 293-294.) In a declaration attached to appellant's severance motion, defense counsel Ramirez

stated "it is this declarant's strong belief that Defendant will be denied a fair trial unless this severance is granted." (2RT 501.) However, appellant did not set forth any argument explaining why joinder violated due process, and did not argue any constitutional grounds during the hearing on his motion. This Court should deem the constitutional claim forfeited. The failure to press for a ruling on an issue constitutes a forfeiture of the issue on appeal. (*People v. Pinholster, supra,* 1 Cal.4th at p. 931; see also *People v. Catlin, supra,* 26 Cal.4th at p. 162.)

Even assuming appellant's claim that joinder resulted in a due process violation is cognizable on appeal, the claim is meritless. "A reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*People v. Mendoza, supra*, 24 Cal.4th at p. 162.) Appellant has failed to demonstrate that joinder actually resulted in any gross unfairness; indeed, he only argues that joinder allowed the prosecutor to use "speculation and inference" (AOB 293), apparently referring to the prosecutor's argument that appellant used different weapons in both sets of crimes. That claim is meritless. As noted above, the comments referred to by appellant were arguments the prosecutor made during the penalty phase (13RT 2691-2696); appellant identifies no arguments made to the jury during the guilt phase of his trial. Thus, appellant has failed to demonstrate that joinder resulted in gross unfairness in the jury's determination of his guilt.

Assuming the trial court erred in denying the motion to sever, the evidence of each charge was strong and none was inflammatory as to the others as discussed above. Accordingly, any error was harmless, since it is not reasonably probable that appelalnt would have received a more favorable result if the Boys and Lucky's charges had been tried separately. (People v. Manriquez, supra, 37 Cal.4th at p. 576.)

XIV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL BASED ON THE PLACEMENT OF A BOX ON THE PROSECUTOR'S COUNSEL TABLE; THERE WAS NO PROSECUTORIAL MISCONDUCT

Appellant contends the trial court erred by failing to grant a mistrial when the prosecutor placed a box at counsel table which displayed a list of alleged crimes and crime locations. (AOB 295-300.) The claim is meritless.

A. Factual Background

On the second day of the guilt phase trial, counsel Ramirez made a motion for mistrial on the ground that the prosecutor had left a box on her table "that has got the label which basically states, witnesses; Lucky's, L.A.S.O; Boys, Inglewood; Hughes, L.A.P.D.; San Bernardino, Los Angeles, Bellflower, and Long Beach." Counsel Ramirez stated the box had been on the prosecutor's table in a position where the jurors could see it when entering or exiting the jury box, and where some jurors could possibly see it while seated in the jury box. Counsel Ramirez argued that one juror who was the wife of a Los Angeles Police Department Homicide detective knew what "L.A.P.D." stood for. Counsel Ramirez argued, "I think that's highly prejudicial." (6RT 1015.)

The prosecutor responded that there were two names on the box, a line, and a series of locations. She argued the following:

> And counsel is asking -- making this motion on the jury speculating what this means, which they could never understand from reading the front of this box.
>
> What he is -- his concerns are, he knows the case, knows what this is all about. He is putting his interpretations into the plain words, Lucky's, Boys, Hughes, and then the city San Bernardino, Los Angeles,

Bellflower, Long Beach. There is no way that the jury is going to know what that is all about.

(6RT 1015-1016.) The prosecutor also argued that the jurors could not see the box because she was sitting in front of it, and that the only jurors who could possibly see the box were seated at one end of the jury box, where the juror whose husband was an L.A.P.D. officer was not seated. (6RT 1016.)

Counsel Ramirez responded that there were two alternate jurors who were seated about five feet away from the box, and that the box had labels that included "L.A.S.O." and "L.A.P.D." (6RT 1016.)

The trial court stated that the prosecutor had acted "thoughtless[ly]" in labeling the box, "but I don't think it rises to the level of having to mistry the case." (6RT 1016-1017.) The trial court stated it could give the jurors a cautionary instruction that if they had observed anything on counsel table, to not draw any inferences from it. The trial court noted, however, that such an instruction "might just exacerbate the situation by trying to instruct them on something that probably the majority of the jurors haven't even noticed or paid attention to." (6RT 1017.) The trial court ordered the box to be taken out of the courtroom, stating the prosecutor could put the materials in another container. The defense did not request a cautionary instruction. (6RT 1017.)

B. No Abuse Of Discretion In Denying The Mistrial Motion

Appellant's claim that the prosecutor's placement of the box at counsel table violated his federal constitutional rights (AOB 295) should be rejected because appellant did not raise any such claim in the trial court (6RT 1015-1017). (*In re Josue S., supra,* 72 Cal.App.4th at p. 168, 170; *People* v. *Neal, supra,* 19 Cal.App.4th at p. 1118.)

This Court reviews a trial court's ruling on a motion for mistrial under the abuse of discretion standard. (*People v. Burgener, supra,* 29 Cal.4th at p. 873; *People v. Welch, supra,* 20 Cal.4th at p. 749.) "[A] mistrial should

granted only when a party's chances of receiving a fair trial have been irreparably damaged. [Citation.]" (*People v. Burgener, supra*, 29 Cal.4th at p. 873, internal quotation marks omitted.)

Here, appellant has failed to demonstrate that his chances of receiving a fair trial were irreparably damaged by the prosecutor's placing of the box on her counsel table. As noted by the trial court, "probably the majority of the jurors haven't even noticed or paid attention to [the labels]." (6RT 1017.) Appellant provides only speculation that any of the jurors actually saw the labels on the box. Even if any of the jurors saw the labels, appellant has not demonstrated that any of the jurors would have understood those labels to mean that appellant had committed additional crimes at those locations and thus should be convicted in this case regardless of the evidence presented.

Moreover, the jurors were instructed with CALJIC No. 1.00, prior to deliberations on the guilt phase, that in deciding the case, they "determine the facts from the evidence received in the trial and not from any other source." (1CT 788; 11RT 2147.) It is presumed the jurors followed this instruction. (*People v. Smith, supra,* 40 Cal.4th at pp. 517-518; *People v. Holt* (1997) 15 Cal.4th 619, 662.) Thus, it follows that the jurors, even if they saw the labels on the box, did not consider those labels in determining appellant's guilt. As such, the trial court did not abuse its discretion in denying appellant's mistrial motion.

C. Any Prosecutorial Misconduct Has Not Been Preserved For Appellate Review, And In Any Event Is Meritless

Appellant also contends the prosecutor committed misconduct by placing the box on counsel table. (AOB 300-302.) Appellant has forfeited this claim, and in any event, the claim is meritless.

Appellant did not object on grounds of prosecutorial misconduct and did not request a curative admonition (6RT 1015-1017) and thus has forfeited the

claim. (*People v. Williams, supra,* 16 Cal.4th at p. 255; *People v. Hardy, supra,* 2 Cal.4th at p. 171.) In any event, appellant's claim is meritless for the reasons set forth above. That is, that any juror saw the labels, then interpreted the labels as meaning that appellant was being investigated for other crimes, and thus should be convicted in this case regardless of the evidence, is based on speculation. Further, there was no prejudice since the jury was instructed with CALJIC No. 1.00 and it is presumed none of the jurors would have considered the labels on the box in determining appellant's guilt. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1020; *People v. Bradford, supra,* 15 Cal.4th at p. 1337.)

XV.

THE TRIAL COURT WAS NOT REQUIRED TO SUSPEND PROCEEDINGS TO DETERMINE APPELLANT'S MENTAL COMPETENCY TO STAND TRIAL; THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL AND REQUEST FOR INDIVIDUAL VOIR DIRE OF THE JURORS FOLLOWING APPELLANT'S MISCONDUCT IN THROWING APPLES AT THE COURT AND JURY

Appellant contends his "self-destructive" behavior at both the guilt and penalty phases of his trial required the trial court to order a mental competency examination to assess his ability to proceed. Appellant also contends the trial court should have granted a mistrial or conducted an individual inquiry of the jurors following appellant's assault on the court and the jurors, violating various state and federal constitutional provisions. Appellant also contends the trial court improperly allowed the jurors to consider his courtroom misconduct in determining penalty. (AOB 310-327.) The claims are meritless.

A. Factual Background

During the defense portion of the guilt phase proceedings, appellant stood up and threw three apples. After a recess, and out of the presence of the jurors, the trial court stated that appellant had been "very well behaved" and had "acted appropriately in court at all times" throughout the pretrial and trial proceedings. The court stated it was disappointed in appellant's actions. The court explained that appellant threw one apple at the court and two apples at the jury, striking two jurors. (10RT 1096.)

The trial court noted that one of the jurors was "extremely upset" and it had been reported that she appeared to "hyperventilating and is close to hysteria." The trial court stated that juror may not be able to complete that morning's trial session, and the trial may have to be delayed. (10RT 1907.) The trial court also stated that the jurors would be told that appellant would be

placed in restraints, in order to reassure them that appellant would not be able to throw anything at them. (10Rt 1907.) The trial court also told appellant:

> The reason I am particularly disappointed is that I don't think it needs to be said that, certainly, you don't help your cause in any way by this sort of conduct that, of course, is totally unacceptable with anybody. And, certainly, as far as the jurors are concerned, it could do nothing but possibly alienate them against you. But that's a fact of your own creation.
>
> I am not going to declare a mistrial or upset these proceedings because of your misconduct; but I must warn you if there is any outburst on your part, or if there is any further misconduct, then you will be excluded from the courtroom. We will set up an audio system where you can hear the proceedings in the anteroom, but you will not be allowed in the courtroom.

(10RT 1907.)

The trial court stated it would, in appellant's absence, ask the jurors if they could continue with the proceedings. Counsel Ramirez requested that the trial court ask each juror whether they could continue, and whether they could be fair and impartial. The trial court refused, stating:

> I will give them an appropriate instruction. But I'm not going to conduct an inquiry at this time that could result in aborting these proceedings, simply because I feel that that would then accomplish exactly the only fathomable purpose of this conduct, which was to do just that. And I'm not going to let that ploy succeed. So I will make no such inquiry.
>
> But I will appropriately instruct the jurors that they must decide the case on the evidence, and not on this piece of conduct in the courtroom.

(10RT 1909.)

The trial court again stated it would only ask the jurors if they could continue. The trial court stated it would instruct the jurors "and include in the package [of instructions] an appropriate instruction on this subject." (10RT 1909-1910.)

