IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GEORGE BRETT WILLIAMS,

Defendant and Appellant.

CAPITAL CASE
S030553

Los Angeles County Superior Court No. TA006961
The Honorable Madge Watai, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Los Angeles County District Attorney's Office charged appellant with two counts of special-circumstance murder (Pen. Code, § 187, subd. (a)) and two counts of second-degree robbery (Pen. Code, § 211). The alleged special circumstances were multiple murder (Pen. Code, § 190.2, subd. (a)(3)) and murder while appellant was engaged in, or was an accomplice in, a robbery (Pen. Code, § 190.2, subd. (a)(17)). It was further alleged as to all counts that appellant personally used a firearm within the meaning of Penal Code sections 1203.06, subdivision (a)(1), and 12022.5. (CT 139-141.) Appellant pled not guilty and denied the special-circumstance and weapon-use allegations.[1/] (CT 146.)

A jury found appellant guilty as charged and also found the murders to be in the first degree. The jury also found true the special-circumstance and weapon-use allegations. (CT 381-385, 390–391.) In the penalty phase of the trial, the jury determined that appellant should be sentenced to death. (CT 410-411.)

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1. Patrick Linton, Dauras Cyprian, and Dino Lee were also charged separately with the crimes committed in this case. The three men eventually entered guilty pleas. (RT 1541-1542, 1706, 1711, 1779, 2869, 2871.)

The trial court appointed another attorney to assist appellant's trial attorney in preparing a motion for new trial. The newly-appointed attorney was assigned to investigate whether trial counsel had been ineffective in representing appellant. (RT 3529-3550.) The trial court denied appellant's motion for new trial and automatic motion for modification or reduction of the death sentence (Pen. Code, § 190.4, subd. (e)). The court sentenced appellant to death for the murders and stayed imposition of sentence for the robberies and weapon-use enhancements. (CT 713-727, 731-735.) Appellant was awarded no days of custody credit. (CT 727.)

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

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Prosecution's Evidence

Appellant, Dauras Cyprian, Patrick Linton, and Dino Lee were friends. (RT 1333-1335, 1651, 1665, 1755-1757, 1760-1761.) They would sometimes socialize near the house of Cyprian's half-brother, Ernie Pierre, who lived across the street from Cyprian and his mother. (RT 1333, 1335-1337, 1339, 1514-1515, 1882, 2142-2145, 2163, 2176.) There was a vacant upstairs bachelor apartment behind Pierre's residence. (RT 1770.)

Appellant had a pager and a cellular telephone.[2/] (RT 1355-1356, 1411-1413, 1506, 1512, 1532-1533, 1546-1547, 1600-1601, 2200-2201.) Cyprian

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2. Monique Williams, appellant's wife, testified that appellant did not have a cellular telephone. Although appellant did have a telephone in his BMW, the phone did not work. (RT 1965, 1968, 2024-2025, 2064.) Appellant sold the BMW shortly before Christmas 1989 and then began driving a dark Mercedes Benz. (RT 1502, 1510-1511, 1555, 1652-1658, 1761-1762, 2006, 2049-2050, 2062, 2163.)

was with appellant when he purchased the cellular telephone for $700, and Linton was with appellant when he bought the pager from Delcomber Communications.[3] (RT , 1649, 1651, 1759-1760.)

In late December 1989, appellant told Linton he was going to "jack someone" for money. (RT 1559-1560, 1605-1607.) On January 2, 1990, appellant told Linton he was going to obtain money for Linton by arranging a narcotics transaction.[4] (RT 1558, 1561, 1600, 1602-1604.)

The records for appellant's home telephone showed that there were three calls made from appellant's house to a business called A.R.A. on January 2. (RT 1496-1497, 2438-2441.) Londell Richardson, an employee of A.R.A., overheard fellow employees Jack Barron and Willie Thomas state they were going to a bar to engage in a drug deal involving $50,000 and three or four kilos of narcotics. (RT 1475-1476, 1482-1487, 1489, 1494-1495.)

Later that day, Linton drove appellant and Cyprian to appellant's house, where appellant retrieved a .38 caliber handgun, a .380 caliber handgun, a rifle, and a plastic bag filled with yellow pages that was supposed to appear to be a bag filled with money. (RT 1562-1563, 1592, 1607-1608, 1765-1766, 2554.) Appellant also had a cellular telephone, which he plugged into the cigarette lighter of Linton's Blazer. (RT 1334-1335, 1503-1504, 1525-1526, 1543-1544, 1598-1599, 1608-1609.)

The men drove to a bar called Bar Mi Cabana. (RT 1612-1613, 1765, 2233-2235.) Appellant exited the Blazer and talked to Thomas and Barron for approximately 30 to 45 minutes. (RT 1564, 1613, 1615-1616, 1767-1768,

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3. Cyprian did not own a beeper or a cellular telephone in December 1989 or January 1990. (RT 1412-1413, 1758-1759, 1817, 1881.) Linton did not own a beeper that functioned. He did, however, keep a nonfunctioning beeper in the glove compartment of his vehicle. (RT 1413, 1660, 1732, 1734.)

4. Williams testified that appellant was with her on January 2, 1990. (RT 2027-2029, 2100-2103.)

1872, 2233, 2235, 2239-2240, 2246.) Barron and Thomas then left together in a blue Sprint. (RT 2250-2251, 2258.) Appellant returned to the Blazer and told Linton to follow the blue car to a house in South Gate. Linton began to follow the car, but appellant then directed Linton to enter a nearby freeway and Linton complied. (RT 1565-1566, 1616, 1618, 1704-1705, 1768-1769.)

The men returned to appellant's house, where appellant dropped off the guns and the plastic bag. Appellant and Linton drove separately to the area near Cyprian's house; Linton parked his Blazer in the driveway near Pierre's residence. (RT 1566-1567, 1618, 1769.) The men then drank and smoked marijuana. At some point, appellant received a page and returned the telephone call. The men eventually went to the vacant upstairs bachelor apartment located behind Pierre's residence. (RT 1429-1430, 1568-1569, 1571, 1770.) Lee subsequently arrived and joined appellant and the others. Approximately ten minutes later, Barron and Thomas arrived in the blue Sprint. (RT 1340-1341, 1570-1571, 1770-1771.)

Appellant went outside to talk to Barron and Thomas. Appellant later returned to the upstairs apartment to retrieve Linton and said they needed to get the guns and the fake money. (RT 1572, 1619, 1771.) Appellant and Linton drove separately to appellant's house. (RT 1572-1573.) Appellant retrieved the guns and plastic bag and got into Linton's Blazer. (RT 1573, 1620.) Appellant and Linton then returned to the area of Pierre's apartment and parked behind the blue Sprint, where Barron and Thomas were waiting. (RT 1573-1575, 1620.)

Appellant, Linton, Barron, and Thomas walked to the upstairs apartment, where Cyprian and Lee were waiting. (RT 1575-1576, 1621, 1771.) Once inside, appellant pulled out a .38 caliber revolver, Linton pulled out a .380 caliber weapon, and someone ordered Barron and Thomas to "[g]et down." Barron and Thomas were forced to the floor. Appellant pulled some

shoestrings out of his coat pocket and ordered the others to tie Barron's and Thomas' hands and feet. Linton complied, but appellant retied the laces around Barron's wrists because he said the bindings were not tight enough. (RT 1575-1578, 1593-1594, 1621-1623, 1626, 1772-1773.) Cyprian went through Barron's and Thomas' pockets and removed their wallets. (RT 1774-1775.) At some point, Lee retrieved a rifle from downstairs, blindfolded Barron, and gagged and blindfolded Thomas. (RT 1627-1628, 1773, 1775-1776.)

Appellant told Cyprian to move the blue Sprint in case someone had followed Barron and Thomas. Cyprian left the apartment and moved the car around the corner. (RT 1582, 1777, 1782-1785.)

In the meantime, a telephone rang in the upstairs apartment. Appellant answered the telephone and stated, "No, they haven't got here yet." (RT 1781.) Appellant placed Barron against a wall so that Barron was sitting with his feet in front of him and his hands behind his back. Appellant told Barron that he would be killed if appellant did not receive three kilos of drugs. Appellant also told Barron to tell his narcotics connection that he had counted the money, but warned Barron not to speak Spanish to the person. Barron replied, "Don't kill me. I'll give you anything you want." (RT 1579-1580, 1595, 1624, 1629, 1776-1777.)

Appellant bent down in front of Barron and dialed a telephone number. (RT 1580-1581, 1629.) Appellant placed the telephone to Barron's ear, but Barron stated that the phone was not ringing. Appellant, who had the gun and telephone in the same hand, began to redial the number when the gun discharged and shot Barron in the chest. Appellant stated, "Ah, shit. Ah, shit, man." (RT 1581, 1629-1630, 1724-1730.) Appellant then walked over to Thomas and shot him twice in the head. (RT 1581, 1632, 1644-1645.) Appellant returned to Barron and shot him in the head. (RT 1582, 1632, 1644-1645.)

Appellant, Linton, and Lee exited the apartment. (RT 1582.) Cyprian then returned from moving the Sprint. (RT 1344-1345, 1355, 1456-1457, 1785.) Appellant stated, "I shot 'em, man. I shot 'em, man." Appellant then said, "I had to kill a man, I had to kill him." Cyprian asked, "What did you do that for, man?" Appellant stated, "It was an accident so I killed the other one because I didn't want a witness." (RT 1345, 1437, 1445, 1583, 1633,1786-1787.)

Irma Sazo, who lived next to Pierre's residence, looked out of her kitchen window after she heard the gunshots and saw appellant and the others exiting from the rear of the property or the garage area. (RT 2141-2142, 2150-2152, 2192-2193, 2202-2203, 2462.) She recognized the men, including appellant, because she had frequently seen them in her neighborhood.[5/] (RT 2142-2145, 2157, 2162-2163, 2176, 2217.) Appellant walked towards Sazo's home and looked in her direction. (RT 2457-2459, 2155.) When appellant noticed Sazo, he stated, "Oh, oh, the lady is in the window." (RT 2155, 2215-2216, 2228.)

Appellant told the others, "We've got to move these people out of here." (RT 1583, 1633.) Appellant and the others decided to place Barron's and Thomas's bodies in Linton's Blazer. Linton moved the Blazer into the garage. (RT 1584, 1634, 1786-1787, 1789.) Appellant and Linton, and possibly Cyprian and Lee, dragged Barron's and Thomas' bodies down the stairs and placed them in the rear of the Blazer. (RT 1584, 1634-1636, 1787, 1850-1852, 2309.)

Cyprian noticed blood on the stairs where Barron's and Thomas' bodies had been dragged and decided to clean the area. He went across the street to his

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5. Sazo described appellant as having a thick Afro. (RT 2212-2213, 2225-2226, 2452-2453.) At the time, however, appellant had a long, jeri-curl. (RT 1521, 2163.)

house, filled an orange bucket with water, and returned to the stairs. He threw water at some of the blood at the bottom of the stairs, but it had no effect. (RT 1345-1346, 1348, 1439, 1585, 1636-1637, 1788-1789, 2160-2161, 2195-2196, 2449-2450.) While Cyprian was doing this, Sazo called the police. (RT 2147, 2161, 2208.) When the police arrived a few minutes later, appellant, Cyprian, Linton, and Lee fled. (RT 1789.)

As Cyprian was running from the scene, a car drove alongside of him. Appellant was in the car and told Cyprian to join him. (RT 1791.) The two men proceeded to appellant's house, where appellant removed his bloody clothes and gave them to his wife, Monique Williams. Cyprian removed his shoes and shirt and also gave the items to Williams, who left in her car and was gone for approximately 15 to 20 minutes.[6/] (RT 1793.) Appellant told Williams that he would be "out riding" and that he would contact her. (RT 1794.) Appellant and Cyprian then got into appellant's Mercedes and drove to a motel in Long Beach, where they spent the night. (RT 1797, 2325-2327.)

In the meantime, Linton reported his Blazer as being stolen. (RT 1637-1638; 1689-1690.) Linton attempted to call appellant's pager approximately nine times. (RT 1639-1640, 2435-2436.)

At the crime scene, the police discovered that Barron's and Thomas' bodies had been placed head-down in the rear of the Blazer. (RT 2308-2309.) The men's hands were tied behind their backs, their feet were bound, and there were ligatures around their necks. (RT 2309.)

Police searched the upstairs apartment and recovered a .30-caliber carbine rifle; a .38-caliber Smith and Wesson revolver; a .30-caliber Rhom revolver; a telephone hand receiver, base, and cord; a pager; the wallets of Barron and Thomas; and a shopping bag filled with yellow pages disguised to

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6. Williams testified that she did not hide any bloody clothing. (RT 2039-2040.)

look like money. (RT 1587-1588, 1592, 1996-1997, 2281-2282, 2288, 2537, 2542, 2545, 2554, 2556-2558, 2608-2609, 2620-2621, 2663-2664.)

The .38-caliber Smith and Wesson revolver had blood spatters on it. (RT 2476, 2483-2484, 2487, 2538-2540.) These spatters were consistent with "blowback," which occurs when a person is shot and the tissue and blood is blown back in the opposite direction of the trajectory of the bullet. (RT 2584.)

The police also found a Titan .380 handgun in the garage and an orange bucket on the stairs. (RT 2283-2285, 2553-2554, 2561, 2609, 2628.) A cellular telephone was found near the downstairs house where Pierre resided. (RT 2270, 2287, 2296-2297, 2604-2605.) The phone appeared to be similar to the one belonging to appellant. (RT 1364, 1409-1410.) The police also located the blue Sprint, which was parked around the corner from the crime scene. (RT 2394-2396, 2398.)

Appellant's fingerprint was found on the outside driver's side mirror of the Blazer. (RT 2371.) Appellant's right thumbprint and a fingerprint from his right index finger were found on the telephone base located in the upstairs apartment. (RT 2365-2368-2370.) One of appellant's fingerprints was also found on a cabinet in the apartment. (RT 2368-2370, 2372.) Fingerprints belonging to Lee, Cyprian, and Linton were also found at the crime scene.[7] (RT 2375.)

No fingerprints were found on the weapons or the cellular telephone recovered from the scene of the murders. (RT 2468, 2472, 2476-2479.) It was not unusual to find no identifiable prints on a gun found at a crime scene. (RT 2488.)

Sazo told the police that she recognized the men who had been in the yard because she had seen them in the past and because one of them lived

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7. There were 35 lift cards containing fingerprints from the crime scene that were identifiable but could not be matched to anyone. (RT 2378.)

across the street. (RT 2448, 2465.) Sazo identified appellant in a photographic mug book. She subsequently identified appellant, Cyprian, Linton, and Lee in photographic lineups. (RT 2147-2148, 2158, 2166, 2572-2576.)

A medical examination of Thomas revealed that he had died from two gunshot wounds to the head. (RT 2400-2401.) Both shots entered the right side of the head above the ear and passed through the brain. (RT 2401, 2405.) There was soot or powder gas along the paths of the bullets, indicating the shots were fired at close range. (RT 2401-2402.) A medium caliber bullet and multiple tiny lead fragments were recovered. (RT 2402.) Thomas' hands and feet were bound with shoelaces and there was a loose ligature around his neck consisting of a torn T-shirt. A small sock had been placed in his mouth as a gag. (RT 2405.)

A medical examination of Barron revealed two gunshot wounds. One bullet entered his chest, pierced his heart, and exited through his back. (RT 2407, 2413.) A muzzle stamp on Barron's chest and soot on his T-shirt indicated that the gun had been pressed against his chest when it was fired. (RT 2407-2409, 2413-2416, 2423.) The second bullet entered from behind Barron's right ear and lodged in his spine, where it was recovered. Soot and smoke along the path of the bullet indicated that it was fired at close range. (RT 2407, 2412.) Barron was still alive when he was shot in the head because there was blood along the path of the bullet. (RT 2411, 2421-2423.) Both gunshot wounds were fatal and would have been independently fatal. (RT 2411.) In addition to the gunshot wounds, Barron's hands were bound and a T-shirt was tied loosely around his neck. (RT 2410-2412.)

David Butler, a senior firearms examiner, examined the bullets retrieved from both bodies and determined that they were .38 or .357 caliber bullets that were fired from a revolver-type weapon. The bullets had five lands and grooves with a right-hand twist. (RT 2493-2495, 2498-2499, 2505-2506, 2522.)

The .38 caliber Smith and Wesson revolver recovered from the murder scene had five lands and grooves with a right-hand twist; however, Butler could not conclusively determine that the weapon fired the bullets recovered from the bodies because the projectiles were damaged.[8] (RT 2495-2499, 2510-2512.)

On January 3, 1990, the day following the murders, appellant and Cyprian drove by the crime scene and noticed the police. They then took appellant's Mercedes to A.M.S. Auto and sold it for $10,000 in cash. (RT 1798, 1861.) Appellant gave half the money to Cyprian. (RT 1862.)

Appellant called his wife, Williams, who picked them up and took them to buy clothes and shoes. (RT 1799, 1864-1865.) Williams then drove them to a Travelodge, where appellant obtained a room and made reservations for him and Cyprian to fly to New York. (RT 1800, 1802-1804, 2346, 2348.) Williams left the motel and returned with suitcases. (RT 1804.)

Williams drove appellant and Cyprian to the airport. (RT 1805.) The two men flew to New York, where they stayed at the Stanford Hotel before moving to another hotel down the street after two or three days.[9] (RT 1754, 1808.) While in New York, appellant and Cyprian used the names "Mark" and "Michael Cole." (RT 1854.)

After several days in New York, appellant and Cyprian went to the

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8. Butler testified that the other weapons recovered from the murder scene could not have been used to shoot the bullets recovered from Barron's and Thomas' bodies. (RT 2513, 2529.)

9. Williams testified that she did not buy suitcases, that appellant did not go to New York, and that she only took Cyprian to the airport. (RT 1967-1968, 2040-2043, 2105-2107, 2109, 2112-2114, 2680.) Appellant and Williams continued to live at their house from January 3, 1990, through January 16, 1990, but she could not explain why no telephone calls were made to their residence during that time period. (RT 2674, 2678.) The telephone records for appellant's home showed that no telephone calls were billed to his number from January 2, 1990, through January 15, 1990. The final call charged to appellant's number occurred on January 17, 1990. (RT 2440-2441.)

airport. Appellant gave Cyprian $500, and Cyprian took a cab to the bus station, where he bought a ticket to Las Vegas. (RT 1810.)

After Cyprian arrived in Las Vegas, he went to the Horseshoe Inn and saw appellant at a craps table. Appellant was there with Williams and said he was registered under Williams' name. (RT 1508, 1811-1812, 1868, 2120, 2122.) Cyprian was eventually joined in Las Vegas by his wife, Cynthia. (RT 1507, 1536-1537, 1811.) Appellant and Williams remained in Las Vegas until January 15, 1990. (RT 2119-2120, 2122.) The Cyprians returned to Los Angeles by bus the day before the Martin Luther King holiday. (RT 1509, 1536-1537.)

A few days later, Cyprian met appellant and asked him what had happened on January 2. Appellant stated that he shot Barron and Thomas twice. (RT 1813-1814.)

On January 19, 1990, appellant and Williams applied for an apartment in Wilmington and moved into the apartment the next day. (RT 1911, 2009-2010, 2125.) Appellant told a neighbor, Raymond Valdez, that his name was "Patrick." (RT 1907.) Everyone in the apartment complex called appellant "Patrick." (RT 1945.)

On February 8, 1990, appellant was arrested. (RT 2131-2132.) He told Williams that he was being framed by Linton and needed an alibi. (RT 2030, 2035.)

While in jail, appellant called Kathy Matuzak, who lived with neighbor Valdez, and said he needed their help. (RT 1913-1914, 1953.) Williams also approached Matuzak about helping appellant and asked Matuzak if she was planning to testify. (RT 1916, 1946, 1951, 2029.)

Appellant asked Valdez to testify that appellant was with him on January 2, 1990, even though appellant was not with Valdez and Valdez did not know appellant at that time. (RT 1908, 1912-1913, 1916, 1919, 1926, 1941, 2038.)

Appellant offered Valdez some marijuana and $1,500 for his testimony. Valdez agreed to testify on appellant's behalf because he believed appellant was being framed. (RT 1913, 1935, 2130, 3030-3031.) Appellant also asked Valdez's neighbors, Chris and Monica Lowery, to testify on his behalf. (RT 1913-1914.)

At some point, Willliams and three males asked Valdez if he was going to testify on appellant's behalf. (RT 1914, 1964.) Valdez thought the men were from the Rolling Sixties gang based on the way they were dressed. (1917-1918.) Williams told Valdez what to say while on the witness stand. Appellant also talked to Valdez on several occasions to tell Valdez what to say during his testimony. (RT 1915, 1921, 2029.)

Valdez eventually moved to a different apartment. Despite the move, Williams later approached Valdez and asked if he was still going to testify for appellant. (RT 1919.) As a result of these continued contacts by Williams and appellant, Valdez feared for his and Matuzak's lives. (RT 1920.)

At some point, Williams approached Dietrich Pack, an employee, at Delcomber Communications (the business where appellant purchased the pager) and offered Pack $100 to destroy appellant's records or records belonging to "Patrick Cole."[10/] (1983-1984, 1994, 2571.) When Pack was later served with a subpoena, she appeared to be on the verge of crying and said she

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10. Williams denied telling Pack to lose or destroy any paperwork. (RT 2036-2037.) Delcomber had a pager contract with someone purporting to be Patrick Cole. (RT 1980.) Although the signature of Patrick Cole on the Delcomber's form could not be matched with appellant's signature (RT 2330-2332), the pager recovered from the crime scene was the same pager that was sold to Patrick Cole. (RT 1980, 1985-1986, 1996-1997, 2545.) In addition, there were six telephone calls made to the pager from Williams' father's house between December 9, 1989 through December 16, 1989, and 11 calls made between December 26, 1989 through January 3, 1990. (RT 2432-2433.) Linton called the pager twice on December 26, 1989, twice on December 28, 1989, twice on December 31, 1989, once on January 2, 1990, and nine times on January 3, 1990. (RT 1646, 2435-2436.)

would not come to court. (RT 2571.)

At some point, Cyprian saw appellant in the county jail. Appellant advised Cyprian not to mention New York and asked Cyprian what he was planning to say in court. (RT 1881.)

2. Defense Evidence

Appellant's defense was alibi. Appellant maintained that he did not commit any of the charged crimes and that he was with his wife, Monique Williams, when the murders and robberies occurred.

Williams testified that she met appellant in 1988. At the time, appellant had a BMW which had a nonfunctioning car telephone. (RT 2825, 2832-2833.) Appellant sold the car before Christmas 1989. (RT 2825.) After he sold the BMW, he drove Williams' white Hyundai or his mother's Mercedes. (RT 2827.) Appellant did not have a cellular telephone, although he did have a pager in 1988 and 1989. (RT 2829, 2831, 2857.)

Williams never saw appellant display or possess guns and he never kept any firearms at home. (RT 2834.) When Williams and appellant lived together at 360 ½ 122nd Street, none of their friends ever visited or called the house. (RT 2846, 2860-2861.)

Appellant also called Dino Lee as a witness. Lee testified that on January 2, 1990, at approximately 6:00 or 7:00 p.m., he arrived near Pierre's residence and met appellant, Cyprian, and Linton. (RT2730, 2732, 2749-2750, 2752, 2791.) The men went upstairs to the apartment behind Pierre's residence, where they discussed a narcotics transaction. (RT 2730, 2754.) At some point, appellant and Linton left the apartment for approximately 20 to 30 minutes and returned in the Blazer. (RT 2755, 2793.)

Appellant and Linton walked into the upstairs apartment with Barron and Thomas, who were thrown to the floor. (RT 2756.) Appellant and Linton

placed firearms to Barron's and Thomas' heads and told them not to move. (RT 2757-2759.) Lee placed his knee on Thomas to hold him down while Linton bound Thomas's hands with shoelaces from appellant's pocket. (RT 2758-2759, 2767, 2791.) Appellant placed a gag in Barron's mouth. (RT 2766.) Barron's and Thomas' wallets were taken by appellant and Cyprian. (RT 2785-2786, 2795.)

At some point, Linton left the apartment and returned with a .30 carbine rifle. (RT 2768.) Linton placed the rifle somewhere and retained the handgun he had previously carried. (RT 2768-2769.) Cyprian left the apartment to move the victims' car. (RT 2787.)

Barron was placed with his back against a wall. (RT 2723.) Appellant had a telephone in his hands and was clicking the gun near Barron's ear. (RT 2724-2725.) Appellant was standing in front of Barron and holding the telephone receiver when he shot Barron. (RT 2724-2725, 2727-2728.) Appellant then shot Barron again and shot Thomas twice in the head. (RT 2781-2782, 2784, 2792.)

Appellant, Linton, and Lee exited the apartment. (RT 2735.) Cyprian then joined the group. (RT 2736-2737.) Appellant dragged Barron down the stairs, and appellant and Linton dragged Thomas down the stairs. (RT 2769-2770.) Lee opened the garage door, and they placed the bodies in the Blazer. (RT 2738.)

Cyprian went across the street to his mother's house, returned with a bucket, and attempted to clean the stairs by throwing water on it. (RT 2772-2773.) When the police arrived, everybody fled. (RT 2774-2775.) Linton and Lee got a ride from someone. (RT 2776-2777.)

Appellant was arrested on February 8, 1990, after he had called the police to tell them he knew the police were looking for him. Appellant told the police that they could pick him up at his mother's house. (RT 2809, 2813.)

Williams never approached Valdez or Matuzak and offered them money and marijuana if they testified for appellant, nor did she ever talk to Valdez about his testimony. Although Williams and appellant did discuss the possibility of having Valdez testify falsely, she did not make any effort to have him actually testify on appellant's behalf. (RT 2821-2823, 2851, 2859, 2866-2867.)

Williams did not call Delcomber Communications and ask them to destroy records relating to Patrick Cole. (RT 2840, 2852.) Pack had a reason to dislike Williams because she once dated Pack's ex-boyfriend. (RT 2852-2853.)

B. Penalty Phase Evidence

1. Prosecution Evidence

a. The Assault On Kenneth Moore

In 1983, Detective Robert Magnuson was assigned to CRASH and knew appellant to be a hardcore member of the Five Nine Hoover Crips. (RT 3234, 3236-3239.) Appellant was nicknamed "Nutty." (RT 3241.)

On May 28, 1983, 18-year-old Kenneth Moore and several other boys were riding their bicycles. (RT 3182, 3196.) None of the boys were associated with any gang. (RT 3197.) At some point, the boys rode past a group of men who yelled, "Five-Nine Hoover" and began to run after them. The boys went another block and ran into a group of men and women who belonged to the Five Nine Hoover Crips, including appellant. (RT 3183-3184, 3199-3200.) The men were yelling, "Come here, cuz," "This Five-Nine," and "You all give me your bikes." (RT 3196.) The girls stated, "Grab me a bike." (RT 3196-3197.)

The boys went in different directions. (RT 3197.) Moore tried to go

through the crowd and fell. (RT 3197.) The men beat Moore, and one of the men, Eddie Jackson, fatally shot Moore twice. (RT 3185, 3192-3194, 3198, 3250.)

Appellant was charged and convicted of misdemeanor assault with a deadly weapon in violation of Penal Code section 245 for his participation in the crimes committed against Moore. The conviction did not involve a personal use of a firearm. (RT 3298.)

b. The Shooting At Officer Sims

On December 3, 1983, Officer Carl Sims was in uniform and was standing outside his police car after arresting a burglary suspect. (RT 3279, 3295.) The suspect's vehicle was being impounded and a tow truck driver was standing nearby. (RT 3279.)

Gunfire suddenly erupted behind Officer Sims. (RT 3280.) The rounds were traveling in close proximity to his head and upper torso. The tow truck driver pushed Officer Sims towards the police vehicle and stated, "Get down, they are going to kill you." (RT 3281.)

Officer Sims dropped to his knees and grabbed a shotgun. (RT 3281-3282.) His partner, Lauro Montes, called for backup from the front seat. (RT 3282.) Officer Sims turned around and saw Tommy Thomas, who yelled, "Watch out, officer. He's behind you. Watch out, he's behind you." (RT 3282.) Officer Sims saw appellant standing behind a palm tree, which was in the direction from which the bullets had emanated. (RT 3282, 3285-3286.) When Officer Sims raised his shotgun, appellant ran and Officer Sims chased him. (RT 3282-3283.)

Officer Sims eventually found appellant and a number of other gang members near a truck. (RT 3283.) Appellant was crouched in the bed of the truck. (RT 3283, 3285-3286.) His hands were hurriedly moving behind a tool

box. Officer Sims told everyone to put their hands in the air, and everyone complied. (RT 3284.)

Officer Sims searched the truck and found a .38-caliber revolver immediately below the tool box where appellant had been moving his hands. (RT 3286.) A search of appellant revealed six live rounds of .38 ammunition, which were consistent with the weapon that was found. (RT 3286-3287.) No charges were filed in the case. (RT 3293-3294, 3298.)

c. The Robbery And Assault Of Mona Thomas And Her Father

On July 7, 1985, appellant was a member of the Rolling 60s gang. (RT 3242-3243.) On that day, Mona Thomas was in a car with her father. (RT 3251.) They stopped the car near a group of 30 men. (RT 3251-3252.) One of the men asked for money, and Thomas replied that she did not have any money. (RT 3252.) Somebody threw a brick at the window. The men pulled her father out of the car and hit him with a gun until he was unconscious. (RT 3252.) They also pulled Thomas out of the car and hit her. (RT 3252.) She was struck in the right eye several times. (RT 3253.)

Officer Michael Daly was later flagged down by Thomas, who was bloody and hysterical. (RT 3263.) Officer Daly noticed an unconscious, bloody male lying in the street. (RT 3264.) Thomas stated that she had just been robbed and that the attackers were standing in front of a nearby apartment complex. (RT 3270.)

Officer Daly and his partner approached the men. (RT 3270.) A number of people, including appellant, were detained. Thomas stated that the detained people were the ones involved in the attack. (RT 3264-3265.) She

pointed to appellant as being involved in the crime.[11] (RT 3264-3266, 3271, 3276-3277.)

Thomas said that $20 had been stolen. Appellant had $2,000 which consisted, in part, of $20 bills. (RT 3272.) No charges were filed against appellant in the case. (RT 3298.)

d. Appellant's Possession Of A Revolver

On December 7, 1985, Officer Michael Bowers conducted a traffic stop of appellant's car. (RT 3207-3208.) Officer Bowers found a blue steel revolver between the console and the driver's seat. There were five live rounds in the gun. (RT 3208-3209.) No charges were filed in the case. (RT 3298.)

2. Defense Evidence

When appellant was three or four, he was adopted by Jessie and Charles Williams after he had been a foster child in their house. (RT 3303-3304, 3363-3364.) The Williams' had two daughters, Betty Williams Hill and Edna Vickers. (RT 3302-3303, 3364-3365.) Appellant was always treated like a member of the family. (RT 3325-3326.)

The Williams later became foster parents for mentally disabled children. (RT 3304.) Appellant was friendly with the children and would help his parents care for them. (RT 3314-3316, 3347, 3378-3379.)

Appellant was not deprived as a child and was raised in an upper middle class or upper class family. (RT 3326.) He was given "all the gadgets that any young child would have." (RT 3306.) There was no shortage of food, clothing, love, or care. (RT 3326-3327.) Appellant was "not deprived of

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11. Thomas testified that she did not remember telling an officer that appellant was involved in the attack. (RT 3261.)

anything" and received "exactly what he needed to make it in life." (RT 3332-3333, 3354, 33593391.)

Appellant's mother did everything in her power to make appellant a useful member of society. (RT 3390-3391.) The family attended church, and appellant's parents attempted to give him guidance and teach him about right and wrong. Appellant understood the difference between right and wrong and understood the significance of taking another person's life. (RT 3327, 3334, 3355, 3372, 3392.)

Appellant had a normal childhood. He did not have any disciplinary problems while he was in school and always had a "smile on his face." (RT 3305-3306, 3314, 3366-3367, 3373-3374.) Appellant treated his adopted parents with the "utmost respect" and was generally obedient. (RT 3309, 3312, 3339, 3341, 3374, 3376.) When appellant was reprimanded, he would correct the deficiency. (RT 3309-3310.) He did not use profanity around his parents and did not drink or smoke. (RT 3310-3312, 3329, 3343, 3349.)

When appellant was approximately 18 or 19, he moved out of the house. However, he would visit his parents approximately two or three times a week and sometimes every day. (RT 3307, 3312, 3370-3371.) In addition, he was always present for holiday and family functions. (RT 3313, 3382.)

When appellant's aunt was sick with cancer, he helped his mother care for her for six or seven months. (RT 3321.) On one occasion, he lifted the aunt out of the house and into a car. (RT 3321.) He would also go to the store for her or take her to medical appointments. (RT 3384.)

Appellant had five children. (RT 3316.) He was a "faithful father" and would play with the children and change diapers. (RT 3316-3317.) For Christmas, he would buy the children "everything out of the toy store." (RT 3322.)

Appellant's family members were unaware of the times that appellant

had been arrested, although his mother was aware of one incident when appellant was in jail. (RT 3331-3332, 3360-3362, 3389-3390, 3395.) His mother did not recall a police officer bringing appellant home when he was a juvenile. (RT 3387-3388.)

3. Prosecution Rebuttal Evidence

On July 2, 1980, appellant was arrested by Officer Mike Damianakas for possession of a deadly weapon. Because appellant was a juvenile, he was booked, transported to his home, and turned over to the custody of his mother, who was advised of the nature of the arrest. (RT 3409.)

APPELLANT'S CONTENTIONS

1. The prosecutor unconstitutionally exercised peremptory challenges against female African-American prospective jurors. (AOB 63-112.)

2. The trial court erred in granting the prosecutor's motion for cause against prospective juror Reheis. (AOB 113-126.)

3. The trial court erroneously excused a prospective juror who was equivocal about whether her attitude about the death penalty would affect her penalty phase deliberations. (AOB 127-140.)

4. The trial court erred in refusing to dismiss Juror Coon for cause. (AOB 141-148.)

5. Appellant's due process rights were violated when the trial court failed to give a limiting instruction regarding the guilty pleas of appellant's accomplices. (AOB 149-157.)

6. The trial court violated appellant's constitutional rights when it refused to allow him to question Patrick Linton about the jury verdict in Linton's case. (AOB 158-168.)

7. The prosecutor committed misconduct by impugning the integrity of defense counsel. (AOB 169-174.)

8. The prosecutor committed misconduct by questioning witnesses about facts not in evidence. (AOB 175-197.)

9. The trial court erred in instructing the jury that efforts to suppress evidence and flight could be considered as evidence of guilt. (AOB 198-201.)

10. The robbery and felony murder special circumstance charges must be reversed because there was insufficient evidence to corroborate the testimony of the accomplices and because the court allowed the jury to convict appellant of a felony murder special circumstance that was never charged. (AOB 202-233.)

11. The trial court violated appellant's state and constitutional rights when it admitted "stale evidence of uncharged criminal activity" and instructed the jury that it could recommend death if it found that appellant was "involved in" the uncharged criminal activity. (AOB 234-298.)

12. The trial court violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights when it instructed the jury that it could impose death if appellant was "involved in" criminal activity. (AOB 299-318.)

13. The trial court violated appellant's constitutional rights by permitting jurors to sentence appellant to die based on aggravating factors that a majority of jurors were not required to find true. (AOB 319-328.)

14. The instructions failed to properly guide the jury's discretion. (AOB 329-330.)

15. Counsel was ineffective. (AOB 331-491.)

16. Appellant's waiver of his right of self-representation was invalid because he was given inaccurate information. (AOB 492-498.)

17. California's death penalty scheme fails to provide a meaningful way to distinguish the few who are selected for death from the many who are

not. (AOB 499-505.)

18. Reversal is required because the court failed to instruct the jury that it must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. (AOB 506-511.)

19. California Penal Code section 190.3, subdivision (a), is being applied in a manner that is arbitrary and capricious. (AOB 512-519.)

20. The failure to provide intercase proportionality violates appellant's constitutional rights. (AOB 520-529.)

21. The death penalty violates international law. (AOB 530-532.)

ARGUMENT

I.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES BECAUSE THE RECORD CONTAINS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S RULING THAT THE PROSECUTOR HAD RACE-NEUTRAL REASONS FOR EXCLUDING THE POTENTIAL JURORS AT ISSUE

Appellant contends that his state and federal constitutional rights were violated because the prosecutor used his peremptory challenges to impermissibly dismiss African-American females from the jury. (AOB 63-112.) This argument must be rejected because the record contains substantial evidence supporting the trial court's ruling that the prosecutor had valid, race-neutral reasons for utilizing his peremptory challenges against the potential jurors.

A. Relevant Facts And Proceedings

1. The Jurors At Issue

a. Theresa Cooksie

In her juror questionnaire, Theresa Cooksie stated that the death penalty should be imposed on "cold hearted killer[s]." (21 Supp. 1 CT 5162-5163.) She strongly agreed that a person should receive the death penalty if he killed another person without legal justification. (21 Supp. 1 CT 5164.) However, she also stated she would vote for life in prison regardless of the evidence and that life in prison without the possibility of parole was a more severe punishment than the death penalty. (21 Supp. 1 CT 5165.)

During voir dire, Cooksie was asked if she "would in every case automatically vote for a verdict of life in prison without the possibility of parole

and never vote for a verdict of death." Cooksie answered, "Yes, depending on the evidence of the case I would vote for life in prison." She later stated that she would not vote for life in prison in every case, but would base her decision on the evidence. (RT 214.) Cooksie was subsequently asked about her statement on the jury questionnaire that she would vote for life in prison regardless of the evidence. Cooksie explained, "I didn't understand that question so I would say no on that, too." (RT 215.) She also clarified that she believed the death penalty was more severe than life in prison. (RT 215-216.) Cooksie later admitted, "I wouldn't want to vote for [imposing the death penalty] - - I mean, I would vote for it, but if, like, I was on the jury, I wouldn't want to put myself in that predicament to vote for a death penalty if I were a juror." When asked to clarify whether she could impose the death penalty, Cooksie responded, "I could but I wouldn't." Defense counsel then asked, "You wouldn't under any circumstances?" Cooksie replied, "No." (RT 217.) Cooksie subsequently stated that in certain circumstances she could impose the death penalty, such as when the killing was "cold-hearted." (RT 217-218.) When Cooksie was asked if she would impose the death penalty if it was justified by everything she had heard, Cooksie responded,

> If I heard everything in the evidence and I feel that I opposed it and then I changed my mind on it, I would overrule it, you know. Like say if I heard more evidence and I say I was wrong in thinking this and I heard a little more and I decide that the death penalty shouldn't be then I would overrule it.

(RT 219.) Cooksie then stated that she could impose the death penalty if the evidence warranted it. (RT 219-220.)

b. Paula Cooper-Lewis

In the juror questionnaire, Paula Cooper-Lewis stated that the death penalty was "fair in some cases." (10 Supp. 1 CT 2470.) She also stated that

she had not decided whether California should have the death penalty. (10 Supp. 1 CT 2471.) She agreed "somewhat" that a person should receive the death penalty if he intentionally killed another without legal justification. (10 Supp. 1 CT 2472.)

During voir dire, Cooper-Lewis later stated that she would not automatically impose death or life in prison and believed she could impose the death penalty. (RT 755-757, 760.) However, Cooper-Lewis also said that she had not decided whether California should have the death penalty. (RT 758.) Later, she stated that, if she was in charge of her own regime, she would have the death penalty as one of the possible sentences. (RT 759.)

c. Ruth Jordan

Ruth Jordan stated in her juror questionnaire that capital punishment was not a deterrent to crime but was "necessary." (5 Supp. 1 CT 1072-1073.) She agreed "somewhat" that a person should receive the death penalty if he intentionally killed another person without legal justification. (5 Supp. 1 CT 1074.) She also stated that she did not know whether life in prison without parole was a more severe punishment than the death penalty. (5 Supp. 1 CT 1075.)

During voir dire, Jordan stated that she would not automatically impose death or life in prison. (RT 912-913.) Jordan said she "believe[d]" she would be able to impose the death penalty on another person. (RT 915.)

d. Retha Payton

In her juror questionnaire, Retha Payton stated that the death penalty was "sometimes necessary." (10 Supp. 1 CT 2436.) She believed that California should have the death penalty because it would force people to "think before committing a serious crime." (10 Supp. 1 CT 2437.)

During voir dire, Payton stated that she would not automatically vote for life in prison or death. (RT 728.) When Payton was asked about her feelings on the death penalty, she stated, "I have really not processed it because under some circumstances you feel that it's necessary and there are times when you don't. It would depend on the circumstances." (RT 728-729.) She also said she could not say whether the death penalty served as a deterrent. The prosecutor then asked, "I just want your feelings. Do you think that the death penalty serves a deterrent value to yourself? Do you think that it does?" Payton answered, "I hadn't really pinned it down." The prosecutor then stated, "You don't have feelings one way or the other as to whether it serves a deterrent value or not?" Payton answered, "Sometimes it would and sometimes it would not. With some people it would and with some people it would not." (RT 729.) The prosecutor then stated, "In terms of your own feelings on the death penalty, you can't give me anymore guidance on how you feel about it other than you haven't really thought about it?" (RT 729.) Payton replied, "No, I really haven't. It is just not something that I would - - could say yes, it would, or no, it wouldn't, because I hadn't thought of it in that terms seriously." (RT 729-730.) However, Payton stated that she believed she could impose the death penalty if the circumstances warranted it. (RT 730.)

e. Harriet Reed

In her jury questionnaire, Harriet Reed stated that the death penalty should only be imposed for "certain hardcore murders." (14 Supp. 1 CT 3554.) She believed that California should have the death penalty "[u]nder certain circumstances" but refused to comment on the purpose of the death penalty. (14 Supp. 1 CT 3555.) She disagreed somewhat that a person who intentionally killed another person without legal justification should receive the death penalty. (15 Supp. 1 CT 3556.) She stated she did not know whether life

in prison without the possibility of parole was a more severe punishment than the death penalty. (15 Supp. 1 CT 3557.)

