IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **LA TWON WEAVER,** Defendant and Appellant.	S033149 **CAPITAL CASE**

San Diego County Superior Court No. CRN22688
J. Morgan Lester, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

On May 6, 1992, appellant La Twon Weaver walked into the Shadowridge Jewelry Store in Vista, grabbed a customer by the neck, and put a gun to her head. He then herded the customer, the store's owner Michael Broome, and two employees to the back of the store and said, "Give me everything you have." When Weaver demanded keys from Broome, and Broome could not produce them, Weaver cocked his gun, aimed it at Broome and shot him in the chest. As Broome lay on the floor of his store, in pain and begging for help, Weaver ignored him and continued to demand "everything." Weaver fled the scene with four bracelets.

Weaver waived his right to trial by jury. Following the guilt phase, the trial court found Weaver guilty of murder during the commission of a robbery and burglary, as well as robbery and burglary, and also found that Weaver had used a firearm and inflicted great bodily injury. Following the penalty phase, the trial court imposed a sentence of death for Broome's murder.

STATEMENT OF THE CASE

On November 4, 1992, the San Diego County District Attorney filed an

amended information charging appellant La Twon Weaver with the murder of Michael Broome in violation of Penal Code section 187, subdivision (a) (Count 1). It was further alleged that Weaver murdered Broome during the commission or attempted commission of the crimes of robbery (Pen. Code, §§ 211, 190.2, subd. (a)(17)) and burglary (Pen. Code, §§ 460, 190.2, subd. (a)(17)). In counts two and three respectively, Weaver was charged with the commission or attempted commission of robbery and commercial burglary (Pen. Code, §§ 211, 459). As to all three counts, the information alleged that in the commission of the crimes Weaver personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a). As to counts two and three, the information alleged in the commission or attempted commission of the offenses, Weaver intentionally and personally inflicted great bodily injury on Michael Broome, within the meaning of Penal Code section 12022.7. (1 CT 94-96.)

On February 16, 1993, Weaver filed a "Motion to Challenge the Composition of San Diego County Juries and to Quash all Current and Available Jury Panels." (4 CT 627-640.) After a hearing on the matter, the trial court denied the motion on February 24, 1993. (13 PTRT [1/] 100.) On February 26, 1993, Weaver personally waived his right to a jury trial. (14 PTRT 1-61;4 CT 671-673.)

The guilt phase of the trial commenced before the Honorable J. Morgan Lester on March 8, 1993. (1 RT 1.) On March 17, 1993, the trial court found Weaver guilty of murder during the commission of a robbery and burglary. The court also found Weaver guilty of robbery and burglary. (6 RT 713-714.) The trial court found true that Weaver had used a firearm and inflicted great bodily injury, and also found the special circumstances of robbery and burglary. (6 RT 714-715.)

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1. Pre-Trial Reporter's Transcript.

On March 19, 1993, Weaver reaffirmed his waiver to jury trial on the guilt phase, special circumstances and penalty phase of the trial. (4 CT 690-691; 7 RT 721-733.) The penalty phase commenced on the same day. (7 RT 745.) On March 31, 1993, the trial court determined that the death penalty was appropriate. (12 RT 1370.)

On May 14, 1993, Weaver filed a motion for a new trial and to modify the death verdict. (4 CT 788-833; 5 CT 851-864.) On May 28, 1993, the trial court denied both motions. (13 RT 1399, 1453.)

On May 28, 1993, the trial court sentenced Weaver to death on count one. He was sentenced to a determinate term of four years for the use of a firearm in committing the murder, three years for the robbery conviction (count two), three years inflicting great bodily injury, and two years for burglary (count three), for a total determinate term of 12 years. However, the sentences on counts two and three were stayed pursuant to Penal Code section 654. (5 CT 866-872; 13 RT 1462-1465.)

STATEMENT OF FACTS

Guilt Phase Evidence

Prosecution's Case

In 1992, Michael Broome owned Shadowridge Jewelers on Melrose Drive in Vista. (1 RT 18-19.) The jewelry store was in a shopping center with several other businesses. (1 RT 176, 194-195.)

Shortly after 4:00 p.m. on May 6, Patricia Arlich, who owned a business located near Shadowridge Jewelers, was behind her store when she saw Weaver in the passenger seat of a car that was traveling slowly behind the jewelry store, nearly stopping. (1 RT 179-183.) Arlich got a good look at Weaver. His hair was arranged in "cornrows" or "little braids." (1 RT 183.) The driver's hair

was different. (1 RT 184.)

Kimberly Decker was driving in the parking lot on her way to the Lucky grocery store before 5:00 p.m. when she pulled along side the car in which Weaver was riding. (1 RT 194-197.) He had "little ponytails" all over his head. She looked directly into Weaver's face and at his hair, as she was wondering why anyone would fix their hair in such a fashion. There was no one else at the shopping center with hair like that. (1 RT 197.)

Arlich, who had seen Weaver earlier riding slowly past the back of the jewelry store, saw him again between thirty and forty minutes later while standing on the sidewalk in front of her business. (1 RT 184.) Weaver walked past Aldrich, and came within two feet of her. He was headed toward the jewelry store. (1 RT 185.)

Stephanie Swihart worked at the Grossmont Bank, which was six to eight storefronts from the jewelry store. (2 RT 211-212, 219.) She walked past Shadowridge Jewelers at about 5:00 p.m. on her way to the mailbox. (2 RT 212, 220.) She saw Weaver sitting on a bench in front of the jewelry store. (2 RT 213, 215.) His hair was in "corn rows" but looked "kind of wild," sticking out all over. (2 RT 213.)

Meanwhile, Ricky Black delivered flowers to a girl at the Crown Book store, which was near Shadowridge Jewelers. (2 RT 227-229.) He watched Weaver for 20 minutes as Weaver walked back and forth, looking "very nervous." (2 RT 228, 231, 235.) Black described Weaver's hair as arranged in "dreadlocks." (2 RT 229.)

Mary Deighton and Lisa Stamm were sales clerks at Shadowridge Jewelers. (2 RT 18; 4 RT 564-565.) Sometime before Weaver entered the jewelry store, Stamm saw him sitting on a concrete slab outside the store. (4 RT 586.) She thought he looked like a "porcupine" with "little spikes" coming up from is head. (4 RT 587.) Weaver was wearing a black nylon jacket, and

under the jacket, a light gray sweatshirt bearing the letters "SDSU" written in red, and blue jeans that bore the "Guess" clothing logo, and he was carrying a white cotton bag bearing the "Guess Men" logo.[2/] (1 RT 51-53, 56.) Deighton noted that Weaver's hair was arranged in braids or "buns" all over his head. (1 RT 71.)

Shortly before 5:15 p.m., while Broome, Deighton, Stamm, and customer Lisa Maples were in the jewelry store, Weaver walked in, put his arm around Maples' neck, pulled out a gun and put it to her head. (2 RT 19, 45; 4 RT 565-567, 579-580.) As Weaver forced Maples to the back of the store, he said, "Don't push any damn buttons. Load up the goods." (1 RT 31.) He moved the group to the back of the store near the safe, yelling "Give me everything you have." (4 RT 568.)

Broome had his hands in the air. (1 RT 33.) In keeping with store policy to give a robber anything he demanded, Broome told Weaver, "Just calm down, we'll give you what you want, just calm down." (4 RT 570, 593.) After Weaver herded everyone to the area of the safe, Weaver demanded the keys from Broome, stating, "Come on man, I know you've got the keys." (1 RT 31-32.) Broome, whose hands were raised, told Weaver he did not have his keys and to take the "girl's" keys. (1 RT 33; 4 RT 570.)

As Broome stood with his arms raised and offering no resistance, and at a distance of about three to four feet from Weaver, Weaver pulled back the hammer, then the trigger of his gun, and shot Broome in the chest. (1 RT 33; 4 RT 571-572.) Broome fell to the floor and said, "Oh my God, I'm dying. Please help me. It hurts." (1 RT 34-35.) Broome repeated his cry for help over and over. (1 RT 35; 4 RT 574.) Weaver ignored Broome's pleas. (4 RT 615.)

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2. Various items of clothing were seized from Weaver's apartment, including a gray sweatshirt bearing the logo of San Diego State University, a green and white shirt found inside the sweatshirt, and a pair of blue jeans bearing the "Guess" label. (4 RT 557.)

Stamm threw jewelry from the diamond cases at Weaver, who still had Maples by the neck and was waiving the gun back and forth, pointing it at everyone in the store. (1 RT 36; 4 RT 574.) Weaver remained there as Stamm tossed jewelry to him. (1 RT 36.) With his hands full, Weaver could not catch the jewelry, and it fell to the floor. (4 RT 574.)

Meanwhile, Martin You, who owned the video store next door, heard a loud noise coming from the jewelry store. Mr. You thought a shelf might have fallen and went to help Broome. (1 RT 104-105.) As he approached Shadowridge Jewelers, he looked through the window of the store and saw Weaver with a gun in his hand and holding a lady by the neck. (1 RT 105, 108.) Realizing that the noise he had heard was a gunshot, Mr. You decided to "distract" the gunman. (1 RT 105.) He kicked the door-stop that was propping the jewelry store door open, and the door closed. (1 RT 36, 105; 4 RT 575.)

After Mr. You closed the door, Weaver shoved Maples away, made a "grabbing" movement at the floor and then fled from the jewelry store. (1 RT 36-37, 106; 4 RT 575-576.) Stamm went through the store pushing the silent alarm buttons under the display cases and then called 9-1-1. (4 RT 577.) Deighton left through the back of the store and went to a neighboring flower shop where someone called 9-1-1. (1 RT 39.) Mr. You returned to his business and then back to the jewelry store where he saw Broome lying in "about a gallon of blood." (1 RT 106-107.)

Kari Machado was a few doors from the jewelry store when she heard the gunshot. (1 RT 125-127.) She got a good look at Weaver as he ran from the store. (1 RT 128-129.) His hair was arranged in "corn rows" or "dreadlocks" all over his head. (1 RT 143.)

Tim Waldon, Christopher Church and Christopher White were on the sidewalk in front of the Track Auto Parts store two doors away when they heard a loud noise or gunshot and saw Weaver running from the jewelry store. (1 RT

147-150, 164-166; 177-178.) Waldon described Weaver's hair as being in "dreadlocks" or rows of thin hair going from front to back. (1 RT 152.) Church said Weaver's hair was arranged in "dreadlock" fashion or "braided." (1 RT 167.) Waldon and Church followed Weaver through the parking lot to a blue Oldsmobile and obtained the vehicle's license plate number. Church and White returned to the store where White wrote the number on the back of a Track Auto Parts advertisement. (1 RT 152, 169-171, 178; 2 RT 340.) The Oldsmobile's number that White wrote down was "1DNC734." (1 RT 178.)

At 5:15 p.m., off-duty San Diego County Sheriff Deputy Joann Stone was traveling southbound on Melrose Drive. (2 RT 241-242.) She noticed a blue sedan rapidly approaching the rear of her vehicle, too fast for the traffic conditions. (2 RT 243.) She watched the blue sedan avoid the traffic by traveling in the emergency lane, veer across three lanes of traffic and eventually turn into the Shadowridge Woodbend apartment complex. (2 RT 243, 247, 255.)

Stone followed the vehicle and drove by slowly as the driver pulled into a parking space, exited the vehicle and entered apartment number 113 at the Shadowridge Woodbend Aparments. (2 RT 248-249, 257, 327.) Apartment number 113 was eight tenths of a mile from Shadowridge Jewelers. (4 RT 558-559.) Weaver resided at apartment number 113, with his girlfriend, Kelly Tapp, and her sister Jennifer Tapp. (2 RT 327.) Jennifer Tapp and Byron Summersville had leased the apartment in 1991. (2 RT 327-328.) Apartment number 113 was not Summersville's primary residence, although he was a frequent overnight visitor . (2 RT 328.)

Stone wrote the license plate number, "1DNC734," on an envelope. (2 RT 251.) Summersville was the owner of the 1982 blue Oldsmobile. (2 RT 382-383.)

As Stone drove past the vehicle the second time, she saw the driver exit

the apartment. He had changed clothes and had a lot of short little "nubby" braids sticking out all over. (2 RT 253.) The driver was La Twon Weaver. (2 RT 259, 289.)

Jeannine Angelo lived in apartment number 4 of the Shadowridge Woodbend apartment complex. (2 RT 291.) As she descended the steps from her apartment on the evening of May 6, 1992, she saw Weaver come down an ivy covered embankment from the direction of the laundry room, bend down, and then leave, traveling back up the embankment through the plants. (2 RT 294-296.) When sheriff's deputies arrived, Angelo showed them where she had seen Weaver bending over. (2 RT 308.) She watched as Deputy David Hillen recovered three items of jewelry and a key from the ivy in the same area. (2 RT 309, 352-354, 356.) The key accessed the apartment complex washroom and swimming pools. (2 RT 310.) Mary Deighton later identified the jewelry as that stolen from Shadowridge Jewelers. (1 RT 54-55.)

Deputy Detective Donald Phelps responded to the Shadowridge Woodbend apartment complex, and as he was investigating the blue Oldsmobile Weaver had been driving, he saw Weaver come from apartment number 113 carrying a laundry basket. (2 RT 337-338, 341-343.) Weaver was wearing a "fresh" shirt. The fact that the shirt was not wrinkled at 5:30 in the evening caught Phelps' attention. (2 RT 343-344.) Weaver's hair appeared to have been recently "bound" or "restrained," the restraints removed, and the hair not completely combed-out or styled. (2 RT 344.) Deputies Hillen and Brian Sheets also noted that Weaver's hair was unkept, and in addition, he had two rubberbands on the back of his head. (2 RT 359, 370.)

Detective Phelps approached Weaver and told him he was investigating an "incident." Detective Phelps detained, but did not arrest Weaver, and he placed him in the back of a patrol car. (2 RT 345.) Detective Hillen later transported Weaver to the sheriff's station. (2 RT 357.)

The Oldsmobile was searched pursuant to a warrant. (4 RT 553.) From inside the vehicle, deputies recovered, among other things, a yellow metal bracelet with clear stones bearing a price tag, later identified as jewelry stolen from Shadowridge Jewelers, a "semi-jacketed" .44 caliber Magnum cartridge, a light blue hair brush and rubberband, spray paint and a roll of duct tape.[3/] (1 RT 54-55; 2 RT 392-394, 397-398; 4 RT 553.)

The gun Weaver used to shoot Broome was never recovered. (4 RT 556). The green and white shirt found inside the sweatshirt with a San Diego State University logo, and a blue work shirt collected from Weaver's apartment tested positive for gunshot residue. (3 RT 518; 4 RT 557.)

Broome had stopped breathing by the time paramedics arrived. (4 RT 577.) He died as a result of a gunshot wound that perforated his right upper chest. (3 RT 550.) The bullet that killed Broome was fired from a .44 caliber Magnum revolver. (3 RT 537, 540, 549, 561.)

At trial, the jewelry store's surveillance tape was played for the court. The tape showed Weaver as he held Maples, pointed the gun, shot Broome and fled the store. (1 RT 57, 68-69.) In addition, Deighton (1 RT 45), Lisa Stamm (4 RT 570-580), Martin You (1 RT 108), Patricia Arlich (1 RT 186), Kimberly Decker (1 RT 197), Stephanie Swihart (2 RT 215), Ricky Black (2 RT 233), Kari Machado (1 RT 129), Tim Waldon (1 RT 157), Deputy Stone (2 RT 259), Deputy Phelps (2 RT 343), Jeannine Angelo (2 RT 299), and Deputy Hillen (2 RT 357-358) all positively identified Weaver in court as the person they had seen at the shopping center, in Shadowridge Jewelers and at the Shadowridge Woodbend apartment complex on May 6, 1992.

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3. Weaver would later tell his father and a psychiatrist that he and Byron Summersville purchased duct tape and spray paint as part of the plan to rob the jewelry store. (9 RT 1136; 10 RT 1212-1213.)

Defense Case

Weaver presented no evidence during the guilt phase of the trial.

Penalty Phase

Prosecution Case

The prosecution presented six witnesses during the penalty phase, three of the victims of the robbery, one by stipulated statement, and three of Michael Broome's family members. The first to testify was Annette Broome, Michael's wife of 12 years; they were to have celebrated their 13-year anniversary the month after Broome was murdered.[4/] (7 RT 757-758.) The couple had two children, Melissa who was nine at the time of her father's death and "Mikey" who was eight. (7 RT 758.) Broome was buried on what would have been his 35th birthday. (7 RT 797, 817.)

The Broome family sold their business in New Jersey and moved to Vista in July 1991. (7 RT 762, 764.) Broome and Annette wanted to open a small town, local jewelry store where their customers could get to know them. (7 RT 764.) They made the move to California because they thought the San Diego area was beautiful and would be a safer area, as New Jersey was getting dangerous. They believed Vista was the right place to bring up their children. (7 RT 764-765)

Annette also worked in the store. (7 RT 766.) The store had a policy with regard to robberies; give the robber anything he wanted, as the jewelry could be replaced, the employee could not be replaced. (7 RT 766.)

On the day of Broome's murder, Annette worked in the store until 3:00

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4. Because Broome's wife Annette and his mother Mary share his surname, respondent references these surviving family members herein by their first names.

p.m. (7 RT 768.) She was at home when she received a telephone call from Wells Fargo Alarm Company, advising her that the panic buttons had been activated at the store, and no one was answering the telephone. (7 RT 769.)

Annette went to the jewelry store, which was a five minute drive from their home. (7 RT 770.) When she arrived, she saw that the entrance to the store had been roped-off. (7 RT 770-771.) The deputy on duty outside would not let her inside the store. (7 RT 771.) When she asked the deputy to have her husband come outside, the deputy told her that he could not come out. When she asked if he was dead, the deputy nodded his head. (7 RT 771.)

Someone from a trauma center escorted Annette from the area and to the video store next door. As she passed the jewelry store, she saw that her husband's body was covered-up. (7 RT 772.) Annette had a "horrible feeling," knowing that she could not be with her husband. (7 RT 772.) She never had the chance to say "Good bye" or "I'm sorry" to him. (7 RT 773.)

Both of Broome's children were seeing psychologists as a result of his death. (7 RT 806, 810.) Melissa created a mural of pictures in her bedroom, dedicated to her father. (7 RT 780.) She had not accepted that her father was dead; she continued to speak of him as though he was on vacation and would be coming home. (7 RT 780.)

Broome was his son Mikey's favorite person. Mikey always wanted to go with his father, even if it was to do something "boring." (7 RT 781.) They shared a bedtime ritual during which Broome would lay with Mikey, tickle him and tell him stories. (7 RT 782.) Mikey would tell his father all of his thoughts. (7 RT 783.) Broome had enjoyed this time, as it gave him the opportunity to relax with his son. (7 RT 783.)

After Broome's death, Mikey would pray that his daddy would come back like Lazarus. (7 RT 784.) During one counseling session, he blurted out that his daddy died because he was a bad boy. (7 RT 785.) Since his father's

murder, Mikey was depressed and no longer wanted to attend Boy Scouts or play soccer. (7 RT 786.)

Mikey also did not want his mother to go to work. Annette had to shorten her hours, often closing the store. (7 RT 788.) Sometimes Mikey would walk Annette to her car, get in and refuse to get out. If she managed to get to the store without Mikey knowing, he would call her, stay on the telephone and just listen to her breathe. (7 RT 789.)