Appellant said, "This is shit." Appellant was escorted from the courtroom. (10RT 1910.)

The trial court noted appellant had made a vulgar comment and told counsel Ramirez that appellant was "very close to being excluded" from trial. The trial court stated, "I'm not about to have a mistrial because of the fact that he decides after all this evidence that he is going to try to abort the proceedings by misbehaving himself." (10RT 1910.)

The jurors were brought back into the courtroom. The trial court told them that appellant would be put under full restraints that would prevent him from throwing anything at the jurors or "do anything that could in any way bring him close to any of you." The trial court then told the jurors:

> The next thing that I must tell you is -- which is, I think, a matter of common sense. But it needs to be said. And I'll say it again in the general instructions to you: that you must decide this case from the evidence that you hear in the courtroom. And the evidence that you receive are the exhibits that have been marked and that you will receive for your use in the courtroom, and the sworn testimony that came from this witness stand, not from anything else.
>
> You must not take into consideration the conduct of the defendant in this courtroom in this incident that happened this morning where the defendant threw some apples in the direction of the jury, or at the jury, and at the judge, as deciding the question of guilt or innocence.
>
> And it must not in any way affect your decision. Because you must decide the question of guilt or innocence based on the witnesses,

evidence that you've heard, the witnesses that you've heard testify so far and that you will continue to hear in this case.

And it would be very improper for you to decide the case and decide because the defendant acted improper in the courtroom that you should therefore use that as a criteria for deciding the case. Because obviously that isn't the proper criteria.

(10RT 1911-1912.)

The trial court asked whether the jurors could continue with the case; none of them indicated that they needed a recess. Counsel Ramirez asked and received a ten minute recess so that he could "talk to [appellant] and avoid him having to be shackled or excluded from – I mean gagged or excluded from the proceedings."

(10RT 1913.)

During the penalty phase of the trial, the trial court stated it understood appellant wished to waive his right to wear civilian clothing, and wanted to wear "county jail blues." The trial court asked appellant whether that was right. Appellant responded, "That's correct." (11RT 2207.) The defense also made a motion to impanel a new penalty phase jury. The trial court denied the motion, stating:

And as far as asserting the defendant's misbehavior as a ground[] for discharging the jury, I think that the jury was adequately instructed. And in view of the time of the deliberation, the thoughtful deliberation that was given in this matter by the trial jury, there's no basis to believe that they decided it on the basis of the defendant's in-court conduct. So again, the motion is denied.

(11RT 2208.)

Subsequently, counsel Stein stated "for the record" that he had advised appellant not to wear eyeglasses at trial, but that appellant had "insisted upon

wearing them." Appellant stated, "What problem is it? They're prescription lens eyeglasses." The court responded that appellant's counsel were upset because the glasses were "very similar to those described by the witnesses [who described appellant]." The trial court stated it would not order appellant to not wear the eyeglasses. (12RT 2338.)

B. There Was No Substantial Evidence Of Mental Incompetency Requiring The Trial Court To Order A Mental Evaluation

Appellant contends that the trial court had a duty to order a mental status examination of him due to his throwing apples at the court and the jury, his refusal to wear civilian clothing, and his insistence on wearing eyeglasses that were similar to those described by the crime scene eyewitnesses as the ones worn by the assailant. (AOB 310, 314-315.) The contention is meritless.

Under the due process clause of the Fourteenth Amendment and state law, a criminal defendant cannot be tried while mentally incompetent. (*People v. Rogers* (2006) 39 Cal.4th 826, 846-847; § 1367, subd. (a); *Drope v. Missouri* (1975) 420 U.S. 162, 181 [95 S.Ct. 896, 43 L. Ed.2d 103].) A defendant is mentally incompetent if, due to a mental disorder, he or she is unable to understand that nature of the proceedings or assist counsel in the conduct of the defense. (§ 1367, subd. (a); see *Dusky v. United States* (1960) 362 U.S. 402, 402 [80 S.Ct. 788, 4 L.Ed.2d 824].)

Whenever a trial court becomes aware of substantial evidence which raises a reasonable doubt regarding a defendant's competence to stand trial, the court must suspend criminal proceedings and order a mental competency hearing. (*People v. Rogers, supra*, 39 Cal.4th at pp. 847-848; *People v. Alvarez* (1996) 14 Cal.4th 155, 211; § 1368.) In determining whether there is substantial evidence of a defendant's mental incompetence, a trial court must consider all of the relevant circumstances, including the defendant's demeanor and behavior. (*People v. Rogers, supra*, 39 Cal.4th at p. 847; *People v. Howard*

(1992) 1 Cal.4th 1132, 1164.) Where a defendant produces evidence regarding his present mental competence which is less than substantial, a trial court exercises its discretion whether to order a competence hearing. (*People v. Welch, supra*, 20 Cal.4th at p. 742.) A defendant is presumed to be competent to stand trial, which may be rebutted by a preponderance of the evidence. (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1418.)

Here, appellant's behavior was insufficient to raise a reasonable doubt as to his mental competence. None of appellant's actions indicated he did not understand the nature of the criminal proceedings or that he was unable to assist in his defense in a rational manner. That appellant threw the apples at the court and the jury and said "this is shit" after the court discussed his misbehavior, at most, showed he was frustrated with the way the trial was proceeding and was not able to manage his anger, not that he did not understand the nature of the proceedings. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1066 [defendant's complaints of unfairness did not show paranoid behavior and incompetency to stand trial, but rather "the course of trial evidently was not entirely to his liking"].) Further, that appellant made no further outbursts at trial after a recess in which counsel talked with appellant about his behavior (10RT 1913) shows appellant understood the nature of the proceedings and was able to assist in his defense. Additionally, that neither of appellant's trial attorneys raised any question regarding his mental competency is a strong factor showing appellant was mental competent to stand trial. (See *People v. Koontz, supra*, 27 Cal.4th at p. 1065.) In fact, when appellant asked to represent himself after the penalty phase, the court asked defense counsel if appellant had the ability to understand the issues in the case and counsel Ramirez replied, "He has always been rational and seems to understand everything that's going on. I have no reason to doubt that." (13RT 2770.)

Appellant's contention that his wearing of eyeglasses similar to those

described by eyewitnesses and his refusal to wear civilian clothing demonstrate "arguably suicidal behavior that warranted an competency evaluation" (AOB 310, 314) is similarly meritless. Those actions may have been some form of protest, but did not show appellant was mentally incompetent or suicidal. In any event, this Court has held that a defendant's preference for the death penalty and "death wish" does not alone constitute substantial evidence of mental incompetence requiring a mental health evaluation. (*People v. Ramos* (2004) 34 Cal.4th 494, 509.) Further, suicidal ideation, which is not accompanied by other indications of an inability to understand the proceedings or to assist counsel, does not constitute substantial evidence of incompetence. (*People v. Rogers, supra*, 39 Cal.4th at p. 848.)

C. The Trial Court Was Not Required Conduct Individual Voir Dire To Determine The Jurors' Impartiality Following Appellant's Throwing Of Apples; The Trial Court Also Properly Denied Appellant's Motion For A Mistrial

Appellant contends the trial court should have conducted individual voir dire to determine whether each juror was capable of deciding the case based on the evidence and disregarding appellant's throwing apples at them and the court. Appellant also contends the trial court should have declared a mistrial based on that conduct. (AOB 315-323.) The claims are meritless.

As a preliminary matter, appellant has forfeited his claims of federal constitutional error by failing to raise them below (109RT 1906-1913). (*In re Josue S., supra,* 72 Cal.App.4th at p. 170; *People* v. *Neal, supra,* 19 Cal.App.4th at p. 1118.) In any event, appellant was not denied his right to an impartial jury by the trial court's refusal to conduct individual voir dire of the jury following appellant's own misconduct in court.

A defendant has a constitutional right to be tried by an impartial jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Nesler* (1997) 16 Cal.4th 561, 577.) An impartial jury is one in which no member has

been improperly influenced and every member is capable and willing to decide the case solely on the evidence presented at trial. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) A sitting juror's involuntary exposure to events outside the trial evidence, such as a third party's attempt to tamper with the jurors by intimidation, may require examination for probable prejudice using the same standard which applies to situations where juror directly commits misconduct. (*Id.* at pp. 294-295.)

However,

> [W]e question whether a convicted person can ever overturn the verdict on grounds that persons *acting in his behalf* deliberately sought to influence the jury. Certainly no such claim could ever be valid where the *accused himself* had instigated the incident; a party cannot profit by his or her own wrongdoing.

(*In re Hamilton, supra,* 20 Cal.4th at p. 305, emphasis in original; see *People v. Williams* (1988) 44 Cal.3d 1127, 1156-1157 [unclear if rule that misconduct occurs where jurors consider evidence from sources other than provided in court should apply where defendant engages in disruptive conduct given policy that a defendant is not permitted to profit from his own misconduct].)

Here, any claim that the jury was improperly influenced or tainted by appellant's own misconduct, that the trial court should have conducted individual voir dire to determine if all jurors could remain impartial, or that the trial court should have granted his motion for a mistrial, should be rejected in light of the principle that appellant cannot benefit from his wrongdoing. (*In re Hamilton, supra*, 20 Cal.4th at p. 305; *People v. Williams, supra*, 44 Cal.3d at pp. 1156-1157.) The trial court's response, to give instructions to the jury reminding them to decide the case on the evidence and to disregard appellant's misconduct, coupled with a general inquiry as to whether the jurors could continue with the case, were sufficient to protect appellant's right to a fair trial.

Appellant nevertheless contends that the cases holding that a defendant cannot profit from his own wrongdoing do not apply in this case because two jurors here were actually struck by apples thrown by appellant. (AOB 321-322.) The claim should be rejected. In *In re Hamilton*, one juror directly heard, and other jurors saw appellant mouthing, the threat that he would "get each and every one of you mother fuckers." (*In re Hamilton, supra*, 44 Cal.3d at p. 1155.) The principles articulated in *Hamilton* regrading a defendant who engages in misconduct fully apply here.