During voir dire, Reed stated that she would not automatically vote for either life in prison or death. (RT 386.) Reed said the death penalty should be imposed for "cruel murders" where bodies were mutilated or burned for no reason. (RT 389-391.) She added that she "never really thought about the death penalty" for "regular murders" and could not state "what other reasons" would justify the death penalty. (RT 389, 391.)

2. The *Wheeler* Motion

During jury selection, the prosecutor used a peremptory challenge to excuse Reed. (RT 1187.) The prosecutor subsequently used a peremptory challenge to excuse Cooksie. (RT 1188.) The prosecutor later accepted the jury four times. (RT 1199-1201.) After additional voir dire, the prosecutor again accepted the panel on two occasions. (RT 1209.)

When the prosecutor used a peremptory challenge to excuse Cooper-Lewis, defense counsel stated, "I think we have the beginnings of a *Wheeler*[12] situation. Of the five blacks that have been in the 12, as part of the 12, the prosecution has perempted Miss Reed, Miss Cooksie, and Miss Cooper-Lewis. I guess only three, three of the four." (RT 1210.) Counsel noted that appellant was African-American and that there was only one African-American on the jury. The court noted that defense counsel had excused a male juror who appeared to be African-American. Defense counsel replied, "He is Creole, whatever that is." The court asked the prosecutor to justify his use of the peremptory challenges. (RT 1211.)

The prosecutor stated that Reed, Cooksie, and Cooper-Lewis all "rated

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12. *People v. Wheeler* (1978) 22 Cal.3d 258.

very reluctantly in terms of their ability to impose the death penalty." The prosecutor stated that in addition to a potential juror's answers on the jury questionnaire, he also rated the jurors in terms of reluctance towards answering his questions during voir dire. He believed that each of the three women had "demonstrated a reluctance in terms of answering direct questions which called for the requirement of the imposition of the death penalty with an affirmative answer that they would impose it." He believed that the women's reluctance to impose the death penalty was evident "from the answers that they gave," "the time that it took them to respond to the question, their general demeanor in answering the questions," and his "impression from each of them." (RT 1211.) The prosecutor noted that his victims were "a male black and a male Hispanic" and that there was going to be a "great cross-section of people" who would be called to the stand and that "[n]ot one of them are white." (RT 1213.)

The court denied the motion and voir dire continued. (RT 1213.) The prosecutor accepted the jury three more times. (RT 1224.) When Payton was placed in the jury box as a potential juror, the prosecutor used a peremptory challenge to dismiss her. (RT 1225.)

Defense counsel made a second *Wheeler* motion. The court asked the prosecutor to explain his use of the peremptory challenge to dismiss Payton. (RT 1226.)

The prosecutor explained that after reading her juror questionnaire, he had rated Payton "a two plus," but had "downgraded her to a one" after listening to her responses during voir dire. The prosecutor stated, "In order to get a one on my scale, she has to answer with extreme hesitance towards any questions related to the death issue or I would never rate her down that far." The prosecutor added, "I would have to look at her questionnaire to know exactly what it was to cause me concern but, obviously, there were hesitations in her answers - - to the responses she gave me." (RT 1226.)

Defense counsel noted that four out of the six African-American potential jurors had been dismissed by the prosecutor and that they had all been women. (RT 1226.) Defense counsel also argued that the prosecutor did not actually remember exactly why he had downgraded Payton. (RT 1227.)

The prosecutor stated, "I don't care if I have to kick 100 blacks, I want to get a fair trial. If that means kicking 100 whites I'll do that." He noted that eight of his peremptory challenges had been against non-African-Americans. He added, "It makes no difference to me the racial makeup of this jury other than the fact that we don't have to do it again." (RT 1227.)

Defense counsel asserted that the prosecutor had utilized four of his twelve peremptory challenges to remove African-Americans and "that is 33 percent right there." He added, "We have only had a mix of 10 percent blacks who have come on this jury as potential jurors, and he has kicked 75 percent of them, so those numbers speak for themselves." (RT 1227.)

The court stated that the prosecutor had justified the use of his peremptory challenges and that they matched the court's list of jurors that would likely be dismissed through the use of peremptory challenges. When the prosecutor asked the court if it had made a mark near Payton's name, the court replied, "This one I did not. I stopped making marks after awhile. That was my problem is that I started making marks and so those you had called on I understood. I stopped making marks after a point. I'm sorry that I did that but at this point I did forget to." (RT 1228.)

After the prosecutor retrieved his notes, he told the court that Payton had initially been rated a three but had been "downgraded to one." The prosecutor had written "ambivalent, no opinions" next to her name. The prosecutor noted that when Payton was asked if the death penalty served as a deterrent, Payton replied, "I hadn't really pinned it down." Payton later stated that she had not thought about the death penalty. Based on her answers, the prosecutor's

impression was that she did not know what she thought about the death penalty and whether she could impose it. The prosecutor added, "It was my general impressions from my discussion with her that she didn't have the ability to do it, or I wouldn't have downgraded her so far." (RT 1229.)

Defense counsel argued that Payton had stated she would not automatically impose life or the death penalty. He noted that Payton's answers appeared to indicate that her feelings on the death penalty "would depend on the circumstances." He added, "[W]e didn't really get that much information from her, but the point is that she indicated she had the ability to impose it." (RT 1230.)

The prosecutor countered that he did not believe that Payton had the ability to impose the death penalty "in spite of what her answers were." He added, "It had a lot more to do with not what she said but how I read what she was saying from being present in court with her and observing her demeanor and the way she answered questions. . . . It was my general impression from the way she answered the questions, not what she said." (RT 1230.)

Defense counsel reiterated that the prosecutor had used 13 peremptory challenges and that 4 of them had been against African-American women. He added that less than ten percent of the potential jurors had been African-American. (RT 1231.)

The prosecutor countered, "With the answers that they gave and the way that they gave them, it wouldn't have made any difference to me whether they were white, black, Hispanic, Chinese; it has nothing to do with it." He reiterated that he had dismissed those jurors because of their demeanor, their answers, and his perception that they could not impose the death penalty. (RT 1231.)

The court found that the prosecutor had stated a sufficient justification for dismissing Payton. Although the court had not made notes regarding

Payton, it accepted the prosecutor's explanation and denied the motion. (RT 1231-1232.)

The prosecutor later used a peremptory challenge to excuse Jordan. (RT 1232.) Defense counsel made a third *Wheeler* motion, noting that the prosecutor had used five peremptory challenges to remove five of the six African-American women. Counsel also noted that Jordan had been on the jury when the prosecutor had earlier accepted the jury panel. (RT 1233, 1236-1238.)

The prosecutor explained that he had initially accepted Jordan because the composition of the jury had been "somewhat satisfactory." The prosecutor noted that he had rated Jordan "very low." He stated that he had been reluctant to dismiss her because he was afraid counsel would make a *Wheeler* motion. He added that he was worried about offending the African-Americans on the panel. (RT 1234.) The prosecutor said that he had thought about the matter further and decided it did not make sense to try the case in front of a person that did not appear to have the ability to render a death verdict. The prosecutor reiterated, "It has nothing to do with the color of her skin. I can't emphasize that enough. It has to do with her responses." (RT 1234, 1236.) The prosecutor added, "I am kicking people who can't impose the death penalty." (RT 1235.) He further explained, "[S]ometimes you get a feel for a person that you just know that they can't impose it based on the nature of the way that they say something." (RT 1237.)

The court stated that it did not remember Jordan's responses. (RT 1234.) The court subsequently said, "I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is . I have found it to be true." The court added, "I can only go by what [the prosecutor] is saying because I stopped making notes . . . ." The court clarified that it was not

making its ruling based on its observations in other death penalty cases. (RT 1239.) The court explained it was "just making a little point. I just wanted to tell you my observation that I have seen this before and I can understand why. That's all. But I am not making my ruling based on that." (RT 1239.)

Defense counsel then argued, "I don't mean to accuse the court of anything. If the court says that and the court is basing its ruling on that information or experience I think that would be totally improper." (RT 1239.) The court agreed, stating, "Of course it is improper. I am just giving it for your information, what I have observed." (RT 1239.)

The court denied appellant's motion by stating, "And at this point I will accept [the prosecutor's] explanation." (RT 1240.)

During subsequent voir dire, the prosecutor asked the potential jurors if any of them were concerned that he had dismissed potential jurors because he believed that they could not impose the death penalty. (RT 1247-1248.) The prosecutor added, "If I have offended anybody I would like to know about it because if it is going to cause you not to be able to listen to the evidence in this case and come back with a fair verdict, now is the time you've got to tell us, because I'm going to do what I think is necessary to get a fair verdict." (RT 1248.)

After the jury was selected, the prosecutor stated that during jury selection he had exercised peremptory challenges to replace white jurors with African-American jurors. The prosecutor noted that he had excused the white jurors because he wanted "a greater mix of racial diversification" on this jury. He also noted that he had rated the remaining African-Americans "very high" because their answers indicated they could impose the death penalty. The prosecutor concluded that there were four male African-Americans, one female African-American, and seven whites on the jury. (RT 1250.)

B. The Trial Court Did Not Err In Denying Appellant's *Wheeler* Motions

The use of peremptory challenges to remove prospective jurors solely on the basis of membership in a cognizable group violates both the state and federal Constitutions.[13] (*People v. Morrison* (2004) 34 Cal.4th 698, 709.) If a party believes his opponent is using peremptory challenges improperly, he must object in a timely fashion and make a prima facie showing that there is a strong likelihood prospective jurors are being excluded because of their race or group association. (*Ibid.*) If the trial court finds that a prima facie case has been established, the burden shifts and the party whose peremptory challenges are being attacked must then provide a race or group-neutral explanation for each dismissal. (*People v. Cash* (2002) 28 Cal.4th 703, 724.) If a race-neutral reason is offered, the trial court decides whether the complaining party has demonstrated racial discrimination. (*Ibid.*)

A prospective juror's views about the death penalty are a permissible race and group-neutral basis for exercising a peremptory challenge in a capital case. (*People v. McDermott* (2002) 28 Cal.4th 946, 970-971; *People v. Mayfield* (1997) 14 Cal.4th 668, 724; *People v. Williams* (1997) 16 Cal.4th 635, 662-666.)

A trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges is reviewed with great restraint. (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) "If the trial court makes a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal," and its ruling on the issue is reviewed for substantial evidence. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1320; *People v. McDermott, supra*, 28 Cal.4th at p.

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13. African-American women constitute a cognizable group for *Wheeler* purposes. (*People v. Cleveland* (2004) 32 Cal.4th 704, 734.)

971; *People v. Alvarez* (1996) 4 Cal.4th 155, 196.)

In the case at bar, the trial court implicitly found that a prima facie case of discrimination had been made for each of the *Wheeler* motions because the court had the prosecutor justify his peremptory challenges.[14/] (*People v. Cash, supra*, 28 Cal.4th at p. 723; *People v. Jackson* (1996) 13 Cal.4th 1164, 1196.) Appellant merely disputes whether the trial court erred when it determined that the prosecutor's explanations were persuasive and not a pretext for discrimination. (AOB 63-112.) As will be shown, the court reasonably determined the prosecutor had legitimate, race-neutral reasons for challenging the prospective jurors that were the subject of the *Wheeler* motions.

The trial court's decision to deny these motions is entitled to deference because the court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecutor and the record contains substantial evidence supporting the trial court's denial of the motions. (See *People v. Jackson, supra*, 13 Cal.4th at p. 1198.) For example, the court denied the motions only after hearing extensive explanations by the prosecutor, arguments by defense counsel regarding the jurors' statements, and responses to those arguments by the prosecutor. (RT 1211-1213, 1226-1240.) At one point, the court even allowed the prosecutor to retrieve his notes so that he could better explain his justification for using a peremptory challenge to dismiss a juror. (RT 1229.) Although the court did not take notes on every juror, it

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14. During the first two *Wheeler* motions, the trial court asked the prosecutor to explain his use of peremptory challenges against the jurors in question. (RT 1211, 1226.) During the third *Wheeler* motion, the prosecutor immediately explained his use of the peremptory challenge against Jordan before the court could ask for an explanation. (RT 1234.) However, the court subsequently denied appellant's third *Wheeler* motion by stating, "And at this point I will accept [the prosecutor's] explanation." (RT 1240.) The court's statement indicates that it had implicitly found that a prima facie case had been established.

noted that many of the dismissed jurors were on its list of prospective jurors that would likely be dismissed through the use of peremptory challenges. (RT 1228.) Thus, the trial court made a sincere and reasoned attempt to evaluate the prosecutor's explanations.

Appellant attempts to avoid this conclusion by arguing that the trial court did not have an independent memory of the voir dire and jury questionnaire responses or the demeanor of the dismissed jurors. (AOB 101.) Although the court admitted that it could not recall Jordan's responses to the death penalty issues (RT 1239), the court did not rule on the *Wheeler* motion until after it had heard defense counsel's argument that the prosecutor improperly dismissed Jordan and the prosecutor's detailed explanation regarding why he decided to excuse her. (RT 1234-1237.) Moreover, the court clearly had some recollection of the responses and demeanor of the other dismissed jurors since the court noted that many of those jurors were on its list of jurors that would likely be dismissed by the parties. (RT 1228.) Thus, the court's ruling on the motions is entitled to deference. (See, e.g., *People v. Cummings* (1993) 4 Cal.4th 1233, 1282.)

Appellant further argues that the court did not make a sincere and reasoned attempt to evaluate the prosecutor's explanations because it based its decision on its observation that African-American women were reluctant to impose the death penalty. (AOB 101-102, 105.) However, the court repeatedly stated that it was not basing its ruling on this observation. (RT 1239-1240.) Thus, the court's statement regarding African-American women in no way alters the conclusion that its rulings on the *Wheeler* motions are entitled to deference.[15/]

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15. Appellant also argues that the trial court's denial of the motions is not entitled to deference because it used a defense dismissal of a prospective juror to justify the prosecutor's dismissal of jurors. (AOB 103-104.) However, the court did not state that it was basing its decision on the dismissal of a

Moreover, the court's denials of these motions is supported by substantial evidence that the prosecutor had legitimate, race-neutral reasons for challenging the prospective jurors. The prosecutor explained that he dismissed each of the jurors because they expressed a reluctance to impose the death penalty or their views on the death penalty were unclear. (RT 1211, 1213, 1226-1227, 1229-1231, 1234-1237.) The prosecutor's explanations were not pretexts because they were amply supported by the record. For example, Reed stated that (1) the death penalty should only be imposed for "cruel murders" where the bodies were burned and mutilated for no reason, (2) she had "never really thought about the death penalty" for "regular murders," and (3) she did not know whether life in prison without the possibility of parole was a more severe punishment than the death penalty. (14 Supp. 1 CT 3554; 15 Supp. 1 CT 3555-3557; RT 389-391.) Cooksie appeared equally reluctant to impose the death penalty, stating (1) that she would vote for life in prison regardless of the evidence, (2) that life in prison was a more severe punishment than the death penalty, and (3) that although she "could" impose the death penalty, she "wouldn't" do so. (21 Supp. 1 CT 5165; RT 214-215, 217-220.) Jordan's ability to impose the death penalty was also questionable since she did not know whether life in prison was a more severe punishment than the death penalty and could only state that she "believe[d]" she could impose the death penalty. (5 Supp. 1 CT 1075; RT 915.) Cooper-Lewis's and Payton's views on the death penalty were even more ambiguous since Cooper-Lewis stated that she had not decided whether California should even have a death penalty and Payton repeatedly said she had not thought about the death penalty. (10 Supp.

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prospective juror by the defense. The court merely noted in passing that an African-American juror might have been dismissed by the defense. The fact that the court subsequently asked the prosecutor to explain his use of peremptory challenges shows that the trial court was not basing its decision on defense counsel's use of peremptory challenges. (RT 1211.)

1 CT 2470-2472; RT 728-730, 758.) Based on these types of responses, the prosecutor justifiably dismissed the aforementioned jurors on race-neutral grounds. (*People v. Jackson, supra*, 13 Cal.4th at pp. 1196, 1198 [prosecutor properly dismissed juror who expressed reluctance to impose death penalty]; *People v. Mayfield* (1997) 14 Cal.4th 668, 725-727 [prosecutor could justifiably exclude juror because juror was a potential death penalty skeptic]; *People v. Arias* (1996) 13 Cal.4th 92, 137-139 [dismissal of juror was proper because juror had never thought about the death penalty and gave "soft and reluctant responses" during voir dire]; *People v. Montiel* (1993) 5 Cal.4th 877, 910-911 [prosecutor could properly dismiss juror who expressed indifference to death penalty].) Thus, the trial court reasonably concluded that the prosecutor had valid race-neutral reasons for dismissing the jurors and there is substantial evidence in the record supporting the trial court's ruling. The trial court properly denied appellant's *Wheeler* motions.

Appellant argues that the trial court's denials were erroneous because other jurors were not excused by the prosecutor even though they gave answers similar to the excused jurors. (AOB 106.) However, "engaging in comparative juror analysis for the first time on appeal is unreliable" and inconsistent with the deference reviewing courts generally give to a trial court's denial of a *Wheeler* motion. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1318; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 116; *People v. Boyette* (2002) 29 Cal.4th 381, 422-423.) The dynamics of jury selection "make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar." (*People v. Johnson, supra*, 30 Cal.4th at p. 1319.) An attempt to make such an analysis on appeal is "highly speculative and less reliable than a determination by the trial court who witnessed the process by which the defendant's jury was selected." (*Ibid.*) Although this Court has not prohibited

comparative juror analysis "outright," it has also stated, "[W]e are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate." (*Id.* at p. 1325.) Thus, because the trial court did not engage in comparative juror analysis, it should not be undertaken here.[16/]

For all of the foregoing reasons, the trial court did not err in denying appellant's *Wheeler* motions. Therefore, appellant's state and federal constitutional rights were not violated by the prosecutor's use of peremptory challenges.

II.

THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR GREG REHEIS FOR CAUSE IN LIGHT OF HIS VIEWS REGARDING THE DEATH PENALTY

Appellant contends the trial court erred by excusing prospective Juror Greg Reheis for cause even though he claimed that he could put aside his personal feelings and impose the death penalty. (AOB 113-126.) Respondent submits that the record contains substantial evidence supporting the trial court's

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16. Even if comparative juror analysis were undertaken, appellant could not prevail because the prospective jurors that appellant uses for comparison all indicated they could impose the death penalty. For example, Billy Haley said he could impose the death penalty in "certain kinds of circumstances." (RT 160-161.) He later added that he believed that he could impose the death penalty "if that's what I felt was necessary." (RT 162.) In a similar manner, Willie Jackson stated that he could impose the death penalty if it was "the appropriate thing." (RT 270-271.) When the prosecutor directly asked if Jackson could impose the death penalty, Jackson responded, "Yes." (RT 272.) Lela Bohn also said she could impose the death penalty and stated that she strongly supported a death penalty and had voted for the death penalty in a recent election. (RT 518-521, 523.) Lyle Stoltenberg and Deborah Hubbard also indicated they were willing to impose the death penalty. (RT 361, 548, 552.)

conclusion that prospective Juror Reheis' views on capital punishment would prevent or substantially impair the performance of his duties as a juror.

A. Relevant Facts And Proceedings

In his jury questionnaire, Reheis stated, "I do not believe the death penalty is morally just." He also stated "[o]nce is too much" when asked if the death penalty was used too often. (6 Supp. 1 CT 1282.) Reheis did not believe California should have the death penalty and strongly disagreed that a person should receive the death penalty if he intentionally killed another person without legal justification. (6 Supp. 1 CT 1283-1284.) Reheis explained his answer by reiterating, "Don't believe in the death penalty." (6 Supp. 1 CT 1284.) He also asserted that he would not automatically vote for life in prison without the possibility of parole, but admitted that he believed life in prison was a more severe punishment than the death penalty. His views on the death penalty had not changed in ten years. (6 Supp. 1 CT 1285.)

During voir dire, Reheis stated that he would not automatically vote for death or life in prison without the possibility of parole and asserted that his personal convictions would not influence his vote regarding either sentence. (RT 984-985.) However, he also admitted that he could not imagine a situation where he felt the death penalty would be appropriate, even if the crime was a heinous one. When Reheis was asked why he had previously indicated he could impose the death penalty, he answered, "Well, the way I read the question was that would my personal beliefs cause me never to be able to render that type of decision. But if you're asking me myself personally can see that happening or be agreeable to that, no." (RT 985.)

Despite this answer, Reheis later stated, "I could see myself voting for the death penalty if that's what the law had dictated." (RT 986.) When defense counsel explained that the law never dictated that the death penalty

must be imposed and that the decision was left to the jury, Reheis said, "If it was completely my option I would not vote for the death penalty." (RT 986-987.) Defense counsel then explained that the law dictated that the "appropriate sentence" be imposed. Reheis then replied, "I believe I could go with the appropriate sentence." (RT 987.) He then said that he believed he could impose the death penalty under certain circumstances. (RT 988.)

The prosecutor then pointed out that Reheis' responses on the jury questionnaire indicated a strong disagreement with the death penalty. When the prosecutor asked Reheis how he "could ever vote for the death penalty" in light of these beliefs, Reheis responded, "The way I would interpret my role here as a juror is not to impose my personal opinions but to view the evidence and then go with what the dictates were from that point." The prosecutor noted, "The law is always going to give you an out where you can go to your personal opinion." Reheis nonetheless asserted that he did not believe he would always believe the appropriate sentence was life in prison. (RT 989.) He again reiterated that he believed he could impose the death penalty. (RT 989-990.) However, when asked to specify the circumstances under which this would happen, Reheis answered, "I couldn't tell you at this point under what circumstances. I would have to be involved in the whole thing. I wouldn't know." (RT 990.)

The prosecutor subsequently asked Reheis if he could impose the death penalty in this case, and Reheis agreed that he could and responded, "If that's what everything presented itself to be, then that would be a decision that I could make." (RT 992-993.) When asked to explain how he could impose the death penalty despite his opposition to it, Reheis stated,

> Well, I believe that there are certain things that you have personal opinions upon that may not be other people's opinions or may not be exactly in conjunction with how the law is written or how the law is to be carried out. My opinion of my own judgment process is such that I could look at that objectively and weigh

> that, surely knowing that there are some prejudices of my own that will enter into it, but I still feel those prejudices would not be strong enough to sway my decision based upon what was presented in here.

(RT 953.) However, Reheis also admitted that on a "personal level" he did not believe the death penalty was ever an appropriate punishment for someone. (RT 993.)

The prosecutor explained that the jury instructions would attempt to "get you to analyze this on a personal level." (RT 993.) When the prosecutor again asked Reheis if the appropriate penalty would ever be death, Reheis answered,

> I don't understand what the instructions are, . . . if it's completely up to me or if there are certain instructions when it comes time for that decision that say under these circumstances you would administer or vote for the death penalty and under these circumstances you would vote for the other one.

The prosecutor explained that there was "never a situation where it's mandated that you vote for the death penalty . . . . unless you believe personally that it's an appropriate sentence." (RT 994.) When the prosecutor then asked if there was any situation in which Reheis could believe the appropriate sentence was death, Reheis responded, "From a personal point of view . . . I would not believe that the death penalty is appropriate." (RT 994-995.) Reheis added, "If it is completely up to me then I would say that I would most likely vote for the life without possibility of parole if that was the only thing, was my personal opinion, then that's what I would obviously say." (RT 995.) Reheis admitted that his opinions on the death penalty would have "some impact" on his ability to impose the death penalty because "that's part of the decision making process." (RT 995.)

The prosecutor moved to excuse Reheis for cause. (RT 996.) During additional voir dire by defense counsel, Reheis again asserted that he believed he could impose the appropriate sentence despite his opposition to the death penalty. (RT 997-999.)

The prosecutor then asked, "No matter what information I put in front of you about [appellant], do you ever think that the appropriate sentence for this person . . . in your own mind is going to be the death penalty?" Reheis responded, "On a personal level, no." (RT 999.)

During a sidebar discussion, the prosecutor stated that he wanted Reheis dismissed for cause because he had "never heard of one who was quite as strong in his views of being anti-death penalty." (RT 999.) The prosecutor explained that "when we talk about the death penalty we're talking about a personal level and a person's ability to impose the appropriate sentence." The prosecutor believed that no matter what evidence was presented, Reheis would not see the death penalty as being an appropriate punishment. (RT 1000.)

Defense counsel argued that Reheis had indicated he could impose the death penalty. (RT 1000.) The court then asked Reheis if he could impose the death penalty despite his personal beliefs. (RT 1000-1001.) Reheis conceded that his "personal feelings would enter into some judgment process," but believed that his beliefs would not "change what the appropriate decision should be." (RT 1001-1002.) Reheis reiterated that he believed he could impose the death penalty "if the evidence was such." (RT 1002.)

The prosecutor stated that he was concerned that there would never be any circumstance in which Reheis believed the appropriate sentence was the death penalty. The prosecutor asked if there were "any circumstances" that would cause Reheis to believe that the death penalty was the appropriate punishment in this case. Reheis answered, "I can't think of those off the top of my head now." (RT 1002.) The prosecutor then asked if there were any circumstances that would cause Reheis to believe that the appropriate punishment for "any person" would be the death penalty. Reheis answered, "No." (RT 1003.) However, in answer to a question by defense counsel, Reheis also stated that he believed he could be fair and impartial and follow the

law. (RT 1004.)

During a second sidebar discussion, the prosecutor argued that Reheis had "created a situation that no matter what I put in front of him he is not going to deem that the death penalty is an appropriate sentence under any circumstances." (RT 1004.) The prosecutor added that Reheis would be "unable to impose an appropriate sentence because the appropriate sentence will never be appropriate to him . . . even if the death penalty happens to be appropriate." (RT 1005.)

The court stated that it believed Reheis was trying to convince everyone that "he can be very objective and forget his own feelings, but his answer keeps coming back to his own convictions. Personally he cannot do it." (RT 1005.) The court also believed that Reheis' response to the prosecutor's last question made it "rather clear" that he would never find a situation in which the death penalty was appropriate. (RT 1005.) The court granted the prosecutor's motion to dismiss Reheis for cause over defense counsel's objection. (RT 1007-1008.)

B. The Excusal Of Reheis Was Proper

A prospective juror may be excluded for cause if the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Harrison* (2005) 35 Cal.4th 208, 227; *People v. Stewart* (2004) 33 Cal.4th 425, 440-441; *People v. Heard* (2003) 31 Cal.4th 946, 958; see *Wainwright v. Witt* (1985) 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841.) A prospective juror is properly excluded if he or she is unable to consider all of the sentencing alternatives, including the death penalty. (*People v. Stewart, supra*, 33 Cal.4th at p. 441; *People v. Heard, supra*, 31 Cal.4th at p. 958.) In general, the disqualification of jurors for cause is within the discretion of the trial court and is seldom reversed on appeal. (*People v. Haley* (2004) 34

Cal.4th 283, 306; *People v. Jones* (2003) 29 Cal.4th 1229, 1246.)

A juror's bias against the death penalty need not be proved with unmistakable clarity. (*People v. Haley, supra*, 34 Cal.4th at p. 306; *People v. Jones, supra*, 29 Cal.4th at p. 1246.) Instead, it is sufficient that the trial court is left with the definite impression that the prospective juror would be unable to faithfully and impartially apply the law. (*People v. Haley, supra*, 34 Cal.4th at p. 306; *People v. Jones, supra*, 29 Cal.4th at pp. 1246-1247.)

If the juror's statements are equivocal, ambiguous, or conflicting, the trial court's determination of the juror's state of mind is binding on appeal. (*People v. Harrison, supra*, 35 Cal.4th at p. 227; *People v. Stewart, supra*, 33 Cal.4th at p. 441; *People v. Jones, supra*, 29 Cal.4th at p. 1247.) If there is no inconsistency in the juror's statements, this Court must uphold the trial court's ruling if it is supported by substantial evidence. (*People v. Haley, supra*, 34 Cal.4th at p. 306; *People v. Jones, supra*, 29 Cal.4th at p. 1246.)

In the case at bar, the trial court properly excused Reheis in light of his views on the death penalty. Reheis maintained, on the one hand, that he strongly opposed the death penalty, believed it was not a morally just punishment, and could not conceive of a situation in which he would impose it. (6 Supp. 1 CT 1282-1285; RT 985, 990, 993-995, 999.) At the same time, Reheis also asserted that he could impose the death penalty. (RT 985-987, 989-990, 992-993, 1001-1002, 1004.) The trial court resolved the conflict and determined Reheis could not personally impose the death penalty. Given Reheis' vacillations and self-contradictions, as well as his moral opposition to the death penalty, the trial court's conclusion that he was unfit as a juror must be upheld since it is supported by substantial evidence. (See *People v. Harrison, supra*, 35 Cal.4th at pp. 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Haley,*

supra, 34 Cal.4th at pp. 307-308 [court properly excused potential jurors who gave contradictory and ambiguous answers regarding the death penalty]; *People v. Navarette* (2003) 30 Cal.4th 458, 490 [potential juror's conflicting statements on death penalty "easily supported" trial court's decision to remove her for cause]; *People v. Jones, supra*, 29 Cal.4th at p. 1247 [potential juror's conflicting statements made trial court's determination of the potential juror's state of mind binding on appeal]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [although potential juror stated that he could impose the death penalty, his equivocal response that he did not know when death would ever be an appropriate sentence justified the trial court's dismissal of the juror for cause].)

Reheis' juror questionnaire and voir dire revealed that he would not impose the death penalty even in the worst cases because he believed it was a morally unjust punishment. (6 Supp. 1 CT 1282-1284.) Reheis repeatedly stated that he could not envision a situation in which the death penalty would be the appropriate sentence. (RT 985, 993-995, 999, 1002-1003.) Such views, respondent submits, substantially impaired his ability to be fair, notwithstanding his equivocations to the contrary. (See *People v. Mincey* (1992) 2 Cal.4th 408, 457 [trial court was justified in excusing potential juror who stated that there were no conceivable circumstances under which she would vote for death penalty]; *People v. Wharton* (1991) 53 Cal.3d 522, 588-590 [trial court did not err in excusing potential juror who did not unequivocally rule out the possibility that he could vote for the death penalty, but his answers indicated he "was holding out only a theoretical possibility that evidence could be shown which would convince him to vote for death"].)

Appellant argues that this Court's decision in *People v. Stewart* (2004) 33 Cal.4th 425 indicates that the trial court erred in dismissing Reheis. (AOB 121-122.) However, *Stewart* does not assist appellant. In *Stewart*, the trial court granted the prosecutor's challenges for cause against certain potential

jurors based solely on their responses on the jury questionnaire. (*People v. Stewart, supra*, 33 Cal.4th at pp. 444-445.) This Court held that the trial court erred in excluding the prospective jurors based solely on their questionnaire responses. (*Id.* at p. 445, 451-452.) In so holding, this Court noted that the responses on the jury questionnaires did not give the trial court sufficient information to ascertain whether the potential jurors' views would prevent or substantially impair the performance of their duties. (*Id.* at pp. 445-449.) Although the questionnaire responses preliminarily indicated that each potential juror might be challenged for cause, this could not be ascertained without any follow-up questioning; during this examination, the trial court could have further explained the role of jurors and probed whether each of the potential jurors could impose the death penalty. (*Id.* at p. 449.)

In the case at bar, the trial court did allow Reheis to be extensively questioned. During this questioning, Reheis repeatedly gave statements indicating he could not fulfill his role as a juror in this case because he could not personally vote for the death penalty. As this Court in *Stewart* noted, the trial court's determination that a prospective juror's views would substantially impair his or her performance as a juror in the case is entitled to deference. (*People v. Stewart, supra*, 33 Cal. 4th at p. 451.) That is the case here. Thus, appellant's claim must be rejected.[17/]

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17. Appellant argues that, if the trial court erred, the guilt judgment and special-circumstances findings should be reversed. (AOB 125-126.) However, decisions by this Court make it clear that such an error only dictates a reversal of the penalty judgment and not the guilt judgment or special-circumstances findings. (*People v. Stewart, supra*, 33 Cal.4th at pp. 454-455; see *People v. Heard, supra*, 31 Cal.4th at p. 966.) Appellant has not "provided any persuasive basis upon which to reconsider that authority or view the trial court's error as a 'structural defect' that impugned the entire proceeding below." (*People v. Stewart, supra*, 33 Cal.4th at p. 455.) Moreover, as will be shown, *infra*, jurors challenged by the prosecutor were not judged by a different standard than those challenged by the defense.

III.

THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR ELIZABETH CHAMPLIN FOR CAUSE IN LIGHT OF HER VIEWS ON THE DEATH PENALTY

Appellant contends the trial court erred by excusing prospective Juror Elizabeth Champlin for cause. (AOB 127-140.) This argument must be rejected because the record contains substantial evidence supporting the trial court's conclusion that prospective Juror Champlin's views on capital punishment would prevent or substantially impair her duties as a juror.

A. Relevant Facts And Proceedings

In her juror questionnaire, Champlin stated that she had "mixed feelings" regarding the death penalty, although she also stated that she did not believe the death penalty was used too often because "people take the death penalty seriously." (24 Supp. 1 CT 6037.) She did not believe California should have the death penalty, but did believe that the death penalty served as "the ultimate penalty and as a deterrent." (24 Supp. 1 CT 6038.) She agreed somewhat that a person should receive the death penalty if he intentionally kills another person without legal justification, stating, "I think people should be aware that taking a life may result in losing theirs." (24 Supp. 1 CT 6039.) She did not believe life in prison without the possibility of parole was a more severe punishment than death and would not automatically vote for death or life imprisonment. (24 Supp. 1 CT 6039-6040.)

During voir dire, Champlin stated that she would not automatically vote for life in prison or death. (RT 645-646.) She reiterated that she had "mixed feelings"regarding the death penalty and explained, "If I were ever to vote for it I would have to be absolutely sure because I know it's a serious thing. I

know it would be a tough thing to do." She added, "I don't know. I can't say honestly that I wouldn't never do it." (RT 646.) She later re-emphasized, "I know it would be a tough decision to make finally whether or not it would be the death sentence or life in prison." (RT649.)

When the prosecutor questioned Champlin about her mixed feelings, he told her, "Take your time and relax." Champlin admitted that she was getting "nervous." Champlin said she did not know how to explain her feelings regarding the death penalty. She added that she preferred to live in a state that did not have the death penalty, and stated, "I didn't vote for it. I don't know." (RT 650.) She said she would not vote for the death penalty if it was on the ballot because she "would prefer not to ever vote for the death penalty at all." (RT 651.)

The prosecutor asked Champlin if she could impose the death penalty on appellant. (RT 651.) Champlin replied, "It would be difficult." The prosecutor then asked if Champlin's personal feelings regarding the death penalty would prevent her from being able to impose the death penalty. Champlin answered, "If it came right down to it I probably could." (RT 652.) However, shortly thereafter, she answered, "Probably not," when asked if she had the "ability under any circumstances to personally vote for a verdict of death in a jury trial." (RT 653.)

The court then remarked, "You have been asked the question at this time and you have had time now to think about it. Do you feel that you could or is this a probably not? What kind of an answer would that be?" Champlin replied, "I probably couldn't." The court asked Champlin if she could not impose the death penalty regardless of the evidence or the circumstances. Champlin answered, "There is still a part of me that thinks that I could but I'm just not certain. I'm really not." The court then asked, "Would you prefer not to sit on a case in which you have to make that determination?" Champlin

responded, "I probably shouldn't." (RT 653.) Shortly thereafter, Champlin began to cry. (RT 654.)

The prosecutor challenged Champlin for cause, and defense counsel objected. The prosecutor argued that Champlin had become "emotional" and "began crying during the answers." He also noted that when he asked her questions, "she sat there for probably 10 or 15 seconds with a distraught look on her face." The prosecutor added, "I think she was extremely candid when she said she didn't believe she could." (RT 655.)

The court found that Champlin would be substantially impaired from performing her job as a juror in the case and dismissed her for cause. (RT 656.)

B. The Trial Court Properly Excused Champlin For Cause

As noted previously, a prospective juror may be excluded for cause if the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Stewart, supra*, 33 Cal.4th at pp. 440-441.) If a juror's statements are equivocal, ambiguous, or conflicting, the trial court's determination of the juror's state of mind is binding on appeal. (*Id.* at p. 441; *People v. Jones, supra*, 29 Cal.4th at p. 1247.)

In the case at bar, the trial court properly excused Champlin based on her views regarding the death penalty. For example, she maintained that the death penalty served as "the ultimate penalty and as a deterrent" and somewhat agreed that a person should receive the death penalty if he intentionally killed another person without legal justification. (24 Supp. 1 CT 6038-6039.) At the same time, however, she also said she had "mixed feelings" regarding the death penalty, did not believe California should have the death penalty, and would never vote for the death penalty if it was on the ballot. (24 Supp. 1 CT 6037; RT 646, 650-651.) Although she stated that she could impose the death

penalty, she also stated that it would be a "difficult" or tough decision, and later stated that she was not certain she could impose the death penalty and that she probably could not impose it. (RT 646, 649, 652-654.) Given Champlin's vacillations and contradictions, the trial court's conclusion that she was unfit to serve as a juror must be upheld since it is supported by substantial evidence. (*People v. Harrison, supra*, 35 Cal.4th at pp. 227-228 [trial court properly excused juror who said she could not impose the death penalty, but later said that "maybe" she could"]; *People v. Haley, supra*, 34 Cal.4th at p. 307 [based on juror's "admitted inability to impose the death penalty, the trial court properly excused" her]; *People v. Griffin* (2004) 33 Cal.4th 536, 558-561 [although at some point, each prospective juror "may have stated or implied that she would perform her duties as a juror," this did not prevent the trial court from finding, on the entire record, that each nevertheless held views that substantially impaired her ability to serve]; *People v. Ayala, supra*, 24 Cal.4th at p. 275 [because the potential juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"]; *People v. Welch, supra*, 20 Cal.4th at p. 747 [court permissibly excused juror who said he did not know whether he could ever see himself feeling that death was the appropriate sentence].)

Appellant concedes that Champlin's statements were contradictory or equivocal and that this Court's precedent upholds a dismissal for cause on those grounds. (AOB 127.) However, he argues that the United States Supreme Court's decisions in *Adams v. Texas* (1980) 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581, and *Gray v. Mississippi* (1987) 481 U.S. 648, 107 S. Ct. 2045, 95 L. Ed. 2d 622, dictate a different result. (AOB 128-140.) These cases do not assist appellant.

In *Adams*, the Supreme Court held that the trial court had impermissibly excluded potential jurors who indicated they would be affected by deciding whether the death penalty should be imposed or who were unable to state whether their deliberations would be affected. (*Adams v. Texas, supra*, 448 U.S. at pp. 49-51.) In *Gray*, a potential juror stated she could impose the death penalty, but was excused for cause after the prosecutor requested an additional peremptory challenge because he had used his allotted perremptory challenges following the trial court's impermissible denial of his challenges for cause. (*Gray v. Mississippi, supra*, 481 U.S. at pp. 653-654.) The Supreme Court stated that the excused juror had been qualified to be seated as a juror on the case, noting that "[e]very Justice" of the Mississippi Supreme Court had reached the same conclusion. (*Id.* at p. 659.)

In contrast to the excused jurors in *Adams* and *Gray*, Champlin indicated that she could not impose the death penalty. When asked if she had the "ability under any circumstances to personally vote for a verdict of death in a jury trial," she responded, "Probably not." (RT 653.) The trial court then stated, "You have been asked the question at this time and you have had time now to think about it. Do you feel that you could or is this a probably not? What kind of answer would that be?" Champlin replied, "I probably couldn't." (RT 654.) She also asserted that she "probably shouldn't" sit as a juror in the case. (RT 654.) While being asked whether she could impose the death penalty, Champlin appeared to be "distraught" and began to cry. (RT 654-655.) In light of these responses, as well as Champlin's emotional state, the court reasonably concluded, based on Champlin's concerns, that she was substantially impaired in her ability to serve as a juror in this case. (*People v. Griffin, supra*, 33 Cal.4th at p. 559; *People v. Ayala, supra*, 24 Cal.4th at p. 275.) The record, as summarized above, supports this conclusion. Thus, appellant's claim must be rejected.

IV.

APPELLANT FAILED TO PRESERVE THE ISSUE REGARDING THE TRIAL COURT'S DENIAL OF HIS CHALLENGE FOR CAUSE AGAINST PROSPECTIVE JUROR RICHARD COON; MOREOVER, THE TRIAL COURT PROPERLY DENIED THE DEFENSE CHALLENGE FOR CAUSE AGAINST COON

Appellant contends that the trial court erred when it denied his challenge for cause against Prospective Juror Richard Coon. (AOB 141-148.) This argument must be rejected because appellant did not preserve the issue below and because Coon's views on capital punishment would not have substantially impaired the performance of his duties as a juror.

A. Relevant Facts And Proceedings

In his jury questionnaire, Richard Coon stated that he was in favor of the death penalty if a person "willingly" took a life "for any reason other than self defense, mental instability, in defense of another, etc." He believed that "we're too lax on the death penalty" and that the only way to deter violent crime was to "make the consequences very un-appealing." (4 Supp. 1 CT 968.) He strongly agreed that a person should receive the death penalty if he intentionally killed another person without legal justification. (4 Supp. 1 CT 970.) However, Coon would not automatically vote for the death penalty or life in prison. (4 Supp. 1 CT 970-971.) He stated that he did not know whether life in prison without parole was a more severe punishment than the death penalty. (4 Supp. 1 CT 971.)