Mikey did not want to sleep in his own room for months, and slept instead on the floor next to his mother's bed. (7 RT 790-91.) He often had nightmares and once told Annette that his daddy could have "ducked." (7 RT 791-792.) Mikey placed the pictures of his father face down because it made him sad to look at his daddy's face. (7 RT 793.) At Broome's funeral, Mikey told his mother his "heart [was] breaking." (7 RT 794.)

As for holidays, Father's Day was horrible, and the family spent it at the cemetery. (7 RT 807.) Annette sold the jewelry store. (7 RT 801.)

Broome's mother, Mary Broome, testified that Broome was the eldest of her four sons. (7 RT 813-814.) Broome helped his mother keep his younger brothers under control as they were growing up. (7 RT 814.) Since her son's death, Mary feared going out at night. (7 RT 819.) She missed her son and continued to dream that he was still alive. (7 RT 820.) Broome's brother Joseph testified that Broome was an outgoing, kind, considerate, compassionate, level headed and intelligent person. (7 RT 822, 830.)

Lisa Maples, the customer whom Weaver had grabbed by the neck upon entering the jewelry store, testified that she had nightmares about guns and violence and needed prescription medicine in order to sleep. (7 RT 834.) She could no longer run at night with her husband, and had instead purchased a treadmill to use in her home. (7 RT 835.) Maples could not return to the jewelry store or the shopping center. (7 RT 835.)

Mary Deighton remembered that Weaver had displayed a different attitude toward Broome than he did toward the three females in the store. Weaver was hostile toward Broome. (7 RT 840.) Even as Broome was begging for help, Weaver did not look in Broome's direction. (7 RT 842.) Deighton said that it was horrifying to listen to Broome's repeated cries for help and hear the blood filling his lungs; he sounded as though he was drowning. (7 RT 843-844.) Deighton was under the care of a psychologist and later a psychiatrist and was prescribed medication to treat her anxiety attacks. (7 RT 845-846.) She still had difficulty sleeping. (7 RT 846-847.)

Lisa Stamm had been experiencing on-going psychological difficulties and was receiving counseling. She was afraid to go out at night, had difficulty sleeping and had nightmares involving crimes of violence, frequently involving a firearm.[5/] (8 RT 853.)

Defense Case

Reports of psychological and psychiatric evaluations of Weaver prepared by psychiatrists Charles Rabiner and Haig Koshkarian, and psychologist Wistar MacLaren were admitted into evidence.[6/] (40 CT 7797-7804, 7805-7811, 7812-7816.)

Dr. MacLaren opined that Weaver's verbal I.Q. was 76. (40 CT 7801.) Dr. Rabiner opined that Weaver had a dependent personality. (40 CT 7810-711.) Dr. Koshkarian concluded that Weaver tended to be passive, dependent and immature. (40 CT 7815.)

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5. The testimony of Lisa Stamm was read into evidence by stipulation of the parties. (8 RT 853.)

6. The reports were admitted by stipulation of the parties. (8 RT 854.)

The parties stipulated that Byron Summersville was a violent and vicious person, and if Alberto Fox were to testify, he would state that in 1992 Summerville stabbed him in the chest without provocation; Tracy Witt would testify that Summersville raped her in 1992; and Detective John Cherry would testify that Summersville had a reputation for viciousness. (8 RT 859.)

The defense contended that Weaver was a "dependent young man" who was influenced by Summersville and alcohol to murder Broome. (8 RT 863.)

Sixteen witnesses, fourteen of whom were relatives and friends of Weaver's, testified on his behalf in the penalty phase. Weaver's mother, Catalina Weaver, testified that Weaver was born in 1968. He had two older brothers and a younger sister. (8 RT 865.) Weaver had a normal childhood. (8 RT 866.) Weaver's mother stayed at home with her children and took them to school everyday. (8 RT 879.) Weaver's father ran a bookkeeping business and was the Pastor of a church where Weaver was the youngest member of the church choir. (8 RT 867, 893.) Weaver was also a member of the Church's "Usher Board" and participated in all the church activities. (8 RT 868.)

The Weaver children attended Calvary Christian School. (8 RT 867, 869.) Weaver's father took him to Bible study classes in the evenings. (8 RT 879.) His father also coached the church's basketball team, on which Weaver was "first string." (8 RT 880.)

The Weavers took family vacations and celebrated holidays together. (8 RT 871, 876-877.) Weaver grew up in a household where there was a great deal of love and support. (8 RT 911.)

Weaver was very active in school and participated in "everything." His favorite activities were choir, music and sports. His received "Bs" and "Cs." When he started high school, he did not want to attend school and his grades fell. (8 RT 872.) Despite Weaver's mother taking him to high school, Weaver would not attend classes. Weaver's mother learned that he would go to his

father's church and play the piano or return to the "rumpus" room behind the garage of the family home and play the piano and drums that were located there. (8 RT 873.)

The church choir produced two albums, in which Weaver played the piano and the organ and also sang a solo number. He was very good at sports and loved basketball. (8 RT 876.) Weaver never fought with other children in school, and Weaver's mother had no difficulties with him causing trouble in the neighborhood, or "running the streets." (8 RT 878, 891.)

Weaver dropped out of high school and met the mother of his child in a "Job Corps" program. (8 RT 895-896.) The baby was born in 1990. (8 RT 899.) Weaver continued to attend Bible study and choir practice through 1991 and into 1992. (8 RT 900-901.) Weaver's mother told of an incident where Weaver assisted in rescuing a man who was being kidnaped. (8 RT 902.)

Weaver sometimes helped his brother who managed the family's second business, a body shop. (8 RT 901.) Weaver did not like working in the body shop because it was "too dirty." (8 RT 908.) In 1992, Weaver was "disappointed" in himself, and moved to Vista to be with his girlfriend and child, and also because Summersville was going to help him find a job. (8 RT 903-904.)

Weaver's father, Ray La Vette Weaver, Sr., testified that, following his arrest, Weaver told his father that "they" had accused him of doing something that he did not do. (9 RT 1074, 1095.) Later, Weaver told his father that he had done something very wrong. (10 RT 1211.) He said that he and Byron Summersville had been drinking and decided to "knock over" a jewelry store. (10 RT 1212.) Weaver claimed Summersville purchased duct tape, spray paint and bullets in preparation. (10 RT 1212-1213.)

Psychiatrist Charles Rabiner testified that he had reviewed the psychological evaluation of Dr. MacLaren, as well as other investigative reports

and transcripts of witness interviews. (9 RT 1023, 1025.) Dr. Rabiner interviewed Weaver twice. (9 RT 1128.) Dr. MacLaren's report indicated that Weaver had a verbal I.Q. of 76. Dr. Rabiner opined that Weaver was not mentally retarded. (9 RT 1127.) Dr. Rabiner diagnosed Weaver as having a mixed personality disorder with dependent and histrionic features, meaning Weaver frequently depended on others to make up his mind for him, looked to others for direction, and had a low sense of self-confidence and self-esteem. (9 RT 1141.) It was his opinion Weaver was a follower. (9 RT 1141.)

Initially, Weaver denied that he committed the murder. (9 RT 1129.) He later told Dr. Rabiner that he was drinking beer with Summersville, and Summersville suggested they rob a jewelry store. (9 RT 1135-1136.)

With regard to the murder, Weaver claimed that he entered the store, took out the gun, told the victims to lay down on the floor and then heard someone come in the store. At that point the gun discharged. (9 RT 1138-1139.) He added that he did not remember pulling the trigger. (9 RT 1139.)

During cross-examination, Dr. Rabiner conceded that his opinion was based in part on what Weaver told him. (9 RT 1152.) Dr. Rabiner also agreed that Weaver's actions after the murder, that is, changing his clothing and hiding the jewelry and gun, were indicative of someone using common sense in an effort to avoid detection. (9 RT 1153-1154.)

In addition, the prosecutor questioned Dr. Rabiner about an interview of Weaver, upon which Dr. Rabiner relied during his evaluation. (9 RT 1147.) Dr. Rabiner agreed that during the interview, after being confronted by police with the evidence against him, Weaver said that he was going to keep denying that he "did it" until he got out of prison and his parents "buy me some kind of good lawyer." (9 RT 1140-1150.) At no time since being in custody did Weaver display remorse. (9 RT 1161-1162.)

Mary Buglio, a forensic alcohol supervisor at the San Diego County Sheriff's crime lab, testified that she analyzed Weaver's blood and found that it had a value of .05 percent at ten minutes after midnight following the murder. (8 RT 922, 917.) It was her opinion that his blood alcohol content would have been approximately .17 percent at 6:00 p.m. the day before. (8 RT 924.) Buglio also testified that the consumption of alcohol affected a person's awareness of his surroundings, as well as abstract and logical thinking. (8 RT 925-926.)

Rebuttal

Mary Deighton testified that she never saw Weaver experiencing any difficulty with his balance or coordination. (10 RT 1233-1234.) When Weaver spoke, she understood him, and his words were not slurred. (10 RT 1234.) Deighton also testified that Weaver was facing Broome when he shot him, pointing the gun directly at him, and he cocked the gun and paused before he pulled the trigger. (10 RT 1235-1236.) Weaver never looked over his shoulder until after he shot Broome, and Martin You closed the door. (10 RT 1235.)

Weaver showed no signs of a lack of coordination or balance when he exited apartment number 113 following the murder. (10 RT 1239-1240.) As Detective Phelps spoke with Weaver, he was able to carry on an intelligent conversation; Weaver made sense, responded appropriately to questions, and his speech was not slurred. Weaver appeared to be in possession of all his mental faculties, understood what the detective was saying and never asked him to repeat his statements. (10 RT 1241.) Phelps said that Weaver was "[l]aid back," not nervous and did not shake. (10 RT 1242.)

ARGUMENT

I.

WEAVER KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL

Weaver contends that his convictions and sentence must be vacated, because he allegedly did not knowingly, intelligently and voluntarily waive his right to a jury trial, violating his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution. Specifically, Weaver claims that the trial court did not advise him of his right to an automatic appeal and that he had the right to participate in the jury selection process. (AOB 20, 24-36.) Because the record establishes that the trial court did in fact advise Weaver of his right to an automatic appeal, and further, because the trial court was not obliged to personally and specifically advise Weaver that he had the right to take part in jury selection, Weaver's claim is meritless.

A criminal defendant may waive his right to jury trial. (*Patton v. United States* (1930) 281 U.S. 276, 312, [50 S.Ct. 253, 74 L.Ed. 854] disapproved on other grounds in *Williams v. Florida* (1970) 399 U.S. 78 [90 S.Ct. 1893, 26 L.Ed.2d 446]; *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 281 [63 S.Ct. 236, 87 L.Ed. 268]; *People v. Collins* (2001) 26 Cal.4th 297, 305 [the practice of accepting a defendant's waiver of the right to jury trial, common in both federal and state courts, clearly is constitutional]; see also *People v. Cook* (2007) 40 Cal.4th 1334, 1342-1343 [capital defendants are permitted to waive the most crucial of rights, including the rights to counsel, a jury trial, to offer a guilt phase defense, and be present at various stages of trial].)

To be effective, a jury trial waiver must be the express and intelligent choice of the defendant. (*Patton v. United States, supra*, 281 U.S. at p. 312; see

also *People v. Collins*, *supra*, 26 Cal.4th at p. 305.) As with the waiver required of other constitutional rights, a defendant's waiver of the right to jury trial must be knowing and intelligent, that is, made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it, as well as voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. (*Id.* at p. 305 citing *Colorado v. Spring* (1987) 479 U.S. 564, 573 [107 S.Ct. 851, 857, 93 L.Ed.2d 954] [requiring a knowing, intelligent, and voluntary waiver of the Fifth Amendment privilege against self-incrimination]; see also *McCarthy v. United States* (1969) 394 U.S. 459, 465-466 [89 S.Ct. 1166, 1170, 22 L.Ed.2d 418] [an "intentional revocation of a known right or privilege" must accompany a guilty plea, which in effect is a waiver of the right to trial by jury, the right to confront opposing witnesses, and the privilege against self-incrimination]; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464, 468 [58 S.Ct. 1019, 1024-1025, 82 L.Ed.1461] [requiring knowing and intentional waiver of the Sixth Amendment right to assistance of counsel].)

The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general under the circumstances, even though the defendant may not know the specific detailed consequences of invoking it. (*United States v. Ruiz* (2002) 536 U.S. 622, 629 [122 S.Ct. 2450, 153 L.Ed.2d 586].) A defendant may waive his right to remain silent, his right to a jury trial, or his right to counsel, even if he does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide. (*Id.* at pp. 629-630.)

Moreover, a waiver need not be in any particular form, nor is it rendered inadequate simply because all conceivable ramifications are not explained. (*People v. Carpenter* (1997) 15 Cal.4th 312, 375.) In *People v. Evanson* (1968)

265 Cal.App.2d 698, the court of appeal upheld the waiver of the right to a jury trial where defense counsel represented to the trial court that he had explained to the defendant his constitutional rights to a jury trial, the nature of a criminal case and that the defendant desired to proceed without the necessity of a jury. (*Id.* at p. 700.) The trial court asked the defendant, "Is that agreeable with you, Mr. Evanson?" (*Ibid.*) The defendant responded, "Yes sir." (*Ibid.*) The trial court made no further inquiry of the defendant. (*Ibid.*; cited with approval in *In re Tahl* (1969) 1 Cal.3d 122, 133, fn. 6 as noted in *People v. Panizzon* (1996) 13 Cal.4th 68, 84.)

Here, in addition to defense counsel's representations to the court, the trial court conducted an exhaustive and detailed voir dire and personally addressed Weaver throughout. (14 PTRT 16-61.) Weaver repeatedly stated that he understood the trial court's advisements and wished to waive a jury trial. (14 PTRT 21, 22, 23-24, 33, 35-36, 43, 44, 46, 47, 48.)

Moreover, the record belies Weaver's contention that his jury waiver was invalid because the trial court did not advise him that he had a right to an automatic appeal. (AOB 20, 24.) The trial court advised the parties in open court, with Weaver present, that pursuant to Penal Code section 1239, subdivision (b), a defendant could not waive his right to the automatic appeal that was mandated in a capital case.[7] (14 PTRT 1, 6-7.) The trial court specifically advised Weaver again during the colloquy that his right to an automatic appeal could not be compromised, even if he wished. (14 PTRT 25.) In addition, while discussing a trial court's review of a jury verdict, the court

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7. Penal Code section 1239, subdivision (b) provides, in pertinent part, as follows:

> (b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her or his or her counsel.

stated that Weaver's case was subject to an automatic appeal. (14 PTRT 47.)

On January 25, 1993, Weaver filed supplemental points and authorities in support of a motion to continue. (3 CT 578-585.) In his motion, Weaver requested a continuance so that he could perform a complete demographic survey of the jury pool. (3 CT 585.) Weaver asserted that the testimony of his potential witness, Dr. Edgar Butler, would establish that it was unknown if the master list of jurors for the North County Judicial district fairly represented the community. (3 CT 578.)

On January 28, 1993, the trial court held a hearing on the matter. (11 PTRT 1-100.) In support of his motion, Weaver presented the testimony of Geraldine Stevens, the San Diego County coordinator of jury services (11 PTRT 6-19) and Dr. Edgar Butler, a human demographer (11 PTRT 20-53). After hearing testimony, the trial court granted Weaver's motion to continue the trial until March 1, 1993. (11 PTRT 91.)

During this hearing, the trial court noted the jury panel was calendared to appear the day following the hearing. The trial court ruled that the jurors would fill out questionaires at that time and be called back at a later date. (11 PTRT 95.)

On February 16, 1993, Weaver filed a "Motion to Challenge the Composition of San Diego County Juries and to Quash all Current and Available Jury Panels" (hereinafter, "motion to quash"). (4 CT 627-640.) On February 18, 1993, the trial court set a hearing on the matter for February 24, 1993. (12 PTRT 101, 116.) During this hearing, the trial court noted that the jury panel had been called in, and the parties had "seen the faces of the actual panel." (12 PTRT 105.)

On February 24, 1993, the trial court held a hearing on Weaver's motion to quash. (13 PTRT 1-100.) In support of his motion to quash, Weaver again called Dr. Butler to testify. (13 PTRT 21-76.) In making its decision, Weaver

asked the court to also consider Dr. Butler's previous testimony from the January 28 hearing. (13 PTRT 78.)

The trial court ultimately found that Weaver failed to demonstrate that minorities were under-represented in the jury lists of San Diego County. Therefore, the trial court denied his motion to quash. (13 PTRT 100.)

Immediately following the trial court's ruling on Weaver's motion to quash, defense counsel advised the trial court that he had spoken with Weaver, and Weaver had decided to waive a jury trial. (13 PTRT 101.) The trial court allowed the prosecutor additional time before undertaking a "detailed constitutional taking" of Weaver's waiver. (13 PTRT 101-102.)

In the meantime, and during the same hearing, the court continued to address jury matters, particularly excusing jurors for reasons of hardship. (13 PTRT 104-105.) Defense counsel advised the court that he had explained the hardship process to Weaver. (13 PTRT 105.)

The trial court advised Weaver personally that he had "every right" to scrutinize the court's rulings with regard to excusing potential jurors, particularly the four or five Black jurors who were on the panel, especially in light of the Weaver's motion to quash the jury panel. (13 PTRT 105.) The trial court expressed concern to Weaver about Weaver's not being present to witness the court's rulings. (13 PTRT 105.) Weaver stated that he understood. (13 PTRT 105.) The court then confirmed that Weaver was going to be absent from court "all of Monday," March 1, the day the trial court was to conduct the hardship hearings. Weaver responded, "Yes, Your Honor, I am." (13 PTRT 106.)[8/] Because Weaver ultimately waived his right to a jury trial, the trial court

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8. The record does not indicate why Weaver chose not to be in court on that particular Monday for the hardship hearing. A portion of the record immediately preceding this colloquy was sealed during record correction. However, Volume 4 of the Clerk's Transcript contains an order to transport

did not conduct a hardship hearing.

The next day, February 26, defense counsel reiterated Weaver's decision to waive a jury as to the guilt and penalty phases of trial. (14 PTRT 2.) The prosecutor advised the court that the People would also waive jury trial on the condition that Weaver waive his appellate rights with regard to certain pre-trial motions that had been litigated.[9/] (14 PTRT 5.) The prosecutor voiced his concern that in the event of an appeal, the record be clear that Weaver's jury waiver was based on the assessment of Weaver and his defense counsel that Weaver would rather have the trial court hear the case than a jury of 12, and Weaver's decision had nothing to do with the trial court's pretrial rulings. (14 PTRT 5, 9.)

The trial court advised the prosecutor that pursuant to Penal Code section 1239, subdivision (b), a capital defendant could not waive his right to the automatic appeal. (14 PTRT 6-7.) The court observed that the prosecutor might bargain in good faith, but the California Supreme Court might rule

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Weaver to the UCSD Medical Center Neurology Clinic on March 1, 1993. (4 CT 666.)