Moreover, appellant has not demonstrated his misconduct affected the jurors' deliberation. In this regard, the trial court gave a direct admonition to the jurors following appellant's throwing of the apples that they were required to decide the case based on the evidence and testimony presented at trial, and "must not" consider, in determining appellant's guilt or innocence, appellant's courtroom misconduct in throwing apples. (10RT 1911-1912.) Additionally, as noted above, the jurors were given general instructions at the end of the guilt phase that they were to decide the case based on the facts presented at trial. (3CT 788; 11RT 2147.) The jurors were also admonished that they must not be influenced by prejudice against appellant, or by passion or prejudice. (3CT 788; 11RT 2147-2148.) It is presumed the jurors followed these instructions and did not consider appellant's courtroom misconduct in determining his guilt. (*People v. Smith, supra*, 40 Cal.4th at pp. 517-518; *People v. Holt, supra,* 15 Cal.4th at p. 662.)

Finally, the failure to individually voir dire the jurors to determine if they could remain impartial was harmless. (See *People v. Williams, supra*, 44 Cal.3d at pp. 1156-1157 [failure to voir dire jury to determine whether any of them had perceived that defendant had threatened them held harmless where juror foreman said that the jury did not discuss the threat during deliberations].) As noted above, the jurors were given specific instructions to not consider

appellant's misconduct in deciding his guilt. Further, as noted by the trial court (11T 2208), the length of the jurors' deliberations at the guilt phase (about three days) indicated that they carefully considered the evidence rather than quickly convict him based upon his misconduct. (11RT 2180-2195.)

D. The Trial Court Properly Permitted The Jurors To Consider Appellant's Misconduct In Throwing Apples In Determining His Sentence

Appellant contends the trial court violated his constitutional rights by allowing the prosecutor, during the penalty phase, to argue to the jurors that they could consider appellant's courtroom misbehavior in deciding his penalty. Appellant also contends the prosecutor's remarks constituted misconduct. (AOB 323-327.) The claims should be rejected.

During closing argument at the penalty phase, the prosecutor argued to the jurors:

> What do we know about the defendant at this point as to his feelings?
>
> Well, you know, we had an incident in this courtroom. This just goes to show you what kind of a person we're dealing with. And His Honor told you, we had that incident in the courtroom where the defendant came out and decided to pelt him with an apple, decided to pelt an apple at the jury, that you were not to consider that in the guilt phase.
>
> That is absolutely right. And everyone went back there and deliberated for a few days and came to decisions based on the evidence. Well, now we're at the penalty phase where you have to determine whether or not the defendant should receive the death penalty.
>
> Can you consider his behavior in this courtroom? You better believe you can. And you have to ask yourself about a person who would do

something like that, Ladies and gentlemen.

And you've got to ask yourself, does this fit in with everything we know about the defendant? You better believe it does. Because he is a person who cares about nothing but himself and his immediate gratification. And nothing we do or say is going to change that.

(13RT 2705-2706.)

Appellant raised no objection to the prosecutor's argument, and thus his claims that the trial court improperly permitted that argument, that the prosecutor committed misconduct, and his related claims of federal constitutional error have been forfeited. (*People v. Navarette* (2003) 30 Cal.4th 458, 516; *People v. Waidla* (2000) 22 Cal.4th 690, 717; *In re Josue S., supra,* 72 Cal.App.4th at p. 170.)

In any event, the claims are meritless. Appellant's courtroom demeanor and behavior were a relevant consideration in the penalty phase, and a prosecutor may comment on a defendant's demeanor. (*People v. Navarette, supra*, 30 Cal.4th at p. 516; *People v. Cunningham, supra,* 25 Cal.4th at p. 1023; *People v. Beardslee* (1991) 53 Cal.3d 68, 113-114.)

XVI.

THE TRIAL COURT'S FLIGHT INSTRUCTION WAS PROPER

Appellant contends the trial court failed to properly limit the flight instruction. (AOB 328-337.) Appellant's claim should be rejected.

A. Factual Background

At the guilt phase, the trial court sustained a defense objection on the ground of lack of relevance as to testimony regarding efforts the police made to locate appellant after prosecution witness Delaguila identified him on December 16, 1988, as the perpetrator of the Lucky's crimes. At a bench conference, the trial court stated the only evidence the prosecutor needed was evidence of appellant's immediate flight from the crime scenes, and barred the prosecution from presenting evidence that, following the crimes, the police had appellant under surveillance and spoken to appellant's family, and that "defendant was basically on the lam." (7RT 1408-1411.)

Subsequently, the trial court instructed the jurors with CALJIC No. 2.52 as follows:

> 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 it is a fact which, if proved, may be considered by you in the light of all the 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 decide.

(3CT 807; 11RT 2157-2158.)

B. The Trial Court's Flight Instruction Was Proper

The record does not reflect that appellant raised any objection to the flight instruction. By failing to request a limiting or clarifying instruction or

admonition in the trial court, appellant forfeited his claims challenging the instruction on appeal. (§ 1127c; see also *People v. Bolin, supra,* 18 Cal.4th at p. 327 ["The instruction correctly states the law, and defendant did not request clarification or amplification. He has therefore waived the issue on appeal"]; *People* v. *Bell* (1989) 49 Cal.3d 502, 550.) In any event, the claims are meritless.

1. The Trial Court Was Not Required To Limit The Instruction To Flight From The Crime Scene

Appellant contends the trial court should have redacted language from the flight instruction that the jury could consider flight after appellant was accused of a crime as opposed to flight from the crime scene. Appellant specifically complains the instruction could have led the jurors to conclude that appellant had been attempting to avoid the police. (AOB 330-332.) The contention is meritless.

The standard for reviewing claims of ambiguous or erroneous jury instructions is whether there is a reasonable likelihood that the jury applied the challenged instruction in a manner that violates the Constitution. (*People v. Frye, supra,* 18 Cal.4th at p. 957; see *People v. Clair, supra,* 2 Cal.4th at p. 663.) Of crucial importance is what meaning the instructions communicated to the jury; if the meaning was not objectionable, the instructions cannot be deemed erroneous. (*People v. Williams, supra,* 16 Cal.4th at p. 272; *People v. Benson* (1990) 52 Cal.3d 754, 801.) In evaluating a contention regarding ambiguous or erroneous jury instructions, a reviewing court must examine the challenged instruction in its proper context in determining whether the instruction violates due process. (See e.g., *People v. Royal* (1999) 14 Cal.4th 481, 526-527; *People v. Frye, supra,* 18 Cal.4th at p. 957.)

Here, there was no likelihood the jurors would have understood the flight instruction to mean they could conclude that appellant had been hiding

from the police. First, the trial court specifically excluded evidence that the police had difficulty locating appellant, or that appellant was "on the lam." (7RT 1408-1411.) On appeal, appellant has failed to identify any such evidence that was presented at trial.

Appellant does argue that he prosecutor's statement that the police had conducted a live lineup "when they finally could" and "as soon as it was possible" suggested to the jurors that appellant was hiding from the police. (AOB 332, citing 11RT 2097-2098.) The claim is meritless. The prosecutor's statements were subject to many reasonable interpretations and did not necessarily suggest any delay in conducting the live lineup was due to appellant hiding from the police. Moreover, the jury was instructed that the statements of the attorneys was not evidence, and that they were to decide the case based on the evidence presented at trial. (3CT 788, 791; 11RT 2147-2148.)

2. The Trial Court Was Not Required To Specifically Instruct That The Jury Must First Determine Whether Petitioner Was The Person Who Fled

Appellant argues that the flight instruction given by the trial court was erroneous because it failed to instruct the jurors first must determine that appellant was the person who fled. (AOB 332-334.) The contention is meritless.

This Court has rejected the contention that preliminary factual determinations, including that the defendant was the person who fled, must be made by a jury before the flight instruction can be given. (*People v. Abeles* (2007) 41 Cal.4th 472, 522; see *People v. Hoffman and Marlow* (2004) 34 Cal.4th 1, 102 [no requirement that facts giving rise to an inference of consciousness of guilt be conclusively proven before cautionary instruction may be given].) Further, CALJIC No. 2.52 itself instructs jurors to consider flight "if proved" and "in light of all other proved facts." Indeed, CALJIC No. 2.52

"'assumed neither the guilt nor the flight of the defendant.'" (*People v. Calnada* (1972) 8 Cal.3d 379, 392; *People* v. *Scott* (1988) 200 Cal.App.3d 1090, 1095.)

3. The Instruction Was Not Improper In Light Of Identity As A Disputed Issue

Appellant next contends the flight instruction was improper because identity was the "sole issue" at trial. (AOB 334-336.) The claim is meritless. This Court has repeatedly rejected the claim that a flight instruction is erroneous where identity was at issue. (*People* v. *Turner, supra,* 8 Cal.4th at p. 201; *People* v. *Pensioner* (1991) 52 Cal.3d 1210, 1245; *People* v. *Mason* (1991) 52 Cal.3d 909, 942-943; see *People* v. *Cruz* (1995) 38 Cal.App.4th 427, 435.)

4. Any Error In Giving The Flight Instruction Was Harmless

Further, any error in giving the flight instruction was harmless, since the jurors were also instructed with CALJIC No. 17.31, which directed them to "[d]isregard any instruction which applies to facts determined by you o not exist" and to "not conclude that because an instruction has been given that [the trial court was] expressing an opinion as to the facts." (3CT 839.) Given CALJIC No. 17.31, considered together with CALJIC No. 2.52, there was no prejudice. (See *People v. Barnett, supra*, 17 Cal.4th at pp. 1153-1154.)

XVII.

THE TRIAL COURT AND PROSECUTOR DID NOT MISLEAD THE JURY REGARDING FINANCIAL COSTS; THE TRIAL COURT PROPERLY REFUSED APPELLANT'S PROPOSED INSTRUCTION REGARDING COSTS

Appellant contends the trial court and prosecutor gave erroneous and misleading information to the prospective jurors during voir dire regarding the parity of the financial cost to the taxpayer when the state imposes the death sentence or incarcerates a prisoner for life. (AOB 338-345.) Appellant also contends the trial court erred by refusing a proposed defense instruction to disregard costs. (AOB 345-358.) The claims are meritless.

A. The Trial Court And Prosecutor Did Not Mislead The Jury Regarding The Comparative Cost Between The Death Penalty And Life Without The Possibility Of Parole

Appellant contends that the prosecutor committed misconduct by presenting false information during voir dire that the death penalty and life imprisonment had equal costs (AOB 339-341), that the trial court and prosecutor violated his due process rights by encouraging the prospective jurors to consider financial cost (AOB 341-343), and the prosecutor violated the Eighth Amendment's prohibition against consideration of irrelevant evidence in determining penalty by informing the prospective jurors that taxpayers fund capital defendants' appeals (AOB 344-345). The contentions have been forfeited, and in any event are meritless.