During voir dire, Coon reiterated that he would not automatically vote for life in prison or the death penalty. (RT 945.) Defense counsel subsequently discussed Coon's statement on the jury questionnaire that he was in favor of imposing the death penalty on those who willingly take a life for any reason

other than self-defense, defense of others, or mental instability. Defense counsel asked, "So if you were a juror would you then automatically vote for the death penalty if it wasn't one of those situations?" Coon replied, "No, I would not. There are other circumstances. I think the judge called it mitigating circumstances." (RT 946.) Coon said he would "lean in favor" of the death penalty, but would not automatically impose it if he determined that the aggravating factors outweighed the mitigating factors. (RT 947-948.) Coon subsequently stated that he would impose the death penalty if the aggravating circumstances outweighed the mitigating circumstances. When asked if he would do so automatically, Coon replied, "I believe I would, yes." (RT 948-951.) He also stated, "[U]ntil I'm put in that position I can't honestly say what I would do at that moment but I would be fair, as fair as I could be in my own eyes." (RT 948.) Defense counsel challenged Coon for cause. (RT 951.)

The prosecutor asked Coon if he could impose life in prison without the possibility of parole if he believed that was the appropriate punishment. Coon answered, "Yes, I could." Coon also stated that he could impose a life sentence if he believed the sentence was appropriate, despite the fact that the aggravating circumstances outweighed the mitigating circumstances. (RT 951.)

The prosecutor explained that the jury was first to decide whether the aggravating circumstances substantially outweighed the mitigating circumstances. If they did, the jury then had to impose the appropriate penalty. Coon once again reiterated that, even if the aggravating circumstances substantially outweighed the mitigating circumstances, he could impose a life sentence if he thought it was the appropriate penalty. (RT 952-953.)

During further voir dire, defense counsel noted that Coon had previously stated he would automatically vote for the death penalty in any case in which the aggravating circumstances substantially outweighed the mitigating circumstances. Coon responded, "I retract that," and noted that the prosecutor's

comments had made the issue "a little more clear." (RT 956.)

Defense counsel again moved to dismiss Coon for cause, explaining that Coon said he would automatically vote for the death penalty when the aggravating circumstances outweighed the mitigating circumstances. (RT 957.) Although Coon later retracted his statements, defense counsel believed that the prosecutor had led him to do so. (RT 958.)

The court denied defense counsel's motion. (RT 960.) Coon was subsequently placed in the jury box as one of the 12 potential jurors in the case. (RT 1188.) Although defense counsel had peremptory challenges available to him at that time, he did not use one to excuse Coon and instead exercised 13 peremptory challenges before accepting the jury. (RT 1188, 1199-1201, 1209-1210.) Thereafter, he exercised four more peremptory challenges before accepting the jury. (RT 1213, 1224-1225, 1232.) He then exercised two additional peremptory challenges before the jury was finally selected with Coon as one of the jurors. (RT 1232, 1240; CT 267.)

B. Appellant Failed To Properly Preserve His Claim Regarding His Challenge To Coon; Moreover, The Trial Court Properly Denied Appellant's Motion

If a defendant contends the trial court wrongly denied a challenge for cause, he must establish that he exercised a peremptory challenge to remove the juror in question, exhausted his peremptory challenges or justified the failure to do so, and communicated to the trial court his dissatisfaction with the jury as selected. (*People v. Horning* (2004) 34 Cal.4th 871, 896; *People v. Maury* (2003) 30 Cal.4th 342, 379.)

In this case, appellant did not adequately preserve his claim regarding his challenge to Coon. Although appellant had peremptory challenges available to him when Coon was placed on the jury, he did not use any of them to dismiss Coon. Instead, he subsequently exercised 19 peremptory challenges against

other potential jurors. (RT 1188, 1199-1201, 1209-1210, 1213, 1224-1225, 1232, 1240.) Appellant also failed to communicate his dissatisfaction regarding the jury to the trial court. (RT 1249-1252.) Thus, appellant has waived any claim of error. (See *People v. Maury, supra* 30 Cal.4th at pp. 379-380.)

Assuming arguendo that the claim has not been waived, appellant still is unable to prevail. Coon stated that he believed the death penalty was an appropriate punishment in certain circumstances. (4 Supp. 1 CT 968, 970-971.) He also stated that he would not automatically vote for the death penalty and that he would consider the mitigating factors in determining whether life in prison or the death penalty was the appropriate sentence. (RT 945-948.) Although Coon initially stated that he would automatically impose the death penalty if the aggravating circumstances outweighed the mitigating circumstances (RT 948-951), he subsequently stated that he could impose life in prison without the possibility of parole if he believed the sentence was appropriate, even if the aggravating circumstances outweighed the mitigating circumstances. (RT 951.) When the prosecutor further explained the penalty phase process, Coon again reiterated that he could impose a life sentence even if the aggravating circumstances outweighed the mitigating circumstances. (RT 952-953.) When defense counsel noted that Coon had previously stated he would automatically vote for the death penalty if the aggravating circumstances outweighed the mitigating circumstances, Coon clarified, "I retract that" and stated that the prosecutor's explanations had made the issue "a little more clear." (RT 956.) In light of Coon's statements that he could impose a life sentence, even when the aggravating circumstances outweighed the mitigating circumstances, and would consider the mitigating circumstances, the trial court acted properly when it denied appellant's challenge for cause. (See *People v. Horning, supra*, 34 Cal.4th at pp. 897-898 [although potential juror said things that would have supported granting a challenge for cause, appellate court must

defer to trial court's denial because statements by juror were contradictory and equivocal]; *People v. Weaver* (2001) 26 Cal.4th 876, 911-912 [trial court permissibly denied challenge for cause because potential juror retracted his "rigid position" that he would automatically vote for the death penalty]; *People v. Cunningham* (2001) 25 Cal.4th 926, 976-977, 979 [although potential jurors indicated a slight preference for the death penalty, the trial court did not err in denying challenges for cause because the jurors did not indicate "an unalterable preference in favor of the death penalty" and stated they would vote as the circumstances of the case warranted].)

Appellant argues that the trial court imposed a "different, higher standard" on the defense challenges for cause than on the prosecutor's challenges for cause. (AOB 146-148.) However, there is nothing to indicate that the trial court imposed an erroneous standard when determining whether to grant or deny appellant's challenge for cause against Coon. As shown above, the trial court's denial of the challenge against Coon was proper. Moreover, the trial court's statement during voir dire regarding African-American women does not in any way indicate that the court used a higher standard in assessing appellant's challenge for cause and does not even logically relate to the issue. Thus, the trial court did not err in denying appellant's challenge to Coon.

V.

THE TRIAL COURT HAD NO DUTY TO GIVE A LIMITING INSTRUCTION AT THE GUILT PHASE REGARDING THE GUILTY PLEAS OF APPELLANT'S ACCOMPLICES, LINTON, CYPRIAN, AND LEE; MOREOVER, THE INSTRUCTIONS GIVEN WERE ADEQUATE

Linton, Cyprian, and Lee were charged with the crimes committed in this case; the three men eventually pled guilty and testified in appellant's case. (RT 1706, 1711, 1779, 2779-2781, 2869, 2871.) Appellant contends the trial court violated his constitutional rights when it failed to give a limiting instruction at the guilt phase informing the jury that the guilty pleas of Linton, Cyprian, and Lee could not be used to infer appellant's guilt. (AOB 149-157.) This argument must be rejected because the trial court had no duty to give such a limiting instruction. Moreover, the instructions given by the trial court were adequate.

A. Relevant Facts And Proceedings

During the prosecution's case-in-chief, Linton testified on direct examination that he was incarcerated at Folsom state prison and was serving a term of 15 years to life for convictions of second-degree robbery and second-degree murder. (RT 1541-1542.) During cross-examination, Linton admitted that he had been charged with two counts of first-degree murder for the murders of Barron and Thomas. (RT 1706, 1711.) Linton testified that his case went to trial. When defense counsel asked what verdict had been reached, the prosecutor objected on relevance grounds. (RT 1711.) During a sidebar discussion, the parties explained that a jury had convicted Linton, but that a mistrial had been declared due to juror misconduct. Defense counsel argued that the prosecutor should have expected that Linton would have been

convicted in any subsequent retrial. Therefore, "there had to be a reason" why the prosecutor instead decided to offer Linton a plea. (RT 17112-1718.) The court sustained the objection and instructed counsel to "[g]et to your point and go from there." (RT 1718.) Linton then testified that when he entered into his guilty plea, he understood that the prosecutor might ask him to testify in appellant's case but that he was not required to do so. (RT 1719.) Linton did not believe that he could receive lenient treatment from the parole board if he testified against appellant. (RT 1719.)

In the prosecutor's case-in-chief, Dauras Cyprian testified on direct examination that he had previously been convicted pursuant to a guilty plea. (RT 1779.) He subsequently testified that he had been sentenced to state prison for 16 years to life and that his testimony would cause him problems in prison. (RT 1884-1885.)

Dino Lee was called as a defense witness. (RT 2721.) During direct examination, he testified that he had originally been charged with two counts of first-degree murder and second-degree robbery. (RT 2779.) Lee eventually pled guilty to one count of second-degree murder and one count of second-degree robbery. Part of the plea agreement was that Lee would testify against appellant and the others involved in the crimes. (RT 2780-2781.)

Defense counsel and the prosecutor stipulated in the presence of the jury that Lee entered a guilty plea on July 9, 1990; Linton entered a guilty plea on January 23, 1991; and Cyprian entered a guilty plea on January 24, 1991. (RT 2869, 2871.)

The jury was subsequently instructed with CALJIC No. 2.20, which stated that in determining a witness' credibility the jury could consider "[t]he existence or nonexistence of a bias, interest, or other motive," as well as any prior felony convictions of the witness. (CT 316-317; RT 2937-2938.) The jury was also instructed with CALJIC No. 2.23, which stated

> The fact that witness has been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of such a conviction does not necessarily destroy or impair a witness' believability. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

(CT 321; RT 2939.)

The jury was further instructed that an accomplice was a person who was subject to prosecution for the offenses charged in this case (CALJIC No. 3.10) and that a "defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense" (CALJIC No. 3.11). (CT 332-333; RT 2944-2945.) Subsequent instructions described the sufficiency of the evidence needed to corroborate an accomplice (CALJIC No. 3.12) and stated that one accomplice could not corroborate another accomplice (CALJIC No. 3.13). (CT 334-335; RT 2945-2946.) The instructions further stated that "[t]he testimony of an accomplice ought to be viewed with distrust" (CALJIC No. 3.18). (CT 337; RT 2946.)

During closing argument, the prosecutor stated, "What does Patrick Linton tell you? I was there. I did this. I took part in it. I'm doing life because of it. But I didn't kill anybody." (RT 2974.) The prosecutor later stated that it was difficult for Lee, Linton, and Cyprian to testify because "[t]his isn't something that is a good thing to do. It is not an easy thing to do. You may get killed for doing this. They all know that." (RT 2975.)

B. The Trial Court Had No Duty To Give A Limiting Instruction And The Instructions Given Were Adequate

Appellant contends the trial court should have given a limiting instruction that informed the jury that the guilty pleas of Linton, Cyprian, and Lee could not be used to infer appellant's guilt. (AOB 149-157.) However,

trial courts do not have a sua sponte duty to give such limiting instructions. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051; *People v. Horning, supra*, 34 Cal.4th at p. 909; *People v. Clark* (1992) 3 Cal.4th 1, 131; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139; *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1850.) In the case at bar, appellant never requested such a limiting instruction and specifically stated, "The defense is satisfied with the present set of instructions." (RT 2881-2893, 2929-2930.) As a result, no such limiting instruction was required.

Despite his failure to request a limiting instruction, appellant argues that such an instruction was constitutionally required pursuant to *Douglas v. Alabama* (1965) 380 U.S. 415, 85 S.Ct. 1074, 13 L Ed.2d 934, *Lee v. Illinois* (1986) 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514, and *Hudson v. North Carolina* (1960) 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 934. (AOB 150-151.) However, these cases do not assist appellant because they involve completely different factual scenarios. For example, *Douglas* is unhelpful to appellant's claim because it dealt with a defendant's inability to cross-examine a key prosecution witness about his out-of-court confession. (*Douglas v. Alabama, supra*, 380 U.S. at pp. 416-420.) *Lee* is equally inapposite because it concerned the use of an out-of-court confession by an accomplice.[18/] (*Lee v. Illinois, supra*, 476 U.S. at pp. 538, 541-542, 546.) Although the United States Supreme Court in *Hudson* did indicate that a codefendant's plea in front of the jury can be prejudicial, the case actually dealt with the denial of the assistance of counsel. (*Hudson v. North Carolina, supra*, 363 U.S. at pp. 702-704.) Thus,

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18. Appellant may be attempting to argue by analogy that the pleas by his accomplices were similar to confessions made by co-perpetrators that implicate the co-perpetrators as well the defendant. However, the guilty pleas merely told the jury that each accomplice had admitted his guilt in the matter and did not implicate appellant. (*People v. Young* (1978) 85 Cal.App.3d 594, 604 fn. 3.)

the United States Supreme Court cases cited by appellant do not dictate that a limiting instruction was required in this case.

The federal appellate cases cited by appellant (AOB 152-153) also fail to buttress his argument. First, decisions by the federal appellate courts are not binding on this Court. (*People v. Seaton* (2001) 26 Cal.4th 598, 653.) Moreover, the premise underlying the federal appellate cases does not apply to this case. According to appellant, these cases seek to ensure that evidence regarding pleas submitted by the prosecutor cannot be misused by the jury. (AOB 151-152.) For example, in *United States v. Halbert* (9th Cir. 1981) 640 F.2d 1000, 1004, which is cited extensively by appellant (AOB 152-153), the codefendants testified against the defendant and were asked by the prosecutor during direct examination about their guilty pleas. Over a defense objection, both of the codefendants were allowed to testify that they had pled guilty. (*Ibid.*) The Ninth Circuit held that although there may be many proper reasons to admit such evidence, the trial court erred by failing to give an instruction limiting the evidence to witness credibility. (*Id.* at p. 1006.)

Here, in contrast, appellant did not object to the admission of the evidence regarding the pleas, and even elicited such evidence from Lee during the defense portion of the case. (RT 2779-2781.) Moreover, appellant also requested and received a stipulation from the prosecutor regarding the dates of Lee's, Linton's, and Cyprian's guilty pleas. (RT 2869, 2871.) Thus, appellant was apparently attempting to use the pleas to his advantage. Therefore, a limiting instruction may not have been warranted or appropriate.

Assuming arguendo that such an instruction was required, appellant cannot prevail because the jury was adequately instructed. The jury was specifically told that "[t]he fact that a witness has been convicted of a felony] . . . may be considered by you *only* for determining the believability of that witness." (CT 321; RT 2939 [emphasis added].) The jurors were further

instructed that testimony by accomplices needed to be corroborated and should be viewed with distrust. (CT 333-335, 337; RT 2945-2946.) Thus, the jury was given sufficient limiting instructions.[19/]

In the event such instructions were not adequate, appellant's argument must still be rejected because any error was harmless beyond a reasonable doubt. (*People v. Young, supra*, 85 Cal.App.3d at p. 602.) Here, any error was harmless because the prosecutor did not rely on the pleas as evidence of appellant's guilt, and the evidence of the pleas was only a minuscule portion of each accomplice's testimony. Although the prosecutor did refer briefly to Linton's plea during closing argument (RT 2974), the pleas were not referred to again in the prosecutor's closing argument or rebuttal. Moreover, the jurors were instructed that prior convictions could only be used to determine witness credibility and that the testimony of any accomplices had to be viewed with distrust and corroborated with evidence other than the testimony of another accomplice. (CT 321, 333-335; RT 2939, 2945-2946.) In light of the minor nature of the evidence and the jury instructions, any error was necessarily harmless.

The length of deliberations or the questions asked by the jury do not alter this conclusion. The jury questions in no way involved the pleas by the accomplices, and the six hours spent in deliberations was in no way extraordinary in a complicated death penalty case involving multiple charges, numerous witnesses, and 11 days of testimony. (CT 268-271, 290-296.) Thus, appellant's claim must be rejected.

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19. Because the jury instructions were adequate, there was no violation of appellant's right to a reliable sentence under the Eighth Amendment. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1193, fn. 5.)

VI.

THE TRIAL COURT PROPERLY LIMITED DEFENSE COUNSEL'S CROSS-EXAMINATION OF LINTON

Appellant contends the trial court violated his constitutional rights when it limited defense counsel's cross-examination of Linton. (AOB 158-168.) This argument must be rejected because the trial court acted properly in preventing defense counsel from asking about largely irrelevant details regarding Linton's case.

A. Relevant Facts And Proceedings

During cross-examination, Linton admitted that he had been charged with two counts of first-degree murder for the murders of Barron and Thomas. (RT 1706, 1711.) When defense counsel asked Linton to specify the verdict that had been reached in his case, the prosecutor objected on relevance grounds. (RT 1711.) The trial court initially sustained the prosecutor's objection. (RT 1712.)

During a sidebar discussion, defense counsel argued that he wanted to show that Linton had a motive to lie in appellant's case because Linton understood when he pled guilty that he could be asked to cooperate in appellant's trial. Counsel also wanted to show that the prosecutor had obtained a first-degree murder conviction in Linton's case, but that a mistrial had been declared after the verdict. Thus, the prosecutor should have expected Linton to be convicted during a retrial, which meant there "had to be a reason" the prosecutor's office agreed to a second-degree murder plea just prior to the start of jury deliberations in Linton's retrial. Counsel wanted to demonstrate that there was an "implied understanding" that if Linton "cooperated in the future," he could obtain a plea bargain for a second-degree murder conviction. (RT 1712-1715, 1717)

The prosecutor explained that there had been a mistrial during Linton's first trial because of jury misconduct. (RT 1713.) The prosecutor further noted that he had made no promises to Linton and that Linton had "no expectations of anything." Instead, the prosecutor had "made it clear" that Linton would "get the deal with or without testifying" against appellant. (RT 1713-1714.) The prosecutor added that "it was stated clearly in the plea that his offer of 15 to life was independent of anything he chose to do later." (RT 1714.)

Defense counsel stated that he wanted to elicit testimony that there was an understanding that if the prosecutor wanted Linton's cooperation in the future, Linton could decide whether he wanted to cooperate. The trial court responded, "That's fine. But I would ask that you get to that because once you get to the first degree murder and it was nullified, we have to get to everything else, about jury misconduct and why." The court stated that defense counsel could ask Linton about his understanding of what was expected of him, but the court cautioned, "I don't want to open the door to the other because then somehow it's going to have to be explained to the jury. I cannot leave them with the inference." (RT 1716.)

Counsel reiterated that he wanted to show that Linton "must have done something" to convince the prosecutor to accept a plea for second-degree murder after Linton had already previously been convicted of first-degree murder. (RT 1717.) The court noted that counsel was "speculating on a great deal" and added, "You are putting before the jury that they did this and they convinced the D.A. to offer second degree, and that is your inference." (RT 1717.) The court later reiterated that it would allow questioning regarding whether Linton believed he had to cooperate with the prosecution, but added, "I cannot have you put something before the jury that is clearly not necessarily the case and leave an inference here so you've got this to argue. I cannot allow that." (RT 1718.) The court later ruled, "Get to your point and go from there,

but the objection will be sustained as far as your leaving an inference in front of the jury as to something that cannot be explained." (RT 1718.)

Defense counsel then asked Linton if he had "some sort of understanding or belief" that the prosecution could ask him to testify against appellant. (RT 1718-1719.) Linton responded that when he entered into his plea, he understood that the prosecutor might ask him to testify in appellant's case but that he was not required to do so. (RT 1719.) Linton did not believe that he could receive lenient treatment from the parole board if he testified against appellant. (RT 1719-1720.)

B. The Trial Court Properly Limited The Cross-Examination Of Linton

The Sixth Amendment guarantees the right of a criminal defendant to be confronted by the witnesses against him and to cross-examine those witnesses. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674; *Davis v. Alaska* (1974) 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347.) In general, "a defendant is entitled to explore whether a witness has been offered any inducements or expects any benefits for his or her testimony, as such evidence is suggestive of bias." (*People v. Brown* (2003) 31 Cal.4th 518, 544; see *People v. Williams* (1997) 16 Cal.4th 153, 207.) Thus, a criminal defendant states a violation of the Confrontation Clause by demonstrating that he was prohibited from engaging in appropriate cross-examination designed to show such bias and thereby expose the jury to facts they could use to draw inferences relating to the reliability of that witness. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 494; *People v. Frye* (1998) 18 Cal.4th 894, 946.)

However, this does not mean that the Confrontation Clause prevents the trial court from imposing any limits on a defendant's inquiry into the possible

biases of a prosecution witness. (*People v. Willliams, supra*, 16 Cal.4th at p. 207; *People v. Cooper* (1991) 53 Cal.3d 771, 816-817; see also *People v. Hillhouse, supra*, 27 Cal.4th at p. 494.) Rather, the trial courts retain "wide latitude" to impose reasonable limits on such cross-examination based on concerns regarding harassment, undue consumption of time, prejudice, the confusion of issues, witness safety, or interrogation that is repetitive or marginally relevant. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 494; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1051; see *People v. Brown, supra*, 31 Cal.4th at p. 545.) Unless a defendant can demonstrate that the prohibited cross-examination "would have produced a significantly different impression" of the witness' credibility, the trial court's limitation on cross-examination does not violate the Sixth Amendment. (*People v. Brown, supra*, 31 Cal.4th at pp. 545-546; *People v. Hillhouse, supra*, 27 Cal.4th at p. 494.)

In the case at bar, the trial court did not violate appellant's constitutional rights under this standard. The trial court allowed defense counsel to question Linton regarding his plea to second-degree murder and whether Linton expected any kind of benefit for his testimony in appellant's case. (RT 1706, 1711, 1718-1720.) The court merely prevented counsel from questioning Linton regarding the prosecutor's motives in offering Linton a plea bargain. This was proper because counsel's theory that the "reason" the prosecution agreed to a plea bargain for second-degree murder after a jury verdict for first-degree murder was to ensure testimony against appellant was based on nothing more than speculation and, thus, any questioning in this area would have had minimal probative value. Moreover, the questions would have required considerable additional testimony regarding the reasons for the initial mistrial in Linton's case, as well as the reason the prosecution agreed to a second-degree murder plea. This would have resulted in an undue consumption of time and would have had little, if any, relevance to appellant's case. For these

reasons, appellant has failed to demonstrate that the jurors would have had a significantly different impression of Linton's credibility had he been allowed to pursue his proposed line of questioning.[20] (See, e.g., *People v. Brown, supra*, 31 Cal.4th at pp. 542-546 [trial court properly prevented defendant from asking witness about pending rape case]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1050-1052 [trial court did not violate defendant's constitutional rights by prohibiting defendant from asking witness if she was on probation]; *People v. Harris* (1989) 47 Cal.3d 1047, 1090-1091 [trial court did not abuse its discretion in preventing defendant from delving into witness' pending case]; cf. *People v. Memro* (1995) 11 Cal.4th 786, 868 [trial court's ruling did not prejudice defendant because any favorable inference he sought was merely speculative].)

Assuming arguendo that the trial court did erroneously limit the cross-examination of Linton, the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684; *People v. Brown, supra*, 31 Cal.4th at p. 546.) Here, any error was harmless because Linton's testimony was largely corroborated by the testimony of Cyprian, as well as the testimony of Lee, a defense witness. (RT 1771-1774, 1780, 1786-1787, 1789, 2723-2725, 2758-2759.) As the prosecutor also noted, there was also "a wealth of evidence" in addition to Linton's testimony, that linked appellant to the murders of Barron and Thomas. This included appellant's out-of-town travels after the murders, the telephone records showing calls made to A.R.A., and the cell phone and fingerprints found at the crime scene. (RT 4145.) Moreover, defense counsel was allowed to ask Linton about his conviction for second-degree murder and whether he expected any kind of benefit for testifying,

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20. Because the trial court did not err, this Court should also reject appellant's claim (AOB 167) that the alleged error violated the right to a reliable sentence under the Eighth Amendment. (See *People v. Cole, supra*, 33 Cal.4th at p. 1210, fn. 13; *People v. Weaver* (2001) 26 Cal.4th 876, 973.)

thereby raising the inference that Linton had a motivation for testifying favorably for the prosecution. (RT 1718-1720.) Thus, even if the trial court erred, appellant's claim must still be rejected.

VII.

APPELLANT DID NOT PRESERVE HIS CLAIM REGARDING THE ALLEGED PROSECUTORIAL MISCONDUCT IN GUILT PHASE CLOSING AND REBUTTAL ARGUMENTS; IN ADDITION, THE PROSECUTOR'S CLOSING AND REBUTTAL ARGUMENTS WERE PROPER

Appellant argues that the prosecutor committed misconduct during the guilt phase by giving closing and rebuttal arguments that denigrated defense counsel. (AOB 169-174.) Respondent submits that the appellant failed to preserve the issue and that, in any event, the prosecutor's arguments were proper.

A. Relevant Facts And Proceedings

Near the beginning of his guilt phase closing argument, the prosecutor stated,

> I gave a lot of thought on how to proceed in my closing argument. I had a hard time sleeping last night because part of me really wants to come in here and attack the defense for the methods which they used to try and mislead you, deceive you, give you false insinuations. And I started by writing out all the things that he had done from the beginning in his opening statement, from the defendant, all the way back to when he started trying to falsify evidence.
>
> And I decided that's not the way to proceed in this case. See, my obligation here is trying to present the truth to the jury.

The prosecutor stated that he would instead "focus on the case which I presented." (RT 2965.)

The prosecutor later stated that the "position of the defense is whoever was at this crime scene is guilty of murder and robbery. That's what it's been since the beginning. And his defense, when he stood up in opening argument is, my client wasn't there." The prosecutor noted, "He says his client wasn't there. I say he's lying." (RT 2966.) The prosecutor then discussed the evidence linking appellant to the murders. (RT 2966-2994.)

During the defense portion of closing argument, defense counsel stated that the telephone records for the phone in the upstairs apartment showed that no telephone calls were made "after the afternoon from that phone." When the prosecutor objected that counsel was misstating the evidence, defense counsel argued, "You can look at the documents yourself and read them to yourself . . . ." He added, "But what I'm suggesting to you is the documents that I have, that I have seen nothing to indicate that the last call from that house phone was in the middle of the afternoon. Check on that when you go over those records." (RT 3077.)

During rebuttal argument, the prosecutor stated that he would comment on certain points made by defense counsel during the defense portion of the closing arguments. The prosecutor then stated,

> I am going to jump forward because the deception continues. It's not something that starts and stops. It started before [appellant] was ever arrested. It's continued as a perversion through this entire system, and it continued through closing argument.
>
> And as an absolute example of that, not only all the times he misstated the evidence, but when you look through the phone records at 11017 South Spring and he says no phone calls after the morning hours, early, early in the afternoon, remember Dauras Cyprian said, "I called Cee Cee that night while we were up in the apartment on January 2nd before the shooting." January 2nd, 9:05 p.m., the call to Moreno Valley when he called Cee Cee. This isn't made up. None of this is. This is what happened.

(RT 3084.) The prosecutor noted that defense counsel and appellant could not "change the phone records. He can't deceive the phone records. He can't manipulate them. He can't confuse them." (RT 3084.)

B. Appellant's Claim Must Be Rejected

To preserve a claim of prosecutorial misconduct, a criminal defendant must make a timely objection and ask the trial court to admonish the jury to disregard the improper behavior of the prosecutor. (*People v. Monterroso* (2004) 34 Cal.4th 743, 785; *People v. Cole* (2004) 33 Cal.4th 1158, 1201.) In this case, appellant did not object to the alleged misconduct by the prosecutor and did not request any such admonitions. Consequently, he has waived his claim of prosecutorial misconduct. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 501; *People v. Medina* (1995) 11 Cal.4th 694, 758.)

Even if there was no waiver, appellant's claim must be rejected. Improper remarks by a prosecutor during closing or rebuttal argument can violate due process if the remarks infect the trial with such unfairness that the resulting conviction is a denial of due process. (*People v. Monterroso, supra*, 34 Cal.4th at p. 785; *People v. Cole, supra*, 33 Cal.4th at p. 1202.) A prosecutor's misconduct violates state law if it involves the use of deceptive or reprehensible methods to persuade the jury. (*People v. Monterroso, supra*, 34 Cal.4th at p. 785; *People v. Cole, supra*, 33 Cal.4th at p. 1202.)

When evaluating a claim of prosecutorial misconduct based on the prosecutor's statements to the jury, the issue is whether there is a reasonable likelihood that the jury construed or applied any of the allegedly improper remarks in an objectionable manner. (*People v. Monterroso, supra*, 34 Cal.4th at p. 785; *People v. Cole, supra*, 33 Cal.4th at pp. 1202-1203.) Although a prosecutor may not attack the integrity of opposing counsel, he has wide latitude to discuss and draw inferences from the evidence presented at trial and

to describe the deficiencies in defense counsel's tactics and account of the facts. (See *People v. Bemore* (2000) 22 Cal.4th 809, 846; *People v. Welch* (1999) 20 Cal.4th 701, 752-753.) Moreover, in addressing a claim of prosecutorial misconduct that is based on the alleged denigration of defense counsel, an appellate court reviews the prosecutor's comments in relation to the remarks of defense counsel and determines whether the former is a "fair response" to the latter. (*People v. Frye* (1998) 18 Cal.4th 894, 978.)

In the case at bar, there is no reasonable likelihood that the jury construed the prosecutor's remarks as impugning defense counsel's integrity. In context, the prosecutor's initial statements during closing argument were proper because they merely urged the jury to focus on the relevant evidence and pointed out that the defense was attempting to confuse the issues in the case. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 502; *People v. Cummings* (1993) 4 Cal.4th 1233, 1303 fn. 49.) For example, the prosecutor stated during closing argument that he had initially planned to discuss how the defense was attempting to create confusion and how the defendant had tried to falsify evidence, but had instead decided to "focus on the case which I presented." (RT 2965.) This statement cannot reasonably be characterized as an attempt to impugn the integrity of opposing counsel and can only be understood as cautioning the jury to rely on the prosecution's evidence of guilt rather than the defense evidence. (See *People v. Cummings, supra*, 4 Cal.4th at p. 1303 fn. 47.) Indeed, this Court has found a prosecutor's argument to be proper even when the prosecutor has argued that defense counsel's argument was incorrect, speculative, and misleading; has asserted that the defense was trying to "create some sort of a confusion"; and has stated that an experienced defense attorney will "twist a little, poke a little, try to draw some speculation, try to get you to buy something." (See, e.g., *People v. Hillhouse, supra*, 27 Cal.4th at p. 502; *People v. Medina* (1995) 11 Cal.4th 694, 759; *People v. Breaux* (1991) 1

Cal.4th 281, 305-306.) In light of these cases, the prosecutor's initial remarks during closing argument in this case must be deemed equally proper.

The prosecutor's subsequent statements during closing argument also cannot reasonably be interpreted as denigrating opposing counsel. For example, the prosecutor was merely commenting that the defense's position was that appellant "wasn't there." (RT 2966.) Although the prosecutor did state, "I say he's lying," his remarks can only be reasonably understood as a comment on the weakness of the defense evidence. This is most clearly shown by the fact that the prosecutor then discussed the evidence that linked appellant to the charged offenses. (RT 2966-2994.) Thus, the prosecutor's statements during closing argument did not constitute misconduct. (See *People v. Bemore, supra*, 22 Cal.4th at pp. 843-847 [prosecutor used a "rhetorical device" focusing on the evidence showing guilt and on any corresponding weakness in the defense case]; *People v. Frye, supra*, 18 Cal.4th at p. 978 [prosecutor's comments were a "fair response" to the defense arguments].)

The prosecutor's statements during rebuttal argument were also proper. The prosecutor's argument was in response to defense counsel's assertion during closing argument that the telephone records for the phone in the upstairs apartment showed that no telephone calls were made from that phone "after the afternoon." (RT 3077.) The prosecutor was merely noting that Cyprian had testified that he called someone using that phone just prior to the shooting and that the telephone records showed a telephone call at 9:05 p.m. (RT 3084.) He was also noting that the jury should not be misled by the defense evidence or defense counsel's argument, but should instead rely on the evidence that had been submitted. Although the prosecutor may have used harsh words to make his point, he is allowed to "vigorously argue his case using appropriate

epithets."[21] (*People v. Welch* (1999) 20 Cal.4th 701, 752-753; see *People v. Wharton* (1991) 53 Cal.3d 522, 567.) Thus, the prosecutor's statements did not constitute misconduct.

Assuming arguendo that the prosecutor's statements were improper, appellant's convictions must be affirmed because it is not reasonably probable that the jury would have reached a more favorable result in the absence of any misconduct. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130; *People v. Welch, supra*, 20 Cal.4th at p. 753.) Here, the prosecutor's allegedly improper remarks were brief and did not permeate his lengthy closing argument. (*People v. Kipp, supra*, 26 Cal.4th at p. 1130; *People v. Walsh* (1993) 6 Cal.4th 215, 265-266.) Moreover, the evidence that appellant committed the charged offenses was strong and even supported by defense witness Lee; this made it even more unlikely that the prosecutor's statements would have any effect on the jury. (RT 2724-2726.) Finally, the trial court instructed the jury more than once that statements by the attorneys were not evidence (CT 306; RT 2932, 2964), and jury's are presumed to follow such instructions. (*People v. Valdez* (2004) 32 Cal.4th 73, 114 fn. 14.) Thus, appellant's claim must be rejected.

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21. Indeed, as the prosecutor later explained, his comments in both closing and rebuttal arguments referred to appellant's

> attempt to secure false testimony from witnesses and pay off people to come and say he was with them when he wasn't, and an attempt to get Peaches to pull records which demonstrated his ownership of the pager. And he's out there actively trying to falsify and create evidence at a time long before this case even hit the judicial system, and that was evidence which was presented.

(RT 4173.)

VIII.

APPELLANT WAIVED HIS CLAIM REGARDING THE PROSECUTOR'S ALLEGED MISCONDUCT IN QUESTIONING WITNESSES DURING THE GUILT PHASE; MOREOVER, THE PROSECUTOR ACTED PROPERLY IN QUESTIONING WITNESSES REGARDING APPELLANT'S TRIP TO NEW YORK

Appellant contends the prosecutor engaged in misconduct at the guilt phase by using facts not in evidence and inadmissible hearsay in questioning witnesses. (AOB 175-197.) Respondent submits that appellant waived this claim and further submits that, in any event, the prosecutor acted properly.

A. Relevant Facts And Proceedings

During opening statement, the prosecutor asserted that the evidence would show that appellant and Cyprian went to New York after the murders and stayed at the Stanford and Aberdeen hotels using the names Mark and Michael Cole. The prosecutor noted that appellant placed his mother's address and his wife's birthday on the registration card to the Stanford Hotel and signed his name as Mark Cole (RT 1291-1292.)

During the prosecution's case-in-chief, Sheila Jones, the aunt of appellant's wife, was called as a witness. (RT 1739-1740.) Defense counsel objected when the prosecutor asked, "Do you have any explanation for why from the Hotel Stanford in New York - -." During a sidebar proceeding, defense counsel stated he would "object to the introduction of the contents of any writings from New York or any place else which are business records, until a foundation is first laid as to authentication and the business records exception of the hearsay rule." Defense counsel argued that to do otherwise would "just bootstrap[] into evidence the contents without any authentication or foundation being laid." (RT 1741.)

The prosecutor stated that he was bringing a witness from New York named Robert Song, who had advised the prosecutor regarding certain details on the records at issue. The prosecutor added that he wanted to ask Jones whether she had spoken to appellant during the dates noted on the records, whether he had told her he was in New York, and whether she could explain why the records indicated that someone from the Stanford Hotel had called her. (RT 1741-1743.)

The court clarified that the prosecutor merely wanted to ask Jones whether she had received telephone calls from appellant. (RT 1742-1743.) The prosecutor added that he would ask details regarding the conversations. (RT 1743.)

Defense counsel said he had no objections "to that." He added that he would object "to anything being asked by using these documents as a reference point." He added that the prosecutor needed to "lay the foundation and get a business records exception" before he could discuss anything related to the contents of the records. The prosecutor stated, "I have no interest at all in introducing these documents." Defense counsel asserted that the prosecutor could not use the documents in any way because it would merely "bootstrap the contents of the business records without laying a foundation for them." (RT 1743.) The prosecutor then reiterated that he was planning on calling Robert Song as a witness. Defense counsel replied, "I don't want the contents of these writings introduced into evidence, marked for identification or referred to." (RT 1743.)

The prosecutor stated that he would use the documents "to reference the date and time of specific calls." (RT 1743.) Defense counsel argued that the prosecutor was not allowed to refer to documents that had not been authenticated and had not been shown to meet the business records exception. (RT 1744.) Counsel added that the prosecutor could write down the

information on his legal pad and refer to that. The prosecutor agreed to do so and agreed to place the records back in an envelope. (RT 1744.)

The court then told the jury to go into the jury room; during this period, the prosecutor transferred the information onto another sheet of paper. (RT 1745.) When he had done so, direct examination continued. (RT 1745-1753.) Jones denied receiving telephone calls from appellant on January 4, 1990 or January 5, 1990, and stated that she was out of town at that time. (RT 1746-1749.)

Daurus Cyprian was called as the prosecutor's next witness. (RT 1753.) On the second day of Cyprian's testimony, the prosecutor attempted to ask Cyprian about his stay at a Travelodge on January 3, 1990. Defense counsel objected, stating, "The objection would be to asking this witness any questions about the contents of that writing or putting that blowup on the bulletin board. The objection would be hearsay and lack of authentication, the same basis as the objection I made yesterday with respect to the hotel receipt from the Stanford Hotel in New York." The prosecutor corrected defense counsel by saying, "Well, he didn't make an objection to the registration card because I never offered it."[22/] (RT 1800.) The prosecutor added, "I intend to do that with this witness, too. He was present at the time that [appellant] signed into these hotels. He was present on the day that it happened, and he can certainly identify them, and I can also ask him if he could identify them." (RT 1800-1801.)

Cyprian testified that on January 4, 1990, he was in New York with appellant and that the two of them went to the Stanford Hotel and checked in under the names "Mark" and "Michael Cole." When they arrived at their room, they made some telephone calls. (RT 1754, 1804, 1806-1807.) Cyprian did not see appellant sign anything or fill out a card for the hotel room, although he did

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22. There does not appear to be any objection during Cyprian's testimony regarding an enlargement of the Stanford Hotel registration card.

see appellant later pay for the telephone calls. (RT 1808-1809.)

During cross-examination, Cyprian reiterated that he had not seen appellant write on any type of registration card or paper while registering at the Stanford Hotel. He also testified that he had not seen any registration paperwork from the hotel. (RT 1859.)

Robert Greenwood, a handwriting expert, also testified for the prosecution. (RT 2323-2324.) During cross-examination, Greenwood testified that he had reviewed some documents that he was unable to link to appellant. (RT 2330.) One of those documents was the registration card from the Stanford Hotel. (RT 2330-2331.) Greenwood later explained during redirect examination that he had not made a comparison of the signature on the registration card because it was written in a small box. (RT 2334.)

At the end of the prosecution's case, defense counsel objected to the admission of the telephone records from New York. The prosecutor noted that those records were not being offered as an exhibit and were never marked. He added that the records would not become "part of the case" until appellant testified. (RT 2714.) Appellant also objected to the registration card from the Stanford Hotel. (RT 2715.) The prosecutor again noted that the card had not been marked for identification and would not become a piece of evidence unless appellant testified. (RT 2716.)

Prior to the presentation of the prosecution's rebuttal case, the defense requested an offer of proof. (RT 2899.) The prosecutor stated that he had contacted the Stanford Hotel and that the custodian of records at the hotel was sending the original registration card via overnight mail. The prosecutor had shown a faxed copy of the cards to a handwriting expert who had concluded that the person who signed the name "Mark Cole" was the same person who wrote the name "Patrick Cole" on the Delcomber receipt. (RT 2900.) The prosecutor noted that the handwriting expert had been in court that morning, but

could not testify because the original registration card had not arrived. (RT 2900.)

Defense counsel argued that the prosecutor's proposed evidence was not proper rebuttal evidence and should have been submitted during the prosecution's case-in-chief. (RT 2901-2902, 2904-2907.) Defense counsel added that there was evidence related to a second hotel in New York, the Aberdeen, and that he had never received any documents related to that hotel. (RT 2902-2903.)

The prosecutor stated, "I put on the record before that it was present in court. I have shown it to him on prior occasions. The date it was shown to him was the 1st of October, and it's been in court every day." (RT 2903.) The prosecutor also stated,

> The Stanford Hotel is a blow-up I have had in every single day since the proceedings began. The court is aware of that. I had actually had a blow-up on the board. It was objected to. It was never marked as an exhibit. We approached side bar early in the proceedings about the Stanford receipts.

(RT 2904.) The prosecutor explained that he had not submitted the evidence during his case-in-chief because of the expense in transporting the custodian of records to Los Angeles and because he had relied on defense counsel's representation that appellant would testify. The prosecutor had planned to have the records authenticated by appellant during cross-examination. Because appellant never testified, the prosecutor wanted to authenticate the records during his rebuttal case. (RT 2901, 2911-2914.) The prosecutor told the court "to look at the opening statement and look at the information which we put in front of the jury which is likely to mislead them if I am not entitled to put on this rebuttal." (RT 2915.)

The court eventually found that the evidence was not proper for the rebuttal portion of the case. The prosecutor then requested to re-open his case-in-chief. (RT 2922.) The court eventually denied the prosecutor's request.

(RT 2928.)

In Supplemental Points and Authorities In Support of Motion For New Trial, defense counsel stated that the prosecutor had placed a "blow-up of the faxed copy of the Hotel Stanford registration card" on a board in front of the jury. (CT 215-216.) Defense counsel "immediately objected, and a conference was held at the side bar which resulted in the removal of the blow-up." (CT 216.)