9. The 19 motions at issue were to (1) strike aggravating factors as unconstitutional; (2) transfer the trial to the downtown courthouse; (3) for jurors' addresses; (4) disclosure of the District Attorney's legal theories; (5) use of juror questionnaires; (6) supplemental attorney voir dire; (7) discovery of district attorney's information about prospective jurors; (8) defense motion for a fair trial; (9) to read jurors a script; (10) application of the *Witt/Witherspoon* standard (*Wainwright v. Witt* (1985) 469 U.S. 412 [422, 105 S.Ct. 844, 83 L.Ed.2d 841]; *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]); (11) for individual sequestered voir dire; (12 & 13) to quash the jury venire; (14) the district attorney's motion to admit photographs in the guilt phase; (15) the district attorney's motion to admit photographs in the penalty phase; (16) defense motion to set bail; (17) prosecution motion to order Weaver to wear an exhibit; and (18 & 19) two defense motions to strike the prosecution's notice of intention to introduce evidence in aggravation. (14 PTRT 11-13.)

otherwise, as it did in *Stanworth*.[10] (14 PTRT 7.) The trial court concluded that there was a possibility or likelihood that the prosecutor's condition might be meaningless. The prosecutor chose to waive jury trial nonetheless. (14 PTRT 8.)

Defense counsel confirmed that Weaver was agreeing to waive the right to appeal from the court's pre-trial rulings on the motions listed by the prosecutor, as most of them applied to matters that would only be relevant in a jury trial. However, defense counsel reserved the right to interpose objections during trial and to appeal the trial court's rulings with regard to those objections. (14 PTRT 14.) The hearing continued with the trial court noting that it was bound by law to accept the proffered jury trial waiver. (14 PTRT 15.)

Defense counsel then produced Weaver's executed written waiver forms. (14 PTRT 15; 4 CT 671-673.) The trial court proceeded to conduct a "detailed inquiry" to ensure that Weaver was waiving his constitutional right to a jury trial on "a proper basis and understanding." (14 PTRT 14-61.)

The trial court advised Weaver that the waiver of jury was for all triable issues before the court during both the guilt and penalty phases of trial. (14 PTRT 16-17.) The court defined the triable issues in the guilt phases as whether the prosecution proved their case beyond a reasonable doubt with regard to the first degree murder charge, special circumstance allegation and the burglary and robbery charges. (14 PTRT 17.)

The trial court also advised Weaver that his right to an automatic appeal could not be compromised, even if he wished. (14 PTRT 25.) The court noted that the law did permit particular waivers of otherwise appealable issues within

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10. *People v. Stanworth* (1969) 71 Cal.2d 820, later affirmed in *People v. Massie* (1998) 19 Cal.4th 550, 566.

the automatic appeal. (14 PTRT 26-28.)

Because the waiver form defense counsel drafted and Weaver executed did not address the issue of unanimity, the trial court explained to Weaver that he had a right to a unanimous jury verdict in both the guilt and penalty phases of trial. (14 PTRT 32-33.) The trial court also explained that if the court determined Weaver was guilty of first degree murder and a special circumstance, the court would progress to a penalty phase. The trial court read Penal Code section 3604, setting forth the punishment to be imposed upon a finding of guilty, and advised Weaver that he was not avoiding the possibility of death by waiving a jury trial. (14 PTRT 42.) The trial court advised Weaver he had the right to confrontation, cross-examination, to remain silent and present a defense, and that he had the right to exercise those rights before a jury. (14 PTRT 44-45.) Weaver explicitly acknowledged that he discussed those rights with defense counsel, conferred with counsel and stated that he was giving up the right to have a jury. (14 PTRT 44-45.)

Weaver responded "No" when the court asked him if anyone "pushed," "coerced," "forced," or "threatened" him to waive his right to a jury. (14 PTRT 45-46.) Weaver stated that his waiver was "done of free will." (14 PTRT 46.) The trial court advised Weaver that there would be no separate, independent review of the evidence by the court as there would be if the case was heard by a jury. (14 PTRT 46-47.)

Weaver confirmed that the information on the written jury waiver form was correct and that his attorneys had explained the terms "jury trial" and "court trial" to him and also explained the differences. (14 PTRT 48-49.) When asked if it was his intention to give up his right to a trial by 12 citizens, Weaver responded "Yes." (14 PTRT 48.)

Weaver repeatedly stated that he understood the trial court's admonitions during the colloquy with the court. (14 PTRT 21, 22, 23-24, 33, 35-36, 43, 44,

47, 48.) Defense counsel Martin stated that he discussed the issue "at great length" with Weaver, co-counsel and "virtually every other member of his office in North Court and many in the downtown office," sought the advice of "virtually every lawyer he knew" who was willing to discuss the matter, considered the pros and cons and strategy with co-counsel, Weaver, Weaver's father and concluded that jury waiver was in Weaver's best interest.[11] (14 PTRT 50-51.) When asked if he agreed with counsel's statement, Weaver said, "I do, Sir." (14 PTRT 52.)

Defense co-counsel Rawson advised the court that he too had sought the opinions of counsel and that a jury waiver was a matter that he and co-counsel had been discussing for the "last several months." (14 PTRT 52.) The trial court found that Weaver made a "knowing, willing, intelligent, voluntary, express, explicit waiver of his right to have a jury trial." (14 PTRT 53.)

The trial court went further and inquired whether it was Weaver's understanding that if he was found guilty of first degree murder and a special circumstance was found to be true, Weaver was giving up his right to a jury trial at the penalty phase, and the trial court would determine the penalty. (14 PTRT 53-54.) Weaver responded that this was his understanding. (14 PTRT 54.) Weaver indicated he understood and wished to give-up his right to have a jury of 12 citizens determine whether he would be sentenced to life without the possibility of parole or death. (14 PTRT 54-55.)

The trial court confirmed that Weaver's attorneys had fully explained to Weaver what a jury trial and a court trial was and the difference between the two. (14 PTRT 55.) The court inquired if anyone had pressured Weaver to waive his right to a jury trial on the penalty phase, and Weaver responded "No." (14 PTRT 55.) The trial court asked if Weaver's waiver of a jury trial for the

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11. Weaver was represented by two attorneys, Jeffrey Martin and David Rawson. (5 PTRT 1, 8-9.)

penalty phase was as voluntary as his waiver on the guilt phase, and Weaver responded "Yes." (14 PTRT 55.) The court advised Weaver that it could consider sympathy, as well as victim impact evidence during the penalty phase and inquired if Weaver still wished to have the court preside over the penalty phase, to which Weaver responded "Yes." (14 PTRT 56.)

The trial court asked as to both the guilt and penalty phase, whether Weaver was making his waiver of a jury trial freely and voluntarily. (14 PTRT 59-60.) Weaver said, "Yes, I am, your Honor." (14 PTRT 60.) When asked if he had any questions about either phase, Weaver responded "No." (14 PTRT 60.) The trial court also asked Weaver's defense attorneys if there were any other inquiries, comments or statements they wished to make. Both declined. (14 PTRT 60.)

The trial court noted that it had conducted a "detailed, somewhat minute process covering a myriad of eventualities." Having done that, the trial court found that Weaver made an intelligent, knowing, willing, express, voluntary waiver of his right to a jury trial for each phase of the case. The trial court concluding by observing that Weaver was "lucid" and giving intelligent responses. Further, Weaver was able to confer and understand counsel in the court's presence. (14 PTRT 61.)

The parties then agreed to move the trial date from March 1, 1993 to March 8, 1993. (13 PTRT 106.)

Because the record demonstrates that the trial court advised Weaver of his right to an automatic appeal, Weaver's claim to the contrary should be rejected. Furthermore, because Weaver is currently exercising his right to an automatic appeal, Weaver's claim of a potential constitutional violation arising from an absence of meaningful appellate review of a death sentence is meritless. (AOB 27-28.)

Weaver also claims that he was not advised that he was giving up his

right to appeal nineteen pre-trial motions. (AOB 24.) In fact, the record indicates that Weaver was aware he was waiving his right to appeal the pre-trial motions, and did so in order to obtain the prosecution's agreement to waive the People's right to a jury trial, an agreement Weaver affirmatively sought for tactical reasons. (14 PTRT 1, 5-7, 9, 14.) In response to Weaver's request to waive a jury trial, the prosecutor stated that the People would waive their right to a jury trial on the condition that Weaver waive his right to appeal the trial court's rulings on the 19 pre-trial motions. (14 PTRT 5.) It was only after the trial court accepted Weaver's waiver on the pre-trial motions that it accepted the prosecution's jury waiver. (14 PTRT 14.) It was immediately following the waiver of the pre-trial motions that Weaver took part in a 45-page colloquy and waived his right to a jury trial. (14 PTRT 16-61.)

In any event, Weaver's counsel had the authority to waive Weaver's right to appeal from the pre-trial motions on his behalf. In fact, "Counsel may waive all but a few fundamental rights for a defendant." (*People v. Riel* (2000) 22 Cal.4th 1153, 1196.) This is so because, when a defendant exercises his right to representation by professional counsel, it is counsel who is in charge of the case. (*People v. Hinton* (2006) 37 Cal.4th 839, 873 citing *In re Horton* (1991) 54 Cal.3d 82, 95.) By choosing professional representation, the accused surrenders all but a handful of fundamental personal rights to counsel's complete control of defense strategies and tactics. (*People v. Hinton*, *supra*, at p. 874.)[12/] As the court of appeal stated in *Evanson*, where a defendant is represented by counsel, it is expected that counsel will intentionally refrain from

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12. Included in the narrow exception are such fundamental matters as whether to plead guilty, whether to waive the constitutional right to trial by jury, whether to waive the right to counsel, and whether to waive the privilege against self-incrimination. (*People v. Hinton, supra,* 37 Cal.4th at p. 874.) Here, with regard to the pre-trial motions, none of these handful of fundamental personal rights is at issue.

asserting, or advise waiver of, even certain constitutional rights in his choice of defense tactics, and it is not necessary that whenever such a tactical waiver occurs the court interrupt the proceedings to advise defendant of the right which is to be waived and question him to ascertain whether the waiver is made with full appreciation of the consequences. (*People v. Evanson, supra*, 265 Cal.App.2d at pp. 701-702.)

Here, the right to appeal certain pre-trial motions is not a constitutional or fundamental personal right. In fact, the federal Constitution does not require a state to provide appellate review at all. (*Abney v. United States* (1977) 431 U.S. 651, 656 [97 S. Ct. 2034, 52 L.Ed.2d 651] [it is well settled that there is no constitutional right to an appeal]; *Griffin v. Illinois* (1956) 351 U.S. 12, 18 [76 S.Ct. 585, 100 L.Ed. 891] citing *McKane v. Durston* (1894) 153 U.S. 684, 687-688 [14 S.Ct. 913, 38 L.Ed. 867]; *Ross v. Moffitt* (1974) 417 U.S. 600, 611 [94 S.Ct. 2437, 41 L.Ed.2d 341] [it is clear that the State need not provide any appeal at all].) Rather, the right to an appeal is a creature of statute. (Pen. Code, §1237; *People v. Panizzon, supra,* 13 Cal.4th at p. 90.)

In this case, after consultation with counsel, Weaver decided to waive a jury trial for tactical reasons. Weaver's motion to quash the jury venire was denied. (13 PTRT 100.) Defense counsel Martin had already sought the advice of "virtually every other lawyer" he knew, including co-counsel Rawson, he consulted with Weaver and Weaver's father and concluded that it was in Weaver's best interest to waive a jury trial. (14 PTRT 50-51.) In order to secure the prosecutor's agreement to forego a jury trial, Weaver chose to waive his right to appeal the pre-trial motions. As the person in control of defense strategies and tactics, it was proper for counsel to waive the right on Weaver's behalf to insure Weaver's wishes to waive a jury trial were realized.

Nonetheless, even if the trial court erred by not advising Weaver with particularity that he had the right to appeal the pre-trial motions, such error was

harmless for a number of reasons. (*People v. Watson* (1956) 46 Cal.2d 818, 821 [where there is no prejudicial error resulting in a miscarriage of justice, a judgment of conviction should be affirmed].)[13/]

First, Weaver's decision to agree to the prosecutor's condition that Weaver waive his right to appeal the nineteen pre-trial motions did not impact Weaver's right to an automatic appeal of his guilty verdict or death sentence. Indeed, Weaver reserved the right to object to and appeal from the trial court's rulings that took place during the trial (14 PTRT 14), a right he is engaged in exercising here.

Second, as acknowledged by defense counsel at trial, most of the pre-trial motions involved issues that would have been pertinent only if there had been a jury trial (14 PTRT 14), and those issues are moot in light of the fact that Weaver waived a jury trial, and this case was presented to the trial court. Third, Weaver does not, indeed in light of the record he cannot, assert that he was, in fact, unaware that he was waiving his right to appeal the rulings on the pre-trial motions in exchange for the prosecution's agreement to waive jury-trial. Indeed, Weaver was present during the entire hearing on the matter and proceeded to waive his right to a jury trial immediately following his waiver of the right to appeal the pre-trial motions and the prosecutor's agreement to also waive jury trial. (14 PTRT 1, 5-7, 9 14.)

Fourth, Weaver does not claim, much less establish, that he would not have waived his right to a jury trial if the court had addressed the issue of waiver on the pre-trial motion rulings in a different manner. Fifth, Weaver fails to assert in this appeal which, if any, of the trial court's rulings on the pre-trial

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13. Because the right to appeal pre-trial motions is not a constitutional right (*Abney v. United States, supra*, 431 U.S. at p. 656), but rather is a creature of statute, an alleged violation is at most an error of state law. Therefore, *Watson* sets forth the correct standard for harmless error review of this issue.

motions at issue he wished to, but was precluded from challenging on appeal. Moreover, Weaver has not shown any prejudice from those rulings. There was no prejudicial error resulting in a miscarriage of justice in this case. (*People v. Watson, supra,* 46 Cal.2d at p. 821.)

Next Weaver claims that the trial court did not advise him that the right to a jury trial included the right to participate in selecting the jury. (AOB 31.) But as Weaver concedes, there is no requirement that a trial court advise a defendant specifically about his right to participate in jury selection. (AOB 32.) Nevertheless, Weaver argues that this Court should create a new rule and require trial courts to advise a defendant of his or her right to participate in jury selection, as "constitutionally mandated." He cites and relies on federal circuit court cases in support of his argument. (AOB 32-33.) Weaver's reliance is misplaced.

None of the cases Weaver cites were grounded in the United States Constitution, and none of the decisions resulted in such a rule in the federal courts. (*United States v. Gonzalez-Flores* (9th Cir. 2005) 418 F.3d 1093, 1102-1103 [although district court "should" inform defendants, court declines to impose absolute requirement of such a colloquy in every case]; *Spytma v. Howes* (6th Cir. 2002) 313 F.3d 363, 370 [although recommended, there is no federal constitutional requirement that a court conduct an on-the-record colloquy with the defendant prior to accepting the jury waiver]; *Marone v. United States* (2nd Cir. 1993) 10 F.3d 65, 67-68 [appellate court suggests district courts inform defendants of the fundamental attributes of jury trial]; *United States v. Robertson* (10th Cir. 1995) 45 F.3d 1423, 1432 [declining to issue a mandatory supervisory rule but urging district courts to inform defendants of the nature of jury trials before accepting waiver]; *United States v. Rodriguez* (7th 1989) 888 F.2d 519, 527 [lesser and even no warnings do not call into question the sufficiency of the waiver so far as the Constitution is

concerned, and state courts are not bound by circuit rules requiring interrogation of defendants].)

Here, Weaver's suggested requirements for an effective waiver are "too stringent for any situation. . . ." (*People v. Robertson* (1989) 48 Cal.3d 18, 36-38.) "[N]o waiver requires the court to explain every single conceivable benefit and burden of the choice being made." (*Ibid.*)

In addition, although not posited in the exact manner Weaver now erroneously claims it should have been, the trial court did in fact make it clear to Weaver that he had a right to take part in selecting the jury. Even though the issue of Weaver's absence from the hardship hearing was ultimately rendered moot when Weaver waived his right to a jury trial, and the hardship hearings were not held, the trial court advised Weaver that he had "every right" to "scrutinize" the court's rulings with regard to excusing potential jurors. Further, the court expressed concern about Weaver's choice to absent himself from the hearing as the trial court made rulings with regard to excusing potential jurors, particularly any Black jurors. Weaver indicated that he understood the trial court's concern about his being absent from the hearing. (13 PTRT 105.) Nonetheless, when the trial court asked Weaver if he was willing to waive his personal presence from the juror hardship hearings, Weaver responded, "Yes, your Honor, I am." (13 PTRT 106.)

Furthermore, the record establishes that Weaver was in court during argument of pre-trial motions, many of which involved jury selection and related jury matters. (8 PTRT 1, 105-106, 110, 115, 120, 135; 9 PTRT 1; 10 PTRT 1; 11 PTRT 1, 5-85; 12 PTRT 101, 103-116; 13 PTRT 105.) Thus, nothing in the record indicates Weaver was not participating in the selection of a jury prior to his decision to a waive a jury trial. Instead, the record supports the inference that Weaver knew he had the right to participate, and was in fact participating in jury selection.

Weaver has failed to demonstrate that the trial court erred by not stating with particularity that Weaver had the right to take part in jury selection. Moreover, he has failed to demonstrate prejudice as a result of the trial court's omission. (*People v. Watson, supra,* 46 Cal.2d at p. 821.)

The trial court in this case conducted an exhaustive and detailed voir dire and Weaver was present throughout (14 PTRT 16-61), Weaver repeatedly stated that he understood the trial court's advisements and wished to waive a jury trial (14 PTRT 21, 22, 23-24, 33, 35-36, 43, 44, 46-48), he was represented by two attorneys who had discussed jury waiver for months prior, explained the trial process with and without a jury to Weaver, had consulted with him, as well as with Weaver's father and other members of the legal community, prepared written waiver forms, all of which resulted in a record that establishes Weaver's choice to forego a jury was a tactical one (14 PTRT 14, 15, 48-49, 50-53; 4 CT 671-673).

As the United States Supreme Court stated in *McCann*,

> Simply because a result that was insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it.

(*Adams v. U.S. ex rel. McCann, supra,* 317 U.S. at p. 281.)

Because Weaver knowingly, intelligently and voluntarily waived his right to a jury trial, this claim should be rejected.

II.

WEAVER KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL ON THE SPECIAL CIRCUMSTANCE ALLEGATIONS

Weaver contends that the special circumstance findings and death sentence must be vacated because he was not advised of, and did not expressly waive his right to a jury trial on the special circumstance allegations. Weaver

claims the trial court's failure to obtain a separate personal waiver violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution. (AOB 37-62.) This Court has previously rejected claims such as Weaver's. Weaver presents no compelling reason for this Court to deviate from its prior holdings. Accordingly, Weaver's claim should be denied.

Whenever a special circumstance is alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. (Pen. Code § 190.4, subd. (a).) There is no requirement that a jury-trial waiver on special circumstance allegations be taken in accordance with a prescribed ritual, that is, a separate interrogation of a defendant about his special circumstance jury trial rights, as distinct from his other jury trial rights. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1105.) Rather, all that is required is that a valid waiver of the jury-trial right on a special circumstance actually cover the special circumstance. (*Id.* at p. 1105.)[14/]

This Court rejected a claim similar to that which Weaver makes here in *People v. Diaz* (1992) 3 Cal.4th 495. In *Diaz,* this Court held that, although a waiver of a defendant's right to have a jury determine the truth or falsity of alleged special circumstances must be made separate, and by the defendant personally, a defendant's awareness that the waiver applies to each aspect of the trial can be demonstrated by the record. (*Id.* at p. 565.)