1. The Complained-Of Comments

Question 114 of the questionnaire distributed to the prospective jurors asked, "Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a death sentence of a criminal defendant?" (4CT 1014.) In response, prospective juror Carolyn B. wrote,

"One major thought - that tax dollars are saved." (3SCT 675.) Prospective juror Barbara G. indicated, "I've heard it is cheaper for the state. But I don't think that's always true." (3SCT 647.) Prospective juror Claudia G. had indicated, "It saves the state a tremendous cost." (7SCT 1794.)

During voir dire, the prosecutor asked Barbara G. to explain her statement to Question 114, and the following exchange took place:

> Ms. Najera: So in this case, on the one hand if a person has life without [the possibility of parole], and the State is supporting them for the rest of their lives, on the other hand if they have a death penalty, the Court is paying for their appeals and we're paying for them to be alive and we're paying for their lawyers, and the appellate process, and whatnot, would you say it about evens out?
>
> [Barbara G.]: It seems to me. But I don't know that much. But that's what my opinion is.

(3RT 497-498.) Immediately thereafter, the prosecutor then asked Claudia G. the following:

> [L]et me ask you, because I think you were asked some questions about that.[29/]
>
> Given -- say His Honor tells you what the factors are to consider when determining what is the appropriate punishment, life or death, and a financial consideration isn't one, though I think that [Barbara G.] put it very clearly when she says probably it will all even out in the long run anyway. Do you feel you could put any financial consideration out of your mind and just judge the case on what His Honor tells you is the law and what you hear in this courtroom?

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29. Earlier in voir dire, counsel Ramirez asked Claudia G. about her response to Question 114. (3RT 478-480.)

(3RT 498.) Claudia G. initially responded that she did know if she could disregard any financial consideration because she did not believe the state should support a person convicted of first-degree murder for up to 40 to 50 years, but later agreed with the prosecutor's statement that "cost is pretty much irrelevant." (3RT 498-500.)

Subsequently, counsel Ramirez asked juror Carolyn B. about a response on her questionnaire in which she indicated that her "major thought was tax dollars." (3RT 536.) The trial court stated:

> And financially, to put this to rest, without going into a great deal of detail, there isn't an awful lot of difference between the cost to the State in a death penalty case and a life without possibility of parole case.
>
> I won't go into any more detail. But I'll tell you, as counsel mentioned before, it's not a factor. It's not one of the factors that you're allowed to consider in determining the question of life or death. So really, you should put it out of your minds.

(3RT 538.)

2. Analysis

As a preliminary matter, appellant has forfeited any claims of error regarding the statements of the prosecutor and trial court that the costs of imposing the death penalty and life without the possibility of parole were comparable. Appellant raised no objection to any of the statement, much less claim there was any prosecutorial misconduct or any constitutional violation, and further did not request any admonition. In these circumstances, appellant has forfeited these claims. (See *People v. Navarette, supra,* 30 Cal.4th at p. 516; *People v. Jones, supra,* 15 Cal.4th at p. 181; *In re Josue S., supra,* 72 Cal.App.4th at p. 170.)

In any event, the claim is meritless. As set forth above (see Arg. V, *ante*), a prosecutor's statements may infect a trial with unfairness to the extent

that it makes the resulting conviction a denial of due process violates the federal constitution. (*Darden v. Wainwright, supra,* 477 U.S. at p. 181.) Also, reviewing courts examine the propriety of a trial judge's statements, on a case-by-case basis, considering the content of the statement and circumstances in which it is made. (*People v. Sanders*, supra; 11 Cal.4th at pp. 531-532.) The costs of life imprisonment or imposing the death penalty are not appropriate considerations in a jury's penalty determination. (*People v. Burgener, supra,* 29 Cal.4th at p. 881; *People v. Thompson* (1988) 45 Cal.3d 86, 132; *Spaziano v. Florida* (1984) 468 U.S. 447, 461-462 [104 S.Ct. 3154, 82 L.Ed.2d 340].)

Here, the prosecutor and trial court both made statements that the costs of imposing the death penalty and imprisoning a defendant to life without the possibility of parole were roughly equal. However, immediately after those statements, the prosecutor and trial court clearly informed the prospective jurors that costs were not to be considered in determining appellant's penalty. Immediately after the prosecutor's comments that the costs of execution and life imprisonment would eventually even out, the prosecutor asked Claudia G. whether she felt she "could put any financial consideration out of your mind and just judge the case on what His Honor tells you is the law and what you hear in this courtroom?" (3RT 498.) After the trial court, in responding to questions regarding Carolyn B.'s "major" concern about "tax dollars," stated that there "isn't an awful lot of difference between the cost to the State in a death penalty case and a life [imprisonment]," the court instructed the prospective jurors that financial costs were not to be considered in determining penalty. (3RT 538.)

Additionally, the during the guilt phase, the jurors were instructed that the statements of the attorneys were not evidence and that they were decide the case based on the evidence presented at trial. (3CT 788, 791; 11RT 2147-2148.)

Further, in light of the instructions given to the jurors during the penalty phase, there is no reasonable likelihood they would have considered financial costs to the State in determining whether death or life imprisonment was appropriate. During the penalty phase, the trial court instructed the jurors that they "must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise." (11RT 2736.) The jurors were also instructed that "in determining which penalty is to be imposed on a defendant, you shall consider all of the evidence which has been received during any part of the trial of this case." (11RT 2740.)

The jurors were also instructed that they were to "take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (11RT 2744.) The jurors were also instructed with a list of specific factors they could consider in determining penalty. (11RT 2740-2742.) Financial costs of either the death penalty or life without the possibility of parole were not listed as applicable factors. Neither the prosecutor nor the defense argued financial costs as a factor the jurors could in determining penalty. (13RT 2680-2734.) Also, as set forth more fully below, there was no evidence admitted at the penalty phase regarding the costs of execution or life imprisonment. Additionally, as previously noted, during voir dire, the trial court and prosecutor repeatedly stated the jurors were not to consider costs.

In light of the totality of circumstances, no juror would have reasonably believed that he or she could consider the trial court's or prosecutor's off-hand comments regarding costs in determining penalty. (See *People v. Thompson, supra*, 45 Cal.3d at p. 132 [any speculation on subject of costs was "made unlikely" by instructions and arguments of counsel which focused on other factors].)

B. The Trial Court Properly Refused Appellant's Instruction

Appellant also contends that the trial court erred by refusing the proposed defense instruction to not consider monetary costs. Appellant contends that such an instruction was warranted based on statements regarding costs presented during voir dire, and because the prosecutor allegedly elicited evidence regarding costs during the penalty phase. (AOB 345-358.) The contention is meritless.

The defense requested the following instruction:

> In deciding whether death or life imprisonment without the possibility of parole is the appropriate sentence you may not consider for any reason whatsoever the deterrent or nondeterrent effect of the death penalty or the monetary cost to the state of execution or maintaining a prisoner for life.

(3CT 863.) The trial court refused the instruction, indicating the case upon which the instruction was based, *People v. Thompson*, *supra*, 45 Cal.3d 86, had been "overruled" and "specifically disapproved," citing *People v. Benson* (1990) 52 Cal.3d 806. (3CT 863.)

In *People v. Thompson*, the defense proposed the same instruction refused by the trial court in the instant case. (*People v. Thompson, supra*, 45 Cal.3d 131.) The *Thompson* Court stated that "it would not have been error to give this requested instruction to forestall consideration of deterrence or cost," but found the omission of the instruction was not prejudicial because costs were not "dwelt on at trial or focused on in argument." (*Id.* at p. 132.) The *Thompson* opinion found the instruction at most would have avoided speculation regarding costs, but any speculation was "unlikely" in light of the instructions and arguments by counsel which focused on other factors in determining penalty. (*Ibid.*)

In *People v. Benson*, this Court stated the following:

> We recognize that there is language in *People v. Thompson, supra,* 45 Cal.3d 86, 132, which might perhaps be read to support the proposition that it would be proper for a court to instruct the jury not to consider deterrence or cost whenever the defendant so requests: "it would not have been error to give this requested instruction to forestall consideration of deterrence or cost . . . ." The language, however, should not be read so broadly: its focus is solely the case under review. In any event, the words constitute dictum.

(*People v. Benson, supra,* 52 Cal.3d at p. 807, fn. 13.)

The *Benson* opinion found an instruction barring consideration of costs as not applicable because "the issue of deterrence or cost was not raised at trial, either expressly, or by implication." (*Id.* at p. 807.) Subsequently, this Court has held that where the issue of costs is not raised by the parties, a trial court does not err by refusing an instruction barring the jurors from considering costs. (*People v. Brown* (2003) 31 Cal.4th 518, 565-566; *People v. Hines* (1997) 15 Cal.4th 997, 1066-1067.)

Appellant contends the trial court erred by refusing his instruction because the court was "inaccurate" in its statements regarding *Thompson* and *Benson*. Appellant specifically contends *Benson* did not overrule *Thompson*, and approved "in dicta of giving this instruction." (AOB 354-355.) Appellant's contention that *Benson* "approved" of *Thompson* is meritless. *Benson* clearly limited *Thompson* by expressly stating that language in *Thompson* "should not be read so broadly" so as to mean that trial courts were required to instruct on costs whenever the defense requested such an instruction, then adding *Thompson*'s language was dictum. (*People v. Benson, supra*, 52 Cal.3d at p. 807, fn. 13.) In any event, this Court's decisions in *Benson, Brown*, and *Hines* clearly indicate that the appropriate test for deciding whether a trial court erred in refusing a defense's requested instruction to not

consider costs is whether the issue of costs was raised by the parties. As set forth below, nothing in the instant case warranted such an instruction.

1. Statements During Voir Dire Did Not Warrant The Instruction

Appellant contends that several statements made during voir dire of several prospective jurors raised the issue of cost, requiring his requested instruction to be given. (AOB 345-353.) As set forth below, nothing that was said by any party or the court would have led any juror to believe that he or she could consider costs in determining guilt or the appropriate penalty. Indeed, the prospective jurors were expressly and implicitly informed not to consider cost when the issue was raised during voir dire.

As a preliminary matter, appellant contends that several prospective jurors did not hear *any* instruction from the trial court to disregard costs (AOB 348, 350-351, 353). Appellant contends that during voir dire, only 14 prospective jurors were in the courtroom at any particular time, and from that, implies that several prospective jurors, including jurors who ultimately decided penalty, were not present when the trial court gave its instruction to disregard costs. (AOB 347.) The contention should be rejected.