Prior to sentencing, the parties returned to the issue of the Stanford Hotel registration documents. The prosecutor reiterated that he decided not to present the evidence during his case-in-chief because he had relied on defense counsel's representations that appellant would testify and had determined that it "wasn't worth the expense" of flying witnesses from New York to California. The prosecutor conceded that the decision was a "tactical error." The prosecutor stated that his error was not done in bad faith. Instead, the defense acted in bad faith by not having appellant testify after representing that he would. (RT 4171.) The prosecutor added, "I had all the documentation from all the phone records which I was relying on in making my opening statements. The facts as I related them existed. . . . It's not like I made it up and had no intention or ability to actually prove it." (RT 4171-4172.) Instead, the prosecutor was prevented from submitting the evidence because he had made a "tactical error." The prosecutor argued that his tactical mistake was "taken advantage of" by the defense because they prevented him from submitting the documents into evidence. (RT 4172.)

B. Appellant Has Waived His Claim; Moreover, The Prosecutor Did Not Engage In Any Misconduct

Appellant contends the prosecutor engaged in misconduct by referring to facts not in evidence and inadmissible hearsay while questioning witnesses.

(AOB 175-197.) Although trial counsel objected to the prosecutor's initial reliance on records while questioning Jones, he did not object when the prosecutor wrote down the information on another sheet of paper and used that to question Jones. (RT 1741, 1744.) In fact, counsel had suggested this course of action and also stated that he did not object to the prosecutor asking Jones questions regarding whether she had received telephone calls from appellant. (RT 1743-1744.) Counsel also failed to object to the prosecutor asking Cyprian about the trip with appellant to New York and the prosecutor asking Greenwood whether he had made a comparison of the signature on the registration card. (RT 1754, 1804, 1806-1807, 2334.) Moreover, defense counsel never requested any admonitions to the cure the alleged instances of misconduct. (RT 1741-1744, 1754, 1804, 1806-1807, 2334.) As such, appellant has waived his claim of prosecutorial misconduct. (*People v. Bolden* (2002) 29 Cal.4th 515, 564; *People v. Gurule* (2002) 28 Cal.4th 557, 651; *People v. Silva* (2001) 25 Cal.4th 345, 373; *People v. Wash* (1993) 6 Cal.4th 215, 258.)

Assuming arguendo that the claim had not been waived, appellant is still unable to prevail. Although a prosecutor commits misconduct by referring to facts not in evidence or inadmissible hearsay (see *People v. Coffman* (2004) 34 Cal.4th 1, 95; *People v. Bell* (1989) 49 Cal.3d 502, 534), there is nothing to indicate that the prosecutor did so in this case. For example, the prosecutor never referred to facts not in evidence or inadmissible hearsay when Cyprian testified that he stayed with appellant at the Stanford Hotel in New York or when Greenwood testified that he had not made a comparison involving the signature on the Stanford Hotel registration card. (RT 1754, 1804, 1806-1809, 2334.) In fact, the prosecutor questioned Greenwood about the Stanford Hotel registration card only in response to defense counsel's cross-examination questions regarding the document. (RT 2330-2331.)

The direct examination of Jones also fails to indicate any misconduct. The prosecutor merely asked Jones if she had received any telephone calls from appellant on January 4, 1990, or January 5, 1990, and she answered that she was out of town at that time. (RT 1746-1749.) Although the prosecutor initially had some telephone records in his hands and may have started to refer to them during his examination of Jones, this does not constitute misconduct because his question and actions could not have been taken by the jury to imply anything harmful. (*People v. Williams* (1997) 16 Cal.4th 153, 252-253.) The prosecutor did not complete his question, did not have the records in his hands for more than a few moments, and placed the items into an envelope after defense counsel objected.[23] (RT 1739-1741, 1744.) For all of the foregoing reasons, the prosecutor did not commit misconduct in the manner in which he questioned the witnesses. (See *People v. Young* (2005) 24 Cal.Rptr.3d 112, 146 [prosecutor's actions were "minor and neither deceptive nor reprehensible"]; *People v. Mayfield* (1997) 14 Cal.4th 668, 754 ["We do not find misconduct . . . based on these isolated and relatively insignificant incidents"].) As such, appellant's constitutional rights were not violated.

Appellant has also failed to establish that the prosecutor committed misconduct by briefly displaying an enlargement of the Stanford Hotel registration card. (AOB 182-184.) Although appellant contends that the enlargement was displayed "for weeks" (AOB 180, 183-184), the record does not support this conclusion. According to appellant's Supplemental Points and Authorities in Support of Motion For New Trial, defense counsel "immediately objected" to the display, and a sidebar conference was held which resulted in its removal. (CT 216.) The prosecutor's statement that he had the enlargement

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23. Although appellant contends the prosecutor removed the documents from an envelope in front of the jury (AOB 178), there is nothing to indicate that this was the case. Rather, it appears that the documents were already in the prosecutor's hands when Jones took the stand. (CT 217.)

"in every day since the proceedings began" did not mean that he had displayed the enlargement since the start of trial. Rather, taken in context, the prosecutor was merely noting that he had brought the enlargement to court every day. (RT 2904.) Because the prosecutor immediately removed the enlargement from the display board after defense counsel successfully objected to it, there was no misconduct. (See *People v. Mayfield, supra*, 14 Cal.4th at p. 754.)

Appellant attempts to avoid this conclusion by arguing that the prosecutor's subsequent failure to admit the Stanford Hotel registration card demonstrates that the prosecutor could not meet the foundational requirements of any hearsay exception. (AOB 184.) However, as the prosecutor repeatedly noted, he had initially planned to call the Stanford Hotel's custodian of records to authenticate the records and show that they constituted business records. He later decided against this course of action because of the expense of transporting the witness from New York and because he relied on defense counsel's assertions that appellant would testify and believed that appellant would authenticate the documents during that testimony. (RT 1743, 2901, 2911-2915, 4171-4172.) In light of these facts, there is nothing to indicate that the prosecutor would have been unable to prove that the Stanford Hotel registration met a hearsay exception.

Appellant appears to further contend that the prosecutor asked questions designed to obtain inadmissible testimony. (AOB 188-192.) Although it is improper for a prosecutor to attempt to elicit inadmissible evidence (*People v. Silva, supra*, 25 Cal.4th at p. 373), there is nothing to indicate that the prosecutor in this case engaged in this type of behavior. The prosecutor merely asked Jones if she had received telephone calls from appellant on January 4 and January 5, 1990 and merely questioned Cyprian about his trip with appellant to New York. (RT 1746-1749, 1754, 1804, 1806-1809.) None of these questions elicited inadmissible evidence or were designed to do so. Moreover, the

prosecutor's redirect examination of Greenwood briefly touched on the Stanford Hotel registration card only because appellant had questioned Greenwood about the document during cross-examination. (RT 2330-2331, 2334.) Thus, appellant has failed to demonstrate that the prosecutor attempted to elicit inadmissible evidence.

Assuming arguendo that the prosecutor did commit misconduct, it was harmless beyond a reasonable doubt. (*People v. Bell, supra*, 49 Cal.3d at p. 534.) First, contrary to appellant's assertion (AOB 188, 195), the prosecutor's alleged reliance on inadmissible evidence and hearsay was not constant and was instead merely fleeting and brief, consisting of only a few questions aimed at three witnesses (RT 1746-1749, 1754, 1804, 1806-1809, 2334). (See *People v. Mayfield, supra*, 14 Cal.4th at p. 754; *People v. Wash, supra*, 6 Cal.4th at p. 258; *People v. Mickey* (1991) 54 Cal.3d 612, 667.) Second, the jury was specifically instructed that statements of the attorneys were not evidence, that the jury should not "assume to be true any insinuation suggested by a question asked a witness," and that "[a] question is not evidence." (CT 306; RT 2932.) The jury is presumed to have followed such instructions. (*People v. Valdez, supra*, 32 Cal.4th at p. 114 fn. 14.) Finally, as the prosecutor noted (RT 4172), the defense benefitted when the prosecutor was prevented from corroborating through documentary evidence that appellant had been in New York after the murders. Thus, any error was harmless.

Appellant attempts to avoid this conclusion by arguing that *People v. Wagner* (1975) 13 Cal.3d 612 and *People v. Evans* (1953) 39 Cal.2d 242 dictate a contrary result. (AOB 189-192.) These cases are clearly distinguishable. In *Wagner*, the prosecutor acted impermissibly by repeatedly asking a defendant questions that insinuated, suggested, and led the jury to believe that the defendant had engaged in prior drug transactions. (*People v. Wagner, supra, supra*, 13 Cal.3d at pp. 619-620.) This Court found that these

actions had prejudiced the defendant because the case centered on the credibility of the witnesses. (*Id.* at pp. 620-621.) In *Evans*, the prosecutor asked a defendant a number of questions that seemed designed to place uncorroborated testimony in front of the jury. (*People v. Evans, supra*, 39 Cal.2d at pp. 247-248.) The prosecutor never made any attempt to prove the truth of the matters asserted in the questions, and this Court found that a new trial was required for this and other reasons. (*Id.* at pp. 248-249, 251-252.)

In contrast, the prosecutor in this case did not ask questions which insinuated or suggested information that was not proved at trial. For example, appellant's trip to New York, the stay at the Stanford Hotel, and the telephone calls made from New York were corroborated by Cyprian's testimony. (RT 1806-1808.) Moreover, unlike *Wagner* and *Evans*, the questions at issue in this case were brief and fleeting. Thus, *Wagner* and *Evans* in no way dictate that the alleged misconduct was prejudicial in this case.

Appellant further argues that the error was prejudicial because the prosecutor admitted that the failure to submit the evidence regarding the Stanford Hotel registration card misled the jury. (AOB 187.) However, the prosecutor was merely noting that he had discussed the Stanford Hotel registration card during opening statements and that the prosecution case would be harmed if he was not allowed to submit evidence of the registration card during his rebuttal case. (RT 1291-1292, 2901, 2911-2915.) The prosecutor was not admitting that he had purposely misled the jury to appellant's detriment. As the prosecutor later stated, the documents existed and he had the ability to prove the documents at the time he made his opening statement. However, he made the "tactical error" of relying on defense counsel's assertions that appellant would testify and, based on that reliance, he decided to submit evidence of the Stanford Hotel registration card and the telephone records during his planned cross-examination of appellant. (RT 4171-4172.) As the

prosecutor further noted, the defense had "taken advantage of" the prosecutor's error because the prosecutor was then prevented from submitting the registration card or the telephone records into evidence. (RT 4172.) Thus, the prosecutor's admission that he had erred in no way indicates that appellant was prejudiced. To the contrary, appellant appeared to benefit from the prosecutor's mistake.

Appellant finally argues that there was cumulative prejudice based on the other alleged instances of misconduct. (AOB 196-197.) Respondent has already shown, *supra*, that there were no instances of misconduct. Therefore, there was no cumulative prejudice. (*People v. Young, supra*, 24 Cal.Rptr.3d at p. 147; *People v. Valdez, supra*, 32 Cal.4th at p. 136.)

IX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT EVIDENCE OF FLIGHT AND EFFORTS TO SUPPRESS OR FABRICATE EVIDENCE COULD BE CONSIDERED AS EVIDENCE OF GUILT

The trial court instructed the jury that evidence of flight or efforts by appellant to fabricate or suppress evidence could be considered as evidence of guilt. (CT 311, 313, 323; RT 2935-2936, 2940.) It also instructed the jury on second-degree murder. (CT 349-353; RT 2952-2953.) Appellant now contends that the instructions on flight, fabrication of evidence, and suppression of evidence should not have been given because any of those factors did not logically support an inference that appellant committed a first-degree murder. (AOB 198-201.)

However, as appellant concedes, his argument has been rejected by this Court. (AOB 201.) As such, the trial court did not err by giving the challenged instructions. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 128; see *People v. Welch* (1999) 20 Cal.4th 701, 757; cf. *People v. Jackson* (1996) 13 Cal.4th

1164, 1224.)

X.

THE ROBBERY CONVICTIONS AND TRUE FINDINGS ON THE SPECIAL-CIRCUMSTANCE ALLEGATIONS MUST BE UPHELD

Appellant contends that the robbery convictions and the true findings on the special-circumstance allegations must be overturned because there was insufficient evidence to corroborate Cyprian's and Lee's testimony regarding the robberies, because the robbery-related special-circumstance allegations were never adequately charged, and because the jury was not given a unanimity instruction. (AOB 205-233.) These arguments must be rejected.

A. Relevant Facts And Circumstances

Appellant was charged with two counts of murder and two counts of robbery. (CT 139-141.) Pursuant to Penal Code section 190.2, subdivision (a)(17), it was alleged that the murders were committed by appellant while he was engaged in a robbery. (CT 139-140.)

During a discussion regarding jury instructions, the prosecutor stated that the robberies charged in counts three and four were premised on the taking of the victims' wallets. (RT 2882.) The prosecutor further stated that the jury could use the attempted robbery of the cocaine as the basis for true findings on the special-circumstance allegations. (RT 2881-2882.) Accordingly, the prosecutor requested an instruction that defined possession. (RT 2881.)

Defense counsel objected to the instruction, stating that "the evidence is entirely speculative as to whether or not a robbery was going to take place with respect to the cocaine. There is no evidence in this case that there was ever any cocaine seen, touched, smelled, delivered, possessed, or anything like that at all

and no evidence or any possession of money in any form whatsoever." (RT 2883.)

Defense counsel also objected to the instruction defining murder. Counsel stated that he objected to the portion that stated that one of the elements of murder was that the killing occurred during the commission or attempted commission of a robbery. (RT 2886-2887.) For the same reasons, counsel objected to the instructions on first-degree felony murder (CALJIC Nos. 8.21, 8.26, and 8.27). Counsel reiterated that he was objecting to those instructions "because of the reference to robbery." (RT 2887.)

The prosecutor then asked if counsel was objecting because "there is another word [he would] rather have put in there" or whether counsel did not believe the evidence demonstrated a robbery. (RT 2887-2888.) Counsel stated, "I don't believe the evidence demonstrates a robbery." (RT 2888.) Counsel clarified that he did not believe there was enough evidence regarding "both theories" of the robbery, including the robbery of the wallets. The court stated that there was sufficient evidence to support the instructions. (RT 2888.)

Defense counsel similarly objected to the instructions on the special circumstances (CALJIC Nos. 8.80, 8.81.17) in regards "to that aspect of it that refers to murder in the commission of a robbery." (RT 2889.) The court later reiterated, "[A]s far as the murder during the commission of a robbery, I will make a finding that there is sufficient evidence that I should allow this matter to go to the trier of fact." (RT 2893.)

During a subsequent discussion on the instructions, the court asked if there was anything else to discuss. (RT 2929.) Defense counsel stated, "The defense is satisfied with the present set of instructions. (RT 2929-2930.)

The jury was instructed that a murder occurs when a person unlawfully kills another person with malice aforethought or during the commission or the attempted commission of a robbery (CALJIC 8.10). (CT 342; RT 2948-2949.)

The jury was further instructed that first-degree felony murder was committed when an unlawful killing occurred during the commission of or attempted commission of a robbery (CALJIC No. 8.21). (CT 346; RT 2951.) The instructions also stated that the commission or the attempted commission of a robbery was one of the special circumstances (CALJIC No. 8.80, 8.81.17). (CT 360, 363; RT 2958-2959.)

The jury was additionally instructed that the testimony of an accomplice needed to be corroborated by other evidence which tended to connect the defendant with the commission of the offense (CALJIC No. 3.11). (CT 333; RT 2945.) The instructions went on to state that the corroborating evidence had to include "some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, *tends* to connect the defendant with the commission of the crime charged" (CALJIC No. 3.12, emphasis added). The instruction further stated that it was not necessary that the corroborating evidence "be sufficient in itself to establish every element of the crime charged." (CT 334; RT 2945-2946.)

The instructions on the special circumstances (CALJIC No. 8.83.3) also stated that testimony of an accomplice had to be "corroborated by other evidence which *tends* to connect the defendant with the commission of such crime." (CT 268; RT 2961, emphasis added.)

During the giving of the instructions to the jury, the prosecutor asked the trial court to read CALJIC No. 6.00, which defined attempt. The prosecutor explained that the instruction "goes towards not only the special circumstance but also the theory of the felony murder." Defense counsel had no objection to the reading of the instruction. (RT 2956.)

Defense counsel stated during closing argument that "four of the five elements that are required for a robbery are present in this case." (RT 3004.) However, there was no evidence showing that the wallets were removed from

the victims with the specific intent to permanently deprive those victims of their wallets. (RT 3005-3006.)

During the prosecutor's rebuttal argument, he began to discuss the instructions on possession and attempted robbery, stating, "There is an instruction which you received on possession and this goes to an attempted robbery that is not even charged in this case." (RT 3091-3092.) At that point, the trial court called both attorneys to the bench. The trial court explained that it had not read the instruction on possession because it did not believe it pertained to the case. (RT 3092.) Defense counsel stated that there was no evidence that Thomas and Barron had the right to possess the cocaine and that such an argument was "entirely speculative." The court noted that the testimony showed that "this was a transaction of $50,000 for cocaine, and the presumption here is that the defendant and his codefendants had $50,000 and the fact that the victims had cocaine." (RT 3093.) The court concluded that Barron and Thomas had "presumptive possession" and said it would read the possession instruction later. Defense counsel stated he was objecting to the instruction. (RT 3094.)

The prosecutor then argued to the jury that there were "two robberies going on at the same time. There is the attempted robbery of the cocaine." (RT 3094.) This attempted robbery was underway when appellant and the others brought Barron and Thomas to the apartment. After the two men were restrained and gagged, the robbery that was "charged in this case actually occurred, and that's the taking of the wallets." (RT 3095.) The prosecutor clarified that appellant had committed the robbery of the wallets and the attempted robbery of the cocaine and that "both of those serve to substantiate the special circumstance, which is murder during the course of an attempted or commission of a robbery." (RT 3096.)

After the prosecutor concluded his rebuttal argument, the court read the

instruction defining possession. (RT 3107.)

B. The Trial Court Properly Instructed The Jury On The Level Of Corroboration Needed To Obtain A Conviction Based On Accomplice Testimony And There Was Adequate Corroborating Evidence To Support The Jury's Findings

1. The Instructions On Corroboration Were Adequate

Appellant contends that the trial court did not adequately instruct the jury that accomplice testimony must be corroborated by evidence which relates to some act or fact which is an element of the offense. (AOB 206-211.) This argument must be rejected.

A conviction cannot be based on the testimony of an accomplice unless it is corroborated by evidence that *tends* to connect the defendant with the commission of the charged offense. (Pen. Code, § 1111; *People v. McDermott* (2002) 28 Cal.4th 946, 985.) The corroborative evidence must tend to implicate the defendant and must relate to some act or fact which is an element of the crime; however, it is not necessary that the evidence be sufficient to establish every element of the charged offense. (*People v. McDermott, supra*, 28 Cal.4th at p. 985; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.)

The CALJIC instructions at issue in this case, as discussed earlier, adequately instructed the jury on these rules and have been deemed correct statements of the law.[24/] (*People v. Jenkins* (1973) 34 Cal.App.3d 893, 899; see *People v. Sanders* (1995) 11 Cal.4th 475, 534; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1229; *People v. Lewis* (2004) 120 Cal.App.4th 837, 848.)

Moreover, any error in instructing the jury on the level of corroboration

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24. Appellant cites to *People v. Martinez* (1982) 132 Cal.App.3d 119 and *People v. Boyce* (1980) 110 Cal.App.3d 726. (AOB 208-209.) However, neither case involves the accuracy or correctness of the instructions related to accomplice testimony.

needed was harmless because a different result was not reasonably probable. (*People v. Andrews* (1989) 49 Cal.3d 200, 215.) As will be shown, *infra*, there was sufficient corroborating evidence in the record; therefore, any error had no effect on the outcome of the case. (See *People v Sanders, supra*, 11 Cal.4th at pp. 534-535.)

2. There Was Sufficient Evidence To Corroborate The Accomplice's Testimony As To The Robberies

Appellant contends that there was insufficient evidence to corroborate the accomplices' testimony regarding the robberies. (AOB 211-215.) This argument must be rejected because there was ample evidence which "tended" to connect appellant to the robberies.

As noted previously, a defendant cannot be convicted based on the testimony of an accomplice unless it is corroborated by other evidence that tends to implicate the defendant and relates to some act or fact which is an element of the crime. (*People v. McDermott, supra*, 28 Cal.4th at p. 985; *People v. Williams* (1997) 16 Cal.4th 635, 680-681.) However, the corroborative evidence need not be sufficient by itself to establish every element of the charged offense, although "it must, without aid from the accomplice's testimony, tend to connect the defendant with the commission of the crime." (*People v. McDermott, supra*, 28 Cal.4th at p. 985.) The requisite corroboration can be established by circumstantial evidence and may be slight and entitled to little consideration when standing alone. (*People v. McDermott, supra*, 28 Cal.4th at p. 985; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1128.) On appeal, the trier of fact's determination on the issue of corroboration is binding unless the evidence should not have been admitted or does not reasonably tend to connect the defendant with the charged crime. (*People v. McDermott, supra*, 28 Cal.4th at p. 985.)

In the case at bar, there was sufficient corroborative evidence which tended to connect appellant to the robberies. For example, both Irma Sazo and Marcella Pierre saw appellant, Cyprian, Linton, and Lee near or exiting the apartment where the robberies occurred. (RT 1344-1345, 1355, 1390, 1431-1432, 1436, 1440, 2141-2142, 2150-2152, 2192-2193, 2202-2203, 2462.) Although evidence placing a defendant at a crime scene is not sufficient by itself to corroborate an accomplice's testimony, it can be sufficient when combined with other evidence connecting a defendant to the crime. (*People v. Medina* (1974) 41 Cal.App.3d 438, 466; see, e.g., *People v. Williams, supra*, 16 Cal.4th at p. 681.) Here, the other evidence included the presence of appellant's fingerprints and his cellular telephone at the crime scene. (RT 1506, 2283-2284, 2287, 2296, 2365-2372, 2564.) Although these pieces of evidence did not conclusively establish that appellant committed the robberies, they certainly tended to connect appellant to the crimes. (See *People v. Zapien* (1993) 4 Cal.4th 929, 982-983.) In addition, the presence of Barron's and Thomas' wallets in a kitchen cabinet indicated that the two men's wallets had been taken from them. (RT 1774-1775, 2556-2558.) The presence of the wallets in the kitchen cabinet, appellant's fingerprints at the crime scene, and the presence of other items belonging to appellant at the crime scene all tend to connect appellant to robbing the victims of their wallets.

Appellant was further linked to the robberies by the evidence regarding his actions following the robberies, such as Sazo's testimony that appellant fled the crime scene, the Travelodge receipts showing that appellant did not go home after the crimes, and the telephone records showing that no telephone calls were billed to appellant's home telephone from January 3, 1990, through January 15, 1990. (RT 2160, 2194, 2320-2322, 2326-2327, 2346, 2348, 2440-2441, 2449-2450.) This evidence of flight supports an inference of consciousness of guilt and constitutes an implied admission that can be used to

corroborate an accomplice's testimony. (*People v. Zapien* (1993) 4 Cal.4th 929, 983, *People v. Garrison* (1989) 47 Cal.3d 746, 773; *People v. Felton* (2004) 122 Cal.App.4th 260, 272-273.) Consciousness of guilt was further shown by testimony from non-accomplices that appellant moved to Wilmington after the crimes, told the neighbors his name was "Patrick," and asked Raymond Valdez to falsely testify that appellant was with him on January 2, 1990. (RT 1907-1908, 1912-1913, 1915, 1919, 1921, 1926, 1935, 1941, 1945, 1983-1986, 1994, 2029, 2038, 2120, 2571, 3030-3031.) In addition, appellant's wife attempted to convince an employee at Delcomber Communications to destroy any records related to a pager that may have belonged to appellant that was found at the crime scene. (RT 1646, 1980, 1984-1986, 1994, 1996-1997, 2432-2433, 2435-2436, 2545, 2571.)

Finally, the accomplices' testimony was corroborated by the evidence showing that appellant arranged the drug transaction that eventually resulted in the robbery. (RT 1559-1561, 1604, 1607, 1765, 1777.) For example, on the day of the robberies, records from appellant's home telephone showed that there were three calls made to A.R.A., where Barron and Thomas worked. (RT 1496-1497, 2438-2441.) An employee of A.R.A. overheard Barron and Thomas stated they were going to a bar to engage in a drug deal involving $50,000 and three or four kilos of narcotics. (RT 1482-1487, 1489, 1494-1495.) Appellant was later seen talking to Barron at the bar, and Barron had mentioned to an acquaintance that he was going to make some money that night. (RT 2230-2240, 2249.)

In light of the foregoing evidence, there was sufficient corroboration of the testimony of appellant's accomplices. As a result, appellant's claim must be rejected.

C. Appellant Has Waived His Claim Regarding Whether He Received Adequate Notice That The Special-Circumstance Allegations Could Be Based On Attempted Robbery; Moreover, Appellant Had Sufficient Notice

1. The Amended Information Adequately Alleged The Attempted Robbery

Appellant contends that he did not have sufficient notice that the special-circumstance allegations could be based on attempted robbery because it had not been charged in the information. (AOB 217-218.) This claim must be rejected for several reasons.

First, appellant did not object at trial to any alleged lack of notice that the prosecutor would base the special-circumstance allegations on attempted robbery. Although defense counsel objected to the instructions related to robbery, he only did so because he did not believe that there was any evidence to support them. (RT 2883, 2887-2888.) Appellant did not object because he believed that attempted robbery had not been alleged or that he received inadequate notice. Therefore, he has waived this contention on appeal. (*People v. Cole* (2004) 33 Cal.4th 1158, 1205; *People v. Seaton* (2001) 26 Cal.4th 598, 641.)

Even if appellant had not waived the claim, he is still unable to prevail because he has failed to establish a constitutional violation. Under the state and federal Constitutions, a criminal defendant must receive notice of the charges against him so that he can have a meaningful opportunity to defend himself against those charges. (*People v. Cole, supra*, 33 Cal.4th at p. 1205; *People v. Seaton, supra*, 26 Cal.4th at pp. 640.)

In the case at bar, appellant received adequate notice that the special-circumstance allegations could be based on robbery or attempted robbery. For example, the amended information alleged that appellant had committed the murders of Barron and Thomas while "engaged in the commission of the crime

of Robbery, within the meaning of Penal Code section 190.2(a)(17)." (CT 139-140.) Subdivision (a)(17)(A) of Penal Code section 190.2 specifically states that the death penalty or life in prison without the possibility of parole applies to murders committed "while the defendant was engaged in, or was an accomplice in, the commission of, *attempted commission of*, or the immediate flight after committing, or attempting to commit" a robbery. (See *People v. Cain* (1995) 10 Cal.4th 1, 41 (emphasis added).) Thus, the amended information clearly referenced a Penal Code provision that included attempted robbery.

Moreover, defense counsel did not express that he was surprised or that appellant would be prejudiced because he had not previously been aware that the prosecutor might base the special circumstances on attempted robbery rather than robbery. Counsel was undoubtedly aware that an attempted robbery theory was possible based on Lee's preliminary hearing testimony that appellant had Barron and Thomas tied up and then told Barron to call "his people" to deliver the narcotics. (CT 70, 72-73.) Defense counsel was further made aware of the attempted robbery theory when the prosecutor said in his opening statement that appellant had arranged a narcotics transaction but had "no intention of giving anybody any money" and that appellant was going to give the drug dealers a bag "with nothing in it and leave with their narcotics." (RT 1279-1280.) Moreover, the required notice is generally deemed adequate if the alleged uncharged offense is a lesser included offense of the charged offense. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369.) As appellant concedes, attempted robbery is a lesser included offense of robbery. (AOB 217.) Under these circumstances, appellant's right to notice of the charges against him was not compromised. (See, e.g., Pen. Code, § 1159; *People v. Cain, supra*, 10 Cal.4th at p. 42; *People v. West* (1970) 3 Cal.3d 595, 612; *People v. Parks* (2004) 118 Cal.App.4th 1, 6.)

Assuming arguendo that there was inadequate notice that the special circumstances might be based on an attempted robbery, appellant cannot prevail because there has been no demonstrated prejudice. (See *People v. Thomas* (1987) 43 Cal.3d 818, 830-831.) At the time the prosecutor requested the attempted robbery instructions, defense counsel did not argue, and there is nothing to show, that appellant could have developed a more persuasive defense had he known in advance that the prosecutor would rely on attempted robbery. In addition, the jury convicted appellant of the two counts related to the robbery of the wallets. (CT 140-141, 388-389; RT 3095-3096.) Thus, even if there was inadequate notice that the special circumstances could be based on attempted robbery, any error was harmless because the jury's verdict on the robbery charges supported the true findings on the special-circumstance allegations. As a result, appellant's claim must be rejected.

2. Appellant's Right To The Assistance Of Counsel Was Not Violated

Appellant contends that the failure to charge the attempted robbery as a special circumstance violated his constitutional right to the assistance of counsel. (AOB 218-226.) However, the record clearly shows that appellant's constitutional rights were not violated.

Both the state and federal Constitutions guarantee a criminal defendant the right to the effective assistance of an attorney. (*Geders v. United States*, 425 U.S. 80, 91, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976); *Herring v. New York*, 422 U.S. 853, 856-857, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); *People v. Bishop* (1996) 44 Cal.App.4th 220, 231.) In order to ensure that a defendant's constitutional rights to an attorney are not violated, a defendant must be informed of the crimes with which he is charged so that he may have a reasonable opportunity to prepare a defense against those charges. (*People v.*

Bishop, supra, 44 Cal.App.4th at p. 231; see *Perry v. Leeke* (1989) 488 U.S. 272, 280, 104 S. Ct. 2052, 80 L. Ed. 2d 674.)

As noted in the previous section, appellant was adequately informed that the special circumstances included attempted robbery. Moreover, defense counsel did not in any way indicate he had not previously been aware that the prosecutor might base the special circumstances on attempted robbery rather than robbery. Thus, appellant's right to notice of the charges against him was not compromised; as a result, his right to the assistance of counsel was not violated. See *People v. Williams* (1997) 16 Cal.4th 153, 242.

Appellant attempts to avoid this conclusion by citing to *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234. (AOB 222-223.) However, decisions of the federal Courts of Appeal are not binding on this Court. (*People v. Seaton, supra*, 26 Cal.4th at p. 653.) *Sheppard* also fails to assist appellant because it is inapposite. *Sheppard* involved a pattern of prosecutorial conduct that affirmatively misled the defendant and prevented him from having an effective opportunity to prepare a defense. The prosecutor in *Sheppard* ambushed the defendant by submitting an instruction on felony murder after the jury instruction conference and during closing arguments, despite the fact that felony murder had never been raised directly or indirectly during the course of the trial. (*Sheppard v. Rees, supra*, 909 F.2d at pp. 1235-1237.) Here, the instructions on attempted robbery were discussed during the jury instruction conference and prior to closing arguments. (RT 2881-2882.) Moreover, there had been references to the attempted robbery theory in the amended information, the prosecutor's opening statements, and the evidence at trial. (CT 139-140; RT 1279-1280, 1558-1559, 1561, 1600, 1602-1604.) The trial court even found that there was sufficient evidence to support the instructions on attempted robbery. (RT 2888, 2893.) Thus, *Sheppard* is of no assistance to appellant. (See *People v. Cole, supra*, 33 Cal.4th at p. 1206; *People v. Williams, supra*, 16

Cal.4th at p. 242.) Accordingly, appellant's claim must be rejected.

3. Appellant Waived His Eighth Amendment Claim; Moreover, His Right To A Reliable Determination Was Not Violated

Appellant additionally contends that his Eighth Amendment right to a reliable determination was violated because the attempted robbery had not been charged as a special circumstance. (AOB 226-228.) Appellant has waived this claim because he failed to raise it in the trial court. (*People v. Koontz* (2003) 27 Cal.4th 1041, 1076; *People v. Jackson* (1996) 13 Cal.4th 1164, 1242 n.20.)

The claim also fails on the merits. "[T]he Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.) The requisite reliability is attained when the prosecution has met its burden of proof at both the guilt and penalty phases in accordance with the applicable rules of evidence and within the guidelines of a constitutional death penalty statute and the death verdict has been returned pursuant to the proper procedures and instructions. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1044.)

As previously established, the amended information, the prosecutor's opening statement, and the evidence sufficiently apprised defense counsel that the special circumstance could be based on either attempted robbery or robbery. Therefore, there was no error and no Eighth amendment violation. (*People v. Cole, supra*, 33 Cal.4th at p. 1221 n.10; *People v. Jenkins, supra*, 22 Cal.4th at p. 1044.) Accordingly, appellant's claim must be rejected.

D. A Unanimity Instruction Was Not Required

Appellant contends that the trial court erred when it failed to give a unanimity instruction in regards to the special circumstance allegations involving robbery and attempted robbery. (AOB 228-233.) This argument

must be rejected.

A defendant in a criminal case has the right to a unanimous verdict. (*People v. Russo* (2004) 25 Cal.4th 1124, 1132; *People v. Napoles* (2002) 104 Cal.App.4th 108, 114.) When a defendant is charged with committing a crime and the evidence reveals there was more than one act which could constitute the offense, the jurors must be instructed that they must unanimously agree that the defendant committed the same criminal act. (*People v. Russo, supra*, 25 Cal.4th at p. 1132; *People v. Percele* (2005) 126 Cal.App.4th 164, 181.)

However, a unanimity instruction is not required when the acts are so closely connected that they are part of one transaction or course of conduct. (*People v. Benavides* (2005) 35 Cal.4th 69, 98; *People v. Percele, supra*, 126 Cal.App.4th at p. 181.) This rule applies when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between those acts. (*People v. Percele, supra*, 126 Cal.App.4th at pp. 181-182; see *People v. Champion* (1995) 9 Cal.4th 979, 932.)

For example, in *People v. Champion, supra*, 9 Cal.4th at p. 932, the defendant argued that his rape conviction should be overturned because the victim testified that he had raped her on two separate occasions and the trial court did not give the jury a unanimity instruction. This Court found that there was no error because the two rapes were "virtually identical" and because the defendant offered no evidence showing that he committed one of the rapes and not the other; instead, his attorney merely argued that he did not commit any of the crimes in the victim's home. (*Ibid.*) This Court concluded that once the jury had determined the defendant committed one of the rapes, it was "inconceivable" that the jury would fail to find that the defendant also committed the other rape of the same victim. (*Ibid.*)

The case at bar falls well within these parameters. First, the robbery and attempted robbery occurred within "a very small window of time," which

indicated they were part of the same course of conduct or transaction. (*People v. Benavides, supra*, 35 Cal.4th at p. 98.) In addition, appellant did not offer evidence tending to show that he committed either the robbery or the attempted robbery but not the other; instead, his attorney argued that he did not participate in any of the crimes occurring in the upstairs apartment and that there was no intent to permanently deprive anyone of any property. (RT at 2997, 3000-3303, 3005-3008, 3020-3023, 3027-3029, 3032–3033, 3035, 3065-3068, 3080.)

Moreover, the prosecutor did not suggest that the jury could find the special-circumstance allegation to be true based on either the robbery or the attempted robbery; rather, he wove the two incidents together. For example, he argued that there were "two robberies going on at the same time. There is the attempted robbery of the cocaine," which was well underway when the robbery that was "charged in this case actually occurred, and that's the taking of the wallets." (RT 3094-3095.) The prosecutor clarified that appellant had committed the robbery of the wallets and the attempted robbery of the cocaine and that "both of those serve to substantiate the special circumstance, which is murder during the course of an attempted or commission of a robbery." (RT 3096.) Under these circumstances, any juror who believed that appellant committed the robbery would "inexorably" also believe that he committed the attempted robbery and vice versa. (*People v. Champion, supra*, 9 Cal.4th at p. 932.) Therefore, the trial court did not err in failing to give a unanimity instruction.[25/] (*Ibid.*; see also *People v. Sapp* (2004) 31 Cal.4th 240, 284-285; *People v. Percele, supra*, 126 Cal.App.4th at pp. 181-182; *People v. Haynes*

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25. Appellant additionally contends that his murder conviction must be overturned because it may have been based on a felony murder theory and the jury was not instructed that it had to unanimously agree whether the underlying felony was a robbery or an attempted robbery. (AOB 233.) However, this Court has held that a defendant is not entitled to a unanimous verdict as to the particular manner in which a felony murder occurred. (*People v. Lewis* (2001) 25 Cal.4th 610, 654; *People v. Pride* (1992) 3 Cal.4th 195, 250.)

(1998) 61 Cal.App.4th 1282, 1294-1295.)

Appellant argues that even if the jurors "could **not** reasonably disagree" whether the robbery and attempted robbery occurred, reversal would be required if the jurors could reasonably disagree whether the homicide occurred during the commission of the attempted robbery or robbery. (AOB 231, emphasis in original.) However, because the attempted robbery and the robbery were closely connected and occurred just prior to the murders, a juror who believed that the murders occurred during the commission of a robbery would also inexorably believe that the murders occurred during the attempted robbery and vice versa. For this reason, the trial court did not err when it failed to give a unanimity instruction.

Assuming arguendo that the trial court did err in failing to give a unanimity instruction, the error was harmless beyond a reasonable doubt. (*People v. Turner* (2004) 34 Cal.4th 406, 423; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 188.) Here, any error was harmless because, as noted previously, there was little basis for the jury to disagree on whether appellant committed an attempted robbery or a robbery because both offenses were committed as part of one transaction or course of conduct and appellant did not offer differing defenses to those acts. Moreover, the jury convicted appellant of the two counts related to the robbery of the wallets. (CT 140-141, 388-389; RT 3095-3096.) Thus, even if a unanimity instruction was required, any error was harmless because the jury's unanimous verdict on the robbery charges shows that the jury also unanimously agreed that the murders occurred during the robberies. Therefore, appellant's claim must be rejected.

XI.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF PRIOR CRIMINAL ACTIVITY DURING THE PENALTY PHASE AND PROPERLY INSTRUCTED THE JURY

Appellant contends that the trial court improperly admitted evidence of prior criminal activity during the penalty phase and improperly instruct the jury regarding this evidence. (AOB 234-298.) For the reasons that follow, these arguments must be rejected.

A. Appellant Has Waived His Claim Regarding The Staleness Of The Prior Criminal Acts; Moreover, The Evidence Was Properly Admitted

Appellant contends the trial court violated his constitutional rights to due process and heightened reliability when it admitted "stale" evidence of prior criminal acts. (AOB 246-255.) This argument must first be rejected because appellant waived the claim by failing to object on these grounds in the trial court. (*People v. Medina* (1995) 11 Cal.4th 694, 772.)

Moreover, as appellant concedes (AOB 247-248), this Court has held that neither the remoteness of prior offenses nor the expiration of the statute of limitations is a proper ground for exclusion because such matters affect the weight, not the admissibility, of the evidence. (*People v. Burgener* (2003) 29 Cal.4th 833, 867; *People v. Anderson* (2001) 25 Cal.4th 543, 585; *People v. Kraft* (2000) 23 Cal.4th 978, 1070; *People v. Medina, supra*, 11 Cal.4th at p. 772; *People v. Anderson* (1990) 52 Cal.3d 453, 476.) Thus, in the penalty phase, the prosecutor may offer evidence of criminal violence that has occurred at any time. (*People v. Burgener, supra*, 29 Cal.4th at p. 867; *People v. Anderson, supra*, 25 Cal.4th at p. 585; *People v. Hart* (1999) 20 Cal.4th 546, 642; *People v. Davis* (1995) 10 Cal.4th 463, 533.) Appellant has offered no

compelling reason to reconsider this rule, nor has he shown that he was unable to defend against the evidence. (See *People v. Anderson, supra*, 25 Cal.4th at p. 586; *People v. Kraft, supra*, 23 Cal.4th at p. 1070.) Therefore, his claim should be rejected.

B. Appellant Has Waived His Double Jeopardy Argument; Moreover, The Admission Of The Evidence Related To His Prior Conviction Did Not Violate Double Jeopardy Principles

Appellant contends that the admission of evidence related to his 1983 conviction for misdemeanor assault violated double jeopardy principles. (AOB 255-266.) This argument must first be rejected because appellant waived the claim by failing to object on these grounds in the trial court. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1188.)

The claim must also be rejected on the merits. As appellant concedes (AOB 260), this Court has repeatedly held that double jeopardy principles are not violated by the admission of the facts underlying a prior conviction at the penalty phase for a subsequent offense. (See *People v. Lewis* (2001) 25 Cal.4th 610, 660; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. Stanley* (1995) 10 Cal.4th 764, 820; *People v. McPeters, supra*, 2 Cal.4th at p. 1188.) This Court has also rejected appellant's contention (AOB 258-260) that *Bullington v. Missouri* (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 dictates that double jeopardy principles were violated by the admission of the evidence related to his prior conviction. (*People v. Lewis, supra*, 25 Cal.4th at pp. 660-661.) Appellant has offered no compelling reasons for this Court ro reconsider its existing precedents. (*Id.* at p. 661; *People v. McPeters, supra*, 2 Cal.4th at p. 1188.) Therefore, his claim should be rejected here.

C. Appellant Waived His Claim Regarding The Admission Of Evidence Of Violent Acts Committed By Co-perpetrators; In Addition, The Admission Of Such Evidence Was Proper

Appellant contends the trial court violated his constitutional rights when it admitted evidence of violent criminal acts committed by others. This included evidence that Eddie Jackson shot Moore, that someone shot at Officer Sims, and that someone threw a brick at Thomas and Williams. Appellant contends the trial court could only admit evidence related to acts specifically committed by appellant, not his co-perpetrators. (AOB 266-276.)

This argument must first be rejected because he never objected on this ground in the trial court. Therefore, the claim has been waived. (*See People v. McPeters, supra*, 2 Cal.4th at p. 1188.)