The trial court in *Diaz* had explained to the defendant that the waiver of his right to trial by jury applied to "*all* aspects of his special circumstances case,

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14. In *Wrest,* this Court held that to the extent Court of Appeal decisions had read *People v. Memro* (1985) 38 Cal.3d 658, 700-705 to require a jury waiver to be taken in accordance with any particular procedure, such as a separate interrogation of the defendant, they were disapproved. (*People v. Wrest, supra,* 3 Cal.4th at p. 1105.)

from beginning to end." (*People v. Diaz, supra*, 3 Cal.4th at p. 565 [emphasis in original].) In addition, Diaz stated that he had discussed the matter "quite thoroughly" with his counsel. (*Ibid.*) Despite the fact that this Court found that the trial court's admonition in *Diaz* was "not a model of clarity," it was sufficient to advise the defendant that his waiver, which included "all aspects of guilt and penalty, included within it a waiver of the right to jury trial on the truth or falsity of the special circumstance allegation." (*Ibid.*)

Like the trial court in *Diaz*, the trial court here explained to Weaver that a waiver of jury was "for all triable issues" before the court, during both the guilt and penalty phases of trial. (14 PTRT 16-17.) Additionally, the court defined the triable issues in the guilt phase as whether the People proved their case beyond a reasonable doubt with regard to the first degree murder charge, "proof of a special circumstance" and the burglary and robbery charges. The trial court explained that if Weaver waived a jury, the court would determine "all legal findings" required in the [guilt] phase. (14 PTRT 17.) Also, similarly to the defendant in *Diaz*, defense counsel here had "spoken with" Weaver about jury waiver, and discussed the issue "at great length" with him. (13 PTRT 101; 14 PTRT 51.)

Moreover, unlike this Court's finding that the trial court's admonition in *Diaz* was "not a model of clarity," the trial court's inquiry and admonitions to Weaver in this case were detailed and exhaustive, far surpassing the requirement articulated in *Diaz*. (14 PTRT 6-61.)[15/] In light of the trial court's

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15. By comparison, the trial court in *Diaz* informed the defendant,

> "[Y]ou'll be giving up that right to have the jury in two different functions. First of all, first function is to decide the question of your guilt or innocence. Then the second function, similarly, assuming there are 12 of them and they would unanimously agree that you were guilty, then you would have 12 jurors who must unanimously agree as to the punishment. [¶¶]

detailed and exhaustive inquiry and admonitions, as well as Weaver's unequivocal and repeated statements of understanding and agreement, the record demonstrates Weaver understood that his jury waiver applied to "all aspects of his special circumstances cases, from beginning to end." (*People v. Diaz, supra*, 3 Cal.4th at p. 565.)

Contrary to Weaver's suggestion (AOB 52-56), the fact that the trial court later prepared a second set of written waiver forms in order to reaffirm the parties' intent with regard to Weaver's jury waiver to include one covering the special circumstance allegations, does not support finding any deficiency (7 RT 722-730). (AOB 52-56.)[16/] This is so because the trial court's initial advisement was proper.

Indeed, as the trial court noted during the subsequent hearing on the reaffirmation matter, the transcript demonstrated that during the taking of Weaver's initial jury waiver, the court had very carefully pointed out that Weaver was waiving jury for "all purposes and all findings in front of the

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> They have a choice, life without possibility of parole or death. . . . And you'll be giving up that right." Defendant answered, "I'm giving it up." The court asked defendant if he understood that the waiver applied to "both phases . . . of the special circumstances case." Defendant assented.

(*People v. Diaz, supra,* 3 Cal.4th at p. 564.)

16. In addition to the initial advisement of rights, during a later hearing to reaffirm Weaver's jury waiver, the trial court asked Weaver if at the time he originally waived jury, it had been his intention to waive on the special circumstances and if his attorneys had explained the waiver to him. Weaver answered that they had. (7 RT 728.) Notably, even now, Weaver does not assert that he was unaware that he was waiving his right to a jury trial on the special circumstance allegation or that he would have chosen to exercise his right to a jury with regard to the special circumstance allegation had the trial court's admonition been other than it was.

court." Thus, the colloquy comported with *Diaz*. (7 RT 722.)[17] Despite its initial "detailed waiver process," the trial court asked the parties if they wanted yet further recitation of jury trial rights. Defense counsel declined. Co-counsel observed that the trial court's "initial waiver was rather specific" as to Weaver's "right to a jury trial and other rights, constitutional rights encompassing that jury trial." (7 RT 730.) Accordingly, defense counsel considered the trial court's initial advisement complete.

Moreover, the trial court's reaffirmation is not evidence of reversible error. (*People v. Mason* (1991) 52 Cal.3d 909, 944.) Weaver's reliance on *United States v. Reyes* (9th Cir. 1979) 603 F.2d 69, for the proposition that the trial court's reaffirmation was not effective is misplaced. In that case, the Ninth Circuit addressed a federal rule that permitted the parties to consent to a jury of less than 12 members, if the parties stipulated in writing, and before a verdict was rendered. (*Id.* at p. 70; Fed. Rules Crim. P. 23, subd. (b).) In fact, it was only after Reyes had been convicted and during his sentencing hearing that the judge in that case obtained Reyes' personal and oral consent on the record. (*Id.*

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17. In addition, the trial court stated that it had relied on *People v. Simpson* (1991) 2 Cal.App.4th 228, 2 Cal.Rptr.2d 589 (cited with approval in *People v. Wrest, supra,* 3 Cal.4th at p. 1104). In that case, the Court of Appeal found that Simpson, "in a classic case of 'buyer's remorse,'" argued that the trial court erred by not taking a separate waiver of his right to trial by jury on the allegations relating to special circumstances. (*Id.* at p. 233.) Simpson had agreed to have the case submitted on the transcript of the preliminary hearing. (*Id.* at p. 234.) In exchange, the district attorney agreed not to seek the death penalty. (*Ibid.*)

The trial court advised Simpson that it was a "'virtual certainty that you would be found guilty of counts one through five of the charges against you in the information *and all the special allegations, including special circumstances allegations will be found true.*'" (*People v. Simpson, supra,* 2 Cal.App.4th at p. 235 [emphasis in original].) The Court of Appeal found that it was "abundantly apparent that appellant was made aware of his right to a jury trial as to *all* charges against him, (including the special circumstance and weapon use allegations). . . ." (*Id.* at p. 236 [emphasis in original].)

at p. 71.) The court held that, although an oral stipulation may, under certain circumstances, satisfy the Rule 23(b), it must appear from the record that the defendant personally gave express consent to the stipulation in open court, and the defendant's expression of consent on the record must appear at the time the stipulation is made, and not at some subsequent point such as a sentencing hearing. (*United States v. Reyes*, *supra*, 603 F.2d at p. 71.)

Reyes is distinguishable for two reasons. First, there is no federal rule at issue here, and in any event, decisions of the federal courts of appeal are not binding on this Court. (*People v. Seaton* (2001) 26 Cal.4th 598, 653; see also *People v. Williams* (1997) 16 Cal.4th 153, 190 [decisions of lower federal courts interpreting federal law are not binding on state courts].) Second, unlike the situation in *Reyes*, it appears on the record that the trial court here did obtain Weaver's jury-trial waiver on the special circumstances allegations prior to the verdict, in fact, prior to trial. (14 PTRT 17, 61.)

III.

THE PROSECUTOR'S COMMENTS ON WEAVER'S FAILURE TO PRESENT LOGICAL EVIDENCE WAS PROPER

Weaver contends that the prosecutor committed error by improperly shifting the burden of proof to the defense during his rebuttal closing argument, violating Weaver's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I of the California Constitution. (AOB 63-71.) Because the prosecutor's remarks were proper comment on the failure of Weaver to produce logical evidence, and did not suggest the Weaver had a formal burden of proof, this claim is meritless.

Prior to trial, the prosecution moved to exclude third-party culpability evidence. (1 CT 97-108; 8 PTRT 82-86.) The prosecutor advised the trial court he anticipated that Weaver would attempt to introduce evidence that

Byron Summersville was the killer. (1 CT 106.)

Weaver filed a reply, arguing that the prosecution had developed evidence that Summersville committed the murder. (2 CT 260-262.) Weaver further claimed that the admission of third party culpability evidence would consume almost no additional time, and would cast doubt on the prosecutor's case against him. (2 CT 262.)

During a hearing on the matter, defense counsel argued that there were too many factors involving Summersville to disregard him based on a motion in limine. (8 PTRT 82.) Defense counsel asserted that although the police thought Summersville was involved, he had never been charged. (8 PTRT 87.) Defense counsel argued that this was an issue for the jury. (8 PTRT 87-88.)

The trial court denied the prosecution's motion with regard to Summersville. (8 PTRT 88, 90.) The court observed that Summersville was of the same race as Weaver, had been in the same shopping center at the same time, was a friend who owned the vehicle that was used as the get-away car, whose fingerprints were on the car, and who may or may not have been thought to be an accessory at the beginning of the investigation. (8 PTRT 88.)

During the guilt phase of the trial, the parties stipulated to, and evidence was introduced, that indicated Weaver was living in an apartment leased by Byron Summersville at the time of the murder, and Summersville owned the vehicle Weaver used as the get-away car when he fled the scene. (2 RT 242-248, 326-327, 382-283, 401-402; 4 RT 555, 559.) The parties stipulated to the proffered testimony of Summersville's co-workers who would have testified about Summersville's physical appearance at the time of the murder, which was consistent with People's Exhibit No.17, a photograph of Summersville. (2 RT 383-384.)

In addition, witnesses saw Weaver riding as the passenger in a car the day of the murder, traveling through the parking lot of Shadowridge Jewelers,

or near the store itself, in the company of another man who was driving. (1 RT 184, 188 [Patricia Arlich], 195 [Kimberly Decker].) The prosecutor showed Summersville's photograph to several witnesses who testified they did not recognize Summersville as the man they saw in, near or fleeing the jewelry store May 6, 1992, and further, that it was Weaver and not Summersville they recognized as the passenger in the car riding in the parking lot earlier in the day. (1 RT 50-51 [Mary Deighton], 134 [Kari Machado], 154 [Tim Waldon], 201 [Kimberly Decker]; 2 RT 217-218 [Stephanie Swihart].)

Defense counsel began his closing argument by asserting that the issue in this case was whether Weaver was the "offender." (5 RT 666.) He argued that the eyewitness testimony identifying Weaver was "fraught with the potential for problems," and then challenged each witness' testimony. (5 RT 666-677.)

Defense counsel also argued that the hair found in the get-away car did not necessarily mean that Weaver was the "offender" in this case. He noted that the vehicle belonged Summersville, who was Weaver's girlfriend's sister's boyfriend, and the car was parked at the apartment where others had access to it. Defense noted that it was "interesting" that no hair comparisons were done on Summersville's hair. (5 RT 678.)

Defense counsel asserted that the police had been interested enough in Summersville to take photographs and fingerprint him. He claimed police were interested in Summersville for "good reason," because he was a young male Black, he had a ponytail, his car was used for the get-away to the apartment he leased and frequented overnight, the proceeds from the offense were found in his car, as was a bullet and Summersville's fingerprints, but not Weaver's. (5 RT 679.) Defense counsel also complained that Summersville was not included in any photo array or line-up. (5 RT 680.)

Defense counsel observed that no jewelry from the robbery was found on Weaver or in his apartment, no fingerprints were found in the store or in Summersville's car linking Weaver to the murder, no gun was recovered and there was no confession. (5 RT 681-682.) In addition, he argued that Weaver's conduct was that of an innocent man. (5 RT 683.)

Defense counsel concluded that he did not need to remind the court that the burden of proof "is forever upon the prosecution to prove their case beyond a reasonable doubt." He argued that without "corroboration" there remained a reasonable doubt, and the court should find Weaver not guilty. (5 RT 683.)

During rebuttal, the prosecutor addressed defense counsel's arguments, beginning with his last point. (5 RT 683-684.) The prosecutor noted the lengths defense counsel had gone to attack the witness identification testimony. He stated, "I kept waiting. I kept waiting for the answer that I think the court was probably waiting for from the defense, and that was, well, if it wasn't Latwon Weaver, just who the heck was it? Who was it?" (5 RT 684.)

After reviewing the evidence, the prosecutor summed-up by stating that he believed is was clear from the evidence that Weaver executed Michael Broome, and there was not any doubt. (5 RT 684-701.) He added that he had waited for defense counsel to offer the court an alternative, stating, "I suppose we just have this some other third person who committed this crime. The court has been offered absolutely no alternative, nor could they offer. . . ." (5 RT 701.)

At this point, defense counsel objected, claiming that the prosecutor was attempting to shift the burden of proof, "which of course is forever upon them." The prosecutor responded, "Not at all. I am commenting on his argument." (5 RT 701.) The court informed defense counsel that it "was well aware all elements remain as to the burden of proof on the People, but it is an argument of fact, so he may comment." (5 RT 701.)

Comments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible. (*People v. Medina* (1995) 11 Cal.4th 694, 755; see also *People v. Young* (2005) 34 Cal.4th 1149, 1195 [a prosecutor may comment that a defendant has not produced any evidence]; *People v. Pinholster* (1992) 1 Cal.4th 865, 948 [a prosecutor is permitted to comment on failure to produce logical evidence]; *People v. Bell* (1989) 4 Cal.3d 502, 539 [comment on the failure to call a logical witness is proper]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1236 [no error in the argument that " . . . if there has been some or is some defense to this case, you'd either have heard it by now or for some reason nobody's talking about it."]; *People v. Ratliff* (1986) 41 Cal.3d 675, 691 [no error in arguing, ". . . is there any evidence on the other side? Any evidence at all? None has been presented to you."].)

Here, contrary to Weaver's assertion that defense counsel only referred "briefly" to Summersville in his closing argument (AOB 65), Byron Summersville loomed large in this trial during pre-trial motions, the presentation of evidence, as well as during defense counsel's closing argument. (1 CT 97-108; 2 CT 260-262; 8 PTRT 82-90; 1 RT 50-51, 134, 184, 188, 195; 2 RT 217-218, 326-327, 382-383, 401-402; 4 RT 555, 559; 5 RT 678-680.) Indeed, defense counsel challenged the unequivocal eyewitness identification of Weaver by eleven witnesses, suggested Weaver was innocent, and insinuated Summersville was the murderer, but offered no evidence in support. (5 RT 666-674, 678-680, 683.) Therefore, the prosecutor's comments on the absence of logical evidence was permissible. (*People v. Medina, supra,* 11 Cal.4th at p. 755.)

Moreover, when the prosecutor pointed out the fact that the defense failed to present any evidence that someone other than Weaver was the murderer, he in no way suggested that Weaver had a formal burden of proof.

(*People v. Ratliff, supra,* 41 Cal.3d at p. 691; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1340 [a distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his innocence].)

In any event, if there was error, it was harmless. To prevail on a claim of prosecutorial error based on remarks to a jury, the defendant must show a reasonable likelihood the trier of fact understood or applied the complained of comments in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; see also *People v. Bolton* (1979) 23 Cal.3d 208, 214 [in the absence of prejudice to the fairness of a trial, prosecutor error will not trigger reversal].)

In this case there was no jury; a judge was the trier of fact. Not only is a judge presumed to have properly followed established law (*People v. Scott* (1997) 15 Cal.4th 1188, 1221), the judge in this case stated the correct law, and that he was aware of it, that is, the prosecution retained the burden of proof, and defense counsel reminded the judge twice. (5 RT 683, 701.)

The law also presumes a difference between lay jurors and judges, and recognizes that judges possess a trained and disciplined mind which enables them to discriminate between that which they are permitted to consider and that which they are not, rendering them entirely uninfluenced by the irrelevant prejudicial matters within their knowledge. (*People v. Albertson* (1944) 23 Cal.2d 550, 577.) Because the prosecutor was arguing to a judge who was aware of the law, there is no reasonable likelihood the judge understood or applied the prosecutor's comments in an improper or erroneous manner. (*People v. Frye, supra*, 18 Cal.4th at p. 970.)

In any event, the evidence against Weaver was overwhelming. Nine witnesses unequivocally identified Weaver (1 RT 45-46, 108, 129, 157, 183,

186-187, 197-198; 2 RT 215, 233, 259), a surveillance tape memorialized Weaver murdering Michael Broome (1 RT 57-71), he was followed to his home after fleeing the scene (2 RT 242-250), some of the jewelry he took from the store was found in the get-away car and more where Weaver was seen hiding it shortly after the murder (1 RT 54-55; 2 RT 296, 309, 392), and the clothing Weaver wore during the murder was found in his apartment and contained gunshot residue (3 RT 518; 4 RT 557). In light of these facts, there is no possibility that the prosecutor's comments prejudiced Weaver.

IV.

WEAVER'S TRIAL COMPORTED WITH THE MANDATES OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS, AND THUS, THERE WAS NO ERROR OR CONCOMITANT PREJUDICE

Weaver contends that the cumulative effect of alleged errors in the guilt phase of his trial deprived him of his rights to due process, a fair trial, and a reliable sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I of the California Constitution. (AOB 72.) Because there was no error, there was no prejudice, and Weaver's contention should be rejected. (*People v. Bolin* (1998) 18 Cal.4th 297, 335; see also *People v. Carey* (2007) 41 Cal.4th 109, 137 [where the Court found no errors, and thus no cumulative prejudice].)

V.

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE

Weaver contends that the admission of victim impact evidence during the penalty phase of his trial violated state law and his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution. (AOB 73-153.) Weaver's broad

federal and state constitutional attacks on victim impact evidence are contrary to United States Supreme Court precedent and the decisions of this Court. As for Weaver's complaints about particular witness testimony, he forfeited these claims when he failed to object in the trial court. In any event, Weaver's claims are meritless as the victim impact evidence was properly admitted.

The United States Supreme Court has concluded that the Eighth Amendment does not pose a *per se* bar to the introduction of victim impact testimony. (*Payne v. Tennessee* (1991) 501 U.S. 808, 827, [111 S.Ct. 2597, 115 L.Ed.2d 720].) The high court reasoned that a State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the trier of fact's decision as to whether or not the death penalty should be imposed. (*Ibid.*)

Shortly after *Payne* was decided, this Court decided that photographs of crime victims while they were alive had been properly admitted under *Payne*. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) After observing that the "circumstances of the crime" was not limited to merely the immediate temporal and spatial circumstances of the crime, but also extended to that which materially, morally, or logically surrounds the crime, this Court held the photographic evidence was also admissible pursuant to Penal Code section 190.3, factor (a), as "circumstances of the crime." (*People v. Edwards, supra*, 54 Cal.3d at pp. 833-835.) Moreover, a trier of fact is mandated to consider the circumstances of the crime in making its determination whether to impose the death penalty. (Pen. Code, § 190.3 ["In determining the penalty, the trier of fact *shall* take into account any of the following factors if relevant:"] emphasis added.)

> "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community

is relevant and admissible as a circumstance of the crime under section 190.3, factor (a)."

(*People v. Kelly* (2007) 42 Cal.4th 763, 793.)