The record does not show that only 14 prospective jurors at a time were present in the courtroom during voir dire, but rather reflects there were many prospective jurors present. Prior to voir dire, the trial court noted that it had asked for groups of "70, 70, and 60" prospective jurors. (2RT 223.) The trial court proposed the procedure of having 14 prospective jurors sit in the jury box, and "the rest of the people in here and have them sit in the courtroom so at least they get a little bit of the feeling of being at the trial and see what's going on." (3RT 363.) Subsequently, the trial court addressed prospective jurors "both in the box and in the audience." (3RT 371.) After five sets of fourteen prospective jurors were placed in the jury box and questioned (3RT 373, 465,

507, 577, 633), the trial court stated, as to a group that included prospective juror Alice P., "this is a group who were here during all the proceedings yesterday" who were not questioned. The trial court also told counsel Ramirez that "bearing in mind that these jurors have heard an awful lot of questioning so far," that he should "question these as you see absolutely necessary." (4RT 700.) Alice P. stated, in response to a question about costs, that she had heard other prospective jurors' responses and the trial court's statements regarding costs, and based on those responses and statements, knew that she was not to consider costs. (4RT 700-701.) Alice P.'s statements indicated that in addition to prospective jurors seated in the jury box, additional prospective jurors were present in the courtroom and heard the trial court's admonition to not consider costs in determining penalty.

Appellant complains of statements regarding costs made during voir dire of prospective jurors Joy B. and William A.[30] when juror Peter D.[31] was among the jurors who were seated in the jury box. (AOB 347-348.) However, those discussions clearly indicated to the prospective jurors that they were not to consider costs.

During voir dire of Joy B., defense counsel Ramirez asked whether, in determining penalty, she would think about "economics, how much it cost[s] to keep a person alive for the rest of their lives?" Joy B. responded, "No." (3RT 404.) Counsel Ramirez then asked William A. the same question. He responded that costs was "one of my concerns, but it wouldn't affect my decision" and "I would consider it. But it wouldn't influence me in my final decision." (3RT 405.) Subsequently, the prosecutor asked William A. to

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30. Prospective Jurors Joy B. and William A.'s juror questionnaires do not include any responses regarding cost. (2SCT 311; 14SCT 3779.)

31. Peter D. served as a juror during both the guilt and penalty phases. (11RT 2202-2203; 13RT 2759.)

assume he was on the penalty phase jury, and:

> At the end of all that, His Honor tells you these are the things you can consider. One of them isn't how much it would cost to keep him in forever; in other words, how much it would cost to house him the rest of his life.
>
> If His Honor told you that isn't one of the factors to consider, would you consider it anyway, or not?

(3RT 431-432.)

William A. responded that he personally would consider costs, but as a juror, would not let costs influence him. The prosecutor noted that everyone in the panel would be asked to make decisions "as a juror" and whether prospective juror William A. could hold himself to that standard. He responded, "Yes." (3RT 432.) Based on the questions asked by both the defense and prosecution, all of the prospective jurors were clearly informed that they were not to consider costs.

Appellant next asserts that during questioning of Peter D., the issue of "economics" was raised, and the trial court failed to clarify that the jurors were not to consider costs. (AOB 348.) The contention is plainly meritless.

The defense asked Peter D. whether he had heard its question regarding "economics," and asked whether he would consider that in deciding penalty. (3RT 415.) Peter D. responded that he would consider all of the evidence presented to him, and that he would not "consider that to be an excuse or to be something which would allow someone to commit a crime." (3RT 416.) Peter D.'s response indicated he understood "economics" to mean a mitigating circumstance (that poverty would not be an excuse for a crime), and not to mean the costs of imposing the death penalty. Further, following that response, there was the exchange between the prosecutor and William A. mentioned above, in which the prosecutor clearly indicated that such costs were not to be

considered.

Appellant also complains about comments made during voir dire of prospective jurors Claudia G. and Barbara G., when jurors Irene M. and Brenda M. were among the prospective jurors seated in the jury box. Appellant also complains about comments made during voir dire of prospective juror Carolyn B., when jurors Larry R. and Gary S. were seated in the jury box. (AOB 348-351; see 11RT 2202 [naming jurors who decided guilt]; 3RT 465 [naming Irene M. and Brenda M.], 517 [naming Larry R. and Gary S.].)

As to Claudia G., defense counsel noted prospective juror Claudia G. had indicated in her questionnaire that imposing the death penalty would save the State a "tremendous cost," and asked if she was going to consider costs. She stated that costs would be on her mind. (3RT 478-479.) Defense counsel told her that the trial court had told "the panel" that "economics" was not a factor they were to consider in determining penalty. She responded that "with [the Court's] instructions, if he says I should not consider it, the I wouldn't consider it." (3RT 479.) Counsel Ramirez told Claudia G. that costs were "not going to be one of the factors that you are allowed to consider, okay?" (3RT 480.)

Appellant specifically complains that defense counsel had inaccurately stated that the judge had informed the jurors that they were not to consider cost at the time counsel questioned Claudia G. (AOB 349.) However, even if the court had not done so, it later instructed the prospective jurors that costs were not an appropriate consideration. (3RT 538.) Moreover, defense counsel, during questioning of Claudia G., clearly indicated costs was not a factor that could be considered by the jurors in determining penalty. (3RT 480.)

Similarly, none of the comments made during questioning of Barbara G. and Carolyn B. warranted an instruction. As set forth above, during questioning of prospective juror Barbara G. (and the immediate, subsequent

questioning of Claudia G.), the prosecutor clearly communicated that the jurors were not to consider financial costs (3RT 498), and, during questioning of Carolyn B., the trial court clearly instructed that the jurors were not to consider costs. (3RT 538).

Appellant next complains of two separate occasions where counsel Ramirez noted that many persons had expressed concerns about costs, and asked all of the jurors who were then currently sitting the jury box (which included jurors Martha M., Erline N., and Sandra S.) whether they would consider costs in determining penalty. (AOB 351, 353; see 3RT 577, 763; 11RT 2202.) The court reporter indicated that during the first occasion, the jurors "answered collectively in the negative." (3RT 596.) As to the second instance, the court reporter indicated that the jurors "answered affirmatively" when asked by the defense if they could promise "that you're not going to consider the cost factor of how much it costs to house someone when you make the decision as to what the appropriate penalty is?" (4RT 752.) Neither instance shows that the trial court was required to give an instruction to disregard costs. Indeed, that the prospective jurors indicated they would not consider costs in determining penalty is a clear indication that such an instruction was not necessary.

Appellant finally complains of statements made when counsel Ramirez questioned prospective juror Alice P. (AOB 353-353.) That discussion would not have lead any prospective juror to believe that he or she could consider costs. During questioning by counsel Ramirez, Alice P. stated "the main thing on that [life without the possibility of parole] was that what it costs the taxpayers to keep them for 60 years." Counsel Ramirez asked her whether it was an overriding concern. Alice P. stated that she had "heard the rest of them" and "heard what the judge had said." After some questioning from counsel, Alice P. stated that before she had "sat here and heard all the

explanations," costs were a consideration for her, but "now it is not." Counsel Ramirez asked her, "So now you know that that's not something that you should consider, right?" Alice P. responded, "That's right." (4RT 700-701.)

Alice P.'s statement that she had "heard the rest of them" (in response to counsel's question as to whether costs would be an overriding consideration for her) and that she had "heard what the judge has said" indicated she had heard other jurors's responses and the trial court's statements regarding costs. The record shows that prior to Alice P.'s response regarding costs, several prospective jurors had been questioned regarding the same issue, specifically Joy B. and William A. (3RT 404-405, 431-432), Peter D. (3RT 415-416), Claudia G. (3RT 479-480), and Barbara G. (3RT 498) and Carolyn B. (3RT 536). Also, prior to voir dire of Alice P. regarding costs, the trial court had instructed the jurors to not consider cost (3RT 538).

Thus, none of the complained-of incidents during voir dire noted by appellant shows that an instruction to the jury to disregard costs was warranted.

2. The Prosecutor's Statements During The Penalty Phase Did Not Require The Instruction

Appellant contends his proposed instruction was warranted because the prosecutor improperly referred to the costs of housing a prisoner for life during cross-examination of defense witness James Park, a prison consultant. Appellant specifically complains that the prosecutor referred to prison overcrowding (12RT 2508) and resources (libraries, recreational facilities, etc.) available to prisoners (12RT 2508-2511), and improperly asked that if an inmate had a child in custody, who would pay for the support of that child (12RT 2524). (AOB 353-354.) The claim is meritless.

As to the question regarding who would pay for the support of a child fathered by an inmate, the trial court sustained the defense's objection. (12RT 2524.) The jurors were instructed at the guilt phase that if an objection was

sustained to a question, they were not to guess as to what the answer would have been, or the reason for the objection; they were also instructed that the statements of the attorneys were not evidence. (3CT 791; 11RT 2149.) It is presumed the jurors disregarded the prosecutor's question and did not consider it during their deliberations. (*People v. Smith, supra,* 40 Cal.4th at pp. 517-518.)

Further, the prosecutor's references to overcrowding and resources did not refer to costs, but rather to the nature of a sentence of life without the possibility of parole, a subject appellant brought up. (See, e.g., *People v. Brown, supra*, 31 Cal.4th at pp. 565-566 [arguments were not based on cost of death penalty, but referred to defendant's future dangerousness].)[32/]

Moreover, the prosecutor was not referring to costs to the State in arguing to the jurors that they should impose the death penalty, and did not tell them that they could consider costs in determining penalty. (13RT 2680-2707.) Rather, when referring to Park's testimony, the prosecutor was speaking about the conditions of appellant's confinement under a life without parole sentence, noting appellant would be housed, fed, clothed, would not have to work, would have access to recreation including weights and a dayroom where he would be entertained, and could get married and have children if he wanted to. The prosecutor argued appellant "does not deserve that" because he had "earned the death penalty." (13RT 2695-2696.)

3. Harmless Error

Even if the statements during voir dire and/or the prosecutor's comments

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32. Evidence of prison conditions for those sentenced to life without possibility of parole is not constitutionally or statutorily relevant as *a* factor in mitigation. (*People v. Ledesma, supra,* 39 Cal.4th at p. 735; see *People v. Thompson, supra,* 45 Cal.3d 86 at p. 139.) Appellant raises no claim that such evidence was improperly admitted.

during the penalty phase warranted appellant's requested instruction, the omission of that instruction did not prejudice appellant.