Appellant's argument also fails on the merits. As appellant concedes (AOB 268), this Court has previously held that statutory and constitutional principles do not require the prosecutor "to establish that the defendant personally committed each and every act occurring during a violent criminal episode" that is admitted pursuant to Penal Code section 190.3, subdivision (b). (*People v. Ray* (1996) 33 Cal.4th 313, 351.) The jury is entitled to know about other violent incidents involving the defendant, "whether he participated as an actual perpetrator or in some other capacity." (*Id.*; *see People v. Bacigalupo* (1991) 1 Cal.4th 103, 137; *People v. Hayes* (1990) 52 Cal.3d 577, 633; see also *People v. Davis* (1995) 10 Cal.4th 463, 534 fn. 31 ["It is not the fact of the original charges, but the underlying conduct, that is probative."].) Thus, appellant's claim must be rejected.

D. The Jury Was Properly Instructed On The Aggravating Circumstances

Appellant contends that the trial court erred during the penalty phase when it failed to give the jury instructions on aiding and abetting to be applied to the Penal Code section 190.3, subdivision (b), evidence. (AOB 276-293.) This argument is without merit.

1. Instructions On Aiding And Abetting Were Not Required

The trial court does not have a sua sponte duty to instruct the jury on the elements of crimes presented pursuant to subdivision (b) of Penal Code section 190.3. (*People v. Anderson* (2001) 25 Cal.4th 543, 587-588; *People v. Hart* (1999) 20 Cal.4th 546, 651.) This rule is based on the recognition that, for tactical reasons, a defendant may not want lengthy instructions on other crimes because he may be afraid that such instructions would lead the jury to place an undue emphasis on the crimes rather than focus on the central issue of whether he should live or die. (*People v. Anderson, supra*, 25 Cal.4th at p. 588; *People v. Hart, supra*, 20 Cal.4th at p. 651.) The trial court has no duty to override the defendant's choice, although it is not prohibited from instructing on the elements of other crimes if such instructions would be vital to a proper consideration of the evidence. (*People v. Anderson, supra*, 25 Cal.4th at p. 588; *People v. Hart, supra*, 20 Cal.4th at p. 651.)

Because a court is not required to give instructions on the elements of the subdivision (b) crimes, by parity of reasoning, it follows it was not required to give instructions on the liability of aiders and abettors. As this Court has stated, "A defendant's history of criminal violence is relevant to the ultimate issue in a capital sentencing trial, but that issue is the appropriate penalty for the defendant's already-proven capital crimes, not whether the defendant committed the specific elements of additional criminal offenses." (*People v.*

Anderson, supra, 25 Cal.4th at p. 588.) Jurors would be immersed in "lengthy and complicated discussions of matters wholly collateral to the penalty determination" if sua sponte instructions of the elements of a crime or aiding and abetting were required. (*Id.* at p. 589; see *People v. Avena* (1996) 13 Cal.4th 394, 436 [fact that the prosecutor characterized a juvenile assault as an attempt to kill does not convert the trial court's failure to instruct sua sponte on the elements of the crime from a correct legal decision into an erroneous one].)

In the case at bar, appellant did not request any instructions on the liability of aiders and abettors, and there was no indication that such instructions were vital to a proper consideration of the evidence. Evidence of a defendant's prior violent conduct is admitted to help the jury to assess the character and history of the defendant so that it can determine which punishment to impose. (*People v. Davis, supra*, 10 Cal.4th at p. 534 fn.31.) Because the "proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on his character," there was no need to give technical instructions on aiding and abetting. (*People v. Cain* (1995) 10 Cal.4th 1, 73.) The evidence and the arguments by the attorneys sufficiently focused the jury's attention "on the moral assessment" of appellant's actions in the prior incidents, and instructions on the liability of aiders and abettors were not vital to this analysis. (See *ibid.*) As such, the trial court was not required to give instructions on the liability of aiders and abettors in the absence of a request for them. (See *ibid.*)

2. CALJIC No. 8.87, As Read By The Court, Was Proper

As read by the court, CALJIC No. 8.87 stated, "Before a juror may consider any of such criminal acts or activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that [appellant] did in fact commit such criminal acts or activity or was involved in

such criminal acts or activity." (RT 3489.) However, the written version of CALJIC No. 8.87 did not include the phrase "or was involved in such criminal acts or activity." (CT 406.) Appellant appears to contend that the trial court's oral instruction was erroneous. (AOB 293.) This argument should be rejected.

As shown, *supra*, it was proper to admit the evidence of violent criminal offenses even if appellant did not commit each and every act during those violent incidents. Thus, although there was a minor difference between the written and oral versions of CALJIC No. 8.87, the oral version was an accurate and correct statement of the law. (Cf. *People v. Lucero* (2000) 23 Cal.4th 692, 731.)

Moreover, a minor misreading of an instruction is at most harmless error when the written instructions received by the jury are correct.[26/] (*People v. Prieto* (2003) 30 Cal.4th 226, 255; *People v. Box* (2000) 23 Cal.4th 1153, 1212.) In the case at bar, the jury was given a written version of the instructions during the guilt phase (RT 2930); therefore, it is likely that they also received a written version of the instructions during the penalty phase. Thus, the discrepancy between the oral and written versions of CALJIC No. 8.87 was harmless.

Any error was also harmless because a different result was not reasonably possible in light of the closing argument by defense counsel. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1221; see also People *v. Crittenden*

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26. Appellant contends that this rule does not apply because the court failed to read an instruction it said it would use and cites to *People v. Murillo* (1996) 47 Cal.App.4th 1104 for that proposition. (AOB 293.) However, in *Murillo*, the trial court failed to read an instruction it had indicated it would give. (*Id.* at pp. 1106-1107.) When the trial court realized its error, it decided to include the instruction in the packet given to the jury but never read the instruction to the jury. (*Id.* at p. 1107.) Thus, *Murillo* does not govern this issue because it does not involve an oral instruction that differed slightly from the written version of the instruction.

(1994) 9 Cal.4th 83, 138; *People v. Heishman* (1988) 45 Cal.3d 147, 163.) For example, defense counsel told the jury,

> I'm asking you not to blame my client for whatever went on in Eddie Jewel Jackson's mind, what caused him to pull out a gun and shoot Kenneth Moore. It is certainly not my client's fault. You've heard no evidence that my client instructed him to do it, encouraged him to do it or even knew that Eddie had a gun in his pocket. And I don't want you to make that great leap in faith and blame my client for what Eddie Jackson did.

(RT 3470-3471.) Counsel stated that the evidence merely showed that appellant had been convicted of a misdemeanor and that "we do know that he didn't use a firearm and we do know that he didn't shoot Kenneth Moore." (RT 3471.) He added that the jury could not "attach great weight" to the Moore incident as an aggravating factor "simply because Eddie Jewel Jackson decided to shoot and kill Kenneth Moore and [appellant] was present in that area, in that group." (RT 3471-3472.) Counsel also argued that it was "pure speculation" that appellant shot at Officer Sims because Sims did not see who shot at him. (RT 3473.) In regards to the incident involving Mona Thomas, counsel argued that there was no proof that appellant "actually committed a crime" or that he committed a robbery or an assault. (RT 3474.)

Thus, counsel emphasized that the prior acts of violent conduct could not be used as aggravating factors because, even though appellant may have been involved in the past offenses, the evidence did not show that he had committed the murder of Moore or the other offenses. In light of these arguments, any error in misreading the instruction was harmless. Therefore, appellant's claim must be rejected.

E. Appellant Has Waived His Contention That He Received Insufficient Notice Related To The Incident Involving Moore; Moreover, The Record Shows That The Defense Did Receive Adequate Notice

Appellant contends the prosecutor did not give him adequate notice that he was going to characterize the Moore incident as a murder. (AOB 294-298.) This argument must be rejected.

Pursuant to Penal Code section 190.3, the prosecution cannot present evidence in aggravation unless notice of the evidence has been given to the defendant a reasonable amount of time prior to trial. (*People v. Coffman* (2004) 34 Cal.4th 1, 111; *People v. Cunningham* (2001) 25 Cal.4th 926, 1016.) The purpose of the rule is to advise the defendant of the evidence against him so that he has a reasonable opportunity to prepare a defense to the evidence. (*People v. Farnam* (2002) 28 Cal.4th 107, 174.)

In the case at bar, appellant did not object on the grounds that he received inadequate notice that the prosecutor was going to characterize the incident involving Moore as a murder. Therefore, he has waived appellate review of this issue. (*People v. Farnam, supra*, 28 Cal.4th at p. 175; *People v. Carpenter* (1997) 15 Cal.4th 312, 421; *People v. Mayfield* (1997) 14 Cal.4th 668, 798.)

Even if the claim was cognizable, appellant is still unable to prevail. Appellant has cited to no case specifically holding that he was entitled to notice of how the prosecutor would characterize the evidence related to the prior violent offense, and it does not appear that he was entitled to such notice. (See *People v. Stitely* (2005) 26 Cal.4th 3d 1, 39; *People v. Coffman, supra*, 34 Cal.4th at pp. 109-110; *People v. Carpenter, supra*, 15 Cal.4th at p. 421; see also *People v. Jones* (1998) 17 Cal.4th 279, 311-312.) As this Court has stated, "Notice pursuant to section 190.3 that the prosecution will present evidence relating to a prior crime or conviction is sufficient to alert the defense that

evidence regarding uncharged crimes or other misconduct committed as part of the same incident or course of conduct as the prior crime or conviction may be offered." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1029; see also *People v. Farnam, supra*, 28 Cal.4th at p. 175.) Moreover, appellant was given notice of how the prosecutor would characterize the Moore incident because, prior to trial, the prosecutor stated, "There was also a crime where [appellant] was arrested and convicted, I think of 245 and he was supposed to be a witness in that crime but it was also a murder . . . ." (RT 5.) Thus, appellant's contention must be rejected.

Assuming arguendo that appellant received inadequate notice, he cannot demonstrate prejudice because he failed to request a continuance once the prosecutor's characterization of the evidence became known. (*People v. Williams* (1997) 16 Cal.4th 153, 241; *People v. Mayfield* (1997) 14 Cal.4th 668, 798-799; *People v. Medina* (1995) 11 Cal.4th 694, 771.) Moreover, appellant has not specified anything that the defense would have been able to do differently if it had received adequate notice. Therefore, there is no reasonable possibility that appellant suffered any prejudice for the allegedly inadequate notification. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1016; *People v. Jenkins, supra*, 22 Cal.4th at p. 1029; *People v. Bradford* (1997) 15 Cal.4th 1229, 1360; *People v. Taylor* (1990) 52 Cal.3d 719, 737.)

XII.

CALJIC NO. 8.87, AS READ BY THE TRIAL COURT, WAS PROPER

Appellant contends that CALJIC No. 8.87, as read to the jury,[27] was unconstitutionally vague, was inconsistent with California law, and violated his right to adequate notice and the effective assistance of counsel because it did not adequately guide the jury's decisionmaking. (AOB 299-318.) These arguments must be rejected.

A. The Instruction Was Not Unconstitutionally Vague

Appellant first contends that the instruction on the Penal Code section 190.3, subdivision (b), evidence was unconstitutionally vague in violation of the Eighth Amendment. In doing so, he argues that this Court erred in *People v. Bacigalupo* (1993) 6 Cal.4th 457, when it held that Eighth Amendment vagueness principles did not apply to the factors used by the jury during the penalty phase. (AOB 299-305.) Appellant is incorrect.

In *Bacigalupo*, the defendant argued that the instruction on the subdivision (b) evidence was impermissibly vague under the Eighth Amendment because it did not provide any principled basis for distinguishing between those who deserved death and those who did not. (*People v. Bacigalupo, supra*, 6 Cal.4th at p. 464.) This Court noted that the United States Supreme Court had drawn a distinction between the decision whether a

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27. As read by the court, CALJIC No. 8.87 stated, "Before a juror may consider any of such criminal acts or activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that [appellant] did in fact commit such criminal acts or activity or was involved in such criminal acts or activity." (RT 3489.) However, the written version of CALJIC No. 8.87 did not include the phrase "or was involved in such criminal acts or activity." (CT 406.)

defendant was eligible for the death penalty and the decision whether the defendant should be sentenced to death. (*Id.* at p. 465; see also *People v. Earp* (1999) 20 Cal.4th 826, 898.) The eligibility question was governed by the United States Supreme Court's decisions in *Godfrey v. Georgia* (1980) 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, and *Maynard v. Cartwright* (1988) 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). (*People v. Bacigalupo, supra*, 6 Cal.4th at p. 475.) Under these decisions, a state's capital punishment scheme had to serve a narrowing function by limiting or circumscribing the class of people eligible for the death penalty. (*Id.* at pp. 465, 475; see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267.) The eligibility criteria had to also provide an objective basis for distinguishing a case in which the death penalty was imposed from the many cases in which it was not imposed. (*People v. Bacigalupo, supra*, 6 Cal.4th at pp. 465, 475.)

In contrast, the sentence selection criteria were not subjected to the same *Godfrey/Maynard* analysis used to evaluate the death eligibility criteria. (*Id.* at pp. 466-467, 475.) This did not "suggest that the Eighth Amendment impose[d] no standards whatsoever on those sentencing factors." (*Id.* at p. 477.) Instead, to meet constitutional dictates, the sentence criteria had to permit the exercise of the judge or jury's discretion and permit consideration of mitigating evidence. (*Id.* at pp. 466-467.) The criteria also needed to be defined in terms which were "sufficiently clear and specific" and they had to "direct the sentencer to evidence relevant to and appropriate for the penalty determination." (*Id.* at pp. 477-478.)

Contrary to appellant's contention (AOB 304-305), this Court's analysis in *Bacigalupo* is not contradicted by *Tuilaepa v. California* (1994) 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750. In *Tuilaepa*, the Supreme Court reviewed several aggravating circumstances, including subdivision (b), and concluded that they were constitutional under the Eighth Amendment. (*Id.* at

p. 980.) As in *Bacigalupo*, the Supreme Court in *Tuilaepa* noted that its decisions had made a distinction between the eligibility decision and the sentencing decision. (*Id.* at pp. 971-973.) The High Court stated that the eligibility criteria could not apply to every defendant that had been convicted of murder and could only apply to a "subclass of defendants convicted of murder." (*Id.* at p. 972.) In contrast, the sentence selection criteria had to allow the jury to consider relevant mitigating evidence. (*Ibid.*) The Supreme Court did note that there was "one principle common to both decisions," which was that a state needed to ensure that the "process is neutral and principled so as to guard against bias or caprice in the sentencing decision." (*Id.* at p. 973.) To meet this requirement, the sentence selection criteria needed to have some "'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" (*Id.* at pp. 973-975, quoting *Jurek v. Texas* (1976) 428 U.S. 262, 279, 96 S.Ct. 2950, 49 L.Ed.2d 929 (White, J., concurring); see *People v. Williams* (1997) 16 Cal.4th 153, 268).

Thus, although worded in a slightly different manner, under both *Bacigalupo* and *Tuilaepa*, the criteria used to determine the appropriate sentence must be clear and understandable and must adequately direct the sentencer to evidence that is relevant to the penalty decision. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 972-975; *People v. Bacigalupo, supra*, 6 Cal.4th at pp. 477-478; see *Espinoza v. Florida* (1992) 505 U.S. 1079, 1081, 112 S. Ct. 2926, 120 L. Ed. 2d 854 [aggravating circumstance is vague if it leaves the sentencer without sufficient guidance to determine the presence or absence of that factor].) Indeed, this Court has often cited to *Tuilaepa* in determining whether various sentencing factors are vague. (See, e.g., *People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Williams, supra*, 16 Cal.4th at pp. 267-268.)

Under the standards set forth by this Court and the United States

Supreme Court, the instruction regarding the subdivision (b) evidence was not unconstitutionally vague. Although appellant argues that the "involved in" language should have been defined because it failed to adequately guide the jury's decision (AOB 306-308), this is not the case. The phrase "involved in" was not being used in a technical or legal sense and is a phrase that is commonly understood by jurors of average intelligence. (See *Commonwealth v. Johnson* (Pa. 2002) 815 A.2d 563, 588-589 [an aggravating circumstance using the word "involved" was not unconstitutionally vague because "involved" was a word of "common usage and meaning" and did not require any "additional definition"]; cf also *People v. Rowland* (1992) 4 Cal.4th 238, 270-271; *People v. Raley* (1992) 2 Cal.4th 870, 901.) Moreover, the instruction was not dramatically different from the factor upheld against a vagueness challenge in the United States Supreme Court. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 976-977.) Thus, the instruction was not unconstitutionally vague.[28/]

Appellant argues that the instruction left many questions unanswered. (AOB 307.) However, the sentence selection factors are often not capable of being defined with "'mathematical precision.'" (*Tuilaepa v. California, supra*, 512 U.S. at 973, quoting *Walton v. Arizona* (1990) 497 U.S. 639, 665, 110 S.Ct. 3047, 111 L.Ed.2d 511.) Thus, the lack of precise definitions or explanations does not render an instruction vague, as evidenced by the numerous capital sentencing factors that have been upheld against vagueness challenges. (See, e.g., *id.* at p. 974.) Indeed, the United States Supreme Court has stated that states can adopt "capital sentencing processes that rely upon the jury . . . to exercise wide discretion" and that states have "considerable latitude in determining how to guide the sentencer's decision" in regards to a

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28. Although appellant attempts to avoid this conclusion by citing to *Arnold v. State* (Ga. 1976) 224 S.E.2d 386 and *State v. David* (La. 1985) 468 So.2d 1126 (AOB 307-308), neither case involves the phrase at issue here and are, therefore, inapposite.

defendant's prior criminal activities. (*Id.* at pp. 974, 977.) Because the instruction in this case was phrased in "conventional and understandable terms," appellant's vagueness challenge must be rejected. (*Id.* at p. 976.)

B. The Instruction Was Not Erroneous And Did Not Violate Any State-Created Liberty Interest

Appellant contends that the addition of the phrase "involved in" to the second sentence of CALJIC No. 8.87, as read to the jury, violated state law and thereby also deprived him of a state-created liberty interest. (AOB 309-313.) These arguments must be rejected.

When a defendant argues that an instruction is erroneous, an appellate court reviews the instruction to determine "how it is reasonably likely the jury understood the instruction, and whether the instruction, so understood, accurately reflects applicable law." (*People v. Raley* (1992) 2 Cal.4th 870, 899; see, e.g., *People v. Fierro* (1991) 1 Cal.4th 173, 251-252.) As appellant concedes (AOB 310), this Court has also held that under Penal Code section 190.3, subdivision (b), a jury can consider prior violent or forceful activity in which the defendant "participated as an actual perpetrator or in some other capacity." (*People v. Ray, supra*, 33 Cal.4th at p. 351; *see People v. Bacigalupo, supra*, 1 Cal.4th at p. 137; *People v. Hayes, supra*, 52 Cal.3d at p. 633.)

The instruction, as read by the trial court, adequately conveyed this concept. The word "involve" has been defined as meaning "to engage as a participant." (Merriam Webster's 10th New Collegiate Dict. (1997) p. 617.) Thus, the use of the phrase "involved in" accurately conveyed that appellant had to be an active participant in the crimes and in no way broadened what the jury could consider in aggravation under Penal Code section 190.3, subdivision (b). Moreover, the oral instruction was significantly similar to one that has been

deemed proper by this Court. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1138; cf. *People v. Pinholster* (1992) 1 Cal.4th 865, 954, fn. 15.) Thus, the instruction was correct.

Because the instruction was proper, there was no violation of a state-created liberty interest. (See *People v. Frye* (1998) 18 Cal.4th 894, 1026.) Moreover, this Court has rejected "the notion that factor (b) created a liberty interest." (*People v. Hardy* (1992) 2 Cal.4th 86, 206.) Appellant's claim must further be rejected because he has failed to explain how this Court's precedent regarding the evidence "is the equivalent of a guarantee of a procedural right based on state law." (*People v. Boyette* (2002) 29 Cal.4th 381, 419, fn. 6.) "A contrary holding would convert all incorrect rulings by our trial courts into constitutional error." (*Ibid.*) Thus, appellant's liberty-interest argument must be rejected.

Assuming arguendo that the instruction was erroneous, reversal is not required because a different result was not reasonably possible. (See *People v. Carter,* supra, 30 Cal.4th at p. 1221.) First, there was only a minor discrepancy between the written instructions and the oral instructions, and a minor misreading of an instruction is harmless when the written instructions received by the jury are correct. (*People v. Prieto, supra*, 30 Cal.4th at p. 255; *People v. Box, supra*, 23 Cal.4th at p. 1212.) In the case at bar, the jury was given a written version of the instructions during the guilt phase (RT 2930); therefore, it is likely that they also received a written version of the instructions during the penalty phase. Thus, the discrepancy between the oral and written versions of CALJIC No. 8.87 was harmless.

The error was also harmless because defense counsel emphasized during closing argument that the jury should not "blame" appellant for any acts committed by other people. (RT 3470-3474.) Thus, counsel emphasized that the prior acts of violent conduct could not be used as aggravating factors

because the evidence did not show that he had committed the murder of Moore or the other offenses. In light of these arguments, any error was harmless. Therefore, appellant's claim must be rejected.

C. Appellant Has Waived His Contention That He Did Not Receive Proper Notice Of The Court's Alteration Of CALJIC No. 8.87; Moreover, There Was No Indication That Appellant Had Not Received The Proper Notice

Appellant contends that he did not receive adequate notice that the court would instruct the jury with an "involved in" theory of culpability and that this deprived him of the effective assistance of counsel because his attorney was unable to address this theory during the penalty phase. (AOB 317-318.) Appellant's claim must first be rejected because he waived it by failing to seek leave to reopen his closing argument or the evidence portion of the penalty phase to address this allegedly new theory of culpability. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1131-1132; *People v. Bishop* (1996) 44 Cal.App.4th 220, 235.)

The claim must also be rejected on the merits. As noted previously, the instruction was accurate. Moreover, the modification of CALJIC No. 8.87 was "de mininis" and did not change "the thrust of the instruction nor undercut the defense argument." (*People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 341; see also *People v. Kipp, supra*, 26 Cal.4th at p. 1131; *People v. Box* (2000) 23 Cal.4th 1153, 1212; *People v. Bishop, supra*, 44 Cal.App.4th at pp. 234-235.) Because the instruction was accurate and the changes were only minor, counsel had received adequate notification regarding the instruction, which is most clearly shown by the fact that "defense counsel here raised no claim of surprise whatsoever." (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739; see also *People v. Kipp, supra*, 26 Cal.4th at p. 1131; *People v. Box, supra*, 23 Cal.4th at pp. 1211-1212.)

Even if counsel had not received adequate notification, appellant cannot prevail because he has not adequately demonstrated that defense counsel would have changed his closing argument or his penalty phase strategy if he had known earlier that the trial court would alter CALJIC No. 8.87 as it did. (*People v. Bishop, supra*, 44 Cal.App.4th at pp. 234-235.) He has also failed to explain "how the defense strategy was significantly affected" by the alteration in CALJIC No. 8.87. (*People v. Kipp, supra*, 26 Cal.4th at p. 1131; *People v. Box, supra*, 23 Cal.4th at p. 1212.) For all of these reasons, any failure to adequately notify counsel was harmless. (*People v. Daniel* (1983) 145 Cal.App.3d 168, 175.)

Appellant attempts to avoid this conclusion by again comparing his case to *Sheppard v. Rees, supra*, 907 F.2d 1234. (AOB 314-315.) However, California and the Ninth Circuit have "uniformly viewed *Sheppard* narrowly and limited it to its facts." (*People v. Lucas, supra*, 55 Cal.App.4th at p. 738.) The case at bar is factually dissimilar to *Sheppard*. "Tellingly, and unlike the defense counsel in *Sheppard* who strenuously protested his surprise at a newly introduced felony-murder theory . . . , defense counsel here raised no claim of surprise whatsoever." (*People v. Lucas, supra*, 55 Cal.App.4th at p. 739; see *People v. Box, supra*, 23 Cal.4th at pp. 1211-1212.) Thus, appellant's reliance on *Sheppard* "is misplaced." (*People v. Box, supra*, 23 Cal.4th at p. 1212.) As such, appellant's claim must be rejected.

D. The Resulting Death Sentence Did Not Violate The Eighth Amendment

Appellant contends that CALJIC No. 8.87, as read by the trial court, violated his Eighth Amendment right to a reliable penalty phase determination. (AOB 317-318.) Under the Eighth Amendment, reliability is achieved when the death verdict has been returned after the jury has received proper

instructions. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1044.) Because, as shown above, the instruction was proper and any error was harmless, appellant's Eighth Amendment rights were not violated. (*People v. Benavides* (2005) 35 Cal.4th 69, 100; *People v. Cole* (2004) 33 Cal.4th 1158, 1212, fn. 14; *People v. Lewis* (2001) 26 Cal.4th 334, 371; *People v. Jenkins, supra*, 22 Cal.4th at p. 1044.)

XIII.

THE INSTRUCTIONS ON THE AGGRAVATING FACTORS WERE PROPER

Appellant contends that the penalty phase instructions violated his constitutional rights because they did not require the jury to unanimously agree as to the aggravating factors. (AOB 319-328.) However, this Court has repeatedly held that juror unanimity is not required for the aggravating factors. (*People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Horning* (2004) 34 Cal.4th 871, 913; *People v. Brown* (2004) 33 Cal.4th 382, 402.) Recent decisions by the United States Supreme Court in *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 and *Blakely v. Washington* (2004) __ U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403, have not changed this conclusion. (See *People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Griffin* (2004) 33 cal.4th 536, 595; *People v. Brown, supra*, 33 Cal.4th at p. 402; see also *People v. Cox* (2003) 30 Cal.4th 916, 972.) Moreover, the failure to require unanimous agreement on the aggravating factors does not lead to an unreliable sentencing determination that violates the Eighth Amendment. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1246; *People v. Raley* (1992) 2 Cal.4th 870, 910.) Thus, appellant's claim must be rejected.

XIV.

THE INSTRUCTIONS PROPERLY GUIDED THE JURY'S DISCRETION

Appellant contends that the penalty phase instructions failed to properly guide the jury's discretion because they failed to delete inapplicable sentencing factors, they failed to specify the aggravating and mitigating circumstances, and they contained factors that were vague. (AOB 329-330.) However, as appellant concedes (AOB 330), this Court has repeatedly rejected such assertions. (*People v. Stitely, supra*, 35 Cal.4th at p. 574; *People v. Panah, supra*, 35 Cal.4th at pp. 499-500 *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Yeoman* (2004) 31 Cal.4th 93, 164; *People v. Hughes* (2002) 27 Cal.4th 287, 404; *People v. Box* (2000) 23 Cal.4th 1153, 1217.) Appellant offers no compelling reason for this Court to reconsider these decisions. Therefore, appellant's claim must be rejected.

XV.

TRIAL COUNSEL WAS NOT INEFFECTIVE

After the jury recommended death, the trial court appointed Douglas Otto to assist appellant's attorney, Ronald LeMieux, in preparing a motion for new trial. Otto was assigned to investigate whether LeMieux was ineffective in representing appellant and to prepare a motion for new trial on the grounds of ineffective assistance of trial counsel. (RT 3529-3550.) Otto eventually prepared a motion for new trial which alleged that LeMieux was ineffective. This motion for new trial contained declarations from LeMieux, appellant, and others involved in the case. (CT 470-591.) LeMieux also prepared a motion for new trial which alleged other errors that occurred during the trial. (CT 463-469, 592-710.) After an extensive hearing in which LeMieux, appellant, and several other witnesses testified, the trial court denied appellant's motion for

new trial. The trial court found that LeMieux had been competent and that a different result had not been reasonably probable. (RT 4177-4178.)

On direct appeal, appellant again contends that his attorney was ineffective. (AOB 331-491.) For the reasons that follow, these arguments must be rejected.

A. Trial Counsel Was Qualified To Represent Appellant

Appellant contends that his attorney was ineffective because he was not qualified to represent appellant in a capital case. (AOB 334-349.) These arguments are not supported by the record.

1. Counsel Had The Necessary Skills, Knowledge, And Resources To Handle A Capital Case And There Is Nothing In The Record To Indicate That He Sought Inadequate Compensation

Appellant contends that his trial attorney was ineffective because he lacked the legal knowledge and skills to handle a capital trial, lacked an office staff and basic legal tools, and failed to seek adequate compensation. (AOB 334-337, 340, 348-349.) These arguments must be rejected.

a. Relevant Facts And Proceedings

In a declaration and during the hearing on the motion for new trial, appellant's trial attorney, Ronald LeMieux, stated that he had predominantly practiced criminal law since becoming a lawyer in 1971. (RT 3648.) Although he had handled capital cases prior to appellant's case, a penalty phase was never held in any of those cases because the defendants were either acquitted or the cases ended in a plea. (RT 3649-3650, 3655-3656, 3661; CT 562-563, 565.) Thus, prior to the instant case, LeMieux had never tried a penalty phase in a

criminal case, although he may have prepared for a penalty phase. (RT 3663, 3758.) LeMieux also testified that he had not attended any courses or lectures on capital case work, but had done some reading on the subject. (RT 3663-3664.) He owned manuals created by the California Attorneys for Criminal Justice and California Public Defender's Association and had a subscription to, and regularly read, the Daily Journal. (RT 3663-3664, 3666.) LeMieux did not belong to any professional organizations and did not receive any publications from defense organizations. (RT 3668-3669.)

At the time of appellant's trial, LeMieux was practicing out of his house and had a small library of materials. (RT 3664-3665, 3667.) He would go to the local law library for anything else that he needed, including publications by defense-related organizations. (RT 3664-3667, 3669.) LeMieux did not have a secretary, a paralegal, or any kind of support staff. (RT 3667-3668.)

LeMieux had "done some reading and inquiry and preparation" for the penalty phase of the trial. He did not believe the penalty phase required "any great deal of expertise or experience" and he had "a pretty good idea" of what evidence the prosecutor would present at the penalty phase. (RT 3760.)

In regards to payment, LeMieux's "customary practice" was to refrain from quoting a fee until he understood the complexity of the case. (RT 3723-3724.) LeMieux and appellant may have initially discussed a fee of $15,000 before settling on a fee of $25,000, at appellant's request. (RT 3723-3724; CT 656.) LeMieux was retained on February 6, 1990, and made his first court appearance on February 22, 1990. (RT 3700, 3723.)

In June 1991, LeMieux was concerned that he could not complete his trial preparation while conducting voir dire. As a result, he asked appellant's family for an additional $10,000 so that he could hire a second attorney and pay for any investigative costs. (RT 3725.) LeMieux eventually hired McCann to conduct jury selection. (RT 3725-3726; CT 567-568.)

Prior to the penalty phase, LeMieux may have asked appellant's family for another $5,000. He had asked for the additional money in the past because the trial was becoming "much longer and much more complicated" than he had originally anticipated. (RT 3763-3764, 3802-3803.)

b. Trial Counsel Was Not Ineffective

The applicable law pertaining to ineffective assistance of counsel claims is set forth in the two-part test articulated by the United States Supreme Court in *Strickland v. Washington* (1984) 466 U.S. 668, 684-687, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Under this test, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness. (*Strickland v. Washington, supra*, 466 U.S. at 687-688; *People v. Benavides* (2005) 35 Cal.4th 69, 93.) A defendant must also affirmatively prove that "there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Benavides, supra*, 35 Cal.4th at p. 93.)

In the case at bar, appellant's claim must first be rejected because he has failed to show that his attorney was ineffective. Although LeMieux had not previously handled a death penalty case that resulted in a penalty phase, this does not necessarily mean that he was ineffective. (See *People v. Wright* (1990)52 Cal.3d 367, 412-413.) As this Court has previously stated, the admission of an attorney to the state bar establishes that the state has deemed him competent to practice law in all types of actions. (*People v. Majors* (1998) 18 Cal.4th 385, 430-431.) Thus, when a defendant is represented by a licensed attorney, there is a presumption in favor of the effectiveness of that attorney. (*Id.* at p. 431.)

Appellant has not rebutted that presumption. LeMieux was an experienced attorney, who had focused on criminal law since becoming a

lawyer in 1971. (RT 3648.) During that time, he may have handled other capital cases, although a penalty phase was never held in those cases. (RT 3649-3650, 3655-3656, 3661; CT 562-563, 565.) Appellant has not pointed to any special expertise that LeMieux needed in order to handle the penalty phase of a capital trial, nor has he identified how the procedures or methods used in a penalty phase differ in any material respect from any other type of trial. Although LeMieux testified that he had not attended any courses or lectures on capital cases, he owned several defense manuals, regularly read the Daily Journal, and had done some reading on capital litigation, as shown by his argument to exclude certain evidence during the penalty phase of the trial. (RT 3160-3161, 3165, 3170-3172, 3663-3664, 3666, 3760.) Although appellant notes that LeMieux did not belong to any professional organizations (AOB 337), there is nothing to indicate that membership in those organizations is a prerequisite to effective representation. Similarly, there is nothing to indicate that counsel's desire to discuss a minor point off the record, or his failure to give the prosecutor a written list of his witnesses after he had verbally given the information to the prosecutor, demonstrates that LeMieux did not adequately understand the rules and procedures related to capital cases. (RT 1266, 1901.) Thus, appellant has not demonstrated on this record that LeMieux lacked sufficient skill and knowledge to handle a capital case.

Appellant attempts to avoid this conclusion by arguing that LeMieux had never handled a case that involved materials filling "more than a single banker's box." (AOB 337.) However, in context, LeMieux's testimony was that the instant case contained a voluminous amount of materials, which took him hours to organize because they were "loosely dumped in a box," nothing was indexed or cataloged, and the documents were not organized in any manner. (RT 3812, 3821-3822.) Thus, LeMieux's statement regarding the volume of materials in no way indicated that he was not qualified to handle a

capital case.

Appellant additionally argues that LeMieux was ineffective because he lacked the resources to handle a capital case. However, LeMieux had a library of materials at home and went to a local law library for anything else that he needed. (RT 3664-3667, 3669.) Although LeMieux did not have a secretary, a paralegal, or any kind of support staff, there is nothing to indicate that these are prerequisites to effective representation. Moreover, LeMieux had a "hands-on approach" and preferred to do the work himself because it gave him a "much better feeling for the case." (RT 3667-3668, 3810-3812.) Thus, appellant has failed to demonstrate that LeMieux was ineffective.

Appellant further argues that LeMieux was ineffective for failing to seek adequate compensation from appellant. (AOB 348-349.) However, the record does not support this contention. LeMieux testified that it was his "customary practice" to refrain from quoting a fee until he understood the complexity of the case. (RT 3723-3724.) Thus, LeMieux did not calculate a fee until after he considered the case and discussed the matter with appellant. (RT 3723-3724.) Although LeMieux may have later asked appellant's family for additional funds (RT 3724, 3763-3764, 3802-3803), there is nothing to indicate that this constituted deficient performance.

Appellant has also failed to demonstrate how any of LeMieux's alleged deficiencies resulted in any prejudice to him. Appellant's argument that LeMieux's inadequate fee contributed to his deficient performance is based on nothing more than speculation. Moreover, there is nothing in the record to indicate that LeMieux's lack of an extensive library at home, failure to join professional organizations, or any other alleged insufficiency in LeMieux's background adversely affected appellant's case in any way. Therefore, his claim must be rejected. (See *People v. Maury* (2003) 30 Cal.4th 342, 389; *People v. Catlin* (2001) 26 Cal.4th 81, 166.)

2. Trial Counsel Did Not Render Ineffective Assistance When He Misstated His Experience In Capital Cases

Appellant contends that LeMieux was ineffective for misrepresenting his capital experience. (AOB 338-340.) However, appellant has failed to demonstrate that his attorney was ineffective in this regard.

a. Relevant Facts And Proceedings

While discussing whether appellant would move to represent himself, LeMieux stated, "It has been my experience in death penalty cases - - and I've done a number of them in the last 22 years - - after the verdict is in, sometimes people do change their minds." (RT 3131.)

During LeMieux's closing argument, the prosecutor objected to LeMieux's statement that appellant would die in prison. (RT 3441.) During a sidebar discussion, LeMieux stated, "And the previous arguments I have made in death penalty cases where my client has been convicted I've incorporated this part of the argument that I'm now going into without objection, and in the copies of arguments that other experienced attorneys have used and have been published, that is a pretty traditional beginning." The court agreed. (RT 3443.)

Later, when LeMieux attempted to compare appellant's crimes to that of the Nightstalker, the prosecutor objected. (RT 3451.) LeMieux explained that he was merely arguing that if appellant's crimes did not compare to other acts of brutality, the jury should vote for life in prison. LeMieux stated, "That is an argument that I've made before and I've heard other attorneys make before. You read it in the publications on how to present final arguments." (RT 3457.)

During a hearing on a motion for new trial, LeMieux testified that at the time he made the statements regarding his experience in capital cases, he knew

the instant case was his first death penalty case. (RT 3865-66.) LeMieux also stated that in noncapital cases he had handled, he had compared the defendant's crimes to other acts of brutality. (RT 3866.)

b. Counsel Was Not Ineffective

The American Bar Association Model Rules of Professional Conduct and the California State Bar Rules of Professional Conduct prohibit an attorney from intentionally making a false statement to a court. (*People v. Gray* (1998) 66 Cal.App.4th 973, 991.) In this case, LeMieux did not intentionally make a false statement when he told the court that, in previous cases, he had compared a defendant's crimes to other acts of brutality. (RT 3457.) LeMieux never told the court that he had previously made such comparisons in death penalty cases and his remarks cannot be interpreted as such. As LeMieux later explained, he had been merely referring to his noncapital cases when he made his remarks. (RT 3457, 3866.) Thus, appellant has failed to demonstrate that his attorney acted in a deficient manner.

To the extent that any of the other statements were false, appellant has not shown that they necessarily constituted constitutionally deficient performance. Thus, his claim should be rejected. (See *People v. Gray, supra*, 66 Cal.App.4th at p. 991.)

Appellant also cannot prevail because he has not demonstrated that he was prejudiced in any way by the remarks. For example, the comment regarding whether appellant would represent himself merely indicated that defendants often vacillated on the self-representation issue. (RT 3131.) There is nothing to indicate that the statement affected the outcome of the trial or appellant's self-representation motion in any way. Likewise, there is nothing to indicate that the outcome of appellant's trial was affected by LeMieux's statement that he had argued in other capital cases that the defendant would die

in prison. In fact, the trial court agreed that LeMieux's argument was proper. (RT 3443.) Finally, the record does not show that the outcome of the penalty phase was in any way affected by counsel's statement that he had previously contrasted a defendant's crimes from other brutal acts. Therefore, appellant's claim should be rejected. (See *People v. Wright, supra*, 52 Cal.3d at p. 412.)

3. Trial Counsel Hired A Qualified Attorney To Conduct Jury Selection

Appellant argues that LeMieux was ineffective for hiring an unqualified attorney, Douglas McCann, to conduct jury selection. (AOB 340-348.) Appellant has failed to show that his attorney was ineffective. LeMieux hired McCann because he had previously worked with McCann, regarded him "highly," and thought that McCann would do a "very good job" during jury selection because McCann had a "brilliant young mind," was a "fast thinker," and had an "agreeable personality." (RT 3726.) Although McCann had never handled a death penalty case before, he had previously worked for the Los Angeles County Public Defender's Office and had handled a number of felony cases as a solo practitioner specializing in criminal law. At least two of these cases were murder cases, and one case involved a conspiracy to commit murder. (CT 562-563.) Prior to appellant's case, McCann also conducted research on capital case work and talked to an attorney who had handled several death penalty cases. (CT 563.) LeMieux also gave McCann materials on voir dire, discussed voir dire with McCann, and "went over the typical type of questions" that are asked during voir dire in a capital case. (RT 3726.) Thus, McCann had sufficient knowledge and skills to conduct the jury selection in this case. Therefore, LeMieux was not ineffective in hiring McCann.[29/] (See *People v.*

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29. Appellant notes that McCann was subsequently disbarred. (AOB 342.) However, there is no support for this in the record. Moreover,

Montiel (1993) 5 Cal.4th 877, 911.)

Appellant attempts to avoid this conclusion by arguing that McCann showed his "ignorance" during jury selection. (AOB 342-345.) However, the record shows that McCann intelligently participated in the jury selection process. He questioned over 100 prospective jurors over the course of 14 days. (CT 234-235, 240-247, 258-259, 265, 267.) He opposed several challenges made by the prosecutor based on the juror's views on capital punishment, he challenged at least five jurors for cause, and he made three *Wheeler* motions. (RT 438, 655, 746, 803, 951, 957, 1000-1008, 1070, 1074, 1210, 1226, 1233.)

Although appellant cites to several incidents that allegedly show McCann's ignorance (AOB 343-344), these instances do not support his argument. For example, the question regarding why there could be a need for more than 206 potential jurors did not reveal any ignorance since the trial court admitted that it was "really hard to tell" how many potential jurors would be excused during *Hovey* voir dire. (RT 137.) Furthermore, McCann appeared to know that he would have 20 peremptory challenges and merely wanted "to think about" whether voir dire should stop after 100 jurors had been selected. (RT 220-221.) Finally, McCann's confusion over the "6-pack" or "twelve-pack" method did not show any confusion regarding the capital jury selection process, but merely indicated confusion with the prosecutor's complicated explanation of how jury selection should proceed. (RT 1093-1094.) Thus, appellant has not demonstrated that McCann acted in anything other than a competent manner. (See *People v. Bemore* (2000) 22 Cal.4th 809, 835; *People v. Freeman* (1994) 8 Cal.4th 450, 485.)

Appellant disagrees by further arguing that the "voir dire undertaken by

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disciplinary action against an attorney, standing alone, does not establish that an attorney was ineffective. (See *People v. Frye* (1998) 18 Cal.4th 894, 996; *People v. Sanchez* (1995) 12 Cal.4th 1, 44; *In re Johnson* (1992) 1 Cal.4th 689, 700.)