As this Court observed in *Edwards*, citing its earlier decision in *People v. Haskett* (1982) 30 Cal.3d 841, although appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a trial, at the penalty phase a fact finder decides a question, the resolution of which turns not only on the facts, but on a moral assessment of those facts as they reflect on whether defendant should be put to death. (*People v. Edwards, supra*, 54 Cal.3d at p. 834.) Therefore, it is not only appropriate, but necessary, that a fact finder weigh the sympathetic elements of defendant's background against those that may offend the conscience, and in this process, one of the most significant considerations is the nature of the underlying crime. (*Ibid.*)

Since *Edwards*, this Court has continued to uphold the propriety of victim impact evidence. (*People v. Robinson* (2005) 37 Cal.4th 592, 650; *People v. Roldan* (2005) 35 Cal.4th 646, 730-731; *People v. Panah* (2005) 35 Cal.4th 395, 494-495; *People v. Benavides* (2005) 35 Cal.4th 69, 107; *People v. Brown* (2004) 33 Cal.4th 382, 396-398 (*Brown II*); *People v. Pollock* (2004) 32 Cal.4th 1153, 1181.) In light of this Court's well-reasoned and established precedent, Weaver's argument that this Court should find *Payne* and *Edwards* were wrongly decided are unpersuasive and should be rejected. (AOB 136.)

Beyond challenging the precedent permitting admission of victim impact evidence, Weaver also contends the trial court erred in admitting the evidence because the trial court misunderstood and misapplied the law. (AOB 103.) The record belies his contention.

On November 24, 1992, the prosecution filed a notice of intention to introduce evidence in aggravation, including testimony from nine witnesses regarding victim impact evidence. (2 CT 113-114.) On December 4, Weaver

filed a motion to exclude evidence of victim impact, arguing that the prosecution's notice and discovery were inadequate and that the trial court should exclude such evidence because it violated the United States and California Constitutions. (2 CT 296-304.) On the same day, the prosecution filed a motion in support of the admission of victim impact evidence. (2 CT 310-316.)

On December 9, 1992, Weaver filed a reply, again arguing that the prosecution's notice was inadequate, that the testimony from Michael Broome's family members would inflame the passions and emotions of the jury, prejudice Weaver, and further, asked the trial court to strike the prosecution's notice of intent to introduce aggravating evidence. (3 CT 365-370.)

On December 10, the trial court held the first of three hearings on the matter of victim impact evidence. (7 PTRT 2, 27.) After the parties argued their respective positions, the trial court noted that it was "conversant" with the United States Supreme Court holding in *Payne v. Tennessee, supra*, 501 U.S. 808 (*Payne*) and had done an "analysis" of this Court's opinion in *People v. Edwards*, *supra*, 54 Cal.3d 787 (*Edwards*). (7 PTRT 46.) After briefing the state of the law with regard to *Payne* and *Edwards* on the record, the trial court ruled that the victim impact evidence was admissible, and the prosecution was to provide Weaver with notice as to exactly what evidence they were going to present at the penalty phase. The court observed that it would be better able to determine if the prosecution had "overreached" at that time. (7 PTRT 53.) The court stated that it would be "extremely cautious" to avoid "overuse" and "redundant use." (7 PTRT 54.)

On December 15, the prosecution filed an amended notice of intention to introduce evidence in aggravation. This notice listed thirteen potential victim impact witnesses. (3 CT 495-503.)

On January 9, 1993, the trial court held the second hearing on the matter.

(9 PTRT 6.) The court stated that the prosecution was going to be permitted to present victim impact evidence within the limitation the court had indicated earlier, observing that "a few [witnesses] would be reasonable and that a lot would be unreasonable." The court reserved a ruling on the exact scope of the victim impact evidence until a subsequent hearing. (9 PTRT 43.)

A few days later, on January 12, the trial court conducted the third hearing. (10 PTRT 28.) Weaver renewed his objection to the admission of any victim impact evidence. (10 PTRT 31.) At this time, the prosecutor advised the court that he expected to call six witnesses, the three percipient victim witnesses, Michael Broome's wife, his parents and possibly one of his brothers. (10 PTRT 33.) The trial court ruled that a spouse or a parent fell with the *Edwards* framework and that permissible victim impact evidence would be addressed later on a "per witness" basis. (10 PTRT 34-35.)

Before the penalty phase began, Weaver again renewed his objection to the introduction of victim impact testimony. (7 RT 734-735.) Weaver claimed that the evidence proposed by the prosecution exceeded the scope and breadth of the victim impact evidence that was permitted in *Payne* and *Edwards*. (7 RT 734-735.)

The trial court reconsidered its earlier ruling and again summarized the law, noting with particularity that irrelevant information or inflammatory rhetoric that diverts a jury's attention from its proper role or invites an irrational purely subjective response should be curtailed. (7 RT 736-741.) The court observed that Weaver had waived a jury trial, but that as a fact-finder, the trial court was subject to the same limitation. (7 RT 741.) The court added that some of the risks of an overly emotional or irrational response were not present in this case because the trial court was experienced with homicide cases and was less likely to permit irrationality into an analysis of evidence. (7 RT 741-742.) The court then denied Weaver's motion. (7 RT 742.)

The trial court ruled that the prosecution could introduce victim impact evidence within limits, and the court would overrule any objection to such evidence. However, if the evidence appeared cumulative, repetitious or "to impugn" some improper reaction from the court, the court would entertain an objection. The trial court permitted Weaver's general objection to victim impact evidence to be a continuing one. (7 RT 742.) The trial court also clarified that its ruling prohibited opinions by witnesses about the crime, the defendant or the appropriate sentence. (7 RT 742.)

As detailed in the Statement of Facts above, the prosecution presented six witnesses during the penalty phase, three surviving victims of the robbery, one by stipulated statement, and three of Michael Broome's family members, Michael's wife, his mother and one of his brothers. (7 RT 757-758, 813-814, 834, 840, 853.) Their testimony consumed 93 pages of a 1,466-page trial transcript. Weaver presented his evidence in mitigation by calling 16 witnesses who gave testimony that consumed 359 pages of the Reporter's Transcript. (8 RT 864-1003; 9 RT 1007-1162; 10 RT 1164-1229.)

Before the judge rendered his decision, he noted that he had limited the amount of victim impact evidence to comport with this Court's decision in *Edwards* and the United States Supreme Court decision in *Payne*. The judge considered only direct victim impact evidence which logically showed the harm caused by the defendant under Penal Code section 190.3, factor (a). (12 RT 1360.)

The judge observed that evidence that was probative was admitted and that which was cumulative or not relevant was not. In addition, items not deemed a direct result of the harm caused by the defendant were either not admitted or given no weight by the court. The judge found none of the victim impact evidence overly emotional, inflammatory, and received no evidence of a suggested penalty. Again citing his years of judicial experience, the judge

noted that emotional evidence did not cause him to react with a rash or purely subjective response or detract from the reliability of the result based on victim impact evidence. (12 RT 1361.)

Weaver argues the trial court wrongly believed it was "obligated" to admit and consider victim impact evidence and misunderstood its discretionary power. (AOB 103.) In support of this contention, Weaver cites the trial court's following statement:

> [F]or purposes of review, newer changes in the law permit victim impact evidence[,] [as it no longer violates] the Eighth Amendment of the U.S. Constitution, Payne versus Tennessee, and the California Supreme Court case of People versus Edwards. These changes in the law, which are recent, gave this court not only the ability, but also the mandate to consider [victim impact] evidence. It is this change in the law that would have caused this court to make a different decision if it were not the law. If for some reason that law on victim impact evidence is changed in the future, any reviewing court should know that absent the strength and force of the extremely high level and heavy weight of such evidence, this court would have reached a different result.

(12 RT 1371.)

The record belies Weaver's contention that the trial court wrongly believed that it was "obligated" to admit and consider victim impact evidence and misunderstood its discretionary power. The trial court considered pleadings from both parties, held three hearings on the matter, permitted the parties to argue their respective positions, and orally summarized the applicable law in detail twice before making its ruling to admit victim impact evidence and placing limits on the scope of the evidence. (7 PTRT 2, 27, 46, 54; 9 PTRT 6, 43; 10 PTRT 28, 31, 34-35; 7 RT 736-742.) In addition, before rendering its decision, the court reiterated that it had exercised its discretion by limiting the scope of victim impact testimony. (12 RT 1360.) The record aptly demonstrates that the court was fully cognizant of, and exercised its discretion.

The trial court's statements that changes in the law permitted and

mandated the court to give full consideration to victim impact evidence, and that it might have made a different decision in the absence of such evidence (12 RT 1371), was no more than acknowledgment that the court understood the law and its duty to consider all the circumstances of Weaver's crime, and after having done so, found the evidence powerful. (See *People v. Roldan, supra,* 35 Cal.4th at p. 725.) The trial court found that the victim impact evidence in this case had "strength and force" and was of an "extremely high level" of "heavy weight" (12 RT 1371.)

Weaver also complains about specific victim impact testimony. (AOB 111-114,122-124, 125-127, 130-131, 132-133, 134.) Weaver forfeited any claim of error with regard to specific testimony when he failed to object in the trial court. (Evid.Code, § 353, subd. (a); *People v. Robinson, supra,* 37 Cal.4th at p. 652; *People v. Roldan, supra,* 35 Cal.4th at p. 732; *People v. Benavides, supra,* 35 Cal.4th at p. 106; *People v. Pollock, supra,* 32 Cal.4th at pp. 1181-1182; *People v. Crew* (2003) 31 Cal.4th 822, 845.)

Weaver's failure to object to specific testimony is particularly significant in this case, as his continuing objection was based only on victim impact evidence *generally*, and the trial court explicitly invited Weaver to voice additional specific objections to any evidence. (7 RT 742.) Weaver failed to do so, and therefore, forfeited the specifics of this claim, preserving only his objection to victim impact evidence generally.

In any event, Weaver's contention that he was prejudiced by the admission of various victim impact testimony is without merit. Weaver waived a jury trial. The law presumes a difference between lay jurors and judges, recognizing that judges possess a trained and disciplined mind which enables them to discriminate between that which they are permitted to consider and that which they are not. (See *People v. Albertson, supra,* 23 Cal.2d at p. 577.) This allows judges to draw conclusions entirely uninfluenced by the irrelevant

prejudicial matters within their knowledge. (*Ibid.*) Moreover, as a general rule, this Court will presume that a trial court has properly followed established law in the absence of a showing of error in the record. (*People v. Scott, supra,* 15 Cal.4th at p. 1221.) Indeed, the trial judge hearing the victim impact evidence in this case had over fourteen years of experience and had presided over a number of homicide cases and was not prone to allowing irrationality into his analysis of evidence. (7 RT 741-742.)

In this case, the judge stated that he was following the law as set forth in *Edwards*, *Payne*, and Penal Code section 190.3, factor (a). Any potentially emotional evidence did not cause the trial court to react with a rash or purely subjective response or detract from the reliability of the result based on the victim impact evidence. (12 RT 1361.) Because this case was tried before a judge, even assuming erroneous admission of evidence, Weaver's claim of prejudice are unfounded, and should accordingly be rejected. (*People v. Albertson, supra*, 23 Cal.2d at p. 577; *People v. Scott, supra,* 15 Cal.4th at p. 1221].)

Weaver also asserts that the victim impact testimony in this case was unfairly prejudicial because of its "sheer volume." (AOB 108-110.) Weaver is incorrect because the victim impact evidence was not unduly lengthy, nor did it entail numerous witnesses. The prosecution called only five witnesses, two of them direct victims of Weaver's criminal conduct, and three of Michael's family members. The prosecution presented the statement of another victim that consisted of only one paragraph. This Court has repeatedly approved multiple witnesses testifying as to the impact of a defendant's crimes on victims. (*People v. Huggins* (2006) 38 Cal.4th 175, 236-238 [no due process violation where seven to eight witnesses testify]; *People v. Panah, supra,* 35 Cal.4th at p. 416 [no due process violation where five family members testify]; see also *People v. Boyette* (2002) 29 Cal.4th 381, 440-441 [seven family

members testify about impact of murder of two victims];see also John H. Blume, "Ten years of *Payne*: Victim Impact Evidence in Capital Cases," 88 Cornell L. Rev. 257, 270 (2003) [most states allowing victim impact evidence place no limit on the number of witnesses].)

Moreover, in contrast to the prosecution's five testifying witnesses, Weaver presented the testimony of sixteen witnesses during the penalty phase. (8 RT 864-1003; 9 RT 1007-1162; 10 RT 1164-1229.) Just as a jury must be allowed to consider mitigating evidence introduced by a defendant, the prosecution has a legitimate interest in counteracting that mitigating evidence with evidence in aggravation, that is, the specific harm caused by the crime in question. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

The victim impact evidence in this case properly focused on Michael Broome's life, the pain his death caused his family and friends, and the impact testimony typical of the victim impact evidence this Court has routinely permitted. (*People v. Kelly, supra,* 42 Cal.4th at p. 793.) For instance, Michael Broome's wife's testimony about the impact of his death on his children (7 RT 773-773; AOB 109-110), was admissible and proper. (*People v. Panah, supra,* 35 Cal.4th at p. 495 [the law does not require a witness to restrict their testimony to the impact on themselves, omitting mention of the impact on other family members].) Moreover, this Court has permitted testimony similar to that presented here regarding grave-site visits (7 RT 807), the impact of murder on holidays and children (7 RT 780, 784-786, 807-810), as well as the mental and emotional conditions resulting from a murder (7 RT 806, 810, 834, 845-846, 853). (*People v. Jurado* (2006) 38 Cal.4th 72, 133-134.)

Weaver contends that some of the victim impact testimony in this case improperly characterized Weaver, his crime and included imagined re-

enactments of the crime.[18] (AOB 122-124.) Specifically, Weaver complains about Michael Broome's wife's testimony wherein she stated that she imagined what her husband had been feeling at the time of the shooting, that the crime was "so cruel and cold" and that "[e]ven a dog stops what they're doing and comes over to lick your wounds if you're crying" (7 RT 805). (AOB 126.) Contrary to Weaver's assertion, Annette Broome's testimony demonstrated the "immediate effects of the murder," that is, "understandable human reactions" that accompany learning of the brutal and senseless murder of a loved one. (*People v. Wilson* (2005) 36 Cal.4th 309, 357; *People v. Brown, supra,* 33 Cal.4th at p. 398.)

In addition, Weaver complains about Michael Broome's wife's testimony regarding her explanation of his death to her young son, telling the child, "'[a] bad man shot Daddy,'" and when the boy did not understand, she repeated, "'[t]he bad man killed Daddy.'" (7 RT 779). (AOB 125-126.) Contrary to Weaver's assertion, Annette Broome attributing the loss of her son's father to a "bad man" was in no way inflammatory. Rather, it was a simple statement of fact, intended to accommodate the limited ability of a young child to understand the loss of his father. A mother having to explain the death of his father to a young child is but one more difficulty faced by those who lose loved-ones to murder. (*People v. Brown, supra,* 33 Cal.4th at p. 398 [in the case of murder, the "harm caused" will first and foremost be suffered by surviving family members].)

Furthermore, the description of the man who murdered Michael Broome in cold-blood as "bad" was an understatement in light of Weaver's crime, the

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18. To the extent Weaver relies on lower federal court decisions in support of his arguments, this Court is not is bound by decisions of the lower federal courts, even on federal questions (AOB 120-121, 125-126). (*People v. Avena* (1996) 13 Cal.4th 394, 431; *People v. Zapien* (1993) 4 Cal.4th 929, 989.)

particulars of which the trial court was already well aware, and ultimately characterized in far more harsh terms. (12 RT 1358 ["callous"] [a violation of basic notions of fair play], 1359 ["unjustified," "senseless," a purposeful execution], 1360 [Weaver "terrorized" his victim].) Annette Broome's testimony did no more than remind the trial court that the victim was an individual whose death represented a unique loss, and it was not "so unduly prejudicial" as to render the trial "fundamentally unfair," nor did it invite "a purely irrational response." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 793.)

In addition, Weaver asserts that Annette Broome's opinion of Mr. Weaver as a "bad man" was an impermissible comment on his lack of worth as a human being, and "pitched" the ultimate question of whether the court should kill the bad man because he killed a good man. (AOB 127.) Weaver's argument is meritless. This Court has found that nothing in *Payne*, or its own cases, that prohibits comparing the victim and the defendant. (*People v. Kelly, supra*, at p. 799.)

Weaver asserts that the testimony of Michael Broome's mother, Mary Broome, was so inflammatory, that emotion reigned over reason. (AOB 14.) Although emotional, Mary Broome's testimony was not surprising, shocking or inflammatory. It was instead, a tragically obvious and predictable consequence of Weaver's crime. (*People v. Sanders* (1995) 11 Cal.4th 475, 550.)

Weaver complains particularly about Michael Broome's mother's testimony, wherein she had voiced concern for her son during the time of the Los Angeles riots (7 RT 819), and Weaver intimates that her testimony raised the specter of racial discrimination (AOB 132). But nothing in Mary Broome's testimony suggested the court should impose the death penalty for racial reasons. (*People v. Kelly, supra*, at p. 799 [finding a similar argument "specious"].)

Testimony about the Broome family's move to California to open a business and because of safety concerns (7 RT 762-766; AOB 133-134), was proper evidence of Michael Broome's hopes and fears. (*People v. Raley* (1992) Cal.4th 870, 917.) Testimony about the effects of Michael Broome's murder on the business community in New Jersey, where he had previous business ties and where his family stilled lived (7 RT 759-760, 824-825; AOB 133-134), was proper evidence of the effect of his loss on friends, loved ones, "and the community as a whole." (*People v. Marks* (2003) 31 Cal.4th 197, 236.)

Weaver complains about Annette Broome's testimony concerning a bomb threat at the court house that took place during the trial, asserting it did not relate to his culpability. (AOB 135.) But Weaver's murder of her husband was responsible for Annette Broome's *reaction* to the bomb scare. Michael Broome's wife and her children lived in fear since his murder. (7 RT 804-805.)

Weaver contends that the victim impact testimony was unfairly prejudicial because of the absence of any aggravating evidence, other than the circumstances of the crime. (AOB 115.) Weaver asserts that the specific circumstances of this murder did not "dilute the prejudicial effect" of the victim impact testimony. In support of this contention, Weaver cites evidence that he was nervous and under the influence of alcohol during the robbery, and that the killing was the result of a "single shot fired during the course a robbery." (AOB 117.) Despite Weaver's attempt to minimize his culpability, the circumstances of the crime were such that the presentation of victim impact evidence did not result in prejudice.

The trial court found nothing in the evidence that suggested an accidental or "reaction-type impulse" shooting. (12 RT 1359.) Rather, the evidence established that Weaver targeted Michael Broome with particularity and intended to kill him. Mary Deighton observed that Weaver displayed a different attitude toward Broome than he did his three female victims; Weaver

was hostile toward Broome. (7 RT 840.) Moreover, after Weaver shot his unresisting and cooperative victim, Weaver did not even look at him as he lie begging for help, his lungs filling with blood and sounding as though he was drowning. (7 RT 841-844.) Instead, Weaver concerned himself with taking as much loot as he could gather. (4 RT 575-576.)

As for Weaver's claims of nervousness and being under the influence of alcohol, Mary Deighton never saw Weaver experiencing any difficulty with his balance or coordination; she understood what Weaver was saying when he spoke, and his words were not slurred. (10 RT 1233-1234.) Weaver was facing Michael Broome when he shot him, pointing the gun directly at Broome, and Weaver cocked the gun and paused before he pulled the trigger. (10 RT 1235-1236.)

Detective Phelps also testified that, shortly after the murder, Weaver showed no signs of a lack of coordination or balance. (10 RT 1240.) Phelps noted that Weaver was able to carry on an intelligent conversation; he was understandable, responded appropriately to questions, and his speech was not slurred. Weaver appeared to be in possession of all his mental faculties, understood what the detective was saying and never asked him to repeat his statements. (10 RT 1241.) Weaver was "Laid back," not nervous and did not shake. (10 RT 1242.)