As set forth above, (1)the jurors were given general instructions at the guilt and penalty phases that the statements of the attorneys were not evidence and that they were to decide the case based on the evidence presented, and a penalty phase instruction listing appropriate factors they could consider in determining penalty, which did not include costs, (2) none of the parties argued cost should be considered in selecting the penalty, and (3) no evidence regarding costs was presented at the penalty phase. In light of these circumstances, appellant's requested instruction at most would have repeated the admonition to avoid speculation on costs, but that speculation was made unlikely by the evidence, instructions, and argument. (See *People v. Thompson, supra*, 45 Cal.3d at p. 132.)

XVIII.

THE PROSECUTOR'S ARGUMENT AND TRIAL COURT'S INSTRUCTION REGARDING VICTIM IMPACT WAS PROPER

Appellant contends the prosecutor's argument regarding victim impact, and the trial court's instruction that they could consider that argument, violated his right to guided discretion in capital sentencing and due process under the state and federal constitutions. (AOB 359-368.) The argument should be rejected.

A. Relevant Facts

At a hearing held at the beginning of the penalty phase, counsel Ramirez stated that the defense had just been given notice of victim impact evidence that the prosecution wished to introduce at that hearing. Counsel Ramirez noted the defense did not have an opportunity to conduct an investigation, and would request a continuance to do so. (11RT 2213.) The prosecutor argued that she had given notice to the defense that she intended to present evidence regarding circumstances of the crime, and that *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] and *People v. Edwards* (1991) 54 Cal.3d 787 "defines victim impact as one of the circumstance of the crime," and the defense "knew circumstances of the crime also included victim impact." The prosecutor also noted she only intended to call one witness, Patrick Rooney's wife. (11RT 2213-2219.) The trial court ruled as follows:

> If in fact [the prosecutor] were going to call a string of witnesses to this effect, then I think the defense could very well claim that they were taken by surprise.
>
> But calling a single witness who is the immediate survivor, the surviving spouse of the victim in this case, I don't think is taking unfair advantage. But if as a result of calling this person you feel that you need

some additional time between the time the People rest their penalty phase until the time you start yours, I'll give you additional time.

(11RT 2219.) The trial court ruled the People could present the testimony of Rooney's wife. (11RT 2220.)

Subsequently, the trial court, citing *Payne* and *Edwards*, stated that "the People are entitled to argue victim impact as a factor regardless of whether they call any witness or not." The trial court asked the prosecutor what she had to gain by calling Rooney's wife and "put[ting] her through the emotional travail of having to describe the depth of her loss" because the prosecutor could "certainly comment on it as much as you please in your argument without having any supporting testimony." (12RT 2339.)

The prosecutor responded that Rooney's widow could testify that her husband was 35 years old at the time of his death, and that he was the sole support for her and their two teenage sons. The prosecutor also stated "I can't start testifying for them." (12RT 2339-2340.) The trial court ruled as follows:

> But the fact that [Rooney] happened to have two children or that he was the sole support of the family as opposed to having a working wife is not something a defendant can foresee.
>
> And I think that over the defense objection that they're not provided with it, that I will permit you to argue it. But I think that the People -- that the defense objection is well taken as to calling the witness.

(12RT 2340.)

The trial court stated it would modify the instruction regarding victim impact to delete the phrase "evidence has been admitted." (12RT 2340-2341.)

In closing argument, the prosecutor argued the following regarding victim impact:

> And what does this mean? How does this impact? We have Patrick Rooney who is now dead. He leaves his wife. She'll never be able to

talk to him again. She and his family will never be able to talk to him, to share their plans, to do anything because the defendant didn't care.

And he didn't have to. He didn't have to do it. he didn't have to kill -- even if he wanted the money, he didn't have to. But he didn't care. He didn't care about what this was going to do to these other people, to Mrs. Rooney and the family. He didn't care because he doesn't care about anything but himself and what's easy for him.

So that, I guess, is what we have been talking about, the circumstances of the crime, the circumstances in aggravation.

(13RT 2700.)

After closing arguments from the parties, the trial court instructed the jurors with CALJIC No. 8.83.2 as follows:

A factor you may consider in this phase of the trial is the specific harm caused by the defendant, including the impact on the family of Patrick Rooney.

You may assess the harm caused by the defendant as a result of the murder of Patrick Rooney as a factor to be considered in determining the appropriate punishment.

(4CT 926; 13RT 2743.)

The trial court refused the following instruction proposed by the defense:

Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention away from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you many not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects

may provide legitimate reasons to sway the jury to show mercy. (3CT 864.)[33/]

B. Analysis

The Eighth Amendment does not prohibit the admission of evidence of the impact of a murder on the victim's family. (*Payne v. Tennessee, supra*, 501 U.S. at p. 827; *People v. Sanders, supra,* 11 Cal.4th at p. 549.) Section 190.3, subdivision (a), permits evidence and argument regarding impact on a victim's family, but is limited to "evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.) [A prosecutor's] argument need not be based upon specific testimony of the victim's family members describing their emotions; the prosecutor can urge the jury to draw reasonable inferences concerning the probable impact of the crime on the victim and the victim's family. [Citations.] (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017; see *People v. Montiel, supra*, 5 Cal.4th at p. 935; *People v. Sandoval, supra,* 4 Cal.4th at p. 191; *People v. Wrest* (1992) 3 Cal.4th 1088, 1101-1108.)

Here, it was stipulated that victim Rooney was survived by his wife. (12RT 2353.) The prosecutor's argument that Rooney was dead, and that his wife and his family would never again be able to talk to him, share plans, or do anything with him (13RT 2700) were reasonable inferences concerning the probable impact of the murder on Rooney and Rooney's family. This Court has held similar arguments made in the absence of specific victim impact testimony to be proper. (*People v. Sanders, supra,* 11 Cal.4th at p. 550, fn. 33 [prosecutor referred to victims' families' grief]; *People v. Kirkpatrick, supra,* 7 Cal.4th at pp. 1016-1017 & fn. 7 [prosecutor mentioned likely suffering of

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33. The record does not include any reported discussion regarding the trial court's reasons for denying the instruction. The face of the proposed instruction indicates that it was refused. (3CT 864.)

victims' friends and family members].) Indeed, the prosecutor's comments in the instant case were "generalized and consisted of obvious truisms to the effect that they were aggrieved." (*People v. Sanders, supra*, 11 Cal.4th at p. 550.) Thus, appellant's argument that the prosecutor committed misconduct by arguing evidence outside the record should be rejected because in this case:

> the prosecutor did not refer to "facts" about the victims outside the record or unknown to defendant; [s]he merely referred generally to the predictable and obvious consequences to [Rooney's family].

(*People Sanders, supra*, 11 Cal.4th at p. 550.)

Appellant's claim that the trial court's modified victim impact instruction was erroneous because it permitted the jurors to consider evidence outside the record and did not advise that victim impact was a factor to consider as one of the circumstances of the crime (AOB 363-367) should be rejected.

First, appellant made no objection when the trial court stated it was going to modify the instruction. (12RT 2340-2341.) Appellant also did not object to the instruction, or request modification of that instruction when it was read to the jury. (13RT 2743.) Appellant's rejected proposed instruction also included no language that victim impact was one of the circumstances of the crime that the jury could consider. Appellant thus has forfeited his claims challenging the trial court's instruction. (See *People v. Bolin, supra,* 18 Cal.4th at p. 327; *People v. Bell, supra,* 49 Cal.3d at p. 550.)

In any event, appellant's claims are meritless. First, as set forth above, the prosecutor's arguments were simply reasonable inferences from the record, and this Court has previously held that such argument need not be based on specific testimony of victims' family members describing their emotions. (See also *People v. Sanders, supra*, 11 Cal.4th at p. 550, fn. 33 [prosecutor's rhetorical references to victims' families's grief "constituted argument, not factual testimony subject to cross-examination"].)

As to appellant's claim that the jurors were not advised that victim impact was a matter to consider under factor (a) of CALJIC NO. 8.85, circumstances of the crime, the prosecutor's argument informed the jurors that victim impact was to be considered under factor (a). Specifically, the prosecutor noted that she would discuss each of the factors discussed in CALJIC No. 8.85, and discussed each of the factors in turn. The prosecutor first discussed factor (a), "the circumstances of the crime of which the defendant was convicted in the present proceeding." The prosecutor, in talking about the murder of Rooney, argued victim impact, then stated "so that, I guess, is what we have been talking about, the circumstances of the crime, the circumstances in aggravation." The prosecutor then continued "and [factor] b is the next one . . . . and b is the presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried . . ." (13RT 2699-2700.) Based on the prosecutor's listing of victim impact as one of the factors the jury could consider under factor (a), then proceeding to discuss circumstances the jury could consider under factor (b), a reasonable juror would have understood that they were only to consider victim impact under factor (a), as one of the circumstances of the crime.

Moreover, there was no reasonable likelihood the jurors gave victim impact any undue weight. In addition to the modified instruction given by the trial court that victim impact was a factor the jurors could consider in determining punishment, the jurors were instructed with CALJIC No. 8.88. That instruction defined aggravating factors and mitigating circumstances, and further informed the jurors:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem

appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigation circumstances that it warrants death instead of life without parole.

(4CT 927-928.)

XIX.

CALJIC NO. 2.90 PROPERLY DEFINED REASONABLE DOUBT AND THE BURDEN OF PROOF

Appellant contends CALJIC No. 2.90 failed to properly define reasonable doubt and the burden of proof. (AOB 369-379.) The claim is meritless.

Here, the trial court instructed the jury with CALJIC No. 2.90. (3CT 812; 11RT 2160-2161.) The United States Supreme Court and this Court have found CALJIC No. 2.90 to be proper and constitutional, and appellant has not presented any new arguments that undermine these precedents. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6 [114 S.Ct. 1239, 1243, 127 L.Ed.2d 583]; *People v. Rundle* (2008) 43 Cal.4th 76, 155; *People v. Millwee* (1998) 18 Cal.4th 96, 161; *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1285-1287 [holding the issue has been "conclusively settled adversely to defendant's position" and citing cases from every California appellate district and *Lisenbee* v. *Henry* (9th Cir. 1999) 166 F.3d 997, 999-1000, rejecting the claim].)

XX.