McCann was . . . wholly deficient" because he confused the jurors. (AOB 343.) However, this is not the case. At least one juror stated that he "pretty much followed" what McCann had said, and in at least one cited instance, any confusion may have stemmed from the trial court's statements. (RT 276, 342.) Moreover, any confusion was not caused by McCann but, as indicated by several juror responses, was instead caused by the complicated rules pertaining to the weighing of the aggravating and mitigating circumstances. (RT 535, 563.) As the prosecutor noted, the jurors' confusion was "understandable considering this is the first time for them to be in this type of situation." (RT 959.) Thus, McCann did not conduct voir dire in an incompetent manner.

Appellant also faults McCann for failing to question the potential jurors about the aggravating evidence that would be used in the penalty phase.[30/] (AOB 344-346.) However, the record shows that McCann did not want to refer to any aggravating evidence because of the possible effect it could have on the jurors during the guilt phase of the trial. (RT 464-471, 514-517.) Moreover, in light of McCann's vigorous participation in jury selection, his decision to forego questions in certain areas should be deemed tactically sound. (See *People v. Bemore, supra*, 22 Cal.4th at p. 835; *People v. Lewis* (1990) 50 Cal.3d 262, 290.)

Finally, appellant's claim must fail because he has not demonstrated that he was prejudiced by McCann's allegedly incompetent representation during jury selection. Nothing in the record indicates that the jury was biased or that it is reasonably probable that a different jury would have been more favorably

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30. Appellant cites to this Court's decision in *People v. Cash* (2002) 28 Cal.4th 703, to buttress his argument. (AOB 344-346.) However, *Cash* is inapposite. In *Cash*, the trial court erred by not allowing the parties to question the potential jurors about mitigating or aggravating evidence. (*People v. Cash, supra*, 28 Cal.4th at pp. 719, 721-722.) *Cash* in no way indicates that an attorney is ineffective if he chooses not to ask potential jurors any questions regarding the aggravating evidence that could be used during a penalty phase.

disposed to appellant. (*People v. Freeman, supra*, 8 Cal.4th at p. 487; see *People v. Mendoza* (2000) 24 Cal.4th 130, 164-165.) Therefore, appellant's claim that LeMieux was ineffective for hiring McCann must be rejected.

B. Counsel Was Physically And Mentally Able To Represent Appellant

Appellant contends that his attorney was physically and mentally unable to effectively represent him because he was suffering from a medical condition, had family problems, and was under investigation by the state Bar. (AOB 350-358.) This argument must be rejected because the record shows that at the time of trial, counsel was physically and mentally capable of representing appellant in an effective manner.

1. Relevant Facts And Proceedings

In a declaration filed with appellant's motion for new trial and during a hearing on that motion, LeMieux stated that in 1989 or 1990, he was notified that he was being investigated by the California State Bar. (RT 3680.) The investigation centered on whether LeMieux had failed to pay various medical liens resulting from the settlement of personal injury actions. (CT 566.) LeMieux had hired an attorney to represent him during the bar investigation and had to assist the attorney during appellant's trial. (RT 3681-3682.) The investigation was a stressful situation to LeMieux and may have "negatively affected" his representation of appellant.[31] (RT 3682-3683; CT 566-567.)

At the time of appellant's trial, LeMieux was practicing out of his house because he wanted to "gradually leave the practice of law." He felt "burned out

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31. The Bar eventually concluded that an agent of LeMieux had "stolen the money." (RT 3681; CT 566.) The Bar also found that LeMieux had negligently entrusted the funds to the agent rather than placing the money into a client trust account. (RT 3680-3681; CT 566.)

psychologically and emotionally" and did not find his job rewarding. (RT 3664-3665, 3667, 3671.) LeMieux stopped advertising for his services, stopped doing civil work, and began to reject cases. (RT 3673.)

During appellant's trial, LeMieux was under "considerable stress" because he had not taken a vacation since August 1980 and had sole physical and legal custody of his two children. (CT 565.) LeMieux lived with his children in Glendale while his second wife lived with their two sons and her father. (CT 566.)

In September 1991, LeMieux leased a home in Malibu for his two children from his first marriage and his second wife and their children. LeMieux continued to live in Glendale. A "constant state of friction" soon developed between the children from LeMieux's first marriage and LeMieux's new family. LeMieux frequently had to drive from Glendale to Malibu to "mediate squabbles" between family members and would not return home until 2:00 or 3:00 a.m. The "exhaustive schedule and conflict" meant that LeMieux was sometimes "ill-prepared in court, tired, and not sensitive to issues that were developing during the course of trial," including the introduction of gang evidence and evidence of appellant's tattoos. (RT 3691-3693, 3747-3748; CT 569.)

At other times, LeMieux only got four or five hours of sleep because he would wake up at 3:00 or 4:00 a.m. and would be unable to fall asleep again. (RT 3688, 3690, 3816.) LeMieux would use the time to prepare for that day's court proceedings. (RT 3693.)

LeMieux did not take notes while in court because he had a tremor in his arms that rendered him unable to write. LeMieux would rely on his memory of the day's testimony and would type a summary of the testimony in the evening. (RT 3688-3689, 3804, 3859.) It had always been LeMieux's practice to type out notes regarding that day's testimony, and this practice had "never failed"

him. (RT 3804-3805, 3815-3816.) In addition, LeMieux knew that he would receive daily transcripts of the court proceedings. (RT 3805.)

During trial, LeMieux had an inability to concentrate for more than five to seven minutes and would periodically experience a "muddled feeling" where his mind would go "blank." (RT 3689, 3698.) He also suffered from "panic attacks" that would occur at least once a week during the trial. (RT 3698.)

After appellant's trial, LeMieux handled some cases in which there were acquittals or in which the cases were dismissed pursuant to Penal Code section 1385. (RT 3808-3809, 3814-3815.) At that time, LeMieux was still suffering from the same physical symptoms that he had during appellant's trial. (RT 3809.)

On July 13, 1992, nine months *after* the jury returned the death verdict in the instant case, LeMieux suffered a breakdown and "passed out" while handling a case in federal court. (RT 3683-3684; CT 411, 566.) LeMieux saw a doctor, who diagnosed the problem as "anxiety depression" or "post trauma stress syndrome." (RT 3684; CT 566.) LeMieux believed that he had been experiencing "anxiety depression disorder, post-traumatic stress disorder, burn-out, or other form of illness for at least a year" and that the illness affected his ability to adequately represent appellant. (RT 3814; CT 566.) LeMieux did not believe that he had acted competently during appellant's trial due to the "cumulative effects of all the stresses." (RT 3699, 3805-3806, 3831-3835.) For example, because of his mental and physical state during trial, he did not object to the gang evidence during the guilt phase of the trial. (RT 3805-3806, 3831.) He also failed to object to Monique Williams' testimony regarding the tattoos on appellant's body. (RT 3831-3832.)

2. Lemieux's Physical And Mental State Did Not Render Him Unable To Represent Appellant

Appellant first contends that his counsel was ineffective because he had "serious mental and physical problems." (AOB 351-355.) However, LeMieux's actual performance in court belies this contention. LeMieux cross-examined witnesses, presented evidence, and appeared to be familiar with the facts of the case. In light of his performance, his testimony that he believed he was ineffective does not establish that his performance actually fell below prevailing professional norms. Significantly, the trial court believed LeMieux "did quite a competent job" and had been unaware that LeMieux "was going through all of these problems." (RT 3146-3147, 4177.) Moreover, LeMieux's breakdown did not occur until July 13, 1992, approximately nine months after appellant had been convicted and the jury had recommended death. (RT 3683-3684; CT 411, 566.) Although LeMieux may have been suffering from some physical symptoms prior to July 13, these ailments did not render LeMieux unable to competently handle a case as shown by the fact that, after appellant's trial but prior to July 13, LeMieux handled some cases which resulted in acquittals or dismissals. (RT 3808-3809, 3814-3815.) Thus, LeMieux's physical and mental state during appellant's case did not adversely affect his performance to such an extent that appellant was denied the effective assistance of counsel. (Cf. *People v. Garrison* (1989) 47 Cal.3d 746, 786-787 [although it was uncontested that defense counsel was an alcoholic during trial, ineffective assistance of counsel was not shown because counsel acted competently during trial]; cf. also *Veal v. State* (Ga. Ct. App. 2000) 531 S.E.2d 422, 427 [counsel was not ineffective although his health may have rendered him unable to hear or remember certain testimony]; *Brimmer v. Tennessee* (Tenn. Crim. App. 1998) 29 S.W.3d 497, 509-510 [counsel's alcohol and drug abuse problems did not necessarily render him ineffective].)

Appellant attempts to avoid this conclusion by noting several occasions which allegedly demonstrate that LeMieux was unable to adequately represent him. These examples, however, do not demonstrate that LeMieux was ineffective. For example, LeMieux's inability to take notes during trial did not adversely affect his performance because he followed his usual practice of typing notes at the end of the evening, a practice that had never failed him. (RT 3688-3689, 3804-3805, 3815-3816, 3859.) Contemporaneous note-taking was also unnecessary because LeMieux would receive daily transcripts. (RT 3805.) LeMieux's inability to get more than four or five hours of sleep a night did not render him ineffective because he used the time that he was awake to prepare for that day's court proceedings.[32/] (RT 3688, 3690, 3693, 3816.) Although LeMieux testified that he would periodically experience a "muddled feeling," there is no indication that this caused his performance to fall below an objective standard of reasonableness. Appellant's actions in regards to the motion for new trial also fail to establish incompetence since, as the trial court noted, LeMieux's points and authorities "were done well." (RT 3560-3561, 4169.) Thus, appellant's examples fail to show that LeMieux was ineffective.

Appellant's remaining examples are contradicted by the record. For example, appellant contends that the guilt phase proceedings were never held on a Friday due to LeMieux's health problems. (AOB 351-352) Although LeMieux asked that court not be in session on one particular Friday due to "medical reasons" (RT 1260), there is nothing to indicate that he requested the other Fridays off due to health problems. Moreover, it does not appear that every Friday session was cancelled because of LeMieux's health. For example, the court told the jury that it was canceling one Friday session because it had to

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32. To the extent that LeMieux was tired during the trial, he was not the only attorney who was fatigued. At one point, the prosecutor told the court that he was "exhausted" and had been "since this thing started." (RT 2442-2443.)

handle another courtroom. (RT 2393.)

Appellant's contention that LeMieux periodically requested breaks or that court end early are also belied by the record. For example, LeMieux asked for a ten-minute break during his opening statement because he had made a mistake when looking at the clock. (RT 1309.) When he realized his error, he continued his opening statement for another 20 minutes. (RT 1318.) LeMieux's request that closing arguments be done on a Monday was not based on any health problems, but was merely made because he would not have more than three or four hours in the evening to prepare a closing argument for the next day. (RT 2893.) Although LeMieux asked the court to "call[] it quits" at 3:15 or 3:20 on September 21, 1991 (RT 2168), he decided to begin his cross-examination of Sazo. (RT 2170-2171.) Approximately an hour later, LeMieux asked if the proceedings could be halted for the day because the next segment of his cross-examination would be "lengthier" and he did not "want to break it up." (RT 2197.) Thus, appellant's cited examples fail to demonstrate that LeMieux's health rendered him unable to competently represent appellant.

Appellant has also failed to show that LeMieux's family problems rendered him incompetent. Despite sometimes needing to mediate family disputes, LeMieux still had time to prepare for each day's proceedings. (RT 3693.) Although LeMieux contended that his family problems caused him to fail to object to evidence regarding gangs and appellant's tattoos (CT 569), the record shows that he did object to testimony regarding appellant's gang membership. However, the trial court overruled the objection and also allowed testimony regarding appellant's tattoos. This testimony was not necessarily harmful to appellant since Williams then testified that appellant was not a gang member. (RT 2001-2006.) During the penalty phase, LeMieux also vigorously argued that the court should bar Magnuson's testimony regarding appellant's gang affiliation. (RT 3212-3233.) The court decided to allow Magnuson's

testimony with certain restrictions. (RT 3232-3233.) As noted previously, LeMieux's performance in court led the trial court to believe that LeMieux "did quite a competent job" and left it unaware that LeMieux "was going through all of these problems." (RT 4177.) Thus, appellant's family situation did not cause him to act in an ineffective manner.

Appellant has also failed to show that the state bar investigation against LeMieux resulted in ineffective performance during appellant's trial. Although LeMieux had to spend some time assisting the attorney who was representing him in that matter (RT 3681-3682), appellant has not pointed to any specific instances in which the state bar investigation resulted in deficient performance in the instant case. (See *People v. Frye, supra*, 18 Cal.4th at p. 996; *People v. Sanchez, supra*, 12 Cal.4th at p. 43.) Thus, appellant has not established that his attorney acted in an incompetent manner.

Because appellant has failed to show that his attorney's mental and physical ailments, family problems, and state Bar investigation negatively affected his performance, he has also failed to demonstrate that his case was prejudiced in any way. Therefore, his claim must be rejected.

C. Trial Counsel Adequately Prepared For Trial

Appellant contends that his attorney did not adequately prepare for trial. (AOB 358-427.) As will be shown below, these arguments must be rejected.

1. Counsel Adequately Reviewed Documentary Evidence

Appellant contends his attorney was ineffective because he did not adequately review the case file he obtained from appellant's prior attorney, he did not obtain the charging documents of appellant's coperpetrators, he did not review the murder books, and he did not obtain documentary evidence which would show that appellant received victim compensation funds after being shot.

(AOB 362-368.) These arguments are without merit.

a. Relevant Facts And Proceedings

On September 11, 1991, prior to trial, LeMieux did not attend a court proceeding that was scheduled for filing motions in limine because he had no motions to file. (RT 1095.) The prosecutor noted that he had made the murder books available that day so that LeMieux would have an opportunity to review them and ensure "he had all items." The prosecutor noted that this was the second time that he had made the murder books available and that LeMieux had also failed to appear when the prosecutor first made the books available. (RT 1096.) The prosecutor also stated that he had previously photocopied a "great number" of documents for LeMieux, such as transcripts of pleas by appellant's coperpetrators, probation reports, and "numerous other items." (RT 1097.)

At trial, during cross-examination of Linton, LeMieux asked if Linton was aware that the death penalty had been possible if the jury had convicted him of first-degree murder and found the special-circumstance allegations to be true. The prosecutor objected. (RT 1706.) During a sidebar conference, LeMieux explained that he had asked the prosecutor on "several occasions" for copies of the information in Linton's case. (RT 1707-1708.) LeMieux had been repeatedly told by the prosecutor that it was not necessary to obtain the documents because "we all know what these people are charged with." LeMieux assumed that everyone was charged with special circumstances because appellant was charged with special circumstances. (RT 1707-1709.)

In a declaration and during the hearing on a motion for new trial, LeMieux stated that he retrieved the case records from appellant's prior attorney, Clay Jacke, approximately 30 days after substituting in as appellant's attorney. (RT 3700, 3723.) LeMieux had not previously worked on a case that had "so much material to deal with." He received two boxes of materials from

Jacke and "it was a maze." It took LeMieux "hours" to place documents in chronological order because Jacke's files were "a mess" and were just "loosely dumped in a box." (RT 3812, 3821-3822.) The records were not "organized in any fashion whatsoever," "[n]othing was indexed, nothing was cataloged." (RT 3821.) From February 1991 through July 1991, he reviewed the materials in the file, summarized those materials, "reviewed all of the police reports in the matter," and began trial preparation. (RT 3701-3702; CT 567.) LeMieux eventually spent over 200 hours preparing for the case and organized the trial materials into 12 notebooks to assist him . (RT 3812, 3789-3790.)

LeMieux had obtained Jacke's copy of the murder book as early as February 1991. (RT 3696.) At some point just prior to trial, LeMieux reviewed the police department's murder books in the case. Although LeMieux missed a court appearance when the murder books were produced, he subsequently compared the materials he had with the police department's murder book and discovered that he had been given all of the documents. (RT 3695, 3711-3712.)

LeMieux obtained the tapes of statements made by appellant's coperpetrators and paid for transcriptions of those tapes. He also obtained transcripts related to the cases of appellant's coperpetrators, including transcripts of their preliminary hearings, guilty pleas, and sentencing hearings. (RT 3730, 3819-3820.)

Appellant did not inform LeMieux about Tony Moreno, a possible defense witness, until after LeMieux received an FBI report regarding Moreno during voir dire in mid-August. (RT 3735-3736, 3739; CT 567.) Appellant had not previously mentioned that he had a relationship with Moreno. (RT 3801.) LeMieux attempted "both personally and through an investigator" to subpoena Moreno, but was unable to do so. (RT 3749; CT 570.)

b. Counsel Was Not Ineffective

Before an attorney acts or refuses to act, he must make a rational and informed decision based on adequate investigation and preparation. (*In re Lucas* (2004) 33 Cal.4th 682, 721-722.) Thus, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary. (*Id.* at p. 722.)

In the case at bar, counsel adequately reviewed the documents related to the investigation of the murders of Barron and Thomas. For example, LeMieux spent over 200 hours preparing for the case. (RT 3812.) Although he did not retrieve the file from Clay Jacke until approximately 30 days after substituting in as appellant's attorney, he spent approximately five months organizing Jacke's file, reviewing the materials in the file, summarizing those materials, and reading all of the police reports. (RT 3700-3702, 3723, 3812, 3821-3822; CT 567.) Moreover, there is nothing to indicate that the 30 days LeMieux took to retrieve the file in any way hampered his preparations for trial. Thus, appellant has failed to demonstrate that LeMieux acted in a deficient manner in regards to the retrieval and review of Jacke's case file.

The same could be said in regards to LeMieux's actions involving the murder book. LeMieux obtained Jacke's copy of the police murder book as early as February 1991, well in advance of trial. (RT 3696.) Although he missed a court appearance when the police department's copy of the murder book was produced, he subsequently reviewed the police murder book and discovered that he had indeed received all of the necessary materials. (RT 3695.) As a result, his review of the police murder book just prior to trial was not ineffective because he had previously seen and read the documents contained in the murder book received from Jacke. (RT 3711-3712.)

Appellant has also failed to demonstrate that counsel was ineffective in regards to obtaining the charging documents of Linton, Lee, and Cyprian.

Appellant does not specify how these documents would have assisted appellant during trial or why these documents were needed. Moreover, LeMieux had asked the prosecutor on "several occasions" for copies of the charging documents for the three men and concluded that everyone had been charged with special circumstances based on the prosecutor's statements. (RT 1707-1709.) LeMieux's actions in regards to appellant's accomplices cannot be deemed incompetent, especially in light of his diligent efforts to obtain the tape-recorded statements made by the accomplices and the reporter's transcripts from the accomplices' cases. (RT 3730, 3819-3820.)

Appellant has also failed to demonstrate that LeMieux acted incompetently in regards to investigating Moreno. Appellant specifically contends that Moreno assisted appellant in obtaining victim compensation funds after appellant was shot and that LeMieux should have obtained documents related to these funds. (AOB 367-368.) However, the record does not indicate why LeMieux failed to do so or that any such records actually existed. (RT 3922-3933.) Therefore, this portion of the claim must be rejected. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1053; *People v. Maury* (2003) 30 Cal.4th 342, 389; see *People v. Holt* (1997) 15 Cal.4th 619, 704.) Moreover, it is possible that LeMieux did not obtain the records because he reasonably decided to spend his time attempting to contact Moreno and preparing for trial in other ways. Thus, counsel was not ineffective in regards to Moreno.[33/]

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33. Appellant also contends that trial counsel was ineffective for failing to provide the prosecutor with certain information, such as a witness list, witness statements, and reports by any defense investigators. (AOB 368.) However, counsel acted adequately. Although LeMieux initially failed to give the prosecutor a written witness list, he agreed to do so and had previously informed the prosecutor that he would call appellant, Moreno, and Williams. (RT 1901.) LeMieux did not have any witness statements to give the prosecutor and had not received any reports by investigators. LeMieux assured the

Appellant's claim must also be rejected because he has failed to specify how his case was harmed by counsel's alleged failure to timely review Jacke's case file, review the police department's copy of the murder book, obtain the charging documents for appellant's accomplices, or obtain documents related to any compensation that appellant received. Because he has failed to demonstrate the requisite prejudice and because no prejudice is evident from the record, his claim must be rejected. (*People v. Majors* (1998) 18 Cal.4th 385, 430; see *People v. Maury, supra*, 30 Cal.4th at p. 389.)

2. Counsel Adequately Investigated The Physical Evidence

Appellant contends that his attorney failed to adequately investigate any of the physical evidence, such as the fingerprint evidence, the pager and cellular telephone found at the crime scene, the weapons, plastic bags, shoelaces, and the plastic bucket. (AOB 368-379.) This argument must be rejected because the record does not support his claim.

a. Relevant Facts And Proceedings

In a declaration and during testimony on the motion for new trial, LeMieux stated that he hired Jackie Glover as an investigator and asked Glover to get documentary evidence regarding beepers from Delcomber Communications. (RT 3704-3705.) Although the owner of Delcomber told Glover that he needed a subpoena duces tecum for the documentary evidence, LeMieux never prepared one. (RT 3706.) As a result, LeMieux never received

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prosecutor that he had not been withholding any information. He later reiterated to the prosecutor, "There isn't anything to give you." (RT 1900-1902.) Thus, counsel was not ineffective. Moreover, appellant does not establish that his case was prejudiced in any way, nor could he, from counsel's alleged failure to divulge the aforementioned information to *the prosecutor*.

any documentary evidence from Delcomber. (RT 3705.) LeMieux had no specific reason why he failed to subpoena the records and believed "in hindsight" that his failure to do so was "incompetent." (RT 3707, 3722-3728.)

LeMieux also stated that after reading the fingerprint analysis reports related to the case, he did not believe that the fingerprint evidence would be an issue at trial. (RT 3714, 3716, 3822-3823.) Appellant told LeMieux he had been at the apartment on various occasions and that his fingerprints "should have been all over the place." Appellant also told LeMieux that he had used the telephone in the apartment and that he had been in Linton's Blazer. LeMieux hoped to establish during trial that appellant had been in the house on prior occasions. (RT 3715.)

LeMieux did not request to have the Sprint dusted for fingerprints because doing so would have been a "gamble." (RT 3717.) The fact that no prints had been found in the car "was more valuable" to appellant than what might have been revealed if additional fingerprint analysis was conducted. (RT 3823.) For example, if Cyprian's prints were found in the car it would have corroborated Cyprian's testimony. (RT 3717-3718.)

Despite LeMieux's conclusion that the fingerprint evidence was not at issue in the case, he also believed that a fingerprint expert could have helped him to evaluate the fingerprint evidence, could have recommended additional fingerprint evidence that should be obtained, or might have assisted in preparing arguments regarding the fingerprint evidence. (CT 568-569.)

b. Counsel Was Not Ineffective

In the case at bar, LeMieux's conduct in regard to the physical evidence cannot be deemed ineffective. For example, Lemieux reasonably decided to forego additional analysis of the fingerprints found at the crime scene because appellant had told LeMieux he had been in Linton's Blazer and at the apartment

on various occasions. Based on appellant's statements, LeMieux reasonably concluded that the best option was for him to establish that appellant had been at the apartment and in the Blazer on prior occasions and thereby provide an innocent explanation as to why appellant's fingerprints were found at the crime scene. (RT 3715.) LeMieux also decided to forego fingerprint analysis on other items of evidence because he believed the lack of fingerprint evidence or analysis could be used to appellant's advantage and because he feared that such an analysis would merely uncover fingerprints that would link appellant to the crimes or confirm the testimony of the accomplices. (RT 3717-3718, 3823.) In fact, counsel attempted to use this lack of fingerprint evidence to his advantage during closing argument. (RT 3018, 3064, 3075-3076.) In light of these logical and tactical reasons, LeMieux acted competently. (*People v. Coffman* (2004) 34 Cal.4th 1, 87 [great deference should be given to counsel's tactical decisions]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1259-1260 [courts should not second-guess reasonable tactical decisions made by counsel].)

Appellant attempts to avoid this conclusion by noting that Lemieux admitted during the hearing on the motion for new trial that, in hindsight, a fingerprint expert could have helped in his trial preparation. (AOB 373; CT 568-569.) However, the fact that LeMieux could have taken other investigative steps does not mean that he should have taken them or that he was ineffective for not taking them. (See *In re Cudjo* (1999) 20 Cal.4th 673, 692-693.) A "fair assessment" of counsel's performance requires that counsel's conduct be evaluated from counsel's perspective at the time of trial and not through the "distorting effects of hindsight." (*In re Jones* (1996) 13 Cal.4th 552, 561.) Counsel's actions are only deemed ineffective if they fall below an objective professional standard. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260; *In re Lucas, supra*, 33 Cal.4th at p. 721.) Despite Lemieux's post-trial

assertions to the contrary, his actions during trial did not fall below an objective standard of reasonableness because he had a tactical reason to forego fingerprint analysis and reasonably believed that a fingerprint expert was not necessary. As such, LeMieux did not act in a deficient manner.

LeMieux also acted competently in regards to the other items of evidence, such as the pager, cellular telephone, weapons, plastic bags, shoelaces, and the plastic bucket. Significantly, the record does not establish that LeMieux failed to conduct any investigation into the cellular telephone, the weapons, plastic bags, shoelaces, and plastic bucket. To the extent that LeMieux failed to investigate these items, the record does not establish why no investigation was conducted, which means the claim must be rejected on direct appeal. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1053; *People v. Maury, supra*, 30 Cal.4th at p. 389; see *People v. Holt, supra*, 15 Cal.4th at p. 704.) Moreover, there is nothing to indicate that a subpoena or any further investigation into the pager, the telephone, or the other items of evidence would have resulted in information helpful to appellant. Thus, the record does not support LeMieux's opinion that, in hindsight, he was "incompetent" in failing to take additional investigative steps. (RT 3707, 3722-3728.)

Appellant's contentions must additionally be rejected because he has failed to demonstrate that his attorney's alleged shortcomings in regards to the physical evidence prejudiced him in any way. As noted previously, there is nothing to indicate that further investigation of any of the aforementioned items would have uncovered evidence that was helpful to appellant. Thus, appellant has failed to establish that his attorney was ineffective. (*In re Marquez* (1992) 1 Cal.4th 584, 602.)

3. Counsel Was Not Ineffective For Failing To Formally Interview Appellant's Prior Defense Team

Appellant argues that LeMieux was ineffective for failing to interview appellant's previous counsel or the investigator. (AOB 380-384.) This argument must be rejected because appellant has not established that his attorney acted deficiently or that his case was adversely affected by counsel's allegedly deficient behavior.

a. Relevant Facts And Proceedings

On September 16, 1991, the day of opening statements, LeMieux told the court that appellant's prior attorney, Clay Jacke, had obtained the appointment of Jackie Glover as an investigator in the case. (RT 1264-1265.) LeMieux noted that Glover had been authorized to expend and had expended $1,295. LeMieux stated that he intended to ask the court to reappoint Glover or to appoint another investigator to work on appellant's case. The prosecutor stated that he had not received any discovery from Glover. LeMieux replied that he had received "absolutely nothing" from Glover and that Jacke's file did not contain any reports from Glover. LeMieux also stated that he had spoken to Glover "two weeks ago" when he "inadvertently" ran into Glover at the county jail, but he did not know what Glover had accomplished in appellant's case. (RT 1265-1266, 1404.)

The next day, LeMieux announced that he had just spoken to Glover again and that Glover now recalled that he had written a short report. LeMieux told Glover to give him the report so that he could give it to the prosecutor. (RT 1404.)

On October 1, 1991, the prosecutor again stated that he had not received any reports by Glover. LeMieux replied that he also had received no written reports from Glover. (RT 2577-2578.) LeMieux said that he had given Glover

certain assignments, but that Glover had been unable to successfully complete them. LeMieux also stated that he still had not received the report that Glover had written for Jacke, despite two requests to do so. (RT 2578.)

After appellant was convicted, Jacke signed a declaration that was included with appellant's motion for new trial. In the declaration, Jacke stated that he represented appellant during the preliminary hearing and was appointed to represent him in the superior court. (CT 559, 582.) On February 22, 1991, LeMieux was substituted in as appellant's counsel. (CT 560.) LeMieux never called Jacke to formally discuss the case; however, Jacke did "run into" LeMieux on two occasions. The first time, Jacke discussed the case with LeMieux for 20 minutes, although they did not discuss the case "in any depth." (CT 560.) On the second occasion, the two men did not "discuss the underlying facts or LeMieux's knowledge of or strategy of the case." (CT 560-561.)

LeMieux also signed a declaration and testified at the hearing for the motion for new trial. In the declaration and during the hearing, LeMieux stated although he did not have any lengthy conversations with Jacke regarding the case, he did ask Jacke questions whenever he happened to see Jacke. (RT 3703.) These conversations occurred "after the trial was in progress." (RT 3739.)

LeMieux also stated that he eventually hired Glover as an investigator. He instructed Glover to locate and interview witnesses, to serve subpoenas on various witnesses, and to get documentary evidence regarding pagers from Delcomber Communications. (RT 3704-3705, 3750.)

b. Counsel Was Not Ineffective

Appellant contends that LeMieux was ineffective because he failed to interview Jacke or Glover. (AOB 380-384.) This argument lacks merit.

Appellant's claim must first be rejected because he has failed to establish

that his attorney acted in a deficient manner. Although LeMieux did not have a formal discussion with Jacke prior to trial, LeMieux spent several months reviewing Jacke's trial file, which would have informed LeMieux regarding the physical evidence in the case, the prosecution's key witnesses, the prosecution's theory of the case, and Jacke's theory of defense. (RT 3739; CT 567.) LeMieux's pretrial discussions with appellant would also have given him insight into the case. (RT 3702-3703.) Moreover, LeMieux did have at least two conversations with Jacke after the trial had started. Although these were not formal discussions, one conversation lasted approximately 20 minutes. (RT 3703, 3739; CT 560-561.) LeMieux also had conversations with Glover regarding Glover's investigative work on the case.[34/] (RT 1265-1266, 1404.) Thus, counsel did not act incompetently in regards to Jacke or Glover.

Appellant has also failed to demonstrate that he was prejudiced in any way from LeMieux's allegedly deficient performance. Therefore, his claim must be denied. (*People v. Maury, supra*, 30 Cal.4th at p. 389; *People v. Majors, supra*, 18 Cal.4th at p. 430.)

4. Failing To Seek A Court-appointed Investigator

Appellant contends that LeMieux was ineffective for failing to hire a court-appointed investigator. (AOB 384-388.) This argument is without merit.

a. Relevant Facts And Proceedings

On September 16, 1991, the day of opening statements, LeMieux told the court that he intended to ask the court to reappoint Glover or to appoint

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34. Appellant contends that LeMieux may have had Glover's report prior to trial. (AOB 384.) However, during the hearing on the motion for new trial, LeMieux did not state when he received the report from Glover. (RT 3703.)

another investigator to work on appellant's case. (RT 1265-1266, 1404.) On October 1, 1991, LeMieux told the court that he was paying Glover "privately." (RT 2578-2579.)

In a declaration and during testimony at the hearing on the motion for new trial, LeMieux stated that he did not formally request an investigator in appellant's case because he had a "hands-on approach" and opted to do investigations himself. (RT 3810.) Thus, he visited the murder scene on three occasions. (RT 3810-3812.) He believed that such visits were "absolutely vital" to "get a feel" for the case. He also believed in taking his own photographs, drawing his own diagrams, and interviewing witnesses himself because it gave him a "much better feeling for a case" and helped him to cope with "credibility questions." (RT 3811-3812.) Nonetheless, LeMieux eventually hired Glover to locate and interview Yvette Pearson, to serve a subpoena on Tony Moreno, and to obtain documentary evidence regarding pagers from Delcomber Communications. (RT 3704-3705, 3750.) Glover did not serve Moreno, and Lemieux never received any documentary evidence from Delcomber. (RT 3705; CT 570.)

b. Counsel Was Not Ineffective

Appellant contends that his attorney was ineffective because he failed to request a court-appointed investigator. (AOB 384-388.) This argument must be rejected. LeMieux "privately" retained Glover to serve as an investigator and gave Glover several investigative tasks. (RT 2578-2579, 3704-3705, 3750.) Thus, LeMieux did have the services of an investigator to assist him in the case and to supplement the "hands-on approach" that LeMieux utilized. (RT 3810-3812.) Although appellant insists that counsel should have requested a court-appointed investigator, he does not specify why a publicly paid investigator would have performed an investigation differently than

Glover. There is also nothing to indicate that the "scope of the investigation that LeMieux assigned Glover" was in any way affected by the private retention of Glover. (AOB 386.) As a result, appellant has not shown that his attorney was incompetent or that his case was prejudiced by the allegedly deficient performance of his attorney. (Cf. *In re Cudjo* (1999) 20 Cal.4th 673, 692 [petitioner did not demonstrate that counsel was ineffective in regards to the investigation that was actually conducted].)

Appellant attempts to avoid this conclusion by noting that there were instances during opening statement where LeMieux indicated that he did not know certain information. (AOB 387-388.) However, there is nothing to indicate that LeMieux's failure to obtain a court-appointed investigator led to his alleged shortcomings about certain information or that the information was somehow vital to the case. Indeed, LeMieux's opening statement appeared to indicate that he realized the information was not important. (RT 1307-1308, 1313-1314.) Thus, appellant's claim must be rejected.

5. Failing To Interview Eyewitnesses

Appellant contends that his attorney was ineffective because he failed to interview eyewitnesses. (AOB 389-401.) This argument must be rejected because the record does not support his contention.

a. Relevant Facts And Proceedings

During the hearing on the motion for new trial, LeMieux testified that he did not interview Sazo because he did not want to "forewarn" her of the possible questions he would ask and thereby allow her to craft answers to them. LeMieux believed that it was often advantageous to not interview a witness and then "catch that witness by surprise on the witness stand." (RT 3730.) LeMieux also believed that Sazo was "the most important witness that the

People had" and that it would be "a strategic and tactical mistake" to discredit her on the witness stand. He instead decided to argue that Sazo had not lied but that she was mistaken in her identification of appellant. (RT 3731-3732.)

LeMieux also testified that appellant may have asked him to interview his co-defendants. (RT 3733.) However, LeMieux decided not to do so because he had the transcripts and the tapes of statements they had given to the police and believed he could use the coperpetrators "as defense witnessses." He also did not want to alert the accomplices to the "monumental contradiction" between Linton's statement that appellant was on his knees when the gun discharged and Lee's statement that appellant was standing. (RT 3734.) To prepare for his examination of the coperpetrators, LeMieux had prepared "extensive cross indexing" of the inconsistent statements between Linton, Lee, and Cyprian. (RT 3820.)

b. Counsel Was Not Ineffective

Appellant contends that counsel was ineffective because he failed to interview certain eyewitnesses, such as Marcella Pierre, Jose Pequeno, Irma Sazo, and appellant's coperpetrators. (AOB 389-401.) However, LeMieux stated during trial that he had discovered that Pierre, who had been subpoenaed as a defense witness, had a possible prior conviction during an interview with her. (RT 1267, 1465-1466.) Thus, the record directly contradicts appellant's claim in regards to Pierre.[35/]

The record also fails to establish that LeMieux failed to interview Pequeno. Although appellant's attorney indicated during oral argument on the

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35. Appellant argues that "timely trial preparation" would have revealed Pierre's prior conviction before she testified. (AOB 401.) However, even the prosecutor was unaware of this prior conviction and said he would research the matter and would allow LeMieux to ask Pierre about the conviction if LeMieux recalled Pierre as a witness. (RT 1466.)

motion for new trial that LeMieux failed to interview this eyewitness (RT 4160), LeMieux never testified that he did not interview Pequeno. Moreover, even if LeMieux failed to interview Pequeno, appellant cannot prevail because the record does not reveal why LeMieux failed to do so. (*People v. Maury, supra*, 30 Cal.4th at p. 389; *People v. Hernandez, supra*, 33 Cal.4th at p. 1053; *People v. Holt, supra*, 15 Cal.4th at p. 704.)

Appellant's claim must additionally be rejected because LeMieux had tactical reasons for not interviewing the other witnesss, such as Sazo and appellant's coperpetrators. LeMieux reasonably decided not to interview these witnesses because he did not want to "forewarn" them of his possible questions or the contradictions in their anticipated testimony. (RT 3730, 3734, 3863.) This strategy was successful because LeMieux managed to elicit evidence that contradicted Sazo's identification testimony; provided an innocent explanation for why appellant's fingerprints were found in Linton's Blazer and the apartment; demonstrated that the other coperpetrators might have had pagers; and showed that the coperpetrators had previously lied to the police, had the opportunity to discuss the case with each other, and arguably received a benefit for testifying against appellant. (RT 1655-1656, 1658, 1666-1667, 1691-1693, 1817-1818, 1822, 1825-1826, 1886-1887, 1889-1891, 2212-2213, 2225-2226, 2732, 2753.) Thus, LeMieux did not act in a deficient manner.

LeMieux's decision was also competent because he was aware of what the witnesses would likely say on the stand due to their previous statements to the police.[36/] (RT 1685, 3730, 3819-3820, 3862-3863.) For example, LeMieux

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36. Although LeMieux stated during the hearing on the motion for new trial that he had "no idea" what Sazo's testimony would be (RT 3730), he was obviously aware of what she was likely to say on the witness stand since he realized that she was one of the prosecution's most important witnesses, had decided that he would try to show that her identification of appellant was a mistake, and said during trial what he expected Sazo to say on the witness stand. (RT 1685, 3731.) Moreover, contrary to appellant's assertion (AOB

anticipated that Lee would testify appellant was standing when he shot Barron; this contradicted Linton's testimony that appellant was kneeling when the gun discharged. (RT 3862-3863.) Although appellant argues that LeMieux stated prior to closing argument that he did not know what the witnesses would say until they testified (AOB 390), that is not the case. LeMieux had asked the court if he could have several days to prepare his closing argument. When the court asserted that LeMieux could have prepared his argument during the course of the trial, LeMieux responded that he knew what evidence the prosecutor had but that "it wasn't until after each person testified" and he saw what evidence was produced by the prosecutor "and what was omitted from this case" that he "gained a sufficient knowledge of the case to be able to construct an argument based on the evidence presented." (RT 2894-2895.) Thus, the record shows that LeMieux reasonably used the witnesses' prior statements to inform him of their possible testimony, and his reliance on those statements cannot be deemed incompetent. (See *People v. McDermott* (2002) 28 Cal.4th 946, 992.)

Appellant attempts to avoid this conclusion by arguing that "there was no strategic downside" to interviewing Sazo and the coperpetrators and learning what they would testify to on the witness stand. (AOB 392-393.) Although appellant disagrees with LeMieux's strategy, he has not overcome the "strong presumption" that LeMieux's conduct "falls within the wide range of

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391), LeMieux was not "profoundly disturb[ed]" that he did not know what Sazo's testimony would be, but was instead concerned that Sazo had not been cross-examined during either of Linton's trials. (RT 3730.)

Appellant also argues that LeMieux only obtained a transcription of Cyprian's statement to the police after Cyprian had taken the witness stand. (AOB 396.) However, the transcript was not crucial to LeMieux's preparation for trial. LeMieux already had a videotape of the statement and merely hired a court reporter to transcribe the tape. (RT 1831-1832.)

professional assistance." (*Strickland v. Washington, supra*, 466 U.S. at p. 689.)

Finally, appellant has failed to establish that counsel's alleged deficiencies prejudiced his case. Appellant does not adequately show that the lack of witness interviews left LeMieux unaware of the eyewitnesses' proposed testimony. (See *People v. Lloyd* (1992) 4 Cal.App.4th 724, 736.) Although appellant argues that he would have learned how Pierre's testimony would differ from her statements to the police (AOB 400), there is nothing to indicate that an interview with her would have uncovered these differences. Appellant has also failed to demonstrate that the witnesses were willing to give interviews to LeMieux. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1093.) Thus, appellant's claim must be rejected.

6. Failing To Interview Or Subpoena Certain Witnesses

Appellant contends that his attorney was ineffective because he failed to interview or subpoena alleged alibi witnesses. (AOB 401-415.) However, the record does not establish that counsel acted in a deficient manner or that the result of appellant's trial was prejudiced by counsel's alleged incompetence.

a. Relevant Facts And Proceedings

(1) Proceedings During Trial

Prior to opening statements on September 16, 1991, LeMieux told the court that two weeks previously, he had received a five-page report that had been faxed to the prosecutor. The report concerned an interview that an FBI agent had with appellant "pertaining to the prosecution of certain Sheriff's deputies and L.A.P.D. officers in all these narcotics skimming cases and arrests that have been going on." (RT 1267-1268, 1271.) Appellant had been an informant for several Sheriff's deputies who were on trial and had also worked

with an officer named Tony Moreno. (RT 1268.) LeMieux stated that prior to his receipt of the FBI report, appellant had been "covering up and protecting Tony Moreno." After the report was disclosed, LeMieux talked to appellant, who "confessed" that he had been an informant for the police. (RT 1270.) LeMieux stated that he was "just floored" by the FBI document because he had been preparing the case based on the "issue of proof" and had not previously realized that appellant "might have been framed or set up." LeMieux said that it appeared that a frame-up could "be a very strong possibility," but he was not certain that the evidence would support this argument. (RT 1270-1271.)

LeMieux stated that he intended to ask the court to order the prosecution, the police department, or "whoever" to provide him with the whereabouts and telephone number of Moreno so that he could subpoena or interview Moreno. Both the prosecutor and LeMieux only knew that Moreno was on "stress leave." LeMieux stated that Moreno was "an absolutely essential material witness for the defense. If he were not material on the issue of guilt or innocence, he is certainly absolutely essential on the issue of penalty." (RT 1267, 1271.) LeMieux added that Moreno's name would "pop up all over this case." LeMieux hoped to submit "a lot of circumstantial evidence indicating that this [case] was a frame-up" by Moreno. (RT 1268.) He added that the evidence would suggest that Moreno "had an active part in this case" and "was very possibly present during the murders" and framed appellant for the crimes. (RT 1268-1269.) LeMieux admitted that he did not have "direct evidence" to support his contentions, but added that he hoped that Moreno would "be very valuable in persuading the jury that [appellant] was not the shooter in this case." (RT 1269.)