Moreover, Weaver displayed common sense in an effort to avoid detection by changing his clothing and hiding the stolen jewelry and disposing of the gun after the murder. (9 RT 1153-1154.) In addition, Weaver said that he was going to keep denying that he "did it" until he got out of prison and his parents "buy me some kind of good lawyer." Weaver never displayed remorse. (9 RT 1140-1150, 1161-1162.)

Contrary to Weaver's assertion, the circumstances of this crime entailed far more than a "single gunshot felony murder." (AOB 179.) Weaver planned

the robbery. He armed himself with a loaded gun and "cased" the jewelry store for some time prior to robbing it. He targeted Michael Broome and killed him senselessly in cold-blood. After shooting Broome, Weaver concerned himself with gathering loot and avoiding detection. (1 RT 31-33, 179-183, 194-197; 2 RT 213, 215, 228, 231, 235; 4 RT 565-567, 571-572, 579-580; 9 RT 1140-1150, 1153-1154, 1161-1162.) In light of the circumstances surrounding Weaver's murder of Michael Broome, the victim impact evidence presented in this case was not unduly prejudicial.

The trial court did not err in admitting the victim impact evidence, and even assuming error, Weaver was not prejudiced given that his penalty determination was by a judge as opposed to a jury.

VI.

THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED MITIGATING AND AGGRAVATING EVIDENCE

Weaver contends that the trial court improperly considered mitigating evidence as aggravating evidence, violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution. (AOB 154-171.) Weaver's contention is belied by the record. The trial court's statements, read in context, demonstrate that the trial court properly considered only the appropriate Penal Code section 190.3 factors in aggravation before it rendered its penalty verdict.

During the guilt phase of the trial, evidence was introduced that indicated Weaver was living in an apartment leased by Byron Summersville, used Summerville's vehicle as the get-away car when he fled the scene of the murder, and that duct tape and spray paint were found in the vehicle. (2 RT 326-327, 401-402; 4 RT 554-555, 559.) Weaver said Summersville planned the robbery, and it was Summersville's idea to buy duct tape and to spray paint

to cover the jewelry store's video surveillance camera. Weaver claimed that it was Summersville's gun he used during the robbery, and Summersville purchased the bullets. (8 RT 1136.) In addition, witnesses saw Weaver riding as the passenger in a car traveling through the parking lot of Shadowridge Jewelers, or near the store itself, in the company of another man who was driving the car. (1 RT 179-184, 194-197.)

During the penalty phase, Weaver also presented extensive testimony regarding his family background. (8 RT 854-1005; 9 RT 1006-1162; 10 RT 1164-1229.) During closing argument, the prosecutor argued, among other things, that Weaver's family background offered him no "excuse" for his crime. (11 RT 1251-1254.)

Before rendering its penalty verdict, the trial court stated that because there had been no jury, and therefore no independent review, it would recite the facts pertinent to its penalty decision in detail. (12 RT 1338-1339.) The trial court also set forth the Penal Code section190.3 factors and addressed each in turn. (12 RT 1339-1367.)

Beginning with mitigating factors (b) and (c), the trial court observed Weaver had not been involved in prior violent criminal activity and had no prior felony convictions. (12 RT 1339-1340.) Under factor (d), the trial court found no evidence of extreme mental or emotional disturbance. (12 RT 1342.) As for factor (e), the trial court found that Michael Broome was not a participant in Weaver's homicidal act, and therefore, factor (e) was not applicable. (12 RT 1343.) As for factor (f), the trial court found no moral justification for Weaver's conduct. (12 RT 1343.) Considering factor (g), the trial court found that, although there had been some evidence of planning with Summersville, there was no evidence of extreme duress, and therefore, there was no mitigation under factor (g). (12 RT 1340-1342.) Considering factor (h), the trial court found no evidence that Weaver suffered from a mental disease or defect

affecting Weaver's ability to appreciate the criminality of his conduct, but the court did consider evidence that Weaver might have been drinking as mitigating. (12 RT 1344-1347.) With regard to factor (i), the trial court noted that Weaver was old enough to know right from wrong and have had extensive moral training, which was provided by a loving supportive family. Although the trial court considered Weavers age, it was not a "weighty mitigating or aggravating factor." (12 RT 1343-1344.)

The trial court also noted and summarized the numerous witnesses and reports Weaver submitted pursuant to section 190.3, factor (k), including testimony regarding Weaver's family and personal background. (12 RT 1347-1352.) The trial court noted the "joint planning" involving Summersville, previously found not to be a matter of substantial domination. (12 RT 1349.) The trial court found that Weaver had "over-emphasized" Summersville's influence and impact, stating there was no evidence to support Weaver's "minimizing" statements, rejecting as evidence of mitigation Weaver's attempts to minimize his culpability by blaming Summersville. (12 RT 1352-1354.)

The trial court considered testimony that Weaver was religious and had been described as caring, giving and peaceful. (12 RT 1350-1351.) The trial court considered evidence that Weaver was not associated with gangs and was of low, average or dull intelligence. (12 RT 1351.)

The court rejected Weaver's evidence offered by Doctors MacLaren and Rabiner that the shooting was merely impulsive, at less than a conscious level, as contrary to the evidence and purely speculative. (12 RT 1352.)

After considering the evidence in mitigation, the trial court considered the facts and circumstances of Weaver's crimes. (12 RT 1357.) The trial court noted that this was not simply a murder in the course of a robbery, but as Weaver described, "something different and suspenseful to do." (12 RT 1357-1358.) The court found that Weaver's statement demonstrated a callous

indifference to a robbery victim "looking down the barrel of a .44 Magnum pistol." (12 RT 1358.)

As evidence of the trial court's alleged error, Weaver cites one statement the trial court made while enumerating the aggravating factors and other pertinent evidence. But Weaver cites only a portion of the court's statement, claiming the trial court stated, "'Defendant was given the benefit of a loving, caring, religious family, but turned his back on that wonderful supportive background.'" (AOB 157-158.) In fact, the court's entire statement was,

> Defendant was given the benefit of a loving, caring, religious family, but turned his back on that wonderful supportive background, *and joined with a man he knew as a drug dealer, Byron Summersville.*

(12 RT 1358 (emphasis added).)

The court found "of grave significance" Weaver's violation of "the most base of fair play notions," that is, he shot an unarmed, defenseless human, who was cooperating with Weaver's demands, his hands raised in complete submission. (12 RT 1358.) Weaver cocked the gun and hesitated before pulling the trigger. (12 RT 1358-1359.) The trial court found that the murder was a "totally unjustified and senseless taking of another human life." (12 RT 1359.) The trial court stated,

> This callousness is compounded by the defendant's actions immediately after the shooting. ¶ Nothing confirms the purposeful execution any more than the defendant's actions immediately afterwards. He continued waving the gun at other store clerks, kept a hold of the hostage until needing to release her to get the jewelry and leave. He continued in his demands without hesitation. ¶ He was completely unaffected by the purposeful shooting, although one witness testified of nervousness, another testified he continued without hesitation. ¶ Nothing in the evidence suggests any accidental or reaction-type impulse shooting. The type of pistol used, a .44 magnum pistol used at point blank range is simply and plainly a killing tool. It can fully be expected to render a fatal shot.

(12 RT 1359.)

The trial court noted that while Michael Broome lay begging for help, Weaver continued the robbery as if nothing happened. (12 RT 1359-1360.) During the time Weaver was dealing directly with Michael Broome, Weaver "showed hatred." He "showed anger toward Michael Broome," and during the robbery Weaver terrorized Lisa Maples, who was a helpless, innocent customer, grabbed from behind by the Weaver, who had a .44 magnum pistol "rammed up against her head." (12 RT 1360.) The trial court also reviewed and considered the victim impact evidence. (12 RT 1360-1367.)

Before issuing its ruling, the trial court explained that it was aware that an aggravating factor is any fact, condition, or event attending the commission of the crime that increases the guilt or enormity or adds to its injurious consequences, which is above and beyond the elements of the crime itself, and a mitigating circumstance is any fact, condition, or event which as such does not constitute justification or excuse for the crime, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. (12 RT 1368-1369.) The court observed that the weighing of aggravating and mitigating circumstances was not a mere mechanical counting of factors, but rather, it was free to assign whatever moral or sympathetic value it determined was appropriate. (12 RT 1369.)

Penal Code section 190.3 instructs the trier of fact to consider, take into account and be guided by the aggravating and mitigating circumstances referred to in section 190.3, and impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. (Pen. Code, § 190.3; see also *People v. Pollock, supra,* 32 Cal.4th at p. 1189.)

Additionally, pursuant to section 190.3, factor (a) the trier of fact may consider the circumstances of the crime when determining the penalty in a capital case. (*People v. Blair* (2005) 36 Cal.4th 686, 748-749 [under factor (a), the trier of fact may consider, in aggravation, evidence relevant to "the

circumstances of the crime" for which the defendant was convicted].) The circumstances of the crime extends to "'[t]hat which surrounds materially, morally, or logically' the crime." (*Id.* at p. 749, quoting *People v. Edwards, supra,* 54 Cal.3d 787, 833.) The trial court's recitation of the facts in this case illustrates the court's consideration of and reliance on the "circumstances of the crime" pursuant to section 190.3, factor (a) as aggravating and that it ruled accordingly (12 RT 1357-1360). (*People v. Blair, supra,* 36 Cal.4th at pp. 748-749.)

Contrary to Weaver's contention, the trial court's reference to Weaver's family background was not consideration of mitigating evidence in aggravation. (AOB 157-158.) The trial court observed that "Defendant was given the benefit of a loving, caring, religious family, but turned his back on that wonderful supportive background, and joined with a man he knew as a drug dealer, Byron Summersville." (12 RT 1358.) In fact, the trial court specifically noted that it considered evidence of Weaver's family background as mitigating. (12 RT 1347-1349.) Rather, the court's statement demonstrated that it was weighing the mitigating evidence of Weaver's family background and the aggravating evidence of the circumstances of the crime, that is, Weaver's choice to involve himself in the plan to rob Shadowridge Jewelers with someone like Summersville.

Moreover, Weaver's contention that the prosecutor argued that Weaver's family background was an aggravating circumstance is belied by the record. (AOB 156.) The word "aggravating" appears nowhere in any of the seven paragraphs of the prosecutor's argument Weaver cites (AOB 156-157), and the prosecutor's argument did not imply that the trial court should utilize mitigating evidence as aggravating. (*People v. Millwee* (1998) 18 Cal.4th 96, 152 [no prosecutorial misconduct where prosecutor never stated or implied that mitigating evidence could be used in aggravation].)

Here, the record reflects that the prosecutor argued Weaver's proffered mitigating evidence did not excuse his crime. (11 RT 1251-1254.) The prosecutor observed that Weaver did not take advantage of the opportunities offered him by a loving family and friends. (11 RT 1251-1252.) The prosecutor asserted that Weaver's family and friends did not know the real La Twon Weaver. The prosecutor noted that in light of his upbringing, Weaver knew the ramifications of doing wrong and nonetheless possessed a "malignant heart." (11 RT 1253.) While Weaver claimed to have made a mistake and that he was under the domination of Byron Summersville, the prosecutor argued that Weaver acted alone and he alone was in control. (11 RT 1260.)

This argument was proper. (*People v. Millwee, supra,* 18 Cal.4th at p. 152 [argument that defendant's character and background evidence was entitled to little mitigating weight in penalty phase of capital murder trial was proper].) Once Weaver placed his general character in issue, "the prosecutor was entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791.)

Weaver's allegations that the trial court gave aggravating weight to Weaver's intellectual and psychological deficits offered under factors (d) and (k) and whether he acted under extreme duress or substantial domination under factor (g) are also without merit. (AOB 162-169.) Weaver complains of particular statements the trial court made about the proffered evidence regarding his intellectual and psychological limitations. But the trial court's statements with regard to Weaver's factors (d) and (g) evidence did no more than explain why the court found the evidence not credible, and accordingly, rejected it as mitigating. (12 RT 1352-1355.)

For instance, the trial court found the conclusions of the shooting by Doctor Maclaren and Doctor Rabiner were "contrary to the evidence," and "purely speculative" and without "foundation." Accordingly, the trial court

rejected the doctors' conclusion the shooting was "merely impulsive, at less than a conscious level, or out of 'fear and impulsiveness.'" (12 RT 1352.)

The trial court also rejected Weaver's claims minimizing his responsibilty for the shooting by claiming that "the gun went off." The trial court found that Weaver fabricated his need to turn to see a new entrant into the store as a reason for the gun "going off." The trial court stated,

> There is no evidence he ever turned at all. The clear evidence is that he cocked the hammer back, and after a very brief, but definable hesitation, he fired a fatal shot at point blank range.

(12 RT 1355.) Having admitted the evidence, listened to it, and considered it, the trial court could properly determine that it was of minimal or no weight at all. (*People v. Robertson* (1989) 48 Cal.3d 18, 55.)

Here, when read in context, the trial court's exhaustive and detailed recitation of the evidence in this case, its application of the evidence to the factors listed in Penal Code section 190.3, and its statement of the law, demonstrate that the trial court knew the law, properly applied it and reached an appropriate conclusion. As the trial court stated in conjunction with its ruling,

> I have done a careful, agonizing, painful, tedious weighing process. And having done so, I paused, took another day, and reanalyzed the entire balance. ¶ And having done that, and having come to my final conclusion, it is this court's opinion that the aggravating factors in this case are of such monstrous weight and are so considerable that the appropriate penalty in this case is death.

(12 RT 1370.)

The trial court's statements regarding Weaver's proffered factors (d), (g) and (k) evidence constituted an explanation for why the court found that the evidence did not mitigate Weaver's crime. Furthermore, the trial court's detailed recitation of the facts surrounding the murder demonstrates that the trial court properly relied on the circumstances of the crime in rendering its penalty

verdict. In any event, to the extent Weaver's proffered mitigating evidence also bore upon the circumstances of the crime, it related to an aggravating factor and was properly considered as such. (*People v. Smith* (2005) 35 Cal.4th 334, 355-356.) Moreover, because the trial court properly followed state law when it considered and weighed aggravating and mitigating evidence, Weaver's claim of a due process violation for failure to impose the death penalty in accordance with California's capital sentencing scheme must also be rejected. (AOB 159.)

VII.

THE TRIAL COURT PROPERLY ADMITTED AND THEN CONSIDERED EYEWITNESS TESTIMONY THAT WEAVER DISPLAYED "HATRED" TOWARD THE VICTIM

Weaver contends that the trial court improperly admitted and considered eyewitness testimony that described Weaver as displaying "hatred" toward Michael Broome, violating Weaver's rights to confrontation, due process, equal protection, and a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I of the California Constitution. (AOB 172-178.) Weaver forfeited this claim when he failed to object on the same grounds in the lower court. In any event, this claim should be rejected on the merits because the trial court properly admitted and considered the testimony.

During the penalty phase, the prosecutor asked Ms. Deighton, an employee of the jewelry store, whether the man with the gun displayed "any sort of different attitude" towards Michael Broome as compared to the other people in the store. (7 RT 839-840.) Defense counsel objected, arguing that the question ". . . calls for speculation; conclusion of the witness added to it's speculative, your Honor." (7 RT 840.)

The trial court ruled, stating, "It lacks foundation that she was able to notice a difference. If she was able to notice one, the court would hear her

answer then." (7 RT 840.)

The prosecutor's inquiry continued as follows:

> [Prosecutor]: Did you notice a difference in attitude displayed toward Michael Broome as opposed to the three females in the store before Michael was shot and killed?
>
> [Ms. Deighton]: Yes, I did.
>
> [Prosecutor]: What was that different attitude that you noted that was displayed toward Michael?
>
> [Ms. Deighton]: He was more hostile towards Mike.
>
> [Prosecutor]: In what sense?
>
> [Ms. Deighton]: He left the rest of us pretty much alone, but he was really angry - his whole attitude towards Mike was just really kind of cocky and angry towards him. It was just so much hatred.
>
> [Prosecutor]: He displayed hatred?
>
> [Ms. Deighton]: Yes. With the rest of us, he didn't act that way; he wasn't concerned with us the way he was with Mike.
>
> [Prosecutor]: Was there anything at all about the manner in which the defendant shot and killed Michael Broome and his demeanor after he shot and dropped Michael to the floor that indicated to you that it was accidental?
>
> [Ms. Deighton]: No.

(7 RT 840-841.)

Deighton continued to testify, noting that between the time the jewelry was thrown to Weaver and the time that he was prepared to leave the store, Weaver did not look at all in Broome's direction. Even while Broome was begging for help, Weaver never "flinch[ed]." (7 RT 842.) Broome repeated that he "hurt" several times, and Deighton could hear what he was going through in his voice as his lungs filled with blood. It was "horrifying" and sounded as if Broome was drowning. (7 RT 843-844.)

During its recitation of the facts in this case, before rendering its verdict, the trial court stated, "During the time the defendant was dealing directly with Michael Broome, he showed hatred. He showed anger toward Michael Broome." (12 RT 1360.)

Weaver forfeited this claim when he failed to object on the same ground

in the trial court as he raises on appeal. In *People v. Seijas* (2005) 36 Cal.4th 291, this Court reiterated the rule set forth in Evidence Code section 353, which mandates that a verdict shall not be set aside by reason of the erroneous admission of evidence, unless there appears on the record an objection or motion to exclude or strike, that was timely made and stated so as to make clear the specific ground of the objection or motion. (*Id.* at p. 302; Evid. Code, § 353.) This Court has consistently held that a defendant's failure to make a timely and specific objection on the ground being asserted on appeal forecloses that ground from being raised on appeal. (*People v. Seijas, supra*, 36 Cal.4th at p. 302; see also *People v. Chatman* (2006) 38 Cal.4th 344, 397.)

Here, in the trial court Weaver objected to the prosecutor's question, asserting that it called for speculation and a conclusion on the part of the witness. (7 RT 840.) Weaver made no further objection. Nor did Weaver make a motion to strike this testimony. On appeal, Weaver claims that Deighton's testimony was "opinion" testimony that lacked a proper foundation. (AOB 173-174.) Because Weaver did not object below on the same ground he raises on appeal, he has forfeited this claim.

Even assuming, arguendo, that Weaver did not forfeit this claim, it should nonetheless be rejected, as Deighton's testimony was properly admitted. Pursuant to Evidence Code section 702, subdivision (a), a witness may testify as to any matter about which she has personal knowledge. Personal knowledge may be demonstrated by the witness's own testimony. (Evid. Code, § 702, subd. (b); see also *People v. Anderson* (2001) 25 Cal.4th 543, 573-574 [if a witness can perceive and recollect events, the determination whether she in fact perceived and does recollect is left to the trier of fact].)

In addition, a lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony. (Evid. Code, § 800, subds. (a), (b); *People v. Farnam* (2002) 28

Cal.4th 107, 153 [witness testimony that defendant stood "in a posture like he was going to start fighting" did not constitute inadmissible opinion testimony of a lay witness].) Moreover, a lay witness may testify about objective behavior and describe behavior as being consistent with a state of mind. (*People v. Chatman, supra,* 38 Cal.4th at p. 397.) A trial court's ruling regarding lay opinion testimony is reviewed for an abuse of discretion. (*People v. Farnam, supra*, 28 Cal.4th at pp. 153-154.)