THERE WAS NO *FARETTA* VIOLATION

Appellant contends the trial court violated *Faretta v. California, supra*, 422 U.S. 806 by failing to determine his competency to represent himself and by failing to advise appellant of the disadvantages of appearing without cousel. (AOB 380-391.) The claim is meritless.

A. Relevant Facts

1. Initial *Faretta* Motion

On February 21, 1991, when the crimes charged in this matter were pending in Los Angeles County Superior Court case number A980576, appellant filed a motion to proceed in propia persona. (18SCT 4616-26.) According to a minute order, on February 21, 1991, a trial court judge (Judge Paul Flynn) held a hearing out of the presence of the prosecutor in which it heard and denied appellant's motion for new counsel, and ordered proceedings on appellant's *Faretta* motion to be continued. (18SCT 4627.) Pursuant to the trial court's request, appellant's then-current trial counsel, John Meyers, filed a memorandum of points and authorities regarding appellant's *Faretta* motion. (18SCT 4628-33.) On March 4, 1991, the trial court appointed Michael Maloney, Ph.D., to examine appellant and make a report regarding appellant's "capacity to knowingly and intelligently waive his right to counsel and represent himself." (18SCT 4634-45.) A minute order reflects the Court held a hearing on appellant's *Faretta* motion on March 4, 1991, and continued the matter. (18SCT 4636.) On March 18, 1991, the Court found appellant was informed of his constitutional rights and had knowingly and intelligently waived his right to counsel, and granted appellant motion to proceed in propia persona. (18SCT 4678.) On March 28, 1991, appellant requested that private

counsel (Derrick Miller) be substituted in as counsel of record and that his pro per status be "removed," which the Court granted. (18SCT 4691.)

2. Second *Faretta* Motion

After the jury reached its verdict of death (13RT 2759-2762), appellant made a second *Faretta* motion on April 22, 1992, requesting that he be able to represent himself. The trial court noted the matter was "here for sentencing" and that appellant had a constitutional right to represent himself. The trial court asked appellant whether he wanted to represent himself. Appellant responded:

> Yes, it is. [¶] The reason why I want to do this is because my counsel have no more trust - - I have no trust in them. They gave me nothing but false promises and led me down a path full of lies. They have shown me ineffective assistance of counsel.

(13RT 2767.)

The trial court disagreed, stating it found that appellant's attorneys were thorough and professional. The trial court stated that, in any event, if appellant wanted to represent himself, it would allow him to do so. The trial court asked appellant, "Is that what you want to do?" (13RT 2767-2768.)

The prosecutor interrupted, stating that before counsel could be relieved, "there statutorily has to be a motion for new trial made to preserve the appellate rights," that "I don't know if the finding has been made he has the appropriate education or otherwise to make such a motion," and that "we need to make an inquiry into that." Appellant stated he was aware of the "retrial motions" and was "fully prepared" to file them. The Court asked whether appellant wanted to proceed and make a motion for a new trial. Appellant responded that he needed an additional ten days to do so. The trial court noted that it was not going to be available and would have to put the matter over until June. (13RT 2768-2769.)

The prosecutor noted that appellant had previously been granted pro per

status by another judge, who had made findings that appellant was "able to go pro per, according to the statute and case law." The prosecutor asked the court to "make the inquiry and the findings" before relieving counsel. (13RT 2769.) Appellant stated, "What make it seem not so appropriate me going propria persona?" (13RT 2769.) The trial court responded that it had to find appellant had "a requisite understanding of the proceedings to go pro per," and stated it believed appellant had the ability to proceed in pro per, based on appellant's comments "made in the past" and the court's observation of appellant. The trial court also told appellant: "I don't recommend it. I think it's an unwise decision for anyone to go pro per." The trial court stated, however, that preparing a new trial motion was "not nearly the complex matter" as preparing a case for trial. (13RT 2769-2770.)

The trial court noted counsel Ramirez had "a great deal of contact with the defendant over the last many months" and asked counsel Ramirez for his opinion regarding whether appellant had the ability to "understand issues in the case in order to represent himself?" Counsel Ramirez responded that in conversations with appellant, appellant "has always been rational and seems to understand everything that's going on." (13RT 2770.)

The trial court stated it had no reason to doubt appellant's ability to comprehend the proceedings, noting there was "one bizarre incident that happened in this courtroom" (appellant's apple-throwing), but explaining:

> I feel that was an aberration and certainly wasn't typical. The rest of the time he behaved himself well and seemed to the Court to be alert through the proceedings and cognizant of everything that was going on.

(13RT 2770.)

The trial court ruled as follows:

> So I am going to make a finding, based on my observation and the representations of counsel, and taking judicial notice of the fact that

another judicial officer on a previous occasion made a finding that he was able to represent himself, that he is -- that he will be allowed to represent himself in pro per.

Pursuant to the prosecutor's request, the trial court "incorporated into the record" a questionnaire that appellant had filled out when he was previously been granted pro per status. (13RT 2771.)

B. Analysis

Under the Sixth Amendment, a criminal defendant has the right to represent himself at trial. (*Faretta v. California, supra,* 422 U.S. at pp. 834-835; *People v. Welch, supra,* 20 Cal.4th at p. 729.) A trial court must grant a defendant's motion for self-representation if the following conditions are met: (1) the defendant is mentally competent and knowingly and intelligently makes the request, having been advised of the dangers of self-representation; (2) the request is unequivocal; and (3) the request is made within a reasonable time before trial. (*Faretta v. California, supra,* 422 U.S. at p. 835; *People v. Welch, supra,* 20 Cal.4th at p. 729.) If these conditions are satisfied, the trial court must permit an accused to represent himself without regard to the apparent lack of wisdom of such a choice, and even though the accused may conduct his own defense ultimately to his own detriment. (*Faretta v. California, supra,* 422 U.S. at pp. 834-835.)

1. Competence

"[T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." (*Indiana v. Edwards* (2008) 128 S.Ct. 2379, 2387-2388 [171 L.Ed.2d 3450].) "The focus of the inquiry is the defendant's mental capacity to understand the nature and purpose of the proceedings against him or her. [Citations.]" (*People*

v. Blair (2005) 36 Cal.4th 686, 711; see *People v. Joseph* (1983) 34 Cal.3d 936, 945 [competency to waive counsel requires mental capacity to realize probable risks and consequences of self-representation].) A trial court must inquire into a defendant's competence to waive counsel when it is presented with substantial evidence of incompetence. (*People v. Blair, supra*, 36 Cal.4th at p. 711.)

Here, the trial court did not err by not conducting a competency proceeding because appellant presented no substantial evidence of incompetence. Appellant's arguments that his courtroom behavior (throwing apples and wearing eyeglasses) showed signs of mental illness (AOB 385) do not show he did not have the mental capacity to understand the nature of the proceedings or the risks and consequences of self-representation. As set forth above more fully (see Arg. 15, *ante*) appellant's actions showed he was frustrated and unable to control his temper, but did not show he lacked mental competence. Similarly, appellant's contention that his statement that he believed attorneys were "spies of the court" (13RT 2778) does not show mental incompetency, but at most shows paranoia. Appellant's argument that Dr. White's testimony that appellant had emotional and personality problems showed mental incompetency is also meritless; that appellant had such problems did not show he was incapable of understanding the nature of the proceedings or of representing himself at the sentencing proceedings. None of the factors identified by appellant show he was mentally incompetent. (See *People v. Blair, supra*, 36 Cal.4th at p. 714 [noting a history of mental illness does not necessarily constitute substantial evidence of incompetence].)

Moreover, the trial court properly found appellant was competent to waive counsel. Appellant's own statements during the discussion regarding his second *Faretta* motion showed he understood the proceedings. Appellant stated, in response to statements from the trial court and prosecutor, that he could file a new trial motion, and, in response to the prosecutor's request that

the trial court make an inquiry and findings regarding his competence, asked why it was not appropriate for him to go pro per. (13RT 2768-2769.) Further, counsel Ramirez, who had worked with appellant throughout both the guilt and penalty phases, stated that in his discussions with appellant, appellant was rational and seemed to understand what was happening. (13RT 2770.) Also, that appellant stopped disrupting the proceedings after trial counsel talked to him about his behavior, so that appellant could remain in the courtroom and not be shackled or be excluded from the proceedings (10RT 1913), shows appellant was competent. (See Arg. XV, *ante.*) Additionally, that a prior judge had granted appellant pro per status (18SCT 4678) was a strong indication that appellant was competent to waive counsel.

2. Advisements

A defendant who makes a *Faretta* motion should be made aware of the dangers and disadvantages of self-representation, in order that the record will establish the defendant knowingly and voluntarily decided to waive his right to counsel and represent himself. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1224-1225; see also *People v. Noriega* (1997) 59 Cal.App.4th 311, 319.)

> As long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required. "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." [Citations.]

(*People v. Pinholster, supra,* 1 Cal.4th at p. 929; see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1048; *People* v. *Noriega, supra,* 59 Cal.App.4th at p. 319; *People v. Wilder* (1995) 35 Cal.App.4th 489, 494.)

A defendant bears the burden to show he did not intelligently and knowingly waive his right to counsel. (*People v. McArthur* (1992) 11

Cal.App.4th 619, 627; *People v. Truman* (1992) 6 Cal.App.4th 1816, 1824.)

> In light of the rule of *People* v. *Bloom* . . . it is clear that this burden is not satisfied by simply pointing out that certain advisements were not given.

(*People v. Truman, supra,* 6 Cal.App.4th at p. 1824.)

Here, the record as a whole shows that appellant understood the dangers of self-representation. First, the record includes a form which appellant filled out when he made his initial *Faretta* motion, on which he initialed boxes next to statements indicating he understood that he would have to, "without the assistance of counsel," follow "many technical rules of substantive law, criminal procedure, and evidence." Specifically, appellant initialed boxes indicating that he understood that if represented himself, he would have to, without the assistance of counsel, file pretrial motions, handle case settlement, conduct his own trial, and matters after trial. Appellant also indicated he understood that the People's case would be handled by an experienced prosecutor. (18SCT 4616-4619.) Additionally, that appellant had previously been granted pro per status shows that he knew the "differences involved in self-representation as opposed to representation by counsel." (*People v. Lewis* (2006) 39 Cal.4th 970, 1006.) Also, shortly before granting appellant's second *Faretta* motion, the trial court warned appellant that it would not recommend that he represent himself, and stated it was "unwise" for anyone to do so. (13RT 2770.) Based on this record, appellant understood the dangers and disadvantages of self-representation.