LeMieux informed the court that he was "helpless" because he did not know how to contact Moreno even after calling the police department's personnel number on three occasions. He had also called the Southeast

Division and the South Bureau and could not obtain any information on Moreno's whereabouts. (RT 1269, 1271.) LeMieux stated that an FBI agent was going to attempt to "produce" Moreno, as well as Moreno's personnel file. A United States Attorney was also supposed to meet with LeMieux to discuss Moreno. (RT 1269.)

The prosecutor said that he would call the police department's personnel division to find the station where Moreno could be subpoenaed. (RT 1271-1272.) The court told LeMieux that he should subpoena Moreno, and LeMieux responded, "I want to." (RT 1272.)

On September 26, 1991, LeMieux advised the court that there could be "a major problem with respect to Tony Moreno" that would require an Evidence Code section 402 hearing. (RT 2444.) LeMieux added that "it appears that we know where he is, that the police are shielding him and they're lying to us about the existence of court orders protecting Tony Moreno from coming into court and testifying, and I need to follow that up a little bit more before I can make representations to this court." (RT 2445.) In the end, the defense did not call Moreno as a witness.

On January 31, 1992, after appellant had been convicted, LeMieux advised the court that he was not prepared to proceed with a motion for new trial. (RT 3507.) LeMieux said that he had been "on the trail" of Moreno and his medical and personnel records since December 20, 1991, and had just learned that Moreno had "surfaced out of the blue" and had testified in federal court. During that proceeding, Moreno testified that he was "back on active duty" and had not been on stress leave, which contradicted the information that LeMieux had previously been given. (RT 3514.)

On February 28, 1992, in discussing a motion for new trial, LeMieux told the court that prior to making his opening statement he had not subpoenaed, interviewed, or contacted Moreno. He added that "all efforts" to

locate Moreno had been unsuccessful. (RT 3531.) LeMieux said that it was "reckless" and "careless" of him to mention Moreno during his opening statement but that he had done so because he had been told that Moreno could be subpoenaed through the division where he worked. Detective Herrera had told LeMieux that Moreno was assigned to the Metro station, but when LeMieux attempted to serve Moreno, "he wasn't there." (RT 3542.)

LeMieux added that Moreno had been "unavailable as a witness under Evidence Code [s]ection 240." LeMieux said that he should have refrained from mentioning Moreno during opening statement or should have requested a continuance to obtain Moreno's presence. LeMieux reiterated that the "frame-up defense did not arise until the middle of voir dire," when the prosecutor received a faxed copy of an FBI report. This report was given to cocounsel McCann, who gave the document to LeMieux. Up to that point, LeMieux had prepared the case "on the issue of proof." (RT 3537.) LeMieux's receipt of the report was the "first time" that he had heard of Moreno and discovered that appellant was an informant. LeMieux reiterated that appellant "never said one breath" about his informant status while LeMieux was preparing for trial and only admitted to being an informant after LeMieux received the FBI report. Appellant had not mentioned Moreno or his informant status previously because he was protecting Moreno "out of a sense of loyalty" and because he hoped Moreno would help him avoid prosecution in this case. (RT 3538.)

(2) LeMieux's Declaration And Testimony During The Motion For New Trial

LeMieux signed a declaration to support the motion for new trial and testified during the hearing on the motion. In both the declaration and during the hearing, LeMieux reiterated that appellant had not mentioned Moreno until

after LeMieux had received the FBI report during voir dire. (RT 3735-3736, 3739; CT 567.) Appellant had not previously mentioned that he had a relationship with Moreno. (RT 3801.) LeMieux and appellant then discussed appellant's role as a police informant and his relationship with Moreno. However, appellant never stated that Moreno was involved in the murders because appellant had always maintained that he was not in the upstairs apartment when the murders occurred. (RT 3740-3743, 3825.)

At some point, appellant told LeMieux that he had accompanied Moreno and another officer on a raid of an apartment where weapons were confiscated. (RT 3797-3798.) Moreno gave appellant three guns from the raid. Appellant subsequently loaned the weapons to either Linton or Cyprian; these weapons were later found at the apartment where Barron and Thomas were murdered. (RT 3798.)

LeMieux did not make any effort to subpoena or interview Moreno until September 16. (RT 3747, 3749, 3751-3752, 3754.) At some point, Detective Herrera was asked to investigate the location of Moreno, and he told LeMieux that Moreno worked at the Metro Division. (RT 3750.) LeMieux attempted "both personally and through an investigator" to subpoena Moreno at the Metro Division and the Northeast Division, but his efforts were "fruitless." (RT 3749, 3754-3755; CT 570.) LeMieux also unsuccessfully attempted to call the officer who told Glover, the investigator hired by LeMieux, that Moreno was under the protection of a court order. (RT 3755.) LeMieux also contacted the Legal Affairs Division of the LAPD and Internal Affairs. (RT 3755-3756.) He was told by Internal Affairs that if Moreno was on stress leave, he could not be contacted. (RT 3756.) LeMieux had not previously been told that Moreno was on a stress-related leave. (RT 3756.)

After LeMieux was unable to serve Moreno with a subpoena, he "dropped the subject" and made no additional efforts to locate Moreno. (CT

570.) At the time, LeMieux did not consider asking for a continuance because he believed that the "best way to proceed" was to present a "reasonable doubt defense." (RT 3757.) However, he subsequently believed that he should have asked for a continuance to conduct an investigation on Moreno, as well as to obtain additional discovery from the prosecutor regarding Moreno and the daily activity logs of Moreno. (RT 3752; CT 570.) LeMieux further believed that the failure to request such a continuance was "extremely prejudicial" to appellant, "was without a sound tactical basis," and was his "first major act of incompetence." (RT 3752; CT 570-571.) He had no explanations for his failure to request a continuance and characterized it as "just a plain blunder." (RT 3752.)

LeMieux decided to include Moreno in his opening statement even though he had not interviewed Moreno, served him with a subpoena, or investigated the underlying facts of the case. (RT 3742, 3744; CT 570.) Although LeMieux based his opening statement on the faxed FBI document and his discussions with appellant, LeMieux believed it was "ill-advised," "reckless," "careless," "incompetent," and "prejudicial" to have made "such fabulous statements before the jury" when he did not know whether they were true or false, had conducted no investigation, and had not "taken steps to determine the accuracy and credibility of the information." (RT 3742-3745; CT 570.)

After the jury recommended death, appellant told LeMieux for the first time that he and Moreno were involved in the drug deal with Barron and Thomas. (RT 3743, 3792, 3824-3825.) Appellant stated that he and Moreno stole six kilos of narcotics from the victims' car. After appellant and Moreno divided the drugs between them, appellant went home. (RT 3791, 3825-3826.)

LeMieux also testified that appellant had asked him to interview certain potential alibi witnesses. These witnesses could not be located, and appellant

could not provide LeMieux with their whereabouts. (RT 3727.)

Appellant also told LeMieux to interview Carlos or Collis Brazil. However, LeMieux did not locate Brazil because appellant's statements regarding where he had been and who he had been with on the night of the murders "varied from time to time." (RT 3727-3729, 3824.) In addition, an investigation by Glover indicated that appellant's whereabouts could not be verified by Brazil. (RT 3729.) If appellant's statements did not appear to be credible, LeMieux discounted them. (RT 3727-3729, 3824.) He based this course of action on his belief that an alibi defense had to be "carved in stone . . . before it can fly" because if the jury disbelieves an alibi witness, it has a tendency to "rehabilitate the prosecution's case." (RT 3824.)

Appellant additionally asked LeMieux to obtain a statement from a hair stylist confirming that appellant had his hair in a Jheri-curl several days before Christmas. LeMieux did not do so because Monique Williams gave LeMieux a photograph showing appellant's hairstyle, and this was better evidence than any statement by a hairdresser. (RT 3732-3733.)

(3) Appellant's Declaration And Testimony During The Motion For New Trial

Appellant signed a declaration that was attached to his motion for new trial and testified during the hearing on the motion. In both the declaration and at the hearing, appellant stated that he had worked as an informant for the Los Angeles Police Department and Los Angeles County Sheriff's Department and had made "tens of thousands of dollars." Moreno was one of the officers that appellant had worked with while he was an informant. (CT 579.) Appellant first worked with Moreno in July 1986 on a drug raid and received $2,000. (RT 4013-4015.) Appellant eventually earned approximately $200,000 in 1986 and 1987 from his work as an informant and would see Moreno almost every day.

(RT 4016, 4018.)

At some point in 1987, appellant began working with Moreno on various drug crimes and crimes involving illegal weapons. (RT 4017-4018.) At some point, appellant was prosecuted for possessing a knife. Moreno said he would have the knife charge dropped if appellant helped him obtain an AK-47. Appellant gave Moreno some information regarding some firearms. (RT 4003-4004.) The operation yielded an AK-47, carbine rifle, .44 magnum, a .380 handgun, and a .38 revolver. (RT 4004-4005.) The knife charges were eventually dropped after Moreno talked to the prosecutor. (RT 4004.) Appellant also received the carbine, .380, and the .38 handgun. Appellant eventually gave the weapons to Linton. (RT 4003, 4005, 4059, 4066-4067; CT 579-580.)

At the end of 1989 and early 1990, appellant arranged a drug deal between Cyprian, Linton or JoJo Dalton, and Barron and Thomas. Appellant was merely a "go-between." The transaction was supposed to happen prior to Christmas at the Mi Cabana Bar. Appellant contacted Moreno and told him when the deal would occur. Appellant agreed to "rip-off the dope and divide it between" himself and Moreno. (CT 580.) Appellant went to the bar with Linton and a person named Keno. However, the transaction did not occur at that time. (RT 4000, 4044-4050, 4061-4063; CT 580.)

On January 2, 1990, appellant saw Moreno for 15 to 20 minutes. (RT 4001, 4056.) Linton then came by appellant's house. While he was there, Thomas paged Linton. Appellant returned the telephone call because Monique Williams was inside the house and was not dressed. (RT 4056-4057.) At the time, Thomas said he could not talk. Five minutes later, Thomas paged Linton again. Appellant returned the telephone call and talked with Thomas for two minutes. (RT 4057-4058.) During the conversation, Thomas said he would arrive at approximately 7:00 p.m. for the drug transaction. Appellant then

called Moreno and told him when the transaction would occur. (RT 4058.) He met Moreno again at approximately 6:30 or 7:30 p.m. (RT 4001, 4056.)

At some point, Moreno and appellant saw Barron and Thomas drive up to the apartment. When Barron and Thomas disappeared inside the apartment, Moreno broke into their car and stole the narcotics. Moreno was not present at the murder scene when the murder occurred. Appellant stayed home the rest of the evening with Collis Brazil, Dana Stokes, a woman named Carmen, and a man named Ronald. Appellant had not stayed home with Williams that day and had not killed Barron or Thomas. Linton later told appellant that the narcotics transaction "had gone wrong." (RT 4002-4006, 4053, 4055; CT 581-582.)

The next day, appellant talked to Linton and Cyprian. Neither of them said that Barron and Thomas had been killed. When appellant eventually learned that Barron and Thomas had been killed, appellant panicked because Moreno did not return his calls. (RT 4007.) Appellant went to Las Vegas for a week, returned home, and sold the narcotics he had obtained from Barron's and Thomas' car. He used the money to get an apartment and a car. (RT 4008.)

On February 8, Detective Herrera told appellant's mother that there was an arrest warrant for appellant. (RT 4008.) Appellant called Moreno, who advised him not to turn himself in until Moreno went on duty. (RT 4009.) Appellant then called Herrera to surrender. (RT 4010.) Appellant refused to give a statement to the police because Moreno told him not to say anything and because Moreno said that he could get appellant released. Later, Moreno said that appellant should only give a videotaped statement and that he should not mention anything about Moreno "ripping off" the narcotics. (RT 4010-4011, 4068; CT 581.)

Appellant was subsequently taken to the 108th Street police station.

While there, Moreno visited appellant and took a statement from him. Moreno subsequently had appellant moved to Parker Center. (RT 4011-4012.) Appellant saw Moreno every day for four or five days. Moreno took two written statements from appellant. Moreno told appellant to keep quiet and Moreno would get him released. (RT 4013.)

Appellant hired Clay Jacke as his attorney and told him about Moreno. (RT 4019-4020.) Appellant eventually replaced Jacke with LeMieux . Appellant told LeMieux about his relationship with Moreno, and LeMieux agreed to investigate Moreno. (RT 4021; CT 583.) Appellant also told LeMieux that Moreno needed to be subpoenaed and that the records from the Victim of Crime Fund would prove that appellant knew Moreno. (RT 4022-4023.)

In the latter part of June, appellant asked LeMieux if he had subpoenaed any potential witnesses, DMV records, appellant's medical records, or the records from the Victim of Crime Fund. LeMieux said that he was handling a rape trial and that he had not subpoenaed the witnesses or the records. (RT 4023-4024.)

(4) Anthony Moreno's Testimony

During the hearing on the motion for new trial, Los Angeles Police Detective Anthony Moreno testified that he had been assigned to "monitor organized crime" within Los Angeles. (RT 3868-3869.) His speciality was "black organized crimes," including gangs. (RT 3886.)

Moreno knew appellant since 1987, but did not form an informant relationship with him until 1988. (RT 3919.) On one or two occasions, Moreno retrieved appellant and took him to perform certain activities. (RT 3920.) However, Moreno did not recall appellant receiving any money for a raid in Inglewood in 1986 or for any other activities with the Los Angeles

Police Department, Los Angeles County Sheriff's Department, or other law enforcement agencies. (RT 3922-3933.)

Moreno had a pager and told appellant to call him on his pager. Depending on what was happening, appellant would sometimes call Moreno's pager every day. (RT 3921.) Moreno would sometimes return the telephone calls. (RT 3921.)

On January 2, 1990, Moreno was on duty wearing street clothes and riding in an unmarked police vehicle. (RT 3891.) Although he had no independent recollection of where he was that day, his log indicated that he went to a Protective League meeting and then spent approximately five and a half hours doing administrative duties. (RT 3892-3893, 3912-3913, 3930-3932.) The log also indicated that he was at headquarters until 11:20 p.m. and then went to a numbered location, where he met with an informant before getting off duty at 1:00 a.m. (RT 3916-3918.)

Moreno did not recall being with appellant on January 2, 1990. (RT 3938.) Moreno had no personal knowledge regarding what happened to Barron and Thomas on January 2. He had not been present at the apartment; had never met Linton, Lee, Barron, or Thomas; was not involved in setting up any kind of narcotics transaction with appellant; did not agree to steal any drugs and divide them between himself and appellant; and he did not break into a Sprint, steal three kilos of cocaine, and then divide the cocaine with appellant. (RT 3938, 3958-3961.) Moreno had no knowledge of the events leading to the deaths of Barron and Thomas and had no knowledge of appellant's involvement or lack of involvement in their deaths. (RT 3963-3964; CT 423.)

On February 7 or 8, 1990, appellant paged Moreno and said that a homicide detective was looking for him. Moreno called the detective and discovered that the detective wanted to talk to appellant. Moreno told appellant to select a location where he wanted to surrender. (RT 3942-3943, 3961-3963.)

Moreno never called appellant to tell appellant that the police were looking for appellant. (RT 3961.)

On February 8, 1990, Moreno went to South Bureau Homicide Division because appellant wanted to speak to him. (RT 3941.) Moreno was at the South Bureau station for approximately three and a half hours. He may have been requested to stay there by one of the investigators, who thought that Moreno might be able to lend assistance if appellant named people who were known by Moreno. (RT 3946-3947.) At some point, Moreno talked to appellant for 10 to 15 minutes and may have conversed with him again a second time. (RT 3945.) He never told appellant that he should make a videotaped statement, but not an audiotaped or written statement. (RT 3944, 3959.)

Moreno did not recall going to visit appellant at the 108th Street Station and taking a written statement from him, although he may have visited appellant at that station. (RT 3947.) Moreno did not transport appellant to Parker Center to be housed there. (RT 3948.) He did not take a written statement from appellant at Parker Center. (RT 3948.)

(5) Douglas McCann's Declaration And Testimony

McCann signed a declaration that was filed with appellant's motion for new trial. In the declaration, McCann stated that he and LeMieux agreed that Moreno was a "critical defense witness." McCann asked LeMieux when he was planning to subpoena Moreno and advised LeMieux not to announce that he was ready for trial until Moreno had been subpoenaed. LeMieux seemed "distracted and defensive" and told McCann not to worry. (CT 563.)

During the hearing on the motion, McCann testified that he was not absolutely certain whether he discussed Moreno with LeMieux before or after the FBI document was received by the defense. Although McCann believed

that he discussed Moreno with LeMieux prior to LeMieux announcing ready for trial, he could have been mistaken. (RT 3846, 3851-3853.) McCann did recall that he was "somewhat persistent" in attempting to ensure that LeMieux would subpoena Moreno, who was a "critical witness" in the case. (RT 3850, 3857.) During jury selection, there was a "concern" that Moreno had not been subpoenaed. (RT 3855.)

b. Counsel Was Not Ineffective

In the case at bar, appellant has failed to demonstrate that LeMieux was ineffective in regards to the alleged alibi witnesses. For example, LeMieux reasonably attempted to locate Moreno shortly after he received the FBI report and appellant admitted that he was an informant for Moreno. Because appellant had not previously informed LeMieux about his informant activities or Moreno, LeMieux was not ineffective for previously failing to investigate or locate Moreno. (RT 1270, 3537-3538, 3735-3736, 3739, 3801; CT 567.) Although appellant contends that LeMieux could have discovered that Moreno was a possible witness prior to receiving the FBI report (AOB 406-407), LeMieux could have reasonably concluded that Moreno did not need to be investigated at that point because appellant had not mentioned his relationship with Moreno or in any way indicated that Moreno should be investigated. (RT 3538, 3801.)

Once appellant had revealed that Moreno could be a valuable witness, LeMieux diligently attempted to locate and subpoena Moreno.[37/] For example, LeMieux called the police department's personnel unit three times in an effort

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37. Appellant also argues in passing that LeMieux was ineffective for including Moreno in his opening statement and for failing to request a continuance to investigate Moreno. (AOB 406, 410-412, 414.) Appellant subsequently makes these arguments in more detail in other subsections of his brief. In order to avoid repetitive arguments, respondent will respond to those contentions at the point when those more detailed arguments are made.

to locate Moreno, and also contacted the Southeast Division and the South Bureau. (RT 1269, 1271.) After being informed that Moreno was assigned to the Metro station, LeMieux attempted to serve Moreno there, as well as at the Northeast Division, but was unsuccessful on both fronts. (RT 3542, 3749-3750, 3754-3755; CT 570.) Efforts to locate Moreno through the prosecutor, United States Attorney's Office, and the FBI also apparently failed. (RT 1269, 1271-1272.) Although LeMieux was apparently told that there were protective orders preventing Moreno from testifying in appellant's case and although LeMieux believed the police were "shielding" Moreno, he continued to attempt to locate Moreno by contacting the police department's Legal Affairs Division and Internal Affairs. (RT 2445, 3755-3756.) Thus, LeMieux's efforts to contact, subpoena, and investigate Moreno were not deficient. (Cf. *People v. Venegas* (1994) 25 Cal.App.4th 1731, 1741.)

LeMieux also acted competently in regards to other alleged alibi witnesses. For example, LeMieux did not investigate some of the alleged eyewitnesses because they could not be located, and appellant could not provide LeMieux with their possible whereabouts. (RT 3727.) LeMieux also doubted that these witnesses could credibly provide an alibi for appellant because his statements to LeMieux regarding the identities of his companions varied from time to time. (RT 3727-3729.) Because LeMieux logically believed that questionable alibi evidence would only assist the prosecution (RT 3824), he reasonably decided not to waste additional time investigating these witnesses. LeMieux also reasonably chose not to further investigate Brazil because an initial investigation revealed that Brazil could not verify appellant's whereabouts on the night of the murders. (RT 3729.) He also reasonably decided not to interview appellant's hairstylist because he had been given a picture of appellant that provided better proof of appellant's hairstyle on the night of the murders. (RT 3732-3733.) In light of the foregoing reasons,

LeMieux did not act incompetently in regards to these alleged alibi witnesses.

Appellant has also failed to demonstrate that counsel's alleged shortcomings adversely affected the outcome of the trial or the penalty phase. In regards to LeMieux's efforts to locate and subpoena Moreno, there is nothing to indicate that any additional, or earlier, efforts would have been successful. More importantly, Moreno's testimony at the hearing on the motion for new trial clearly established that he would *not* have been a helpful witness for appellant. Although Moreno testified that it was possible that he could have been with appellant at some point on January 2, 1990 (RT 3932), he did not recall being with appellant on that date, he had no personal knowledge regarding who murdered Barron or Thomas, and he had no knowledge regarding appellant's level of involvement in the murders of Barron or Thomas. (RT 3927, 3938, 3958-3961, 3963-3964; CT 423.) Any implication to the contrary would have been harmful to appellant because it would have contradicted Monique Williams' alibi testimony that appellant was with her on the night of the murders.

In regards to the other alleged alibi witnesses, there is nothing to show that they would have provided useful information to appellant. Instead, appellant's varying statements regarding the identifications of his companions, and the initial investigation indicating that Brazil could not verify appellant's whereabouts on the night of the murders, make it unlikely that the outcome of appellant's trial would have been different had LeMieux conducted further investigations related to these witnesses. Thus, appellant has failed to demonstrate that his attorney was ineffective. (See *People v. Dyer* (1988) 45 Cal.3d 26, 54; cf. *In re Roberts* (2003) 29 Cal.4th 726, 747.)

Appellant attempts to avoid this conclusion by arguing that his case was close, as indicated by the length of the jury deliberations. (AOB 486-487.) However, the jury deliberations lasted approximately a day and a half, which

was reasonable in light of the three weeks of testimony (CT 268-271, 290-293, 294-299, 390), the serious nature of the charges, and the complicated nature of the case. (*People v. Taylor* (1990) 52 Cal.3d 719, 732.) "Rather than proving the case was close, the length of the deliberations suggests the jury conscientiously performed its duty." (*People v. Carpenter* (1997) 15 Cal.4th 312, 422.) Thus, appellant's claim of ineffectiveness must be rejected.

7. Failing To File Futile Or Irrelevant Motions

Appellant contends that his attorney was ineffective for failing to file various motions. (AOB 416-425.) This argument must be rejected.

a. Relevant Facts And Proceedings

In a declaration and during the hearing for the motion for new trial, LeMieux stated that he decided not to file any motions in the case, such as a discovery motion or a motion for production of physical evidence, because he did not believe any motions had "merit." He also failed to file a discovery motion because he had not filed one during his "22 years of practice." (RT 3694, 3719; CT 568.) Instead, LeMieux received all of the materials he needed through the "cooperation and the friendly relationship" he maintained with prosecutors. The prosecutor in appellant's case was "very cooperative" and "worked very agreeably" with LeMieux and gave LeMieux "everything" that he requested. (RT 3695, 3720-3722, 3817-3818.) If Lemieux believed that a discovery motion was necessary, he would have filed one. (RT 3818.)

LeMieux had prepared a request for production of evidence but never filed it because the prosecutor gave him the items that would have been included in the request. (RT 3708-3709, 3711.) LeMieux usually prepared a draft of a request for production of evidence that could be completed and filed if the prosecutor did not disclose the items that he needed. (RT 3709-3710,

3818-3819.)

LeMieux also failed to file motions to request a second counsel or for experts because he believed he "needed no assistance in any of these matters" and could "accomplish [his] goals" through cross-examination. (CT 568.) In retrospect, however, LeMieux concluded that "the assistance of any and all of the experts" could have been of some assistance to him. Thus, second counsel could have helped him prepare and present the defense, while a fingerprint expert could have helped to evaluate the fingerprint evidence, recommend additional fingerprint evidence that should be obtained, or assist in preparing arguments regarding the fingerprint evidence. Similarly, a ballistics expert could have assisted him in evaluating the ballistics evidence, could have testified to various facts concerning the evidence, and could have helped to determine where Barron was sitting when he was shot. A psychological expert could have helped LeMieux to determine the effect of intoxicating substances on appellant's mental state. (CT 568-569.)

Because LeMieux had never handled a penalty phase in a capital case, he "naively believed" that he would be given 30 days to prepare for the penalty phase. As a result, LeMieux did not conduct any investigation for the penalty phase until appellant had been found guilty. Although LeMieux had done "some reading and inquiry and preparation" for the penalty phase prior to the end of the guilt phase, he still believed that he should have obtained a continuance to investigate the aggravating and mitigating evidence. (RT 3760; CT 571.)

b. Counsel Was Not Ineffective

Appellant's contentions regarding counsel's failure to file motions must be rejected because counsel had tactical reasons for not filing some of the motions. For example, LeMieux did not file a discovery motion or a request

for production of physical evidence because he had received "everything" he needed or requested through an informal process. (RT 3695, 3708-3709, 3711, 3720-3722, 3817-3818.) The use of such an arrangement did not amount to incompetence, especially since LeMieux was prepared to file discovery or production motions if he believed they were necessary (RT 3709-3710, 3818-3819). (See *People v. Jackson* (1980) 28 Cal.3d 264, 290; *People v. Harris* (1986) 175 Cal.App.3d 944, 959.)

Appellant's contentions must also be rejected because the record contradicts some of his claims. For example, the record establishes that counsel objected to the gang evidence and that he received adequate and timely notice of the aggravating evidence the prosecutor planned to use during the penalty phase. (RT 2001-2006, 3212-32333, 3768.) The record additionally shows that LeMieux knew about the possible benefits the coperpetrators received since he had obtained transcripts related to the coperpetrators' cases, including transcripts of their preliminary hearings, guilty pleas, and the sentencing hearings. His cross-examination of the coperpetrators also showed that he possessed information about the possible benefits they had received. (RT 1719-1720, 1889-1891, 2779-2781, 3730, 3819-3820.) Thus, appellant has failed to establish that his attorney acted deficiently in regards to these motions.

Appellant has also failed to demonstrate that LeMieux was incompetent due to his failure to file a motion regarding Moreno's unavailability or to request penalty phase experts. Because the record does not reveal why LeMieux failed to make these requests or motions, the claim must be rejected on appeal. (*People v. Maury, supra*, 30 Cal.4th at p. 389; *People v. Hernandez, supra*, 33 Cal.4th at p. 1053; *People v. Holt, supra*, 15 Cal.4th at p. 704.) In addition, it is possible that LeMieux failed to file the motions because he reasonably believed they would not be helpful or a productive use of his time. Thus, the record does not support appellant's claims in regards to Moreno or

possible penalty phase experts.

The record similarly fails to support appellant's contention that his attorney was ineffective for failing to request experts for the guilt phase, the appointment of second counsel, or continuances prior to the guilt and penalty phases. (AOB 417, 419-421, 425.) There is nothing to show that the trial court would have granted any such motions. (CT 584.) Thus, LeMieux cannot be deemed incompetent for failing to make them. (*People v. Smithey* (1999) 20 Cal.4th 936, 1012; *People v. Price* (1992) 1 Cal.4th 324, 387.) Moreover, any mid-trial continuance requests may have harmed appellant's case by alienating the judge or jury. (*People v. Johnson* (1994) 6 Cal.4th 1, 51.) Although LeMieux in hindsight believes he should have made all of the foregoing motions (RT 3538, 3752, 3760; CT 568-571), a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" and "to evaluate the conduct from counsel's perspective at the time." (*Strickland v. Washington*, 466 U.S. at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

Moreover, LeMieux's assessment that he was incompetent does not necessarily buttress appellant's claim because an attorney's actions are only deemed ineffective if they fall below an objective professional standard. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1260; *In re Lucas, supra*, 33 Cal.4th at p. 721.) In this case, LeMieux acted reasonably at the time, and his failure to file the aforementioned motions did not fall below an objective professional standard for the reasons already stated. Thus, counsel did not act in a deficient manner when he failed to file motions for a continuance, second counsel, or guilt phase experts.

Even if appellant had somehow shown that his attorney was incompetent for failing to file any of the aforementioned motions, his claim must still be rejected because he has not demonstrated that he was prejudiced by any of these

alleged failings. For example, the record does not disclose that the lack of any formal discovery or production motions, requests for experts or second counsel, requests for the aggravating evidence, or motions on Moreno's unavailability negatively affected appellant's case or that the outcome of the case would have been altered had such motions been made. (See *People v. Jackson, supra*, 28 Cal.3d at p. 291; *People v. Weaver, supra*, 26 Cal.4th at p. 978; *People v. Anderson, supra*, 25 Cal.4th at p. 598; *People v. Webster* (1991) 54 Cal.3d 411, 437.) It is also unlikely that the filing of a formal in limine motion would have had any effect on the admission of gang-related evidence since the trial court overruled LeMieux's objections to the gang evidence during trial. (RT 2001-2006, 3212-32333.) In addition, appellant has not shown that any mid-trial continuance motions would have been granted by the trial court or that any additional time would have resulted in locating Moreno or resulted in a different outcome during the penalty phase. (*People v. Seaton* (2001) 26 Cal.4th 598, 698; *People v. Smithey, supra*, 20 Cal.4th at p. 1012.) Thus, no prejudice has been demonstrated.

Appellant argues that he was prejudiced because LeMieux's failure to file motions left him ignorant about various items of information or lacking certain items, such as Pierre's criminal history or the transcripts of the coperpetrators' police interviews. He also contends that the lack of motions also meant that LeMieux had to request the presence of law enforcement officers at the "last minute." (AOB 418.) The record belies these claims. As noted previously, even the prosecutor was unaware of Pierre's prior conviction, which meant that a pretrial discovery motion would not have resulted in LeMieux obtaining the information prior to trial. (RT 1466.) Such a motion would also have failed to assist LeMieux in obtaining a transcript of the coperpetrators' statements to police prior to trial. As previously indicated, LeMieux merely received a transcript of the police interviews during trial

because the person he had hired to do the transcripts did not complete them until after the trial started. (RT 1831-1832.) Finally, LeMieux did not request the presence of law enforcement officers at the last minute; as he told the court, he had given the prosecutor a list of the requested officers "last week." (RT 2443.) Thus, appellant has failed to demonstrate that he was prejudiced by counsel's allegedly deficient behavior. As a result, his claim must be rejected.

D. Trial Counsel Was Not Ineffective In Regards To His Absence During Jury Selection

Appellant contends that LeMieux was ineffective because he was absent during jury selection. (AOB 425-427.) However, he has failed to show that his attorney acted in a deficient manner or that his case was prejudiced in any way.

In the case at bar, LeMieux reasonably decided to hire McCann to conduct jury selection so that LeMieux could have additional time to prepare for trial. (CT 567.) Although LeMieux did not attend jury selection, he talked to McCann about jury selection and was "kept abreast" of the jury selection proceedings. (CT 567-568; RT 3726, 3739.) Thus, LeMieux remained involved in the jury selection process. Appellant has not established why these conversations between McCann and LeMieux did not sufficiently inform LeMieux of jury selection and the prospective jurors. As a result, LeMieux did not act incompetently in deciding not to attend jury selection.

Appellant attempts to avoid this conclusion by arguing that McCann was not in a position to question the prospective jurors about their predispositions regarding aspects of the defense or the prosecution case. (AOB 427.) Appellant does not show how this alleged problem stems from LeMieux's absence during jury selection or why the conversations between LeMieux and McCann did not resolve this problem. Moreover, McCann was adequately informed about the case from LeMieux and from his conversations with

appellant. (RT 3846-3849.) Thus, appellant has not established that his attorney was incompetent.

More importantly, appellant has not proved that his case was in any way prejudiced by LeMieux's absence during voir dire. For example, he has not alleged or shown any specific instances during voir dire that required LeMieux's presence, nor has he shown how LeMieux's presence during voir dire would have altered the outcome of the trial. Although appellant contends that LeMieux had not established any rapport with the jury because he failed to attend jury selection (AOB 427), this is nothing more than speculation. (Cf. *People v. Mendoza* (2000) 24 Cal.4th 130, 164-165.) Moreover, he has done nothing to demonstrate that this supposed lack of rapport in any way affected the outcome of the case. Thus, appellant's claim must be rejected.

E. Trial Counsel Acted Competently During Trial

Appellant contends his attorney abdicated his duties during the trial. (AOB 427-442.) As will be shown, this argument must be rejected.

1. Counsel's Opening Statement Did Not Demonstrate Ineffectiveness

Appellant contends his attorney was ineffective for failing to introduce evidence or witnesses that he mentioned during opening statement. (AOB 428-439.) This argument must be rejected because it is not supported by the record.

a. Relevant Facts And Proceedings

During his opening statement, LeMieux first focused on the facts in the case that were not in dispute. (RT 1296-1314.) He then discussed the facts that were in dispute, delineated why appellant's accomplices were not credible, and noted how Sazo had been mistaken when she identified appellant. (RT

1315-1317, 1321, 1325-1329.) LeMieux emphasized that the "only" factual issue in the case was whether the evidence established beyond a reasonable doubt that appellant murdered the victims. (RT 1316-1319.) He further stated that he would not prove who shot Barron and Thomas but would only prove that appellant did not shoot the two men. (RT 1316.)

LeMieux also mentioned that appellant had been an informant for the police and that he had been working "very closely on a day-to-day basis" for Tony Moreno. (RT 1312, 1330.) He noted that "this is a classic case of a frame-up" and that "the reasons and motives for the frame-up will become clear as the trial progresses." (RT 1330.) He added that appellant's experience as an informant made him "a very, very experienced, sophisticated streetwise individual, intimately versed in the manner used by the police to bust narcotics dealers." Appellant was "too experienced" to "do a clumsy stupid thing" such as the murders in this case. (RT 1331.)

He also stated that appellant would tell the jury that he had loaned three firearms to Linton and Cyprian on January 1, 1990. (RT 1312-1313, 1329.) The evidence would also show that the murder weapon was not found at the crime scene because it had been removed by the actual perpetrators of the crime. (RT 1327, 1329.) He further asserted that the evidence would establish that the .38 revolver found at the crime scene was not the murder weapon and that it had not been fired. (RT 1329.)

According to LeMieux, the evidence would show that the beeper found at the crime scene belonged to Linton and the cellular telephone found at the scene belonged to Cyprian. (RT 1313, 1329.) LeMieux characterized an orange bucket found at the crime scene as being "a very important piece of evidence in this case" that would be "pivotal" in proving that appellant was not present at the house. (RT 1320.)

In discussing Sazo's upcoming testimony, LeMieux noted that her

statements regarding a BMW were not reliable because appellant had sold the BMW. To prove this, LeMieux said he would "produce for you the man, Kevin Chain, who owns that automobile now who lives in Ojai." (RT 1328.)

Finally, LeMieux told the jury that although the prosecutor had indicated the evidence would show that appellant sold his Mercedes, bought clothes, and then went to New York, the "whole scenario" was "all lies." Instead the evidence would show that appellant merely drove Cyprian to LAX. (RT 1326.)

In a declaration and during testimony for a motion for new trial, LeMieux discussed his opening statement. He said that he decided to include Moreno in the opening statement even though he had not interviewed Moreno, served him with a subpoena, or investigated the underlying facts of the case. (RT 3742, 3744; CT 570.) Although LeMieux based his opening statement on the faxed FBI document and his discussions with appellant, LeMieux believed it was "ill-advised," "reckless," "careless," "incompetent," and "prejudicial" to have made "such fabulous statements before the jury" when he did not know whether they were true or false, had conducted no investigation, and had not "taken steps to determine the accuracy and credibility of the information." (RT 3742-3745; CT 570.)

LeMieux also stated that he had originally planned to have appellant testify, but later advised him not to testify. (RT 3792; CT 572.) This decision was based, in part, on the prosecutor's failure to present evidence regarding the New York trip or appellant's videotaped statement to the police. (RT 3794-3795, 3836-3839.) LeMieux had also believed that appellant could turn out to be the "worse [sic] witness for the defense" because he would be up against a skilled prosecutor who would be "continually hammering at him." (RT 3837.) Appellant reluctantly followed Lemieux's advice not to testify. (RT 3796; see also RT 4044; CT 585.) In retrospect, LeMieux believed that his advice was "foolhardy" and contributed to the verdicts in the case. Because LeMieux had

been "irresponsible" in saying during opening statement that appellant would testify and explain the evidence, LeMieux believed that "much" of the prosecution's evidence was not contradicted. (CT 572.)

2. Counsel Was Not Ineffective

Appellant's contention must first be rejected because the record shows that evidence was submitted to support LeMieux's statements related to the pager, the murder weapon, the plastic bucket, appellant's purported trip to New York, and the sale of appellant's BMW. For example, as LeMieux later noted, handwriting analysis did not establish that appellant had signed the pager contract and did not eliminate the possibility that Linton had signed the contract. (RT 2330-2332, 2336-2337, 3073-75.) There was also evidence that could support LeMieux's statement that the .38 revolver was not the murder weapon because there were no fingerprints found on the gun, there were no casings or live rounds found in the gun, the ballistics evidence was inconclusive, blood had not initially been noted on the gun, and the first officers arriving at the scene had not checked the gun to see if it was warm or smelled as if it had been recently fired. (RT 2294-2295, 2478-2479, 2505-2508, 2510-2512, 2530-2531, 2672-2673, 3059-3065, 3067-3068.) The evidence similarly could be used to support LeMieux's statements regarding the plastic bucket because Sazo's testimony regarding Cyprian's use of the bucket could be interpreted to contradict the coperpetrators' testimony and thereby cast doubt on what happened that night, as well as indicate that more people might have been involved in the murders. (RT 2160-2161, 2195-2196, 3015-3017, 3026.) LeMieux also established, through the testimony of Monique Williams, that appellant did not go to New York and that he sold his BMW on December 21, 1989. (RT 1967, 2825-2827.) Although LeMieux did not call Kevin Chain to prove the sale of the BMW, he submitted a document from the Department of

Motor Vehicles confirming that the car had been sold on December 21, 1989. (RT 2826-2827.) While the aforementioned evidence was not always shown through defense witnesses, LeMieux said during opening statements that portions of the defense would be established through the cross-examination of the prosecution's witnesses. (RT 1317.) Thus, counsel did not act deficiently in regards to his opening statement related to the aforementioned evidence. (See *People v. Frye* (1998) 18 Cal.4th 894, 984; see also *Phoenix v. Matesanz* (1st Cir. 2000) 233 F.3d 77, 85; *United States v. McGill* (1st Cir. 1993) 11 F.3d 223, 227-228.)

Counsel also acted competently in regards to his statements that appellant would testify. (RT 1317.) When LeMieux made his statement, he intended to have appellant testify. (RT 1304-1305, 3792; CT 572.) In light of appellant's willingness to testify (RT 4028-4029, 4044; CT 585), LeMieux's opening statement "was an appropriate exercise of his decisionmaking responsibilities at trial." (*People v. Frye, supra*, 18 Cal.4th at p. 984.) LeMieux later decided that appellant should not testify because the prosecutor failed to present evidence regarding the New York trip and appellant's videotaped statement to the police and because he feared that appellant would not be able to withstand the potentially withering cross-examination by the prosecutor. (RT 3138, 3794-3795, 3836-3839.) In light of these reasons, counsel cannot be deemed incompetent for advising appellant against testifying even though he had told the jury in opening statement that appellant would testify. (*People v. Frye, supra*, 18 Cal.4th at pp. 983-984.) LeMieux's post-trial belief that he was ineffective should not alter this conclusion because he had adequate tactical reasons at the time that he advised appellant not to testify. (See *In re Andrews, supra*, 28 Cal.4th at p. 1253; *People v. Mendoza, supra*, 24 Cal.4th at p. 158.)

LeMieux's statements regarding Moreno and the transfer of the weapons

also fail to constitute deficient performance. As many courts have held, making a promise regarding defense evidence and then failing to deliver does not necessarily constitute ineffective assistance of counsel. (See, e.g., *Commonwealth v. McMahon* (Mass. 2005) 822 N.E.2d 699, 712; *People v. Burnett* (2003) 110 Cal.App.4th 868, 885; *Edwards v. United States* (D.C. 2001) 767 A.2d 241, 248.) One reason is that there is always a risk that the promised evidence or testimony will not materialize. (*Commonwealth v. McMahon, supra*, 822 N.E.2d at p. 713.) In this case, LeMieux reasonably based his statements regarding Moreno on the conversations he had with appellant, as well as the FBI document. (RT 3742-3745; CT 570.) Moreover, the failure to submit evidence regarding the transfer of the weapons and appellant's connection to Moreno was based on the subsequent strategic decision that appellant should not testify. Furthermore, the failure to produce Moreno as a witness was forced upon LeMieux because he could not locate Moreno, despite diligent efforts to do so. Because LeMieux believed that he would call appellant and Moreno as witnesses when he made the statement, it was not unreasonable for him to structure his opening statement around the anticipated testimony of the two men. (*Commonwealth v. McMahon, supra*, 822 N.E.2d at p. 713; see *People v Frye, supra*, 18 Cal.4th at pp. 983-984.) Although LeMieux in hindsight believed that he had acted ineffectively (RT 3742-3745; CT 570), the aforementioned factors demonstrate that he acted in a competent manner. (See *In re Andrews, supra*, 28 Cal.4th at p. 1253; *People v. Mendoza, supra*, 24 Cal.4th at p. 158.)