In *Chatman*, the defendant made an argument similar to that which Weaver makes here, and this Court rejected it. In *Chatman*, a witness testified that he observed the defendant kick a high school custodian four or five times. (*People v. Chatman, supra*, 38 Cal.4th at p. 397.) The prosecutor asked whether defendant "seemed to be enjoying it." (*Ibid.*) The witness responded, "Yeah." (*Ibid.*) Defense counsel objected, arguing that the answer was speculation, irrelevant, and inadmissible under Evidence Code section 352. (*Ibid.*) The trial court overruled the objection. (*Ibid.*) On appeal, this Court found that because the testimony came from a percipient witness, who spoke about personal observations, the witness was competent to testify that the defendant's behavior and demeanor were consistent with enjoyment. (*Ibid.*)

The defendant in *Chatman* also argued the question called for improper opinion evidence. (*People v. Chatman, supra*, 38 Cal.4th at p. 397.) This Court held that because the defendant did not object on that basis at trial, he could not make that argument on appeal. (*Ibid.*) In any event, this Court found that such an objection would have failed. (*Ibid.*) This was so because, while a lay witness may not give an opinion about another's state of mind generally, the Court ruled that a witness may testify about objective behavior and describe behavior as being consistent with a state of mind. (*Ibid.*)

Here, like the witness in *Chatman*, Mary Deighton was a percipient witness who spoke from personal observation. Weaver asserts that Deighton's

testimony was unsupported. (AOB 174-178.) Weaver's contention is meritless.

Deighton witnessed Weaver enter the jewelry store, take a hostage, brandish a gun, and demand keys from Broome. (1 RT 19, 29-30, 32.) When Broome told him he did not have his keys and to take the "girl's," and while Broome's arms were raised and he offered no resistence, Weaver cocked his gun and shot Broome. (1 RT 32-35, 77-78.) After Broome fell to the floor, bleeding from his chest, and pleaded for help, Weaver continued with the robbery, ignoring Broome's pleas for help, despite the "horrifying" sound of Broome's lungs filling with blood . (1 RT 34-36; 7 RT 842-843.)

Deighton also observed that Weaver was more hostile towards Broome; Weaver was "really angry," and "kind of cocky" toward Broome. Contrary to Weaver's contention, Deighton's testimony was not speculative. Deighton observed Weaver's behavior toward Broome and described it as "cocky," "angry" and "hostile." Weaver did not behave the same way toward the female victims. (7 RT 840-841.) In addition, Deighton observed nothing in Weaver's demeanor after he shot Michael that indicated the shooting was accidental. (7 RT 841.)

Moreover, Weaver shot an unarmed and cooperative Broome, but did not physically injure the remaining three female victims. (7 RT 841.) In addition, Weaver ignored Broome's pleas for help as he lie drowning in his own blood, and Weaver continued with the robbery as though nothing extraordinary had happened. (7 RT 842-844.) Weaver's behavior was consistent with hatred aimed at Broome. Thus, Deighton's testimony spoke to her personal observation of Weaver's objective behavior and described that behavior as being consistent with a state of mind. (*People v. Chatman, supra,* 38 Cal.4th at p. 397.) It is the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. (*Jackson v. Virginia* (1979) 443

U.S. 307, 319 [99 S. Ct. 2781, 61 L. Ed.2d 560].) Here, the trial court resolved any conflicts in the testimony and rejected Weaver's interpretation. Therefore, the trial court did not abuse its discretion when it permitted Deighton's testimony to be admitted.

Even if there was error in admitting Deighton's testimony that Weaver demonstrated hatred toward Broome, the error was harmless beyond a reasonable doubt. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960; see also *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824.) Indeed, the trial court's recitation of the facts in aggravation in this case establish, beyond a reasonable doubt, that even without considering Deighton's short reference to hatred, the trial court would have reached the same verdict.

The trial court observed that Weaver chose to join forces with a man he knew as a drug dealer. (12 RT 1358.) The court found "of grave significance" Weaver's violation of "the most base of fair play notions," that is, Weaver shot an unarmed, defenseless human, who was cooperating with his demands, hands raised in complete submission. Nevertheless, Weaver cocked the gun, hesitated and then pulled the trigger, resulting in a murder that was a "totally unjustified and senseless taking of another human life." (12 RT 1358-1359.)

The trial court found that nothing confirmed the "purposeful execution" any more than Weaver's actions afterward he shot Broome, as Weaver continued waving the gun at other store clerks, kept a hold of the hostage until needing to release her to get the jewelry and leave. These actions occurred in conjunction with Weaver continuing his demands without hesitation, completely unaffected by the purposeful shooting; as Michael Broome lay begging for help, Weaver continued the robbery as if nothing happened. (12 RT 1359-1360.)

In addition, the trial court found the victim impact evidence strong and of "heavy weight." (12 RT 1371.) The trial court concluded that after a

"careful, agonizing, painful, tedious weighing process," the aggravating factors in this case were of "such monstrous weight and are so considerable" that the appropriate penalty was death. (12 RT 1370.)

In light of the trial court's recitation of the evidence and weighing of the factors in mitigation and aggravation, as compared to its brief statement that Weaver acted with hate, the court would have come to the same conclusion even without considering Deighton's testimony that Weaver's behavior toward Broome was motivated by hate. Therefore, any error was harmless beyond a reasonable doubt.

VIII.

WEAVER'S PENALTY PHASE TRIAL WAS CONDUCTED WITHOUT ERROR, THEREFORE, THERE WAS NO PREJUDICE

Weaver contends that the cumulative effect of alleged errors in the penalty phase of his trial violated his rights to due process, a fair trial, to present a defense and to a reliable sentencing determination, in violation of the United States and California constitutions. (AOB 181.) As with the guilt phase, there was no error, and therefore no prejudice. Thus, any claim of cumulative prejudice should be rejected, as well. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 297 [finding no merit to defendant's individual assignments of error, claim of cumulative prejudice rejected as well]; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 40 [finding no penalty phase errors and no possible accumulation of harms amounting to prejudice, even assuming error.)

IX.

WEAVER WAIVED HIS RIGHT TO A SEPARATE AND INDEPENDENT JUDICIAL REVIEW OF HIS DEATH SENTENCE IN THE TRIAL COURT, AND THEREFORE HIS CLAIM OF ERROR IS NOT COGNIZABLE ON APPEAL

Weaver contends that the trial court's denial of a separate, independent review of his death sentence, pursuant to Penal Code section 190.4, subdivision (e), deprived him of his due process and equal protection rights under the United States and California Constitutions. (AOB 182-202.) Because Weaver explicitly waived his right to a separate, independent review of his sentence, this claim is not cognizable on appeal. In any event, the trial court stated its reasons for sentencing Weaver to death, on the record, twice. Therefore, if there was error, it was harmless.

During the colloquy regarding Weaver's decision to waive a jury trial, the court informed Weaver that pursuant to Penal Code section 190.4, subdivision (e), he was entitled to a separate, independent review of the evidence following a jury trial, guilty verdict and death sentence. (14 PTRT 46.) The court explained that during such a review, the trial court would go on the record and determine whether the jury appropriately followed the law and applied the evidence. (14 PTRT 46.) The court also explained that if Weaver waived a jury trial, the trial court would not conduct a separate, independent review of the evidence because a judge had made the decision. (14 PTRT 46.) The court advised Weaver that the possibility of a new trial motion was not foreclosed, but then reiterated,

> Nonetheless, I must advise you that the automatic review of a juries' [sic] finding does not take place when there is no jury, and that's kind of an intermediate step before the case goes up to an automatic appeal to the California Supreme Court. ¶ Do you understand that the automatic, independent review of the evidence and the way the law was applied by the court will not take place in a jury waiver because there is no jury

performance for me to review?

(14 PTRT 47.)

Weaver responded, "Yes, your Honor." (14 PTRT 47.) The court asked Weaver's trial counsel if they concurred, and both said "Yes." The court then continued with the colloquy. (14 PTRT 47.) Ultimately, the trial court found that Weaver had made an "intelligent, knowing, willing, express, voluntary waiver" of his rights to a jury trial as to the guilt and penalty phases, as well as an appropriate waiver for all purposes. (14 PTRT 61.)

After the guilt phase of the trial, the court itemized and analyzed the evidence that had been presented. (6 RT 705-712.) The trial court concluded that from a "logical analysis of the evidence" no other person could have committed the crimes charged. (6 RT 712.) The trial court found beyond a reasonable doubt the special circumstances that Weaver murdered Michael Broome during a robbery and burglary, and further that Weaver used a firearm and specifically intended to, and did, inflict great bodily injury upon Michael Broome. (6 RT 713-716.) The trial court stated, "there was no doubt as to the verdict, let alone a reasonable doubt." (6 RT 716-717.)

On March 31, 1993, following the presentation of evidence during the penalty phase of the trial, the court reminded defendant that at the time of jury waiver the court had advised him it could not, as the fact finder, conduct an independent review of the evidence. (12 RT 1338.) Nonetheless, the court found it was incumbent upon it to make a detailed statement of the factors in mitigation and aggravation that the court had considered in reaching its ruling. (12 RT 1338.) The trial court then set forth the factors, and the evidence bearing upon each. (12 RT 1339-1367.) After analyzing the evidence and applying the law, the trial court found death to be the appropriate penalty in this case. (12 RT 1370.)

On May 28, 1993, the trial court held a hearing on Weaver's motion for

a new trial and to modify the verdict. (13 RT 1390; 4 CT 794-833.) The trial court found no error and denied Weaver's motion for a new trial. (13 RT 1399.)

The trial court then addressed the issue of a section 190.4, subdivision (e) hearing. (13 RT 1399.) The court reminded Weaver that at the time of the jury waiver it had advised Weaver that if he had a jury trial the court would conduct a separate and independent review of the evidence, but that if he waived a jury trial, the court would not conduct a separate and independent review of the evidence. (13 RT 1399-1400.) Nonetheless, the trial court proceeded to conduct an exhaustive review of the evidence presented during the penalty phase as it applied to each factor and stating its reasons for imposing the death penalty. (13 RT 1437-1453.)

As the record demonstrates, Weaver waived his right to an independent judicial review in the trial court. In fact, the circumstances here are similar to those in *People v. Horning* (2004) 34 Cal.4th 871. In *Horning*, the defendant waived jury trial during the penalty phase. (*Id.* at p. 911.) After a contested penalty trial, the trial court rendered a verdict of death and gave a detailed statement of reasons for its verdict. (*Ibid.*) Thereafter, the court heard and denied defendant's motion for a new trial, again with a statement of reasons. (*Ibid.*) Before sentencing, the court permitted defendant to personally argue again for a life sentence. (*Id.* at pp. 911-912.) When the defendant finished speaking, the question arose whether the court should entertain a motion to modify the sentence. (*Id.* at p. 912.) Defense counsel said,

> I'm told there's some modification or something else the Court is supposed to do prior to the time, although Your Honor outlined that on September the 7th [when it rendered its verdict]. You may just want to refer to that.

(*Ibid.*) Counsel also said he did not "want to waive anything." (*Ibid.*)

In response, the trial court noted the decision in *People v. Diaz, supra,*

3 Cal.4th 495, and pointed out that it had already stated its reasons when it rendered its verdict. (*People v. Horning, supra,* 34 Cal.4th at p. 912.) The trial court stated, "So I don't believe that's necessary at this point in time." (*Ibid.*) Defense counsel responded, "Okay." (*Ibid.*) After permitting counsel for both sides to argue again what the sentence should be, the court imposed the death sentence. (*Ibid.*)

On appeal, the defendant contended the trial court erred when it did not rule on an automatic motion to modify the sentence. (*People v. Horning, supra,* 34 Cal.4th at p. 912.) Because defendant did not object, this Court found the issue not cognizable on appeal. (*Ibid.*) As this Court observed, defense counsel might not have wanted to "waive anything," but he did so nonetheless when he suggested the court could refer to its earlier ruling and responded, "Okay." (*Ibid.*)

Here, unlike Horning, who simply failed to object, Weaver affirmatively waived his right to an independent review, after being advised explicitly and with particularity, and both his trial counsel agreed to the waiver. Therefore, his contention is not cognizable on appeal. (*People v. Horning, supra,* 34 Cal.4th at p. 912.)

A. Weaver Was Not Entitled To Separate And Independent Review In The Trial Court

If this Court finds that Weaver did not waive this issue, it should nonetheless be rejected, as it is without merit. In *Horning*, this Court addressed a similar claim and found no error or prejudice in that case. This Court found that for a trial court, who was also the trier of fact, to rule on a motion to modify the verdict would be superfluous. (*People v. Horning, supra,* 34 Cal.4th at p. 912.)

In *Horning*, this Court observed that it had never decided whether a defendant who waives a jury trial on the issue of penalty is entitled to a

modification hearing under section 190.4, noting that the statutory language is ambiguous, sometimes referring to a verdict of death by the "trier of fact" and sometimes referring to the "jury's" findings. (*People v. Horning, supra,* 34 Cal.4th at p. 912.) Although a modification motion after a penalty phase court trial appears at first glance to be an exercise in futility, there is one aspect of the modification motion that is significant even when the penalty issue has been determined by a court rather than a jury, and that is the requirement in section 190.4, subdivision (e), that the trial court "state on the record the reasons for his [or her] findings." (*Ibid.*) "'This statutory requirement enables this Court to review the propriety of the penalty determination made by the trial court sitting without a jury.'" (*Ibid.*, quoting *People v. Diaz, supra,* 3 Cal.4th at p. 575, fn. 35.)

In *Horning*, the trial court gave detailed statements when it originally rendered its verdict, even though it was not required to do so. (*People v. Horning, supra,* 34 Cal.4th at p. 912.) This Court found nothing in section 190.4 suggested a trial court must state its reasons twice. (*Ibid.*) Moreover, the defendant in *Horning* could have challenged the court's verdict as part of his new trial motion, a motion the trial court did in fact entertain in *Horning*. (*Ibid.*)

As in *Horning,* the trial court in this case entertained Weaver's motion for a new trial and permitted Weaver to personally address the court. (13 RT 1431-1434.) In addition, the trial court stated its reasons for imposing a death sentence twice, even though, as this Court stated in *Horning,* nothing in section 190.4, subdivision (e) required it to do so. (12 RT 1339-1367; 13 RT 1437-1453.) Thus, the trial court's statements met Penal Code section 190.4, subdivision (e)'s requirement, which provides this Court with a record from which to review the propriety of the penalty determination made by the trial court sitting without a jury. Because the trial court stated its reasons for

imposing a death sentence twice, and this Court has a record from which it can review the propriety of the trial court's decision, Weaver was not prejudiced from a lack of a separate review in the lower court. (*People v. Horning, supra,* 34 Cal.4th at p. 912.)

As for Weaver's constitutional claim of a due process (AOB 194-197), this Court has observed that the federal Constitution does not require that juries state on the record the reasons for their findings at the penalty phase of a trial. (*People v. Diaz, supra,* 3 Cal.4th at p. 576, fn. 35 citing *People v. Frierson* (1979) 25 Cal.3d 142, 179.) Because, pursuant to section 190.4, subdivision (e), a trial judge must ultimately justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible, even in the absence of written findings by the jury. (*People v. Diaz, supra,* 3 Cal.4th at p. 576, fn. 35.)

Here, the trial court stated its reasons for imposing the death penalty, providing this Court with a record from which it can conduct a meaningful review of Weaver's sentence in the same manner as if a jury found the death penalty appropriate. In any event, even if a statement of reasons for a death verdict was a constitutionally mandated, Weaver received such a statement from the trial court, twice. Therefore, Weaver was not prejudiced. (*People v. Horning, supra,* 34 Cal.4th at p. 912.)

Weaver's claim of an equal protection violation is equally meritless. (AOB 197-202) Weaver was not "similarly situated" to capital defendants whose cases were decided by juries. (See *City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439 [105 S.Ct. 3249, 87 L.Ed.2d 313] [explaining that the Equal Protection Clause is essentially a direction that all persons "similarly situated" should be treated alike].) Unlike capital defendants who exercise their right to be tried by a jury, Weaver waived a jury trial, and did so knowing he would not receive a separate and independent review of his

sentence in the trial court.[19/]

Weaver waived his right to a separate and independent review in the trial court. Thus, there was no error and no prejudice.[20/] In any event, the trial court stated its reasons for imposing the death penalty, providing this Court with a record from which it can conduct meaningful appellate review of his sentence. Accordingly, this claim should be rejected.

X.

CALIFORNIA'S STATUTORY SPECIAL CIRCUMSTANCES NARROWLY DEFINE THE CLASS OF DEFENDANTS ELIGIBLE FOR THE DEATH PENALTY

Weaver contends that California's death penalty law violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I of the California Constitution because the statutory special circumstances are impermissibly broad. (AOB 207-258.) Weaver is incorrect.

In *People v. Tafoya* (2007) 42 Cal.4th 147, this Court held that California's death penalty law comports with the Eighth Amendment's

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19. Criminal defendants can waive even the most fundamental of constitutional rights. (See *Singer v. United States* (1965) 380 U.S. 24, 34, [85 S.Ct. 783, 13 L.Ed.2d 630] [right to waive jury trial]; *Boykin v. Alabama* (1969) 395 U.S. 238, 243 [89 S.Ct. 1709, 23 L.Ed.2d 274] [right to plead guilty and waive privilege against self incrimination, jury trial and to confront accusers]; *Faretta v. California* (1975) 422 U.S. 806, 835 [95 S.Ct. 2525, 45 L.Ed.2d 562] [right to waive counsel]; *Platt v. Minnesota Min. & Mfg. Co.* (1964) 376 U.S. 240, 245, [84 S.Ct. 769, 11 L.Ed.2d 674] [right to waive trial where crime was committed].) Weaver does not offer any justification for exempting from waiver a statutory right to an independent review at the trial level.

20. Weaver's contention that he is somehow denied review of the trial court's rulings that could have led to a modified verdict, and he was therefore prejudiced by its absence (AOB 200-202), is without merit. This Court is in the position of conducting such a review. Therefore, Weaver cannot demonstrate prejudice.

requirement of "narrowing" because the special circumstances narrowly define the class of defendants eligible for the death penalty. (*Id.* at p. 197; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 358; *People v. Chatman*, *supra*, 38 Cal.4th at p. 410; *People v. Harris* (2005) 37 Cal.4th 310, 365 [finding that section 190.2 adequately narrows the class of murder for which the death penalty may be imposed, and is not over-broad, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits imposition of the death penalty for an unintentional felony murder]; see also *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [finding it generally accepted that the felony murder circumstance furnishes a meaningful basis required by the Eighth Amendment for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not citing *Furman* v. *Georgia* (1972) 408 U.S. 238, 313 [33 L.Ed.2d 346, 392, 92 S.Ct. 2726] (conc. opn. of White, J.) and *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [64 L.Ed.2d 398, 405-406, 100 S.Ct. 1759] (plur. opn.)].) In addition, this Court has found that it is also generally accepted that a death penalty law that makes felony murderer death-eligible does not violate the equal protection clause of the United States Constitution. (*People v. Anderson, supra*, 43 Cal.3d at p. 1147.)

Moreover, in *People v. Frye, supra,* 18 Cal.4th at p. 1028, this Court considered the defendant's proffered statistical data of published appeals in support of an argument similar to Weaver's and found it unpersuasive. (AOB at pp. 209, 235-243, 256.) Weaver presents no compelling reason for this Court to revisit its earlier decisions upholding California's death penalty statutes.

XI.