XXI.

CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant raises several contentions that California's death penalty statute violates the United States Constitution. (AOB 392-458.) The claims are meritless, and have been repeatedly rejected by this Court.

Appellant's contention that section 190.2 is unconstitutionally broad because it permits capital punishment for many first degree murders, including unintentional felony murder (AOB 394-396) has been rejected by this Court. (*People v. Boyer, supra,* 38 Cal.4th at p. 483; *People v. Stitely, supra,* 35 Cal.4th at p. 573; *People v. Crittenden* (1994) 9 Cal.4th 83, 154-155.)

Appellant's contention that section 190.3, subdivision (a), as applied allows arbitrary and capricious imposition of death (AOB 397-399) has been rejected by this Court and the United States Supreme Court. (*People v. Boyer, supra*, 38 Cal.4th at p. 483; *People v. Stitely, supra,* 35 Cal.4th 514, 574; *Tuilaepa v. California* (1994) 512 U.S. 967, 975-980 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

Appellant's contention that California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing because it does not narrow the pool of murderers to those most deserving of death (AOB 399-400) has been rejected by this Court. (*People v. Boyer, supra*, 38 Cal.4th at p. 483; *People v. Nakahara* (2003) 30 Cal.4th 705, 722; *People v. Snow, supra,* 30 Cal.4th 43, 126; *People v. Anderson, supra,* 25 Cal.4th 543, 601-602, 106; *People v. Keenan* (1988) 46 Cal.3d 478, 505-506.)

Appellant's contention that his death verdict was not premised on findings beyond a reasonable doubt reached by a unanimous jury that one or more aggravating factors existed and outweighed mitigating factors, in violation of a line of cases including *Apprendi v. New Jersey* (2003) 530 U.S. 466 [120

S.Ct. 2348, 147 L.Ed.2d 435], and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428. 153 L.Ed.2d 556] (AOB 401-417) is meritless. This Court has rejected all of these arguments and has also held that *Ring* and *Apprendi* and similar cases do not affect California's death penalty law. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1067-1068; *People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Ward, supra,* 36 Cal.4th at p. 221.)

Appellant also asserts due process and the cruel and unusual punishment provisions of the state and federal constitutions require that a jury be instructed that they may impose death only if there are persuaded beyond a reasonable doubt that aggravating factors exist and outweigh mitigation factors. (AOB 417-421.) This Court has held that the reasonable doubt standard does not apply to finding aggravating factors, finding that aggravating factors outweigh mitigating factors, or that death is the appropriate punishment. (*People v. Smith* (2003) 30 Cal.4th 581, 641; *People v. Jones* (2003) 30 Cal.4th 1084, 1126-1127; *People v. Snow, supra*, 30 Cal.4th at p. 126.)

Appellant's contention that California law violates federal constitutional provisions by failing to require that a jury base its death sentence on written findings regarding aggravating factors (AOB 421-424) has been rejected by this Court. (*People v. Boyer, supra*, 38 Cal.4th at p. 485; *People v. Monterroso, supra,* 34 Cal.4th at p.795; *People v. Jenkins, supra,* 22 Cal.4th 900, 1053.)

Appellant also asserts California's death penalty statute, as interpreted, unconstitutionally forbids intercase proportionality review. (AOB 424-426.) This Court has rejected the claim. (*People v. Boyer, supra*, 38 Cal.4th at p. 484; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182; *People v. Cox* (1991) 53 Cal.3d 618, 690-691; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50 [104 S.Ct. 871, 79 L.Ed.2d 29].)

Appellant next asserts the prosecution may not rely upon unadjudicated criminal activity, and even so, such alleged criminal activity could not serve as

a factor in aggravation unless found true beyond a reasonable doubt by a unanimous jury. (AOB 426-439.) The claim is meritless. This Court has found that consideration of unadjudicated crimes under factor (b) is constitutional. (*People v. Boyer, supra*, 38 Cal.4th at p. 483; *People v. Gray, supra*, 37 Cal.4th at p. 236; *People v. Morrison* (2004) 34 Cal.4th 698, 729.) This Court has also rejected the argument that jury unanimity as to the existence of any aggravating factor is required. (*People v. Prieto, supra,* 30 Cal.4th at p. 275.) Moreover, the cases appellant relies upon (*Ring/Apprendi*) in support of his argument requiring jury unanimity as to finding unadjudicated criminal activity have been, as noted above, found by this Court to be inapplicable to California's death penalty law.

Appellant next argues that the use of restrictive adjectives such as "extreme" and "substantial" in the list of potential mitigating factors in the death penalty statute impermissibly acted as barriers in the consideration of mitigation by the jury. (AOB 439.) This Court has repeatedly rejected the contention. (*People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Prieto, supra,* 30 Cal.4th at p. 276; *People v. Barnett, supra,* 17 Cal.4th at p. 1179.)

Appellant also asserts the trial court failed to instruct that statutory mitigating factors were relevant solely as potential mitigators. (AOB 439-444.) This Court has repeatedly rejected this contention. (*People v. Boyer, supra*, 38 Cal.4th at p. 486; *People v. Gray, supra*, 37 Cal.4th at p. 236; *People v. Morrison, supra,* 34 Cal.4th at p. 730; *People v. Farnham, supra,* 28 Cal.4th at p. 191; *People v. Kraft, supra,* 23 Cal.4th at p. 1079.)

Appellant next raises several claims asserting that CALJIC No. 8.88 was unconstitutional. He asserts the instruction failed to adequately describe the jury's sentencing discretion and deliberative process, specifically complaining of the phrases "so substantial" and "warranted" in the instruction. (AOB 444-449.) This Court has rejected contentions challenging the instruction's "so

substantial" phrase (*People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Carter* (2003) 30 Cal.4th 1166, 1226; *People v. Medina, supra,* 11 Cal.4th at p. 781) and "warranted" language (*People v. Wilson, supra*, 43 Cal. at pp. 31-32; *People v. Moon, supra,* 37 Cal.4th at p. 43; *People v. Boyette, supra,* 29 Cal.4th at p. 465). This Court likewise has rejected the claim that the instructions failed to inform the jury that the "central determination" is whether death was the appropriate punishment, not just an authorized one. (*People v. Boyette* (2002) 29 Cal.4th 381, 465.) Appellant's assertion that CALJIC No. 8.88 failed to inform the jurors that they were required to impose life without the possibility of parole if they found that mitigation outweighed aggravation (AOB 449-452) has been rejected by this Court. (*People v. Moon, supra,* 37 Cal.4th at p. 42; *People v. Catlin, supra,* 26 Cal.4th at p. 174.)

Appellant next asserts that California's sentencing scheme violates the federal Constitution's Equal Protection Clause by denying capital defendants procedural safeguards afforded to non-capital defendants. (AOB 452-457.) This Court has rejected claim, noting that capital and non-capital defendants are not similarly situated. (*People v. Brasure, supra,* 42 Cal.4th at p. 1068; *People v. Morrison, supra,* 34 Cal.4th at p. 731; *People v. Roberts* (1992) 2 Cal.4th 271, 341.)

Appellant finally asserts the jury should have been instructed on presumption of life. (AOB 457-458.) This Court has rejected this claim. (*People v. Brasure, supra,* 42 Cal.4th at p. 1068; *People v. Gray, supra*, 37 Cal.4th at p. 237; *People v. Prieto, supra,* 30 Cal.4th at p. 271.)

XXII.

THE DELAY IN THE APPELLATE PROCESS DOES NOT VIOLATE THE EIGHTH AMENDMENT

Appellant contends his sentence would be inherently excessive in violation of the Eighth Amendment because the delay in the appellate process in this case will exceed 20 years. (AOB 459-465.) The contention is meritless.

This Court has "consistently concluded" that appellate delay in capital cases does not demonstrate that the death penalty or the process leading to it is cruel and unusual punishment. (*People v. Anderson,* 25 Cal.4th at p. 606; *People v. Seaton, supra,* 26 Cal.4th at p. 570; *People v. Frye, supra,* 18Cal.4th at p. 1021.) Indeed, this Court has noted that appellate delay is a "constitutional safeguard, not a constitutional defect [citations] because it assures careful review of the defendant's conviction and sentence [citation]." (*People v. Anderson, supra*, 25 Cal.4th at p. 606.)

> Moreover, an argument that one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life.

(*People v. Anderson, supra*, 25 Cal.4th at p. 606.)

XXIII.

APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW OR THE EIGHTH AMENDMENT

Appellant contends his death sentence violates international law and the Eighth Amendment, as affected by international standards. (AOB 466-472.) The contention has been rejected by this Court. (*People v. Wilson, supra*, 43 Cal.4th at p. 33; *People v. Brown* (2004) 33 Cal.4th 382, 403-404; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Boyer, supra,* 38 Cal.4th at p. 489; People v. Snow, supra, 30 Cal.4th at p. 127; see also *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 [death penalty itself does not constitute cruel and unusual punishment].)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: September 14, 2008

Respectfully submitted,

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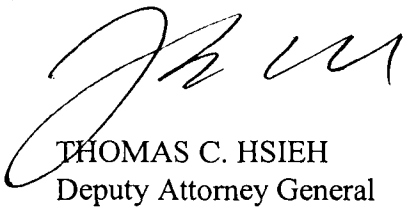

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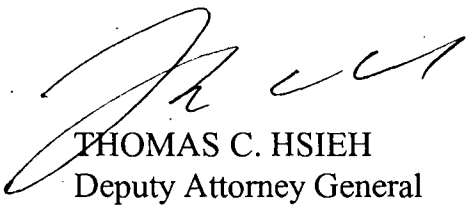
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 64,546 words.

Dated: September 14, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



THOMAS C. HSIEH
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: ***People v. Marchand Eliott*** ***No. S027094***

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 16, 2008, I placed 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:

SEE ATTACHED SERVICE LIST

In addition I placed one (1) copy in this Office's internal mail collection system, to be mailed to California Appellate Project (CAP) in San Francisco addressed as follows:

California Appellate Project
Attention: Luke Hiken
101 Second St., Suite 600
San Francisco, CA 94105

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on September 16, 2008 at Los Angeles, California.

Rina B. Genson

Rina B. Genson
Signature

TCH:rbg
LA1993XS0002

SERVICE LIST:

Case Name: ***People v. Marchand Eliott*** Case No.: **S027094**

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