Appellant's claim must also be rejected because he has failed to demonstrate that he was prejudiced by his attorney's alleged incompetence. The statements at issue did not have an impact on the outcome of the trial because they were only a minor part of LeMieux's opening statement, which focused on the main issue facing the jury, the facts not in dispute, the weakness

of the accomplices' testimony, and the mistaken identification made by Sazo. (RT 1296-1317, 1321-1325-1329.) Moreover, the opening statement likely had no adverse effect on appellant's case because defense counsel did not make the statements at issue closely before jury deliberations, but instead made them at the start of a lengthy trial. (*Phoenix v. Matesanz, supra*, 233 F.3d at p. 95; *Commonwealth v. Carney* (Mass. App. Ct. 1993) 610 N.E.2d 975, 976; see, e.g., *Anderson v. Butler* (1st Cir. 1988) 858 F.2d 16, 17.) Although appellant argues that the length of deliberations indicates the case was "very close" (AOB 481), the day and a half of deliberations was reasonable in light of the three weeks of testimony (CT 268-271, 290-293, 294-299, 390), the serious nature of the charges, and the complicated nature of the case. (*People v. Carpenter, supra*, 15 Cal.4th at p. 422; *People v. Taylor, supra*, 52 Cal.3d at p. 732.) Appellant's argument that counsel's closing argument "destroyed his integrity in the jury's eyes" (AOB 481-482) does not establish prejudice because it is based on nothing more than speculation. (Cf. *People v. Mendoza* (2000) 24 Cal.4th 130, 164-165.) Thus, counsel was not ineffective, and appellant's claim must be rejected.

3. Counsel Adequately Prepared And Gave A Closing Argument

Appellant contends that his attorney failed to adequately prepare a closing argument. (AOB 439-441.) This argument must be rejected because his attorney prepared a coherent closing argument and because appellant does not demonstrate that he was prejudiced in any way by the closing argument.

The decision regarding how to argue to the jury is considered inherently tactical, and the effectiveness of an attorney's oral argument is difficult to judge from a written transcript. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1163; *People v. Williams* (1997) 16 Cal.4th 153, 219.) To prevail on a claim that

counsel's closing argument constituted ineffective assistance, a defendant must overcome the strong presumption that his attorney's actions were based on sound trial strategy under the circumstances prevailing at that time. (*People v. Barnett, supra*, 17 Cal.4th at p. 1163)

In the case at bar, appellant has failed to overcome this strong presumption because the record shows that counsel had competently prepared a closing argument that was logical and coherent. For example, counsel's theme in closing argument was that the prosecutor had not adequately proved who killed Barron and Thomas. (RT 2995-2996.) LeMieux contended that the prosecutor's case was "so cloudy" on that issue "that for three weeks it's been raining in this courtroom on that issue." (RT 2996. 3082.) To emphasize this point, he referred to specific areas where the prosecutor had failed to prove appellant's guilt of the charged offenses, such as the lack of evidence that appellant demonstrated consciousness of guilt, the lack of evidence that a robbery occurred, the lack of any handwriting analysis linking appellant to the pager contract, and the weaknesses in the fingerprint evidence. (RT 2997-2998, 3000-3007, 3009-3011, 3014-3015, 3020-3024, 3026-3029, 3073-3076, 3078-3081.) LeMieux's preparation was also shown by the numerous times he seamlessly worked quotes from the trial transcripts into his closing argument and the number of times he referred to diagrams or charts that he had produced for the closing argument.[38/] (RT 3003-3004, 3007, 3009-3010, 3012-3013, 3018-3021, 3030-3037, 3050-3056, 3063.) Thus, LeMieux's closing argument was well-prepared and delivered in a competent manner.

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38. Appellant argues in passing that LeMieux admitted that he did not know what the witnesses would say on the stand. (AOB 440.) However, LeMieux actually stated that he knew what evidence the prosecutor had but that "it wasn't until after each person testified" and he saw what evidence was produced by the prosecutor "and what was omitted from this case" that he "gained a sufficient knowledge of the case to be able to construct an argument based on the evidence presented." (RT 2894-2895.)

Appellant attempts to avoid this conclusion by arguing that the objections lodged by the prosecutor during LeMieux's closing argument showed that LeMieux's closing argument did not go well. (AOB 441-442.) However, the objections merely showed that counsel was vigorously making his arguments. In addition, the number of objections was not significant in light of the length of LeMieux's closing argument.

Appellant additionally argues that the prosecutor seized on LeMieux's alleged blunders when he stated during rebuttal argument that "the deception continues" and that it had "continued as a perversion through this entire system." (AOB 442; RT 3084.) However, as the prosecutor later explained, his comments did not refer to LeMieux's closing argument, but instead referred to appellant's "attempt to secure false testimony from witnesses and pay off people to come and say he was with them when he wasn't, and an attempt to get Peaches to pull records which demonstrated his ownership of the pager. And he's out there actively trying to falsify and create evidence at a time long before this case even hit the judicial system." (RT 4173.) Thus, counsel did not act in an incompetent manner during closing argument.

Appellant's claim must also be rejected because he has not demonstrated that LeMieux's allegedly deficient closing argument somehow prejudiced his case. As a result, he has failed to meet his burden of showing that his attorney was ineffective. (*People v. Majors, supra*, 18 Cal.4th at p. 430.)

F. Counsel Performed Competently At The Penalty Phase

Appellant contends that his attorney acted in a deficient manner during the penalty phase. (AOB 443-466.) This argument must be rejected for the reasons that follow.

1. Counsel Adequately Appreciated The Constitutional Significance Of The Penalty Phase Of The Trial And Was Familiar With How To Try A Penalty Phase Proceeding

Appellant contends that his attorney did not appreciate the constitutional significance of the penalty phase and was not familiar with how to try a penalty phase proceeding. (AOB 445-446, 448-449.) These arguments must be rejected.

A "[d]efendant bears the same burden of demonstrating ineffective assistance of counsel at the penalty phase as at the guilt phase." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1030.) This means that a defendant must establish that his attorney's representation fell below an objective standard of reasonableness and that prejudice resulted. (*Ibid.*)

In the case at bar, appellant has failed to demonstrate either aspect of this standard. Contrary to appellant's assertion, LeMieux realized the significance of the penalty phase since he knew from "the very inception of this case" that one would be required if appellant was convicted of the charged offenses and the special circumstances were found to be true. (RT 3664, 3760.) LeMieux had "done some reading and inquiry and preparation" for the penalty phase prior to the end of the guilt phase of the trial. He also had "a pretty good idea of what was going to happen in the penalty phase in terms of what evidence the People were going to put on and how we were going to meet it and what our strategy was." (RT 3760.) LeMieux also discussed the penalty phase with appellant "numerous times before this trial began." These discussions included "all of the options available" to appellant, the factors that could be used in aggravation, and what LeMieux would ask each witness. (RT 3125, 3129, 3760.) Thus, the record does not demonstrate that LeMieux was unaware of the importance of the penalty phase or that he was unfamiliar with how to try a penalty phase proceeding.

Appellant has also failed to show that LeMieux's alleged incompetence

prejudiced his case. Therefore, his claim must be rejected. (*People v. Majors, supra*, 18 Cal.4th at p. 430.)

2. Counsel Acted Competently In Not Requesting A Continuance Prior To The Penalty Phase

Appellant contends that his attorney was ineffective because he failed to request a continuance prior to the penalty phase. (AOB 446-448.) This contention must be rejected.

a. Relevant Facts And Proceedings

In a declaration filed with appellant's motion for new trial, LeMieux stated that because he had never handled a penalty phase in a capital case, he "naively believed" that he would be given 30 days to prepare for the penalty portion of the trial. As a result, LeMieux did not conduct any investigation for the penalty phase until appellant had been found guilty. LeMieux believed that he should have obtained a continuance to investigate the aggravating evidence, which would have shown that appellant's involvement in the prior crimes was "minimal" and "negligible." A continuance would also have given LeMieux time to investigate appellant's psychological background, interview friends and associates, obtain a "mental status examination," and determine the effects of chronic drug and alcohol use. (CT 571.)

During a hearing on the motion for new trial, LeMieux testified that he had been presented with the aggravating evidence prior to the trial. (RT 3768.) LeMieux spoke to appellant's parents and sisters prior to the penalty phase. (RT 3760-3762, 3781-3781.) These conversations were not "intensive" conversations, but they did allow LeMieux to "garner a little bit of information here and there," which gave him a "picture of the type of person that [appellant] was." (RT 3782-3783.) LeMieux also discussed some of the aggravating

evidence with appellant prior to the penalty phase. (RT 3771.) After the guilty verdicts, LeMieux had a "long conversation" with appellant's father regarding who should be called as a witness. (RT 3762.) However, appellant gave LeMieux "explicit instructions not to present any mitigating evidence," but was "subsequently dissuaded from that view." (RT 3659.)

b. Counsel Was Not Ineffective

Appellant has failed to show that LeMieux was ineffective for not requesting a continuance prior to the penalty phase. First, the record indicates that the trial court would not have granted a continuance motion at that point in the case because some of the jurors had "time problems" and "vacation schedules" and the court was concerned about losing jurors. (RT 3132.) Because the motion would likely have been futile, LeMieux cannot be deemed incompetent for failing to make it. (*People v. Smithey, supra*, 20 Cal.4th at p. 1012.) Moreover, a continuance at that point in the trial may have harmed appellant's case by alienating the judge or the jury. (*People v. Johnson, supra*, 6 Cal.4th at p. 51.) Although LeMieux in hindsight believes that he should have made a continuance motion (CT 571), a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" and "to evaluate the conduct from counsel's perspective at the time." (*Strickland v. Washington, supra*, 466 U.S. at p. 689; *In re Andrews, supra*, 28 Cal.4th at p. 1253.) During appellant's trial, LeMieux may have reasonably believed that a continuance was not necessary because appellant had initially instructed him not to present any mitigating evidence. (RT 3659.) LeMieux's post-trial assessment that he was incompetent does not buttress appellant's claim because an attorney's actions are only deemed ineffective if they fall below an objective professional standard. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1260; *In re Lucas, supra*, 33 Cal.4th at p.

721.) In this case, LeMieux acted reasonably at the time; therefore, his failure to file a continuance motion did not constitute deficient performance.

Appellant additionally argues that LeMieux should have requested a continuance when he learned that the prosecutor had given him an illegible photocopy of a police report regarding one of the prior offenses that the prosecutor wanted to use in aggravation. (AOB 447-448.) However, LeMieux did request that he be allowed to cross-examine the prosecutor's witness after lunch so that he would have time to read the police report. (RT 3174.) Moreover, the lack of a readable copy of the police report did not leave LeMieux uninformed about the facts underlying the prior offense, as shown by LeMieux's attempts to convince the court to exclude evidence regarding that offense. (RT 3164-3173.) Thus, appellant has failed to demonstrate that his attorney acted in a deficient manner.

Appellant has similarly failed to show that he was prejudiced by the failure to request a continuance. First, the appellate record does not show that there was a "reasonable probability that the trial's outcome would have been different had counsel sought and obtained such a continuance." (*People v. Seaton, supra*, 26 Cal.4th at p. 698.) As noted previously, there is also nothing to show that the trial court would have granted a continuance motion at that point. (*Ibid.*; *People v. Smithey, supra*, 20 Cal.4th at p. 1012.) Therefore, appellant's claim must be rejected.

3. This Court Should Reject Appellant's Claim That Counsel Was Ineffective In Regards To His Failure To Hire An Investigator, A Mitigation Specialist, Law Enforcement Expert, And A Mental Health Expert, And Failed To Request Funds To Assist Him In Preparing For The Penalty Phase Of The Trial

Appellant contends that his attorney was ineffective because he failed to hire an investigator, a mitigation specialist, a law enforcement expert, and a mental health expert and failed to request any funds to assist him in preparing for the penalty phase of the trial. (AOB 449-452.) These arguments must be rejected for several reasons.

First, appellant has not shown why LeMieux failed to hire an investigator, a mitigation specialist, or a law enforcement expert or why he failed to request funds to assist him in preparing for the penalty phase of the trial. Thus, these portions of the claim are more appropriately raised in a habeas corpus petition. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; *People v. Maury, supra*, 30 Cal.4th at p. 389; *People v. Holt, supra*, 15 Cal.4th at p. 704.) Appellant has also failed to show that additional funds were needed by LeMieux to prepare for the penalty phase. In addition, LeMieux may have reasonably decided not to ask for any funds or request an investigator, mitigation specialist, law enforcement expert, or a mental health expert because appellant initially did not want LeMieux to present any mitigating evidence and did not want him to oppose any aggravating evidence. (RT 3125-3128, 3148, 3154, 3157-3158, 3659.) LeMieux also decided not to hire a mental health expert because there was no indication that "that there was any type of mental disorder involved in this case at all." (RT 3783, 3787, 3789, 3800-3801.) Thus, there is nothing to indicate that counsel was ineffective.

Appellant has also failed to specifically demonstrate that the outcome of the penalty phase would have been different had LeMieux hired an investigator, mitigation specialist, law enforcement expert, or mental health

expert or requested additional funds. (*People v. Majors, supra*, 18 Cal.4th at p. 430.) Thus, appellant has failed to sufficiently support his contentions, and they must be rejected here.

4. Appellant Has Not Established That His Attorney Was Ineffective For The Manner In Which He Handled The Aggravating Evidence

Appellant asserts that his attorney was ineffective for failing to adequately investigate or rebut the aggravating evidence. (AOB 452-455.) The record does not support these contentions.

a. Relevant Facts And Proceedings

During a hearing on the motion for new trial, LeMieux testified that he had read the police reports about the aggravating evidence and discussed some of the aggravating evidence with appellant prior to the penalty phase. (RT 3771, 3774-3775.) During one of these discussions, appellant admitted that he did have a loaded revolver in his car when he was stopped for a traffic infraction. As a result, there was no way to "mitigate that conduct." (RT 3774-3775.)

LeMieux did not attempt to contact any of the witnesses to any of the aggravating incidents because his strategy was to "down play" appellant's involvement in the incidents, rather than "try those cases in front of the jury and magnify their importance." (RT 3771-3774, 3776, 3781.) LeMieux also wanted to obtain a stipulation from the prosecutor that appellant had only been convicted of a misdemeanor in the 1983 assault on Kenneth Moore and had not been charged with shooting Moore. (RT 3772.) LeMieux believed that the two stipulations and his cross-examination of the prosecution witnesses "down played the aggravating aspect of that incident" or took "much of the sting out

of it" and was the "best tactical decision to be made at the penalty phase." (RT 3772, 3774.)

In regards to the 1983 assault with a deadly weapon on Officer Carl Sims, LeMieux did not "try to dig up evidence" to exculpate appellant because the officer wrote in his report that he did not see who shot at him. LeMieux preferred to "let it sit like that and rely on cross-examination and bring that point out to the jury." (RT 3777.) He believed that in some cases it would be harmful to "go out and alert people" regarding the questions that would be asked at trial. (RT 3777.) For that reason, LeMieux believed it was "sufficient" to have the officer admit on the witness stand that he did not see who shot at him. (RT 3778.)

b. The Record Fails To Establish That Counsel Was Ineffective

Appellant contends that his attorney was ineffective for failing to investigate or rebut the aggravating evidence that was presented by the prosecution. (AOB 452-455.) However, the record does not show that LeMieux acted incompetently in the way he handled the aggravating evidence. LeMieux was adequately informed about the details of the aggravating evidence by reading the police reports about the incidents and by discussing those incidents with appellant. (RT 3771, 3774-3775.) LeMieux opted to forego an investigation on the incident involving possession of a concealed firearm because appellant had admitted that the underlying facts were true. (RT 3774-3775.) LeMieux decided not to investigate or strongly rebut the other incidents because he did not want to alert the witnesses to his potential cross-examination questions and because his strategy was to "down play" appellant's involvement in the incidents, rather than "try those cases in front of the jury and magnify their importance." (RT 3771-3774, 3776-3777, 3781.) These tactics were

reasonable. (See *People v. Williams* (1997) 16 Cal.4th 153, 261.) LeMieux also preferred to emphasize during cross-examination and through stipulations the weaknesses in the prosecution's case, such as Officer Sims' admission that he did not see who shot at him, the fact that many of the incidents did not result in charges, the fact that appellant was only convicted of a misdemeanor in the Moore incident, and the lack of physical evidence linking appellant to some of the offenses. (RT 3268-3269, 3273, 3293-3294, 3297-3299, 3772, 3774, 3777-3778.) Thus, counsel did not act incompetently.

Appellant attempts to avoid this conclusion by arguing once again that LeMieux did not realize until the night before the penalty phase that he had been given unreadable police reports. (AOB 454-455.) As noted previously, the unreadable report involved only one of the aggravating incidents and did not leave LeMieux uninformed about the facts of the incident, as indicated by his forceful efforts to convince the court to exclude evidence related to the offense. (RT 3164-3173.) Thus, appellant has failed to demonstrate that his attorney acted in a deficient manner.

Appellant has additionally failed to demonstrate that he was prejudiced by his counsel's alleged failings. For example, appellant has not shown what LeMieux would have uncovered had he conducted a more thorough investigation, nor has he demonstrated that LeMieux would have been able to more successfully rebut the aggravating evidence if he had conducted investigations into the incidents. As a result, appellant's claim must be rejected.

5. Counsel Competently Failed To Make Futile Motions Regarding The Admissible Aggravating Evidence

Appellant contends that his attorney was ineffective for failing to "adopt appropriate pretrial strategies" to prevent the prosecutor from introducing aggravating evidence of crimes in which appellant was not the sole perpetrator

or from introducing aggravating evidence that violated the statute of limitations or double jeopardy principles. (AOB 455-457.) As noted in Argument XI, *supra*, the evidence was properly admitted. Thus, counsel cannot be deemed ineffective for failing to make futile motions or objections to the evidence, and appellant cannot demonstrate that he was prejudiced by counsel's alleged shortcomings. (See *People v. Hines, supra*, 15 Cal.4th at p. 1038 fn. 5; *People v. Price, supra*, 1 Cal.4th at p. 387.) Moreover, the record does not establish why counsel failed to try to prevent the admission of the allegedly inadmissible evidence. As a result, the claim must be rejected on appeal. (*People v. Carter, supra*, 30 Cal.4th at p. 1211; *People v. Maury, supra*, 30 Cal.4th at p. 389.)

6. Counsel Adequately Investigated And Presented Mitigating Evidence

Appellant contends that his attorney failed to adequately investigate and present mitigating evidence during the penalty phase. (AOB 457-466.) However, there is nothing to indicate that counsel was ineffective.

a. Relevant Facts And Proceedings

After appellant was convicted, LeMieux informed the trial court that appellant wished to represent himself and was "absolutely insistent that no mitigating evidence be brought on his behalf." Appellant had instructed LeMieux "in the strongest terms" not to call his mother, wife, relatives, "or anybody connected to his family" as witnesses during the penalty phase. (RT 3125, 3127, 3130.) LeMieux noted that appellant's mother had "very serious heart problems" and that appellant was "absolutely insistent" that she not be forced to testify. (RT 3127.) LeMieux stated that this was "not a last minute decision" by appellant but was "something that has been in the works through the trial whenever we talked about the penalty phase." (RT 3129.)

The next day, appellant told the court that he did not want any evidence to be presented and that he did not want his family members to be called as witnesses. (RT 3142.) LeMieux also reiterated that appellant had instructed him not to admit any mitigating evidence. (RT 3148.) LeMieux further stated that appellant did not want him to "present any mitigating evidence of his general character, gang background evidence, whether he'd be a good confinement risk, things like that." As a result, LeMieux had not discussed those matters with appellant's family, although he had prepared what would be his presentation of mitigating factors, if he was allowed to present such evidence. (RT 3154.) LeMieux again told the court that appellant did not want his mother to be called as a witness. (RT 3157.) The court told appellant to think about having LeMieux present mitigating evidence. The case was then adjourned until the next day, when the penalty phase commenced. (RT 3158, 3174.)

After the jury recommended that appellant be sentenced to death, he filed a motion for new trial. During a hearing on the motion, LeMieux testified that during the guilt phase, he had a conversation with appellant to determine "what kind of person he is, about what he's done." He also spoke to appellant's parents and sisters prior to the penalty phase. (RT 3760-3762, 3781-3782.) Although these conversations were not "intensive," LeMieux would "garner a little bit of information here and there," which gave him a "picture of the type of person that [appellant] was." (RT 3782-3783.) Appellant's mother said that appellant was "courteous, respectful, polite, never a problem in the house, never swore, never talked back, et cetera." (RT 3761-3762.) After the guilty verdicts, LeMieux had a "long conversation" with appellant's father regarding who should be called as a witness during the penalty phase. (RT 3762.) However, appellant gave LeMieux "explicit instructions not to present any mitigating evidence." He was "subsequently dissuaded from that view," but did insist that

his father and mother not be called to the witness stand because of their health. (RT 3659.)

Appellant testified that during the guilt phase of the trial, LeMieux never discussed the penalty phase with him and never asked him about his background. (RT 4030, 4083-4084.) After the trial court refused to remove LeMieux as appellant's attorney, LeMieux talked to appellant's mother, sisters, and Monique Williams' aunt and uncle. Appellant initially did not want LeMieux to present any mitigating evidence because LeMieux did not want to handle appellant's case. He was also concerned about his parents testifying because of their age. The next day, appellant decided that mitigating evidence should be presented. (RT 4035, 4075-4077, 4080-4081.)

Appellant's mother testified that LeMieux never asked about appellant's background, and appellant's two sisters testified that LeMieux only discussed appellant's background with them briefly just before they testified. (RT 4093-4095, 4101-4102, 4107-4108.)

b. Counsel Was Not Ineffective

Although appellant contends that his attorney was ineffective for failing to investigate and present mitigating evidence (AOB 457-466), his claim is not supported by the record. In regards to appellant's claim involving his family members, the record shows that LeMieux did conduct adequate interviews with appellant's relatives. LeMieux not only had a discussion or discussions with appellant to gain information about appellant's background and to discuss the penalty phase with him, but he also spoke to appellant's parents and sisters. (RT 3129, 3760-3762, 3781-3782.) These conversations with appellant's relatives, though not "intensive," gave LeMieux a "picture of the type of person that [appellant] was." (RT 3782-3783.) LeMieux also had a "long conversation" with appellant's father regarding who should be called as a

witness during the penalty phase. (RT 3762.) Thus, contrary to appellant's assertion, LeMieux did conduct an adequate investigation into appellant's background. Although LeMieux may not have conducted detailed interviews with appellant's mother or sisters, this was caused by appellant's initial directive that LeMieux not present any mitigating evidence or call relatives to the witness stand. (RT 3125, 3127, 3130, 3142, 3148, 3154, 3157, 3659.) More importantly, appellant does not point to any information that would have been discovered had he conducted more intensive interviews with family members or sought other avenues of investigation. Based on these factors, LeMieux acted competently. (See *Strickland v. Washington, supra*, 466 U.S. at p. 699 [counsel could surmise through conversations with the defendant that character and psychological evidence would not be helpful]; *In re Scott* (2003) 29 Cal.4th 783, 826-827 [attorney is not required to present mitigating evidence over a defendant's objections]; *In re Andrews* (2002) 28 Cal.4th 1234, 1254, 1259 [attorney is not required to present mitigating evidence over the defendant's objections; defendant failed to show that there was any mitigating evidence that would have been uncovered during an investigation]; *People v. McDermott, supra*, 28 Cal.4th at p. 991-992 [counsel not ineffective even though he did not interview witnesses until the day of their testimony].)

Appellant attempts to avoid this conclusion by citing to *Wiggins v. Smith* (2003) 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471. (AOB 459-460, 464-465.) However, in *Wiggins*, the defense attorneys abandoned a thorough investigation into the defendant's background, despite information known to them that the defendant's mother was an alcoholic, the defendant had stayed in several foster homes and showed emotional problems while there, the defendant was frequently absent from school, and the defendant was left alone for days without food on at least one occasion. (*Id.* at p. 525.) In contrast, the discussions with appellant's family did not reveal any of the types of issues that

were evident in *Wiggins* and did not indicate that any further avenues of investigation should be conducted. Indeed, appellant's mother told LeMieux that appellant had always been "courteous, respectful, polite, never a problem in the house, never swore, never talked back, et cetera." (RT 3761-3762.) Thus, counsel acted in a competent manner. (See *Strickland v. Washington, supra*, 466 U.S. at p. 699.)

Counsel also acted competently in regards to LeMieux's alleged failure to investigate or present additional evidence regarding appellant's work as a police informant. (AOB 465-466.) First, there is nothing in the record to indicate whether or why LeMieux failed to investigate the possible existence of mitigating evidence regarding appellant's status as an informant. As a result, appellant's claim must be rejected on direct appeal. (*People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Moreover, any failure by LeMieux to conduct such an investigation may have been caused by appellant's insistence that mitigating evidence not be presented. (RT 3125, 3127, 3139, 3142, 3154.)

As noted previously, LeMieux diligently attempted to locate Moreno during the guilt phase of the trial, and there is nothing to indicate that LeMieux would have been able to locate Moreno or that Moreno would have been willing to talk to LeMieux during the penalty phase. There is also nothing to indicate that any reports from the United States Attorney's Office or the State Board of Control would have been admissible or that there were any witnesses willing to talk to LeMieux regarding appellant's informant activities. Appellant has further failed to demonstrate that his activities as an informant were necessarily mitigating. Thus, appellant has not demonstrated that his attorney acted in an incompetent manner. (See *In re Andrews, supra*, 28 Cal.4th at p. 1257 [evidence that defendant argues should have been presented was not unambiguously mitigating]; *People v. Medina* (1995) 11 Cal.4th 694, 773 [a court "cannot assume from a silent record that particular witnesses were ready,

willing and able to give mitigating testimony"].)

Appellant has also failed to show that he was prejudiced by his attorney's alleged failings. For example, there is nothing to show that LeMieux would have uncovered additional mitigating evidence had he conducted a more thorough investigation or interviewed appellant's family members in a more detailed manner. (See *People v. Medina, supra*, 11 Cal.4th at p. 773; *People v. Wrest* (1992) 3 Cal.4th 1088, 1116.) Moreover, there is nothing to indicate that the jury would have been inclined to sentence appellant to life imprisonment if they had received additional mitigating evidence. (*In re Andrews, supra*, 28 Cal.4th at p. 1265.) Appellant's contentions to the contrary (AOB 488-490) are based on nothing more than speculation and are inadequate to demonstrate prejudice. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) Therefore, appellant's claim must be rejected.

7. Counsel's Delivered His Closing Argument In A Competent Manner

Appellant contends that LeMieux's unfamiliarity with the law regarding capital sentencing prevented him from competently delivering his closing argument during the penalty phase. (AOB 466.) The record indicates otherwise. Although appellant contends that "virtually every argument" LeMieux made "ran headlong into an objection" (AOB 466), this is not the case. The prosecutor only made five objections (RT 3441-3446, 3448, 3450-3452) that were sustained during LeMieux's lengthy closing argument. (RT 3440-3485.) Most of LeMieux's arguments went unchallenged. LeMieux did not comment that the objections and side-bar conferences interrupted "his ability to provide a coherent argument to the jury to spare his client's life." (AOB 466.) Rather, LeMieux merely commented that the one objection at issue at the time had "seriously interrupted" his argument. (RT 3459.) He was

in no way indicating that he was unable to make a coherent argument, and, in fact, continued his argument in a coherent and logical manner. (RT 3460-3485.) Thus, the record does not support appellant's contention that his attorney was incompetent during closing argument. The record also fails to show that the jury would have been inclined to sentence appellant to life imprisonment had LeMieux given a closing argument that received no objections from the prosecutor. Therefore, his claim must be rejected.

G. Appellant Must Demonstrate That He Was Prejudiced By His Attorney's Alleged Acts Of Incompetence In Order To Prevail On His Claims That His Attorneys Were Ineffective

Appellant contends that pursuant to *United States v. Cronic* (1984) 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657, he does not need to show prejudice to establish his claims of ineffective assistance of counsel. (AOB 467-475.) However, *Cronic* is inapplicable.

In *Cronic*, the United States Supreme Court stated that prejudice need not be shown if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." (*United States v. Cronic, supra*, 466 U.S. at p. 659.) However, the Supreme Court has stressed that for *Cronic* to apply, "the attorney's failure must be complete." (*Bell v. Cone* (2002) 535 U.S. 685, 697, 122 S.Ct. 1843, 152 L.Ed.2d 914.) This Court has similarly noted that *Cronic* applies only when "counsel's deficiencies were so severe as to result in a complete breakdown of the adversary process." (*People v. McDermott, supra*, 28 Cal.4th at p. 991; see also *In re Visciotti* (1996) 14 Cal.4th 325, 353 [application of *Cronic* has been "limited"].) Thus, an argument that an attorney "failed to work hard enough" falls "outside of the small exception carved out by *Cronic*." (*In re Avena* (1996) 12 Cal.4th 694, 728.)

In the case at bar, appellant's contentions are merely that his attorneys failed to work hard enough to defend him. Thus, *Cronic* does not apply. (*In*

re Avena, supra, 12 Cal.4th at p. 728.) *Cronic* also does not apply because appellant's attorneys did not completely fail to defend appellant. As noted previously, McCann opposed several challenges to prospective jurors made by the prosecutor, challenged at least five jurors for cause, and made three *Wheeler* motions. (RT 438, 655, 746, 803, 951, 957, 1000-1008, 1070, 1074, 1210, 1226, 1233.) LeMieux gave opening statements and closing arguments, cross-examined the prosecution's witnesses, objected to certain testimony and evidence, and presented a number of witnesses on appellant's behalf during the guilt and penalty phases of the trial. Thus, appellant's attorneys did not fail to subject the prosecution's case to adversarial testing. As a result, he must demonstrate that he was prejudiced by his attorneys' allegedly deficient acts. (See, e.g., *Bell v. Cone, supra*, 535 U.S. at p. 697-698 ["the failure to adduce mitigating evidence and the waiver of closing argument" "are plainly of the same ilk as other specific attorney errors" that are subject to *Strickland*'s requirement that prejudice be established]; *People v. McDermott, supra*, 28 Cal.4th at p. 991 [because attorney "vigorously represented defendant and subjected the prosecution's case to adversarial testing," *Cronic* did not apply]; *People v. Majors, supra*, 18 Cal.4th at p. 431 [record did not support claim that *Cronic* applied]; *In re Visciotti, supra*, 14 Cal.4th at p. 352-353 [although attorney engaged in "multiple" deficient acts, prejudice needed to be established] *In re Avena, supra*, 12 Cal.4th at p. 727-728 [even though attorney's representation "was minimal at best," a showing of prejudice was required].)

Appellant argues that prejudice should not be required because certain trial exhibits have not been located. (AOB 473-475.) However, appellant does not adequately explain how the missing exhibits prevent him from establishing prejudice. His contentions do not directly involve the exhibits, and there is nothing to indicate that a review of such exhibits is necessary to resolve

appellant's claims. Although appellant contends that "the option of re-examining" the exhibits or "retrac[ing] the steps LeMieux should have taken" is no longer available (AOB 473-474), such actions are not appropriate on direct appeal, which is limited to the four corners of the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *In re Carpenter* (1995) 9 Cal.4th 634, 646.) Thus, the missing exhibits do not hinder appellant's ability to establish prejudice.

Appellant further argues that prejudice can be shown by LeMieux's alleged broken promises and the failure to call Moreno as a witness. (AOB 477-490.) However, appellant does not show how these two alleged failings necessarily demonstrate prejudice for all of his claims of ineffective assistance of counsel, including those claims that do not involve LeMieux's opening statement or Moreno. Additionally, as shown in the previous subsections, appellant was not prejudiced by his attorneys' alleged deficiencies. Therefore, his contentions must be rejected.

Appellant finally argues that, cumulatively, the asserted instances of ineffective assistance of counsel violated his constitutional rights. (AOB 490-491.) However, as shown, *supra*, appellant's attorneys were not ineffective. Therefore, his claim must be rejected. (*People v. Stewart* (2004) 33 Cal.4th 425, 521; *People v. Carter* (2003) 30 Cal.4th 1166, 1023; *People v. Burgener* (2003) 29 Cal.4th 833, 884; *People v. Smithey* (1999) 20 Cal.4th 936, 1017.)

XVI.

APPELLANT VALIDLY WAIVED HIS RIGHT TO REPRESENT HIMSELF

Appellant contends that the waiver of the right to represent himself was invalid because the trial court gave him inaccurate information. (AOB 492-498.) The record belies this claim.

A. Relevant Facts And Proceedings

On Tuesday, October 8, 1991, after the verdicts were read in the guilt phase of the trial, LeMieux told the court that appellant wished to represent himself. (RT 3125-3126.) LeMieux explained that appellant had "lost all confidence" in him because he had not proved that appellant was innocent, had not produced Moreno as a witness, and had not called appellant as a witness. (RT 3126.) LeMieux also explained that appellant did not want him to introduce any mitigating evidence. (RT 3125, 3127-3128, 3130.) LeMieux stated that he had "an outline" of what he would do during the penalty phase if was allowed to do so and that he had explained to appellant what he would ask each witness. (RT 3125, 3128.) LeMieux added that he did not have much mitigating evidence. (RT 3128.) The court and the parties agreed that appellant would have until October 9, 1991, to decide whether to represent himself, and that the penalty phase would begin on October 10, 1991. (RT 3133-3134.)

On October 9, appellant stated that he still wanted to represent himself because he had no confidence in LeMieux. (RT 3139.) Appellant explained that he did not want LeMieux to represent him because LeMieux had not called him as a witness and had not subpoenaed certain witnesses to testify. He added that he did not want to call his family members as witnesses during the penalty phase. (RT 3141.)

The court told appellant that LeMieux had been hired to handle "the

entire trial," including the penalty phase. The court noted, "The prosecution has given him all the material, and yesterday he said he's prepared to go forward. That's why I don't understand why you are doing this." (RT 3144.) The court later reiterated, "And you heard Mr. LeMieux yesterday. He said he was prepared to go on. And he has all the material on this matter. And he is prepared on this thing." The court again asked appellant to explain why he wanted to represent himself at this stage of the proceedings. (RT 3145.) The court again stated, "Mr. LeMieux has said yesterday that he was prepared. And so this is why - - if I look confused, I am confused, okay?" (RT 3146.) The court told appellant that LeMieux "knows all about this case" and that LeMieux had done "a great" and "masterful job," "an amazingly good job," and a "very good job." (RT 3146-3147.) The court added,

> My observation is that Mr. LeMieux did a really outstanding job. And this is midstream. I don't understanding your thinking, especially, as I said, for you to dismiss him at this time. An attorney takes a case for the entire trial. And he's prepared. So how can you prepare yourself when he's lived with this all this time? When he's been prepared? How are you going to prepare your part of the case?

(RT 3147.) LeMieux told the court that appellant did not want to introduce any mitigating evidence. (RT 3147-3148.)

The court told appellant, "Now, I cannot sit here and believe that you are truly inviting the death penalty." Appellant stated that there was no difference between the two sentences. (RT 3149.)

The prosecutor told appellant that "self-representation is never a good thing." (RT 3149.) He cautioned that it was always better to have an experienced attorney who understood the trial process, knew how to cross-examine witnesses, and could help devise meaningful trial strategies. (RT 3150.)

The court reiterated that it was "very concerned" that appellant wanted

to represent himself during the penalty phase. The court offered to allow appellant to discuss the matter with his family. (RT 3151.)

After speaking with appellant, LeMieux told the court that he did not want to be dismissed as appellant's attorney. (RT 3151-3152.) The court told LeMieux that it had the discretion to allow appellant to represent himself. The court also stated that it was not trying to "push" appellant "into anything" and wanted to hear appellant's thoughts on the matter. (RT 3152-3153.)

The court asked appellant, "I mean, so you want to keep your attorney so you can be properly represented? How's that?" Appellant responded, "Yes." The court again asked, "And do you agree with me that you should be represented?" Appellant responded, "Yes." The court later added, "Now, Mr. LeMieux has been preparing this. Yesterday he said that. This is why I was very upset that you felt that you'd be able to handle all of this." (RT 3153.)

B. The Record Does Not Show That Appellant Waived The Right To Represent Himself Based On The Court Giving Him Inaccurate Information

"A defendant who knowingly and intelligently waives the right to counsel possesses a right under the Sixth Amendment of the federal Constitution to conduct his or her own defense." (*People v. Jenkins* (2000) 22 Cal.4th 900, 959; see *People v. Danks* (2004) 32 Cal.4th 269, 295.) When a defendant moves to represent himself, the trial court must make the defendant aware of the dangers and disadvantages of self-representation. (*People v. Jenkins, supra*, 22 Cal.4th 900, 959.)

In the case at bar, appellant contends that he withdrew his motion to represent himself because the court gave him inaccurate information regarding LeMieux. (AOB 492-498.) However, the record shows that appellant withdrew his self-representation motion and told the court that he wanted to be represented by LeMieux only after he had a discussion with LeMieux. (RT

3152-3153.) Thus, "it is evident that it was the defendant's consultation with defense counsel rather than the court's comments that persuaded defendant to withdraw his motion for self-representation." (*People v. Jenkins, supra*, 22 Cal.4th at p. 961; cf. *People v. Snow* (2003) 30 Cal.4th 43, 70.) Moreover, the court's comments were not improper. Rather, the court was properly advising appellant of the dangers of self-representation. (*People v. Jenkins, supra*, 22 Cal.4th at p. 961) The court's comments were not inaccurate because they were based upon the court's observations and LeMieux's remarks about his readiness on October 8, 1991. (RT 3125, 3128, 3144-3147.) Thus, the court did not give appellant inaccurate information about LeMieux, nor did the court's comments cause appellant to withdraw his self-representation motion. Therefore, appellant's claim must be rejected.

XVII.

THIS COURT HAS REPEATEDLY HELD THAT THE CALIFORNIA DEATH PENALTY SCHEME PROVIDES A MEANINGFUL WAY TO DISTINGUISH THE FEW WHO ARE SELECTED FOR DEATH FROM THE MANY WHO ARE NOT

Appellant contends that the 1978 death penalty law violates the Eighth Amendment because it does not adequately narrow the class of persons eligible for the death penalty. (AOB 499-505.) As appellant concedes (AOB 504-505) this Court has repeatedly rejected this claim. (See, e.g., *People v. Ramos* (2004) 34 Cal.4th 494, 532-533; *People v. Griffin* (2004) 33 Cal.4th 536, 596; *People v. Sapp* (2004) 31 Cal.4th 240, 286; *People v. Boyette* (2002) 29 Cal.4th 381, 439-440; *People v. Samayoa* (1997) 15 Cal.4th 795, 863; *People v. Arias* (1996) 13 Cal.4th 92, 187.) Although appellant requests that this Court address the issue in light of the majority, concurring, and dissenting opinions in *Tuilaepa v. California* (1994) 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750

(AOB 504), the Supreme Court did not address, in that case, the issue that appellant raises. Moreover, this Court has rejected appellant's contention even after considering Justice Blackmun's dissent in *Tuilaepa*. (See, e.g., *People v. Sanchez* (1995) 12 Cal.4th 1, 60-61.) Thus, appellant's claim must be rejected.

XVIII.

THE CONSTITUTION DOES NOT REQUIRE THAT THE JURY FIND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS

Appellant contends that under recent Supreme Court precedent, the jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. (AOB 506-511.) This Court has repeatedly rejected this argument. (See, e.g., *People v. Panah, supra*, 35 Cal.4th at p. 499; *People v. Vieira* (2005) 35 Cal.4th 264, 300.) The Supreme Court's recent decision in *Blakely v. Washington* (2004) 542 U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403, has not changed this Court's analysis on this issue. (See, e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Morrison, supra*, 34 Cal.4th at p. 730.) Thus, appellant's claim must be rejected.

XIX.

PENAL CODE SECTION 190.3, SUBDIVISION (A), IS NOT BEING APPLIED IN AN ARBITRARY OR CAPRICIOUS MANNER

Appellant contends that the "circumstances of the crime" factor in Penal Code section 190.3, subdivision (a), is used by prosecutors in such a way that it leads to arbitrary and capricious decisionmaking that violates the Eighth

Amendment.[39] (AOB 512-519.) This Court has repeatedly rejected this claim. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Turner* (2004) 34 Cal.4th 406, 438.) In doing so, this Court has noted that the "seemingly inconsistent range of circumstances" that "can be culled from death penalty decisions" shows "that each case is judged on its facts, each defendant on the particulars of his offense. Contrary to defendant's position, a statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances." (*People v. Brown* (2004) 33 Cal.4th 382, 401; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1052-1053.) Therefore, appellant's claim must be rejected.

XX.

INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED

Appellant contends that the lack of intercase proportionality review violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. (AOB 520-529.) This Court has repeatedly rejected these contentions and should do so here. (See, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 500; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Burgener* (2003) 29 Cal.4th 833, 885; *People v. Anderson* (2001) 25 Cal.4th 543, 602.)

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39. Appellant does not contend that any of the facts urged by the prosecution in connection with this factor were improper.

XXI.

CALIFORNIA'S DEATH PENALTY PROCEDURE DOES NOT VIOLATE INTERNATIONAL LAW

Appellant contends that California's death penalty scheme violates international law. (AOB 530-532.) This Court has rejected this contention and has specifically rejected the argument that California's scheme violates the International Covenant of Civil and Political Rights. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 27 Cal.Rptr.3d 360, 439; *People v. Ramos* (2004) 34 Cal.4th 494, 533-534; *People v. Brown* (2004) 33 Cal.4th 382, 404.) Therefore, appellant's claim must be rejected here, as well.

CONCLUSION

Based on the foregoing, respondent respectfully requests that appellant's conviction and death sentence be affirmed.

Dated: July 25, 2005

Respectfully submitted,

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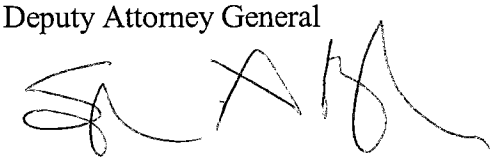

STEPHANIE A. MIYOSHI
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Attorneys for Plaintiff and Respondent

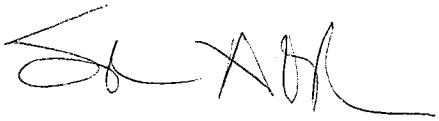
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 62,357 words.

Dated: July 25, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE

Case Name: ***People v. Williams, George Brett***
Case No. S030553, Capital Case

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 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 JUL 27 2005, I served a copy of the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 South 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 fully postpaid, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on JUL 27 2005, at Los Angeles, California.

Bernard M. Santos

Signature

SAH:bs
LA1994XS0008