FACTOR (A) DOES NOT RESULT IN ARBITRARY OR CAPRICIOUS IMPOSITION OF THE DEATH PENALTY BECAUSE EACH CAPITAL CASE IS JUDGED ON ITS FACTS AND EACH DEFENDANT ON THE PARTICULARS OF HIS OFFENSE

Weaver contends that, as applied, Penal Code section 190.3, factor (a) allows for the arbitrary and capricious imposition of the death penalty and violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 259-269.) Specifically, Weaver claims that in practice, section 190.3, factor (a) permits broad use of the circumstances of a crime and leads to indiscriminate imposition of the death penalty. (AOB 266.)

This Court has repeatedly held that consideration of the circumstances of the crime under section 190.3, factor (a) does not result in arbitrary or capricious imposition of the death penalty. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1330; *People v. Harris*, *supra,* 37 Cal.4th at p. 365; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.) That a seemingly inconsistent range of circumstances can be collected from decisions upholding imposition of the death penalty only reflects that each case is judged on its facts and each defendant on the particulars of his offense. (*People v. Alfaro*, *supra*, 141 Cal.4th at p. 1331.) "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." (*Ibid.*) Accordingly, Weaver's contention should be rejected.

XII.

THE CALIFORNIA DEATH PENALTY LAW IS CONSTITUTIONAL

Weaver contends that the California death penalty is unconstitutional because it offends the Fifth, Sixth, Eighth, and Fourteen Amendments of the

United States Constitution, as well as article I of the California Constitution. (AOB 270-315.) Here, Weaver raises several challenges to the California death penalty law. This Court has rejected all of them, and Weaver provides no compelling reason for this Court to depart from its previous rulings.

Specifically, Weaver claims that the death penalty scheme has no safeguards to avoid arbitrary and capricious sentencing. He asserts the law is deficient because: (1) sentencing factors are not required to be charged and found beyond a reasonable doubt (AOB 271); (2) the law does not require assignment of a burden of proof (AOB 278); (3) the law fails to provide for inter-case proportionality review (AOB 297); (4) the use of restrictive adjectives in the list of potential mitigating factors act as barriers to the consideration of mitigation (AOB 302); (5) factor (k) is unconstitutionally vague because it fails to distinguish a death-worthy case from one that is not and fails to guide the "the jury's" discretion in deciding the appropriate penalty (AOB 303); (6) the absence of instructions that mitigating factors are relevant solely as mitigators, and further the lack of an instruction that the absence of mitigating evidence cannot be considered aggravating preclude a reliable, individualized capital sentencing determination (AOB 304-306); (7) the law provides fewer procedural protections than those afforded defendants sentenced for non-capital crimes (AOB 307); (8) the trial court relied on instructions that improperly include inapplicable factors which might cause the finder to believe the absence of a mitigating factor is an aggravating factor and fail to define "aggravating" and "mitigating" (AOB 310-312); and (9) use of the words "so substantial" and "warrants" in jury instructions provide no restraint on the arbitrary and capricious imposition of the death penalty (AOB 313-315).

Generally, this Court has held that California's death penalty statute is not lacking in the procedural safeguards necessary to protect against arbitrary

and capricious sentencing under the Eighth and Fourteenth Amendments. (*People v. Blair, supra,* 36 Cal.4th at p. 753.)

More specifically this Court has ruled that neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. (*People v. Griffin* (2004) 33 Cal.4th 536, 593-594; *People v. Rodriguez, supra*, 42 Cal.3d at pp. 777-779.)

Moreover, the lack of a burden of proof does not deprive a defendant of any constitutional right. (*People v. Jones* (2003) 30 Cal.4th 1084, 1126-1127.) The trier of fact need not, and should not be instructed as to any burden of proof or persuasion at the penalty phase. (*People v. Blair, supra,* 36 Cal.4th at p. 753; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418; *People v. Holt* (1997) 15 Cal.4th 619, 682-684; *People v. Hayes* (1990) 52 Cal.3d 577, 643.)

Furthermore, California's death penalty law is not "arbitrary and capricious" because it does not require inter-case proportionality review. (*People v. Lewis* (2001) 25 Cal.4th 610, 677.) Inter-case proportionality review is not required by the due process, equal protection, fair trial, or cruel and unusual punishment clauses of the federal Constitution. (*People v. Anderson, supra,* 25 Cal.4th at p. 602; *People v. Blair, supra,* 36 Cal.4th at p. 753.)

Contrary to Weaver's claim, section 190.3, factor (k) is not unconstitutionally vague. This Court has held that the purpose of the sentencing selection factors set forth in section 190.3 is to guide the fact finder's discretion in deciding the appropriate penalty, not to distinguish a death-worthy case from one that is not. (*People v. Mendoza* (2000) 24 Cal.4th 130, 192; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465-466.) While Weaver

makes the bald assertion this Court's decision in *Mendoza* was "incorrectly decided," he provides no basis upon which that holding should be reexamined. Weaver has not demonstrated any relationship between this case and the alleged insufficiency of factor (k). (*People v. Mendoza, supra,* 24 Cal.4th at p. 192.)

The failure to instruct that some section 190.3 penalty factors may be considered only in mitigation does not violate the Eighth or Fourteenth Amendments. (*People v. Osband* (1996) 13 Cal.4th 622, 705; *People v. Arias* (1996) 13 Cal.4th 92, 187-188; *People v. Blair, supra,* 36 Cal.4th at p. 753.)

The constitutional guarantee of "equal protection does not require this court to subject capital convictions to the same sentence review given defendants convicted under the indeterminate sentencing law." (*People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Cox* (2003) 30 Cal.4th 916, 970; *People v. Lewis* (2001) 26 Cal.4th 334, 395.)

Instructions are not flawed for failure to delete inapplicable sentencing factors. (*People v. Roldan, supra,* 35 Cal.4th at p. 744; *People v. Williams, supra*, 16 Cal.4th at p. 268.) Nor are instructions flawed for failure to "delineate between the aggravating and mitigating circumstances" or define "aggravating" and "mitigating." (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43; *People v. Roldan, supra*, 35 Cal.4th at p. 744; *People v. Boyette, supra,* 29 Cal.4th at p. 466.)

The use of adjectives such as "extreme" and "substantial" in section 190.3 penalty factors (d) and (g) does not impermissibly restrict the jury's consideration of mitigating evidence in violation of the Eighth or Fourteenth Amendments. (*People v. Blair, supra,* 36 Cal.4th at pp. 753-754; *People v. Arias, supra,* 13 Cal.4th at pp. 188-189; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191.)

This body of law forecloses Weaver's contentions, and they should accordingly be rejected.

XIII.

IMPOSITION OF THE DEATH PENALTY FOR FELONY MURDER IS CONSTITUTIONAL

Weaver contends that California's capital punishment scheme violates the proportionality requirement of the Eighth Amendment to the United States Constitution, article 1 of the California and various international laws by permitting the death penalty for felony murder. Specifically, Weaver claims that California's death penalty law is improperly imposed without regard to a defendant's state of mind. (AOB 316-332.) This Court has repeatedly held that Penal Code section 190.2 is not rendered unconstitutional because the statute permits imposition of the death penalty for an unintentional felony murder. (*People v. Harris, supra,* 37 Cal.4th at p. 365; *People v. Anderson, supra,* 25 Cal.4th at p. 601; see also *People v. Pollock, supra*, 32 Cal.4th at p. 1175 [the mental state required for felony murder is "simply the specific intent to commit the underlying felony."].)

In *Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127], the United States Supreme Court found that a narrow focus on the question of whether or not a given defendant "intended to kill," was a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. (*Id.* at p. 157.) In fact, the high court observed that some non-intentional murderers might be among the most dangerous and inhumane of all, including the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim. (*Ibid.*) The Court noted that this "reckless indifference to the value of human life" might be "every bit as shocking to the moral sense as an 'intent to kill.'" (*Ibid.*; *People v. Diaz, supra,* 3 Cal.4th at pp. 568-569; Pen. Code, § 190.2, subd. (a)(17)(A)&(G).)

Weaver's reliance on *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140] and *Tison v. Arizona*, *supra*, 481 U.S. 137, is misplaced. In contrast to Weaver, the defendants in those cases were not the actual killers. In *Enmund*, the defendant was a get-away driver. The Supreme Court held that the death penalty could not constitutionally be imposed on one "who neither took life, attempted to take life, nor intended to take life." (*Enmund v. Florida*, *supra*, 458 U.S. at p. 787.) In *Tison*, the co-defendants, neither of whom specifically intended to kill the victims or inflicted the fatal gunshot wounds, were nonetheless actively involved in every element of the kidnaping and robbery and were physically present during the entire sequence of criminal activity that culminated in the murder. (*Tison v. Arizona*, *supra,* 481 U.S. at pp. 138, 158.) The Supreme Court held that the defendants' major participation in the felony, combined with reckless indifference to human life, was sufficient to satisfy the *Enmund* culpability requirement. (*Ibid.*)

In *Cabana v. Bullock* (1986) 474 U.S. 376 [106 S.Ct. 689, 88 L.Ed.2d 704], the Fifth Circuit Court of Appeals issued a writ of habeas corpus because the jury had sentenced Bullock to death without finding that he had killed, attempted to kill, or intended to kill. (*Id.* at p. 392.) The Court of Appeals vacated Bullock's death sentence, but permitted the State to either impose a sentence of life imprisonment or conduct a new sentencing hearing at which the proper findings to warrant a death sentence could be made and the death sentence reimposed. (*Id.* at p. 382.) The Supreme Court observed that its ruling in *Enmund* did not concern the guilt or innocence of the defendant, established no new elements of the crime of murder that must be found by the jury, and did not affect the state's definition of any substantive offense. (*Cabana v. Bullock, supra*, 474 U.S. at p. 385.) In modifying the Court of Appeals decision, the Supreme Court stated that the Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible

under *Enmund*. (*Id.* at p. 386.) If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability. (*Ibid.*) Moreover, if a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence. (*Ibid.*) The Supreme Court remanded the case, giving the state the option of holding a hearing, at which the State court could make the requisite findings and reinstate the death sentence, if appropriate. (*Id.* at p. 392.) The Court noted that a hearing need not be a new sentencing hearing, or one devoted to the identification and weighing of aggravating and mitigating factors. (*Ibid.*) Nor was a jury required to make the requisite findings. (*Ibid.*)

In *Hopkins v. Reeves* (1998) 524 U.S. 88, 99 [118 S.Ct. 1895, 141 L.Ed.2d 76], the Supreme Court found that the Court of Appeals erroneously relied on *Enmund* and *Tison*, in support of its grant of a writ of habeas corpus in that case. (*Id.* at p. 99.) The Supreme Court noted that the Court of Appeal had reasoned that *Enmund* and *Tison* require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder. (*Ibid.*) The Supreme Court observed that the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a *mens rea* requirement with respect to the killing. (*Id.* at pp. 99-100.) The Supreme Court stated that it had rejected precisely such a reading in *Cabana*. (*Id.* at p. 100.) Thus, nothing in *Enmund*, *Tison*, *Cabana* or *Hopkins* require a finding of an intent to kill.

In this case, Weaver was undisputedly the actual killer. (*People v. Bonillas* (1989) 48 Cal.3d 757, 780.) Therefore, the Eighth Amendment concerns raised in *Enmund* and *Tison* are not implicated here. In addition, the

trial court in this case made a finding that Weaver intentionally killed Michael Broome. (12 RT 1359-1360.)

In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court held that evidence establishing the defendant is the actual killer and guilty of felony murder establishes a degree of culpability sufficient under the Eighth Amendment to permit defendant's execution. (*Id.* at p. 1016.) The defendant in *Smithey* made contentions similar to those made by Weaver. Smithey claimed that his death sentence violated the United States and California Constitutions because the penalty was grossly disproportionate to his individual culpability in light of the nature of the crime and his personal characteristics and background. (*Id.* at pp. 1015-1016.) In addition, he claimed that the record did not support a finding that he intended to kill his victim or acted with reckless indifference to human life. (*Id.* at p. 1016.) Smithey further argued that someone who is convicted of felony murder but did not actually kill, attempt to kill, or intend to kill, cannot be sentenced to death absent a showing of major participation in the underlying felony, combined with a culpable mental state consisting, at a minimum, of reckless indifference to human life. (*Ibid.*) This Court rejected Smithey's contentions.

This Court observed that the jury found *Smithey* possessed the specific intent required for the crimes of robbery and attempted rape, and that he killed a vulnerable victim by slitting her throat in three places in the course of committing those crimes. (*People v. Smithey, supra*, 20 Cal.4th at p. 1016.) Because ample evidence supported those findings, the defendant's individual culpability placed him well within the class of murderers for whom the Constitution permitted a sentence of death. (*Ibid.*) Moreover, this Court found that the record in that case contained abundant evidence that defendant actually killed and intended to kill. Thus, even assuming that the Eighth Amendment required proof of intent to kill before defendant could be sentenced to death for

felony murder, "that requirement ha[d] been satisfied." (*People v. Smithey, supra*, 20 Cal.4th at p. 1017.)

Here, the trial court found it undisputed that Michael Broome was killed during an armed robbery, and further, that there was no reasonable doubt that Weaver was the person who committed the robbery. (7 RT 712-713.) Moreover, the trial court stated that Weaver had committed a "purposeful execution." (12 RT 1359-1360.) Thus, the record establishes that Weaver actually killed and intended to kill. (*People v. Smithey, supra*, 20 Cal.4th at p. 1017.) Accordingly, ample evidence supports the trial court's findings.

The record establishes that Weaver "cased" the jewelry store in advance, entered the store, took a hostage, put a gun to her head and demanded of his victims, "Load up the goods" and "Give me everything you have." (1 RT 31, 179-183; 2 RT 19, 45; 4 RT 565-568, 579-580.) He then shot the unarmed, unresisting Michael Broome and fled with four pieces of jewelry. (1 RT 33, 36-37, 54-55, 106; 2 RT 309, 352-354, 356; 3 RT 392, 395; 4 RT 570-572, 576, 593.) Weaver's crime was captured on a surveillance tape, and the tape corroborated the eyewitness testimony. (1 RT 58-69.) Based on this evidence, Weaver's culpability "placed him well within the class of murderers for whom the Constitution permitted a sentence of death." (*People v. Smithey, supra,* 20 Cal.4th at p. 1016.)

Furthermore, Weaver leveled his gun at Michael Broome, cocked it, paused and then fired at the unresisting Michael Broome at close range, all of which provides ample evidence that Weaver intended to kill Michael Broome. (1 RT 33; 4 RT 571-572; 10 RT 1236.) Indeed, as the trial court found, nothing confirmed the "purposeful execution" any more than Weaver's actions after he shot Broome, as Weaver continued waving the gun at store clerks, kept a hold of the hostage until needing to release her in order to pick-up the jewelry and leave, continuing his demands without hesitation, completely unaffected by the

"purposeful" shooting. Furthermore, as Michael Broome lay begging for help, Weaver continued the robbery as if nothing happened. (12 RT 1359-1360.) In light of this evidence, and even assuming that the Eighth Amendment required proof of intent to kill before Weaver could be sentenced to death for felony murder, that requirement was satisfied here. (*People v. Smithey, supra*, 20 Cal.4th at p. 1017.)

XIV.

BECAUSE THERE IS NO NATIONAL CONSENSUS AGAINST THE IMPOSITION OF CAPITAL PUNISHMENT IN GENERAL, CALIFORNIA'S DEATH PENALTY LAW DOES NOT OFFEND EVOLVING STANDARDS OF DECENCY

Weaver contends that California's death penalty law offends standards of decency under the Eighth and Fourteenth Amendments, as well as article I of the California Constitution and international law. (AOB 333-336.) This Court has repeatedly rejected this contention. (See *People v. Moon* (2005) 37 Cal.4th 1, 48 [finding there is no national consensus against the imposition of capital punishment in general, nor can it be said that capital punishment is used with diminishing frequency in those states in which it is legal, noting 38 states have some form of the death penalty, as does the federal government and the federal military]; *People v. Blair, supra,* 36 Cal.4th at p. 754; *People v. Kennedy* (2005) 36 Cal.4th 595, 640; see also *Atkins v. Virginia* (2002) 536 U.S. 304, 312 [122 S.Ct. 2242, 153 L.Ed.2d 335] [the clearest and most reliable objective evidence of contemporary values is the legislation enacted by our nation's legislatures].)

Weaver provides no viable reason for this Court to reverse its prior holdings on this issue. Therefore, this claim should be rejected.

XV.

WEAVER'S SENTENCE MEETS FEDERAL AND STATE CONSTITUTIONAL REQUIREMENTS

Weaver contends that his conviction and sentence was obtained in violation of international law, as well as various international treaties to which the United States is a party. (AOB 337, 343.) But international law does not bar imposing a death sentence that was rendered in accord with state and federal constitutional and statutory requirements, as was the situation here. (*People v. Cook, supra*, 39 Cal.4th at p. 620; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 106; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Weaver has failed to demonstrate that his sentence does not meet state and federal constitutional and statutory requirements. (*People v. Cook, supra,* at p. 620.) Therefore, this contention should be rejected.

XVI.

PROSECUTORS' DISCRETION TO SEEK DEATH PENALTY DOES NOT RENDER CALIFORNIA'S DEATH PENALTY LAW ARBITRARY

Weaver contends that California's death penalty law is arbitrarily and disparately applied, violating the United States and California Constitutions, as well as various international agreements, because it permits individual county prosecutors the discretion to choose whether to seek the death penalty. (AOB 344-353.) This Court has repeatedly held that California's death penalty is neither vague nor arbitrary on the basis it accords wide discretion to prosecutors to seek the death penalty. (*People v. Cook, supra*, 39 Cal.4th at p. 617; *People v. Harris, supra,* 37 Cal.4th at p. 366; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136.) Therefore, Weaver's claim should be rejected.

XVII.

WHETHER CONSIDERED INDIVIDUALLY OR CUMULATIVELY THERE WAS NO PREJUDICIAL ERROR

Weaver contends that the cumulative effect of alleged constitutional and international law infirmities in the California death penalty scheme deprived him of his rights to due process, a fair trial, and to a reliable sentence under state law, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, article I of the California Constitution and international law. (AOB 354.) Because, as argued above, California's death penalty law is constitutional, and because international law was not violated, Weaver's claim should be rejected. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 199; *People v. Cook, supra*, 39 Cal.4th at p. 619; *People v. Guerra* (2006) 37 Cal.4th 1067, 1165.)

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks this court to affirm appellant's judgment of conviction and death sentence.

Dated: March 19, 2008

Respectfully submitted,

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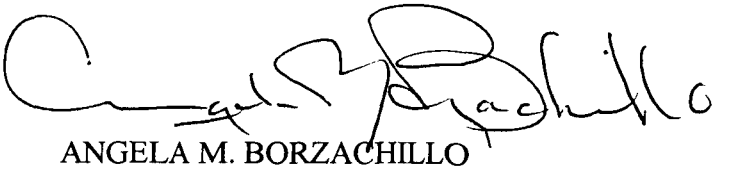

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CERTIFICATE OF COMPLIANCE

I certify that the attached respondent's brief uses a 13 point Times New Roman font and contains 29,141 words.

Dated: March 19, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Weaver*** No.: **S033149**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. 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 March 20, 2008, I served the attached **respondent's brief** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West "A" Street, Suite 1100, San Diego, California 92101, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 20, 2008, at San Diego, California.

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Signature